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IN RE APPLICATION, TWIN LOUPS RECLAMATION DISTRICT, APPELLEE, V. ALFRED WELSH BLESSING ET AL., INDIVIDUALLY AND AS REPRESENTATIVES OF THEIR RESPECTIVE CLASSES, APPELLANTS.

IN RE APPLICATION, TWIN LOUPS IRRIGATION DISTRICT, APPELLEE, V. ALFRED WELSH BLESSING ET AL., INDIVIDUALLY AND AS REPRESENTATIVES OF THEIR RESPECTIVE CLASSES, APPELLANTS.

IN RE PETITION FOR WATER SERVICE CONTRACT, BEFORE THE BOARD OF DIRECTORS OF THE TWIN LOUPS RECLAMATION DISTRICT, ET AL., APPELLEES, V. ALFRED WELSH BLESSING ET AL., APPELLANTS.

276 N. W. 2d 185

Filed March 13, 1979. Nos. 41692, 41693, 41778.

1. **Waters: Legislature: Statutes.** Determination of the feasibility of a water reclamation project is a legislative function and is not within the scope of the judicial review authorized by section 46-568, R. R. S. 1943.
2. _____: _____: _____. Determination of the adequacy of a supply of water for a reclamation project is a legislative function and is not within the scope of the judicial review authorized by section 46-568, R. R. S. 1943.
3. **Waters: Contracts: Statutes: Elections.** A contract for the purchase of a water supply which creates a 40-year obligation on the part of a reclamation district must, under section 46-564, R. R. S. 1943, be submitted to the voters of the district for approval.
4. _____: _____: _____: _____. The power of an irrigation district to enter into a contract with the United States for the construction, operation, and maintenance of the necessary works for the delivery and distribution of water is not limited by a requirement that the contract be approved by the voters of the district. § 46-156, R. R. S. 1943.
5. _____: _____: _____: _____. A contract for a supply of water which provides for payment to be made by an irrigation district for a period of more than 1 year from the date of making the contract must be submitted to the legal voters of the district for approval or disapproval. § 46-1,145, R. R. S. 1943.
6. **Constitutional Law: Statutes.** Adoption and incorporation into the 1943 revision of the statutes of an act which, as originally passed, may have been in violation of the constitutional provision prohibiting statutory amendments without reference to the section amended cures the constitutional defect. Art. III, s. 14, Constitution of Nebraska. § 49-601, R. R. S. 1943.

7. **Class Actions: Parties: Statutes.** A party having interest adverse to the interests of the parties he seeks to represent may not sue as representative of a class under the provisions of section 25-319, R. R. S. 1943.

Appeal from the District Court for Howard County: DONALD H. WEAVER, Judge. Affirmed in part, and in part reversed and remanded.

Virgil J. Haggart, Jr., and William Geo. Dittrick of Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellants.

Lyle E. Strom and William J. Riley of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, and Cyril P. Shaughnessy of Shaughnessy, Shaughnessy & Shaughnessy, for appellees.

Heard before SPENCER, C. J., Pro Tem., BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and RONIN and RIST, District Judges.

WHITE, J.

This is a consolidated action involving two subdivisions of the state, the Twin Loups Reclamation District and the Twin Loups Irrigation District. The other parties are certain residents of the Irrigation and Reclamation Districts. The Irrigation and Reclamation Districts are authorized and operating under the provisions of Chapter 46 of the Reissue Revised Statutes of Nebraska, 1943.

The districts were organized to further a plan to irrigate land in portions of Valley, Greeley, Howard, Merrick, and Nance Counties. At trial, the validity of the organization of the districts was questioned. The trial court found the districts to be legally organized and that finding is not questioned here.

The first case, No. 41692, involves a special statutory procedure by the Reclamation District authorized by section 46-568, R. R. S. 1943, for the purpose of "praying a judicial examination and determination of any * * * contract of the district * * *."

On June 4, 1976, the Reclamation District entered into a contract with the United States Bureau of Reclamation. The contract generally covers payment of a portion of the water supply works to be constructed which includes the Calamus Dam, the Davis Creek Dam and Reservoir, the Kent Diversion Works, the Kent Canal, first section of the Mirdan Canal, and various works related to those projects.

The Reclamation District's obligation is to begin payments when water becomes available and to continue payments over a period of 50 years. The total expected to be repaid is $16,790,400, if the entire approximately 53,000 acres in the Irrigiation District are afforded water. In addition, the district is obligated to pay annually the operating and maintenance expenses of the system.

The trial court held the contract valid, and this appeal resulted.

Appellants first assert that the trial court erred in refusing to pass on the feasibility of the project. We agree with the trial court. The Legislature clearly authorized the courts to pass on the validity of contracts of the district. It did not, and possibly could not, delegate to the courts the authority to pass on the wisdom of the projects themselves. Reclamation districts are "political corporate quasi-municipal subdivisions of the state." Nebraska Mid-State Reclamation District v. Hall County, 152 Neb. 410, 41 N. W. 2d 397. There can be little doubt that in determining to enter into a contract, the district was acting in a legislative capacity. It is not the function of the court to act as a super-legislature, and that power cannot be delegated to us. The appellants' first assignment is without merit.

Next, and related to the first assignment, is the assertion that the trial court failed to consider whether there was an adequate water supply for the project. Appellants assert that no application was at the time of trial on file with the Director of Water Resources

for an allocation of water from the North Loup River. The presence or absence of an adequate water supply is a substantial factor to be considered by the directors in the exercise of their delegated legislative powers. For reasons stated above, the argument is rejected.

The appellants next assert that the Reclamation District exceeded its statutory authority in entering into the contract with the Bureau of Reclamation. Specifically, the appellants assert that section 46-564, R. R. S. 1943, requires the contract to be submitted to the electors of the district. Section 46-564, R. R. S. 1943, provides in part: "Whenever the board incorporated under sections 46-501 to 46-573 shall, by resolution adopted by a majority of the said board, determine that the interests of said district and the public interest or necessity demand the acquisition, construction or completion of any source of water supply, water works, or other improvements or facilities, or the making of any contract with the United States or other persons or corporations, to carry out the objects or purposes of said district, wherein the indebtedness or obligation shall be created, to satisfy which shall require a greater expenditure than the ordinary annual income and revenue of the district shall permit, the board shall order the submission of the proposition of incurring such *obligation or bonded or other indebtedness* for the purposes set forth in said resolution, to the qualified electors of the district at an election held for that purpose." (Emphasis supplied.)

The section is titled "Bonded indebtedness; submission to qualified electors; election." The appellees first contend that it is therefore inapplicable since no bonded indebtedness is proposed here. However, the section clearly is broader than that. Section heads, supplied in compilation, as this one was, do not constitute any part of the law. § 49-802 (8), R. R. S. 1943.

Under the contract, the Reclamation District agrees to pay for delivery of a supply of water. The "Water Service Charge" to the Reclamation District is to be determined with reference to two components: (1) The "O & M component" consisting of the entire annual cost of operation and maintenance of the system, and (2) the "Construction Component" which "shall be applied toward the return to the United States of the cost of construction of the water supply works * * *." This construction component is specified in the contract as $4.95 per irrigable acre but is subject to renegotiation depending on ultimate construction costs. Thus, the annual charge is essentially unrelated to the amount of water used. The charge is fixed in the sense that a reduction in the amount of water actually used will not result in a reduction of the charge.

The Reclamation District would meet this annual water service charge by tolls, most notably under its water service contract with the Irrigation District, and by special assessments on irrigable land in the district, and by a tax levied on all tangible property located in the district pursuant to statutory authority. The district argues that section 46-564, R. R. S. 1943, does not apply because the contract does not create a present "debt" and because the water service charge will be met out of "ordinary annual income and revenue of the District."

Although section 46-564, R. R. S. 1943, is in form a limitation on indebtedness, it has, as a clear objective, the limitation of taxes. Its intention is to prevent the board of directors, without voter approval, from incurring obligations payable in a future year while leaving it to future boards to find the money to pay for them. The applicability in the present situation is obvious. Although the district correctly points out that the annual amount actually paid under the contract will depend upon the number of irrigable acres within the district which are capable

of being served by the project, that number is essentially beyond the control of the district for 40 years after the United States undertakes performance. If the entire 53,000 irrigable-acres goal is achieved, annual payments by the Reclamation District will be in excess of $200,000. The amount will be less than that if fewer acres are capable of being served, but appellees do not seriously contend that the obligation will be less than the district's current annual income, which is about $20,000. According to the contract, the district will be required to levy all "assessments, tolls, and obligations" and use "all of the authority and resources" necessary to meet the contract obligations. In addition, the district agrees to assess annually the maximum ad valorem property tax permitted by law. Contrast this with the long-term lease arrangement recently challenged under Nebraska's constitutional limitation on state debt. See Ruge v. State, 201 Neb. 391, 267 N. W. 2d 748. There, this court recognized that the lease agreement of the proposed State Downtown Education Center and Office Building resembled in some respects a long-term purchase obligation. However, the lease and the state's payment obligations could be terminated by the Legislature's refusal of an appropriation for the lease payment in any future year. No similar prerogative is vested in the Reclamation District under this contract. The contract clearly creates the type of obligation which section 46-564, R. R. S. 1943, prohibits absent voter approval. For that reason, the portion of the trial court's order affirming the contract is reversed.

The appellants finally assert that the trial court erred in holding the appellants could not appear as the representatives of a class and in refusing to grant an attorney's fee. We will consider this argument in the last section of this opinion as it is common to all the actions.

In case No. 41693, the board of directors of the Ir-

rigation District sought a judicial examination and approval of its contract with the United States "* * * for operation and maintenance of a distribution system." The judicial procedure is authorized by section 46-1,151, R. R. S. 1943.

The contract is in some respects similar in construction to that discussed above in connection with case No. 41692. The United States agrees to construct "Distribution Works," including canals, laterals, and drains. In return, the Irrigation District essentially agrees to pay a "Construction Charge Obligation" of $10,494,000 over a 40-year period.

The appellants contend that the Irrigation District is without authority to undertake such an obligation without prior approval by the voters in the district. However, the appellants are unable to cite authority for the proposition that such an election is required. Section 46-156 (1), R. R. S. 1943, provides that: "The board of directors, or other officers of the (Irrigation) district, shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of sections 46-101 to 46-1,111 * * *." However, section 46-126, R. R. S. 1943, expressly authorizes the board to "* * * enter into any obligation or contract with the United States for the construction, operation, and maintenance of the necessary works for the delivery and distribution of water * * *." The contract under consideration is such a contract.

Sections 46-1,143 and 46-1,145, R. R. S. 1943, require an election to authorize a long-term supply of water. The contract between the Irrigation District and the United States was not for a supply of water but for the construction of works. The district proposes to get its water supply from the Reclamation District under an agreement which will be discussed below. Contrast that situation with the one considered in Frenchman Valley Irr. Dist. v. Smith, 167 Neb. 78, 91 N. W. 2d 415, cited by appellants. In that

case, the United States agreed not only to undertake construction but also to deliver up to 20,000-acre feet of water. For that reason the contract fell within the purview of the statutory requirement for voter approval of water supply contracts.

The appellants point out that there is no reason for the Legislature to require voter approval of a contract for water supply but not of a contract for construction. The long-term financial obligations of the district in either situation are very similar. Voter approval of a construction plan is expressly required only if the project is to be financed by bonds. § 46-194, R. R. S. 1943. The appellants argue convincingly that the original irrigation laws anticipated that financing would always be through issuance of bonds, that other financing procedures were introduced into the statutes in a piecemeal manner to take advantage of new federal reclamation programs, and that any omission of voter approval provisions to correspond with these new procedures was inadvertent. But an inadvertent omission by the Legislature is nonetheless an omission. This court will not restrict the statutory authority of the Irrigation District where the Legislature imposed no such limitation.

While the court was thus correct in holding that the Irrigation District had authority to contract with the United States, it was in error in holding that the Irrigation District's contract with the Reclamation District was not a matter for voter approval. Article 2 of the contract between the Irrigation District and the United States provides that: "The obligations of the United States under this contract shall be contingent upon the District making an appropriate water service contract, satisfactory to the Secretary, with the Reclamation District for water service to the District." The contract entered into to satisfy that condition precedent was in the form of an order by the board of directors of the Reclama-

tion District granting the Irrigation District's petition for a water supply. Under the contract, the Irrigation District obligates itself to pay annually a fixed amount to be determined with reference to the number of irrigable acres within the district which are capable of being served by the project. The term of the contract is 50 years. As in the contract between the Reclamation District and the United States, the obligation of the Irrigation District to the Reclamation District is not reduced by the use of less water than anticipated. The payments are for a right to a supply of water. Section 46-1,143, R. R. S. 1943, provides in part: "The board of directors of any irrigation district organized under the laws of this state may enter into contracts for a supply of water for the irrigation of the lands within such irrigation district with any person, firm, association, corporation or the United States of America * * *."

Section 46-1,145, R. R. S. 1943, provides in part: "If such contract provides for payments to be made extending for a period of more than one year from the date of making the contract, the board of directors of such irrigation district shall submit the contract to the legal voters of the district at any general election, or at a special election called therefor for the approval or disapproval of the contract. * * *"

The contract between the Irrigation District and the Reclamation District was clearly a contract "for a supply of water" providing for "payments to be made extending for a period of more than one year." Unless this court accepts the construction of the statute adopted by the federal court in Bridgeport Irr. Dist. v. United States, 40 F. 2d 827 (8th Cir., 1930), the board of the Irrigation District is without authority to enter into such a contract without prior approval of the voters of the district.

In that case, the United States sued for the balance due on a contract for supply of water. The answer of the district admitted execution of the con-

tract by the directors, but alleged that they were without authority to do so and that the contract was therefore void. This position was based on the failure of the board to submit the contract to the voters as was apparently required by what is now section 46-1,145, R. R. S. 1943, quoted above. That section was added to the irrigation laws in 1915. The federal court found the section did not operate to void the contract, relying on the "savings clause" of the 1915 act which provided that: "This act shall not limit the rights which any irrigation district has under the existing laws to purchase a water supply and shall be cumulative thereto." (Subsequent to the Bridgeport decision, the savings clause became section 46-205, Compiled Statutes of Nebraska, 1929, and was entirely omitted, without comment, when the statutes were revised in 1943. We place no reliance, one way or the other, on this omission.)

In basing its decision on the savings clause, the court noted that to hold the act amendatory of preexisting law would require the law be declared unconstitutional as violative of Article III, section 14, Constitution of Nebraska, because the act did not contain a reference to the sections amended. It concluded that the election requirements must have been meant to apply only "under special circumstances not present in this case." For reasons which follow, we decline to accept this restrictive construction of the section.

Since the passage of the 1915 amendments, the Nebraska Legislature in 1943 adopted a general revision of the statutes under the title Revised Statutes of Nebraska 1943. § 49-601, R. R. S. 1943. We have previously held that the 1943 revision had the effect of removing any constitutional objection, under Article III, section 14, Constitution of Nebraska, for lack of proper title to previously enacted legislation. See, Peterson v. Vasak, 162 Neb. 498, 76 N. W. 2d 420; McGraw Electric Co. v. Lewis & Smith Drug

Co., Inc., 159 Neb. 703, 68 N. W. 2d 608. The reasoning is equally applicable here. The purpose of the enactment of the 1943 revision, in addition to the elimination of obsolete and redundant sections of the statutes, was to clearly set out, as if in a completely new act, the law applicable to an area of legislative concern. Little purpose would attach to a revision whose provisions would carry with them the unintentional limitations of their legislative birth, no matter how long ago that event had passed. We hold that the objectionable infirmities of statutory provisions enacted prior to 1943, based on the provisions of Article III, section 14, Constitution of Nebraska, which provides "* * * no law shall be amended unless the new act contain the section or sections as amended * * *," are cured by the 1943 revision of the statutes.

The contract in question, being clearly in violation of the law requiring a prior election, is void. The trial court is reversed.

The third case is an action by certain residents of the Irrigation District questioning the authority of the Irrigation District to contract for a water supply with the Reclamation District. The case was tried last and the trial court sustained the demurrer to the petition on the basis of its decision in the second case. As discussed above, the court was in error and the decision is reversed.

In the final assignment of error, the opponents of the Irrigation and Reclamation Districts assign as error the trial court's dismissal of their petition as a class action. We affirm.

Nebraska has no provision similar to the Federal Rules of Civil Procedure rule 23 (A) and (B) authorizing a class-certifying hearing in the trial court. In this state, the petition for class status may be challenged by a motion for summary judgment as in Blankenship v. Omaha P. P. Dist., 195 Neb. 170, 237 N. W. 2d 86, or by demurrer. See 10 Creighton L.

Rev. 11, p. 18. In either case, if, on examination of the petition or the motion and supporting evidence, it appears that "* * * any party in the class stands to suffer a long run loss as a result of his inclusion in the class, the representative party will have a conflict of interest with the other class members." See 56 Neb. L. Rev. 338. In that case, class status will be denied. See Blankenship v. Omaha P. P. Dist., *supra*.

The class purportedly represented by the appellants is: "* * * those individuals owning land in the Irrigation District and/or the Reclamation District, and those persons interested in the contract executed on June 4, 1976, between the United States of America, Bureau of Reclamation and the Twin Loups Irrigation District." However, included among the individuals owning land in the district are those who petitioned to be included in the districts and must be thought to favor the undertaking of such a project. In fact, the stated class includes the very directors whose acts are challenged here. A real and substantial conflict is apparent within the stated class. The District Court was correct in denying representative status to the appellants.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

DALE A. THEOBALD, APPELLANT, V. ELOISE A. AGEE, EXECUTRIX OF THE ESTATE OF RICHARD H. ROGERS, DECEASED, ET AL., APPELLEES.

276 N. W. 2d 191

Filed March 13, 1979. No. 41738.

1. **Specific Performance: Contracts: Evidence: Frauds, Statute of.** In an action for specific performance of an oral contract to convey real estate where partial performance is relied upon to avoid the defense of the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal. Such

contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear, satisfactory, and unequivocal evidence, they are unenforceable unless it is also proved by evidence of like character that there has been such performance as the law requires. The acts constituting performance must be such as are referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract or relation. They must be something that the claimant would not have done unless and on account of the contract and with the direct view to its performance so that nonperformance by the other party would amount to fraud upon him.

2. **Words and Phrases: Specific Performance: Contracts.** The words "referable solely to the contract," as used in the foregoing rule, properly interpreted and applied mean that, if the evidence as a whole of a party seeking specific performance of an oral contract to convey real estate indicates that it is referable solely to the contract sought to be enforced and not to some other or different contract, then the burden of the rule has been satisfied. In determining whether or not the acts were referable solely to the contract, the acts of performance must be considered as a whole in their own light and in the light of all other material and relevant facts and circumstances, present, antecedent, and subsequent as shown by evidence with no part excluded.

3. **Equity: Appeal and Error.** An appeal to this court in an equity action is reviewed de novo.

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

Barney & Carter, P.C., for appellant.

Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellees.

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

BRODKEY, J.

Plaintiff below, Dale A. Theobald, appeals to this court from the order entered by the District Court for Lancaster County, dismissing an action brought by him against the Executrix of the Estate of Richard H. Rogers, deceased, and his heirs and devisees, seeking specific performance of an alleged oral con-

tract for the devise of an interest in a farm located near Minden, Nebraska.

In his amended petition, Theobald alleges the deceased, Richard H. Rogers, was the president and chief operating officer of O'Shea-Rogers Tractor and Equipment Company, a Nebraska corporation, hereinafter referred to as the "Company," which was engaged in the wholesale distribution of farm equipment manufactured and distributed by Ford Motor Company. Rogers and his immediate family owned 50 percent of the common stock of the Company. Theobald was an employee of the Company from 1947 until February 1964, when the Company was sold to the Ford Motor Company. The alleged oral contract involved in this litigation arose out of a conversation which occurred in mid-December 1958, between Rogers and the plaintiff, who at that time was the Company's sales manager, and one Edwin Mangold, who at the time was distribution manager for the Company. The general manager of the Company was one LaVern Augustin, who had informed Rogers that he was resigning from the Company. Theobald testified, as to the conversation that Rogers had with him and Mangold at that time, as follows: "Q- And will you relate to the Court, as best you can, what each party said during the course of this conversation? A- This was immediately after I had learned that Mr. Augustin was leaving, and Mr. Rogers called Mr. Mangold and me into his office and closed the door. And he said, 'I have something I want to tell you fellows.' He said, 'I really hadn't intended to tell you now, at this time, but, goddamn it,' he said, 'Augustin has forced my hand.' And he said, 'I think you fellows have done a good job; it's a tough job; you've worked hard for me and I wanted to show my appreciation. And I just want you to know that I've made provisions for you fellows in my will so that you'll have an interest in a farm and a pretty damned good farm out at Minden. * * *'

"Mr. Mangold and I, both, expressed surprise and also appreciation. And he then went on to elaborate on why he was doing this. Q- What did he say in that regard? A- He said, 'This is a tough job and you fellows, I think, have done a good job for me, and I want to take care of you in some way, and so I've made a provision for you, providing you don't pull out on me like Augustin. Now, I had Augustin provided for, too, in this program, but since he is leaving,' he said, 'I'm not going to go ahead with the provision for him. * * *'

"As we left his office I recall that we again expressed our appreciation for his thoughtfulness and his consideration."

Mangold also testified with reference to the conversation, and his testimony was substantially similar to that of Theobald. He also testified that sometime in August 1959, Rogers showed him a paragraph in his will which left a one-third interest in a certain farm, legally described in the will, to him, Theobald, and another employee. Augustin also testified that when he resigned, Rogers tried to persuade him to stay on by promising him a farm, stating that Theobald and Mangold "were receiving a farm between them." There was also testimony from one Eugene Sparrows, a representative of the Ford Motor Company, who testified that Rogers had informed him that in his will he was leaving an interest in a farm near Minden, Nebraska, to the men who had helped him accumulate his wealth.

Richard Rogers died testate on December 27, 1975. His will and codicil, executed in 1973, and admitted to probate, made no provision for either Theobald or Mangold. Certain other prior wills of Rogers were offered and received in evidence. It appears that Rogers executed a will on January 4, 1965, which left Theobald a one-third interest in a farm and Mangold $1,000 in cash. In a will executed on January 6, 1967, Rogers left Theobald $10,000 in cash, and nothing to

Mangold. In his next will, executed on January 10, 1968, Rogers left nothing to the plaintiff or Mangold. In all subsequent wills executed by Rogers, which were received in evidence, he made no provision for Theobald or Mangold. In his amended petition, Theobald prays that the court find that a valid contract to devise or convey a real estate interest in the farm in question was consummated by and between Rogers and him; and that he had performed the contract on his part by remaining in the employment of the Company until it was sold, in reliance upon the existence of the contract, and that he was therefore entitled to specific performance of the contract. He prayed that the executrix be directed and ordered to convey to him an undivided one-third interest in the property. In their answer, the defendants allege, among other things: "(c) The amended petition discloses on its face that the alleged cause of action is based upon the alleged breach of an alleged oral contract for the conveyance of land, which under the provisions of Section 36-105 of the 1943 Revised Statutes of Nebraska, Reissue of 1974 is void and unenforceable."

The trial judge was faced with the issues as to whether there was in fact an oral agreement between the plaintiff and the deceased as alleged; and whether the evidence of such agreement and the terms thereof was clear, satisfactory, and unequivocal; and even if it were determined that there was an oral agreement for the conveyance of real estate, whether under section 36-106, R. R. S. 1943, there was sufficient part performance by the plaintiff to require specific performance of the contract in equity. Following the trial, the District Court dismissed plaintiff's petition and cause of action and specifically found that plaintiff's performance was not sufficient under section 36-106, R. R. S. 1943, and that the oral agreement was void under section 36-105, R. R. S. 1943. There is a dispute between the

parties as to whether the trial court found that there was a valid oral agreement between the parties, as alleged. In his brief on appeal, Theobald contends that the court so found. Defendants take the contrary position. We are not prepared to state that the trial court resolved this issue, and the language of the court contained in its order-opinion is illuminating and must be considered. We quote excerpts from the order: "4. Although the court *believes* from a consideration of all the evidence that there was a valid agreement between the parties, that issue and the evidence relating thereto, as well as to the terms and conditions, need not be discussed, as the final issue set forth above is dispositive of this litigation. * * * *Assuming* the existence and sufficiency of the agreement, and further that it is an oral agreement for the conveyance of real estate within the contemplation of section 36-105, the plaintiff relies upon his continued employment with O'Shea Rogers Tractor and Equipment Company until February 29, 1964 as his part performance. In support of this contention, he offered his own testimony, that of Verne Augustin, Edward Mangold, Eugene Sparrow, and in particular Exhibit No. 7. That exhibit reflects the plaintiff's wages from 1950 to 1964, and reveals that they diminished from and after 1959, the year of the *alleged* agreement. * * *." (Emphasis supplied.)

In view of the above language, we believe there are serious doubts as to whether the court determined that an oral contract was consummated between the plaintiff, Dale A. Theobald, and the deceased, Richard H. Rogers. In this connection, we also note that in his brief on appeal, Theobald contends that the contract in question was actually a three-party contract between him, his employer, O'Shea-Rogers Tractor and Equipment Company, and the deceased, who was president of and owner of stock in O'Shea-Rogers Tractor and Equipment Company. We think

it is clear from the evidence in the record that Rogers was acting on his own behalf in his conversations with his employees, because of the attitude of his partner, O'Shea, who was the owner of the other 50 percent of the stock in the corporation. This, we believe, is made clear by the testimony of Theobald himself with reference to a conversation with Rogers which occurred in December 1958, in which Rogers explained why he was providing for Mangold and Theobald in his will. He testified: " 'As you fellows know, this is a tough business and I think you fellows have done a good job. I know you work hard and you try. We are faced with a lot of problems in this business, these occasional droughts which affect sales, service problems, some of which have been horrendous, and we have to help the dealers all we can to keep them going, and quite frankly, I'm probably not paying you what I ought to be paying you, and I purposely kept salaries low because I don't want to get my salary level up to the point where in another year, a bad year, we would either have to cut back on salaries or let people go, and I don't like to do either one of those things. And we don't have a stock-option program because, as you know, I have a partner in this business and he is not much for that, and I have never personally been very enthusiastic about a profit-sharing plan, and I suppose if we installed one here we would probably have to do it down at the motor company and I know my partner is dead set against it down there. So,' he said, 'it doesn't really leave me much latitude in what I can do, except what I can do for you *in a personal* way to make it up to you. And this is what I've done.' " (Emphasis supplied.) It is clear that any contract, or negotiations for a contract, were between the plaintiff, Theobald, and the deceased, Richard H. Rogers, only. We conclude, however, that it is unnecessary for us to reach the question as to whether a valid contract or agreement between

the parties was ever reached, for the reason that it is possible to dispose of this litigation on the issue of the sufficiency of plaintiff's part performance of the alleged oral contract. Before proceeding to a discussion of that issue, it will be helpful to review certain well-established principles of law in this state with reference to contracts of the nature involved herein, and the sufficiency of part performance thereunder to take such contracts out of the operation of the statute of frauds.

Although cases stating and restating the law applicable to this situation involved herein are legion, a very recent exposition thereof is contained in Ross v. Ross, 192 Neb. 186, 219 N. W. 2d 756 (1974), in which case we stated: "In an action for specific performance of an oral contract to convey real estate where partial performance is relied upon to avoid the defense of the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear, satisfactory, and unequivocal evidence, they are unenforceable unless it is also proved by evidence of like character that there has been such performance as the law requires. The acts constituting performance must be such as are referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract or relation. They must be something that the claimant would not have done unless and on account of the contract and with the direct view to its performance so that nonperformance by the other party would amount to fraud upon him. Caspers v. Frerichs, 146 Neb. 740, 21 N. W. 2d 513." See, also, Rudolph v. Hartung, *post* p. 678, 277 N. W. 2d 60 (1979); 27 Neb. L. Rev. 417 (1948); 32 Neb. L. Rev., p. 1, at pp. 2 to 9 (1952).

Likewise, in Riley v. Riley, 150 Neb. 176, 33 N. W. 2d 525 (1948), after stating the rule with reference to the evidentiary burdens devolving upon the plaintiff to prove an oral contract, the terms of which are clear, satisfactory, and unequivocal and wherein the acts constituting performance were such as were referable solely to the contract sought to be enforced and not such as might be referable to some other or different contract, we also discussed the meaning of this latter rule, stating: "Properly interpreted and applied this rule means that if the evidence as a whole of a party seeking specific performance of an oral contract to convey real estate indicates that it is referable solely to the contract sought to be enforced and not to some other or different contract then the burden of the rule has been satisfied. The fact that there may be adversary evidence indicating that the acts refer to some other contract or situation will not defeat this satisfaction of the rule. Where one seeking specific performance of an oral contract to convey real estate has satisfied by evidence the requirements of this rule and there is evidence of an adversary in conflict therewith the decision on this question becomes one of preponderance with the preponderant burden on the one seeking performance.

"It appears proper to say that in determining whether or not the acts of plaintiff were referable solely to the contract alleged his acts of performance must be considered as a whole in their own light and in the light of all other material and relevant facts and circumstances, present, antecedent, and subsequent as shown by his evidence with no part excluded."

In this case the evidence in the record, considered in the light of the rules announced above, leads to the conclusion that plaintiff's acts of performance were not solely referable to the contract he seeks to have specifically performed and no other. Plaintiff has contended that his part performance of the al-

leged contract consisted of his continued employment by O'Shea-Rogers Tractor and Equipment Company at an income level below the industry average, and he has introduced in evidence an exhibit showing his income from prior and subsequent years. The evidence clearly reveals, however, that his income as shown by the exhibit included not only his base salary of $900 per month, but also reflected bonuses given him by the Company for each year. Contrary to his claims, plaintiff has not shown that his income decreased after the date the alleged contract was entered into. In 1959, his income increased over his 1958 income, which was the year the alleged contract was entered into. There is no showing that his continued employment by the Company was solely referable to his alleged agreement with Rogers, and there is no evidence in the record that he had ever threatened to quit his employment before Rogers informed him that he had provided for him in his will, which, incidentally, had already been drafted sometime prior thereto, without Theobald's knowledge. It seems clear that Theobald's continued employment was equally referable to his employment contract with the Company, under which contract he received payment for his services. It should also be noted that Theobald brought this action for specific performance against the Rogers' estate, and the Company was not made a party defendant.

This being an equity action, upon appeal to this court we review the evidence de novo. We agree with the conclusion of the trial court that the claimed act of partial performance by Theobald was not solely referable to the alleged Rogers' contract, but, to a substantial degree, was referable to his employment agreement with the Company. This fact was not only alleged in plaintiff's amended petition, but was also admitted in his direct testimony. There is no evidence indicating that his claimed acts of

performance were any different subsequent to the alleged agreement than they were prior thereto, nor is there evidence in the record that after his many years of continuous employment, he had ever threatened to resign either prior to or at the time of the alleged agreement. There is absolutely no evidence in the record that plaintiff was ever informed as to the period of time that he would have to work for the Company after the alleged agreement or that he agreed to work any specified period. It is not possible to conclude from the record, even assuming the existence of an oral agreement between Theobald and Rogers, that plaintiff's performance thereafter was solely referable to that agreement. While there are in this case certain equitable considerations revealed by the record that are favorable to plaintiff's position, we conclude from a de novo review of the record that the trial court was, under the facts and applicable law, correct in its decision that plaintiff's part performance did not comply with the requirement of section 36-106, R. R. S. 1943; and, therefore, even assuming the existence of an oral contract, such contract would be void under section 36-105, R. R. S. 1943. The trial court was correct in dismissing plaintiff's petition, and its action in so doing must be affirmed.

AFFIRMED.

DONALD A. HAERRY, SUCCESSOR PERSONAL REPRESENTATIVE OF THE ESTATE OF ELISE HOFFSCHNEIDER, DECEASED, APPELLEE, V. ALFRED HOFFSCHNEIDER, APPELLANT.

276 N. W. 2d 196

Filed March 13, 1979. No. 41794.

1. **Wills.** A testamentary disposition is the act or will of a person granting property or rights effective at the death of such person.

2. **Wills: Contracts.** A contract between two persons is not rendered testamentary by the fact that some provisions are to be performed at the time of or subsequent to the death of one of the parties.
3. **Wills: Contracts: Intent.** When several documents are executed successively as a part of the same general transaction, the language of each document and the order of their execution may be considered as indications of the intention of the makers.
4. **Judgments: Attorney's Fees.** Attorney's fees, if recoverable by the terms of an agreement, are included in the judgment and are not taxable as costs.
5. **Attorney's Fees.** Attorney's fees may be allowed and taxed as costs only when provided by statute or a uniform course of procedure.

Appeal from the District Court for Seward County: WILLIAM H. NORTON, Judge. Affirmed in part, and in part reversed.

Blevens, Blevens & Jacobs, for appellant.

Wallace W. Angle of Angle & Lang and C. Russell Mattson of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee.

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

KUNS, Retired District Judge.

This is an action by Donald A. Haerry, Successor Personal Representative of the Estate of Elise Hoffschneider, plaintiff and appellee, against Alfred Hoffschneider, defendant and appellant, for the recovery of amounts alleged to be due upon a contract. The District Court for Seward County, Nebraska, rendered judgment against appellant, who now assigns error. We affirm in part and reverse in part.

The record shows that Elise Hoffschneider, a widow, had two children, Melba Marie Holm, hereinafter referred to as Melba, and Alfred Hoffschneider, hereinafter referred to as Alfred. She had given a quarter-section farm to Alfred in 1965. Subsequently, on November 29, 1966, accompanied by Alfred, she consulted her attorney and had him pre-

pare the following: (1) A deed conveying another quarter-section farm to Alfred, reserving to grantor a life estate therein; (2) a will devising a quarter-section farm to Melba, with a limitation over to Alfred if Melba failed to survive testatrix, and the residue of her estate to Alfred; and (3) an agreement in the following language:

"THIS AGREEMENT made between Elise Hoffschneider and Alfred Hoffschneider, her son, WITNESSETH:

"That Elise Hoffschneider has this day conveyed certain real estate in Seward County, Nebraska, to Alfred Hoffschneider and has this day executed her Last Will and Testament, and in consideration thereof the said Alfred Hoffschneider agrees that if the assets of the estate of Elise Hoffschneider are insufficient to pay debts, except mortgage encumbrances, expenses of administration and any estate and inheritances [sic] taxes on property passing under her will, then he will at the time of her death pay to her estate sufficient sums of money as shall be required for the payment of such liabilities in order that the real estate described in her will shall pass to her daughter, Melba Marie Holm, subject only to the mortgage thereon in favor of the Federal Land Bank of Omaha.

"Dated November 29, 1966."

Elise Hoffschneider signed all three documents and Alfred signed the agreement. He entered into the possession of the realty conveyed to him but Elise Hoffschneider never asserted her life tenancy therein. There were no further transactions between Alfred and his mother in connection with these matters.

Following the death of Elise Hoffschneider on September 13, 1975, her will was admitted to probate without objection. Letters Testamentary were issued to W. A. Refshauge, the executor named in the will, who died during the pendency of his executorship and the appellee was appointed as his succes-

sor. As the probate proceeded, the following liabilities against the estate were established: Debts and expenses of administration - $7,304.56; federal estate tax - $23,119.19; and state inheritance tax - $1,172.36. None of these amounts had been paid except the state inheritance tax. Interest and penalties were accumulating upon the federal estate tax liability. Personal property in the hands of the executor amounted to $2,270.28, with the only remaining asset being the realty devised to Melba. Demand was made upon Alfred to pay the balance due upon these liabilities, and, upon his refusal, this action was filed.

The petition alleged the execution of the agreement, the amount of liabilities, and the demand for payment; and prayed for judgment. The appellant, in his second amended answer, after denying the allegations of the petition generally, alleged the agreement was void because it was a testamentary act not executed according to the statute and because it had been revoked by the terms of the will of Elise Hoffschneider. The reply was a general denial. A jury was waived and trial was had to the court. The above amounts were stipulated by the parties. The court found generally in favor of the appellee and entered judgment against the appellant for the amounts prayed, and costs, including an attorney's fee fixed by the court.

Appellant's principal assignment of error is directed against the finding and judgment of the court that the agreement was an enforcible contract against the appellant. He argues that the agreement was testamentary and should have been executed in accordance with section 30-204, R. R. S. 1943. It should be noted that the agreement simply recites the execution of the deed and the will and contains no independent provisions disposing of any property or rights belonging to Elise Hoffschneider. The parties then agreed that Alfred should pay to

the estate the amounts needed after the death of Elise Hoffschneider to exonerate the devise to Melba from all charges, except the mortgage to the Federal Land Bank. The time of death is simply a time for performance. In dealing with a similar contention, in Brock v. Lueth, 141 Neb. 545, 4 N. W. 2d 285, this court said: " 'A testamentary disposition of property involves the act or will of a single individual, a condition that does not here exist. The question involved is rather one arising out of contracts between parties in every respect possessing the capacity to contract. The rights of the parties must, therefore, depend upon their contract obligations, and in the determination of those rights the contracts should be considered in the light of surrounding circumstances and the condition of the parties at the time of making them.' " A will is a unilateral disposition of property binding only from the death of the maker; a contract is an agreement drawing its binding force from the meeting of the minds of the parties. 94 C. J. S., Wills, § 140, p. 920. Since the agreement is bilateral and not testamentary, execution in accordance with section 30-204, R. R. S. 1943, was not required.

Appellant next argues that the provisions of clause II of the will are inconsistent with and prevail over the terms of the agreement. The will reads: "All estate, inheritance, legacy, succession or transfer taxes (including any interest and penalties thereon) imposed by law with respect to all property taxable by reason of my death, limited however to property passing under this will, shall be paid by my executor out of my general estate as a part of the expenses of administration with no right of reimbursement from any beneficiaries under the terms of this will."

Although the deed, the will, and the agreement were all executed upon the same date and may be read together for the purpose of ascertaining intention, it should be noted that the will refers to the

previous conveyance by the deed and the agreement refers to the previous execution of the will. Appellant's argument, that the will revoked the obligation of the agreement, must fail because the agreement, although contemplated, was not in existence at the time of the execution of the will and for the further reason that such a revocation would be completely inconsistent with the general estate plan of Elise Hoffschneider as manifested in the three documents. A revocation of the agreement would bring about the complete reverse of the stated intention of Elise Hoffschneider that the devise to Melba should be subject only to the mortgage to the Federal Land Bank. The decisions cited by the appellant in support of his argument on this point all involve situations where the obligation, claimed to be waived, revoked, or released by provisions of a will, had come into existence before the will was executed and it was held that the testator had clearly intended to release and discharge such obligations upon his death. Here, the documents give a preference to Alfred, then provide for Melba, and finally provide an obligation to be collected by the executor so that the devise to Melba will be free from debts, taxes, and expense of administration. The testatrix was entitled to plan so that the land she had owned would stay in the family without being subject to possible sale by the executor to meet estate debts. The trial court construed the deed, the will, and the agreement correctly and properly imposed liability upon the appellant.

The next assignment of error is against the amount of attorney's fees taxed as costs. The taxation of any attorney's fee as a part of the cost appears to be such a plain error that it should be considered under Rule 8 a 2 (3), Revised Rules of Supreme Court, 1977, even though not specifically assigned. Both parties agree that the provision of the agreement relating to expenses of administration

should include attorney's fees. Even though such a contractual obligation may be enforced and reduced to judgment in an appropriate action, a trial court may not proceed to fix such fee and tax it as a part of the costs. 20 C. J. S., Costs, § 218, p. 459. The parties are entitled to make up and to try issues of such liability, the same as any other issues in a case. It has long been the rule that the practice in this state is to allow the recovery of attorney's fees only when provided by statute or in accordance with a uniform course of procedure. State ex rel. Ebke v. Board of Educational Lands and Funds, 159 Neb. 79, 65 N. W. 2d 392. The portion of the judgment fixing and taxing attorney's fees as part of the costs is vacated and reversed, without prejudice, however, to the maintenance of a further action for the recovery of such fees. The judgment of the trial court is affirmed in all other respects.

AFFIRMED IN PART, AND IN PART REVERSED.

KENNETH KAREL BERRY, APPELLEE, V. JUDITH HARWOOD BERRY, APPELLANT.

276 N. W. 2d 200

Filed March 13, 1979. No. 41797.

1. **Judgments: Evidence.** The findings of the trial court will be upheld unless shown to be clearly against the weight of the evidence or the result of an abuse of discretion.
2. **Divorce: Custody: Minors: Parent and Child.** A trial court may exercise the statutory power to take custody of the minor children of a marriage when it is uncertain that an award of custody to one parent or the other will be in the best interests of the children.
3. _____: _____: _____: _____. A decree placing custody of minor children in the court with possession in one of the parents is not required to state specific provisions for the monitoring of that possession.
4. **Divorce: Alimony.** When dissolution of a marriage is decreed, the court may order the payment of such alimony by one party to

the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed in part, and in part reversed and remanded.

David L. Herzog, for appellant.

Vincent P. Sutera of Sutera & Sutera, for appellee.

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

KUNS, Retired District Judge.

This is an action for dissolution of marriage brought by Kenneth Karel Berry, the petitioner and appellee, against Judith Harwood Berry, the respondent and appellant, in the District Court for Douglas County, Nebraska. The respondent assigns error against the provisions of the decree in respect to child custody and alimony. We affirm in part and reverse in part.

The record shows that the parties were married in 1961. The petitioner is a clinical psychologist practicing privately and an associate professor at the University of Nebraska College of Medicine. The respondent had worked occasionally outside the home but had spent the bulk of her time in caring for the two surviving children of this marriage: Karen Jennifer, born in 1962 and Jason, born in 1971. During the pendency of the action, respondent had become a student at the University of Nebraska-Omaha to complete her studies in social work. The extent of the family property and assets will be discussed later.

Both parties sought the temporary custody of the children and the court held a hearing thereon shortly after the filing of the action. An order was entered taking custody of the children in the court and grant-

ing possession of the children and of the family home to the petitioner. The case then proceeded to a final hearing upon the merits. This hearing was devoted almost entirely to the conflicting claims of the parties to custody. The parties testified extensively and called numerous witnesses, including psychological and psychiatric experts. The testimony covered the conduct of both parties, both as to the children and to each other, and the mental problems of both. Much of the testimony, including the expert opinions, conflicted to such an extent that the determination of facts could not be made on any basis except the trial court's evaluation of credibility of the various witnesses and of the fitness of each party to have custody of the children. A recital of the details of the testimony would unduly lengthen this opinion. The trial court did make inquiry of the daughter, Karen Jennifer, about her custodial preference, to which she replied that she preferred to live with the petitioner. The court ordered that custody should continue in the court with possession of the children in the petitioner subject to a right of visitation in the respondent. Respondent's assignment of error is that this portion of the order is not supported by the evidence, that it is not in the best interests of the children, and that it is defective for want of provisions for future monitoring of petitioner's possession of the children.

In Schinkel v. Schinkel, 199 Neb. 1, 255 N. W. 2d 851, we held that the findings of the trial court will be upheld unless shown to be clearly against the weight of the evidence or the result of an abuse of discretion. Here, the trial court was confronted with a record which did not weigh clearly either way and yet was required to make disposition of the custody and possession of the children. Section 42-364, R. S. Supp., 1976, authorizes the court to place the custody of minor children in the court, to determine custody on the basis of the best interests of the chil-

dren, and to make subsequent changes when required. In Bartlett v. Bartlett, 193 Neb. 76, 225 N. W. 2d 413, we said: "When the best interests of the children, in regard to custody, is not clear, the court may, and should, place custody in the court. In regard to such disposition we have stated that: 'Its purpose is to facilitate judicial supervision and summary power to act swiftly in their (the childrens') best interests. * * * The parent having possession where the court has retained custody is in effect an agent of the court.' Benson v. Benson, 190 Neb. 87, 206 N. W. 2d 51.

"It is evident that when a court finds it necessary to place custody of minor children in the court, it does so because it is doubtful that it is cognizant of the full story relating to the best interests of the children and of the propriety of awarding custody to one of the parties."

The trial court acted precisely in accordance with the reasoning of that opinion. The effect of retaining court custody is to defer a final determination of the fitness of either party and of the appropriate action to further the best interests of the children.

The question of whether monitoring provisions should be set out in a decree has not previously been presented to us. In Greenfield v. Greenfield, 199 Neb. 648, 260 N. W. 2d 493, when our modification of a decree directed the trial court to take legal custody, the trial court was admonished to provide for close monitoring of the possession of the children. The precise extent of monitoring depends in part upon the staff and assistance available to the court, in part upon reports and complaints made by the parents, and generally upon the circumstances of each individual case. It is desirable that the court and its staff should be able to act flexibly in response to the developments that may occur. It is possible specific provisions in a decree might have a somewhat restraining effect, inhibiting quick and

perhaps summary action. In view of these considerations, we hold that the trial court is not required to make specific provisions in a decree for the monitoring of possession of children over which it has taken custody.

The assignment of error against the custody provisions of the decree is not well taken and is without merit.

Next we consider the property provisions of the decree. The record does not show that either party brought property to the marriage and apparently the family assets represented a joint accumulation during the 16-year period. The petitioner gave his opinion that the value of the home was about $45,000 and furnishings about $3,000; the mortgage on the home was stated at $33,000 and other family debts at $10,000. The family owned two cars, one being used by each party. Details concerning the balances in bank accounts and certificates of deposit were not supplied. During the year 1976, petitioner earned a salary of $27,000 before taxes from the University of Nebraska College of Medicine and an income of about $9,000 after taxes from his private practice. The respondent earned about $250 from part-time work in a hospital. There was no evidence concerning the prospects of the respondent for future earnings.

The decree contained a finding that the value of the equity in the home was $13,320 and assigned the home and the furnishings to petitioner. Alimony in the amount of $6,700 was awarded respondent, payable at the rate of $250 per month for 27 months. Respondent was further ordered to restore $850 to the savings account maintained for the benefit of Karen Jennifer. The decree did not mention the automobiles or the bank accounts and certificates of deposit.

Section 42-365, R. S. Supp., 1976, provides in part: "When dissolution of a marriage is decreed, the

court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment * * *." In Brown v. Brown, 199 Neb. 394, 259 N. W. 2d 24, where the evidence showed that each party had a substantial earning capacity, we held that a property division should be supplemented by alimony over the ensuing 10-year period. The trial court in the instant case based its allowance of alimony upon its finding of one-half the value of the equity in the home and awarded an amount of alimony which is inadequate even upon the scanty evidence in the record. The award of alimony to the respondent is reversed and the cause is remanded for a new trial as to that issue only.

Other assignments of error have been considered and found to be without merit.

A fee of $500 will be allowed respondent for the services of her attorney in this court.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

DOROTHY R. BECKER ET AL., APPELLANTS, V. NATIONAL AMERICAN INSURANCE COMPANY, A NEBRASKA CORPORATION, APPELLEE.

276 N. W. 2d 202

Filed March 13, 1979. No. 41804.

1. **Equity: Judgments: Appeal and Error.** On an appeal from a judgment in equity when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other.
2. **Minority Shareholders: Corporations: Statutes.** In a proceeding by a dissenting shareholder seeking a finding and determination of the fair value of shares of stock under the provisions of section

44-133.06, R. R. S. 1943, the statutory provisions as to a judgment against the insurance company for the fair value of the shares, together with interest, are mandatory.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Judgment vacated. Cause remanded with directions.

Thomas P. Leary, for appellants.

Lyle E. Strom and Bruce D. Vosburg of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee.

Heard before SPENCER, MCCOWN, CLINTON, and WHITE, JJ., and WARREN, District Judge.

MCCOWN, J.

This is a statutory action by dissenting shareholders of a Nebraska stock insurance company for a finding and determination of the fair value of shares acquired by another corporation under the provisions of the Insurance Company Plan of Exchange Act. §§ 44-133.01 to 44-133.08, R. R. S. 1943. The District Court found that the fair value of the shares of defendant National American Insurance Company on November 8, 1973, did not exceed $1,139 per share, and dismissed plaintiffs' petition.

In September 1973, the defendant, National American Insurance Company, a Nebraska corporation, began proceedings under the Insurance Company Plan of Exchange Act by which H. F. Ahmanson and Company, the owner of 88.64 percent of the outstanding stock of National American, would acquire the remaining 11.36 percent of National American stock. Ahmanson owned 17,728 shares of National American stock and offered to pay $1,139 per share for each of the remaining 2,272 shares.

On September 6, 1973, the board of directors of National American Insurance Company adopted the plan of exchange. Thereafter the various actions and procedures required by sections 44-133.01 to

44-133.08, R. R. S. 1943, were taken by National American. The plan was approved by the Director of Insurance and notice was given to all stockholders. On November 9, 1973, the stockholders of National American approved the plan over plaintiffs' dissent. Notice was sent to all stockholders detailing the procedure by which they could exchange their shares. Under the statutory provisions the effective date for determining the fair value of the stock involved here was November 8, 1973.

Within the time provided by the act the plaintiffs in this action, who were the owners of 133 shares of National American stock, filed written objections and made written demand upon National American for payment of $2,000 per share, which plaintiffs asserted was the fair value. In response National American again offered to pay the sum of $1,139 per share to plaintiffs. Plaintiffs refused the offer. Within 10 days after November 9, 1973, National American deposited in a trust account in the United States National Bank of Omaha the sum of $1,139 per share for stock not previously exchanged, except that no sum was deposited for shares of stock owned by dissenters.

On January 23, 1974, within the statutory time, the plaintiffs filed this action under the provisions of section 44-133.06, R. R. S. 1943, praying for a determination of the fair value of plaintiffs' shares and for judgment and interest in accordance with the statute. The matter was not tried until June 1977. The evidence for the plaintiffs was that the fair value of the National American stock on November 8, 1973, was $1,416 per share. The evidence for the defendant was that $1,139 per share was the fair value. The defendant's expert testified that the $1,139 valuation included a 19 percent premium for the acquisition of the minority stock. The expert witnesses differed as to which insurance companies were comparable, particularly with respect to one

South Carolina company. The witnesses also differed in the comparative weight to be given to various elements of valuation.

On August 23, 1977, the District Court entered a memorandum opinion finding and determining that the fair value of the shares of National American Insurance Company on November 8, 1973, did not exceed $1,139 per share. The court then entered a decree on August 29, 1977, dismissing plaintiffs' petition with prejudice and taxing the costs to the plaintiffs. The plaintiffs have appealed.

On this appeal the plaintiffs contend that the District Court failed to correctly find and determine the fair value of the plaintiffs' shares, and failed to enter judgment against the defendant for the fair value of such shares, together with interest as provided by statute.

The statute provides that a proceeding of this kind shall be prosecuted as an equitable action, and the practice and procedure shall conform to the practice and procedure in equity cases. The memorandum opinion of the trial court establishes that the court accepted the defendant's evidence as to the fair value of the stock rather than the evidence of the plaintiffs. The record is persuasive that the determination was correct. 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. Wasserburger v. Coffee, 201 Neb. 416, 267 N. W. 2d 760.

While it may be contended that the language of the decree that the value "did not exceed $1,139.00 per share" was not a specific finding and determination of value, we are convinced that the only reasonable construction of the language, on the basis of the evidence, was a finding and determination that the fair

value of the shares of National American Insurance Company on November 8, 1973, was $1,139 per share. That finding and determination was correct.

The plaintiffs also contend that if the fair value of the shares was properly fixed at $1,139 per share as of November 8, 1973, the plaintiffs were entitled to a judgment against the defendant for such amount, together with interest, as provided by statute, and plaintiffs' petition was improperly dismissed.

Section 44-133.06, R. R. S. 1943, specifically provides that a dissenting shareholder in the position of the plaintiffs who has filed a petition seeking a finding and determination of fair value "shall be entitled to a judgment against the company for the amount of such fair value as of the day prior to the date on which such vote was taken approving such plan, together with interest thereon at the rate of five per cent per year to the date of such judgment." The same statute provides: "The judgment shall be payable only upon and simultaneously with the surrender to the company of the certificate or certificates representing such shares." It also provides: "Shares acquired by the company pursuant to payment of the agreed value therefor or payment of the judgment entered therefor, as provided in this section, shall stand canceled unless otherwise provided for in the plan of exchange."

It will be noted that the statutory pattern distinguishes between dissenting shareholders who have timely filed an action seeking a judicial finding and determination of fair value, and all other classes of shareholders. In view of the nature of the action and the terms of the plan and the offer, as well as the evidence offered by the defendant, it is apparent that the judgment in this case could not be less than $1,139 per share.

The statute requires the defendant to make payment of $1,139 per share upon all certificates surrendered within 10 days after November 9, 1973, and

to make payment under the terms of the plan as to any remaining shareholders. The plan required defendant, within 10 days after November 9, 1973, to deposit $1,139 per share for all stock not previously exchanged and paid for, but the plan specifically provided that no sum was to be deposited for shares of stock owned by dissenters. The defendant therefore has had the use of the funds payable to plaintiffs since November 1973.

The defendant attempts to justify the failure to enter judgment with interest on the assumption that since the plaintiffs failed to obtain any increase in valuation, they should be relegated to the same classification as those stockholders for whom funds were deposited by the defendant in November 1973. We disagree. The provisions of the act are mandatory. It cannot be assumed the Legislature intended to deprive any dissenting shareholder of the benefits of the statute simply because he failed to prove that the stock had any greater value than had previously been offered. It certainly should not be so interpreted where the defendant insurance company has retained the use of the funds due.

A proceeding by a dissenting minority shareholder for a finding and determination of the fair value of his shares under section 44-133.06, R. R. S. 1943, in essence, is similar to a condemnation action in reverse. The exchange is involuntary and his property is acquired over his dissent. The only issue involved in the litigation is the fair value of the stock being acquired.

The District Court was correct in fixing the fair value of plaintiffs' shares at $1,139 per share. The court failed to enter judgment against the defendant for that amount, plus interest, in accordance with the mandatory terms of the statute, and erred in dismissing plaintiffs' petition. The entry of judgment for the fair value, plus interest, was mandatory, but the assessment of costs lies in the discretion of the

court. It was proper to assess costs in the District Court to the plaintiffs when they failed to establish that the stock had any greater value than the amount offered to all shareholders.

The judgment of the District Court is vacated and the cause remanded to the District Court with directions to enter judgment in favor of each plaintiff against the defendant in the sum of $1,139 for each share of the common capital stock of the defendant, National American Insurance Company, owned by such plaintiff, together with interest thereon at the rate of 5 percent per year from November 8, 1973, to the date of entry of such judgment. Costs in the District Court to be assessed to the plaintiffs. Costs in this court are assessed to the defendant.

JUDGMENT VACATED. CAUSE REMANDED WITH DIRECTIONS.

COUNTY OF SCOTTS BLUFF, NEBRASKA, APPELLEE, V. MARVIN HUGHES AND DOROTHY HUGHES, HUSBAND AND WIFE, APPELLANTS, IMPLEADED WITH WILLIS YOUNG ET AL., APPELLEES.

276 N. W. 2d 206

Filed March 13, 1979. No. 41813.

1. **Estoppel: Equity.** Equitable estoppels operate as effectually as technical estoppels. They cannot in the nature of things be subjected to fixed and settled rules of universal application, like legal estoppels, nor hampered by the narrow confines of a technical formula. So, while the attempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case, and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances.
2. _____: _____. The essential elements of equitable estoppel are: As to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to convey the impression that the facts are otherwise

than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

3. **Estoppel: Equity: Governmental Subdivisions.** The doctrine of equitable estoppel will not be invoked against a governmental entity, except under compelling circumstances where right and justice so demand. The doctrine is to be applied with caution in such cases and only for the purpose of preventing manifest injustice.

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

R. L. Gilbert, for appellants.

W. H. Kirwin, Deputy County Attorney, for appellee County of Scotts Bluff.

Heard before KRIVOSHA, C. J., BOSLAUGH, and BRODKEY, JJ., and RONIN and NORTON, District Judges.

NORTON, District Judge.

This is a quiet title action involving a boundary dispute between the County of Scotts Bluff, as plaintiff, and three named individuals as defendants. The matter was tried to the court and judgment was entered quieting title to the disputed lands in the plaintiff. Two of the defendants appeal. We reverse and remand.

The petition of the plaintiff alleges generally that it is the owner of certain described lands; that the defendants, Dorothy Hughes and Marvin Hughes, through an agreement of sale with one Roy Croft for the purchase of adjacent real estate, were claiming an adverse interest in plaintiff's real estate; that the defendant, Willis Young, claimed an interest in plain-

tiff's real estate inferior to and not adverse to the plaintiff; and that the conveyance (agreement) by Croft to the defendants Hughes of any interest in plaintiff's real estate was void for lack of title on the part of Croft. Plaintiff prayed for title to the disputed lands to be confirmed in it.

By way of answer, the defendant Young generally denied and alleged an option to purchase a portion of the lands in dispute through an agreement with the defendants Hughes. The plaintiff, in its reply, denied this affirmative allegation.

The defendants Hughes in their answer generally denied plaintiff's claims and alleged that the boundary line between plaintiff's real estate and defendants' real estate had been established by a fence; that a conveyance in 1932 through which the plaintiff had acquired title was intended only to convey to said fence line; that in 1968 the plaintiff caused the disputed lands to be added to the tax rolls and thereafter taxes were assessed against those defendants and their predecessors in title; and that it should now be estopped from claiming any interest or title in the same. In a cross-petition, the defendants Hughes set forth three causes of action, raising the following issues: First, that the defendants and their prececessors in title had exercised open, continuous, exclusive, notorious, and adverse possession of the disputed lands prior to plaintiff's ownership of such real estate, and continued to do so thereafter until the date of this action; second, that the fence previously referred to had been recognized by the parties and their precedessors as a common boundary from the time of the construction until the commencement of these proceedings; and third, that the plaintiff had been responsible for a diversion in the North Platte river, (which created this problem) and notwithstanding, the defendants Hughes were still the owners of government survey Lots 1 and 2, which would include the disputed lands. Defendants

prayed for title to be confirmed in them.

By way of reply to defendants Hughes' answer, the plaintiff denied that a deed of conveyance upon which it derived its title contained any reservation, or was ambiguous in any fashion; that the placing of the disputed lands on the tax rolls was at the instance of the claimants and raised an estoppel; and that the conveyances upon which the plaintiff based its title conveyed the disputed lands as accretions to their real estate. For answer to the defendants' cross-petition, the plaintiff alleged: As to the first cause, that the defendants were precluded from asserting adverse possession against the plaintiff by reason of the fact that each derived part or all of his title through a common predecessor in title, and by virtue of the provisions of section 39-1404, R. R. S. 1943; and as to the second and third causes, that the allegations were denied and were incompetent, irrelevant, and immaterial to any issue.

On the basis of these pleadings, a written stipulation, and a visit to the premises, the matter was submitted to the trial court. From an examination of the record, we can reasonably determine the following facts to be true.

Plaintiff derives its title to the hereinafter described real estate from two conveyances made, executed, and delivered in 1932. The first conveyance, of an undivided one-half interest, was from J. R. Croft and wife, conveying 55 acres, more or less; the second conveyance, of an undivided one-half interest, was from the heirs of Herman G. Stewart, conveying 50.64 acres, more or less. Since 1932, the plaintiff has been the record owner and in possession of that tract of land generally described as Lots 1 and 2 "South," being a part of Section 28, Township 23 North, Range 57 West of the 6th P.M., Scotts Bluff County, Nebraska.

Defendants Hughes derive their claim of title to the hereinafter described real estate by virtue of a

contract of sale with one Roy Croft, dated November 30, 1970. Briefly, this agreement provides for the payment of annual installments each year for 15 years from March 1, 1971. Roy Croft derived his title from his father and mother, J. R. Croft and Daisy G. Croft, in 1939 through a conveyance calling for transfer to him of 161.70 acres and setting forth the following general description: Lots 1 and 2, "North," being a part of Section 28, Township 23 North, Range 57 West of the 6th P.M., Scotts Bluff County, Nebraska.

J. R. Croft derived his title to the above described real estate from Frank E. and Mary F. Powell, husband and wife, in 1923. Therefore, in 1932, when J. R. Croft and his wife conveyed to the plaintiff an undivided one-half interest in Lots 1 and 2 "South," they were also the record title owners of Lots 1 and 2 "North."

Prior to 1932, Lots 1 and 2 "North" were separated from Lots 1 and 2 "South" by the North Platte river flowing in two separate channels at this point, and between these channels there existed an island. At some time prior to 1907, a fence was constructed east to west through this island, located roughly on the half-section line of Section 28. This fence had the effect of dividing the island between the respective owners of the "north" and "south" parts of Lots 1 and 2. This fence remained in the same location at the time of trial of this matter and, except for necessary repairs, had never been changed or altered from the time of its original construction. Also prior to 1932, the two channels of the river were crossed by two wooden bridges which were located on the north/south boundary line on the east side of Section 28.

At some date after 1921, but prior to 1932, the wooden bridges were removed and in their place a large earthen dam was constructed across the south channel of the river, and a bridge constructed across

the north channel. At about the same time, a fill was placed in the south channel at the head of the island. The record does not disclose who was responsible for this fill. The effect of this construction was to divert all the water flowing in the river to the north channel. This was the situation that existed in 1932, when the plaintiff became the owner of the real estate first above described, and this situation lays the basis for plaintiff's claim that the meander line of the river had been shifted from its previous location to the center of the north channel prior to its possession, thereby joining all of the island with Lots 1 and 2 "South."

Subsequent to 1907 and prior to 1932, the owners of Lots 1 and 2 "North" exercised full possession and control of that portion of the island lying north of the fence line mentioned above.

Subsequent to 1932, J. R. Croft, Roy Croft, and the defendants Hughes, each during their particular periods of possession of the north part of the island, made repairs to the fence to keep it in condition so that livestock could be pastured on the north part thereof. These particular individuals did in fact use this real estate openly and notoriously for that purpose and under a claim of ownership. In defendant's exhibit 5, Roy Croft stated that in 1941 the county attorney of Scotts Bluff County directed a letter to his father, J. R. Croft, advising the latter that the county owned the north part of the island. Thereafter Roy Croft contacted the county attorney who then told him to keep away from the disputed lands, and his reply was that he had "* * * been in there for 40 years and he was going to stay until some court says to get out * * *." No action was apparently taken by the plaintiff.

During his possession of the north one-half of this island (which would have been after 1939), Roy Croft leased a portion thereof for 7 years to one John Bar-

rett for a ready-mix plant. In 1966, he leased a portion to one Lloyd Mathson for gravel mining, and the Mathson lease passed to the defendant Young, who was still in possession at the time of this suit, under a lease/purchase agreement with defendants Hughes and Croft. During this time, Young sold gravel to the plaintiff which was mined from the disputed lands and which the plaintiff used for road purposes. Further, it is undisputed that during his period of possession Roy Croft leased the north portion of the island for hunting and trapping purposes to various individuals at various times.

During the period from 1932 to 1968, the plaintiff would upon occasion verbally object to the ownership claim of Roy Croft, but did not at any time exercise any physical control over the north part of the island nor did it attempt to have him ejected by any legal proceedings. The record is clear that the plaintiff never took possession of any of the disputed lands prior to this suit.

In 1968, the county assessor of Scotts Bluff County placed the disputed lands (north part of island) on the tax rolls by adding them to Lots 1 and 2 "North," and taxes were assessed on the same for that year and for each year thereafter until the commencement of this action. The record discloses that these taxes were paid without protest by Roy Croft and the defendants Hughes. The plaintiff has affirmatively alleged that the lands were added to the tax rolls at the instance of the defendants Hughes and, in its response to certain interrogatories, states "* * * that the request for the inclusion of these lands as taxable lands of the Defendant Hughes was made at the request of the Defendant Hughes, and was not caused by or the action of the County of Scotts Bluff other than to a request therefore [sic]." But, despite this allegation, we note the defendants Hughes had no claim of ownership in 1968, and obviously could not have authorized such action.

On October 26, 1977, following a visit to the premises, the trial court entered judgment finding generally in favor of the plaintiff and quieting title to the disputed lands in the plaintiff. The defendants Hughes and the defendant Young thereafter filed their motion for a new trial asserting seven grounds for error. The motion was overruled and the defendants Hughes thereafter perfected an appeal to this court on the following assignments of error: (1) The trial court erred in failing to fix the fence line described in defendants' answer as the common boundary line between the property of the respective parties; (2) the trial court erred in failing to quiet title to the disputed lands in the defendants; (3) the trial court erred in determining that deeds executed in 1932 conveyed to the plaintiff the disputed lands; (4) the trial court erred in failing to find that adverse possession of the disputed lands subsequent to 1932 divested plaintiff of title, if any, in the disputed lands which it might have acquired by such deeds in 1932; (5) the trial court erred in failing to find that the plaintiff is estopped to claim the disputed lands; and (6) the trial court erred in failing to quiet title in the defendants in the land to the north of the thread of the stream of the North Platte river as it existed prior to 1921 and fixing the common boundary line as the thread of such stream at the time of the diversion made in 1921.

It is not necessary to discuss each of these assignments of error, some of which are mutually dependent upon the others, as from the evidence it is patently obvious the plaintiff, having the early opportunity to do so, did not take those precautionary steps which might have protected its claim of title in this case, and it should now be estopped to assert any claim of ownership to the disputed lands.

It might be argued that the facts set forth above in themselves are not enough to sustain the claim of equitable estoppel in this case, with the exception of

the one fact that the disputed lands were placed on the tax rolls in 1968 and such taxes were paid without protest by Roy Croft and defendants Hughes, who had no claim of ownership until 1972. That fact alone leaves little to doubt. Defendants' exhibit 5 contains the original copy of a letter dated August 16, 1968, from the county assessor of Scotts Bluff County, Nebraska, directed to the then owner, Roy Croft, which states in part as follows: "I have been directed by the Scotts Bluff County Board of Commissioners to add all accretion land, *used or occupied by you,* in Scotts Bluff County to the tax rolls for 1968." (Emphasis supplied.) This letter then goes on to delineate the exact description, which leaves no doubt that the plaintiff added the disputed real estate to Lots 1 and 2 "North" for tax purposes. This official action by the board of county commissioners of Scotts Bluff County can only be interpreted as a final acknowledgment in a long-standing matter that the ownership of the lands added was vested in Roy Croft, who was then using or occupying same, and by implication the defendants Hughes acquired the equitable title thereto under the agreement of sale dated November 30, 1970.

We have previously stated in the case of May v. City of Kearney, 145 Neb. 475, 17 N. W. 2d 448, as follows: " 'Equitable estoppels operate as effectually as technical estoppels. They cannot in the nature of things be subjected to fixed and settled rules of universal application, like legal estoppels, nor hampered by the narrow confines of a technical formula. So, while the attempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case, and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances. * * * The following, however, may be ventured as the sum

of all cases: That a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon. Such an estoppel is founded on morality and justice, and especially concerns conscience and equity.' "

In the case of Pester v. American Family Mut. Ins. Co., 186 Neb. 793, 186 N. W. 2d 711, in an effort to further refine the position of this court with respect to equitable estoppel, we stated: "The essential elements of equitable estoppel are: As to party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice."

Without going back through all the evidence presented in detail, let it suffice to say that the elements of estoppel are present in this matter. After an extended period of time, during which the defendants Hughes and their predecessors in title to Lots 1 and 2 "North" had, in connection therewith, occupied and used the disputed lands under claim of ownership, the plaintiff, acting through its official representative body, placed those disputed lands on the tax rolls, thereby creating the impression that there

was no dispute on its part regarding the ownership of same by defendants and their predecessors. The obvious intent of the plaintiff in this latter action was to induce the payment of additional taxes to plaintiff by the record owner of Lots 1 and 2 "North," the plaintiff then having full knowledge of all of the facts of this particular situation. Relying upon the position taken by the plaintiff, and having no knowledge of what its true position was, as manifested by the filing of this action, the defendants Hughes and their predecessors subsequently paid the taxes assessed in good faith, and did other material things with regard to the full use and enjoyment of the property. The actions taken subsequently by the plaintiff substantially changed the defendants Hughes' position to their injury, detriment, and prejudice.

Perhaps the only question that remains is whether or not the principle of equitable estoppel may be enforced against the plaintiff as a governmental entity. In the recent case of Warren v. Papillion School Dist. No. 27, 199 Neb. 410, 259 N. W. 2d 281, we made the following comments: "Although May v. City of Kearney * * * indicates that the doctrine of estoppel may be applied against governmental entities in compelling circumstances, the 'limitations upon the May case have been recognized in many subsequent cases. Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation. * * * Exceptions are made only where right and justice so demand. The doctrine is to be applied with caution and only in exceptional cases under circumstances clearly demanding its application to prevent manifest injustice.' Christian v. Geis, 193 Neb. 146, 225 N. W. 2d 868 (1975)."

Recognizing the necessity of limitation on the application of the doctrine of equitable estoppel in cases involving governmental entities, we nevertheless conclude that this case does not fall within the

limitations, that it is indeed an exceptional one in past history, attitude, and behavior of the parties, and that in the final analysis conscience dictates that justice itself can only be served and the rights of the defendants preserved by the imposition of the doctrine as against the plaintiff.

In a different vein, we would specifically note that the petition filed by the plaintiff in this case joins Dorothy Hughes and Marvin Hughes, wife and husband, together with Willis Young, as the named defendants, together with all other persons having or claiming an interest in the real estate in dispute. This petition was filed on February 20, 1976. The agreement between the defendants Hughes and Roy Croft, previously mentioned, was filed for record in the office of the register of deeds for Scotts Bluff County, Nebraska, on April 24, 1972, and was in fact plead in plaintiff's petition. An examination of that agreement and the real estate description set forth therein discloses that Roy Croft purported to sell the lands in dispute to the defendants Hughes. However, despite this fact and the knowledge that Roy Croft had previously asserted his ownership of the disputed lands, he was not joined as a party defendant in this proceeding nor was any service of summons had on him. The file does not disclose service of any other type in this case, and by virtue of the provisions of section 25-21,113, R. R. S. 1943, a serious question arises as to whether or not the judgment of the trial court entered October 26, 1977, purporting among other things to foreclose his interests in the disputed lands, would be binding upon him. One wonders what the position of the plaintiff might be if the defendants Hughes, who possess an equitable title only, were now to default, and Roy Croft were to reenter into possession of Lots 1 and 2 "North." Could he then resell Lots 1 and 2 "North" under the same description as used previously and, if so, would the plaintiff then have to commence another

proceeding to enforce their disputed claim? This is noted only for the record, since no issue in this regard was specifically raised on appeal, and it becomes moot in view of the finding of this court.

The judgment of the trial court is reversed and the cause remanded for entry of a decree in accord with the findings set forth herein.

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C. J. concurs in result.

JAMES R. CUNNINGHAM, APPELLANT, V. J. JAMES EXON, GOVERNOR OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

276 N. W. 2d 213

Filed March 13, 1979. No. 41857.

Declaratory Judgments: Constitutional Law. A citizen taxpayer has standing to maintain an action for a declaratory judgment to challenge the accuracy and validity of the proclamation, publication, and incorporation of an amendment to Article VII, section 11, Constitution of Nebraska.

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

Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

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

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

MCCOWN, J.

The plaintiff, a citizen and taxpayer, brought this action against the defendant officials of the State of Nebraska for a declaratory judgment challenging the accuracy and validity of the proclamation, publication, and incorporation of an amendment to Article

VII, section 11, of the Constitution of the State of Nebraska, adopted at a general election on November 2, 1976. The District Court sustained the defendants' general and special demurrer upon the ground that plaintiff did not have standing to maintain the action, and dismissed plaintiff's petition. Plaintiff has appealed.

Plaintiff's petition alleges that the defendants failed to accurately proclaim, publish, and affix to the laws of the State of Nebraska, an amendment to Article VII, section 11, of the Nebraska Constitution, by erroneously omitting the following language: "The state shall not accept money or property to be used for sectarian purposes; Provided, that the Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but no public funds of the state, any political subdivision, or any public corporation may be added thereto."

In March 1976, L.B. 666 was adopted by the Legislature and approved by the Governor. L.B. 666 was titled: "AN ACT for submission to the electors of amendments to Article VII, section 11, of the Constitution of Nebraska, relating to education; to permit contracting for nonsectarian services of handicapped children; to permit aid for nonsectarian purposes for postsecondary students; to prohibit the use of public funds for sectarian purposes; to provide for the time and manner of submission and form of ballots; and to provide the effective date thereof."

The bill proposed: "(T)here shall be submitted to the electors of the State of Nebraska for approval the following amendment to Article VII, section 11, of the Constitution of Nebraska, and the further amendment of Article VII by the addition of new section 11A thereto, which are hereby proposed by the Legislature:

"Sec. 11. *Notwithstanding any other provision in the Constitution,* ~~Appropriation~~ *appropriation* of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof; *Provided, that the Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for educational or other services for the benefit of children under the age of twenty-one years who are handicapped, as that term is from time to time defined by the Legislature, if such services are nonsectarian in nature.*

"All public schools shall be free of sectarian instruction.

"~~The state shall not accept money or property to be used for sectarian purposes, Provided, that the Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but no public funds of the state, any political subdivision, or any public corporation may be added thereto.~~

"A religious test or qualification shall not be required of any teacher or student for admission or continuance in any school or institution supported in whole or in part by public funds or taxation.

"Sec. 11A. *Notwithstanding any other provision in the Constitution, the Legislature may provide financial aid in the form of loans or grants to students attending postsecondary educational institutions not wholly owned or controlled by the state or a political subdivision thereof if such aid is expressly limited to nonsectarian purposes. The Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but any public funds of the state, any political subdivision, or any*

public corporation added thereto shall not be used for sectarian purposes."

The ballot forms for submission of the proposed amendments set the amendments out separately to be voted on separately. The explanation of the proposed amendments as prepared by the executive board of the legislative council submitted the proposed amendment to section 11 as "Part 1 of Proposed Amendments No. 6," and the proposed amendment adding section 11A as "Part 2 of Proposed Amendments No. 6." The full text of L.B. 666 was published as provided by law prior to the general election on November 2, 1976. At the election the voters of Nebraska approved Part 1 of Proposed Amendments No. 6 and rejected Part 2.

The major complaint of the plaintiff is that no explanation was made to the voters that the adoption of Part 1 of the amendments would result in the elimination of the language referred to by the plaintiff unless Part 2 was also adopted. The plaintiff asserts that the language was not validly eliminated nor intended to be eliminated, and that the court should declare that the language remains a part of Article VII, section 11, Constitution of Nebraska.

The District Court found that the plaintiff did not allege nor sustain any injury peculiar to himself, nor did the amendment involve the expenditure of state funds, and therefore the plaintiff did not have standing to maintain a declaratory judgment action. The District Court sustained the defendants' demurrer and dismissed plaintiff's petition.

The sole issue on this appeal is whether the plaintiff had standing to challenge the accuracy of the proclamation, publication, and incorporation of a constitutional amendment adopted by the electors of Nebraska.

The defendants rely upon the well-established rules that declaratory judgments must involve justiciable controversies, and that in order to maintain

an action for a declaratory judgment as to a legislative enactment, plaintiff must show some special injury peculiar to himself aside from and independent of the general injury to the public, unless the legislative enactment involves the expenditure of public funds or involves an illegal increase in the burden of taxation. See, Schroder v. City of Lincoln, 155 Neb. 599, 52 N. W. 2d 808; Holland v. Brownville Grain Co., 174 Neb. 742, 119 N. W. 2d 304; 26 C. J. S., Declaratory Judgments, § 118, p. 270. The defendants therefore contend that the only persons who could have standing to challenge the amendment here are potential recipients of federal funds who may have been affected by the adoption of the constitutional amendment involved in this case.

An exception to the general rule relied upon by defendants has been established in other jurisdictions where matters of great public concern are involved and a legislative enactment may go unchallenged unless plaintiff has the right to bring the action. In a case involving the challenge of a city charter amendment by a citizen and taxpayer, the Colorado Supreme Court held that the taxpayer had standing and the right to bring a declaratory judgment action against the city even though his interest was no different than that of other taxpayers. The court said: "(W)e can conceive of no greater interest a taxpayer can have than his interest in the form of government under which he is required to live, or in any proposed change thereof. In the last analysis, this interest may well exceed any pecuniary interest he may have. The interest and concern of plaintiff as a taxpayer is not primarily confined to himself alone, but is of 'great public concern' * * *. If a taxpayer and citizen of the community be denied the right to bring such an action under the circumstances presented by this record, then wrong must go unchallenged, and the citizen and taxpayer reduced to mere spectator without redress." Howard v. City of

Boulder, 132 Colo. 401, 290 P. 2d 237. The Colorado Supreme Court later reaffirmed the holding of the Howard case with respect to statutory provisions involving a reorganization of state government and said: "The rights involved extend beyond self-interest of individual litigants and are of 'great public concern.' " Colorado State Civil Service Emp. Ass'n. v. Love, 167 Colo. 436, 448 P. 2d 624. See, also, Portmann v. Bd. of Elections, 60 Ohio App. 54, 19 N. E. 2d 531; Abbott v. Iowa City, 224 Iowa 698, 277 N. W. 437.

So far as we have been able to determine, the rules of standing relied upon by the defendants have been applied only with respect to challenges to statutes and ordinances. The rule which grants standing to citizen taxpayers in cases of great public interest and concern has also been applied only to state statutes and municipal charters and ordinances. Apparently neither rule has ever been applied with respect to an amendment to a state constitution. The reasoning of those cases which grant standing to a citizen taxpayer to challenge the validity of a statute or ordinance where matters of public interest and concern are involved and the enactment may otherwise go unchallenged, is even more persuasive where the declaration sought involves the accuracy and validity of an amendment to a state constitution.

There can be no doubt that the amendment of Article VII, section 11, Constitution of Nebraska, raises issues of great public interest and concern, and that the petition here states a justiciable controversy. It is also obvious that if the amendment to Article VII, section 11, Constitution of Nebraska, cannot be challenged by a citizen and taxpayer unless and until he has a special pecuniary interest or injury different from that of the public generally, it is entirely possible that no one may have standing to challenge it. An amendment which changes the provisions of a state constitution as to the use of public funds for

sectarian and educational purposes is of such great public interest and concern that a citizen taxpayer should have standing sufficient to maintain an action for a declaratory judgment as to such an amendment without the necessity of showing that he has sustained some special injury peculiar to himself and distinct from that of the public generally. We hold that a citizen and taxpayer has standing to maintain an action for a declaratory judgment to challenge the accuracy and validity of the proclamation, publication, and incorporation of an amendment to Article VII, section 11, Constitution of Nebraska.

The sole issue on this appeal is whether the plaintiff has standing to challenge the amendment. He does. We make no determination on the merits of the case. It remains for the District Court to make a judicial determination of these issues.

REVERSED AND REMANDED.

CLAY FRENCH, A MINOR BY AND THROUGH HIS FATHER AND NEXT FRIEND, ROBERT FRENCH, APPELLANT, V. RONALD CORNWELL, APPELLEE.

276 N. W. 2d 216

Filed March 13, 1979. No. 41864.

1. **Constitutional Law: Athletic Code of Conduct: Schools and School Districts.** A student has a significant interest in participation in interscholastic athletics which may be the subject of Fourteenth Amendment protections.
2. **Constitutional Law: Schools and School Districts.** Participation in interscholastic athletics ordinarily has significantly less important constitutional dimensions than does participation in traditional academic education.
3. **Constitutional Law: Athletic Code of Conduct: Schools and School Districts.** As a general rule a school official, in exercising the power of suspending a student, is liable for a compensating award only if the official acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that the action could not be reasonably characterized as being in good faith.

4. **Summary Judgments.** The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. Properly used it can accomplish that purpose.

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

Hurt & Gallant, for appellant.

Ray C. Simmons, for appellee.

Heard before SPENCER, Retired Justice, MCCOWN, and BRODKEY, JJ., and BLUE and REAGAN, District Judges.

BLUE, District Judge.

Plaintiff, Clay French, a minor by and through his father and next friend, Robert French, brought this action for special damages of $701.66 for legal services and for general damages against Ronald Cornwell, assistant principal and activities director of West Point Junior-Senior High School.

Plaintiff, Clay French, who was then 15 years of age, was arrested on New Year's Day, January 1, 1977, in West Point, Nebraska, and charged with intoxication. On January 2, 1977, the plaintiff's father advised the wrestling coach of the West Point school of the arrest. The coach brought the matter to the attention of the defendant, Ronald Cornwell, who, along with his other duties, was responsible for administering the athletic program for the school. At a meeting in the defendant's office on January 3, 1977, according to the affidavits for defendant, the plaintiff admitted he had been arrested and that he had been drinking alcoholic beverages on January 1, 1977. The plaintiff was orally suspended by defendant from participating in wrestling matches for 6 weeks, but not from wrestling practice. Clay French and his father were both present when the suspension was announced. The following day the parents were mailed a notice of the suspension.

This suspension was in accordance with the policy

of the West Point board of education, as recited by the superintendent of schools in his affidavit: "* * * provided that if an athlete of the West Point High School was convicted in a court of law of drinking alcoholic liquors, or was seen drinking by a coach, or he admitted to drinking, then this athlete would lose six weeks of competition in the sport in which he was competing at the time of such liquor incident."

The plaintiff on January 20, 1977, in the juvenile court of Cuming County, Nebraska, admitted he was intoxicated on January 1, 1977, and was placed on probation for a period of 30 days.

The 6-week suspension from wrestling meets lasted only 2 weeks because of a temporary restraining order entered by the District Court. At the request of plaintiff and his parents for a further hearing, the superintendent of schools appointed the principal of the North Bend, Nebraska, high school as a special hearing officer. A further hearing was held and the examiner upheld the 6-week suspension.

The superintendent of schools on January 27, 1977, reduced the original penalty of 6 weeks to 2 weeks, which was the suspension period already served.

The plaintiff alleged in his petition that his suspension by defendant was unlawful and in violation of his rights because it was without due process of law; that the defendant had no authority to suspend plaintiff; and that the suspension violated "LB 503."

A student has a significant interest in participation in interscholastic athletics which may be the subject of Fourteenth Amendment protections. Braesch v. DePasquale, 200 Neb. 726, 265 N. W. 2d 842 (1978). The question in this case, as in Braesch, is what process was due plaintiff under the circumstances?

While participation in interscholastic athletics ordinarily has significantly less important constitutional dimensions than does participation in traditional academic education, it is nevertheless a significant one. Brenden v. Independent School Dis-

trict 742, 477 F. 2d 1292 (8th Cir., 1973).

The Supreme Court in Goss v. Lopez, 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725, held a student facing temporary *academic* suspension must be given oral or written notice of the charges against him, and if he denies them, an explanation of the evidence against him, and an opportunity to present his side of the story. It would seem that the rudimental requirements of Goss v. Lopez, *supra,* would certainly be more than sufficient, in this case, when the suspension is only from 6 weeks of athletic competition.

In the case before us there can be no doubt that Clay French and his parents were aware of the rule of the West Point school system. In fact, plaintiff's father was a member of the school board and voted for the adoption of the rule. Also, there is no doubt that Clay French admitted violation of the rule. Generally, courts have concluded that when the acts which are the basis for disciplinary action are admitted, the requirements of due process are far less stringent, and that due process requirements with respect to the "guilt" finding process have been met by the admissions. See Betts v. Board of Education of City of Chicago, 466 F. 2d 629 (7th Cir., 1972), and Braesch v. DePasquale, *supra.*

Under the circumstances, we feel that the procedures in connection with plaintiff's suspension by defendant were appropriate and did not violate due process requirements. It is agreed that unfair suspensions must be protected against; however, the courts should refrain from imposing such a burdensome set of requirements on the school administration that compliance would become too costly and time consuming. The result would be a loss of the effectiveness of a regular disciplinary tool and would result in overwhelming administrative procedures.

The plaintiff contends that there was no compliance with sections 79-4,170 through 79-4,205, R. R. S.

1943. (Student Suspension or Expulsion.) Without analyzing all of the above sections in this opinion, we note that section 79-4,179 defines "long-term suspension" as expulsion of a student *from attendance in all schools* within the system for a period exceeding 5 school days but less than 20 school days. Since plaintiff was suspended only from wrestling meets for 6 weeks, the provisions of this act are not applicable.

The defendant contends he is immune from liability under the facts of this case.

The leading case in this area is Wood v. Strickland, 420 U. S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975), where several students who were suspended from school sued school officials under the Federal Civil Rights Act. The Supreme Court in 95 S. Ct., at p. 999, 1000 stated: "Liability for damages for every action which is found subsequently to have been violative of a student's constitutional rights and to have caused compensable injury would unfairly impose upon the school decisionmaker the burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties. School board members, among other duties, must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations. Denying any measure of immunity in these circumstances 'would contribute not to principled and fearless decision-making but to intimidation.' Pierson v. Ray, *supra,* 386 U. S., at 554, 87 S. Ct., at 1218. The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students. The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon

their private resources from monetary liability were a likely prospect during their tenure."

At 95 S. Ct. 1001 it is stated: "A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."

It is stated at 79 C. J. S., Schools and School Districts, § 503, p. 451: "As a general rule a teacher and the members of a school board in exercising the power of expelling or suspending a pupil must exercise judgment and discretion, and are not liable in damages for errors of judgment in that respect if they act without malice, wantonness, or intention to wrong the pupil."

It is stated at 68 Am. Jur. 2d, Schools, § 268, p. 592: "The gist of an action for wrongful expulsion or suspension is malice; therefore, there can be no recovery where the expulsion or suspension is the result of an error of judgment by the school authorities, and where they act without malice, in good faith, and in the line of what they honestly believe to be their duty."

In the instant case there is no allegation or proof of any intent or conduct on the part of defendant that would deprive him of the immunity referred to in Wood. He was clearly acting within his privilege as a school official.

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. In this respect the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions,

the motion should be denied and the case tried on its merits. Farro v. Rubottom, *ante* p. 120, 274 N. W. 2d 149 (1979). As we said in Pfeifer v. Pfeifer, 195 Neb. 369, 238 N. W. 2d 451 (1976): "The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. Properly used it can accomplish that purpose."

Upon viewing the facts most favorable to the plaintiff, we conclude that the defendant's motion for summary judgment was properly granted and the motion for new trial was properly overruled. The judgment of the District Court is affirmed.

AFFIRMED.

JANICE D. CAMPBELL, APPELLANT AND CROSS-APPELLEE, V. WILLIAM G. CAMPBELL, APPELLEE AND CROSS-APPELLANT.

276 N. W. 2d 220

Filed March 13, 1979. No. 41887.

1. **Divorce: Appeal and Error.** In an appeal of an action for the dissolution of marriage, the Supreme Court is required to try a case de novo and reach independent conclusions on the issues presented by the appeal, without reference to conclusion or judgment reached in the District Court.
2. **Courts: Judgments: Time.** The District Court has inherent power to vacate or modify its own judgment at any time during the term at which it is rendered. Such action rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be interfered with.
3. **Divorce: Alimony: Property.** A judgment of the trial court fixing the amount of alimony or making distribution of property will not be disturbed on appeal unless it is patently unfair on the record.
4. **Divorce: Alimony: Property: Minors.** In determining the question of alimony and division of property, the court shall have 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.

5. **Divorce: Attorney's Fees.** In an action for dissolution of marriage the award of attorney's 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 Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Lustgarten & Roberts, for appellant.

Frank L. Burbridge of Kutak Rock & Huie, for appellee.

Heard before SPENCER, Retired Justice, BRODKEY, and MCCOWN, JJ., and REAGAN and BLUE, District Judges.

BLUE, District Judge.

The petitioner, Janice D. Campbell, filed a petition for dissolution of marriage against the respondent, William G. Campbell, on September 8, 1976. Trial was had. On August 2, 1977, the District Court entered a decree dissolving the marriage. Petitioner filed a motion for a new trial as to this decree on August 4, 1977.

A further trial was held and a decree was entered on October 28, 1977, adjudicating custody, child support, and property rights. Petitioner filed a motion for a new trial as to this decree on October 31, 1977. This motion was argued and submitted on November 14, 1977.

On December 7, 1977, an order was entered overruling the petitioner's motion for new trial and modifying the decree of October 28, 1977, by awarding alimony to petitioner in the sum of $600 per month for 60 months and then $300 per month for 61 months or to terminate upon the death of either party, or re-

marriage of the petitioner. The property division was also modified by awarding certain property in Missouri to respondent but requiring him to pay petitioner for the property in installments. This modified decree was made in the same term of court as the decree of October 28, 1977. Petitioner filed a notice of appeal from the order of December 7, 1977, which order overruled petitioner's motion for new trial as to the decree of October 28, 1977. Petitioner moved for an order dismissing her appeal on January 27, 1978. Respondent gave notice of intent to cross-appeal on February 3, 1978. Pursuant to paragraph 1 f of the Revised Rules of Supreme Court, 1977, the court denied the motion to dismiss. The cause proceeded as if the appeal had originally been perfected by the appellee (respondent) who cross-appealed. The petitioner has filed a brief as cross-appellee and original appellant, and asserts affirmative relief on the cross-appeal.

For his assignments of error, respondent claims the trial judge had no authority to enter the modified decree of December 7, 1977, and that the division of property and the award of alimony were unreasonable. Petitioner in her assignments of error claims: The trial court did not award adequate alimony; the trial court erred in not allowing petitioner to elicit evidence of what happened during the marriage leading to the irretrievable breakdown; the trial court erred in not restoring to the petitioner property inherited by her; and the trial court's award of fees to petitioner's attorney was inadequate.

In an appeal of an action for the dissolution of marriage, the Supreme Court is required to try the case de novo and reach independent conclusions on the issues presented by the appeal, without reference to the conclusion or judgment reached in the District Court. § 25-1925, R. R. S. 1943; Barnes v. Barnes, 192 Neb. 295, 220 N. W. 2d 22. We have considered the record in this case with this rule in mind.

The parties were married on June 15, 1956. Three children were born to the marriage; Anne B. Campbell, born September 30, 1959; Elizabeth D. Campbell, born January 29, 1962; and Amy B. Campbell, born August 23, 1965. Elizabeth has been blind since birth. She is attending the Omaha public schools. The trial court fixed child support at $300 per month per child and made special provision for Elizabeth requiring continued payments until she becomes self-supporting. Life insurance with death benefits of approximately $90,000 was set aside for the children and, in addition, medical and dental coverage was to be maintained by respondent for the children. Respondent makes no complaints about the above provisions for the children.

Petitioner graduated from the University of Nebraska in 1956. Respondent graduated from the same university at the same time and subsequently graduated from George Washington University Law School. While respondent was in law school, petitioner was employed, earning $6,000 or $7,000 a year.

Upon graduation from law school and after a period in the Air Force, respondent returned to Omaha to practice law. He is now a partner in an Omaha law firm. Respondent's income for 1974 was $52,012.18; for 1975 it was $46,067.94; and for 1976 it was $95,696.82, as reflected by the income tax returns. One reason for an increase in the income of 1976 was that there was a net gain of $19,000 realized from the sale of stock. Petitioner is employed part time by Goodwill Industries as a director of volunteer services, and earns approximately $400 to $500 per month.

In the decrees of October 28, 1977, and of December 7, 1977, the trial court awarded the following property to petitioner, which the evidence shows is of the value indicated as follows: Family residence - $43,262 (equity); note receivable - $12,000; stock in American National Bank - $1,500; stock and war-

rants in Magnolia Metal - $3,200; stock in Bank of Bellevue - $750; furniture and household goods - $12,000; china, silver, jewelry, and art - $5,108.55; receivable from respondent for Missouri partnership assets - $20,800. These items total $98,620.55.

The petitioner received between $12,000 and $14,000 from an inheritance, which sum went into the family residence.

The respondent was awarded the following, which the evidence shows is of the value indicated: Law firm equity - $11,000; Integrated Cattle Co. - $6,100; stock in Bank of Niobrara - $67,000; certificate of deposit - $10,000; proceeds from Manning Trust - $38,000; personal property - $7,500; silver, jewelry, and art - $5,000; Centennial Land and Livestock Note - $8,000. These items total $152,600.

Respondent was required to pay indebtedness in the sum of $58,200, which in effect reduces his share to $94,400.

These values were either stipulated or not disputed except for the tangible personal property. However, the above values of such personal property are quite close.

Respondent claims that the trial court had no authority to amend and modify the decree of October 28, 1977, by the decree of December 7, 1977. The record shows that both of these decrees were entered in the same term of court.

It is settled law in this state that the District Court has inherent power to vacate or modify its own judgment at any time during the term at which it is rendered. Such action rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be interfered with. Hall v. Hall, 201 Neb. 590, 271 N. W. 2d 43 (1978); Pofahl v. Pofahl, 196 Neb. 347, 243 N. W. 2d 55 (1976).

In Buchanan v. Buchanan, 186 Neb. 89, 180 N. W. 2d 886 (1970), which was a divorce case, the District Court, during the same term of court and on its own

motion, modified a decree of divorce by reducing the amount of alimony. The wife challenged the authority of the trial court's action. This court stated: "Plaintiff's only assignment of error challenges the authority of the court to modify the decree on its own motion. No additional evidence was taken. It appears that the court simply came to the conclusion that the original determination of the case was in some respects erroneous and, in the interests of justice, should be modified. The prevailing rules governing such a situation appear in Morgan v. Weiner, 173 Neb. 715, 114 N. W. 2d 720, and Beliveau v. Goodrich, 185 Neb. 98, 173 N. W. 2d 877. A district court has inherent power to vacate or modify its own judgment at any time during the term at which it is rendered. Such action rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be interfered with.

"When, in a case tried to the court and determined on its merits, the court after entry of decree, upon due reflection, arrives at the conclusion that an erroneous or unjust decree has been entered and modifies or sets it aside, no question of an abuse of discretion can arise. The only question presented is whether the final determination is right or wrong, just or unjust, on the merits."

In modifying the decree, the court was purportedly influenced by this court's holding in Brown v. Brown, 199 Neb. 394, 259 N. W. 2d 24 (1977).

A judgment of the trial court fixing the amount of alimony or making distribution of property will not be disturbed on appeal unless it is patently unfair on the record. Remmers v. Remmers, 200 Neb. 647, 264 N. W. 2d 857 (1978).

In determining the question of alimony and division of property, the court shall have regard for the circumstances of the parties, duration of the marriage, history of the contributions to the marriage by each party, including contributions to the care and

education of the children, an 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. See § 42-365, R. S. Supp., 1978.

Upon a consideration of the evidence presented to us and upon consideration of the above rules, it is our conclusion that there was no abuse of discretion in regard to the division of property or alimony. In deciding this, we are not unmindful that there is evidence that petitioner received as an inheritance between $12,000 and $14,000 which went into the home of the parties.

The petitioner claims one of the circumstances of the parties to be considered by the trial court in making its award of alimony and division of property is whether the unilateral acts of one party were responsible for the irretrievable breakdown of the marriage, citing Theye v. Theye, 200 Neb. 206, 263 N. W. 2d 92 (1978), for her authority. This contention is answered by Judge C. Thomas White in his concurring opinion in the Theye case, with which the majority of the members of the Supreme Court concurred: "I agree with the majority in the result. I disagree with any implication in the opinion that the result somehow follows a determination of responsibility for the initial breakdown of the marriage. The award of alimony and the division of property are determined by the circumstances of the parties at the time of dissolution of the marriage, the length of the marriage, the health, relative earning power, and education of the parties, and whether there are unemancipated children. See § 42-365, R. S. Supp., 1976. No case has said that the granting, denial, or reduction of alimony nor the division of property are to be considered punitive. I would not engraft any such provision on the law of this state."

Petitioner claims that the fee of $2,500 awarded to

her attorney was inadequate. The award of attorney's fees involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulties of the questions raised, and the customary charges of the bar for similar services. Weber v. Weber, 200 Neb. 659, 265 N. W. 2d 436 (1978).

The allowance of the fee is discretionary with the court. Brown v. Brown, *supra*. We find there was no abuse of discretion in this regard.

The decree was not improperly modified and amended. The judgment of the District Court is affirmed. The petitioner is awarded a fee of $1,500 for services of her attorney in this court.

AFFIRMED.

BRODKEY, J., and SPENCER, Retired Justice, concur in result.

BERTHOLD J. GARVIN, ADMINISTRATOR OF THE ESTATE OF LINDA GARVIN, DECEASED, APPELLANT, V. ROBERT COOVER ET AL., SPECIAL ADMINISTRATOR OF THE ESTATE OF RUEBEN A. ANDERSON, DECEASED, APPELLEES.

276 N. W. 2d 225

Filed March 13, 1979. No. 42033.

1. **Negligence: Wrongful Death: Minors: Damages.** Although damages for the wrongful death of a child may include loss of society, comfort, and companionship, the same must be shown by the evidence to have a monetary value.
2. **Negligence: Wrongful Death: Minors: Damages: Juries.** Damages for loss of society, comfort, and companionship resulting from the wrongful death of a child being by their very nature problematical, the amount is peculiarly for the jury to determine, and unless clearly wrong, a reviewing court will not interfere with its verdict.

Appeal from the District Court for Madison County:

MERRITT C. WARREN, Judge. Affirmed.

George H. Moyer, Jr., of Moyer, Moyer & Egley, for appellant.

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

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and CASE and FUHRMAN, District Judges.

HASTINGS, J.

This is an action for damages for the wrongful death of Linda Garvin, the daughter of Berthold J. and LaVerne Garvin, who was killed in an automobile accident on November 17, 1969, in Madison County, Nebraska. The first cause of action was for the recovery of general damages suffered by the next of kin for wrongful death of Linda, and the second cause for the recovery of special damages for funeral and burial expenses in the specified amount of $1,420. The trial court directed a verdict in favor of the defendant Coover on both causes of action and the jury found in favor of plaintiff against the defendant Roush on the first cause of action and assessed the damages at "none," and found in favor of the plaintiff on the second cause and fixed the damages at $1,427. Plaintiff filed a motion for new trial, claiming that the verdict was contrary to the evidence and law in that it was inadequate. No complaint is made of the instructions or any other portion of the trial. The case is submitted on an abbreviated bill of exceptions containing only the testimony of four witnesses, whose testimony is limited to personal facts about the deceased.

Linda Garvin was born on April 21, 1949, and as previously indicated, died on November 17, 1969, at the age of 20 years and approximately 7 months. Although appellant's brief claims, appellees do not deny it, and the trial court instructed that Linda's minority would not have ended until December 25, 1969, that position is based on L.B. 167, Laws 1969,

c. 298, s. 1, p. 1072, Legislature of Nebraska, Eightieth Session, which lowered the age of majority to 20 years. It is true that that session of the Legislature adjourned on September 24, 1969, and laws in the ordinary course of events do not become effective until after the passage of 3 calendar months following adjournment. However, this particular act was passed and then approved on March 13, 1969, with the emergency clause. Therefore, Linda had reached her majority at the time of her death.

The evidence shows that Linda was a bright, considerate, dependable, and loving child who had a variety of interests both in and out of school. She had contributed to the family well-being by helping to care for her sister and brothers who were 3, 5, and 7 years younger than she, and also had helped with other household chores and in a family business activity which involved delivering milk. She graduated from high school and commenced her nurses training at Nebraska Wesleyan University and Bryan Memorial Hospital in August of 1967, and at the time of her untimely death was participating in a 3-month course in psychiatric training at the Hastings Regional Center. Linda's parents had paid approximately $2,500 of her education costs, and apparently she had earned the remainder. Indications were that she would have become a registered nurse sometime during the year 1970.

In view of the fact that Linda had reached her majority at the time of her death, there is nothing to support an award for loss of services during her minority. That would leave only the possibility that Linda would have contributed back something from the benefits of her own education to that of her younger siblings. There was no contract, no definite amount, no particular promise. The only testimony on that point was that in a conversation with her father he said she was going to have to put something back and she said that was fine. A not un-

likely reply from a normal child against the backdrop of that situation.

Up until Selders v. Armentrout (No. 1), 190 Neb. 275, 207 N. W. 2d 686 (1973), the sole measure of damages for the wrongful death of a child, other than loss of services during minority, was the loss of contributions that might reasonably be expected to be made after reaching majority. In the instant case this would include the expectation of a return of any money advanced for Linda's education plus any other amount which might reasonably be expected. See Dorsey v. Yost, 151 Neb. 66, 36 N. W. 2d 574 (1949). However, Selders (No. 1), *supra,* added the additional factors of the loss of the society, comfort, and companionship of the child. Nevertheless, there is still a limitation on such damages. As stated in Ensor v. Compton, 110 Neb. 522, 194 N. W. 458 (1923), which extended our wrongful death statute to include as an element of damage the loss of companionship of a widower's deceased wife, and which was cited and quoted with approval in Selders (No. 1), *supra*: "This change, while significant, does not provide a wide open door to all sorts of claims for damages. The loss under the statute is still a pecuniary loss. Nothing can be allowed on account of mental suffering or bereavement or as a solace on account of such death. Only such damages can be recovered as are shown by the evidence to have a monetary value." Appellant concedes the correctness of this rule in his brief under Proposition of Law I.

Other than the testimony about the education money, both of Linda's parents testified that they gained companionship with her attendance at church, took pride and comfort in her industry and application to her school work, found comfort and companionship from her interest in sewing and music, felt pride and comfort in her interest in sports and family recreation, and in her devotion to her family. If anything, it is probably true that the feeling of

loss which these parents felt at the death of their daughter was understated considering, among other things, that their testimony came some 8 years after their tragedy. The question here which we must answer, however, is whether there was such a reasonable expectation of monetary contributions on Linda's part and a monetary worth which can reasonably be assigned to the loss of her society, comfort, and companionship that we can say the verdict of "none" was so inadequate as to be contrary to the evidence and therefore wrong as a matter of law.

It is virtually impossible to "color match" cases in attempting to decide a given issue. Appellant cites Vandenberg v. Langan, 192 Neb. 779, 224 N. W. 2d 366 (1974), in which something in excess of $32,000 was awarded for the loss of services, contributions, society, comfort, and companionship of a 16-year-old boy; and Caradori v. Fitch, 200 Neb. 186, 263 N. W. 2d 649 (1978), wherein a jury awarded $40,000 for the death of an 11-year-old girl. On the other hand, Dorsey v. Yost, *supra,* involved a zero verdict to cover the loss of services and future contributions of an 11-year-old girl, and in Selders v. Armentrout (No. 2), 192 Neb. 291, 220 N. W. 2d 222 (1974), three verdicts totaling $4,500 involved children, ages 9, 13, and 15 years, with $3,692.10 being apparently included for medical and funeral bills, or a net verdict of less than $300 each for services, contributions, society, comfort, and companionship.

However, one common thread runs throughout all of those cases, namely, that damages in any wrongful death case are incapable of computation and are largely a matter for the jury. In Selders v. Armentrout (No. 2), *supra,* this court said: "The amount which should be awarded in any wrongful death case is incapable of computation and is largely a matter for the jury. As stated in Dorsey v. Yost, 151 Neb. 66, 36 N. W. 2d 574, 14 A. L. R. 2d 544: 'The amount to which a parent is entitled cannot be ac-

curately determined because of the numerous contingencies involved. The amount being very problematical, it is peculiarly for the jury to determine, after hearing all the evidence bearing upon the situation, including the parent's position in life, the physical and mental condition of the child, his surroundings and prospects, and any other matter that sheds light upon the subject. Members of juries generally have children of their own and have information as to the pecuniary value of children's services and the expense involved in their care and education. A jury is peculiarly fitted to determine the loss sustained by a parent in such a case. At best, the verdict can only be an approximation as no yardstick exists by which the correct answer can be found with exactness.'

"The evidence in this case was such that the jury could have concluded the pecuniary loss to the parents, including the value of society and companionship, was relatively small. We are unable to say under all the facts and circumstances the verdicts were inadequate."

From all that appears in the record before us, the case was fairly tried and submitted to the jury under proper instructions, and we are not inclined to disturb its verdict. We conclude, therefore, that the judgment should be affirmed.

AFFIRMED.

IN RE APPLICATION, NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. LLOYD HUEBNER AND LORENE HUEBNER, APPELLEES.

276 N. W. 2d 228

Filed March 13, 1979. No. 42046.

1. **Administrative Law.** An administrative board has no power or authority other than that specifically conferred upon it by statute

or by a construction necessary to accomplish the purpose of the act.

2. **Administrative Law: Airports and Landing Areas: Statutes.** Section 3-136, R. R. S. 1943, specifically exempts restricted landing areas designed for personal use from licensing requirements, and therefore the Department of Aeronautics is without authority to issue licenses for such restricted landing areas designed for personal use.
3. **Administrative Law: Public Service Commission: Appeal and Error: Time.** The Public Service Commission may reconsider an order on its own motion during the 30 days after the mailing of a copy of the order and before an appeal to the Supreme Court has been taken. Upon the expiration of 30 days from the mailing of a copy of the order, or upon an appeal being perfected to the Supreme Court, the power of the Public Service Commission to reconsider its order upon its own motion, or upon the motion of an interested party who should otherwise have perfected an appeal, terminates and such order becomes final and binding.

Appeal from the Nebraska Public Service Commission. Reversed.

Barlow, Johnson, DeMars & Flodman, for appellant.

John A. Gale of Girard & Gale, for appellees.

Heard before KRIVOSHA, C. J., WHITE, CLINTON, MCCOWN, JJ., and J. KELLY, District Judge.

KRIVOSHA, C. J.

This is an appeal from an order of the Nebraska Public Service Commission (Commission) denying an application of the Nebraska Public Power District (District).

On August 1, 1977, the District, pursuant to section 75-710, R. R. S. 1943, filed application No. 32365 with the Commission seeking permission to construct 22 miles of a double circuit 230 kV, 3 phase electric transmission line to be located in Lincoln County, Nebraska, all as more particularly described in a map attached to the application.

On that same day the Commission, pursuant to section 75-714, R. R. S. 1943, transmitted to the Department of Aeronautics certain portions of the ap-

plication and requested comment from the Department of Aeronautics. On August 5, 1977, the Department of Aeronautics wrote to the Commission advising that "the subject application will not adversely affect any existing public airport, and this Department (Department of Aeronautics) has no objections to the construction, operations, or maintenance as set forth in Exhibits "A" and "B" as submitted to this office."

On September 22, 1977, the Commission entered its order granting the application of the District and allowing the construction of the line. No appeal was taken from that order and the order became final.

On December 13, 1977, almost 3 months after the Commission entered its order granting authority to the District to construct the line, the Commission wrote to Lloyd Huebner informing him that when application No. 32365 filed by the District on August 1, 1977, was transmitted to the Department of Aeronautics, the Department of Aeronautics failed to notify the Commission of the "Huebner Airport," and therefore Huebner was not contacted regarding the effect, if any, the proposed line would have on the safe operation of his "airport."

The record indicates that Huebner, although he did not receive formal notice of a hearing, was in fact aware at all times of the District's plans to construct the line. He was first contacted by the District on February 14, 1977, and wrote to the District concerning the line on February 28, 1977. He attended a meeting called by the District and held on March 8, 1977, when the construction of the line was discussed. The evidence is clear that Huebner had actual notice of the construction of the line and its location.

The Commission, on its own motion, stayed in part that portion of its order of September 22, 1977, affecting construction of the line on certain portions of the property owned by Huebner and ordered a hearing

on the application for January 6, 1978, at 9 a.m.

On January 6, 1978, the hearing was held by the Commission, and on February 6, 1978, (almost 5 months after entering its initial order granting authority) the Commission denied the application of the District in its entirety and directed the line not be constructed.

In its order of February 6, 1978, the Commission found that Lloyd Huebner was an interested party by reason of having a "licensed restricted landing strip affected by such application" as described in section 75-715, R. R. S. 1943. Further, the Commission determined that the fact that the District had already acquired a right-of-way on Huebner's property by condemnation and made payment of money to Huebner did not affect Huebner's right to object to the application as an owner of a licensed restricted landing strip.

If in fact the facility owned by Huebner was not of such type that was under the jurisdiction of the Department of Aeronautics and could be licensed, then Huebner was not an interested party requiring notice under the provisions of section 75-715, R. R. S. 1943, and the order of September 22, 1977, was in all respects lawful and binding. We hold that such facility is not within the meaning of section 75-715, R. R. S. 1943, and the Commission was in error in holding to the contrary.

The evidence discloses that at the time Huebner first learned about the District's desire to construct the line he did not then have a landing facility of any type on his property. The Department of Aeronautics issued order No. 77-7-18-1 on July 18, 1977, granting to Huebner the right to use the area on his land as a "restricted landing area *personal use.*" (Emphasis supplied.) While the Department of Aeronautics issued a registration certificate for the area and called it "Huebner Airport," it is clear

from a reading of the statute that such authority did not exist in the Department of Aeronautics and no license was authorized or required.

The facility to be used by Huebner for landing purposes was a cleared area in a meadow. While not determinative of the issues in this case, the evidence further discloses that Huebner owned no airplane and that the area being designated as "restricted landing area for personal use only" would not be shown upon charts of the Department of Aeronautics and could not be used by anyone other than Huebner himself who did not own an airplane. The record further discloses that at the time of the hearing in February 1978, the airstrip had never been utilized.

An airport is clearly defined by the provisions of section 3-101 (6), R. R. S. 1943, and specifically excludes restricted landing areas.

Further, a reading of the State Aeronautics Department Act (§§ 3-101 to 3-154, R. R. S. 1943) discloses that there are in fact two types of restricted landing areas. One may be used or made available for the landing and taking off of aircraft as provided from time to time by the Commission, and a second type is limited to *personal use only.* (Emphasis supplied.) §§ 3-101 (8) and 3-136, R. R. S. 1943.

Under the provisions of section 3-133, R. R. S. 1943, the Department of Aeronautics is authorized to license airports and restricted landing areas. However, section 3-136, R. R. S. 1943, provides that the provisions of sections 3-133 to 3-135, R. R. S. 1943, shall *not* apply to restricted landing areas designed for personal use. In other words, a restricted landing area designed for personal use is exempted from the licensing requirements of section 3-133, R. R. S. 1943. The fact that the Department of Aeronautics chose to issue a piece of paper purporting to be a license for a facility, in spite of the exemption contained in section 3-136, R. R. S. 1943, does not cause

that facility to rise to the dignity of a licensed restricted landing area within the meaning of section 75-715, R. R. S. 1943. Huebner argues, even though section 3-136, R. R. S. 1943, specifically exempts restricted landing areas for personal use only, that under the general regulation authority granted the Department of Aeronautics by section 3-128, R. R. S. 1943, the Department of Aeronautics could nevertheless adopt a rule to license and regulate restricted landing areas for personal use only. Such an argument cannot be maintained. An administrative board has no power or authority other than that specifically conferred upon it by statute or by a construction necessary to accomplish the purpose of the act. Scotts Bluff County v. State Board of Equalization and Assessment, 143 Neb. 837, 11 N. W. 2d 453; City of Auburn v. Eastern Nebraska Public Power Dist., 179 Neb. 439, 138 N. W. 2d 629. In view of the fact that section 3-136, R. R. S. 1943, specifically exempted restricted landing areas designed for personal use only from licensing requirements, the Department of Aeronautics was without authority to license such facilities and could not destroy the exemption contained in section 3-136, R. R. S. 1943, by adopting a contrary rule under the provisions of section 3-128, R. R. S. 1943. In truth and in fact such areas could have been created and used by Huebner without any permission from the Department of Aeronautics. See Bruns v. City of Seward, 186 Neb. 658, 185 N. W. 2d 853, where this court observed that personal use airports were permitted without certificate by the department's practice. The facilities used by Huebner were neither a licensed airport nor a licensed restricted landing area within the meaning of section 75-715, R. R. S. 1943, and the Director of the Department of Aeronautics was not required to notify Huebner nor was Huebner an affected person within the meaning of section 75-715, R. R. S. 1943. The failure of the Department of Aeronautics

to specifically notify Huebner of the hearing before the Commission which led to the granting of the application on September 22, 1977, was not a defect which affected the validity of the Commission's order entered on that date. The order entered on September 22, 1977, was in all respects valid and binding and became a final order 30 days thereafter.

If the order of September 22, 1977, was then a valid and binding final order, could the Commission revoke that order and deny the application more than 4½ months after it was first entered? We believe it could not.

While it may be true, under certain circumstances not involved in this case, the Commission may have authority to modify its own previously granted orders, it is clear from a reading of this record that no such circumstances justifying such action existed. The Commission's order of September 22, 1977, was a final order and could not be revoked either on the motion of an interested party or on the Commission's own motion.

Section 75-136, R. R. S. 1943, provides: "If a party to any proceeding is not satisfied with the order entered by the commission, such party may appeal to the Supreme Court as provided in section 75-137 to reverse, vacate, or modify the order." Section 75-137, R. R. S. 1943, provides an appeal procedure, including the filing of a notice of appeal with the Commission within 30 days after date of the mailing of a copy of the order by the Commission, or by the filing of a motion for rehearing within 10 days after the date of the mailing of a copy of the order by the Commission. Section 75-137, R. R. S. 1943, further provides that if the Commission fails to rule on a motion for rehearing within 30 days after such motion is filed, the appeal to the Supreme Court may be perfected by filing a notice of appeal even before the Commission enters an order ruling on the motion for

rehearing and the review by the Supreme Court shall be the same as if the Commission had overruled the motion for rehearing. It is clear from a reading of that section that individuals must act in accordance with statutory time prescribed therein and upon failure to do so are precluded from proceeding to object to the order. In re Application of Chicago, B. & Q. R. R. Co., 154 Neb. 281, 47 N. W. 2d 577.

Likewise, the Commission itself is also limited under normal circumstances to modify or revoke its own order. We have heretofore held that the Commission may reconsider an order on its own motion during the 30 days after the mailing of a copy of the order and before an appeal to this court has been taken. Upon the expiration of 30 days from the mailing of a copy of the order, or upon an appeal being perfected to this court, the power of the Commission to reconsider its order upon its own motion terminates. Andrews Van Lines, Inc. v. Smith, 187 Neb. 533, 192 N. W. 2d 406. It would, therefore, be a strange situation if under normal circumstances neither an interested party nor the Commission itself could affect a final order after the passage of 30 days and yet the Commission could in some manner revoke its previous order 137 days after initially entering it. We believe that our previous holding in Andrews Van Lines, Inc. v. Smith, *supra,* has equal application in the case at bar, and find that upon the expiration of 30 days from the mailing of a copy of the order of the Commission, the power of the Commission to reconsider its own order entered on September 22, 1977, terminated. There must be some finality to judgments and persons must be able to rely at some point in time upon the action of an administrative body. To hold otherwise would be to promote uncertainty and chaos. We, therefore, find that the order of the Commission entered on September 22, 1977, granting authority to the District to con-

struct the line, having become final, could not thereafter be revoked, and accordingly, we reverse the action of the Public Service Commission entered on February 6, 1978, and reinstate the previous order of September 22, 1977.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. TONY J. PANKEY, APPELLANT.

276 N. W. 2d 233

Filed March 13, 1979. No. 42100.

1. **Criminal Law: Sexual Assault: Consent.** Where a victim's resistance to a sexual assault would obviously be useless, fruitless, or foolhardy, it is wholly unrealistic to require affirmative direct demonstration of the utmost physical resistance as proof of the victim's opposition and lack of consent. It is only required that the victim make reasonable resistance in good faith under all the circumstances and that the resistance be such as to make nonconsent and actual opposition genuine and real.
2. **Judgments: Juries: Appeal and Error.** In determining the sufficiency of evidence to sustain a conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury.
3. **Juries: Verdicts: Evidence.** The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
4. **Criminal Law: Kidnapping.** While the purpose of committing the crime of kidnapping may be to make it possible to commit some other crime, the crime of kidnapping is a separate and distinct crime for which prosecution may be had.
5. **Criminal Law: Evidence.** Before evidence of previous sexual activity may be introduced into evidence, in order to establish a pattern of conduct or behavior on the part of the victim, it must be shown that such earlier involvement was voluntary.

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 J. Kirk Brown, for appellee.

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

KRIVOSHA, C. J.

The defendant herein was charged with three counts of first degree sexual assault and one count of kidnapping. After trial to a jury, the defendant was found guilty and sentenced to a term of 1 to 3 years on each of the sexual assault counts and to a minimum term of 3 years on the kidnapping count.

The defendant appealed to this court arguing three assignments of error: (1) That the District Court committed reversible error in refusing to allow the defendant to introduce into evidence previous sexual conduct of one of the prosecutrixes, (2) that the District Court committed reversible error in failing to dismiss kidnapping charges against the defendant, and (3) that the District Court committed reversible error in overruling defense motions for a directed verdict for the reason that the evidence was insufficient as a matter of law to show nonconsent by the prosecutrixes. We reject all three arguments and affirm.

We treat the assignments in reverse order. With regard to the third assignment of error, little purpose would be served, either in this case or for future cases, to set out at length the sordid details of the crime. Suffice it to say that if the jury believed the State's evidence, it was more than ample to convict the defendant of the crimes charged. The evidence was sufficient to show that the defendant, together with two other males, held two young women against their will for several hours and during that time, committed repeated acts of criminal assault upon them. During the course of the evening, one of the prosecutrixes escaped from the home in which they were being held and ran nude through the

streets until she came upon a strange home where she sought help. That behavior hardly seems consistent with consent. The other prosecutrix escaped later in the morning and when contacted by the police, was in a hysterical and shaken condition, likewise not consistent with the claim of consent. The evidence discloses that there also was present in the home a Doberman pinscher which the young women had been advised would kill on command.

Where resistance would obviously be useless, fruitless, or foolhardy, it is wholly unrealistic to require affirmative direct demonstration of the utmost physical resistance as proof of the females' opposition and lack of consent. It is only required that the female make reasonable resistance in good faith under all the circumstances, and that the resistance be such as to make nonconsent and actual opposition genuine and real. State v. Parker, 196 Neb. 762, 246 N. W. 2d 210; State v. Smith, 192 Neb. 794, 224 N. W. 2d 537.

In any event, a question of fact as to the issue of consent was created.

In determining the sufficiency of evidence to sustain a conviction, however, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Spidell, 194 Neb. 494, 233 N. W. 2d 900; State v. Brown, 195 Neb. 321, 237 N. W. 2d 861. The verdict of a jury must be sustained if taking the view most favorable to the State, there is sufficient evidence to support it. State v. Johnsen, 197 Neb. 216, 247 N. W. 2d 638; State v. Partee, 199 Neb. 305, 258 N. W. 2d 634. Defendant's assignment of error, therefore, must be rejected.

Defendant's second assignment of error is likewise without merit. Defendant would have us declare that where an individual is held against his will for the purpose of committing another crime, the crime

of kidnapping should not exist. We have previously considered that argument and rejected it. In State v. Goham, 187 Neb. 34, 187 N. W. 2d 305, we said, "The purpose of kidnapping in every instance is to make it possible to commit some other crime. Its very nature therefore embraces other crimes as well as that of kidnapping. The penalties of kidnapping are intentionally more severe than the other crimes which may be included because of the consequences which often result from its perpetration." We find no basis to depart from that position and defendant's error in this regard is likewise found to be without merit.

Finally, the defendant maintains that the trial court erred in not permitting the defendant to introduce into evidence the fact that one of the prosecutrixes had 6 days earlier reported that she had been raped and thereafter did not proceed with the prosecution. Under the provisions of section 28-408.05, R. R. S. 1943, the trial court held an in camera proceeding to determine the admissibility of the evidence. The defendant sought to introduce in evidence a police report provided by the Council Bluffs, Iowa, police department, in which one of the prosecutrixes reported that 6 days prior to the incidents involved in this action, she had been raped. Thereafter, she refused to proceed with the prosecution and the matter was dropped.

Section 28-408.05 (3), R. R. S. 1943, provides: "Specific instances of prior sexual activity between the victim and any other person other than the defendant shall not be admitted into evidence in prosecutions under sections 28-401, 28-408.01 to 28-408.05, 28-409, and 28-929, unless consent by the victim is at issue, when such evidence may be admitted if it is first established to the court at an in camera hearing that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the vic-

tim as to be relevant to the issue of consent." The trial court advised the defendant's counsel that if evidence could be produced to show that the reported incident in fact was voluntary and not a rape, he would consider permitting the evidence to be introduced. The trial court, however, correctly pointed out to the defendant's counsel that the mere fact an individual had been raped or claimed to have been raped 6 days earlier would not constitute relevant evidence as to the past sexual conduct of the victim. The fact that the prosecutrix may have suffered similar misfortune within just several days of the incident involved herein might establish her bad luck, but certainly would not establish her past sexual conduct within the meaning of section 28-408.05, R. R. S. 1943. In the absence of any evidence by anyone, including the alleged attacker, that the previous incident was voluntary and with consent, such fact would not be properly admissible to establish relevant evidence concerning the past sexual conduct of the victim.

In view of the fact that the defendant's assignments of error are without merit, we must reject his appeal and affirm the judgment. The judgment of the District Court is affirmed.

AFFIRMED.

JOHN R. DOYLE, IN PERSON, AND FOR ALL PERSONS SIMILARLY SITUATED, APPELLEE, V. UNION INSURANCE COMPANY, A CORPORATION, ET AL., APPELLANTS.

277 N. W. 2d 36

Filed March 20, 1979. No. 41780.

1. **Corporations: Insurance: Officers and Directors: Damages.** A shareholders' suit proceeding as a cause for damages on behalf of the policyholders and based upon the premise that the corporate directors violated their fiduciary duties is an equitable action and triable de novo in this court.

2. **Corporations: Insurance: Officers and Directors: Statutes.** Section 44-224.05, R. R. S. 1943, which authorizes the Director of Insurance of the State of Nebraska to approve or disapprove contracts of bulk reinsurance, by which a domestic insurance company operating on other than the stock plan, may cede its business to another licensed insurer, and which statute requires that such contract of bulk reinsurance make a fair and equitable provision for distribution to policyholders of the ceding company of their equity in the surplus funds, does not abrogate the common law duties of corporate directors to policyholders of a mutual insurance company and the approval of the contract by the Director of Insurance does not insulate the directors of the company from liability for violation of their fiduciary duties.
3. **Corporations: Officers and Directors.** Directors are fiduciaries or trustees and must comply with the applicable fiduciary duties in their dealings with the corporation.
4. **Corporations: Officers and Directors: Damages.** Where a director has acted in complete good faith and breached no fiduciary duties, then he is not liable for mere mistakes in judgment; but a violation by a director of a duty required by law, whether willful, fraudulent, or negligent, is a breach of trust and the director is liable for any damages proximately caused by the breach.
5. _____: _____: _____. Directors should have a general knowledge of the manner in which the corporate business is conducted; and, where the duty of knowing exists, ignorance because of neglect of duty on the part of a director creates the same liability as actual knowledge and failure to act on that knowledge.
6. **Attorney and Client: Fraud: Statutes.** A communication between a lawyer and a client is not privileged under the provisions of section 27-503, R. R. S. 1943, if the services of the lawyer are sought or obtained to enable or aid anyone to commit or plan to commit what the client knew, or reasonably should have known, to be a fraud.
7. **Trusts: Property: Damages.** A trustee is required to dispose of trust property on the most advantageous terms which it is reasonably possible for him to secure for the benefit of those whom he represents. Where he breaches this duty, the measure of damages is the difference between the price for which the property was sold and its fair and reasonable market value at the time of the sale.
8. **Witnesses: Evidence.** The testimony of expert witnesses is not treated any differently in the fact-finding process than that of witnesses generally when it comes to determining the weight and credibility of the testimony, whether the fact finder is the judge or the jury.
9. **Corporations: Officers and Directors: Ratification.** The issue of whether void or voidable acts of corporate directors may be ratified by an approving vote of the shareholders arises only when

there has been full disclosure to the shareholders of all material facts.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Willkie Farr & Gallagher and Crosby, Guenzel, Davis, Kessner & Kuester, for appellants.

M. J. Bruckner, W. Scott Davis, and Michael McCormack, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and BLUE, District Judge, and KUNS, Retired District Judge.

CLINTON, J.

This is a class action by John R. Doyle, a policyholder of Union Insurance Company, a mutual company which dealt in property and casualty insurance, on behalf of himself and all other persons who were policyholders of the company on December 31, 1972. The action was commenced on March 16, 1973, in the District Court for Lancaster County against Union and the directors of Union to restrain the defendants from certain actions proposed to be taken on March 19, 1973, and praying for such other and additional relief as might be just and equitable. Equitable relief was denied and the action proceeded thereafter in February 1976, as a cause for damages on behalf of the policyholders, founded upon the premise that the directors had violated their fiduciary duties in "selling" the assets of Union to a newly created stock company for less than their real value.

On July 29, 1977, the court rendered judgment against certain of the defendants in the sum of $2,567,500 and the costs of the action. The cause as to other defendants was dismissed on motion for summary judgment.

The occasion for this action was a plan, since accomplished, originated by Maurice R. Gerleman and

William R. Berkley, a New York financier, to "sell" Union (hereinafter Old Union) to a new stock insurance company, hereinafter called New Union, substantially all of the shares of which would be owned by Houston General Insurance Company of Fort Worth, Texas, and Traders and General Insurance Company of Dallas, Texas. These two companies are wholly-owned subsidiaries of Finevest Services, Inc., a New York corporation of which Berkley is the principal owner and operator. The vehicle by which the sale was accomplished was the ceding of Old Union's business to New Union by a contract of bulk reinsurance under the provisions of section 44-224.05, R. R. S. 1943. The contract included provision for the purchase of the assets of Old Union by New Union and distribution to the policyholders of their equity in the surplus funds of Old Union. The plan was approved by the Director of Insurance of the State of Nebraska and a majority of the policyholders of Old Union.

The apparent theory upon which the case was tried was that the directors breached their fiduciary duties to the policyholders by: (1) Acting in their own interest or the interest of some of them; (2) selling the company for less than its fair value; and (3) failing to make complete and adequate disclosures to the policyholders in the proxy statements by which policyholders' approval of the terms of the contract were solicited.

The defendants-appellants make 26 assignments of error. The assignments fall into the following categories: (1) The court erred in not finding that the approval of the transaction by the Director of Insurance and his finding that the formula for distribution of policyholders' surplus was fair and equitable insulated the directors from any liability they might otherwise have. (2) The evidence does not support the findings of the court that the defendants were negligent or otherwise failed in their fiduciary du-

ties; and the defendants in any event can be liable only if grossly negligent, and the evidence does not support such a finding. (3) The court erred in admitting into evidence privileged communications between Maurice Gerleman and James Sedgwick, counsel for Gerleman and Old Union. (4) The court erred in not using a proper measure of damages, and the evidence does not support the amount of damages as found by the court. (5) The court erred in not determining that ratifying policyholders are not entitled to share in the judgment proceeds; therefore the amount of the judgment must in any event be reduced. (6) The court erred in not giving appellants credit for a $2,200,000 tax escrow account, which will be distributed to the policyholders in addition to the $8,300,000 dividend approved by the Director of Insurance if an income tax dispute with the Internal Revenue Service is resolved favorably to Old Union.

A shareholders' suit of this kind is an equitable action, which, except for the fact of dissolution of Old Union, would have been for the benefit of the corporation and not the shareholders. It is triable de novo in this court. Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393. However, when the evidence on material questions of fact is in irreconcilable conflict, we do, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the other. The appellants assert that the court's findings were not based upon resolution of issues involving credibility of witnesses and therefore the trial court's findings are to be accorded no weight. A careful reading of the record shows that questions of credibility and weight are involved. Apparently the court considered a reference of some factual issues for determination by a jury which it has the discretionary power to do in equity cases.

§ 25-1105, R. R. S. 1943; Bank of Stockham v. Alter, 61 Neb. 359, 85 N. W. 300. However, all parties waived the proffered jury trial on such issues. We affirm.

Because of the size of the record, we must at times discuss the evidence in a conclusional way. We treat the assignments in the order in which we have listed them, amplifying the discussion as necessary to embrace the scope of the argument of the appellants.

EFFECT OF THE APPROVAL OF THE DIRECTOR OF INSURANCE

Section 44-224.05, R. R. S. 1943, provides that any domestic insurance company operating other than on the stock plan may cede its business to another licensed insurer "by a contract of bulk reinsurance upon compliance with this section." The statute requires that the contract be first filed with and approved by the Director of Insurance and also approved by a majority of the stockholders. It provides that the Director of Insurance shall not approve the plan unless "he finds it to be fair and equitable to the policyholders of *each* insurer . . . ." (Emphasis supplied.) It further provides that the contract shall make provision "for distribution to each policyholder of the ceding company of his equity in the surplus funds, . . . as determined under a fair and equitable formula approved by the director."

Section 44-224.08, R. R. S. 1943, provides that all special meetings of policyholders called pursuant to section 44-224.05, R. R. S. 1943, shall be called upon a printed notice which must contain, among other things, (1) a brief statement of the substance of the bulk reinsurance contract and (2) a brief statement of the plan for distribution of surplus assets. The provisions of the statute, relating to approval by the Director of Insurance of the reinsurance agreement and the distribution of the surplus to policyholders,

contain no specific provision for notice to policyholders. The only mention of notice is an indirect one by reference to section 44-2312, R. R. S. 1943, which provides that hearings in "contested cases" under Chapter 44 are governed by the provisions of sections 84-913 to 84-919, R. R. S. 1943, which are part of the Administrative Procedures Act. No one here contends that the application to the Director of Insurance and his approval was a contested case.

Section 44-224.05, R. R. S. 1943, demonstrates a legislative intent to protect policyholders. Before the Director of Insurance approves the plan he must find that it is fair and equitable to policyholders. Nowhere does this statute or the related statutes impliedly or expressly demonstrate an intent to abridge or limit the common law rights of policyholders, who are, in the case of a mutual company, its owners. Rather, the statutes indicate that review and approval by the Director of Insurance is intended to be an initial screening process by means of which obviously inequitable arrangements may be avoided without the necessity of possible expensive and protracted litigation by policyholders. Neither does the language of the statute demonstrate any intention that mere approval by the Director of Insurance absolves (assuming that this is a legislative prerogative) the corporate directors from liability for violation of their fiduciary duties.

The statutes in question were first enacted in 1957. The applicable section does not appear to have been intended as a vehicle to determine disputes between corporate directors and policyholders. In Clark v. Lincoln Liberty Life Ins. Co., 139 Neb. 65, 296 N. W. 449, this court observed that under the then existing statutes which gave the department of trade and commerce the broad authority of "general supervision, control and regulation of insurance companies," the department had no power to make an initial adjudication to determine legal and equitable

controversies between insurance companies and their policyholders. Nothing in the present statute appears to change that principle.

The cases upon which the appellants rely are not on point. Ashurst v. Preferred Life Assur. Soc. of Montgomery, 282 Ala. 119, 209 So. 2d 403, did not involve a claim of breach of duty by corporate directors. That case involved the conversion of a fraternal company to a stock company. The policyholders at the time of conversion were to be issued stock. The transaction was not the "equivalent" of a sale as it did not constitute a change of ownership. In that case some policyholders wanted a dividend declared, and the court held there was no statutory right to a distribution of surplus.

Kueckelhan v. Federal Old Line Ins. Co., 74 Wash. 2d 304, 444 P. 2d 667, involved a "rehabilitation" of an insurance company because its investments failed to comply with statutory requirements. The insurance commissioner in that case was in effect authorized to act as a receiver, and the case is therefore not at all on point. Cotten v. Republic National Bank of Dallas, 395 S. W. 2d 930 (Tex. Civ. App., 1965), involved an action by a trustee in bankruptcy to have a loan made by a bank to the insurance company declared void. The issue was whether the bank knew the insurance company was insolvent when the loan was made. The court in that case held the lending bank was entitled to rely upon the presumption that the board of insurance commissioners had carried out its duty of making annual audits unless it had actual knowledge to the contrary. Casey v. Woodruff, 49 N. Y. S. 2d 625, and Otis & Co. v. Pennyslvania R. Co., 61 F. Supp. 905 (E. D. Pa., 1945), are, in fact, squarely contrary to the appellants' position. Trans World Airlines, Inc. v. Summa Corp., 374 A. 2d 5 (Del. Ch., 1977), involved federal statutes related to Civil Aeronautics Board approval of corporate transactions which, in

effect, preempted state law in certain limited transactions. The case is clearly distinguishable.

On the other hand, Rowen v. LeMars Mut. Ins. Co. of Iowa, 230 N. W. 2d 905 (Iowa), cited by the appellee, involves a situation and a holding which in principle are like those at hand. It was there argued by the corporate directors that the plaintiff policyholders had not exhausted their administrative remedies before the insurance commissioner. The Iowa Supreme Court held the doctrine of exhaustion of administrative remedies was inapplicable where the cause alleged "a series of torts by corporate insiders." The court said, in discussing the effect of the insurance commissioner's approval of the contract: "It is true he may disapprove a control transaction when he finds it is unfair or unreasonable to policyholders. Thus, as an incident of his powers he may provide a preventive administrative remedy for the wrongs alleged in this case. However, the statutory power to disapprove a control transaction is a limited power. It is not a legislative delegation to the insurance commissioner of jurisdiction over corporate insider torts, even though the commissioner is granted administrative authority to disapprove control transactions when such wrongs appear."

We hold that section 44-224.05, R. R. S. 1943, which authorizes the Director of Insurance of the State of Nebraska to approve or disapprove contracts of bulk reinsurance, by which a domestic insurance company operating on other than the stock plan may cede its business to another licensed insurer, and which statute requires that such contract of bulk reinsurance make a fair and equitable provision for distribution to policyholders of the ceding company of the equity in the surplus funds, does not abrogate the common law duties of corporate directors to policyholders of a mutual insurance company and that approval of the contract by the Director of In-

surance does not insulate the directors of the company from liability for violation of their fiduciary duties.

BREACH OF FIDUCIARY DUTY

We first state some of the general principles defining the duties of corporate directors to the corporation and to its shareholders. Directors are fiduciaries or trustees and must comply with the applicable fiduciary duties in their dealings with the corporation and its shareholders. Davis v. Walker, 170 Neb. 891, 104 N. W. 2d 479. Where a director has acted in complete good faith and breached no fiduciary duties, then he is not liable for mere mistakes in judgment. Rettinger v. Pierpont, 145 Neb. 161, 15 N. W. 2d 393. However, a violation by a trustee of a duty required by law, whether willful, fraudulent, or neglect, is a breach of trust and the trustee is liable for any damages proximately caused by the breach. Rettinger v. Pierpont, *supra*; Johnson v. Radio Station WOW, 144 Neb. 406, 13 N. W. 2d 556. Where directors are empowered to sell all the assets of a corporation, they must act with at least that degree of care that ordinarily prudent men would exercise in their own affairs. Davis v. Walker, *supra*; Ashby v. Peters, 128 Neb. 338, 258 N. W. 639; Henn, Law of Corporations (2d Ed., 1970), § 234, p. 453. Directors should have a general knowledge of the manner in which the corporate business is conducted; and, where the duty of knowing exists, ignorance because of neglect of duty on the part of a director creates the same liability as actual knowledge and failure to act on that knowledge. Ashby v. Peters, *supra*. Directors may delegate their work to an executive committee, but they may not delegate their responsibilities, and they rely on the committee at their own risk. Ashby v. Peters, *supra*.

Clarity of later discussion makes it necessary to identify the individual defendants against whom judgment was rendered as well as certain other per-

sons. They are Maurice R. Gerleman, president and member of the board of directors of Old Union; E. E. Francis, chairman of the board; C. A. Gerleman, treasurer, member of the board, and wife of Maurice; Robert G. Walters, senior vice president, secretary, and member of the board; George Kimball, board member; and E. P. Francis, wife of E. E. Francis and board member. Those dismissed on motion for summary judgment from which no appeal was taken are John V. Head, board member, senior vice president, and general counsel; and James H. Ellis, board member. Oliver DeMars, another board member, resigned from the board on February 22, 1973, previous to the action of the board which gives rise to this cause.

The evidence would permit the trier of fact to find, either as uncontradicted facts or as reasonable inferences from the evidence, the facts and conclusions which follow. In July 1972, Gerleman and Berkley had a meeting in New York City. Shortly thereafter in August, pursuant to arrangement, the two held another meeting in Estes Park, Colorado. As a consequence of these meetings and later correspondence, a plan and understanding between the two men was reached. Under the terms of the understanding, a new stock insurance company would be organized under the laws of the State of Nebraska with a capital and surplus of $3,500,000 which was to be supplied by Berkley or organizations controlled by him. For the relatively nominal consideration of $25,000, Gerleman and key officers of Old Union would receive 20 percent ownership of the corporation as well as employment with New Union with substantial salary increases and other benefits. The major portion of the 20 percent would go to Gerleman.

After the initial contacts with Berkley, Gerleman made contact with another insurance company. Its proposition also included the acquisition by Gerle-

man of a 20 percent interest in the new company for a relatively nominal consideration.

In September 1972, Gerleman caused Old Union to pay to Berkley $25,000 for investment advisory services for a 1-year period beginning July 2, 1972. It is to be noted that this payment was for services which apparently had begun before the meeting between the two men and would continue to a time when, if the plan came to fruition, Old Union would no longer exist.

Gerleman began the negotiations and the implementation of the plan with little or no consultation and without approval of the board of directors of Old Union until December 21, 1972, when the board enacted a resolution authorizing management to take steps to "determine the feasibility" of affiliation with Finevest Services, Inc. No disclosure to board members of details of the affiliation was made at that time. In the latter part of September 1972, Berkley and Gerleman had consulted Nebraska counsel who began work on the legal aspects of the sale, including that of obtaining approval of the Director of Insurance of the State of Nebraska, with whom a first meeting was held on December 21, 1972. Implementation of the transaction was continued without further consultation with the board or its members (except as hereinafter noted) until formal approval of the transaction in final form was obtained on March 5, 1973.

In January 1973, counsel having been informed that Gerleman would get 20 percent of New Union for $25,000, advised Gerleman that a disclosure of this fact would have to be made to the Director of Insurance. Gerleman testified that as a consequence he abandoned that pursuit in January or February. In any event, no disclosure of this aspect of the negotiations was made to the Director of Insurance or to the board of directors.

At some time during the periods above mentioned,

Gerleman, at Berkley's suggestion, hired Touche Ross & Co., certified public accountants and accountants for Berkley, for the purpose of conducting an audit of Old Union to determine the policyholders' surplus. A figure of $8,300,000 was arrived at.

Sometime before February 21, 1973, there was a discussion between Gerleman, Berkley, Oliver DeMars, and James Ellis in which the valuation of Old Union was discussed. Ellis was of the opinion that the company might be worth more than its "adjusted" book value. He recommended that a named eastern investment firm should be hired to conduct an independent appraisal. Following this discussion on February 21, DeMars resigned from the board because he was opposed to the proposal of Finevest Services, Inc.

On March 5, 1973, a majority of the board, including all those previously mentioned except the dissenters hereafter identified, acting wholly upon Gerleman's recommendation, approved the contract of bulk reinsurance which, apparently, up to that time none of them had seen or discussed. Mrs. Francis voted by a "proxy" given her husband. James Ellis voted against the proposal and later submitted a letter which pointed out that the directors were trustees for the policyholders and in which he stated: "To my knowledge there has been no attempt to (i) obtain an independent appraisal of the value of Union Fire, or (ii) seek or accept any other bid or offer from a proposed purchaser. There would undoubtedly be many larger and more experienced insurance companies or groups interested in Union Fire. The least that could be done to protect Union Fire policy holders would be to obtain an independent appraisal and ask for other proposals." Mr. Head also voted against the bulk reinsurance agreement and later submitted a letter giving the reason for his opposition. His objections related both to the

purported reasons for the sale (hereafter discussed) and the valuation of the property, and he suggested that certain specific items of value had not been considered. The reservations which these two men expressed concerning the transaction are borne out by independent evidence in the record.

Even before the meeting of March 5, 1973, notices of special meetings of policyholders, proxy statements, and proxies had been printed and were, within a few days after the meeting, in the mail to Old Union's more than 100,000 policyholders. On March 19, 1973, a very large majority of the policyholders voted in favor of the sale. On March 19, 1973, Finevest entered into an indemnity agreement with at least one of the directors, Mr. Francis, and did or offered to indemnify other directors. Indemnification was against policyholder action on account of the bulk reinsurance contract.

Mr. Gerleman made no attempt to determine whether the $8,300,000 policyholders' surplus determined by Touche Ross represented the selling value of Old Union. With the exceptions above indicated, the directors who approved the agreement made no efforts at all to inform themselves about it. The record leads to the conclusion they had not even read the contract when they voted on it.

We have by no means recited all the pertinent evidence on the issue now being discussed, but the record otherwise fully supports the conclusion that in this transaction, except for the dissenting directors, Gerleman was in effect a one-man board of directors and those approving the transaction were almost completely uninformed and acted wholly on his recommendation.

Although the trial court made no specific findings on this point, it could have well concluded that Gerleman in particular and Walters in a measure were acting in self-interest. At the time of trial, Gerleman was president of one of the two insurance

companies which owned the stock of New Union and Walters was president of New Union, both at much higher salaries and better side benefits than Old Union afforded. There is other evidence, relating to the terms of the contract, truth of the reasons purportedly justifying the sale, valuation of the business, and provisions of the proxy statement, which is pertinent to the issue here discussed. In order to avoid repetition, this evidence will be set forth in connection with the other assignments of error. The import of the portions pertinent to the present issue will be readily inferable without discussion.

In sum, the evidence clearly supports the conclusion that Gerleman acted in self-interest and was negligent and that the approving directors violated their fiduciary duties by negligence in that they failed to inform themselves in any appreciable degree on a matter of utmost importance to the policyholders.

THE PRIVILEGED COMMUNICATION

Gerleman and Old Union objected to the introduction in evidence of certain written communications between James L. Sedgwick, attorney for Old Union, and Gerleman as president of Old Union, on the ground that they came within the attorney-client privilege. These communications were contained in letters dated January 3, 1973, and January 10, 1973, and were as follows: "P.S. If you and Bill have firmed up your understanding with regard to your 20% ownership of the new stock insurer for $25,000.00, I would appreciate it very much if you would include that information with the above." "5. If it is decided that you will get 20% of the new insurer for $25,000, we must advise the Director of this part of the plan, ahead of the filing or it might look like we are trying to hide something. Very frankly, this aspect scares me and I am firmly convinced will get an adverse reaction from Jackson. My reason is that it makes, on the surface, questionable the

stated reasons for pursuing this affiliation. Therefore, I suggest discussing the possibility of finding another manner of providing equity ownership."

Section 27-503, R. R. S. 1943, provides in part as follows: "(2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (a) between himself or his representative and his lawyer or his lawyer's representative, ... (3) The privilege may be claimed by the client, ... The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary. (4) There is no privilege under this rule: (a) If the services of the lawyer are sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a . . . fraud . . . ."

An analysis of the facts shows quite clearly that Gerleman's proposed acquisition for nominal consideration of an equity interest in New Union would be fraudulent and a violation of his fiduciary duties. As president of Old Union, he had only a job and that ownership interest he may have had as a policyholder. Implementation of the plan would have given him for $25,000 an ownership interest worth $700,000—that is, 20 percent of the $3,500,000 capital and surplus of New Union. The fact that Berkley was willing to make such a concession is itself evidence from which a conclusion might be drawn that Berkley thought what he was getting was worth more than what he was paying. Otherwise, Berkley would have been unlikely to have been willing to make such an agreement with Gerleman. There is nothing in the record to show the dividend to shareholders was increased because of the "abandon-

ment" of an agreement for equity ownership by Gerleman.

We hold, under the provisions of section 27-503, R. R. S. 1943, a communication between a lawyer and a client is not privileged if the services of the lawyer are sought or obtained to enable or aid anyone to commit or plan to commit what the client knew, or reasonably should have known, to be a fraud. See Garner v. Wolfinbarger, 430 F. 2d 1093 (5th Cir., 1970).

EVIDENCE OF DAMAGES AND THEIR MEASURE

A trustee is required to dispose of trust property on the most advantageous terms which it is reasonably possible for him to secure for the benefit of those whom he represents. State ex rel. Ebke v. Board of Educational Lands and Funds, 154 Neb. 244, 47 N. W. 2d 520. The trial court found the measure of damages was the difference between the price for which the property was sold and its fair and reasonable market value at the time of the sale. This standard conforms with the statement of the court in State ex rel. Ebke v. Board of Educational Lands and Funds, *supra*, and with the general rule relating to damages in like cases. 90 C. J. S., Trusts, § 299, p. 465.

The pertinent portions of the bulk reinsurance contract are as follows. New Union does, by the agreement to reinsure, assume all the outstanding insurance contracts, etc., in force of Old Union. The effective date of the bulk reinsurance agreement is as of the close of business on December 31, 1972. Finevest Services, Inc. became the trustee for policyholders of the assets to be distributed to them. "14. The distributable surplus to policyholders of Union, the amount of the dividend, shall be computed and is hereby defined as follows: "(a) The surplus as regards policyholders as shown on the Annual Statement of Union filed with the Nebraska Department

of Insurance for the year ended December 31, 1972.
"(b) Plus the ceding commission to be received from New Union in an amount equal to the policyholders' equity in the unearned premium reserve shown on such Annual Statement; such equity to be determined by Union with the assistance of an independent certified public accountant and such figure to be submitted to the Director, Nebraska Department of Insurance. In the event the Director of the Nebraska Insurance Department disapproves said amount, then such equity shall be that as determined by the Director.
"(c) Plus the value of all non-admitted assets appraised at their fair market value as of December 31, 1972.
"(d) Plus or minus the difference between the value of all real estate shown on said Annual Statement and the appraised fair market value of said real estate. Said appraisal to be made by an unaffiliated, trained appraiser.
"(e) [P]lus or minus the difference between the December 31, 1972, book value and the market value of all bonds owned by the Company as shown by said Annual Statement.
"(f) Minus the amount of expenses incurred by Union as a direct result of this Bulk Reinsurance Agreement."

The controversy over valuation relates both to an overall valuation and to three specific items which the plaintiff claims were not considered or not properly valued in determining the price. All would, of course, affect the final amount of policyholders' surplus which, under the statutes, was required to be distributed.

We first mention briefly the matter of the specific items. No valuation was assigned to agency force—that is, the availability and loyalty of functioning independent agents who were selling policies for Old Union. The evidence supports the conclusion that

agency force did have a value and in fact was indispensible to the functioning of Old Union and New Union. The evidence shows considerable time and expense were incurred, with active participation by Berkley and Gerleman, in "selling" the "sale" to Old Union's more than 500 agents. In 1972, the agents produced for Old Union net premiums of $8,192,874.45. In that year Old Union had a net underwriting gain of $1,054,812.35.

An explanation of the other two specific items subject to dispute would require a more extended discussion than is necessary for the purposes of this opinion. The dispute essentially relates to the determination of the ceding commission which was to be paid and whether or not certain reserves were overstated and, on that account, the policyholders' surplus was undervalued, all of which would result in a windfall to New Union. A great deal of expert testimony focused on these items, but the question is ultimately one of valuation.

Finally, the parties presented evidence of an overall valuation founded upon conflicting premises.

One of the appellants' experts arrived at a valuation of $7,883,000 by averaging three figures representing various approaches, including Touche Ross' audited value of $8,300,000. This expert stated that his purpose was to "make an evaluation of the fairness of the dividend declared to Union policyholders." He did not value agency force because it, he said, is reflected in the premiums paid. This expert was employed by Berkley, and he acknowledged that in 1972 Old Union had a statutory underwriting income of $1,054,812, and that this was a very important factor to any investor.

The appellants' second expert was also employed to evaluate the fairness of the $8,300,000 dividend. It is clearly inferable from his testimony that his evaluation was founded upon an assumed situation where the mutual would be converted into a stock

company and the policyholders were going to be issued stock in the new company. That is not what was happening here, where the contract amounted to a sale with new owners taking over. It is also plainly inferable from his testimony that he was focusing on an assumed market for shares of individual shareholders and not the sale of an entire company. He arrived at a valuation of $6,600,000. This expert also was hired by Berkley.

One of the appellee's experts used a price earnings multiple and allowed for the fact that control of the corporation was being acquired. He arrived at a maximum valuation of $22,131,000 and a minimum valuation of $12,786,000, depending upon the earnings multiple used and what premium above market was assigned for acquisition of control. The appellee's other expert directed most of his testimony to a discussion and demonstration that the ceding commission was not properly computed and that the reserves previously mentioned were overstated and therefore policyholder surplus undervalued.

The appellants argue the testimony of an expert (presumably their own) cannot be arbitrarily disregarded and therefore the court erred in computing damages by its own method. The court determined valuation by multiplying an adjusted book value by 1.5. In so doing, it accepted some portions of the expert testimony and rejected others. This he was entitled to do under our law. Testimony of expert witnesses is not treated any differently in the fact-finding process than that of witnesses generally when it comes to determining the weight and credibility of the testimony. See, NJI No. 1.42; Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151. The rule is not changed merely because the fact finder is the judge and not the jury.

The finding of damages by the court was within the range of the evidence, was not arbitrary, and, indeed, may have been conservative.

EFFECT OF POLICYHOLDER APPROVAL OF THE BULK REINSURANCE CONTRACT

Did the vote of a majority of the policyholders approving the reinsurance contract ratify voidable acts of the directors and absolve them from liability?

The issue of whether stockholders may absolve corporate directors from liability for their actions is one upon which there is relatively little agreement. Some of the competing policies and interests involved are: (1) It should be possible for a majority of the stockholders to make an informed decision to stay out of court, and (2) litigation is not always the ideal solution to void or voidable behavior on the part of the directors; however, (3) dissenting stockholders have a property interest in the corporation, and our system has not favored the elimination of property interests by majority vote, (4) it is all too easy for directors to obtain sufficient proxies for ratification of what are often technical and complex ventures, and (5) the courts are not sympathetic to any sort of validation of violations of fiduciary duties. See generally Leavell, The Shareholders as Judges of Alleged Wrongs by Directors, 35 Tulane L. Rev. 331; Comment, Shareholder Validation of Directors' Frauds: The Non-Ratification Rule v. The Business Judgment Rule, 58 Northwestern L. Rev. 807.

The principle which governs under the facts in this case is that a ratification by shareholders (in this instance, policyholders) arises from their approving vote only when all the material facts are disclosed to them. Hudson v. American Founders Life Ins. Co. of Denver, 151 Colo. 54, 377 P. 2d 391. See, also, First Nat. Bank of Omaha v. East Omaha Box Co., 2 Neb. (Unoff.) 820, 90 N. W. 223; Henn, Law of Corporations (2d Ed., 1970), § 194, p. 379. When there has been a full disclosure, the courts of this country have adopted various positions as to what may be

ratified and in what manner. Here, however, we need not go beyond the principles and facts applicable to the case before us.

When we compare the information contained in the proxy statement with the facts earlier recited, we find there was clearly incomplete disclosure as well as deception. We list the following.

(1) The reasons for the sale as recited in the proxy statement were false and deceptive. It recited: "The Board of Directors . . . of Union have been concerned for some time about the Company's continued ability to achieve favorable results." It then recites reasons for the expressed concern, to wit, inability to attract and retain executive personnel, inability to compete viably with opposition insurance companies, and inability to get necessary additional capital because the mutual form of the company makes it impossible to sell stock and additional capital can come only by retention of earnings.

The above is contradicted by the following: The statement that the board of directors had been concerned for some time is simply not true. The "clouds on the horizon" were seen only by Gerleman. The board had made no investigation of any kind relative to future prospects. The claim of inability to attract executive personnel seems spurious, since it was contemplated from the beginning that the officers of Old Union would be the officers of New Union. In fact, the record establishes that Berkley offered Gerleman a 5-year contract at $50,000 a year. When the sale was consummated, the officers of Old Union became the officers of New Union.

The only evidence introduced on the question of ability to compete contradicts the pessimistic note of the forecast. As to ability to attract capital, it is true that because of the mutual form, Old Union could not sell additional shares. It is to be observed,

however, that New Union was to have capital and surplus of only $3,500,000 compared with the policyholders' statutory surplus in Old Union which, on December 31, 1972, was $7,994,280 and which represented an increase of almost a million dollars in 1 year.

The record establishes that Old Union was a healthy company, founded in 1886 and having a long history of profitability.

The stated reasons for the necessity of the "sale" are also undercut by the fact that, without any doubt whatever, the driving force behind the transaction was Gerleman and he was motivated by self-interest. The fact he was originally to acquire an equity interest in New Union never was disclosed to the policyholders. Had they been so informed, their views might have been quite different.

(2) The proxy statement says: "After numerous discussions and a great deal of investigation, the Board of Directors on December 21, 1972, authorized Management to seriously pursue a possible affiliation with Finevest Services, Inc." The fact is there was no investigation by the board of directors and the only discussion was the one which occurred at the meeting of December 21, 1972, which resulted in a resolution to investigate feasibility. Although the general outline of the plan had by then been well formed, no significant disclosure of the plan had been made to the directors.

(3) The proxy statement recites: "New Union would pay to Union a ceding commission equal to the Policyholders' equity in the unearned premium reserve as of December 31, 1972." Whether the ceding commission was fairly valued was the subject of a great deal of evidence. It was a matter to which the board gave no consideration whatever. The evidence rather clearly supports the conclusion there was enough additional equity in this item alone to account for the $700,000 ownership eq-

uity which Gerleman was to acquire.

(4) The proxy statement recites that from the dividend would be deducted "costs incurred in the preparation of the Bulk Reinsurance Agreement and the preparation and mailing of this proxy solicitation material. These costs are estimated to be less than $200,000.00." Any unused balance was to go to the shareholders.

The evidence shows that items other than those listed were paid and intended to be paid from that reserve. Some of them were, in fact, incurred or paid before the policyholders' meeting and even before the proxy statements were mailed. These include an undetermined portion of the fee of Touche Ross' audit, which portion was unnecessary to the sale but required to enable Finevest Services, Inc., to go public; traveling, housing, and other expenses of Finevest officers incurred during the "selling" of the plan to the agents; legal fees for the incorporation of New Union, which fees obviously should have been paid by owners of New Union; and legal fees of Willkie, Farr, and Gallagher for initial defense of this action. A credit-back adjustment of $13,000 to the $200,000 reserve was later made, but its nature is not shown.

(5) The proxy statement gives the impression the board approval was unanimous when it was not. The dissents of Ellis and Head are not noted and, of course, the reasons for their dissent are not declared.

We find that a complete disclosure of all material facts was not made to the shareholders and for that reason policyholder approval did not operate as a ratification under the particular facts of this case.

CREDIT AGAINST JUDGMENT FOR TAX ESCROW ACCOUNT

The appellants' final contention is that they should be given credit against the judgment for that part of the tax escrow account for $2,200,000 which, after

final determination by the Internal Revenue Service, might be found not subject to claim for federal corporate income tax of Old Union.

The sources of the escrow account were the following three items: (1) $1,187,000 refunded by the Internal Revenue Service on account of income tax paid by Old Union for 1972 and prior years. The refund was made because of a deduction taken on the final return of Old Union for the period January 1, 1973, to March 1, 1973 (the time when it ceased to do business), consisting of the policyholders' dividend of $8,300,000 which it is claimed is deductible by reason of specific provision of the Internal Revenue Code relating to mutual insurance companies. The deduction resulted in a loss carryback for the years 1970, 1971, and 1972, hence the refund. (2) A deferred income tax reserve of $629,000 for the $1,250,000 ceding commission (deferred acquisition cost), paid to Old Union in 1973 and shown on its final return for the short period, but as to which it is claimed income tax was not payable because of the dividend deduction. (3) A $393,258 reserve for taxes because of a return to income from previous deductions in the Protection Against Loss account (a reserve for losses permitted by the Internal Revenue Code).

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.

Other assignments of error made by the appel-

lants have been considered and found to be unmeritorious.

AFFIRMED.

MCCOWN, J., concurring in result.

I would restrict the holding as to the availability of the attorney-client privilege to the particular corporate context of this case and hold that where a corporation and its officers are charged with actions inimical to the interests of stockholders, the fiduciary obligations owed to stockholders are stronger than the policy favoring privileged communications, and that the facts in this case establish good cause for holding that the attorney-client privilege was not available here. See, Garner v. Wolfinbarger, 430 F. 2d 1093 (5th Cir., 1970), cert. den. 401 U. S. 974, 91 S. Ct. 1191, 28 L. Ed. 2d 323; In re Transocean Tender Offer Securities Litigation, 78 FRD 692 (N. D. Ill., 1978).

Although the language of section 27-503 (4) (a), R. R. S. 1943, is specific, nevertheless a holding that the lawyer-client privilege is not available in any case where the attorney's services are obtained in order to commit or plan to commit what the client knew to be fraud is far too broad.

KUNS, Retired District Judge, joins in this concurrence.

ELLEN G. SEBESTA, APPELLANT, V. ARTHUR SEBESTA, APPELLEE.

277 N. W. 2d 49

Filed March 20, 1979. No. 41807.

1. **Divorce: Property Settlement Agreements: Statutes.** A party to a property settlement agreement entered into pursuant to section 42-366, R. R. S. 1943, may not, as a matter of right, withdraw therefrom prior to approval or disapproval of the agreement by the trial court.
2. **Divorce: Property Settlement Agreements.** A property settle-

ment agreement by the parties to an action for dissolution of marriage will be considered in the light of the economic circumstances of the parties and the evidence at the hearing to decide whether or not it is unconscionable; if it is not found unconscionable, it binds both the parties and the court.

Appeal from the District Court for Valley County: EARL C. JOHNSON, Judge. Affirmed.

Richard L. Huber of Higgins, Higgins & Huber, for appellant.

Robert D. Stowell of Stowell & Jensen, for appellee.

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

KNAPP, District Judge.

This is an action for dissolution of marriage. The court found that the marriage was irretrievably broken, approved the parties' written property settlement agreement and dissolved the marriage. Petitioner wife appeals, contending the court erred in not granting her motion, filed prior to entry of the decree, to declare the agreement null and void and in not finding the agreement to be unconscionable. We affirm the judgment of the trial court.

The parties were married in 1942. Appellant was then 16 years old; appellee was 22 years old. Neither of them completed high school. With the exception of 15 to 20 head of cattle then owned by appellee, neither of them brought property of value to the marriage. Four children were born to the marriage; two survive, a married daughter and a son who was 18 years old at the time the decree was entered. During the marriage, by purchase and by inheritance, the parties accumulated the property which is the subject of this appeal. When the petition was filed they owned 608 acres in Valley County, Nebraska, purchased in 1955, which, with the farm home and other improvements thereon, was ap-

praised at $195,000; 24 acres in Loup County, Nebraska, purchased in 1976 for $3,072; a one-third interest in 1,032 acres in Loup County, Nebraska, inherited by appellee in 1949 and valued at $44,032; 150 head of cattle valued at $33,750; farm machinery, including a 1974 pickup, valued at $15,000; a 1968 Buick automobile valued at $500; and a certificate of deposit in the amount of $9,730.08. They owed $55,000 to their bank, $9,500 in miscellaneous business debts, and a $22,000 balance on a mortgage on the Valley County land.

Appellant's petition for dissolution was filed September 20, 1976. Hearing was had on her application for temporary allowances on December 16, 1976. Evidence of the parties' assets and liabilities was received and temporary allowances were ordered. Shortly thereafter, appellee's counsel wrote a letter to appellant's counsel outlining a proposed property settlement agreement. Appellant learned of this proposal on December 24, 1976, while visiting her daughter, who had been informed thereof by appellee. Appellant insisted that appellee come to their daughter's home to explain the proposed agreement and, on December 27, he did so. The proposal, in addition to dividing the property, included conveying to each of their two children a quarter section of the Valley County land. Following this discussion they, with their daughter, went to the office of appellee's counsel in Ord, Nebraska, and there executed warranty deeds conveying the quarter sections to their children. Appellee's counsel was not present and was not aware that the parties were in his office. Appellant and her daughter then drove to Burwell, Nebraska, to confer with appellant's counsel, who read to them the letter from appellee's counsel setting forth the terms of the proposed settlement. Appellant advised her counsel that she agreed to the proposed terms and had already executed the deeds conveying the quarter sections to their children.

Thereafter, the terms of the agreement were incorporated into an instrument entitled "Stipulation of Property Settlement" (hereinafter called Stipulation). It provided that appellee would have custody of the parties' minor son and would assume the debts, including the mortgage on the Valley County land. It included a recital that the parties had, on December 27, 1976, conveyed to each of their two children a quarter section of the Valley County land. Appellee received the balance of the Valley County land (288 acres) together with the farm home and other improvements thereon, all farm livestock and machinery, and the 1974 pickup. Appellant received all of the Loup County land (368 acres), the $9,730.08 certificate of deposit, the 1968 Buick, and the personal effects and clothing then in her possession. Appellee received "all other personal property of the parties." Neither "personal effects and clothing" nor "all other personal property of the parties" was then, or later, more fully identified, nor was any monetary value assigned thereto by either of the parties at any of the three hearings before the trial court. The Stipulation further stated that the parties had made every reasonable effort to reconcile their differences and were convinced that their marriage was irretrievably broken and that reconciliation and continuance of the marriage was impossible.

Appellee executed the Stipulation on January 13, 1977. Appellant's counsel mailed it to appellant, together with a certain "Statement" prepared by him, and, on January 21, 1977, appellant took both instruments to the office of appellee's counsel, executed and acknowledged them before his secretary, a notary public, and left the executed instruments there with directions to mail them to her attorney. Again, it should be noted that appellee's counsel was not present nor was he aware of appellant's presence in his office. The "Statement" prepared by

appellant's counsel and executed and acknowledged by her on January 21, 1977, was captioned as a pleading in the case, entitled "Statement," and is as follows: "I, ELLEN G. SEBESTA, do hereby acknowledge that I have been informed by my Attorney * * * that I would probably be awarded by the District Court of Valley County, Nebraska, a greater amount of the joint property accumulated by my husband and myself during the period of our marriage, than the property I will receive according to the Stipulation of Property Settlement signed by me this date.

"However, it is my express wish and desire that the joint property owned by my husband and myself and accumulated during the period of our marriage be divided and disposed of according to the Stipulation of Property Settlement which I have executed this date, and I hereby certify that I have knowingly and willingly executed said Stipulation, with full knowledge of my act and without any restraints whatsoever."

On January 31, 1977, appellant returned to the office of appellee's counsel and, in his presence, executed United States Quarterly Gift Tax Returns relating to the gifts of the Valley County quarter sections to their children.

On March 23, 1977, hearing was had on appellant's petition for dissolution. Appellee testified that the marriage was irretrievably broken and to the execution by the parties of the Stipulation and the gift tax returns. Appellant's counsel then stated to the court "* * * my client now states to me that apparently she has changed her mind since signing this particular document (the Stipulation) and does not feel at this time that was a fair property settlement." Appellant did not take the stand, but on being asked by the court if she had any questions replied: "Yes, I do. I don't want it to go through."

The court ordered both parties to undergo mar-

riage counseling, the results thereof to be reported to the court. Appellant's counsel requested and received permission to withdraw as counsel in the case.

On May 10, 1977, the marriage counselor seen by the parties filed his report with the court setting forth the visits had with the parties, the tests administered to them, and his conclusion that the marriage was irretrievably broken.

In the interim, appellant, through new counsel, had filed a motion requesting the court to declare the Stipulation null and void for the reason appellant "did not have sufficient facts to sufficiently know the value of the property described and further did not have adequate information to base an intelligent opinion as to the reasonableness of said settlement." Hearing on appellant's motion was had on May 25, 1977. The parties and their daughter testified at length about the circumstances surrounding the execution of the various instruments referred to hereinbefore. The assets and liabilities of the parties were again inquired into. Counsel's examination of witnesses was not limited or constrained in any degree. No testimony was elicited suggesting that the parties' assets and the valuations thereof set out hereinbefore were not essentially correct nor that appellant had been misled in any way with respect thereto. While appellant stated she signed the Stipulation because she thought if she signed it she "might have a chance of getting my husband back," there is nothing in the record indicating that appellee or anyone else had said or done anything that would support her supposition. Nor is there any showing of fraud, intimidation, or other improper means practiced by anyone to overcome appellant's will.

Appellant first contends that a party to a property settlement agreement entered into pursuant to section 42-366, R. R. S. 1943, may, as a matter of right, withdraw therefrom at any time before the trial

court has ruled thereon. The applicable portions of that statute provide: "(1) To promote the amicable settlement of disputes between the parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written property settlement agreement containing provisions for the maintenance of either of them, the disposition of any property owned by either of them, and the support and custody of minor children.

"(2) In a proceeding for dissolution of marriage or for legal separation, the terms of the agreement, except terms providing for the support and custody of minor children, shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is unconscionable."

This court has previously stated that the statute quoted constitutes an explicit statement of legislative policy concerning the desirability and binding effect of property settlement agreements entered into pursuant thereto and that such agreements, unless found to be unconscionable, bind both the parties and the court. Prochazka v. Prochazka, 198 Neb. 525, 253 N. W. 2d 407. Appellant's first contention is without merit.

Appellant next contends that the Stipulation is unconscionable. After subtracting the portion of the Valley County land deeded to the children, the value of the Loup County land inherited by appellee, and the debts assumed by appellee, the total value of the parties' property available for division is $106,552. Of this, appellant received property reasonably valued at $57,334. After careful consideration of the parties' economic circumstances as reflected by the record, together with all other relevant evidence produced by the parties, we find that the Stipulation

is not unconscionable. The judgment of the trial court is affirmed.

AFFIRMED.

GENE R. GRIFFETH, APPELLANT, V. SAWYER CLOTHING, INC., A CORPORATION, TOM SAWYER, PRESIDENT, APPELLEE.

276 N. W. 2d 652

Filed March 20, 1979. No. 41835.

1. **Summary Judgments.** A motion for summary judgment can be granted where there is no genuine issue as to any material fact in the case and where, under the facts, movant is entitled to judgment as a matter of law.
2. **Contracts: Evidence.** A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions, or where the language employed is vague or ambiguous.
3. _____: _____. Parol evidence is admissible to explain and show the true nature of the transaction between the parties.
4. **Contracts: Assignments.** An assignee of a contract generally acquires no greater right than that possessed by the assignor.
5. **Contracts: Assignments: Intent: Evidence.** Assignments of contracts containing clauses restricting competition will be strictly construed and the assignment limited to the intent of the parties as disclosed by the terms of the instrument if they are complete and unambiguous. Where the language in the contract regarding assignment is susceptible of more than one construction, or is vague or ambiguous, extrinsic evidence may be received for the purpose of determining the intent of the parties.

Appeal from the District Court for Pawnee County: WILLIAM B. RIST, Judge. Affirmed.

Morrissey & Morrissey, for appellant.

L. Joe Stehlik and Baylor, Evnen, Baylor, Curtiss & Grimit, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, and BRODKEY, JJ., and RONIN and NORTON, District Judges.

NORTON, District Judge.

This is an action in equity to enforce, by injunc-

tion, an agreement not to compete in the sale of shoes in Tecumseh, Nebraska, for a period of 5 years. The matter was tried to the District Court for Pawnee County, at the conclusion of which the court entered judgment for the defendant. Plaintiff appeals. We affirm.

There is no dispute in the facts from which this case arose. Prior to November 11, 1975, Clifford W. Boline, Jr., and Patricia Boline, husband and wife, hereinafter referred to as "Bolines" owned and operated two businesses in Tecumseh, Nebraska. One was a clothing store known as "Cliff's Clothing," and the other was a shoe store known as "Cliff's Shoes." These businesses were housed on separate premises in Tecumseh, approximately 1 city block apart.

On November 11, 1975, the Bolines entered into a written contract of sale with the defendant-appellee, wherein the Bolines sold and the defendant purchased the business known as "Cliff's Clothing." The contract of sale contained a clause entitled "AGREEMENT NOT TO COMPETE," the material parts of which are as follows: "* * * the Buyer in turn, agrees not to compete with the Seller in the sale of shoes, and other footwear and footwear accessories in Tecumseh, Nebraska for a period of five years from this date. * * *" The contract also contained the following concluding clause: "THIS CONTRACT SHALL BE BINDING upon the heirs, executors and administrators of the parties hereto." On January 1, 1976, pursuant to the terms of the contract, the defendant took possession of this business.

Subsequently, on May 4, 1976, the Bolines entered into a written contract of sale with the plaintiff-appellant, wherein the Bolines sold and the plaintiff purchased that business known as "Cliff's Shoes." Following the consummation of the sale between the Bolines and the plaintiff, the defendant commenced selling shoes, other footwear, and footwear acces-

sories at its business in Tecumseh, Nebraska. Thereafter, on December 10, 1976, the Bolines made, executed, and delivered to the plaintiff an assignment of: "* * * all of the rights and interests which we have under a certain Contract of Sale dated November 11, 1975, between Sawyer Clothing, Inc., a corporation, of Pawnee City, Nebraska, as Buyer and us as Seller."

On January 11, 1977, plaintiff commenced this suit in the District Court for Pawnee County, Nebraska, alleging in substance a breach of the covenant not to compete by the defendant with no adequate remedy at law and seeking an injunction against the defendant. Trial was had on September 13, 1977, and judgment entered on October 5, 1977, wherein the court found the covenant not to compete between the Bolines and the defendant was personal in nature between the parties and nonassignable, and dismissed the plaintiff's cause of action. Plaintiff duly filed a motion for a new trial, and subsequent to the overruling of that motion perfected this appeal.

After this case was docketed and prior to submission, the defendant filed a motion in this court to dismiss, alleging that "Cliff's Shoes" had been closed and the business terminated, and that the question heretofore presented by the appeal was therefore moot. Plaintiff filed his objection thereto, and the motion was submitted. We overrule this motion with the comment that if the judgment of the trial court were affirmed without change, the right to "no competition" between Bolines and the defendant might still survive between those parties despite the fact that the business known as "Cliff's Shoes" has terminated; and, conversely, if the trial court were reversed and a finding made by this court that the rights possessed by the Bolines had in fact passed to the plaintiff, the fact that the business conducted by "Cliff's Shoes" had been terminated might be highly material to plaintiff's rights.

Plaintiff assigns four errors on the part of the trial court, to wit: (1) That the decision of the court is not sustained by the evidence; (2) that the decision of the court is contrary to the evidence; (3) that the decision of the court is contrary to the law; and (4) that the court committed error in overruling plaintiff's motion for summary judgment prior to trial.

For the purposes of this decision, we will deal first with plaintiff's motion for summary judgment. A motion for summary judgment can be granted only where there is no genuine issue as to any material fact in the case and where, under the facts, movant is entitled to judgment as a matter of law. Janssen v. Hamblet, 197 Neb. 705, 250 N. W. 2d 902. While there is no dispute between the parties over the facts recited above, a review of the entire record leads to the inescapable conclusion that true controversies were raised and existed between the parties with respect to whether or not the agreement not to compete, as drawn, had been modified by the subsequent conduct of the contracting parties, and as to whether or not the contracting parties had, in fact, intended to limit the assignability of the covenant not to compete. There being genuine issues of fact between the parties, the trial court properly overruled plaintiff's motion.

The only issues which remain for consideration, therefore, are whether the judgment of the trial court is sustained by the evidence or is contrary thereto, and whether or not it is contrary to the law.

As previously noted, the original contract of November 11, 1975, between the Bolines and the defendant contained language which appeared on the face of the instrument to limit the assignability of the instrument itself. In the contract of May 4, 1976, by which the Bolines sold and the plaintiff purchased the business known as "Cliff's Shoes," appeared the following language: "* * * Additionally, the Sellers do assign to the Buyers all of the protection provided

to the Sellers under a certain Contract of Sale with Tom Sawyer, Inc., a corporation of Pawnee City, Nebraska, wherein said corporation agrees not to compete with the Sellers in the sale of footwear for a period of five years." Notwithstanding this language, some doubt must have existed on the part of the plaintiff that he had acquired any protection from this provision. What else can explain the assignment dated December 10, 1976, a portion of which was heretofore set forth?

In an attempt to resolve this problem and to explain the intent of the parties with regard to the assignability of the agreement not to compete, to show that it was intended by the parties to be personal in nature as alleged in its answer, the defendant offered certain parol evidence consisting of a conversation between Clifford W. Boline, Jr., and one Dick Nannen, which conversation occurred after the execution of the contract between Bolines and the defendant. This evidence tended to show that the Bolines did not believe their right of no competition on the part of the defendant would survive. The evidence was conditionally received by the trial court and thereafter struck, upon plaintiff's motion, on the basis that such evidence was hearsay and constituted an attempt to alter or vary the terms of a contract complete upon its face. An offer of proof of this evidence was then made by the defendant, to which the plaintiff objected, and this objection was sustained by the trial court.

We believe this evidence should have been received. Parol evidence is admissible to explain and show the true nature of the transaction between the parties. Ely Constr. Co. v. S & S Corp., 184 Neb. 59, 165 N. W. 2d 562. A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions, or where the language employed is vague or ambiguous. Hansen v. Circle Lake Development Corp., 199 Neb. 678, 260

N. W. 2d 609. The fact that an ambiguity existed in this matter and that the November 11, 1975, contract was subject to two constructions is apparent from the limiting language of the instrument itself and the overt actions of the contracting parties after it was executed. The evidence offered does not alter the terms of the contract, but merely explains the true intent of the parties as to who was bound by its terms. With reference to the plaintiff's assertion that the evidence is hearsay, we note the exception to the rule of evidence permitting the receipt of admissions against interest, which in this case satisfied the requirements that the admission occur subsequent to the act and involve a party or one who speaks for the party with authority to do so. The plaintiff is claiming his rights under those of the Bolines. Certainly, any right which he may have is limited to that possessed by his predecessor in title. An assignee of a contract generally acquires no greater right than that possessed by the assignor. Hansen v. E. L. Bruce Co., 162 Neb. 759, 77 N. W. 2d 458. The plaintiff is bound by Bolines' admissions made prior to the sale of the business and the purported assignment of their rights, as though he had made the admissions himself. His objections were without merit. The evidence should have been received as an aid in construing the intent of the contracting parties. Therefore, taking all of the evidence as a whole, it would establish that the transaction between the Bolines and the defendant, in the matter of the no competition clause on the part of the defendant, was intended by the contracting parties to be personal in nature. The evidence thus sustains the judgment of the trial court and is not contrary thereto as alleged.

While the findings as set forth above might well dispose of this case, the plaintiff has also assigned as error his contention that the judgment of the trial court was contrary to the law, and cites in support

thereof the case of Hickey v. Brinkley, 88 Neb. 356, 129 N. W. 553. Lest there be any question remaining, we will deal with that contention.

In the Hickey case, the defendants sold a business to Hickey under an agreement whereby the defendants would "not themselves or permit any one of their family or in their employ" to engage in a similar business in that locality for a period of 10 years. Subsequently, Hickey sold to the plaintiff the business and good will and assigned to the plaintiff his agreement with the defendant. The defendant then continued the business in dispute. In construing the assignment of the original contract in that case this court stated: "We are also of opinion that a contract of this nature which is intended to protect the good will of the business is assignable to the purchaser of the business. * * * The intention of the parties was to guard against the property sold becoming valueless to the purchaser by reason of the seller again resuming business in that locality." It is noted that in the Hickey case the material difference lies in the fact that the court reached its conclusions based solely upon the instruments themselves, and there was no extrinsic evidence offered or received to explain the intent of the parties.

Since the decision in the Hickey case, this court has dealt with various contracts containing no competition clauses. Courts generally do not look with favor upon restraint against competition, and contracts containing covenants which impose restraint upon competition will be strictly construed and doubts are resolved against the latitudinarian construction thereof. Midlands Transp. Co. v. Apple Lines, Inc., 188 Neb. 435, 197 N. W. 2d 646. The holding in Hickey v. Brinkley, *supra*, may lead to a position of some variance with these principles. We believe that the better rule in the assignability of such contracts would be to limit that assignability strictly to the intent of the parties as disclosed by the lan-

guage of the instrument if it is complete and unambiguous. Where the language in the contract regarding assignment is susceptible of more than one construction, or is vague or ambiguous, extrinsic evidence may be received for the purpose of determining the intent of the parties. To the extent that Hickey v. Brinkley, *supra*, is in conflict with the foregoing, it is overruled.

The judgment of the District Court for Pawnee County, Nebraska, is affirmed.

AFFIRMED.

KRIVOSHA, C. J., concurs in result.

ROSS ALLEN MCCREA, APPELLANT, V. ROBERT CUNNINGHAM, AS MAYOR OF THE CITY OF OMAHA, NEBRASKA, ET AL., APPELLEES.

277 N. W. 2d 52

Filed March 20, 1979. No. 41839.

1. **Municipal Corporations: Administrative Law: Police Powers.** Minimum visual acuity standards promulgated by the Personnel Department of the City of Omaha with the concurrence of the Fire Division for the employment of firefighters are held to be reasonable, and not arbitrary or capricious; and to bear a reasonable relationship to fitness of applicants and their capacity to discharge the duties of a city firefighter. Such standards are directly related to the health and safety of both the firemen and the public; and constitute a proper exercise of the police power of the state, and are not unconstitutional.
2. **Municipal Corporations: Police Powers.** In the exercise of police power delegated to a city, it is generally for municipal authorities to determine what rules, regulations, and ordinances are required for the health, comfort, and safety of the people.
3. **Police Powers.** A legal presumption exists in favor of the validity of such rules, regulations, and ordinances, and the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence that it is arbitrary, unreasonable, or confiscatory.
4. **Constitutional Law.** The acts of legislative bodies, whether state or municipal, if performed within the prescribed limits, are not subject to revision or control by the courts on the ground of in-

expediency, injustice, or impropriety. Such are purely functions of legislative power.

5. **Municipal Corporations: Statutes.** Sections 48-1101 and 48-1102 (8), R. R. S. 1943, of the Nebraska Fair Employment Practice Act, do not mandate the employment of firemen with visual defects which affect their ability to engage in their occupation.

6. **Municipal Corporations: Statutes: Public Policy.** Sections 20-126 and 20-131, R. R. S. 1943, setting forth the policy of this state to employ the blind and visually handicapped do not require the employment of firemen with visual handicaps where that disability prevents the performance of the work involved.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed.

David L. Herzog, for appellant.

Herbert M. Fitle and James E. Fellows, for appellees.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and BRODKEY, JJ., and STANLEY, District Judge.

BRODKEY, J.

On January 12, 1977, Ross Allen McCrea, as plaintiff, instituted an equity action in the District Court for Douglas County, Nebraska, naming as defendants to that action the Mayor, the Public Safety Director, the Personnel Director, and the Fire Chief, all of the City of Omaha, Nebraska, praying for a permanent injunction preventing the enforcement or use of certain visual standards or requirements promulgated and in effect in connection with the employment of firemen for the City of Omaha; and also praying for a declaratory judgment with reference to the enforceability, lawfulness, constitutionality, and reasonableness of such vision requirements and regulations pertaining to the duties of a City of Omaha Fire Fighter (801); and for a decree declaring the rights, duties, and legal obligations of the parties, and for other relief.

In his petition filed in the action, plaintiff, after alleging the positions held with the City of Omaha by

the defendants, and their duties, alleges that prior to the institution of the lawsuit he had applied for employment with the City of Omaha in the position of Fire Fighter (801), pursuant to an announcement containing the description of the nature of the work, and setting forth certain requirements, including that the applicant have vision not less than 20/30, correctable to 20/20 in each eye, and have normal color perception. Plaintiff alleges that he fulfilled each of the requirements and requisite qualifications for the position and passed the various examinations required of him; that his name was put on a list of eligible candidates to be hired as a firefighter on October 11, 1976; and that he was designated as eligible appointee No. 11. Plaintiff further alleges that sometime after August 2, 1976, he was notified that his employment application for the position was rejected because of the condition of his eyesight. Plaintiff alleges his eyesight is suitable, reasonable, and proper for all the work tests required of a firefighter, that his vision is suitable and correctable for the work required of firefighters, and that he can reasonably perform all the duties and tests required. He further alleges the defendants are enforcing and utilizing against him standards or guidelines regarding vision qualifications which are arbitrary, capricious, and unreasonable, and not related to the employment work or service to be performed, and which are violative of his constitutional rights under both the Federal and Nebraska Constitutions. He alleges he possesses no adequate remedy at law; and, as previously stated, prays for injunctive relief against using the regulations in question. In his second cause of action he repeats the allegations of the first cause of action, and further alleges that the regulations pertaining to vision are void, vague, unreasonable, arbitrary, and unconstitutional and should, therefore, be declared void and unenforceable by the court by way of a declaratory judgment.

Plaintiff obtained a restraining order to be in effect until trial. The order was later modified to provide that the defendants may proceed with the selection of firefighter candidates and may fill 12 of the 14 vacancies, but the two remaining vacancies were to be held open for the plaintiff, Ross Allen McCrea, and a plaintiff in a similar action, Thomas J. Shimerdla, pending the outcome of the litigation.

The McCrea and Shimerdla cases were consolidated for trial before Judge Patrick W. Lynch; and the cases were tried pursuant to a stipulation of facts entered into between the parties and supplemented by testimony of witnesses, following which, the court took the matter under advisement, and entered orders denying the applications for injunction and dismissing plaintiffs' petitions. The court found that the vision requirements for entry level firefighter personnel were supported by competent evidence, that the minimum sight standards were not unreasonable or radically inconsistent with those for firemen in other metropolitan cities canvassed, and that they bore logical and reasonable relationship to an applicant's fitness and capacity to discharge the duties of a city firefighter. The court further found the minimum levels of fitness are and have been applied continuously and impartially to all candidates for employment with the Omaha Fire Division and no convincing evidence had been presented that there had been anything arbitrary or capricious in the adoption or application of the visual acuity standards for Omaha firemen.

Plaintiff McCrea has appealed to this court from the order of the District Court denying his injunctive relief and dismissing his petition, but it appears that Thomas J. Shimerdla, plaintiff in the other case consolidated for trial, has not appealed. Plaintiff's principal assignments of error are that the trial court erred in not finding that the vision standards enforced by the City of Omaha were capricious, ar-

bitrary, and not a reasonable or bona fide condition of employment; and also that the trial court erred in not finding an unreasonable classification existed between the standards for entry level firemen, and other firemen.

For the purpose of submitting the issues of the case to the court for determination, the parties and their attorneys entered into a stipulation as to the facts. Among the facts stipulated to were that the named defendants were the Mayor, Public Safety Director, Personnel Director, and Fire Chief of the City of Omaha and "that said persons were designated by law with the responsibility to promulgate, utilize and enforce the regulations for hiring fire fighters for employment by the City of Omaha, Nebraska." Also stipulated was that on or about August 2, 1976, the City of Omaha posted a notice for examination for the position of Fire Fighter (801), which announcement contained a description of the nature of the work and set forth the requirements for the position, including a requirement that vision be not less than 20/30 correctable to 20/20 in each eye and have normal color perception. It was further stipulated that Ross Allen McCrea did on or about August 26, 1976, make application to fill the position of Fire Fighter (801), and he was ranked No. 11 among the eligible candidates; that he fulfilled and satisfied each firefighter qualification and examination except the requirement relating to correctable vision; and that further the Personnel Director did on October 19, 1976, place his name on a Form P-20 as an eligible candidate to be hired, and he was selected for final testing and evaluation, including conformance with the minimum vision requirements required by the City of Omaha. It was further stipulated that on November 23, 1976, Ross Allen McCrea was given a health evaluation examination and was certified unqualified by Dr. Paul P. Reichstadt for unsatisfactory vision, and he was

so notified by letter from Paul L. Murphy, labor relations division, under date of November 30, 1976. It was further stipulated as of the date of the filing of the lawsuit and date of trial there was a position open and available for employment of the plaintiff as a firefighter. In addition, it was stipulated: "Vision requirements adopted by the City of Omaha for Fire Fighter are 20/30 vision in each eye, correctable to 20/20. The establishment of this minimum standard has been determined by the Personnel Department with the concurrence of the Fire Division by survey of the applicable standards utilized by other metropolitan cities in the selection and hiring of entry level fire fighters."

Attached to the stipulation are also copies of the requirements from other cities, including St. Louis, Missouri; Kansas City, Missouri; El Paso, Texas; Des Moines, Iowa; Sacramento, California; Phoenix, Arizona; Wichita, Kansas; Akron, Ohio; San Antonio, Texas; Lincoln, Nebraska; Cincinnati, Ohio; St. Paul, Minnesota; Tucson, Arizona; and Fort Worth, Texas. Also attached to the stipulation as exhibits were replies from certain cities contacted with reference to the foundation for the establishment of the applicable standards in each of such cities. Finally, it was stipulated that the National Fire Protection Association Pamphlet No. 1001, entitled "Fire Fighter Professional Qualifications" provides: " '2-2.7.2 Vision. The cause for rejection for appointment shall be: (b) Standard Visual Acuity. Standard visual acuity without correction, less than 20/40 in one eye, and 20/100 in the other eye; and with correction, less than 20/20 in one eye, and 20/40 in the other eye.' "

In addition to the facts stipulated by the attorneys, the evidence at the trial was implemented by the testimony of witnesses called by both the plaintiff and the defendants. Plaintiff called as his first witness Dr. Raymond E. Records, professor of medi-

cine and chairman of the ophthalmology department of the University of Nebraska Medical Center. He testified as to the meaning of 20/20 vision, stating it was regarded around the world as standard normal vision; and it provided a zero point or reference point for evaluating vision. He stated that at 20 feet a man with purportedly normal vision can resolve a letter which is 7 millimeters high. In answer to the question whether there was vision that is better than 20/20, he stated there was and that one can have vision that is 20/15, one line better than 20/20. He also testified he could find no medical literature establishing standards for firemen. He further stated the difference between vision of 20/30 and 20/20 was very small and that a man with 20/30 vision could do anything that a man with 20/20 vision could do. He was asked, based upon his acquaintanceship with the functions of a fireman and the eye standards required by the City, whether there was any rational basis with any reasonable medical certainty to restrict firefighters, as far as visual acuity, to those who have vision of 20/30 correctable to 20/20, and he replied "No." We note in passing that the record reveals the plaintiff's visual acuity test was 20/200. There is evidence in the record that prior to the establishment of the visual acuity test required of plaintiff, the standard for firemen in Omaha was set at 20/20, which was an even higher standard than the one to which plaintiff was subjected. There is also evidence in the record that in 1971 a meeting occurred between Fire Chief Van Scoy and George Miller, employment manager for the City of Omaha, in which it was determined to change the visual acuity standard from 20/20 to 20/30, correctable to 20/20, because of manpower problems and a shortage of applications for positions as firefighters. No scientific or medical studies were made to warrant the change. Evidence was also presented that face masks for use by firemen who wear glasses are

available. In an exhibit introduced by plaintiff there is a picture of face mask equipment which is shown covering a man wearing glasses; however, there is also testimony in the record indicating that particular equipment is intended for commercial use, and not for firefighting purposes. Fire Chief Van Scoy testified he was not ordering the type of face masks shown depicting an individual wearing glasses because of the way the diaphram hooks up and because the face piece is different. He was asked: "I am, therefore, asking you, Chief Van Scoy, there is equipment available for use by firefighters who wear glasses wherein a face mask can effectively fit over the face; isn't that correct? A. No, sir." Evidence was also presented to the effect that many of the firefighters for the City of Omaha do wear glasses, and are able to and do remove their glasses when fighting fires. Chief Van Scoy testified with reference to the problems arising with the use of eyeglasses by an on-the-line working firefighter, stating: "Well, one of the problems is, if you do not have good vision and you have to put the mask on that we have today, they will leak around the side where your glass frame goes back over your ear. And if they leak and you are in a contaminated area, smoke will get in there. If you get into a very toxic chemical, it could get into your facepiece and kill you."

It is to be noted in the instant case that the question of the reasonableness of the action taken by the personnel department in setting its visual acuity standards for firemen is well supported by the documentation which is part of the stipulation entered into between the parties. Of the approximately 15 cities responding to the survey conducted by the City of Omaha, it appears that every major metropolitan fire department has adopted standards of visual acuity similar to that adopted by the City of Omaha. In some cases the standards are more strict than

those adopted by Omaha; in other cases they are more lenient. We set out below a sampling of the replies received from the personnel departments and others of various cities replying to the inquiry of the City of Omaha as to the basis for establishing their visual standards for firefighters. The personnel department of the city of Cincinnati, Ohio in its reply states: "Medical standards for employees of the City of Cincinnati are established by the Civil Service Commission upon the advice of medical personnel including the Health Commissioner, the Fire Physician and the Police Physician. The present vision standards for Fire Recruit have been set at 20/40 each eye uncorrected (far point vision). * * * The Fire Division feels (and we agree) that vision standards are necessary considering that we are screening young persons in their 20's and that vision will probably deteriorate with age. The Fire Division has had no problems with retirements due to failing eyesight. It should also be remembered that fire personnel are required to drive heavy equipment under emergency conditions, as well as wear masks which may or may not permit the use of glasses." The personnel department of the city of St. Louis states in its response: "As you know from your prior survey, we require uncorrected vision measured at 20/20. We performed a thorough job study on this position prior to our last examination. Two elements were found which justified the 20/20 requirement. The first of these was brought out by members of the Fire Department. They felt that if a Firefighter were to lose his glasses or contacts during a fire that his life and that of his fellow Firefighters might be endangered. The use of glasses also affects the seal of the gas masks used by Firefighters.

"A review of the standard by our medical people brought out the fact that visual acurity [sic] tends to lessen with age. Thus, a young Firefighter hired

with affected eye sight might have a greater handicap later in his career than one with 20/20 vision." The Civil Service Commission of Akron, Ohio, replied stating that its vision requirements were established on a basis of "a study conducted by Dr. Gerald Bowling, Akron Physician, in conjunction with the Fire Division Training School," and stated: "The study determined that, due to the amount of smoke and steam generated at a fire and the consequences of a Firefighter losing or breaking glasses in high density smoke, contact lenses and/or glasses represent a substantial hazard to the individual and possibly other Firefighters who are dependent upon him. Therefore, the standard was set at 20/60, 20/40 corresponding to State Law which requires the wearing of eye glasses for operating vehicles and performing other work requiring corrective visual acquity [sic]." The personnel office of the city of St. Paul, Minnesota, also replied, enclosing a copy of a letter from a Dr. John R. Kennedy, O.D., St. Paul, Minnesota, who states that he had talked to Dr. Irvin Borish, professor of visual optics at Indiana University, and Dr. Oscar Richards, professor of optometry at Pacific University and as a result of those consultations his opinion was as follows: "The Fire Fighter must see to drive heavy equipment under most adverse conditions — rain, snow, night time. He must be able to function in smoke filled, dark room, climb stairways which may be broken, travel corridors which may have collapsed floors, and in addition, he is encumbered at times by respirator masks that reduce his vision. There is incomparable noise at times that prevents auditory signaling. If he wears glasses, these can be and have been broken or lost while doing his work, but he must still be able to perform his duties and reduce risk of loss of life or injuries to himself and others.

"It is my opinion as one who has specialized in the

field of human vision for more than twenty years that a Fire Fighter would be the least risk to his employer and himself if his visual acuity was 20/60 or better uncorrected and 20/40 or better with correction. He should have a normal field of vision, normal depth perception, and normal color vision."

All of the foregoing letters, and others, are in evidence by virtue of the stipulation of the parties and may be considered as evidence in this matter.

In City of Scottsbluff v. Winters Creek Canal Co., 155 Neb. 723, 53 N. W. 2d 543 (1952), quoting from the case of Standard Oil Co. v. City of Kearney, 106 Neb. 558, 184 N. W. 109 (1921) we stated: " 'In the exercise of police power delegated to a city, it is generally for the municipal authorities to determine what rules, regulations and ordinances are required for the health, comfort and safety of the people, but their action is not final and is subject to the scrutiny of the courts.'

"As stated in Union Pacific R. R. Co. v. State, 88 Neb. 247, 129 N. W. 290, quoting from In re Anderson, 69 Neb. 686, 96 N. W. 149: ' " 'The test in such cases is whether the regulation in question is a bona fide exercise of the police power or an arbitrary and unreasonable interference with the rights of individuals under the guise of police regulation.' " '

"A legal presumption exists in favor of validity, and unless the contrary appears upon the face of the ordinance, the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence that the regulation imposed by it is so arbitrary, unreasonable, or confiscatory as to amount to depriving such party of property without due process of law. State ex rel. Andruss v. Mayor, 120 Neb. 413, 233 N. W. 4; Council Bluffs Transit Co. v. City of Omaha, 154 Neb. 717, 49 N. W. 2d 453." Further, in Jones v. Village of Farnam, 174 Neb. 704, 119 N. W. 2d 157 (1963), we stated: "The acts of legislative bodies, whether state or municipal, if performed

within the prescribed limits, are not subject to revision or control by the courts on the ground of inexpediency, injustice or impropriety. Such are purely functions of legislative power. Neither will the courts take cognizance over matters involving the wisdom or necessity for the enactment of legislation. The legislative body may alone determine whether a certain piece of legislation is needed or advisable for the general government of the people from whom its power emanates. The concern of the courts is as to the limits of the power, and not the manner or method by which the power is sought to be exercised, if kept within the prescribed limits. Therefore, judicial inquiry is strictly one of power, and not of expediency. To do otherwise would amount to an unwarranted encroachment by the judicial branch of the government upon the powers of the legislative branch and thus tend to destroy the necessary coordination existing between these two separate branches. The principle was adopted by this court in Omaha & C.B. Street R. Co. v. City of Omaha, 114 Neb. 483 (208 N. W. 123); Enders v. Friday, 78 Neb. 510 (111 N. W. 140); Village of Bellevue v. Bellevue Imp. Co., 65 Neb. 52 (90 N. W. 1002)."

The standards involved in this case are directly related to the health and safety of the firemen and the public, and hence are a proper exercise of the police power of the state, and are not violative of any rights of the plaintiff under the State or Federal Constitutions. We conclude that appellant has failed to sustain his burden to establish the invalidity or unconstitutionality of the standards in question.

Two other matters require discussion. Although this action is clearly not an action brought under the Nebraska or Federal Fair Employment Practice Act, plaintiff points out that under section 48-1101, R. R. S. 1943, it is declared to be "the policy of this state to foster the employment of all employable persons in the state on the basis of merit regardless

of their race, color, religion, sex, *disability*, or national origin, and to safeguard their right to obtain and hold employment without discrimination because of their race, color, religion, sex, *disability*, or national origin." (Emphasis supplied.) He further points out that under section 48-1102 (8), R. R. S. 1943, disability is defined as "any physicial or mental condition, infirmity, malformation, or disfigurement which * * * shall include, but not be limited to * * * visual impediment * * *, and shall also mean the physical or mental condition * * * unrelated to such person's ability to engage in a particular occupation." We believe the evidence in this case clearly establishes that a visual impediment in a firefighter is not "unrelated" to such person's ability to engage in his occupation, even though his visual acuity, as such, may possibly be corrected by the wearing of glasses for ordinary purposes.

We also note that section 48-1108, R. R. S. 1943, further provides: "Notwithstanding any other provision of sections 48-1101 to 48-1125, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, * * * on the basis of his religion, sex, *disability*, or national origin in those certain instances where religion, sex, *disability*, or national origin is a bonafide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * *." (Emphasis supplied.) Plaintiff's contention in this regard is clearly without merit; and any discrimination, if such there be, is based upon a bona fide occupational qualification. Plaintiff also points out that section 20-126, R. R. S. 1943, provides: "It is the policy of this state to encourage and enable the blind, the *visually handicapped*, and the otherwise physicially disabled to participate fully in the social and economic life of the state and to engage in remunerative employment." (Emphasis supplied.) We note, however, that section 20-131, R. R. S. 1943,

provides: "It is the policy of this state that the blind, the *visually handicapped*, and the otherwise physically disabled shall be employed by the state, the political subdivisions of the state, the public schools, and all other employment supported in whole or in part by public funds on the same terms and conditions as the able bodied, *unless it is shown that the particular disability prevents the performance of the work involved.*" (Emphasis supplied.) The nonapplicability of the above section is clearly evident, as the evidence supports the conclusion in this case that the particular disability does prevent the performance of the work involved.

In Maxwell v. Civil Service Commission of City and County of San Francisco, 169 Cal. 336, 146 P. 869 (1915), a case which has been repeatedly cited and affirmed since its issuance, the court had before it the San Francisco Charter providing for a classified civil service and declaring that all places of employment in the department shall constitute the classified service, and that applicants for places therein shall be subjected to examination which shall include "appropriate" tests of physical qualifications. The court held that the commission holding an examination for promotion in the fire department from the rank of battalion chief to the rank of assistant chief engineer could dispense with the physical tests, and the court would not interfere with its discretion. The language of the court in that case is interesting and persuasive: "While it cannot be denied that physical fitness and health are prime requisites for a fireman, whatever his work in the service, it does not follow that in all examinations, those to determine the fitness of applicants for promotion, as well as those having for their object the selection of eligible men for entry into the department, there should be included tests of physical qualifications and health. Section 4 of article 13, quoted above, does not require physical tests in all

cases or even in any specifically defined cases. Such tests are to be included 'when appropriate.' It would seem that, under this language, the decision whether physical tests are appropriate is committed to the civil service commission, and that it is difficult to say, in any particular case, that the appropriateness is so clear and obvious that a court would be justified in controlling the determination of the board. * * * Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. They may decide a particular question wrong — but it is their question. Such boards are vested with a high discretion and its abuse must appear very clearly before the courts will interfere."

We conclude from an examination of the evidence in this case and the applicable law, that the trial court was correct in denying plaintiff's application for an injunction, and in dismissing plaintiff's petition in this action. We affirm the judgment of the District Court.

AFFIRMED.

ROBERT R. TAYLOR, APPELLEE AND CROSS-APPELLANT, V. PHYLLIS J. FROST, APPELLANT AND CROSS-APPELLEE.

276 N. W. 2d 656

Filed March 20, 1979. No. 41870.

1. **Public Policy: Contracts.** A bargain in whole or in part for or in consideration of illicit sexual intercourse or of a promise thereof is illegal; but subject to this exception, such intercourse between parties to a bargain previously or subsequently formed does not invalidate it.
2. **Public Policy: Equity.** The doctrine that one who seeks the help of a court of equity must come into equity with clean hands is founded upon public policy, and conflicting public policy considerations may require relaxation or limitation of the application of that equitable maxim.

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

William G. Line of Kerrigan, Line, Martin & Hanson, for appellant.

Nicholas J. Lamme of Yost, Schafersman, Yost, Lamme & Hillis, for appellee.

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

CLINTON, J.

This action by plaintiff, Robert Taylor, against the defendant, Phyllis Frost, is founded upon three theories. First, plaintiff seeks the repayment of loans in the amount of $21,011.19, made by plaintiff to the defendant during the period of July 9, 1974, to October 10, 1976. Under the second theory, plaintiff seeks the recovery of the same money upon the premise of the existence of a constructive trust founded upon unjust enrichment, it being alleged that the money was advanced for the express purpose of purchasing a residence in Fremont, Nebraska, which would be the home of the parties when they married; it is further alleged that, for convenience when the residence was purchased, the defendant was made grantee in the deed which was delivered on September 5, 1974; and that the engagement between the parties was terminated by the defendant and she has refused to convey the property or return the money to plaintiff. The third theory appears to be that of resulting trust. The prayer of the petition was for the declaration that the defendant held the property for the plaintiff and that the property be ordered conveyed to the plaintiff.

The answer of the defendant admits the money was received by her, and asserts two defenses: (1) The money advanced was by way of gift or payment made in consideration of meretricious sexual services rendered by her to the plaintiff, and (2) the de-

fendant is barred from obtaining relief either in law or in equity because he comes into court with unclean hands.

During the pendency of the action the property was, by agreement of the parties, sold and the net proceeds of the sale were, also by agreement, substituted for the real estate. The matter was tried to the court which found generally for the plaintiff and rendered judgment in his favor for the net proceeds of the sale of the property with accrued interest. We affirm the judgment of the trial court.

The evidence tends to establish the following facts. Although the parties never lived together, they had engaged in sexual intercourse clandestinely beginning sometime in early 1971 until sometime in 1976. This action was commenced in 1977. When the parties first became acquainted in the summer of 1970, Phyllis was married and contemplating divorce from her husband. In February 1971, she commenced an action for divorce. According to Robert's testimony, this is when the sexual relations commenced and it was during a period of time when they contemplated marriage. According to Phyllis, sexual relations commenced in October of 1970. A decree of divorce was entered in July 1971. However, before it became final, Phyllis had the decree set aside on October 22, 1971. Sexual relations between the parties continued even after the decree was vacated. They stopped seeing each other for a period of about 9 months ending in October 1973, at which time Robert testified that Phyllis called and said they could "make a go of it." In July 1974, Phyllis again filed a divorce action and a second decree of divorce was entered on September 27, 1974. During the time preceding the filing of the second petition, the evidence indicates that Robert gave Phyllis various gifts and money, as he was to do later. However, none of these gifts or funds are money or property here involved.

The first of the advances of money used for the purchase and improvement of the residence in question was $1,200 paid on July 9, 1974, which at that time was for the purpose of enabling Phyllis to make a downpayment on a duplex (not the property here involved) for use as a residence for Phyllis and her children "until she and I were married." However, that purchase did not take place. Sometime later, before the conveyance of September 5, 1974, the parties made a joint decision to purchase the property here involved. Phyllis used $1,000 of the $1,200 previously mentioned to make the earnest money payment. Later Robert furnished the balance of the downpayment in the amount of $8,000, and from time to time thereafter furnished additional funds for carpeting, drapes, landscaping, house payments, and other improvements. In all, Robert furnished more than $21,000 which indisputably was used for the house in question. At the time the contract was entered into, the house was still in the process of construction.

Robert testified he furnished the money because they were going to be married and with the understanding that the house would then be their home.

Phyllis testified the money constituted gifts given for sexual services and that she was "prostituting [herself] for this house." Phyllis, however, acknowledged she was contemplating marriage with Robert and that "sometimes" she contemplated the use of the residence as "our" home.

Robert purchased engagement and wedding rings in about February 1976 and later gave the engagement ring to Phyllis. She wore it from time to time but returned it later in the year.

Without setting forth the testimony of the parties in detail, it was clearly sufficient to permit the trial judge to find that the parties did have an agreement to marry, that Robert advanced the money to Phyllis because he intended the property to be their

home when they married, and that Phyllis understood and agreed with this plan. It is plain the trial court did not believe Phyllis' testimony that there was a bargain between the parties that money invested in the property was in exchange for sexual services.

The above evidence was sufficient to permit the court to find either a resulting trust or a constructive trust. Kuhlman v. Cargile, 200 Neb. 150, 262 N. W. 2d 454; Jirka v. Prior, 196 Neb. 416, 243 N. W. 2d 754. The judgment must be affirmed unless either of the two defenses are good. That is the question which we here decide.

As to the first defense that the contract was in consideration of meretricious sexual services, the parties do not cite and we cannot find any Nebraska precedents directly on point. We adopt the following rule: "A bargain in whole or in part for or in consideration of illicit sexual intercourse or of a promise thereof is illegal; but subject to this exception such intercourse between parties to a bargain previously or subsequently formed does not invalidate it." Restatement, Contracts, § 589, p. 1098. Cougler v. Fackler, 510 S. W. 2d 16; Corbin on Contracts, § 1476, at p. 622. The evidence we have earlier recited would permit the trial court to find that the illicit sexual intercourse between the parties was not in whole or in part in consideration or exchange for the money advanced to pay for the residence. It may be the parties would not have contemplated marriage except for having engaged in illicit sexual relations. However, that conduct began long before the parties contemplated the purchase of a home. If Robert's testimony is believed, then such relations and their continuance were no part of a bargain for the advancement of the funds necessary to purchase and improve the property.

The second defense offers considerably more difficulty. It is a sound public policy to protect the mar-

ital relationship from interference, and agreements which interfere with the relationship are ordinarily unenforceable. Breiner v. Olson, 195 Neb. 120, 237 N. W. 2d 118; Morgan v. Wright, 219 Ga. 385, 133 S. E. 2d 341.

When the parties to this action began their sexual relationship, and when they first contemplated marriage in 1971, Phyllis was a married woman and not free to contract marriage. That status continued until 6 months after September 27, 1974. Robert acknowledges he knew Phyllis was not free to marry. Robert was unmarried throughout this relationship.

Ordinarily one who seeks the help of a court of equity must come into equity with clean hands. This doctrine is founded upon public policy and conflicting public policy considerations may require relaxation or limitation of the application of that equitable maxim. Lloyd v. Gutgsell, 175 Neb. 775, 124 N. W. 2d 198. As we have noted, Phyllis, while still married, claims to have made a contract of prostitution in order to gain a house. Such contracts by a married person are also contrary to the public policy which is designed to protect marriage, as well as the legislative public policy making prostitution illegal. If we were to hold that the "clean hands" maxim enables one in her claimed position to keep her "illegal" gains, then that would also tend to interfere with the marriage relationship and might promote fraud. All things considered, we believe the trial court was correct in relaxing the application of the clean hands doctrine in this case.

The plaintiff has cross-appealed, urging that he have judgment for the amount he expended in the purchase and improvement of the home, rather than the net amount after deducting the expenses of the sale. Without respect to the abstract merits of plaintiff's claim as to the proper measure of damages, we believe the stipulation of the parties forecloses the claim. It recites ". . . the purpose hereof

is to substitute the net sale proceeds of the real estate in lieu of the real estate . . ." Other language of the stipulation might arguably support the conclusion that the net proceeds were to be applied to the judgment. The amount contributed was a matter of proof. The latter provision would seem to apply if the judgment were for less than net proceeds. The trial court apparently interpreted the stipulation in this manner. We do not intend to change it.

AFFIRMED.

RIGID COMPONENT SYSTEMS, A CORPORATION, APPELLANT, V. NEBRASKA COMPONENT SYSTEMS, INC., AND UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLEES.

276 N. W. 2d 659

Filed March 20, 1979. Nos. 41894, 41897.

Corporations: Words and Phrases. The word "maintain," within the statute providing that no foreign corporation transacting business in the state without a certificate of authority shall be permitted to maintain any action, suit, or proceeding in any court of the state until such corporation shall have obtained a certificate of authority, does not inhibit the institution of the action, and a foreign corporation may at any time after the action is brought maintain and prosecute it by first complying with the terms of the statute.

Appeals from the District Court for Pierce and Knox Counties: MERRITT C. WARREN, Judge. Affirmed.

B. B. Bornhoft, for appellant.

Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellee United States Fidelity And Guaranty Company.

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and CASE and FUHRMAN, District Judges.

CASE, District Judge.

This action arises out of two separate actions in

two different counties by a nonresident corporation against a resident corporation and its surety on a performance bond. The parties, the issues, and counsel are identical in each action and by stipulation the cases were heard and ruled on at the same time in the lower court. The stipulation has been allowed in this court and both cases are controlled by our rulings herein.

The plaintiff-appellant, Rigid Component Systems, is a foreign corporation in the business of supplying building materials and the defendant-appellee, Nebraska Component Systems, Inc., was engaged in residential construction. The codefendant, United States Fidelity And Guaranty Company, was the surety on the performance bond of Nebraska Component Systems, Inc.

The defendant, Nebraska Component Systems, Inc., was dissolved as a corporation on August 3, 1976, and these actions were filed against the dissolved corporation and its surety on July 6, 1977, to recover for building materials furnished.

A pretrial motion was filed by the defendants to dismiss based upon an alleged failure of the plaintiff to secure a certificate of authority under the provisions of section 21-20,121, R. R. S. 1943, which provides in substance that a foreign corporation may not maintain an action in a Nebraska court arising out of the transaction of business in this state until it has secured a certificate of authority to transact business within the state. The lower court sustained the motion and dismissed plaintiff's petitions.

The plaintiff's position here presents the question of whether a foreign corporation not eligible to sue under the statute at the time the action is instituted can, after bringing it, maintain the action by complying with the terms of the statute.

We have not previously defined "maintain" as used in this statute. We find the following definitions: "A suit is deemed to be pending from the

time it is commenced until its final determination. To maintain a suit is to uphold, continue on foot, and keep from collapse, a suit already begun." 1 Am. Jur. 2d, Actions, § 91, p. 620.

The word "maintain" as applied to actions is further defined as to continue, to carry on, to support, as contradistinguished from to institute, the action that has already been brought. 54 C. J. S., Maintain, p. 902.

The verb "maintain" in pleading has a distinct, technical signification. It signifies to support what has already been brought into existence. California Savings & Loan Soc. v. Harris, 111 Cal. 133, 43 P. 525 (1896).

A like definition appears substantively in Black's Law Dictionary, (4th Ed.), p. 1105, and in Inn Operations, Inc. v. River Hills Motor Inn Co., 261 Iowa 72, 152 N. W. 2d 808 (1967). We adopt these definitions as being applicable to the statute in question.

The plaintiff alleges delivery of materials in December of 1975, and January and February of 1976. The petitions were filed in July of 1977, and the motions for dismissal were filed October 19, 1977.

The plaintiff contends it should have been given an opportunity to secure the certificates of authority during the course of litigation. The plaintiff made no request for additional time in which to comply and the record is devoid of any offering to procure the certificate up to and including hearing in this court.

The issue could have been resolved by the procuring of the certificate during the substantial period between filing and the adverse ruling or by domestication under the provisions of section 21-20,122, R. R. S. 1943.

We now hold that whenever the issue is raised and supported by proper proofs, the court may in its discretion limit the time for procuring a certificate or dismiss as was done here.

The ruling appealed from is correct and is hereby affirmed.

AFFIRMED.

CITIZENS STATE BANK, APPELLANT, V. ROBERT E. SPARKS, APPELLEE.

276 N. W. 2d 661

Filed March 20, 1979. No. 41909.

1. **Uniform Commercial Code: Notice.** Compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency.
2. **Uniform Commercial Code: Notice: Burden of Proof.** The burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice.
3. **Uniform Commercial Code: Notice: Sales.** Where a secured party conducts a private sale of repossessed collateral security, the notice required by section 9-504 (3), U. C. C., is reasonable notification of the time after which any private sale is to be made.
4. **Uniform Commercial Code: Notice: Waiver.** Relinquishment of keys to an automobile being held as collateral, for a limited purpose, and execution of title to that automobile, which execution is unauthorized, does not constitute a waiver by the debtor of reasonable notice required by section 9-504 (3), U. C. C.

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

Richard L. Spittler, for appellant.

Mac H. McConnell, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY, and MCCOWN, JJ., and RICHLING and CLARK, District Judges.

CLARK, District Judge.

The county court of Madison County in an action for a deficiency judgment against the defendant-debtor found that reasonable notice had not been given to the defendant by the plaintiff, as required by section 9-504 (3), U. C. C.

The District Court affirmed the judgment of the county court and dismissed the plaintiff's petition. The plaintiff then perfected this appeal. We affirm the judgment of the District Court.

The record reflects that in March 1974 defendant executed a note and security agreement with plaintiff bank in order to purchase the automobile in question. After making payments for some time, defendant fell delinquent, and the bank claimed the note due and payable in the early part of 1976. Attempts were made by the defendant or his family to rewrite the loan without success.

Thereafter, on or about February 2, 1976, the plaintiff, through its officer, James Tonniges, telephoned defendant's residence in Clearwater, Nebraska, and informed defendant or his family that the car would have to be repossessed.

By letter dated February 5, 1976, Mr. Tonniges advised defendant: "This is to inform you that we are in the process of reposessing [sic] your 1971 Dodge Charger. Someone will be there within the next few days to pick up the car. We will then sell the car and the money will be applied to your note, any balance remaining will then be taken to small claims court." This letter constituted the only notice given by the bank to the defendant relating to the intended disposition of the automobile.

Toward the end of February 1976 the automobile was towed away and taken to a garage for repairs, since it was inoperable at the time. Several days later defendant gave the car keys to a garage employee because "* * * they come and picked it up and I figured they were going to work on it, and so I gave — just gave him the keys."

The automobile was subsequently taken to Contois Motor Company in Neligh, Nebraska, where it was sold at private sale on June 7, 1975. Mr. Tonniges did not recall exactly how much the car sold for but thought it was around $1,000, which amount was

credited to defendant's account. The sales tax receipt indicated a sale price of $1,275. Contois Chevrolet received no commission, and there were no expenses of sale. The variation in price is not explained by the record.

The title to the auto in question was never actually in defendant's name but was in the name of defendant's parents, apparently for the purpose of obtaining a lower insurance premium. Everyone acknowledged that the car actually belonged to the defendant, and the case was tried on that theory. For purpose of appeal we will also follow that theory.

On about June 5, 1978, defendant's parents, at the request of plaintiff's agent, signed the title to the car over to plaintiff bank. Defendant was not aware of the fact that his parents had signed the title over until some time later, and it was apparently done without his authority.

Plaintiff assigns as error the finding of the lower courts that the notice given by plaintiff did not constitute reasonable notification of a private sale pursuant to the provisions of section 9-504 (3), U. C. C., and failure to award a deficiency judgment against defendant.

Section 9-504 (3), U. C. C., insofar as it is pertinent to this case, provides "* * * Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor * * *."

The sale in this case was a private sale, and, therefore, the notice required by the Uniform Commercial Code is notification of the time after which the collateral will be sold. Such notice should be in written form and sent in such time that the debtor would have a minimum of 3 business days to ar-

range to protect his interests. See DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co., 196 Neb. 398, 243 N. W. 2d 745.

The only notification in this case was the letter from plaintiff to defendant some 3 weeks before the car was repossessed. This letter failed to state a time certain after which the collateral would be sold or even whether the sale would be public or private.

"Compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency." Bank of Gering v. Glover, 192 Neb. 575, 223 N. W. 2d 56.

"* * * the burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice. * * * Failure to give notice is an absolute bar to the recovery of a deficiency." DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co., *supra*.

It is obvious the letter of February 5, 1976, did not constitute notice as required by the Uniform Commercial Code in that it did not identify the type of sale or the time after which private sale would be made and, furthermore, was sent some 3 weeks prior to the time plaintiff took possession of the collateral.

The ruling of the lower courts must stand unless the defendant's right to notice was waived by his subsequent conduct amounting to waiver or estoppel.

Plaintiff argues that if the letter of February 5, 1976, was not sufficient notice, the defendant has waived his right to notice by his actions in relinquishing the keys to the automobile and in executing title thereto. In support of this proposition plaintiff cites a 1970 Kentucky case, Nelson v. Monarch Invest. Plan Of Henderson, Inc., 452 S. W. 2d 375. This case involved sale of an automobile held as collateral. The Kentucky court in its ruling sum-

marized the facts as follows: "The following facts appear. Defendant *voluntarily* transferred complete dominion and control of this automobile to plaintiff. He was advised in substance that he probably could obtain a better price than the plaintiff if he sold the automobile. Defendant told plaintiff that he did not want the car back under any circumstances. *Defendant delivered to plaintiff the car, the car keys, the license receipt and consignment agreement. The record indicates clearly defendant had no further interest in this automobile* and did not intend to bid on it. * * * The evidentiary material establishes an intentional relinquishment of the right to notice. If it did not constitute a waiver, it seems clear that defendant's actions relied on by plaintiff estopped him to claim a violation of the statute." (Emphasis supplied.)

We believe that Nelson v. Monarch, *supra*, can be distinguished from this case. In the instant case the automobile was not delivered to plaintiff voluntarily; the keys were delivered for a limited purpose, i.e., to facilitate repair work; and the title was executed by defendant's parents without defendant's authority or knowledge. Further, defendant expressed an interest in retaining the automobile.

While not denying that a case of waiver or estoppel could arise under section 9-504 (3), U. C. C., we do not feel the circumstances in this case rise to that level.

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

AFFIRMED.

GUSTAV THIESZEN IRRIGATION COMPANY, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS THIESZEN IRRIGATION CO., APPELLANT, V. TIM MEINBERG AND LEONARD MEINBERG, APPELLEES.

276 N. W. 2d 664

Filed March 20, 1979. Nos. 41911, 41912.

1. **Contracts: Time.** Where a contract is silent with respect to time of performance, a reasonable time for performance will be presumed or implied by law.
2. **Contracts: Time: Evidence.** Where a contract is silent with respect to time of performance, the reasonable time which is presumed by law is a rebuttable presumption, and parol or extrinsic evidence may be received to rebut that presumption.
3. **Contracts: Time: Juries.** Whether a specific delivery date was agreed upon or the question of whether delivery was effected within a reasonable time is ordinarily a question of fact for the jury, not a question of law for the court.

Appeals from the District Court for Seward County: WILLIAM H. NORTON, Judge. Affirmed.

Michael McGill and Richard H. Nowka of McGill, Koley, Parsonage & Ryan, P.C., and Milton R. Larson, for appellant.

Blevens, Blevens & Jacobs, for appellees.

Heard before KRIVOSHA, C. J., BRODKEY, and MCCOWN, JJ., and RICHLING and CLARK, District Judges.

CLARK, District Judge.

These cases, joined for trial and this appeal, were law actions tried to a jury wherein the plaintiff, Gustav Thieszen Irrigation Company, Inc., brought suit to recover the balance due upon contracts for delivery of center pivot irrigation systems against each of the defendants. Defendants, Tim Meinberg and Leonard Meinberg, cross-petitioned for recovery of damages to their crops by reason of late delivery of the systems.

At the close of plaintiff's cases the court directed

verdicts against each of the defendants for the contract price. Judgments were entered thereon, and they are not an issue in this appeal.

The jury found for each of the defendants on their cross-petitions, and plaintiff appeals. We affirm the judgment of the District Court.

The record reflects that the defendants, Leonard Meinberg and Tim Meinberg, are father and son and are farmers in Seward County, Nebraska. In September 1973 each of the defendants entered into a contract with plaintiff for a pivot irrigation system and made downpayments thereon.

The contracts entered into were complete as to description of the goods being sold, price, etc., but failed to indicate a time for delivery, although the contracts each provided a blank space for delivery date. These contracts further provided they were subject to price increase and that in the event of such a price increase, the defendants would have the option of cancellation.

In May 1974 the defendants each entered into subsequent contracts with plaintiff which were identical with the September 1973 contracts except that there was an increase in purchase price and they bore the notations that these contracts superseded all previous contracts between the parties.

The irrigation system was delivered to defendant Leonard Meinberg's farm on June 24, 1974, and was erected and operating on July 8, 1974. Defendant Tim Meinberg's system was erected and operating on July 5, 1974.

At trial evidence was allowed by the trial court, over objection by the plaintiff, to the effect that oral representations were made by agents of plaintiff that the systems would be delivered and operative in time for the 1974 crop season and to the effect that the systems would be delivered by June 1, 1974. Evidence was also received regarding reasonableness of delivery under all the circumstances surrounding

the transaction. Included in these circumstances was testimony regarding the September 1973 contracts.

The trial court ruled that the contracts of September 1973 and May 1974 were part of the same transaction and, further, that they were not fully integrated, inasmuch as they did not cover all the dealings of the parties in that no delivery date was provided for in any of the contracts.

The plaintiff assigns as error: (1) The court erred in determining that the contracts of May 8, 1974, were not fully integrated; (2) the court erred in admitting any parol evidence regarding the provisions of the September 26, 1973, contracts and the May 8, 1974, contracts; (3) the court erred in submitting instruction No. 9 to the jury, which instructed them that parol evidence could be considered for the purpose of determining whether a specific date of delivery had been agreed upon; (4) the court erred in allowing any evidence of the September 23, 1973, contracts to be put in the record; (5) the court erred in not finding as a matter of law that delivery was effected within a reasonable time; (6) the court erred in submitting the question of whether delivery was effected within a reasonable time to the jury; (7) the court erred in overruling plaintiff's motion for summary judgment on defendants' cross-petition; and (8) the court erred in overruling plaintiff's motion for a directed verdict upon defendants' cross-petitions.

Assignments of error (1) through (4) are concerned with the proposition of whether the May 1974 contracts were fully integrated and application of the parol evidence rule. They will be considered as one assignment of error.

The parol evidence rule has been stated as follows: "When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integra-

tion of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." Corbin on Contracts, § 573, p. 357.

Plaintiff argues that the contracts in this case are completely integrated in that the only item missing is the delivery date, and, it claims, that deficiency is supplied by operation of law. Obviously, if that deficiency is not supplied by operation of law, the contracts are not completely integrated, and parol or other extrinsic evidence should be allowed to explain the position of the parties in that regard.

It is true that where a contract is silent with respect to time of performance, a reasonable time for performance will be presumed or implied by law. See Davco Realty Co. v. Picnic Foods, Inc., 198 Neb. 193, 252 N. W. 2d 142; § 2-309 (1), U. C. C.; Williston on Contracts (3rd Ed.), § 38, p. 114.

There is a split of authority regarding admission of parol evidence on the issue of delivery time when the contract is silent on the subject. However, it has been held that the legal presumption of "reasonable time" is a presumption that can be rebutted by parol or other extrinsic evidence.

Professor Corbin states what we believe to be the better rule: "In the making of contracts, the parties often express their agreement on several terms, leaving some others unconsidered, or at least unexpressed. * * * For example, they may agree upon a sale of goods without specifying the time or place of delivery * * *. The law will often supply such a gap by requiring delivery 'within a reasonable time * * *.'

"Suppose, however, that the parties did in fact think of these matters and orally agreed upon a * * * definite time and place for delivery of goods, making this oral agreement simultaneously with the execution of a writing that states all the other terms of the selling agreement. Does the 'parol evidence

rule' prevent the enforcement of the oral agreement as to time and place, on the ground that it contradicts and varies a completely integrated written contract? The cases show that the courts have floundered and disagreed in answering this question. The answer should be No; the writing is only a partial integration * * *.

"The presumptions of law or fact, or the inferences, by which the court fills gaps in a contract that is in all other respects in writing, do not themselves constitute any part of the 'integration' that is supposed to be protected against variance or contradiction by the 'parol evidence rule.' By the weight of authority, supported by the better reason, oral testimony is admissible to prove that a time or place was agreed on and to rebut the usual presumptions and inferences that would otherwise prevail * * *. Oral testimony * * * is not varying or contradicting the writing; it is merely enabling the court to fill a gap by adding something that is not expressed in the writing at all." 3 Corbin on Contracts, § 593, at pp. 555, 556, 559. See, also, Fletcher v. Brewer, 88 Neb. 196, 129 N. W. 288; Huffman v. Ellis, 64 Neb. 623, 90 N. W. 552; Wehnes v. Roberts, 92 Neb. 696, 139 N. W. 212; Kansas City Bridge Co. v. Kansas City Str. Steel Co., 317 S. W. 2d 370 (Mo., 1958); and Williston on Contracts (3rd Ed.), § 640, at pp. 1054-57.

Further, "Did the parties assent to a particular writing as the complete and accurate 'integration' of that contract? In determining (this issue) * * * there is no 'parol evidence rule' to be applied. On (this issue) * * * no relevant evidence, whether parol or otherwise, is (to be) excluded." 3 Corbin on Contracts, § 573, at pp. 359-60.

The trial court, in allowing parol and extrinsic evidence on the subject of delivery time in this case, was correct.

The plaintiff's fifth and sixth assignments of error deal with whether the court should have determined,

as a matter of law rather than submitting to the jury, the question of whether delivery was effected within a reasonable time.

The record of the case and our ruling on admissibility of extrinsic evidence clearly reflect that there was a fact situation in this regard. "When there is no precise rule of law which governs, the question of what, under the circumstances of a particular case, is a reasonable time is usually a question for the jury." 53 Am. Jur., Trial, § 201, p. 171. We conclude that plaintiff's fifth and sixth assignments of error are without merit.

Plaintiff's seventh and eighth assignments of error deal with the failure to grant summary judgment or directed verdict in favor of the plaintiff on defendants' cross-petitions. In view of the court's opinion, these assignments are also without merit.

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

AFFIRMED.

NEGUS-SWEENIE, INC., APPELLANT, V. BEAVER LAKE CORPORATION, INC.; DEVELOPMENT SERVICES, INC., A FOREIGN CORPORATION; AND THE UNITED STATES NATIONAL BANK OF OMAHA, A BANKING CORPORATION, APPELLEES.

276 N. W. 2d 668

Filed March 20, 1979. No. 41927.

1. **Fraud.** The essential elements required to sustain an action for fraudulent misrepresentation are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage.
2. **Summary Judgments.** Summary judgment shall be rendered forthwith if the pleadings, depositions, and admissions are on file,

together with the affidavit, if any, showing that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

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

Patrick L. Cooney and Eugene L. Hillman of McCormack, Cooney & Mooney, for appellant.

Joseph Polack and Robert Schwarzkopf of Morsman, Fike, Davis and Schumacher, P.C., for appellees.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and WHITE, JJ., and J. KELLY, District Judge.

J. KELLY, District Judge.

The plaintiff-appellant brought suit against Beaver Lake Corporation, Inc.; Development Services, Inc.; and The United States National Bank of Omaha. This appeal relates only to the issue between the plaintiff, Negus-Sweenie, Inc., and the defendant, The United States National Bank of Omaha.

The plaintiff claims fraudulent misrepresentation by the defendant bank upon which the plaintiff relied to its damage. The defendant bank on April 5, 1972, wrote the following letter: "Mr. Don Hedrick; Hedrick, Cox and Associates; 6900 Granger Road; Cleveland, Ohio 44131; Dear Mr. Hedrick: You may advise your bidders that sufficient funds for the construction of the dam at Beaver Lake, in accordance with estimates furnished by the engineers in charge, are available at this bank.

"These funds may be used only in connection with the construction of said dam and will be disbursed to contractors and materialmen upon certification by the engineers that work has been completed and inspected and is in accordance with approved plans and specifications. Sincerely, INSTALLMENT LOAN DEPARTMENT, /s/ J. R. Burnham, Vice President."

The plaintiff, Negus-Sweenie, Inc., never inquired as to how much the estimate of the engineers in charge was or how much money was available at the bank.

The evidence discloses that the engineer's estimate was $910,000, which was later increased to $948,570. The plaintiff's original bid was $1,249,945. The defendant bank actually advanced to Beaver Lake Corporation, Inc., the sum of $1,000,000 and the plaintiff, Negus-Sweenie, Inc., admits it received the sum of $1,016,784.59.

The defendant bank did not make an untrue statement as to funds available, in fact made more funds available than the amount of the estimate of the engineers in charge.

When the bank issued the April 5, 1972, letter it made no untrue or misleading statements and stated: "* * * in accordance with estimates furnished by the engineers in charge * * *." If plaintiff, Negus-Sweenie, Inc., did in fact rely on said letter, they were obligated to find what the engineer's estimate was.

There is no genuine issue as to any material fact and the judgment of the District Court ordering that the motion for summary judgment be granted is correct and is affirmed.

AFFIRMED.

VINCE KESS, INC., APPELLEE, V. KRUEGER CONSTRUCTION COMPANY AND UNIVERSAL SURETY COMPANY, APPELLANTS.

276 N. W. 2d 669

Filed March 20, 1979. No. 41928.

1. **Mechanic's Liens.** One who furnishes material used in the construction of an improvement is not excluded from the benefits of the mechanic's lien law solely because the materials so used were furnished to a subcontractor of a contractor.

2. _____. The object of the mechanic's lien law being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions.
3. _____. The object of the statute in permitting an account for labor and materials furnished to be filed for record is to apprise persons dealing with the real estate of the existence of such claim for a lien.

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

Mark A. Hunzeker of Pierson, Ackerman, Fitchett & Akin, for appellants.

Bailey, Polsky, Huff, Denney & Cada and James D. Smith, for appellee.

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and CASE and FUHRMAN, District Judges.

FUHRMAN, District Judge.

This is a suit brought by appellee, Vince Kess, Inc., for the foreclosure of a mechanic's lien which had been transferred to other security. The appellants, Krueger Construction Company and Universal Surety Company, demurred to the amended petition of appellee. The demurrer was overruled. Appellants elected to stand on their demurrer, and judgment was entered in favor of appellee in the sum of $378.92 with interest at 9 percent plus the sum of $3.25 and costs. Appellants appeal from said judgment.

The appellee sold and delivered supplies and materials to Chuck Tramp Drywall, a subcontractor of the appellant, Krueger Construction Company, which were used in the construction of a house on "Lot Ten (10), Block One (1), Prairie Acres, Lincoln, Lancaster County, Nebraska."

The first issue raised by the appellant is whether a person who furnishes material to a subcontractor of a contractor is entitled to a mechanic's lien under the provisions of section 52-102, R. S. Supp., 1978.

Section 52-102, R. S. Supp., 1978, provides in part:

"Any person or subcontractor who shall * * * furnish any material * * * for any of the purposes mentioned in section 52-101, to the contractor, or any subcontractor who shall desire to secure a lien upon any of the structures mentioned in said section, may file a sworn statement of the amount due him from such contractor for such * * * material * * * within four months from the * * * furnishing such material * * *. If the contractor does not pay such person or subcontractor for the same, such subcontractor or person shall have a lien for the amount due * * * and the risk of all payments made to the original contractor shall be upon the owner until the expiration of the four months hereinbefore specified."

Appellant contends that since appellee was a supplier of materials to a subcontractor the appellee does not fall within the terms of the statute.

In Zarrs v. Keck, 40 Neb. 456, 58 N. W. 933 (1894), a person who supplied materials to a subcontractor of a subcontractor was held to be entitled to a mechanic's lien. In the case at bar, the issue being raised by a demurrer, it is undisputed that the appellee furnished the supplies and materials in the value claimed. There is no reason for this court to construe the statute so as to exclude appellee from its benefits simply because it furnished material to a subcontractor of a contractor. We conclude that one who supplies material used in the construction of an improvement is not excluded from the benefits of the mechanic's lien law solely because the materials so used were furnished to a subcontractor of a contractor.

The remaining issue is whether the mechanic's lien law requires a written itemization of all materials furnished under the provisions of section 52-103, R. S. Supp., 1978, which provides in part: "Any person entitled to a lien under section * * * 52-102 shall make an account in writing of the items of labor * * * or material furnished * * * shall * * *

file the same in the office of the register of deeds * * *."

The mechanic's lien statement filed by the appellee contains the street address for the property on which the materials were furnished along with the words "materials purchased for construction" and a monetary amount of $378.92. The mechanic's lien statement also states that the materials set out in the account were furnished for "Chuck Tramp Drywall."

The object of the mechanic's lien law being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions. LaPuzza v. Prom Town House Motor Inn, Inc., 191 Neb. 687, 217 N. W. 2d 472 (1974). The object of the statute in permitting an account for labor and materials furnished to be filed for record is to apprise persons dealing with the real estate of the existence of such claim for a lien. Portsmouth Savings Bank v. Riley, 54 Neb. 531, 74 N. W. 838 (1898).

The mechanic's lien statement filed by the appellee was certainly sufficient to put others on notice, including the appellant, Krueger Construction Company, that the appellee was claiming a mechanic's lien in the amount of $378.92 for materials supplied to Chuck Tramp Drywall for construction improvements on the specified piece of property described in the mechanic's lien statement.

The evidence supports the judgment of the District Court.

AFFIRMED.

SYLVIA DIANE QUIGLEY, APPELLEE, V. JAMES HENRY QUIGLEY, APPELLANT.

276 N. W. 2d 671

Filed March 20, 1979. No. 41931.

1. **Divorce: Child Support: Time.** An application for modification or change with respect to allowance for child support in a divorce decree may be made subsequent to the time of the decree, but must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res judicata.
2. **Divorce: Attorney's Fees.** Award of attorney's fees is discretionary with the trial court.

Appeal from the District Court for Cherry County: GEORGE H. STANLEY, Judge. Affirmed.

Scritsmier, Romatzke & Byrne, P.C., for appellant.

R. Kevin O'Donnell and William P. Mueller of McGinley, Lane, Mueller, Shanahan & McQuillan, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and WHITE, JJ., and J. KELLY, District Judge.

J. KELLY, District Judge.

This is an appeal from the order of the District Court for Cherry County, Nebraska, denying an application of the appellant to reduce child support payments, alleging a substantial change in the circumstances of the parties.

The marriage of the parties was dissolved on September 13, 1976, and the court ordered child support payments in the amount of $900 per month for three minor children. No appeal was taken from this decree.

On August 1, 1977, the appellant filed an application for modification of decree. The appellant alleges his income has been reduced and the appellee has become employed since the date of the decree on September 13, 1976.

Prior to the decree dissolving the marriage the appellant had been a partner in the law firm of Quigley, Dill and Quigley in Valentine, Nebraska; however, at the time the decree was entered, September 13, 1976, the appellant was not in the law firm and had no law firm income for that year.

The appellant has a license to practice law in the State of Nebraska; this is the position he was in at the time of the decree of dissolution on September 13, 1976.

A proceeding to modify a judgment for child support is not a retrial of the original case or review of the equities of the original decree. The subsequent employment of the appellee at a modest salary is not itself sufficient to require a change in child support.

The judgment of the District Court is affirmed.

AFFIRMED.

HARRY RUDOLPH, APPELLANT, V. WALTER A. HARTUNG, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES C. MCDANIEL, DECEASED, ET AL., APPELLEES.

277 N. W. 2d 60

Filed March 20, 1979. No. 41957.

1. **Contracts: Statutes: Frauds, Statute of: Equity: Wills.** An oral agreement to make a will is unenforceable under the statute of frauds, section 36-105, R. R. S. 1943. However, nothing contained in sections 36-101 to 36-106, R. R. S. 1943, shall be construed to bridge the powers of a court of equity to compel specific performance of agreements in cases of part performance.
2. **Contracts: Property: Evidence.** One seeking specific performance of an oral contract for the conveyance of real estate has the burden of proving by a preponderance of the evidence a contract that is clear, satisfactory, and unequivocal in its terms.
3. **Contracts: Intent: Evidence.** It is very proper that the assertion of such a contract, especially when it is claimed to be entirely in parol, should be regarded by the court with grave suspicion, and the establishment thereof required by evidence which clearly indicates the minds of the parties met upon the terms of the contract sought to be established.

4. **Contracts: Property.** In order to enforce an oral contract for the conveyance of a part of the estate of a deceased person the evidence of the contract and its terms must be clear and satisfactory; and the thing done constituting performance must be such as is referable solely to the contract sought to be enforced and not such as might be referable to some other and different contract.
5. **Contracts: Wills.** The part performance necessary to render an oral contract to make a will enforceable must be referable solely to the oral agreement.
6. **Equity: Witnesses: Evidence.** Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.

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

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

Dixon G. Adams, for appellees.

Heard before BOSLAUGH, BRODKEY, and WHITE, JJ., and SPENCER, Retired Justice, and COADY, District Judge.

SPENCER, Retired Justice.

This is an action for specific performance of an oral contract to execute a will permitting plaintiff, Harry Rudolph, to purchase farmland at a specific price. After hearing, plaintiff's petition was dismissed. Two questions are presented by Rudolph's appeal. (1) Was there an agreement to execute a will? (2) If so, was there sufficient performance to remove the contract from the statute of frauds? We affirm.

Rudolph became a tenant on the Charles McDaniel farm in Sarpy County in late 1953. The farm consisted of 210 acres, divided by the Rock Island Railroad. A tract of 63 acres lying north and west of the railroad is the area involved herein.

Rudolph claims sometime in the late summer of 1974, in the presence of his son Earl, he made an agreement with McDaniel to erect a building with

the understanding that sometime the land on which it was set would be his. Rudolph testified McDaniel, who was then past 80 years of age and living with an older sister, said "he would be glad to see the building put up. That we could reach an agreement that he would go ahead and take care of details. That it would be specified in his will that I could go ahead and purchase this."

Plaintiff's testimony was that he would have bought the ground at that time if he could have. McDaniel, however, said "he wants to own the property as long as he lives." They discussed a price but didn't know the exact acres. They thought it was 52 or 53 acres. They agreed on a price of $100,000. They had discussed a price of $2,000 an acre, but rounded it off at $100,000 when McDaniel said $4,000 or $6,000 wouldn't make any difference. Rudolph testified "He told me he would specify in his will that this portion should be entitled to me at his death."

Plaintiff testified he told McDaniel "if I couldn't be guaranteed of having the site in years to come, that I would go look for a different site to put my building on." The building was to be a machine shop so that he and his son, who had attended agricultural-mechanical school at Curtis, Nebraska, could do their own work and could operate a machine shop.

Earl Rudolph testified he and his father talked to McDaniel about purchase of the land. He was asked if they wanted to purchase it outright. His testimony was: "A- We would have been very open to that. This is what we had thought about trying to buy it at that time. And Charlie said, 'No, I own it until I die.' Q- And as the discussion continued, you finally agreed on a price of $2,000 an acre for approximately 53 acres, or rounding off to a $100,000. And when were you to buy the ground? A- Upon his death through the estate. Q- And did Charlie

say anything about putting that in his will? A- He made one statement: 'I'll take care of it.' Q- Did you subsequently have any further conversation or take part in any conversation between your Dad and Charlie and yourself regarding the agreement on the land? A- Yes, we had one conversation after that which I was in on and that was in the shop as it was being erected. He come up and stated it was a real nice building, happy to see you put it up. And we asked him at that time if he had thought anything more about it or if he was going to do anything about it and that, and he says yes. He says, 'I agreed that you will be able to purchase this parcel of land in discussion here for the set price.' And he says, 'After my death. I will take care of it.' "

William Dohse, a lifelong friend of McDaniel, testified that in July of 1975, he asked a question about the new building and McDaniel responded, " 'Oh, that's Harry's. It belongs to Harry and you'll have to ask him for more information.' " Dohse could not remember any further details about the conversation.

Web Warren, an insurance agent who insured McDaniel's buildings, testified he noticed the new building and asked McDaniel about it. Charlie told him he had given Harry permission to put up the building because he, Harry, was going to get the rest of the buildings anyway. He did not write any insurance on it because Harry had his insurance with another company.

There were two houses on the place, a big one in which Charlie and his sister lived, and a smaller one in which the Rudolph family lived. Rudolph had put several buildings on the place in addition to the machine shop. Some were grain storage bins and the others were machine sheds to house his machinery. Nothing appears in the record to indicate what agreement may have been made about these buildings, if any.

Charlie McDaniel died February 9, 1977, when he was close to 86 years of age. He was survived by a sister and several nephews and nieces. His last will and testament, dated September 18, 1968, was admitted to probate. His nephew, Walter A. Hartung, was appointed as the personal representative of the estate.

Walter and his brother Albert both testified Rudolph talked to them about buying this portion of the farm after their uncle's death, but made no mention of any agreement, nor was any price mentioned. Rudolph confirmed this conversation and admits he did not say anything about any agreement. He only told them he wanted to buy a portion of the farm. About 2 weeks later, when the Hartungs visited with Rudolph, he told them Charlie had said he could have it for $100,000. Walter told him he had better see attorney Adams as he couldn't think of selling it at that price.

Neither Walter nor Albert had ever heard about any agreement previously. Nor had Lulu, Charlie's surviving sister, ever mentioned it. They were unable to find any memorandum of any kind among Charlie's papers referring to any agreement to sell. They did find a letter from a Robert Corn, dated May 5, 1973, offering $4,000 per acre for the farm. This is a little over a year previous to the alleged agreement. The will offered for probate was found in McDaniel's safe deposit box. The bank records indicate Charlie McDaniel had been in the box several times after the alleged agreement in 1974.

An oral agreement to make a will is unenforceable under the statute of frauds, section 36-105, R. R. S. 1943. However, nothing contained in sections 36-101 to 36-106, R. R. S. 1943, shall be construed to bridge the powers of a court of equity to compel specific performance of agreements in cases of part performance. § 36-106, R. R. S. 1943.

It is well settled that one seeking specific per-

formance of an oral contract for the conveyance of real estate has the burden of proving by a preponderance of the evidence a contract that is clear, satisfactory, and unequivocal in its terms. Busteed v. Sheffield, 153 Neb. 253, 44 N. W. 2d 471 (1950).

We are in full agreement with the following statement found in Annotation, 69 A. L. R. 16: "It is very proper that the assertion of such a contract, especially when it is claimed to be entirely in parol, should be regarded by the court with grave suspicion, and the establishment thereof required by evidence which clearly indicates the minds of the parties met upon the terms of the contract sought to be established."

Rudolph is seeking to enforce an alleged oral agreement to sell the 63 acres, which was thought to be only 53 or 54 acres, for $2,000 an acre rounded off to $100,000. If we correctly interpret Rudolph's present position, he is willing to pay $2,000 an acre for 63 acres, or $126,000. The transaction was to be accomplished by putting a provision in a will expressing the agreement. The agreement is strictly oral. There is no direct corroboration of it. The testimony of the disinterested witnesses, which does not mention any such agreement, can as readily be explained by other theories.

We have repeatedly held in similar situations that in order to enforce an oral contract for the conveyance of a part of the estate of a deceased person the evidence of the contract and its terms must be clear and satisfactory; and the thing done constituting performance must be such as is referable solely to the contract sought to be enforced and not such as might be referable to some other and different contract. See Lintz v. Apking, 145 Neb. 714, 18 N. W. 2d 55 (1945).

Rudolph testified unless he had obtained an agreement he would have built the machine shop elsewhere. He spent $9,000 in its construction. The rec-

ord would indicate if there was an agreed price of $2,000 per acre, it was at least $1,500 per acre, or $94,500 less than had been offered the year previously. We are persuaded that if the facts and circumstances do not sufficiently indicate the existence of the contract the court should not allow equivocal parol evidence to supply its terms.

Plaintiff had previously constructed several other buildings on the property which were not involved in any specific agreements except such as might be inferred from his tenancy. The reasonable inference is that McDaniel had no objection to the erection of buildings on the property. The testimony of Warren, the insurance agent, is that McDaniel considered these buildings to be the tenant's, and the tenant maintained his own insurance on them. There is nothing in this relationship which would prove an agreement to sell.

We are puzzled by the fact that if the agreement was as definite as plaintiff testifies, some provision was not mentioned about the older sister who was living in the big house on the premises with McDaniel. The sale of the land to Rudolph would have involved the sale of the houses on the land.

Both the Rudolphs testified that McDaniel helped them in the shop after it was built. It does seem out of character for McDaniel not to have made a new will if that was his agreement, or at least to have visited about it with his sister who helped him with his financial affairs. All witnesses confirm he was a man of his word and had a very friendly relationship with the Rudolph family.

Everyone seems to agree McDaniel did not want to sell the property. For some reason he kept the written copy of the offer of $4,000 per acre which was made the year previous to the alleged agreement. It does not appear in character for him to have agreed to a $2,000 figure without some mention of the previous offer.

The implication in the testimony is that Rudolph would have given up his tenancy if the agreement had not been made. He was actually farming the Dohse land as well as the McDaniel farm. He could have put up the building on another site and still farmed the McDaniel land as well as the Dohse farm. In addition to farming Rudolph was operating a cattle feeding business. McDaniel wanted no part of it because of his age. He let Rudolph do so without any change in the annual rent, which was 60-40 grain rent plus $75 for a 17-acre pasture.

It does seem a little strange none of the parties realized there were actually 63 acres in the tract rather than 52 or 53 as supposed by Rudolph. In his approach to the Hartungs about the agreement, he said he had an offer to purchase for $100,000. The price agreed on was never too definitely established. From the record it seems to be if there were 52, 53, or 54 acres, the price was to be $100,000. If it was more, the price was $2,000 per acre.

We have a problem with the fact that if a contract was made, Rudolph never inquired after the building was erected as to what McDaniel had done to effectuate the agreement. It seems some mention would have been made about it or some memorandum would have been drawn over a period of almost 3 years, particularly when McDaniel was around the premises every day.

The part performance necessary to render an oral contract to make a will enforceable must be referable solely to the oral agreement. Overlander v. Ware, 102 Neb. 216, 166 N. W. 611 (1918). The fact that Rudolph had erected other buildings on the premises without some specific agreement other than consent would seem to raise a question as to whether the erection of the machine shop is referable solely to the alleged agreement.

An appeal in an equity case is tried de novo in the Supreme Court. § 25-1925, R. R. S. 1943. However,

as we said in Bailey v. Mahr, 199 Neb. 29, 255 N. W. 2d 866 (1977): "Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence. this court will consider the fact that the trial court observed the witnesses and their manner of testifying." On the record we cannot say the trial judge was wrong in dismissing the petition.

The record indicates that Rudolph has filed a $30,000 claim for the building, which is being held in abeyance pending the outcome of this case. The attorney for the estate stated in open court the estate made no claim to the building and had no objection to its removal from the premises. No attempt is being made herein to deprive the plaintiff of his property. The estate contends the plaintiff will suffer no loss when his claim is processed in county court.

The judgment of the District Court is affirmed.

AFFIRMED.

CREIGHTON-OMAHA REGIONAL HEALTH CARE CORPORATION, A NEBRASKA NONPROFIT CORPORATION, DOING BUSINESS AS CREIGHTON MEMORIAL ST. JOSEPH HOSPITAL, APPELLANT, V. DOUGLAS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

277 N. W. 2d 64

Filed March 20, 1979. No. 41996.

1. **Pleadings: Jurisdiction.** A plaintiff must plead and prove the jurisdictional facts, the facts which show that the court has jurisdiction of the subject matter of the action.
2. **Counties: Statutes: Poor and Indigent.** The county board by statute is made the overseer of the poor and the county has a mandatory duty to provide for poor persons whether they are residents or nonresidents of the county.
3. **Counties: Hospitals: Poor and Indigent.** A county may be liable for the reasonable value of necessary hospital services furnished to

a poor person where the county board after receiving notice of the situation neglects or refuses to make any arrangements for the care of the poor person.

4. _____: _____: _____. A hospital which furnishes hospital services to a poor person without prior authorization by the county board acts at its peril with respect to reimbursement from county funds.

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

C. E. Heaney, Jr., and John K. Green of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Donald L. Knowles, Douglas County Attorney, and John Q. Powers, for appellee.

Heard before BOSLAUGH, CLINTON, and WHITE, JJ., and RIST and WINDRUM, District Judges.

BOSLAUGH, J.

The plaintiff is a nonprofit corporation which operates Creighton Memorial St. Joseph Hospital in Omaha, Nebraska. The plaintiff appeals from an order sustaining a demurrer and dismissing the petition of the plaintiff in an appeal from the disallowance of a claim by the county board of Douglas County, Nebraska.

The petition alleged that on or about September 22, 1977, Willie Somora, a poor person within the meaning of sections 68-103 and 68-104, R. R. S. 1943, presented himself at the emergency room of the plaintiff's hospital for treatment of injuries. Documents which are included as a part of the transcript of the proceeding before the county board show that Somora had been employed as a cook's helper prior to being treated at University Hospital and released to Douglas County Hospital for treatment of alcohol abuse. Somora was then transferred to St. Joseph's Hospital for treatment of injuries Somora had sustained when he had been beaten and robbed. At St. Joseph's Somora was treated for a broken ankle, an

abscess on his right thigh, and a hernia. The hospital services furnished to Somora by the plaintiff amounted to $1,951.80.

The petition further alleged that after ascertaining the physical condition and financial resources of Somora, the plaintiff, by letter, requested the county board to arrange for appropriate medical and hospital care for Somora. The request was made before the plaintiff had rendered other than immediate necessary emergency services to Somora. The letter which appears in the transcript reads as follows: "Enclosed please find applications for medical or hospital assistance or both for the following medically indigent patient(s) now located in Douglas County who have presented themselves for treatment by the Saint Joseph Hospital.

"Simultaneously herewith we have delivered to the Douglas County Welfare Office the relevant medical and/or financial data needed to support these applications.

"The Hospital is willing to undertake to treat or continue to treat these patients if you are willing to contract with us for their care. If not, would you please advise us to whom these individuals should be referred in order to insure that they receive necessary and appropriate medical and hospital treatment."

The petition further alleged that the plaintiff received no response from the county board to its request; that "as a result of the defendant's failure to provide necessary care, plaintiff was required to admit Mr. Somora and render those hospital services medically indicated" which had a fair and reasonable value of $1,951.80; and that by reason of the facts alleged the defendant was indebted to the plaintiff upon a contract implied by law.

The petition also alleged that an agreement existed between the plaintiff and the defendant that patients of the Douglas County Hospital who were in

need of further medical treatment of a nature which the county hospital no longer provided, might be transferred to the plaintiff's hospital for treatment at the expense of the defendant. Somora, however, had been discharged from the county hospital by the defendant and then assisted in obtaining care at the plaintiff's hospital rather than transferred to the plaintiff's hospital under the transfer agreement.

The defendant contends that the demurrer was properly sustained for two reasons: (1) The petition failed to plead the jurisdictional facts; and (2) a county is not liable for hospital services furnished to poor persons in the absence of express authorization by the county board.

The defendant's first contention is based upon the absence of detailed allegations in the petition as to each step performed by the plaintiff in perfecting its appeal from the action of the county board. The defendant cites no authority which directly supports its contention and there is no such requirement.

It is a general rule that a plaintiff must plead and prove the jurisdictional facts, the facts which show that the court has jurisdiction of the subject matter of the action. Everts v. School Dist. No. 16, 175 Neb. 310, 121 N. W. 2d 487.

The jurisdictional facts in this case were that the plaintiff had filed a claim with the county board for hospital services furnished to a poor person and that the claim had been disallowed. These allegations were sufficient to show that the county board had jurisdiction of the claim and that upon disallowance the trial court could acquire jurisdiction by appeal.

The defendant's second contention is that the county is not liable for necessary hospital services furnished a poor person in the absence of prior express authorization by the county board. The defendant relies upon section 68-104, R. R. S. 1943, which provides as follows: "The county board of each county shall be the overseers of the poor and are vested with the

entire and exclusive superintendence of the poor in such county; Provided, the county board may employ a physician or physicians by the year to furnish such medical service as may be required for the poor of its county. In providing medical and hospital care for the poor, the county board shall make use of any existing facilities, including tax supported hospitals and charitable clinics so far as the same may be available. The county board shall have authority to arrange or contract for medical, surgical and hospital services at such rates as may be determined and the county shall not be liable for any such services not expressly authorized by the county board."

The county board by statute is made the overseer of the poor and the county has a mandatory duty to provide for poor persons whether they are residents or nonresidents of the county. §§ 68-104, 68-114, R. R. S. 1943; Mary Lanning Memorial Hospital v. Clay County, 170 Neb. 61, 101 N. W. 2d 510. We have said that the law must be construed so as to make it effective, otherwise it would be in the power of the authorities having charge of the poor to neglect or refuse to relieve the destitute. Gage County v. Fulton, 16 Neb. 5, 19 N. W. 781. If the county board or other public officers who are charged with the care of the poor and indigent arbitrarily refuse to perform their mandatory duty in respect to the care of the poor and indigent, appropriate legal remedies may be employed. Marshall v. County of Nance, 163 Neb. 252, 79 N. W. 2d 417.

In emergency situations the liability of the county has been recognized. In Miller v. Banner County, 127 Neb. 690, 256 N. W. 639, we said: "In the present instance we have a case of an emergency, where an immediate operation was necessary for the saving of human life. No county physician appears in the picture, and the county board has wholly failed to provide the essentials of the necessary care that

common humanity requires. Obviously, under these circumstances, the rule our statutory provisions imply and the history of poor relief in all jurisdictions sustains governs, viz., that in cases of emergency a physician should, if reasonably possible, attempt to communicate with the proper corporate authorities charged with the care of the poor, but if an arbitrary refusal is given, or if such corporate authorities be noncommittal, the necessary services may be rendered notwithstanding, and the law imposes an obligation upon the county to pay the reasonable value of such services." See, also, Burnham v. Lincoln County, 128 Neb. 47, 257 N. W. 491.

In Mary Lanning Memorial Hospital v. Clay County, *supra*, the county was held not liable for hospital services furnished a nonresident poor person where there had been no direct contract between the hospital and the county board. In that case we said: "The hospital undoubtedly could have avoided most of the difficulty it now finds itself in if, at the very first opportunity after Freytes was admitted, it had presented the matter directly to the county board for if the county board had arbitrarily refused to perform the mandatory duty imposed upon it by section 68-114, R. R. S. 1943, appropriate legal remedies could have been taken to enforce that duty."

In this case the plaintiff notified the county board of the situation by a letter which was hand delivered to the county board. The plaintiff received no response. The plaintiff then proceeded to furnish the necessary treatment which Somora required for his broken ankle, abscess, and hernia. Under these circumstances it would appear that a duty would arise for the county to pay to the plaintiff the reasonable value of the services which the county was obligated by statute to furnish to Somora. Otherwise, the board has the power to neglect or refuse to relieve the destitute.

In a situation such as in this case, the hospital acts

at its peril in furnishing hospital services without prior authorization. The question as to whether the patient qualifies as a poor person entitled to hospital services at the expense of the county is a question of fact to be decided in the first instance by the county board. See Neill v. Dakota County, 140 Neb. 26, 299 N. W. 294. The case before us is here on demurrer so that issue may be resolved upon a trial on the merits.

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

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. RANDY GALEN BOOTH, APPELLANT.

276 N. W. 2d 673

Filed March 20, 1979. No. 42195.

1. **Criminal Law: Police Officers and Sheriffs: Probable Cause.** 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.
2. **Criminal Law: Searches and Seizures: Probable Cause.** The existence of probable cause for a warrantless search must be determined on the particular facts and circumstances of each case which must be determined by a practical and not by any technical standard, and where time is of the essence it is a highly relevant factor in evaluating the circumstances.
3. **Criminal Law: Searches and Seizures: Police Officers and Sheriffs: Probable Cause.** Probable cause for search or arrest without a warrant can rest upon the collective knowledge of the police rather than solely on that of the officer who actually makes the search or arrest, when there is some degree of communication between the two.
4. **Criminal Law: Searches and Seizures: Probable Cause.** A furtive gesture when coupled with prior reliable information may constitute probable cause for search or arrest.
5. **Criminal Law: Police Officers and Sheriffs.** Circumstances and conduct which may very well not excite the suspicion of the ordinary person might be highly significant to a law enforcement offi-

cer trained in the habits and conduct and paraphernalia of users of drugs.

6. **Criminal Law: Searches and Seizures: Motor Vehicles: Probable Cause.** Probable cause for searching a motor vehicle is to be determined in view of its mobility and by a practical and not a technical standard, and differs from that required to search a fixed structure.
7. **Criminal Law: Searches and Seizures: Probable Cause.** Given probable cause to search, from a constitutional standpoint there is no difference between on the one hand seizing and holding a car at the station house before presenting the probable cause issue to the magistrate and on the other hand carrying out an immediate search without a warrant.
8. **Trial: Instructions.** The trial court may refuse a requested instruction where the substance of the request is covered in the instructions given.
9. **Criminal Law: Judgments.** 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.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Affirmed.

Jack R. Knicely, for appellant.

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

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

HASTINGS, J.

Defendant appeals his conviction for possession of amphetamines with intent to distribute, deliver, or dispense. He assigns as error the overruling by the trial court of his motion to suppress certain evidence seized without a search warrant and without an arrest warrant and the subsequent admission of that evidence at the time of trial, the refusal to give certain requested instructions, the admission of certain opinion evidence, and the overruling of defendant's motion for a directed verdict because of insufficiency of the evidence.

On June 4, 1977, David Bickford, a longtime resi-

dent of Sidney, Nebraska, drove over to the home of his 21-year-old son, Mark, to pick up some building material. Present were Mark, Terri, who is Mark's present wife, and the defendant. It appeared to him that an argument was in progress and he inquired of Terri what the problem was. She informed him that "Mark had just taken a needle or injected a needle in his arm." When Bickford asked his son what the story was he told him to mind his own business. He stated that his son was acting strangely, that he didn't see him use any drugs, but assumed that he had and that he had gotten them from the defendant. Mr. Bickford then relayed this information to deputy sheriffs Mark K. Teel and Charles D. Wolford.

Deputy Teel testified that he had been in law enforcement work since 1972, and a deputy sheriff since October 1, 1975; that he had attended several courses and seminars on narcotics and dangerous drugs, and on his own had studied a book entitled "Drugs and Abuse," issued by the Bureau of Narcotics and Dangerous Drugs, U. S. Department of Justice; that he had made from 50 to 60 arrests for drug-related crimes. He stated he was well acquainted with the defendant and had arrested him on two prior occasions and had searched his house on January 6, 1977, pursuant to a warrant, and had found various drug paraphernalia, such as scales, syringes, needles, bent spoons, and suspected marijuana. As of June 4, 1977, he was aware of the fact that defendant had been convicted of possession of marijuana, possession of firearms, and burglary, and that other deputies had told him when he first came on the force to observe defendant whenever possible as he was suspected of dealing in narcotics because they previously had searched his premises and found growing marijuana and firearms and suspected cocaine. He also related that Mr. Bickford had told him substantially the information set out above, and in addition that defendant was "try-

ing to get his son to shoot up with him" and that "it was time something was done."

The two deputies then proceeded downtown and very soon observed defendant driving his vehicle which they then followed to a point where he drove into a service station. The deputies parked diagonally across the street. They observed defendant pull up near the pop machine, get out of his car, go into the office, apparently purchase something, and return to his car. He pulled up to and past the gas pumps and started out into the street, at which time the deputies started their car. The defendant looked across the street and saw them, backed his car up to the gas pumps, and proceeded to fill his tank. Following this, defendant went into the office, apparently to pay for the gas, came out, and walked around to the rear to the restrooms. The deputies then pulled across the street and into the service station, met defendant, and while deputy Wolford went into the restroom to search for possible concealed contraband, deputy Teel told defendant he wanted to talk to him. The deputy noticed that defendant had a curved metal spoon hanging from the right side of his pants, and told him he had reason to believe that defendant was transporting narcotics. Defendant was barefooted and dressed only in a tank-top shirt and pair of trousers.

Deputy Teel instructed defendant to place his hands on his car and he was frisked. The only thing found was a crude homemade pipe that, according to the deputy based on his experience, was of the type used to smoke marijuana and which contained a residue suggestive of burned marijuana. Defendant was advised that the deputy had reason to believe that he was transporting narcotics in his vehicle, at which time defendant appeared to be getting very nervous and commenced rubbing the inner portion of the bowl of the spoon with his thumb. Deputy Wolford started reading defendant the

Miranda warnings and Teel proceeded to search the auto on both sides of the front seat, on top, and beneath the seat. Underneath the seat on the driver's side a tin Sucrets container was found containing several small white tablets suspected to be amphetamines, five syringe needles, one 1 cc. plastic syringe, a clear plastic bag containing green leafy materials, an aspirin container containing a blue tablet, a Coke bottle cap, and a razor blade. Defendant was then informed that he was under arrest for possession of amphetamines.

After obtaining defendant's permission, deputy Wolford drove his automobile to the courthouse, while deputy Teel took defendant in the patrol car and booked him into jail. Defendant's car was locked, and about 1½ hours later the deputies made an inventory search of defendant's auto and found 700 or 800 amphetamine tablets in the ashtray. This search was also made without a warrant.

In our judgment, the original contact with defendant was justified. The deputies had received a complaint of possible law violation from a citizen and resident of the community about a person whose prior criminal activity was known to the officers. Section 29-829, R. R. S. 1943, authorizes a peace officer 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 and may demand of him his name, address and an explanation of his actions." Furthermore, it is the duty of a sheriff or his deputy "to ferret out crime * * * and insofar as it is within his power, to secure evidence of all crimes committed in his county, and present the same to the county attorney * * *." § 23-1710, R. R. S. 1943. Finally, as stated in State v. Brewer, 190 Neb. 667, 212 N. W. 2d 90 (1973): "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. Adams v. Williams, *supra*."

However, as the initial contact was developing, certain additional factors appeared to the officers giving them probable cause for a warrantless search, remembering that the existence of "probable cause for a warrantless search must be determined on the particular facts and circumstances of each case" which "must be determined by a practical and not by any technical standard and where time is of the essence it is a highly relevant factor in evaluating the circumstances." State v. Forney, 182 Neb. 802, 157 N. W. 2d 403 (1968). In addition to the information given the officers by Mr. Bickford which admittedly, by itself, would not have furnished "probable cause," they knew from their own experience, plus information received from other law enforcement officials, that defendant had been arrested for drug violations and had been, in the past, found to have in his possession drugs, certain drug paraphernalia including bent spoons, as well as firearms. Knowledge on the part of law enforcement officers of previous law violations of the suspect is a factor to be considered in establishing probable cause for search or arrest for a similar crime. See State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595 (1974). Also, " 'probable cause * * * can rest upon the collective knowledge of the police, rather than solely on that of the officer who actually makes the arrest,' when there is 'some degree of communication between the two.' " United States v. Nieto, 510 F. 2d 1118 (5th Cir., 1975).

With this information in mind, the officers observed the defendant starting to leave the station, driving past the gas pumps and part way into the street, when upon seeing the deputies he immediately backed up to the pumps, pumped some gas into his tank, went into the office, and when he saw the officers approaching, headed for the restroom.

From their experience, the deputies had reason to suspect that defendant might try to hide or dispose of contraband. These actions would fall within the "furtive gesture" rule which had its genesis in Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889, and was expanded upon in Sibron v. New York, 392 U. S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968), which provides that a furtive gesture when coupled with prior reliable information may constitute probable cause for search or arrest. In the latter case the court stated at p. 66 that "deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest."

When deputy Teel first stopped the defendant, he observed the bent spoon hanging from his pants top, which, coupled with his training, experience, prior knowledge of the defendant, and information related to him earlier in the day, would support grounds for his believing that defendant either had committed or was about to commit the crime of illegal use of drugs. Circumstances and conduct which may very well not excite the suspicion of the ordinary person might be highly significant to a law enforcement officer trained in the habits and conduct and paraphernalia of users of drugs. Deputy Teel possessed such expertise. See State v. Benson, 198 Neb. 14, 251 N. W. 2d 659 (1977).

Therefore, we feel that there were sufficient grounds for the initial "pat-down" search which revealed the presence of a pipe which in the officer's opinion contained residue of smoked marijuana.

The search of the automobile at the scene was entirely justified by the knowledge possessed by the deputies. "Probable cause for searching a motor vehicle is to be determined in view of its mobility

and by a practical and not a technical standard, and differs from that required to search a fixed structure." State v. Connor, 189 Neb. 269, 202 N. W. 2d 172 (1972). See, also, Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543. It was this search, which revealed the presence of amphetamines, that formed the basis of the arrest for possession of a controlled substance.

The second search was performed at the station house approximately 1½ hours after the defendant had been placed in jail. Defendant cites Chambers v. Maroney, 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970), for the proposition that a search made at the police station sometime following the arrest after the defendant is in custody is not incident to the arrest and therefore is not justified in the absence of a warrant. However, defendant does not go far enough in his quotation from Chambers, *supra*, nor is he correct in stating in his brief that deputies Teel and Wolford did not have probable cause for the first search at the filling station before the arrest.

It is necessary to read on in Chambers, *supra*, as follows: "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

"On the facts before us, the blue station wagon could have been searched on the spot when it was

stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained."

As we have held, there was probable cause for the initial cursory search at the scene and there still remained probable cause for the search at the station house which revealed the large quantity of amphetamines that was the basis of this prosecution. It is not necessary to discuss the legitimacy of an "inventory search." The seizure of the evidence was proper and so was its reception in evidence at the trial.

Defendant complains of the trial court's failure to give his requested instructions numbered 1 and 5, which required that the jury find that defendant "physically or constructively possessed a controlled substance," that "he had knowledge of the presence of the substance and its character," that "he possessed it with the intent to deliver," and that "proof of guilty knowledge may be made by evidence of acts, declarations or conduct of the accused." The court instructed in the exact words of the statute that the State must prove that defendant "Knowingly or intentionally possessed a controlled substance, to wit, amphetamine: With the intent to distribute, deliver or dispense * * *." If, as required by the court's instructions, the jury had to find that defendant knowingly or intentionally possessed a controlled substance, it would stand to reason that he had physical or constructive possession and had knowledge of its presence and character as a controlled substance as covered in the proposed instructions.

That proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused, is certainly no different than instruction No. 8, also NJI No. 14.11, given by the court, which told the jury that defendant's intent was a material element of the crime and may "be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct." As stated in State v. Bolden, 196 Neb. 388, 243 N. W. 2d 162 (1976): "The trial court may refuse a requested instruction where the substance of the request is covered in the instructions given." There is no merit in this assignment of error.

Defendant's objection to the admission of opinion testimony of deputy Teel and Michael L. Auten, a chemical expert, as to burned marijuana residue in the pipe and as to the analysis of the vegetable matter taken from the auto, is based on foundation and relevance. Suffice it to say that both witnesses qualified as experts in their respective fields to permit their testimony under section 27-702, R. R. S. 1943. Furthermore, although not forming the basis for the charge in the instant case, the seizure and identity of the substance as marijuana was one of several facts and circumstances furnishing the basis for probable cause for search and arrest.

Finally, there is no question but what the evidence, if believed by the jury, was sufficient to justify a guilty verdict. "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. Sommers, 201 Neb. 809, 272 N. W. 2d 367 (1978).

The judgment is affirmed.

AFFIRMED.

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

MCCOWN, J., dissenting.

From the time the police officers saw the defendant drive into the service station until the time they arrested him and searched his car they obtained no more relevant information on the issue of probable cause than they already had. If the police officers here did not have probable cause for the arrest and search when they first saw the defendant drive into the service station, they did not acquire probable cause from the defendant's "furtive" actions in filling his gas tank and going to the restroom. To put gas in a car at a service station open for business and then walk to the restroom in broad daylight is neither stealthy, secret, surreptitious, nor furtive. Neither can such actions be said to constitute flight.

The essence of the majority holding here is that if police officers know that a suspect has been previously convicted of a crime, and they have reasonable grounds to suspect that he may also have committed another crime of the same nature, and the officers are looking for him in order to question him, then any actions by the suspect which the officers subjectively interpret as an effort to avoid or delay meeting them is sufficient to constitute probable cause for arrest and search.

Reasonable grounds for suspicion cannot be equated with probable cause so easily. Neither does a walk to the restroom transform a reasonable suspicion into probable cause for an arrest and search.

WHITE, J., joins in this dissent.

MILLIRON RANCH CORPORATION, APPELLEE, V. ERNIE BRINKMAN, APPELLANT.

277 N. W. 2d 68

Filed March 27, 1979. No. 41859.

Trial: Instructions: Appeal and Error. It is prejudicial error for the trial court to include in its instructions to the jury allegations of fact found in the pleadings which have not been supported by the evidence.

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

Steven J. Flodman of Barlow, Johnson, DeMars & Flodman, and Arlen D. Magnuson of Magnuson & Peetz, for appellant.

Edward E. Hannon of Cronin & Hannon, for appellee.

Heard before SPENCER, Retired Justice, BOSLAUGH, and WHITE, JJ., and WOLF and SPRAGUE, District Judges.

SPRAGUE, District Judge.

This is an action for damages as a result of a fire which occurred in Holt County. The case was submitted to a jury which returned a verdict in favor of the plaintiff. The defendant perfected an appeal to this court.

On September 26, 1974, a fire occurred north of Atkinson, Nebraska, damaging pasture land owned by Milliron Ranch Corporation. The defendant, Mr. Ernie Brinkman, left Atkinson, Nebraska, on that date to visit Mr. Duane Beck, sole owner of the plaintiff corporation.

On arriving at the Beck residence Mr. Brinkman was informed by Mrs. Beck as to the location of Mr. Beck. He then proceeded 1 mile north on a main road in search of Mr. Beck. Next, he traveled 1 mile west and went down a public trail road. He did not find Mr. Beck in the first field. Mr. Brinkman

proceeded to turn north on a public trail road. There was a hill to the north and Mr. Brinkman thought Mr. Beck might be haying over the hill.

The public trail road consisted of one visible track or parallel tracks from one vehicle, and appeared to have been recently traveled on. The whole right-of-way was unmowed. The public roadway in question extends in a north-south direction and is located between Sections 31 and 32. The plaintiff owned the land on both sides of the road.

After proceeding down the public road for 300 or 400 yards, Mr. Brinkman attempted to turn around in the road. During this turning movement the front wheels of the car dropped in a rut. He tried to rock the automobile to free it. After no more than 3 to 4 minutes time he realized something else would need to be done to free the car.

The defendant got out of his car. He saw smoke coming from underneath. When Mr. Brinkman saw the smoke, he made additional efforts to free the Ford automobile. His efforts failed, and the fire began to spread. He left the area without being able to save the contents of the car or stop the fire. Mr. Brinkman returned to the fire as soon as possible. It was traveling across country to the northeast. Before the fire was stopped, it had burned over a substantial area of pasture land.

The plaintiff in his pleadings set out specific allegations of negligence that were incorporated into jury instruction No. 5 as follows: "Before the plaintiff can recover against the defendant Ernie R. Brinkman, the burden is upon the plaintiff to prove by a preponderance of the evidence each and all of the following propositions:

"1. That the defendant Ernie R. Brinkman committed certain activity while operating his automobile upon the trail road between Section 31 and Section 32, Township 32, Range 14, West of the 6th P.M. in Holt County, Nebraska, on September 26, 1974,

which an ordinary, reasonable and prudent person would not have done under similar circumstances and conditions, and that one or more of those acts were as follows:

"A. That the defendant drove his automobile into high grass at a time when the defendant knew, or should have known, that the condition of the grass made it easily kindled by the heat of the automobile.

"B. That the defendant drove his automobile off the track on which he was driving and into grass approximately three feet high when he could not see where he was driving by reason of said dry grass.

"C. That the defendant continued to operate his automobile when the same was stuck, when he knew, or should have known, said operation would cause the automobile to overheat and cause a fire in the dry grass under the automobile. * * *"

Instruction No. 5 generally and allegations 1-A, 1-B, and 1-C were duly objected to prior to their submission to the jury. This court finds the giving of this instruction was prejudicial error. The instruction presents specific allegations of fact found in the pleadings which were not supported by any evidence.

Our court has uniformly held that it is reversible error for the trial court to include in its instructions to the jury allegations of fact found in the pleadings which have not been supported by the evidence. Fuss v. Williamson, 159 Neb. 525, 68 N. W. 2d 139; Colton v. Benes, 176 Neb. 483, 126 N. W. 2d 652; Lund v. Mangelson, 183 Neb. 99, 158 N. W. 2d 223; Graham v. Simplex Motor Rebuilders, Inc., 189 Neb. 507, 203 N. W. 2d 494; Oberhelman v. Blount, 196 Neb. 42, 241 N. W. 2d 355.

Instruction No. 5 1-A instructed the jury to consider "* * * when the defendant knew, or should have known, that the condition of the grass made it easily kindled by the heat of the automobile." There was no evidence submitted to the jury that the condition

of the grass made it easily kindled by the heat of the automobile. No evidence was submitted to prove the amount of heat, if any, that an automobile would have produced under the circumstances. Under paragraph 1-B there was no evidence submitted that the height of the grass instructed on was the height on the roadway in question. Paragraph 1-C instructed the jury to consider "* * * when he knew, or should have known, said operation would cause the automobile to overheat and cause a fire in the dry grass under the automobile." There was no evidence submitted that the defendant's automobile would overheat if operated as alleged or that such overheating caused a fire in the dry grass under the automobile. The record is totally absent any evidence as to the conditions under which the grass could have ignited or under which the automobile could have overheated. There is no evidence that the automobile would, in fact, produce any heat.

Plaintiff suggests that certain inferences may be drawn from the fact that the grass was dry, that the defendant was operating his automobile, and that there was a fire. The pleadings, however, contain specific allegations that were included in the instructions to the jury. No evidence was offered in support of these allegations. It was prejudicial error to present to the jury for its determination these issues of fact for which there was no proof.

The court does not consider discussion of the other assignments of error necessary to an appropriate disposition.

The judgment of the District Court is reversed and the cause remanded with instructions to grant a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

SPENCER, Retired Justice, concurs in result.

WOLF, District Judge, concurring with the result.

Although I concur with the majority opinion reversing and remanding this action for new trial, I

hesitate to join in the opinion which would suggest that if expert testimony could establish that an automobile of this age and make could reasonably overheat under such circumstances as to cause a fire in range grass, that this proof would be sufficient to submit to the jury as proof of negligence by the defendant.

Where injury may be caused to another by the operation of a motor vehicle, there are the usual allegations of ultimate negligence such as reasonable control and proper lookout; however, in this case it is clear that the original entry upon the high grass was not the cause of the injury nor was the defendant's failure to be able to see where he was driving a cause of the fire, although it may have been a contributing factor to the defendant becoming stuck. The problem is there is no legal duty not to get stuck.

The true test in determining whether an act of negligence was committed by the defendant was whether he operated his vehicle in such a manner that he exposed the plaintiff to an unreasonable risk of injury when an ordinarily or reasonably prudent and careful man would not have done so under similar circumstances. The test should not be what an expert would have done under the circumstances.

WHITE, J., joins in concurrence.

THE MILLARD SCHOOL DISTRICT, SCHOOL DISTRICT NO. 17, DOUGLAS COUNTY, NEBRASKA, APPELLANT, V. THE STATE DEPARTMENT OF EDUCATION AND THE STATE BOARD OF EDUCATION, APPELLEES.

277 N. W. 2d 71

Filed March 27, 1979. No. 41866.

1. **Declaratory Judgments.** The granting of declaratory relief is discretionary with the trial court, and there is no absolute mandate compelling it to exercise its jurisdiction to grant such relief.
2. **Declaratory Judgments: Statutes.** A court may refuse to enter a declaratory judgment on the validity of an administrative rule

when the petition essentially presents a claim against the state for money. § 84-911, R. R. S. 1943; § 77-2406 et seq., R. R. S. 1943.

3. **Declaratory Judgments.** A court may refuse to enter a declaratory judgment where it would not terminate the uncertainty or controversy giving rise to the proceedings.

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

Brian L. Campbell of Young, White, Ramsey, Wieland & Owens, for appellant.

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

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

WHITE, J.

The appellant Millard School District was plaintiff below. The appellees, defendants below, are the State Department of Education and the State Board of Education.

This case arose from a dispute over the meaning of certain provisions of Laws 1973, L.B. 403. The act is now found in principal part in sections 43-641 to 43-660, R. R. S. 1943. It requires the board of education of each school district to provide special education programs for mentally or physically handicapped children who would benefit from such programs.

Section 8 of the act, effective July 1974, required the State Department of Education to reimburse the local school district for 90 percent of the "excess cost" of the programs, as defined in the act.

Pursuant to that section, the plaintiff was reimbursed for most of the claimed excess costs. However, Millard's additional claim for over $100,000 for the cost of initial diagnosis and eight other items was denied by the defendants under the State Department of Education's "Rule 51." Rule 51, entitled "Rule on Development of Reimbursable Local Special

Education Programs for Handicapped Children," was adopted by the department as a guideline for the administration of L.B. 403.

By letter of September 18, 1975, Millard filed a claim with the Department of Administrative Services for those portions of its claim which had been denied by the State Department of Education. In the letter, Millard expressed its opinion that the claim was for valid, reimbursable expenses, implying that Rule 51 was an inaccurate interpretation of L.B. 403. The director of the Department of Administrative Services forwarded Millard's claim letter to the Commissioner of the State Department of Education for "review and action as you see fit." The Commissioner of Education notified Millard that its claim had been submitted to the State Board of Education and denied. Millard then filed this lawsuit, characterizing it as an action for a declaratory judgment on the validity of Rule 51. The trial court refused to declare the rule invalid, resting its decision on "one or more" of four stated reasons. The court's first reason related to the existence of an alternate remedy. Since we agree with its determination on that matter, it is unnecessary to review the other reasons or to recite them here.

As stated by the District Court: "Section 9 of Article VIII of the Constitution provides: 'The Legislature shall provide by law that all claims upon the treasury shall be examined and adjusted as the Legislature may provide before any warrant for the amount allowed shall be drawn. Any party aggrieved by the action taken on a claim in which he has an interest may *appeal* to the district court.' (Emphasis added.) Such provision has been implemented in Chapter 77 of the Nebraska statutes under Sections 77-2406 to 77-2409. Under Sec. 77-2406, R. R. S. 1943, a claim must be examined, adjusted and approved by the Department of Administrative Services." In this case, such a claim was filed with the

Department of Administrative Services. The claim was referred to the State Department of Education. The State Department of Education wrote plaintiff that the claim could not be paid, but all parties agree that this was not a disallowance by the Department of Administrative Services as required by the statute. After disallowance, the remedy of the plaintiff would have been an appeal. Instead, the plaintiff filed this declaratory judgment action.

Section 84-911, R. R. S. 1943, provides, in part, that: "(1) The validity of any rule (of a state administrative agency) may be determined upon a petition for a declaratory judgment thereon addressed to the district court of Lancaster County if it appears that the rule or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner." However, a court is not constrained to render a declaratory judgment in every case where it "may" do so. It was noted in American Fidelity and Casualty Co. v. Service Oil Co., 164 F. 2d 478, 480, that: "There is a distinction between the jurisdiction of a court to grant declaratory relief and the exercise of discretion pursuant to that jurisdiction." This court has repeatedly recognized that the granting of declaratory relief is discretionary. See Blanco v. General Motors Acceptance Corp., 180 Neb. 365, 143 N. W. 2d 257; Custer Public Power Dist. v. Loup River Public Power Dist., 162 Neb. 300, 75 N. W. 2d 619.

We believe that this discretion was properly exercised here. This is not the classic declaratory judgment situation where a party would otherwise be required to do or refrain from doing some action at his legal peril. The school district was required, in any event, to provide special education services to handicapped students. The district's challenge to Rule 51 only served to raise the question of whether or not it should be reimbursed for certain expenditures of

meeting that requirement. One of the major areas of disagreement is whether the cost of initial diagnosis is reimbursable. Except for the single school year of 1974-1975, that question is no longer in dispute, for Laws 1976, L.B. 761, amended L.B. 403 to specifically include those costs. Thus, this case essentially presents a claim for money against the State. As pointed out above, section 77-2406, R. R. S. 1943, provides a clear statutory procedure for presenting that claim. "Proceedings for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law for the character of action in hand." Stewart v. Herten, 125 Neb. 210, 249 N. W. 552. See, also, Zarybnicky v. County of Gage, 196 Neb. 210, 241 N. W. 2d 834; Murphy v. Holt County Committee of Reorganization, 181 Neb. 182, 147 N. W. 2d 522; Scudder v. County of Buffalo, 170 Neb. 293, 102 N. W. 2d 447.

The possibility of recurring disputes on the meaning of former Rule 51 has been removed by the Legislature.

The claim for 1974-1975 could be adequately heard through appeal from a determination by the Department of Administrative Services. Even if the court entered a declaratory judgment in favor of Millard, it would still be necessary for the Department of Administrative Services to rule on the claim. That would leave the possibility of an appeal. Nothing would be served by such piecemeal adjudication. A court may refuse to enter a declaratory judgment where it would not terminate the uncertainty or controversy giving rise to the proceedings. See Graham v. Beauchamp, 154 Neb. 889, 50 N. W. 2d 104.

This action, although characterized as one for declaratory judgment, was filed in anticipation of a denial of a claim against the State for money. The trial court was correct in restricting the plaintiff to the statutory procedure established for that situation.

The order of the trial court refusing declaratory relief is affirmed.

AFFIRMED.

THE WESTSIDE COMMUNITY SCHOOLS, SCHOOL DISTRICT NO. 66, DOUGLAS COUNTY, NEBRASKA, APPELLANT, V. STATE OF NEBRASKA, NEBRASKA DEPARTMENT OF EDUCATION, STATE BOARD OF EDUCATION, APPELLEES.

277 N. W. 2d 73

Filed March 27, 1979. No. 41867.

1. **Declaratory Judgments.** The granting of declaratory relief is discretionary with the trial court.
2. _____. Proceedings for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law for the character of action in hand.
3. **Declaratory Judgments: Statutes.** A court may refuse to enter a declaratory judgment on the validity of an administrative rule when the petition essentially presents a claim against the state for money. § 84-911, R. R. S. 1943; § 77-2406 et seq., R. R. S. 1943.

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

Verne Moore, Jr., of Moore, Moore & Peters, for appellant.

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

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

BOSLAUGH, J.

This case involves substantially the same issues as Millard School District v. State Department of Education, *ante* p. 707, 277 N. W. 2d 71, decided today. It arises out of a controversy concerning L.B. 403 enacted by the 1973 Legislature relating to the education of handicapped children. The act provided that it was the duty of the board of education

of every school district to provide or contract for special education programs for all resident children who would benefit from such programs. School districts not in compliance with the act were barred from receiving state funds as long as the violation existed.

The act required school districts to report to the State Department of Education all children who would benefit from special education programs together with a plan and budgets for providing such programs for the school years 1974-75. The budgets were to be approved by the State Department of Education. The act further provided that effective July 1, 1974, the State Department of Education was to reimburse each district for 90 percent of the "excess cost" of the programs as defined in the act.

The plaintiff, Westside Community Schools (School District No. 66 of Douglas County, Nebraska), complied with the act and submitted a plan and proposed budget for the 1974-75 school year which was returned to the plaintiff endorsed, "Approved and Returned 8-30-74, Francis E. Colgan, Special Education Section." Colgan was the director of special education within the state department.

Rules and regulations relating to the program were approved by the State Board of Education on June 7, 1974. These rules provided that the series of activities resulting in the Department of Education reimbursing 90 percent of the excess cost directly relating to service for the handicapped included "Screening and referral of handicapped children." These rules were approved by the Attorney General but were never approved by the Governor as required by section 84-908, R. R. S. 1943.

On April 16, 1975, the State Board of Education adopted "Rule 51" relating to the program. This rule was subsequently approved by both the Attorney General and the Governor. Rule 51 made no provision for reimbursement to the districts for the

cost of diagnosis and identification of children who were eligible for special education and further provided that "the amount appropriated by the Legislature for reimbursement for special education programs shall become the basis for reimbursement."

After the adoption of Rule 51 all districts, including the plaintiff, were required to submit an additional special education plan and budget for the school year 1974-75. The plaintiff submitted such a plan and budget on or about May 5, 1975. The State Department of Education's share of the excess cost was determined to be $235,271, subject to possible proration.

The plan and budget originally submitted by the plaintiff provided for an expenditure of $581,391, of which $436,696 was to be reimbursed by the State. The plaintiff claims that it is entitled to be reimbursed in the amount of $89,139.38 for funds it has expended for preidentification and diagnosis of children and $11,301.45 for contracted services provided by private agencies.

On December 16, 1975, the plaintiff filed a claim with the Department of Administrative Services of the State of Nebraska for $114,266.28 it claimed was due it under L.B. 403. On December 17, 1975, the Director of Administrative Services forwarded the claim to the State Commissioner of Education for review and "action as you see fit." On December 22, 1975, the State Commissioner of Education wrote to the superintendent of the plaintiff stating that the amounts requested were in excess of the approved budget, and that the " 'loss through proration' is the result of a legislative decision."

This action was commenced on January 9, 1976. The defendants are the State of Nebraska, the Nebraska Department of Education, and the State Board of Education. A special appearance filed by the State of Nebraska was sustained and the action dismissed as to it.

The petition alleged that Rule 51 was in conflict with L.B. 403 and that the plaintiff had expended funds in reliance upon the approval of its plan and budget on August 30, 1974. On the first cause of action the plaintiff prayed for a declaratory judgment that funds expended in diagnosis and identification of handicapped children should be reimbursed and that it should recover the sum of $89,139.38 expended for that purpose. On its second cause of action the plaintiff prayed for a declaratory judgment that school districts may utilize the services of private agencies for special education and that it recover the sum of $11,301.45. On its third cause of action the plaintiff prayed for a declaratory judgment that the proration of amounts due it was illegal and that it should recover the sum of $13,825.45. Thus, although the plaintiff characterizes the action as one for a declaratory judgment, in fact it was primarily an action to recover money alleged to be due it.

By various pleadings the defendants alleged that the trial court had no jurisdiction of the subject matter of the action and that the petition did not state a cause of action.

The trial court found generally for the defendants and that the plaintiff's sole remedy was by claim under sections 77-2406 to 77-2409, R. R. S. 1943. The trial court made other findings but they are not relevant to the disposition which we make of this appeal.

Section 77-2406, R. R. S. 1943, provides: "All claims of whatever nature upon the treasury of this state, before any warrant shall be drawn for the payment of the same, shall be examined, adjusted and approved by the Department of Administrative Services." Section 77-2407, R. R. S. 1943, provides for an appeal to the District Court in the event of a disallowance of a claim. Section 77-2408, R. R. S. 1943, provides for a review in this court of the action of the District Court.

The essence of the plaintiff's action was a claim

"upon the treasury" of the State of Nebraska. The Constitution of Nebraska, Article VIII, section 9, provides that the Legislature shall provide how claims shall be examined and adjusted. Section 77-2406, R. R. S. 1943, prescribes the procedure to be followed. The plaintiff filed a claim with the Department of Administrative Services but did not pursue that remedy.

The declaratory relief which the plaintiff sought was only incidental to the money recovery. Ordinarily, declaratory relief is not available where a special statutory action has been provided. Peak v. Bosse, *ante* p. 1, 272 N. W. 2d 750. Proceedings for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law for the character of action in hand. Stewart v. Herten, 125 Neb. 210, 249 N. W. 552. See, also, Zarybnicky v. County of Gage, 196 Neb. 210, 241 N. W. 2d 834; Murphy v. Holt County Committee of Reorganization, 181 Neb. 182, 147 N. W. 2d 522; Scudder v. County of Buffalo, 170 Neb. 293, 102 N. W. 2d 447.

The granting of declaratory relief is discretionary. See, Blanco v. General Motors Acceptance Corp., 180 Neb. 365, 143 N. W. 2d 257; Custer Public Power Dist. v. Loup River Public Power Dist., 162 Neb. 300, 75 N. W. 2d 619. The refusal of declaratory relief was clearly within the discretion of the District Court.

The judgment of the District Court is affirmed.

AFFIRMED.

HERMAN BANKS ET AL., APPELLANTS AND CROSS-APPELLEES, V. BOARD OF EDUCATION OF CHASE COUNTY HIGH SCHOOL DISTRICT NUMBER 15 ET AL., APPELLEES AND CROSS-APPELLANTS.

277 N. W. 2d 76

Filed March 27, 1979. No. 41884.

1. **Schools and School Districts: Taxes: Constitutional Law: Statutes.** Section 79-548.01, R. R. S. 1943, is not an unconstitutional delegation of legislative authority.
2. _____: _____: _____: _____. The tax authorized by section 79-548.01, R. R. S. 1943, provides a necessary revenue within the meaning of Article VIII, section 1, of the Nebraska Constitution.
3. **Schools and School Districts: Statutes.** A school athletic facility is a schoolhouse or other building within the meaning of section 79-506, R. R. S. 1943.
4. **Schools and School Districts: Elections.** Authority to direct the purchase of a site for a schoolhouse or other school buildings in a Class VI district is reserved to the voters of the district.
5. **Schools and School Districts: Taxes: Statutes.** Section 79-548.01, R. R. S. 1943, is a revenue measure which makes no change in school site selection procedure.
6. **Schools and School Districts: Fees and Costs.** Architectural fees are general expenses, not expenses of building which must be submitted to the voters.
7. **Schools and School Districts: Statutes: Notice.** The notice provisions of section 79-501 et seq., R. R. S. 1943, do not apply to a board of education meeting to approve general expenses such as a contract for architectural services.
8. **Courts: Fees and Costs.** Taxation of costs is a matter resting in the sound discretion of the trial court.

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

Law Offices of Kenneth Cobb, P.C., Kenneth Cobb, for appellants.

Murphy, Pederson & Piccolo and LeRoy Anderson, for appellees.

Perry, Perry, Witthoff & Guthery, McGill, Koley, Parsonage & Ryan, P.C., by Verne Moore, Jr., Malcolm D. Young, Shrout, Christensen, Krieger & Marwald, Deutsch, Jewell, Otte, Gatz, Collins & Domina,

William G. Cambridge, Snyder, Sidner, Svoboda, Schilke, Wiseman & Thompsen, and Kelley Baker, for amici curiae.

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

WHITE, J.

This action was brought by residents and taxpayers of Chase County High School District No. 15, a Class VI district, against the Board of Education of that district. The plaintiffs sought: (1) A declaration that section 79-548.01, R. R. S. 1943, is unconstitutional, and an injunction prohibiting the expenditure of funds already collected under tax levies made pursuant to that section; (2) a declaration that a contract for the purchase of real estate for athletic field purposes was null and void; and (3) a declaration that a contract for architectural services entered into by the board was null and void.

The District Court found that the board was without authority to purchase the land, and for the defendants on all other issues. The plaintiffs appeal and the defendants cross-appeal. We affirm.

At an election in which approval of the building of a new school plant was sought, the proposition was defeated. Subsequently the board signed a contract for the purchase of 38 acres of land, not adjacent to the existing site. The board also approved a contract for architectural services in the amount of $11,000, for the design grading, draining, and location of facilities for a running track and football field, on the 38-acre site.

Payment for the land and the architect's fee were met from the special fund established, pursuant to section 79-548.01, R. R. S. 1943, from a 4-mill levy approved by the board.

We first address the issue, raised by the plaintiffs, of the constitutionality of section 79-548.01, R. R. S.

1943. The section provides: "The board of education of any Class III, IV, V, or VI school district may establish a special fund for the purposes of acquiring sites for school buildings or teacherages and purchasing existing buildings for use as school buildings or teacherages, including the sites upon which such buildings are located, and the erection, alteration, equipping and furnishing of school buildings or teacherages and additions to school buildings for elementary and high school grades and for no other purpose. Such fund shall be established from the proceeds of an annual levy, to be determined by the board of education, of not to exceed four mills on the dollar upon the assessed value of all taxable property in the district, except intangible property, which shall be in addition to any other taxes authorized to be levied for school purposes. Such tax shall be levied and collected as are other taxes for school purposes."

Plaintiffs argue that the section is an unlawful delegation of legislative authority. Plaintiffs rely on Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227, where this court invalidated the statutory scheme authorizing the director of the Department of Agriculture to prescribe regulations for Grade A milk. Violation of the regulations promulgated by the director were made a criminal offense. "The attempt of the Legislature to thus grant to the director the power to create criminal offenses violates all fundamental concepts relating to the delegation of legislative authority." Lincoln Dairy Co. v. Finigan, *supra*. No criminal penalties are involved here. The power delegated by the statute is the power to levy a tax, and the tax is clearly limited as to amount and purpose. The plaintiffs' contention that the Legislature is without constitutional authority to make such a delegation is without merit. Campbell v. Area Vocational Technical School No. 2, 183 Neb. 318, 159 N. W. 2d 817, is controlling here: "A

school district is a creation of the Legislature. Its purpose is to fulfill the constitutional duty placed upon the Legislature 'to encourage schools and the means of instruction' and it is a governmental subdivision to which authority to levy taxes may properly be delegated under the Constitution."

Plaintiffs further assert that section 79-548.01, R. R. S. 1943, violates Article VIII, section 1, of the Nebraska Constitution. That section provides in part: "The *necessary revenue* of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct." (Emphasis supplied.) Plaintiffs' position is that since section 79-548.01, R. R. S. 1943, contemplates the creation of a fund, the tax it purports to authorize is not for a "necessary" revenue.

The word "necessary" is not one with a clear-cut fixed meaning. Numerous cases have analyzed its meaning within a given statute, contract, or will provision. The plaintiffs cite cases equating "necessary" with "indispensable," e.g., Wolf & Son v. Independent School District, Etc., 51 Iowa 432, 1 N. W. 695. At the other end of the spectrum are those which define "necessary" to include that which is merely "convenient," e.g., Higdem v. Whitham, 167 Mont. 201, 536 P. 2d 1185. In this case, the word "necessary" is found in the constitutional provision which is a general grant to the Legislature of the taxing power. The determination of what is necessary revenue under that section can only be made with reference to the duties imposed in the other sections of the Constitution. The relevant "other section" here is Article VII, section 1, Nebraska Constitution, which commands the Legislature to "* * * provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." If the tax authorized under section 79-548.01, R. R. S. 1943, has as its purpose the raising of revenue which could reasonably

be said to be necessary for the maintenance of the public schools, then it must be upheld as constitutional. The trial court said: "An analysis of the above stated constitutional provision (Article VIII, section 1) shows that it is applicable to both the state and its subdivisions. A holding that the provision prohibits present tax for future improvements would, under present conditions, prevent the state from levying now for future acquisitions. In a state which has a history of aversion to build now and pay later, this does not seem reasonable. There has never, so far as the Court could find, been a constitutional restriction requiring construction or purchases by bonded debt. Large purchases must always require taxes ahead or after the fact. They are often 'necessary,' and over the long run as 'necessary' as meeting current expenses. In the absence of a constitutional provision prohibiting the accumulation of funds or requiring votes of the people for the accumulation of funds, it seems it should not and is not prohibited." We agree.

We now consider the authority of the board to enter into a contract for the purchase of land. The site was originally proposed as the location of an entire new high school. When the bond issue to finance the new school was rejected by the voters, the board arranged to purchase the land for the running track and football field.

Section 79-503 et seq., R. R. S. 1943, which are applicable to Class VI school districts under section 79-1103, R. R. S. 1943, grant authority to direct the purchase of a site for a "schoolhouse * * * or other school buildings" to the voters, as opposed to the board, of the school district. See specifically section 79-506, R. R. S. 1943. An athletic program is a proper, and probably necessary, part of any high school curriculum. Since the statute envisions "other school buildings" as being something different from "schoolhouse," it clearly must include an

athletic facility with a cost in excess of $200,000. See Nicholas v. Calhoun, 204 Miss. 291, 37 So. 2d 313; School Dist. U2-20 Jt. v. Fanning, 232 Ore. 593, 377 P. 2d 4, and decisions cited in Fulk v. School Dist. No. 8 of Lancaster County, 155 Neb. 630, 53 N. W. 2d 56. The board was thus without authority, absent voter approval, to purchase the site, unless it can be said that the site selection procedure was changed by section 79-548.01, R. R. S. 1943. It was not. The legislative history confirms what is clear on the face of the act. Section 79-548.01, R. R. S. 1943, is a revenue measure only. There was no intention to withdraw from the electors the control over school site selection given them by section 79-503 et seq., R. R. S. 1943. The trial court was correct in holding that the board lacked authority to purchase the site.

Finally, we reach the issue of the validity of the board's contract with the Wilson architectural firm. Architectural fees are general expenses, not expenses of building which must be submitted to the voters. See Fiske v. School District of the City of Lincoln, 58 Neb. 163, 78 N. W. 392, affirmed on rehearing, 59 Neb. 51, 80 N. W. 265. The plans submitted under the architectural contract in that case were apparently of a more preliminary nature than those submitted in the case at bar, but we reject the plaintiffs' attempt to distinguish the Fiske case on that basis, for the rationale espoused there is equally applicable here. The plans are a prerequisite to obtaining an estimate of the cost for the project and to provide the board with information necessary for decisions on financing. It is, therefore, possible that plans would never be realized. As an exercise and necessary expense of the planning duties of a school board, architectural expenses on proposed improvements are general expenses.

The plaintiffs next argue that the meeting, at which the architectural contract was let, violated Nebraska's public meetings law. Section 84-1411,

R. R. S. 1943, contains the relevant provisions of the public meetings law. It provides, in part, that: "(1) Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice, or a statement that the agenda, which shall be kept continually current, shall be available for public inspection at the principal office of the public body during normal business hours. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting."

In this case, the board meeting which authorized the approval of the contract with Wilson & Company was held on December 11, 1975. Notice of the meeting was posted at the high school, the courthouse, and the post office on December 9, 1975. The notice stated that the agenda for the meeting could be obtained at the office of the superintendent. The agenda included notice of a "discussion" with John Smutz of Wilson & Company. It stated that the discussion "should result in determining whether we want this company or not." The language may not be a model of clarity, but did inform the public that an agreement with the architect was to be discussed and possibly entered. The contention is without merit.

The final attack is directed to section 79-503, R. R. S. 1943, which requires 5-days notice to the voters of annual and special meetings. The section is concerned with building, leasing, or changing a schoolhouse site, all of which require voter approval. As determined above, a contract for architectural services involves a general expense and may be approved by the board without voter approval. All

members of the board were present and none complain of inadequate notice.

Finally, the school board complains of the taxation of costs against it by the trial court. Taxation of costs is a matter resting in the sound discretion of the trial court. See Sones v. Spiegal, 179 Neb. 838, 140 N. W. 2d 799. In view of the success of the plaintiffs in invalidating the land sale contract, it cannot be said that the court abused its discretion in assigning costs to the school board.

The order of the trial court is affirmed.

AFFIRMED.

COLUMBUS BANK AND TRUST COMPANY, A NEBRASKA BANKING CORPORATION, APPELLEE, V. HIGH COUNTRY STABLE, A PARTNERSHIP, DARVIN R. RITCHIE, DIANE F. RITCHIE, GARY L. RITCHIE, EUGENE B. LEY, AND M. B. LEY, APPELLANTS, IMPLEADED WITH WILLIAM C. KARLIN, APPELLEE.

277 N. W. 2d 81

Filed March 27, 1979. No. 41891.

1. **Negotiable Instruments: Burden of Proof.** Unless specifically denied in the pleadings, signatures on a promissory note are admitted, and when the signatures are admitted, production of the instrument entitles the holder to recover unless the defendant establishes a defense.
2. _____: _____. When signatures are admitted, the burden is upon the defendant to plead and prove a defense.
3. **Burden of Proof: Summary Judgments.** When signatures are admitted and the defendant has failed to plead a defense, no fact issue is presented.
4. **Summary Judgments.** Existence of a factual dispute relative to issues not framed by the pleadings cannot preclude the rendition of a summary judgment otherwise appropriate.

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

Kelly, Kelly & Kelly, for appellants.

Kennedy, Holland, DeLacy & Svoboda, for appellee Columbus Bank.

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

KNAPP, District Judge.

Plaintiff bank brought this action against High Country Stable, a Nebraska partnership; Darvin R. Ritchie, Gary L. Ritchie, Eugene B. Ley, and William C. Karlin, the general partners thereof; and Diane F. Ritchie and M. B. Ley, upon a promissory note executed and delivered to plaintiff by High Country Stable and upon written guaranties covering the partnership's indebtedness executed and delivered to plaintiff by Darvin R. Ritchie and Diane F. Ritchie and by Eugene B. Ley and M. B. Ley. The action was stayed as to defendant Karlin following the filing of a Suggestion in Bankruptcy on his behalf. The remaining defendants answered by general denial.

Following extensive discovery, plaintiff moved for summary judgment, alleging that the pleadings, depositions, and admissions on file, together with plaintiff's supporting affidavit, showed there was no genuine issue as to any material fact and plaintiff was entitled to judgment as a matter of law. The trial court sustained plaintiff's motion, entered judgment against all remaining defendants and overruled defendants' motion for new trial. Defendants appeal, contending that genuine issues as to material facts remain unresolved. We affirm the judgment of the trial court.

The deposition of William Karlin established the execution and delivery of the promissory note and nonpayment thereof. Defendants' admissions established the execution and delivery of the guaranties and nonpayment thereunder. Defendants' answer did not specifically deny the signature on the note and, therefore, section 3-307, U. C. C., applies. That

section provides: "(1) Unless specifically denied in the pleadings each signature on an instrument is admitted. * * *

"(2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense." Comment 1 following that section states: "The purpose of the requirement of a specific denial in the pleadings is to give the plaintiff notice that he must meet a claim of forgery or lack of authority as to the particular signature, and to afford him an opportunity to investigate and obtain evidence." See, also, Center Bank v. Mid-Continent Meats, Inc., 194 Neb. 665, 234 N. W. 2d 902; Adair v. Adair, 192 Neb. 571, 222 N. W. 2d 908.

Defendants' sole contention on appeal is that certain statements in the Karlin deposition can be construed as justification for inferences that funds belonging to defendant partnership may have been wrongfully comingled with another Karlin account and that plaintiff may have received certain insurance proceeds and may have wrongfully failed to apply such proceeds to the account of the partnership and that, because of the possibility of comingling of accounts and the possibility of wrongful failure to apply funds, there exists a factual issue as to the amount due on the note.

The petition set out copies of the note and of the guaranties and alleged the amount claimed to be due. Defendants failed to plead payment, partial payment, wrongful acts, fraud, want of authority, or any other defense that would contravert plaintiff's allegation of amount due. Such defenses must be affirmatively pleaded in order to be available to defendants. Not being pleaded, no issue of fact is presented for determination. Center Bank v. Mid-Continent Meats, Inc., *supra;* Poland v. Gibson, 190 Neb. 696, 211 N. W. 2d 900.

An affirmative defense not pleaded raises no issue.

The existence of a factual dispute relative to a nonexistent issue cannot preclude the rendition of a summary judgment otherwise appropriate. The judgment of the trial court was correct and is affirmed.

AFFIRMED.

JOHN W. DECAMP, INDIVIDUALLY AND ON BEHALF OF ALL OTHER TAXPAYERS SIMILARLY SITUATED, APPELLANT, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

277 N. W. 2d 83

Filed March 27, 1979. No. 41901.

1. **Constitutional Law: Schools and School Districts: Counties.** Article VII, section 5, of the Constitution of Nebraska, which provides in part that all fines and penalties shall be appropriated exclusively to the use of the common schools in the counties where the fines or penalties are imposed, applies only to penalties which are pecuniary punishments inflicted by laws, ordinances, or police regulations for their violation.
2. **Constitutional Law: Fees and Costs.** Court costs are not fines or penalties within the meaning of Article VII, section 5, of the Constitution of Nebraska.
3. **Ordinances: Fees and Costs.** Where the record shows that an ordinance prescribes uniform court costs for a range of offenses irrespective of the amount of the fine and that the costs are actually collected pursuant to a court proceeding and nothing in the record shows that the costs collected are not compensatory, then the sums collected as court costs will not be held to be penalties.

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

Herbert J. Friedman, Friedman Law Offices, for appellant.

Charles D. Humble, City Attorney, and William G. Blake, for appellee.

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

CLINTON, J.

This is an action begun in the District Court for Lancaster County by plaintiff, a taxpayer of the City of Lincoln and of School District No. 1, City of Lincoln, individually and on behalf of other taxpayers similarly situated. Plaintiff urges that the part of the City's ordinance, section 10.68.040, relating to court costs is in violation of Article VII, section 5, of the Constitution of Nebraska, and seeks an accounting of funds designated in the ordinance as "court costs." The action is brought for the benefit of the above-mentioned school district. The defendant City of Lincoln does not challenge the standing of the plaintiff to bring this action. The District Court held the ordinance constitutional. We affirm.

Article VII, section 5, of the Constitution of Nebraska, insofar as pertinent to this action, provides: "All fines, penalties, and license money, arising under the general laws of the state, . . . shall belong and be paid over to the counties respectively, where the same may be levied or imposed, and all fines, penalties, and license money arising under the rules, by-laws, or ordinances of cities, villages, precincts, or other municipal subdivision less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue, ..."

Chapter 10.68 of the Lincoln municipal code establishes "a violations bureau" under the jurisdiction of the municipal court. The ordinance providing that costs in cases processed by a violations bureau shall be set by ordinance was enacted pursuant to the authority of section 26-112 (2), R. R. S. 1943, as amended in 1967. That statute, insofar as is pertinent, provides as follows: "The clerk of the municipal court shall charge and receive the following fees: . . . (2) In criminal matters: . . . six dollars; except

that in all cases handled by a violations bureau established by the local governing body by ordinance, under the jurisdiction of the municipal court, the court cost shall be as set forth in such ordinance; . . . ."

Certain sections of the Lincoln municipal code, chapter 10.29, details of which the parties apparently did not consider significant, define regulations and prohibitions relative to the parking of motor vehicles on city streets. The ordinance which is attacked, section 10.68.040, establishes the fines and penalties for violations of the various parking ordinances and regulations and it provides that any person accused of a violation may "appear before the violations bureau of the Municipal Court, and waive arraignment and right to a hearing and enter a plea of guilty by a payment . . . in those complaints involving a parking ordinance or regulation."

Fines of 5 cents if paid within 5 days of receipt of the police tag and $1.05 if paid within 5 to 15 days are then prescribed in the ordinance. These two fines, it is inferable, are applicable to parking meter violations; for other violations, the fines are graduated from $4.05 to $29.05, which amounts include added penalties for delay in payment. In the case of every fine from 5 cents to $29.05, the ordinance provides that court costs of 95 cents shall be assessed. Although we do not regard it as significant, we note the fact that the notice portion of the uniform citation and complaint (the police tag) does not separate fine and costs. For example, the 5-cent fine and costs of 95 cents for a parking meter violation, if paid within the 5-day period, are listed on the citation simply as $1.

The cause was submitted to the trial court on a stipulated statement of facts, and that stipulation, together with the proceedings showing its admission in evidence and the appropriate certification, constitutes the entire bill of exceptions in this case.

In addition to stipulating the status of the parties and the enactment, effectiveness, and contents of the pertinent ordinances, the stipulation indicates the following facts. During the period April 18, 1973, to April 18, 1977, the City issued citations of the type previously described to motorists for violating the ordinances pertaining to parking meters; and motorists paid either $1 or $2, depending upon the time of payment, to the clerk of the municipal court of Lincoln. An accounting of funds is attached to the stipulation. It indicates that, during the period previously mentioned, the total amount collected by the violations bureau for parking meter violations was $809,448.60; of that amount, $277,141.40 was for the fine portion which was paid to the Lincoln school district, and $532,307.20 was for court costs and was paid into the general fund of the City.

The plaintiff's arguments are neither well developed nor sharply focused. However, as we interpret them, he appears to be taking two positions: (1) All court costs under the ordinance are penalties within the Constitution and therefore their use in the general fund of the City is unconstitutional, and (2) in any event, the $1 and $2 parking meter assessments are purely fines and their divergence to pay administrative costs in the guise of "court costs" is a violation of the Constitution.

In support of his position, the plaintiff relies primarily upon the following precedents: School District of McCook v. City of McCook, 163 Neb. 817, 81 N. W. 2d 224; School District of Omaha v. City of Omaha, 175 Neb. 21, 120 N. W. 2d 267. He also cites opinions of the Supreme Courts of Wisconsin and Missouri interpreting somewhat similar constitutional provisions, but, in view of our analysis of Nebraska law, we need not consider them.

In School District of McCook v. City of McCook, *supra,* this court had before it the question of the applicability of Article VII, section 5, of our Constitu-

tion, to money collected for violations of parking meter regulations of the City of McCook. We held there that the sums collected were penalties to which the constitutional provision applied. The applicability of the McCook case to the present case will be considered in detail later in this opinion.

In School District of Omaha v. City of Omaha, *supra,* we held that forfeited recognizances and cash bonds were penalties within the meaning of the Constitution. This case is of little value in resolving the issue before us because of the unique status of court costs in our legal system.

Plaintiff's first claim, that all court costs imposed in connection with any proceeding for violation of law, ordinance, or regulation are penalties within the meaning of Article VII, section 5, Constitution of Nebraska, does not withstand the scrutiny of either constitutional history or precedent.

Article VII appropriates "All . . . fines, penalties, and license money . . . exclusively to the use and support of the common schools . . . ." An examination of the history of court costs prior to the passage of that amendment demonstrates beyond any doubt that the framers of the amendment chose their words carefully, and if they had intended that court costs be included, they would have said so specifically.

The first Nebraska Constitution, which was adopted by the electors in 1866 and became the fundamental law of the state in 1867, did not contain the provision in question. That provision first appears in the Constitution of 1875. Before the Constitution of 1875 was adopted, the concept of court costs as something distinct from either fines or penalties had already been recognized by the Legislature and was embodied in various statutes of the state. See, e.g., sections 276, 278, and 282 of Chapter XXVI, General Statutes of Nebraska, 1876, pp. 787-789, as well as Chapter L, G.S., 1873, p. 840. Court costs from the

enactment of the first statute to today have been payable whether the person charged of a crime was convicted or acquitted. See, § 537, G.S., 1873, p. 841; §§ 29-2701 to 29-2709, R. R. S. 1943. Where the person is acquitted the costs, including that part of costs known as filing fees, are paid by the government. § 537, G.S., 1873, p. 841; § 29-2705, R. R. S. 1943. That court costs have been, during all our history, payable both in civil as well as criminal cases, is so well known as to not require demonstration. Some of such costs are in partial recompense for the expenses of court operation, while others reimburse the party for expenses incurred. Court costs have never been treated as penalties for the violation of a law.

Since the enactment of the amendment, this court has often been called upon to determine whether various forfeitures or impositions, both in criminal and civil matters, were penalties within the meaning of the constitutional provision. See the cases cited in the annotation, Article VIII, section 612, Constitution of 1875, contained in Cobbey's Annotated Statutes of Nebraska, 1911, as well as the annotations appearing in later volumes. It has never been held that court costs are included within the term "penalty" as used in the Constitution.

In School District of McCook v. City of McCook, *supra,* upon which the plaintiff relies, we cited School District of the City of Omaha v. Adams, 147 Neb. 1060, 26 N. W. 2d 24, in which we had held that the 50-percent "penalty" imposed for failure to list personal property for taxation was clearly not the sort of penalty contemplated by Article VII, section 5, of the Constitution, saying: "We said, also, that the more strict definition of 'penalty' was intended, that is, the pecuniary punishment inflicted by a law, ordinance, or police regulation for its violation." We hold that court costs do not fall within this strict definition.

We now turn to the more difficult question. Are

the $1 and $2 impositions penalties disguised as costs? On the basis of the record before us and before the trial court, we cannot say so. There is in the record no history of what preceded the ordinance in question with which we might compare the present operation of the violations bureau. Only on the basis of such a comparison could the fact finder detect a subterfuge and say as a matter of law that the impositions in question are fines or penalties in toto. It is worthy of note, however, that before section 26-112, R. R. S. 1943, was amended in 1967 recognizing the processing of parking violations by a violations bureau under the aegis of the municipal court, parking violations of all types were required to be handled in the municipal court in the same manner as any other prosecution. Court costs in such cases were $5. L.B. 579, Laws 1963, p. 528. The express purpose of the 1967 amendment was to permit a reduction of court costs where the violations were processed by a violations bureau. L.B. 189, Laws 1967, p. 452. Thus, the effect of the 1967 amendment and the ordinance, Lincoln municipal code, chapter 10.68, was to reduce costs in parking violation cases from $5 to 95 cents while L.B. 184, Laws 1971, increased to $6 the court costs in cases other than those processed by a violations bureau.

The factual and legal circumstances existing in School District of McCook v. City of McCook, *supra,* are clearly distinguishable from those in this case.

The McCook ordinance required the deposit of a coin in the meter, and parking was lawful only during the metered time. In the case of a violation, a notice requiring the person to report to the police station was placed on the auto of the violator by the police department. The ordinance made no provision as to what happened then although it did provide for a penalty in the form of a $100 fine. However, such fine was not involved in the McCook case. The City of McCook later enacted a supplementary ordinance

which provided that if a violator failed to appear within 3 days, a complaint and warrant would be issued but, if the violator appeared within 3 days, he could plead guilty and pay $1 to cover costs and expenses of administration.

Still later, a "regulation" was adopted which purported to increase parking fines from 5 cents to 25 cents if the person appeared within 24 hours and to $1 if he appeared after 24 hours. The origin or basis of the 5-cent fine did not appear in the record in that case. Thereafter, yet another amendatory ordinance was enacted which provided that violators appearing at the police station within 24 hours after receiving the notice were required to pay 25 cents, consisting of 10 cents for the parking privilege and 15 cents for administrative expense. If the appearance was more than 24 hours after the notice was issued, the payment was set at $1.25, consisting of 10 cents for the unpaid parking and $1.15 for administration costs. Only after 72 hours would a complaint be filed, a warrant issued, and a fine imposed.

During the existence of these provisions only four complaints were filed, and those were dismissed upon payment of the amounts above mentioned. The question in School District of McCook v. City of McCook, *supra*, was whether the sums of money received by the city pursuant to the violation notices were penalties within the meaning of the constitutional provision.

In School District of McCook v. City of McCook, *supra*, we said: "It is apparent . . . that the collection of the 5-cent and 25-cent charges were no part of the regulatory purpose of the ordinance, but were in fact penalties paid by the violator to purge himself of the charge of violating the overparking provisions of the ordinance." We then held: "The collection of money by a city, under an ordinance permitting its payment in a fixed amount within a specified time to avoid prosecution for the violation of a regu-

latory ordinance under the police power, is a penalty within the meaning of Article VII, section 5, of the Constitution.

"The exactions involved in the present case are punitive in character, and not remedial or compensatory to the city, and as such are penalties arising under the rules, by-laws, and ordinances of cities as provided in Article VII, section 5, of the Constitution."

In McCook, no complaints were filed, no court was involved, and there were no court costs to be paid or that could be paid. The entire amount of the impositions was clearly punitive. In the case now before us, the ordinance prescribes uniform court costs throughout the entire range of offenses irrespective of the amount of the fine. Complaints are filed which are processed by the violations bureau, an administrative arm of the municipal court. Payment of the specified amount to the violations bureau is deemed equivalent to the entry of a plea of guilty in court. The purpose of the costs appears to be compensatory and the record does not contradict that conclusion. The circumstances which led to our conclusion in McCook simply are not present here.

AFFIRMED.

NORMAN EGLE AND LINDA EGLE, APPELLANTS, V. JOHN JUNIOR KITT AND MARGIE E. KITT, APPELLEES.

277 N. W. 2d 87

Filed March 27, 1979. No. 41926.

1. **Trial: Motions, Rules, and Orders.** A pretrial order, entered following a pretrial conference, controls the subsequent course of the action unless modified.
2. **Contracts: Specific Performance: Abatement.** A purchaser, in an action for partial specific performance of a land contract, is entitled to an abatement of the purchase price with respect to seller's deficiency of title, even though purchaser, at the time of contracting, knew of such deficiency, when (1) seller contracted to sell the

entire interest in the land, and (2) purchaser had reasonable grounds to believe seller could fulfill the contract.

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

Padley & Dudden, P.C., and Thomas J. Holmes, for appellants.

C. Kenneth Spady of McGinley, Lane, Mueller, Shanahan & McQuillan, for appellees.

Heard before BOSLAUGH, CLINTON, and WHITE, JJ., and RIST and WINDRUM, District Judges.

RIST, District Judge.

This is an action for specific performance of an option contract for the purchase of real estate brought by plaintiffs, Norman and Linda Egle, against defendants, John and Margie Kitt, wherein plaintiffs are purchasers and defendants are sellers.

The evidence reflects without significant dispute that in 1968, plaintiffs leased approximately 2,010.41 acres of farm and grazing land from defendants for 5 years upon a cash-rent basis. This lease was renewed January 1, 1973, for an additional term of 5 years. On August 10, 1973, the parties entered into a written agreement giving plaintiffs the option to purchase the land from defendants for $185,000, to be paid in the manner specified in the option contract, the option period being the term of the renewed lease. Said option provided that if it were exercised by plaintiffs, the defendants would execute and deliver to plaintiffs, "a good and sufficient warranty deed," conveying the land to plaintiffs. In 1975, oil exploration was conducted upon the land and its value rose substantially. Defendants then told plaintiffs they intended to retain the mineral rights to the land, and later told plaintiffs that defendants' children, all of whom were of full age and who owned an undivided three-fifths interest in the land, would

not convey, and that defendants considered the option valueless. Plaintiffs then commenced this action for specific performance and tendered the downpayment required by the option into court. Neither the renewed lease nor the option agreement were terminated by the parties.

Plaintiffs' amended petition alleged in substance the facts concerning the leases, the execution of the option contract, the ownership by defendants of only an undivided two-fifths interest in the land, and defendants' refusal to carry out the option contract. Plaintiffs prayed for specific performance with damages to the extent of the interest which defendants could not convey.

Defendants, by answer, admitted the leases and generally denied the other allegations of the amended petition.

On trial, the attorney for defendants who had prepared the option contract, testified that on August 10, 1973, the option was being prepared in his office with the parties present, and he then told both parties that defendants were not the owners of all the land and did not have the power to sell it; that plaintiff, Norman Egle, then said he was aware of this but needed the option for the purpose of a loan application. The attorney testified he then prepared the option contract because the defendant, John Kitt, directed it be done.

The defendant, John Kitt, testified that at the time of this conversation, the plaintiff, Norman Egle, said he needed the option so he could get a loan to purchase the land. John Kitt also admitted that at the time the option was signed it was his intent to sell the land to plaintiffs but he was no longer willing to do so.

The plaintiff, Norman Egle, was never asked if the above conversation occurred on August 10, 1973, and made no denial of it. He did testify that when the option was signed by the parties on that date he

thought he had an agreement to buy the entire interest in the land.

The trial court entered its judgment granting plaintiffs specific performance with respect to the two-fifths interest owned by defendants, directing the latter to convey the same to plaintiffs for two-fifths of the purchase price set forth in the option contract and abated the remaining three-fifths of that price.

Defendants filed their motion for new trial alleging the judgment was contrary to the law and the evidence. The trial court sustained the motion and ordered a new trial, specifically finding: (1) A purchaser is not entitled to abatement of purchase price if aware of the deficiency in title prior to entering into the contract, and (2) the testimony reflected plaintiffs were advised of defendants' lack of title prior to signing the option contract, with no denial thereof by plaintiffs.

From this action of the trial court the plaintiffs have appealed, assigning as error the trial court's determination that abatement should be denied where the vendee has knowledge of the title deficiency at the time of contracting and that lack of such knowledge by plaintiffs was an affirmative defense never pleaded by defendants and hence not properly before the court.

We deal with the last assignment first. It is not well stated in the briefs, but plaintiffs' position is that defendants must allege and prove plaintiffs' knowledge of title deficiency if it is to be considered. The pleadings do not raise this issue but we note the pretrial order outlining the issues to be tried included the following: "The court may consider any issues made up by the pleadings and the evidence, and is not restricted to the consideration of these issues (issues specifically noted in the pretrial order)." This order was unmodified and governed the subsequent course of the action. O'Shea v.

O'Shea, 191 Neb. 217, 214 N. W. 2d 486. It is sufficient to encompass the court's consideration of the issues of title deficiency and plaintiffs' knowledge of the same as reflected in the evidence.

There is no question but what defendants only owned an undivided two-fifths interest in the land. Neither party contends otherwise. We also believe the trial court was correct in determining the evidence showed plaintiffs had knowledge of such title deficiency prior to signing the option contract. We proceed further on that basis.

The question to be considered first is whether the trial court correctly stated the rule of law in its order sustaining the motion for new trial, namely, that knowledge by vendees of vendors' title deficiency prior to the execution of the contract, bars abatement of purchase price in an action for partial specific performance.

The rule as fully set out in the case relied upon by the trial court, Moore v. Lutjeharms, 91 Neb. 548, 136 N. W. 343, is: "If a purchaser, at the time of entering into a contract for the purchase of real estate, is aware of a defect in the vendor's interest or title, or deficiency in the subject matter, he will not, in a suit for specific performance, be entitled to any compensation or abatement of price, *unless equity and good conscience clearly require it.*" (Emphasis supplied.) See, also, O'Brien v. Fricke, 148 Neb. 369, 27 N. W. 2d 403. The rule, therefore, is not as absolute as indicated in the trial court's order.

This court has not had occasion to delineate criteria or circumstances when equity would not apply the rule denying abatement, although there is dicta in the case of Smith v. Hornkohl, 166 Neb. 702, 90 N. W. 2d 347, discussing some considerations in this regard. Other jurisdictions have considered the question of when prior knowledge ought not bar abatement and are found and discussed in detail in Annotations, 154 A.L.R. 767. See, also, 71 Am. Jur. 2d,

Specific Performance, §§ 131, 175, pp. 168, 223. An annotation of a purchaser's right to partial specific performance is found in Annotations, 148 A.L.R. 563.

We conclude from an examination of these authorities that in an action by a purchaser for partial specific performance of a land contract, abatement of purchase price should be granted even though at the time of contracting the purchaser had knowledge of seller's title deficiency, when (1) the seller contracted to sell the entire interest in the land, and (2) the purchaser had reasonable grounds to believe the seller could fulfill the contract.

Applying this rule to the case before us we note it was clearly the intention of both parties that the option agreement, at the time of its execution, cover the entire interest in the land; that plaintiffs, as lessees, had dealt with defendants, as lessors, for the entire interest in the land for over 5 years before the option contract was executed, and continued to do so until defendants, finding that oil exploration had caused a significant increase in value, sought to avoid the obligation by first stating they wished to reserve the mineral rights, then advising that their children would not convey, and finally, indicating they considered the option unenforceable. The fact that defendants were parents of the other owners and had dealt with plaintiffs on the basis of the entire interest in the land over such a period of time would, under the circumstances shown here, afford a reasonable basis for plaintiffs to believe, at the time the option was executed, the defendants were in a position to carry out the contract according to its terms. It is clear this is what plaintiffs expected and equally clear what defendants intended to do until subsequent events changed their minds. We find no evidence in the record that plaintiffs had any reason to believe defendants could not or would not carry out the contract until long after its execution.

It would, therefore, be inequitable to deny partial

specific performance to plaintiffs with respect to the interest owned by the defendants and abating the purchase price proportionately for that which they do not own and cannot now convey. The trial court's original judgment was correct.

We therefore reverse the action of the trial court sustaining defendants' motion for new trial and direct that the court's original judgment be reinstated with appropriate modification of the time period for carrying out the same following receipt of the mandate of this court.

REVERSED WITH DIRECTIONS.

EDWARD H. ECKSTEIN ET AL., APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

277 N. W. 2d 91

Filed March 27, 1979. No. 41933.

1. **Property: Due Process.** The right to full and free use and enjoyment of one's property in a manner and for such purposes as the owner may choose, so long as it is not for the maintenance of a nuisance or injurious to others, is a privilege protected by law, and one of which a property owner may not be deprived without due process of law.
2. **Property: Police Powers.** The owner's right to use his property is subject, however, to reasonable regulation, restriction, and control by the state in the legitimate exercise of its police powers.
3. **Ordinances: Police Powers.** The test of legitimacy is the existence of a real and substantial relationship between the exercise of those powers in a particular manner, and the peace, public health, public morality, public safety, or the general welfare of the city.
4. **Ordinances: Property.** A police regulation cannot arbitrarily invade private property or personal rights.
5. **Ordinances.** There must be a reasonable relationship between the object the ordinance seeks to accomplish and the means by which it operates.
6. _____. There must be a clear, real, and substantial connection between the assumed purpose of the enactment and its actual provisions.

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

Miles W. Johnston and Johnston, Grossman, Johnston, Barber & Wherry, for appellants.

Charles D. Humble, City Attorney, and James D. Faimon, for appellee.

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

BOSLAUGH, J.

The plaintiffs own residence properties on 44th Street north of Colfax Avenue in Lincoln, Nebraska. This action was brought to enjoin the City from enforcing an ordinance relating to the use of private wells within the city limits. The ordinance, section 8.52.010 of the Lincoln municipal code, provides as follows: "The use of private wells within the limits of the city for domestic purposes shall be permitted only when the city's water distribution system is not available to the premises on which water is required. The city water distribution system shall, for the purposes of this chapter, be considered available when a water distribution main is located within three hundred feet of any part of said premises on which water is required."

The plaintiffs' homes were constructed between 1956 and 1963 and all are served by private wells. The area was annexed and became a part of the City in 1964. There was no city water service available to any of the properties prior to 1969. Commencing in 1975 the plaintiffs began to receive letters from city officials advising them that their water supply did not comply with the ordinance and that they would be required to bring it into compliance. This action was commenced on August 26, 1977.

The petition alleged that the ordinance was unconstitutional and confiscatory and deprived the plaintiffs of their property rights without due process of law. The City filed no answer but the case was tried

on the theory that the City had alleged the ordinance was valid as a health measure.

The parties stipulated that the plaintiffs' homes were served by a sanitary sewer constructed by an improvement district in 1957, and that the well on each property has been used since the residence was constructed. The parties further stipulated that the water system and well on each property had been regularly tested and approved by the State of Nebraska for potability and health requirements; that the tests performed were the standard bacteriological quality tests of water; and that the tests passed the potability, sanitary, and health requirements for the year 1977. During the trial the counsel for the City stated it was "not contesting these wells are comtaminated (sic)."

The trial court found that the ordinance was a valid exercise of the police power because there was a likelihood that the wells might become contaminated. The plaintiffs appeal from the judgment dismissing the action.

The City presented evidence concerning the city water system in which the water is treated with chlorine and tested constantly to reduce the possibility that the water might become contaminated with bacteria or chemicals. A sanitarian employed by Lincoln-Lancaster County health department testified that it is more likely for untreated ground water to become contaminated than city water which has been treated.

The director of the Lincoln-Lancaster County health department testified that from a public health standpoint a treated public water source was preferable to a private well. Although the home of this witness was served by a private well, he stated that he would connect to the city water system if it was available in his area.

The plaintiffs do not dispute the right of the City to adopt ordinances to protect the health and general

welfare of its citizens. The issue here is whether the ordinance in question was necessary and reasonably designed to protect the health and general welfare of the City.

The right to full and free use and enjoyment of one's property in a manner and for such purposes as the owner may choose, so long as it is not for the maintenance of a nuisance or injurious to others, is a privilege protected by law, and one of which a property owner may not be deprived without due process of law. The owner's right to use his property is subject, however, to reasonable regulation, restriction, and control by the state in the legitimate exercise of its police powers. The test of legitimacy is the existence of a real and substantial relationship between the exercise of those powers in a particular manner, and the peace, public health, public morality, public safety, or the general welfare of the city. Stahla v. Board of Zoning Adjustment, 186 Neb. 219, 182 N. W. 2d 209.

A police regulation cannot arbitrarily invade private property or personal rights. United States Brewers' Assn., Inc. v. State, 192 Neb. 328, 220 N. W. 2d 544.

There must be a reasonable relationship between the object the ordinance seeks to accomplish and the means by which it operates. Clough v. North Central Gas Co., 150 Neb. 418, 34 N. W. 2d 862. There must be a clear, real, and substantial connection between the assumed purpose of the enactment and its actual provisions. Carolene Products Co. v. Banning, 131 Neb. 429, 268 N. W. 313.

In Board of Health v. Crew, 212 Md. 229, 129 A. 2d 115, cited by the City, a regulation requiring property owners to connect to a public water system when it was available was held valid. The well involved in that case was a shallow well located near several septic tanks or cesspools and the evidence showed that contamination was in-

evitable. A similar factual situation does not exist in this case.

The evidence in this case shows that in certain situations it is likely a well will become contaminated. The evidence, however, contains very little concerning the particular wells of the plaintiffs which are involved in this action. The plaintiffs do not contest the right of the City to prohibit the use of water from contaminated wells. The plaintiffs' contention is that the City has no right to prohibit the use of water from private wells because there is merely a possibility that the wells may become contaminated.

As we view the record the ordinance is overbroad. The evidence does not support a finding that the possibility of the plaintiffs' wells becoming contaminated is sufficiently probable to justify an absolute prohibition against their use for domestic purposes.

The judgment is therefore reversed and the cause remanded with directions to enter judgment for the plaintiffs in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C. J., concurs in result.

JOAN S. FERLISE, APPELLEE, V. BYRON RAZNICK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROSE RAZNICK, APPELLANT.

277 N. W. 2d 94

Filed March 27, 1979. No. 41948.

1. **Evidence.** Any statement made by or attributable to a party to an action which constitutes an admission against his interest and tends to establish or disprove any material fact in the case is competent evidence against him.
2. **Trial: Juries.** The court should eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

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

Michael J. Lehan, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and REIMER, District Judge.

REIMER, District Judge.

The plaintiff brings this action for injuries suffered in an automobile accident against the original defendant, Rose Raznick, who later died, and the action was revived against her personal representative. After trial to a jury in the District Court for Douglas County, Nebraska, both a verdict and judgment were entered for the plaintiff in the sum of $13,500. We affirm.

Negligence of defendant's decedent is not denied and no claim of contributory negligence is made. The sole issue before the jury was the nature and extent of the plaintiff's injuries. On this matter, the following facts are relevant. The plaintiff was, at the time of the accident, 51 years of age and had been a widow for a number of years. Her employment career commenced in 1973 after her children were raised. She worked at several different places and, eventually, was employed as a waitress and bartender until this employment was terminated on June 15, 1975. The accident happened on June 18, 1975, while the plaintiff was going to make application for unemployment benefits. Plaintiff later made application for unemployment benefits under date of June 30, 1975, and soon thereafter began drawing benefits which continued into the year 1976, although at times she had part-time employment and the amount of benefits were reduced by her part-time earnings. Plaintiff testified that she was offered work as a bartender approximately 3 weeks

following the accident, but was unable to do that type of work so soon; that she did go back to work as a part-time bartender in November 1975; and that she tried to get other, less strenuous employment between June and November. At one time she tried selling insurance, but the numerous occasions of getting in and out of the car "ended up as bad" as bartending.

The defendant assigns and argues in the brief two errors. The first deals with the application of the plaintiff for unemployment benefits. This issue was first raised prior to trial when plaintiff, by motion in limine, requested an order of the court restricting the defendant from attempting or bringing to the attention of the jury evidence of the fact that plaintiff may or may not have received unemployment benefits. On this matter the court correctly ruled as follows: "THE COURT: If she claims that she was unable to work at all and she certified that she was able to work, then I will permit it, but if she claims she was only diminished in her ability to work, then that evidence would not be pertinent, because while it doesn't say she is able to do any kind of work, only that — It's a question of whether it's an inability to work at all or a diminished capacity to work."

During the course of the trial, in chambers and out of the presence of the jury, defendant had certain documentary evidence marked as exhibits "A" through "M" and offered the same into evidence, upon which offer the court ruled: "* * * the exhibits standing by themselves serve no useful purpose of cross examination; that they are not a rebuttal of the testimony already given by the witness, both on direct examination and cross examination, and that receipt of these exhibits, the Court having reviewed the same in camera, would only unduly confuse the jury and encumber the record." The court then sustained the plaintiff's motion in limine.

A careful examination of these exhibits indicated

that most of them deal with periods of time after November 1975, when the plaintiff started to work part time. As to these exhibits, the ruling of the court was correct.

Only exhibits "H" and "I" are relevant to this discussion. Exhibit "H" consists of four pages of records from the Nebraska Department of Labor, Division of Employment, and exhibit "I" consists of five pages of records from the same department. The first page of each exhibit is a "CLAIM FOR BENEFITS" form, appearing to have been signed by the plaintiff in exhibit "H" on June 30, 1975, and in exhibit "I" on November 3, 1975. Each form contains this printed statement immediately above the apparent signature of the plaintiff: "12. I register for work, certify that I am unemployed, available and able to work, and that I am seeking suitable work. I am not seeking benefits under another State or Federal Law or Railroad Unemployment Insurance. I understand that the Nebraska Law provides penalties for false statements. I claim benefits under the Nebraska Employment Security Law and state the above information is true and correct." The remaining pages of each exhibit do not appear to have been prepared by the plaintiff and no apparent signature of plaintiff appears on any of those pages.

The first page of each exhibit "H" and "I" were admissible in evidence. "The applicable rule is that extrajudicial statements of fact made by a party relating to matters material to the issues in a controversy are available to the adverse party in a trial thereof as admissions against interest or for impeachment. Such statements are, however, not conclusive but may be explained, rebutted, or contradicted, and thereafter are to be given such weight as the trier of the facts deems them entitled." Dorn v. Sturges, 157 Neb. 491, 59 N. W. 2d 751. However, the remaining pages of each exhibit "H" and "I" were clearly irrelevant and immaterial to the issues in

this case and the court committed no error in excluding the exhibits as offered. The record does not reveal that defendant ever made a separate offer of only the first pages of these exhibits. On this record we find no error.

For defendant's second assignment of error, it is complained that the court erred in failing to include the following in instruction No. 10: " 'there may be no recovery, however, for any result which normally would have followed from the pre-existing condition had there been no accident.' "

The medical testimony of both Drs. Kinney and Minard was that the plaintiff suffered from an arthritic condition prior to the accident. Dr. Minard testified that plaintiff was suffering from degenerative changes in her neck and back which are similar to what most people experience from age 30 on, but that in plaintiff these changes probably started by age 17. There is, however, no testimony of any type of disability prior to the time of the accident. The testimony is that the injury aggravated or accelerated the aging or arthritic process.

"The trial court should eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend." Myers v. Willmeroth, 151 Neb. 712, 39 N. W. 2d 423. The instructions were correct under this record.

The judgment of the trial court should be, and is, affirmed.

AFFIRMED.

IN RE INTEREST OF TABITHA CHANT, JESSE THOMAS, AND WILLIAM THOMAS, CHILDREN UNDER EIGHTEEN YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JESSE TYSON CHANT AND ROSE MARIE THOMAS CHANT, NATURAL PARENTS, APPELLANTS.

IN RE INTEREST OF REBECCA ANN CHANT, A CHILD UNDER EIGHTEEN YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JESSE TYSON CHANT AND ROSE MARIE THOMAS CHANT, NATURAL PARENTS, APPELLANTS.

277 N. W. 2d 97

Filed March 27, 1979. Nos. 41990, 41989.

1. **Parent and Child: Minors.** The right of parental custody and control is a natural but not an inalienable right. The public also has a paramount interest in the protection of the rights of children.
2. **Courts: Statutes: Evidence: Parent and Child: Minors.** In a proceeding in juvenile court under sections 43-202 (2) and 43-209, R. S. Supp., 1978, the court may terminate all parental rights of the parents if the court finds it would be in the best interests of the child to so terminate parental rights. The decision to terminate parental rights need not be based upon proof beyond a reasonable doubt.
3. **Courts: Judgments: Parent and Child: Evidence: 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. The judgment of the trial court will be upheld on appeal unless there is an abuse of discretion.
4. **Parent and Child: Time: Hearings.** When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the children require that a final dispositional hearing be held without delay.

Appeal from the District Court for Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

Reedy, Schiltz & Prohaska, for appellants.

Donald L. Knowles, Douglas County Attorney, and Lee C. Brawner, for appellee.

Heard before BOSLAUGH, CLINTON, and WHITE, JJ., and RIST and WINDRUM, District Judges.

WINDRUM, District Judge.

Jesse Tyson Chant and Rose Marie Thomas were the natural parents of three children whose names and dates of birth are as follows: Tabitha Chant, February 8, 1973; Jesse Thomas, January 3, 1974; and William Thomas, January 3, 1974. On April 7, 1975, a petition was filed in the Separate Juvenile Court of Douglas County, Nebraska, in the interest of said minor children. The natural parents of the children were thereafter married on April 16, 1975. The parents did not resist detention of the three children. The adjudication hearing was held on August 28, 1975, at which time the original petition was amended to strike therefrom the prayer to terminate the parental rights of the parents in said children. All of the parties, including an attorney representing the children as guardian ad litem, stipulated to the facts in the amended petition. The court, at the conclusion of the hearing, found the children to be neglected within the meaning of section 43-202 (2), R. R. S. 1943, as amended, and placed the children in the custody of the Douglas County social services, dismissed the prayer of the petition which sought termination of parental rights of the natural parents, and continued the matter for a dispositional hearing at a later date.

On October 2, 1975, pursuant to a court order, Tabitha was returned to her parents and the first of several plans was presented to the parents, which said plan was designed to result in the return of all of the children to the family home.

On August 24, 1976, a petition was filed in the interest of Rebecca Ann Chant, a child born to the parties on August 8, 1975, and a supplemental petition was filed in the interest of Tabitha, Jesse, and William. The prayer of both petitions sought termination of the parental rights of both parents. Once again the parents did not contest the detention of any of the children and again stipulations were made

by the parties in regard to the allegations contained in the petitions. On November 16, 1976, all of the children were found to be neglected within the meaning of section 43-202 (2), R. S. Supp., 1978, beyond a reasonable doubt, based on the stipulations entered into by the parties at the adjudication hearing. The issue of termination of parental rights was taken under advisement, and all four children were placed in the custody of the Douglas County social services.

The final hearing in the matter of the termination of the parental rights was held on January 17, 1978, at the conclusion of which the court found that the best interests of the children would be served if they were placed for adoption and the parental rights of the parents were terminated. The journal entry germane thereto contained no specific findings as to why termination was ordered.

The two cases pose identical issues and are considered as one for the purposes of appeal.

The natural parents of the children appealed assigning as error: (1) That the Separate Juvenile Court applied an improper standard of proof in making its decision to terminate the parental rights; and (2) that the decision to terminate parental rights was not supported by the evidence before the court.

A recitation of all of the evidence would serve no useful purpose. One may peruse recent cases, for example, State v. Jenkins, 198 Neb. 311, 252 N. W. 2d 280; and State v. Tibbs, 197 Neb. 236, 248 N. W. 2d 330, if one wishes to seek examples of facts warranting termination of parental rights.

Section 43-209, R. S. Supp., 1978, sets forth the procedure to be applied by the juvenile court in terminating parental rights:

"* * * 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.*" (Emphasis supplied.)

The initial hearing was held on August 28, 1975. The final adjudication to terminate the parental rights was made on January 17, 1978. There were at least six hearings held. The record is replete with evidence of the cooperation of several persons and agencies, all under the guidance of the court, in attempting all sorts of plans and conditions to rehabilitate the parents. The record indicates that while attempts were made by the parents to comply with certain of the conditions contained in these plans, always on a sporadic basis, the record is replete with evidence indicating that cooperation on the part of the parents was entirely lacking.

The appellants' contention that the court must find beyond a reasonable doubt that it would be to the best interests of the children if the parental rights of their natural parents be terminated is in error.

Section 43-206.03 (3), R. S. Supp., 1978, provides as follows: "At the hearing the court shall first consider only the question of whether the minor is a person described by section 43-202. This shall be known as the adjudication. After hearing the evidence on such question, the court shall make a finding and adjudication entered in the minutes based on proof beyond a reasonable doubt, whether or not the minor is a person described by subdivision (3) or (4) of section 43-202 or by a preponderance of the evidence whether or not the child is a person described by subdivision (1) or (2) of section 43-202." The section above quoted provides that proof must be beyond a reasonable doubt whether or not the minor is a person described by subdivision (3) or (4) of section 43-

202, R. S. Supp., 1978. No such standard is set forth in determining the proper disposition to be made of such child. Quite to the contrary, subsection (4) of section 43-206.03, R. S. Supp., 1978, provides: "Strict rules of evidence shall not be applied at any dispositional hearing." This would certainly indicate that the standard of proof would not be beyond a reasonable doubt at an adjudication hearing.

The right of parental custody and control is a natural but not an inalienable right. The public also has a paramount interest in the protection of the rights of children. State v. Jenkins, 198 Neb. 311, 252 N. W. 2d 280.

In determining whether or not parental rights should be terminated, it must be determined that the best interests of the child are served. State v. Jenkins, *supra*.

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. The judgment of the trial court will be upheld on appeal unless there is an abuse of discretion. Those rules are followed by this court even though an appeal of such a case in this court is heard de novo on the record. State v. Jenkins, *supra*.

Ample evidence exists in the record in this case indicating blatant disregard by the parents of the court's orders for approximately 2½ years. Nowhere were there any challenges that these rehabilitation orders were unreasonable.

It should be further noted that all the attorneys who are officers of the court, namely the county attorney, the attorney for the parents, and the guardian ad litem of the children, at the final adjudication hearing on January 17, 1978, on behalf of their clients, agreed the condition of the home under the control

of the natural parents of the children did not at that time warrant return of the children to the home. In State v. Tibbs, 197 Neb. 236, 248 N. W. 2d 330, at p. 243, in speaking of the appellant, the court stated as follows: "Although appellant has indicated a willingness to accept conditions of close supervision of his family by the State Department of Public Welfare if the children are left in his custody, it must be remembered that he has already had one chance to do that, as he was given physical custody of the children under supervision of the Welfare Department from approximately February 11, 1975, the date of the original order of the county court, to approximately August 28, 1975, on which date the county court entered its order providing for the termination of parental rights, a period of over 6 months. During that period, he violated the clear order of the court, and the condition of the children did not appear to have improved. Although the appellant would like additional time to demonstrate his ability to properly care for his children, we point out that this litigation has been pending for approximately 2 years, and the best interests of the children require that it be brought to final conclusion without further delay."

In this case appellants had not one, but numerous chances to comply with the court order over a period approximating 2½ years. If natural parents cannot satisfactorily rehabilitate themselves within a reasonable length of time, it is not in the best interests of the children to unduly delay a decision as to the disposition of the children.

We conclude there is sufficient evidence in the record to justify the action taken by the courts below and the judgment of the Separate Juvenile Court is affirmed.

AFFIRMED.

DALE PARTRIDGE, APPELLANT, V. JOHN E. YOUNGHEIN ET AL., APPELLEES.

277 N. W. 2d 100

Filed March 27, 1979. No. 42036.

1. **Summary Judgments.** The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity, expense, and delay of trial, those cases where there is no genuine claim or defense.
2. _____. In consideration of a motion for summary judgment, the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may be drawn from the evidence.

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

Hutton & Garden, P.C., for appellant.

Mueting & DeLay, for appellees.

Heard before BOSLAUGH, BRODKEY, and WHITE, JJ., and SPENCER, Retired Justice, and COADY, District Judge.

COADY, District Judge.

Approximately 2 weeks before his trees appeared to be dying, the plaintiff, Dale Partridge, looked into the sky, saw an airplane fly over his home and surrounding orchard, and saw a white mist emit from the plane. At that time and place, May 27, 1972, he took pictures of the plane in the air.

The plaintiff filed suit against three defendants — John Younghein; Skyways, Inc., a corporation; and the City of Norfolk. The plaintiff answered certain interrogatories on December 3, 1973, and made certain admissions on March 8, 1974. The plaintiff deposed John Younghein on September 9, 1974. The defendants deposed the plaintiff on September 21, 1974. Upon motion for summary judgment, the plaintiff's cause against the City was dismissed on March 7, 1977. That dismissal is not before us on appeal.

E. Myron Erickson was deposed on December 14, 1977. On February 3, 1978, and upon motion for summary judgment, the trial court dismissed plaintiff's cause against the remaining defendants after having properly considered the depositions, admissions, and answers to interrogatories mentioned above and the pleadings. Plaintiff appeals from the second ruling on summary judgment and we affirm.

John Younghein was the president of Skyways, Inc. and the pilot of the airplane witnessed by the plaintiff. He, on behalf of said corporation, was spraying a 2,4-D amine weed-killer solution over and on city property at the request of the City of Norfolk. The city's property is across the road from plaintiff's 5-acre tract. About his house, the plaintiff had 6 pear trees, 6 peach trees, and 267 apple trees with eight different varieties of apples. The plaintiff pleads that defendants' drifting spray killed 71 trees, ruined the 1972 fruit crop, and substantially reduced the 1973 crop.

The plaintiff took pictures of the plane on May 27, 1972, because he had been "warned by previous owners and such * * * if we ever saw a plane or anything like that to make sure you get the identification numbers and stuff." He was not worried on that day and did not do anything for a couple of weeks. After 2 weeks, he first noticed something wrong. "My blooms were touching leaves and foliage and the foliage was falling like curling up." The leaves were green with spots on them. The fruit was drying up. The fruit had oil on it. The leaves of the peony bushes about the house were curling up and had black spots. His flowers all had spots on them, but they did bloom and did not die. His tomato plants died.

On said discovery date, plaintiff called John Younghein and the two of them inspected the premises in the presence of four other people. Mr. Younghein took some cuttings and mailed them to the Uni-

versity of Nebraska for examination and analysis. The cuttings were taken from trees near the plaintiff's house.

The plaintiff testified that when defendant Younghein got his report back, the plaintiff did not believe either the defendant or the report. The plaintiff then took cuttings from the center of the orchard where the damage was more severe. He sent his own cuttings to the University of Nebraska, the University of South Dakota, and the Erickson Laboratory in Fremont. Plaintiff's cuttings were first sent to the University of Nebraska.

The plaintiff claimed the written reports he received were his counsel's work product and he has not disclosed their contents. However, he testified that the Erickson Lab and the University of South Dakota found oil residue on the cuttings submitted to them. He testified that they reported fuel oil damage. He also said they reported some trees would have built up immunities to herbicides and others would not have.

The plaintiff did admit he received two letters from an extension assistant at the University of Nebraska. The first letter, dated June 19, 1972, read as follows: "Your letter to Mr. Howard White concerning apples was sent to John Furrer, Extension Pesticide Specialist at the University. He examined the leaves and found no visible evidence of herbicide injury. After his examination the sample was forwarded to me for disease diagnosis.

"There are two diseases which are causing the condition which you are concerned about. The first is apple scab. While the level of infection is relatively low it is causing some discoloration of the foliage. Of greater concern is a disease known as fire blight. One of the more typical symptoms of this disease is the development of mumified fruits which you have described. It will also cause a blackening and subsequent death of the leaves. From the sample

you sent I would say that you have a heavy infestation of this disease which should be controlled in the near future.

"I have enclosed two extension bulletins on apple diseases and fire blight which you may find useful. If you have further questions, please feel free to write or call."

The second letter, dated June 23, 1972, read as follows: "There seems to be some confusion on what trees are being attacked by which organism. The samples I received today have some fire blight on them but it is not as severe as the previous sample. The major cause for concern on this set of samples is apple scab. If you will notice the discolored and brown tissue have darker spots on them. This is the result of a severe reaction to apple scab. The darker spots are the site of the original infections.

"You brought out a good point about the resistance to fire blight and I will try to explain this. First of all, the susceptibility chart is a relative chart and by no means absolute. Under certain environmental conditions the resistance of one variety may break down. There is also the possibility that the strain of bacteria attacking the apples are more virulent or more potent.

"If this were herbicide injury there would be no noticeable differences among varieties. Since 2,4-D is actually a growth hormone it would affect all apple tissue in a similar manner. Evidently this is not the case. This, combined with microscopic and visual examination all indicate that the damage is not the result of a herbicide."

The deposition of Mr. Erickson from Erickson Laboratories disclosed that he had found a trace of fuel oil on the cutting he examined. He testified that his examination was not intended to discover disease and that he had no expertise or ability concerning diseases. He did not believe the amount of fuel oil he found could have damaged a tree. He did examine

the cuttings submitted to him for traces of herbicide and herbicide damage. Because of the effect which climatic conditions have on the subject, the deponent could not say how long traces of 2,4-D last on a leaf or twig but that 2,4-D does penetrate plant surfaces.

The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity, expense, and delay of trial, those cases where there is no genuine claim or defense. Pfeifer v. Pfeifer, 195 Neb. 369, 238 N. W. 2d 451 (1976). It is effective and serves a separate, useful purpose when it can be used to pierce the allegations of the pleadings and show conclusively that the controlling facts are otherwise than as alleged. Eden v. Klaas, 165 Neb. 323, 85 N. W. 2d 643 (1957).

The crux of the decision to be made here is only related to the question as to whether defendants' spray got on plaintiff's orchard. That clearly is a disputed fact. But for purposes of summary judgment, that is decided against defendants. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party. Farro v. Rubottom, *ante* p. 120, 274 N. W. 2d 149 (1979).

The basic question raised by the evidence and the briefs is whether reasonable minds might decide herbicide poisoning caused the leaves to curl, the fruit to shrivel, and the trees to die or was a proximately contributing cause of the same. In this respect, the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits. Farro v. Rubottom, *supra*.

Without producing them at the deposition or at

the hearing on the motion for summary judgment, the plaintiff says the reports from Erickson Lab and the University of South Dakota reported fuel oil damage. Plaintiff said his work product reports disclose some herbicide immunity theory as opposed to disease resistance mentioned by the Nebraska extension assistant which, we guess, was an attempt to discredit the University of Nebraska reports. Evidence consisting of denials, general allegations, conclusions, arguments, and statements that would not be admissible in evidence is of no avail in opposition to a motion for summary judgment. Evidence opposing the rendition of a summary judgment, to be effective, must be made on personal knowledge and show affirmatively that affiant is competent to testify to the matters stated therein. Eden v. Klaas, *supra.*

Upon reviewing the facts above stated, the reader will notice that there are three obvious facts in this case concerning the issue of proximate cause. First, the hard and direct evidence points to disease. Second, some of the circumstantial evidence points to disease and some to herbicide poisoning. Third, nowhere in pleadings or his evidence does plaintiff even deny that his trees were diseased. Based on the evidence before us, and there are some aspects of the adversary system left in this modern day, we cannot say that reasonable men might conclude that a proximately contributing cause of plaintiff's damage was the defendants' drifting spray.

Because summary judgment is not favored and our research has found it to be an extremely technical procedure, we have intentionally refrained from mentioning any evidence taken from the deposition of John Younghein except those parts which were helpful to the plaintiff's contentions. Some perspective may be gained from his testimony that he made as an expert by reason of his trade. He testified that 2,4-D damage should have been visible on the small broadleaf plants about the plaintiff's premises within 24 to

48 hours and noticeable long before the end of 2 weeks.

He also testified he used white smoke to test the wind south of plaintiff's premises but that he was always east and away from said premises when he applied spray. That portion of the city property south of and along plaintiff's house and orchard, Younghein claimed to have sprayed by hand from the ground.

The judgment of the trial court was correct and is affirmed.

AFFIRMED.

WHITE, J., concurs in result.

WEST GATE BANK OF LINCOLN, APPELLANT, V. LAWRENCE R. EBERHARDT ET AL., APPELLEES.

277 N. W. 2d 104

Filed March 27, 1979. No. 42045.

1. **Equity: Trial: Evidence.** Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.
2. **Conveyances: Burden of Proof.** Where there is a conveyance between close relatives without adequate consideration, the burden is upon the parties to the transaction to establish that it was done in good faith.
3. **Property: Contracts: Appeal and Error: Fraud.** Valuation of property is a matter of judgment, and a contract based upon inadequate consideration will not be set aside on that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself evidence of fraud.

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

Anderson & Stock, for appellant.

Crosby, Guenzel, Davis, Kessner & Kuester, for appellees.

Heard before BOSLAUGH, BRODKEY, and WHITE, JJ.,

and SPENCER, Retired Justice, and COADY, District Judge.

SPENCER, Retired Justice.

This is an action in aid of execution to set aside a conveyance of real estate by defendants Lawrence R. and Phyllis Eberhardt to defendants Fred C. Eberhardt, Jr., and Christa M. A. Eberhardt. West Gate Bank of Lincoln alleges the conveyance was without adequate consideration and for the purpose of defrauding plaintiff. The trial court dismissed the petition. The bank, appellant, alleges seven assignments of error which essentially cover two issues: (1) The adequacy of the consideration, and (2) the placing of the burden of proof on the bank. We affirm.

Bank had secured two judgments against Lawrence and Phyllis Eberhardt totalling $41,439.49. An execution to be levied on the property involved in this action was returned unsatisfied on July 7, 1977. Four months before the entry of the first judgment, which was on January 3, 1977, the Eberhardts had conveyed the property to Lawrence's brother, Fred C. Eberhardt, Jr., and his wife, Christa M. A. Eberhardt, for a stated consideration of $70,000.

Mutual Savings Company loaned Fred and Christa $70,000 on said property. This was disbursed as follows: $60,046.13 to Mutual to satisfy two mortgages it had on the property; $362.60 to the city treasurer; $1,290.96 to the county treasurer; $67.75 for abstracting and miscellaneous expense; and $8,232.56 to Lawrence Eberhardt. In addition to the $8,232.56 Lawrence was paid an additional $5,000. Fred and Christa assumed responsibility for the payment of unpaid special assessments of $1,930.99 to the water district, and $1,510 to the sewer district. This would indicate a consideration of $78,440.99. Approximately 3 or 4 months prior to the sale, Lawrence and Phyllis had moved to Colorado.

Bank in its creditor's bill alleged the conveyance from Lawrence to Fred was fraudulent and requested that it be set aside. Defendants answered, alleging good and adequate consideration and denied any fraudulent intent. The District Court found the consideration to be adequate and that Bank had failed to sustain its burden of proof and dismissed the creditor's bill.

An appeal in an equity case is tried de novo in the Supreme Court. § 25-1925, R. R. S. 1943. However, as we said in Bailey v. Mahr, 199 Neb. 29, 255 N. W. 2d 866 (1977): "Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying."

We first consider Bank's assignment on the burden of proof. Bank contends we inadvertently changed the rule in First Nat. Bank v. First Cadco Corp., 189 Neb. 553, 203 N. W. 2d 770 (1973), where we held: "Where there is a conveyance between close relatives *without adequate consideration*, the burden is upon the parties to the transaction to establish that it was done in good faith." (Emphasis supplied.)

Bank contends our previous cases held a conveyance between relatives which had the effect of hindering or delaying a creditor was presumptively fraudulent and the burden was on the parties to establish the adequacy of the consideration in the first instance.

Bank argues the question is whether or not an intent to defraud existed. It contends the cases, in speaking of the good faith of the transaction, are saying intent is the major issue and that intent, not adequacy of consideration, is the threshold question. On this theory Bank contends as soon as it established it was a creditor and property of the debtor had been conveyed to a close relative of its debtor, the burden then shifted to the defendants to prove the good faith

of the transaction. First Nat. Bank v. First Cadco Corp., *supra,* holds inadequacy of consideration is a badge of fraud. We interpret Cadco to hold that inadequacy of consideration suggests an intent to defraud and shifts the burden to the defendants.

In Schulze v. Jensen, 191 Neb. 253, 214 N. W. 2d 591 (1974), quoting Cadco, we reiterated: "Where there is a conveyance between close relatives *without adequate consideration,* the burden is upon the parties to the transaction to establish that it was done in good faith." (Emphasis supplied.)

To establish a prima facie case Bank had the burden of showing the conveyance was one between close relatives and that the consideration appeared to be inadequate. When this was done the burden of proof then shifted to the defendants to establish the good faith of the transaction.

We now turn to the adequacy of the consideration. Valuation of property is a matter of judgment, and a contract based upon inadequate consideration will not be set aside on that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself evidence of fraud. Peters v. Woodmen Accident & Life Co., 170 Neb. 861, 104 N. W. 2d 490 (1960).

Bank adduced evidence that at approximately the time of the conveyance, a loan purpose appraisal estimated the current market value of the property to be $90,100. Fred paid the equivalent of $78,440.99. Considering the fact that no real estate salesman's commission was involved in a sale between brothers, it cannot be said that the sale price is so inadequate as to suggest fraud. The trial judge who heard the testimony and observed the witnesses found the consideration was adequate. On the record we cannot say he was wrong.

We agree with the trial court, the plaintiff failed to prove the conveyance was fraudulent and void. The

creditor's bill was properly dismissed.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID A. SHAW, SR., APPELLANT.

277 N. W. 2d 106

Filed March 27, 1979. No. 42198.

1. **Criminal Law: Judgments: Sentences: Appeal and Error.** Before a criminal matter may be appealed to the Supreme Court, it must be a final judgment, and no judgment will be regarded as final unless the sentence is pronounced.
2. **Criminal Law: Statutes: Sexual Sociopaths: Sentences: Time.** Pursuant to section 29-2902, R. R. S. 1943, criminal proceedings in a case in which there is probable cause to believe that the defendant is a sexual sociopath may be adjourned and the sentence suspended until proceedings pursuant to the sexual sociopath law have been completed. Upon completion of those proceedings, at the earliest possible time thereafter, the defendant is to be returned to the District Court wherein he was convicted. At that time an appropriate sentence on the criminal charges is to be imposed. Such sentence shall be deemed to commence from such time as the defendant is committed to either the Nebraska Regional Center or the Nebraska Penal and Correctional Complex, less any credit for time already spent in incarceration. No defendant shall be required to remain in custody for a period of time longer than the sentence imposed for the criminal charge or until such time as defendant is determined to be a subject fit for release pursuant to the provisions of the sexual sociopath law, whichever later occurs.

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

Michael D. Gooch, 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.

This appeal is from an order of the District Court

for Sarpy County, Nebraska, denying defendant's motion for post conviction relief. Defendant assigns as error: (1) That the trial court erred in finding that post conviction relief was not the proper remedy for defendant; and (2) that the trial court erred in failing to find that defendant had been denied his constitutional right to effective assistance of counsel as guaranteed by the Sixth Amendment, made applicable to the states by the Fourteenth Amendment to the United States Constitution. We have carefully examined the record in this matter and find the decision reached by the trial court was basically correct and should be affirmed. Nevertheless, we believe this case displays some of the painful ambiguities found in the Nebraska sexual sociopath law (sections 29-2901 to 29-2910, R. R. S. 1943), which therefore require us to make a detailed examination of this case. The uncertainty caused by the law requires us to declare certain principles which will resolve both the instant case and subsequent cases brought pursuant to the sexual sociopath law.

The evidence discloses the defendant was charged with the commission of a sexual assault in violation of section 28-408.04, R. R. S. 1943. On June 8, 1977, defendant appeared at arraignment with his court-appointed counsel and entered a plea of guilty to the charge. The record discloses that by reason of entering such a plea of guilty the county attorney agreed to dismiss two other charges then pending against defendant, and agreed further not to file an additional charge against defendant.

After receiving the plea of guilty, the court made inquiry of defendant as to whether he had ever been involved in any prior sexual offenses and was advised that defendant had so been involved. The court announced all further proceedings on the sexual assault charge would then be suspended, and that the matter would proceed pursuant to the provisions of the sexual sociopath law. It would appear

this came as no surprise to defendant or his counsel. The record specifically disclosed that, prior to the hearing on June 8, 1977, the court and counsel had discussed the possibility of determining whether defendant was a sexual sociopath.

On July 13, 1977, defendant again appeared before the trial judge with his court-appointed counsel. At that time, defendant waived his right to postpone for 10 days a hearing on the probability of his being a sexual sociopath and asked the court to proceed at once on the matter. The court received two medical evaluations and by reason thereof found defendant to be a sexual sociopath. On July 13, 1977, the court further ordered defendant committed to the Nebraska Regional Center for observation and diagnosis pursuant to the provisions of section 29-2903, R. R. S. 1943, for a period not to exceed 90 days.

On September 7, 1977, defendant appeared before the District Court with his court-appointed counsel and waived his right to a jury trial on the issues of whether defendant was a sexual sociopath and if so, whether defendant was treatable.

On October 27, 1977, defendant appeared in the District Court with his court-appointed counsel and was found by the District Court to be a sexual sociopath. The court further found defendant would not benefit from treatment at the Nebraska Regional Center. Defendant was therefore committed to the Nebraska Penal and Correctional Complex for an indefinite period, pursuant to the provisions of section 29-2903 (3), R. R. S. 1943. No appeal was taken from either the plea of guilty to the sexual assault charge entered by defendant on June 8, 1977, or from the finding and order as to his sexual sociopath status which the District Court entered on October 27, 1977.

Sometime in April of 1978, defendant filed a motion for post conviction relief, maintaining he received ineffective assistance of counsel, thereby denying him his constitutional rights. An evidentiary

hearing on the motion was held before the District Court for Sarpy County, Nebraska, on June 1, 1978, with defendant present in court. At this time the defendant was represented by Mr. Michael Gooch who subsequently was appointed by the court to represent defendant in the post conviction matter.

Defendant maintained that he had requested his initial court-appointed counsel to appeal from the order of the court entered on October 27, 1977.

His initial court-appointed attorney testified that he had in fact discussed with defendant the matter of appealing both the plea entered on June 8, 1977, as well as the order entered on October 27, 1977, but had advised defendant that, in counsel's opinion, appeal would be unsuccessful in either case. He further testified the defendant did not indicate any desire to appeal either from his plea of guilty entered on June 8, 1977, or from the order of the court entered on October 27, 1977.

The record is somewhat unclear as to whether the trial court denied defendant relief by reason of the court's determination that post conviction relief was not proper or because defendant had not been denied the assistance of effective counsel in fact. While the trial judge indicated he was not certain whether post conviction relief was applicable in this case, he nevertheless made positive findings to the same extent as would have been made had post conviction relief been available. Confusion occurred in the trial court's mind by reason of the fact that defendant had never been sentenced on the sexual assault charge. Since the provisions of the Post Conviction Act apply to prisoners in custody *under sentence,* the availability of this remedy was questioned by the trial court. § 29-3001, R. R. S. 1943.

Failure to impose a sentence on the criminal charge when sexual sociopath proceedings are had has been a source of difficulty in a number of previous cases. In State v. Irwin, 191 Neb. 169, 214 N.

W. 2d 595, we thought to some extent we had eliminated that difficulty. Apparently we did not and therefore we shall attempt to do so herein. Hopefully such action will then put an end to the confusion which has heretofore existed.

Before one may be found to be a sexual sociopath it is required that the individual first be convicted of a sexual offense. §§ 29-2901 and 29-2902, R. R. S. 1943. Provisions of the sexual sociopath law then provide that all further criminal proceedings are to be suspended until proceedings under the sexual sociopath law are held. No sentence is to be imposed unless defendant is found not to be a sexual sociopath or is ultimately determined to be a fit subject for discharge from either the Nebraska Penal and Correctional Complex or the Nebraska Regional Center. § 29-2906 (3), R. R. S. 1943. This procedure of suspending the criminal action and delaying the imposition of sentence on the criminal charge until an individual is fit for discharge may result in the imposition of sentence being delayed for many years. It thereby denies defendant any right of appeal on the original criminal conviction until that time.

We have previously said that before a criminal matter may be appealed to this court, it must be a final judgment. No judgment will be regarded as final unless a sentence is pronounced. Kennedy v. State, 170 Neb. 193, 101 N. W. 2d 853. It is therefore clear that by delaying the imposition of a sentence indefinitely, a defendant is denied the right of appeal from the original charge. Such denial offends basic notions of due process and equal protection of the law and cannot be permitted.

Moreover, the ultimate imposition of sentence may be made by a judge not familiar with the matter and at a time when witnesses favorable and necessary to an adequate defense may no longer be available to the defendant, which likewise offends notions of

due process and equal protection. There would be little comfort to a defendant who obtained a reversal of his criminal conviction 30 years after being found guilty, only to then discover that no witnesses essential to his cause on retrial were available. Likewise, it takes little analysis to recognize that one may not be declared a sexual sociopath unless and until one is convicted of a sexual offense. § 29-2901, R. R. S. 1943. Yet without the imposition of a sentence, one has no right of appeal from that conviction until after he is determined to be fit for release. Such a result cannot be permitted to obtain. See, Ex parte United States, 242 U. S. 27, 37 S. Ct. 72, 61 L. Ed. 129; and Mintie v. Biddle, 15 F. 2d 931 (8th Cir., 1926). See, also, American Bar Association Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, § 5.4 (a).

We therefore hold, pursuant to section 29-2902, R. R. S. 1943, criminal proceedings in a case in which there is probable cause to believe that defendant is a sexual sociopath may be adjourned and the sentence suspended until proceedings pursuant to the sexual sociopath law have been completed. Upon completion of those proceedings, at the earliest possible time thereafter, defendant shall be returned to the District Court wherein he was convicted. At that time an appropriate sentence on the criminal charge shall be imposed. Such sentence shall be deemed to commence from such time as defendant is committed to either the Nebraska Regional Center or the Nebraska Penal and Correctional Complex, less any credit for time already spent in incarceration. No defendant shall be required to remain in custody for a period of time longer than the sentence imposed for the criminal charge or until such time as defendant is determined to be a subject fit for release, whichever *later* occurs. It would appear this would guarantee defendant his necessary constitutional

rights while protecting the rights of society in regard thereto.

All persons presently in custody as sexual sociopaths, who have not been sentenced for the sexual assaults which led to their being declared a sexual sociopath, should be returned to the district in which they were convicted for the purpose of sentencing on the criminal charge. Such sentence shall commence to run from the date in which such defendant was incarcerated less appropriate credit for time served prior to conviction.

By reason of the action that we take, the confusion and difficulty which has heretofore existed concerning the manner of appeal from such actions should now be resolved. Post conviction remedies are available only in criminal matters and only to individuals who are in custody under sentence. Therefore, an individual convicted of a sexual offense may, after the imposition of a sentence on the criminal charge, file a direct appeal of such judgment to this court or may, in an appropriate case, file a motion for post conviction relief.

With the foregoing in mind, we turn again to a review of the trial court's refusal to grant defendant relief under his motion for post conviction relief.

Confinement under the sexual sociopath law is not criminal in nature, but is rather civil. See, State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595, and State v. Little, 199 Neb. 772, 261 N. W. 2d 847. Appeals from confinement as a sexual sociopath or from the annual review are in accordance with the provisions of section 29-2906, R. R. S. 1943. Rules applicable to civil appeals control in such cases. Likewise, a writ of habeas corpus may be available to a defendant who maintains that he is being held in custody unlawfully. §§ 29-2801 to 29-2824, R. R. S. 1943.

In light of what we have said in this case, and the fact that defendant has not been sentenced, no final order yet exists. Therefore, no further consideration

at this time need be given to any matters concerning the defendant's conviction for sexual assault. Likewise, post conviction relief, not applicable to actions under the sexual sociopath law, need not be considered. Should defendant maintain he is not now a sexual sociopath, he has full right to raise that matter at his annual review or upon an appeal therefrom, or may bring an action for habeas corpus. A denial of effective assistance of counsel would not be applicable to a civil proceeding. Accordingly, we need not therefore consider the errors alleged by the defendant as to that claim. The judgment of the District Court denying relief to the defendant is affirmed.

AFFIRMED.

ROBERT BREZINA, APPELLANT, V. EVERETT J. HILL, AS AGENT FOR THE HATTIE HILL ESTATE, ET AL., APPELLANTS, IMPLEADED WITH RICHARD GRUBAUGH ET AL., APPELLEES.

277 N. W. 2d 224

Filed April 3, 1979. No. 41862.

1. **Equity: Evidence: Trial.** In an equitable action where evidence on material issues of fact is in conflict, the reviewing court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. **Property: Interest.** Where money or property belonging to another was not paid or turned over to the person entitled to receive it at the time when it should have been paid or turned over, interest is generally allowed.
3. _____: _____. Interest is allowable where the conduct of a party justifies its allowance, particularly where money or property belonging to another is wrongfully withheld to the enrichment of the debtor and to the detriment of the creditor.
4. **Specific Performance: Breach of Contract: Damages.** The law does not permit the complete remedy by specific performance to be split into separate actions for different elements of damages flowing from a single breach of contract.

5. **Principal and Agent: Brokers: Contracts: Commissions.** A broker is entitled to his commission in accordance with the terms of his listing contract, and the right to compensation is not impaired by subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed.
6. **Principal and Agent: Brokers: Commissions.** A commission cannot be collected by the agent for his services if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency.
7. **Principal and Agent: Brokers: Negligence.** A real estate broker is an agent owing a fiduciary duty (1) to use reasonable care, skill, and diligence in procuring the greatest advantage for his client, and (2) to act honestly and in good faith, making full disclosures to his client of all material facts affecting his interests. A neglect to do so renders him liable to his client for whatever loss the latter may suffer as a consequence thereof.
8. **Principal and Agent: Brokers.** The rule requiring a broker to act with utmost good faith toward his principal places him under a legal obligation to make a full, fair, and prompt disclosure to his employer of all facts within his knowledge which are or may be material to the matter in connection with which he is employed, which might affect his principal's rights and interests or influence his action in relation to the subject matter of the employment, or which in any way pertain to the discharge of the agency which the broker has undertaken.

Appeal from the District Court for Butler County: BRYCE BARTU, Judge. Affirmed in part, and in part reversed and remanded with directions.

Miles W. Johnston of Johnston, Grossman, Johnston, Barber, and Wherry, for appellant Brezina. Edward Asche and Edgar V. Thomas, for appellants Everett J. Hill et al.

William L. Walker and Earl Ludlam, for appellees.

Heard before SPENCER, Retired Justice, MCCOWN, and BRODKEY, JJ., and REAGAN and BLUE, District Judges.

SPENCER, Retired Justice.

This action by Robert Brezina began as one for specific performance on a contract for the sale of land. Defendants are the property owners, who will

be referred to as the Hill heirs, and the real estate brokers with whom the property was listed, Grubaugh Bros. We sustained a judgment on the pleadings for the Hill heirs in the specific performance action. See Brezina v. Hill, 195 Neb. 481, 238 N. W. 2d 903 (1976).

After the entry of judgment on the mandate, the issues tried in this action were Brezina's cause of action against Grubaugh Bros. for damages and interest; the claim of Grubaugh Bros. against the Hill heirs for commission; and the cross-petition of the Hill heirs against Grubaugh Bros. for damages.

The trial was to the court which found Brezina had failed to sustain his burden of proof and dismissed his petition against Grubaugh Bros. The cross-petition of the Hill heirs was dismissed and judgment was entered against them in favor of Grubaugh Bros. in the amount of $4,050 and costs. Brezina and the Hill heirs prosecute this appeal. We affirm in part and reverse in part.

Before discussing the facts, we believe it may be helpful to an understanding of the issues on this appeal to briefly synopsize the original action which was for the specific performance of a contract for the sale of farmland in Butler County. A listing contract for the sale of the farm was entered into between Everett J. Hill, hereinafter referred to as Hill, and Grubaugh Bros. by Richard Grubaugh, hereinafter referred to as Grubaugh, on July 24, 1973. Hill signed it "Heirs of Hattie E. Hill, Everett J. Hill agent." The contract granted Grubaugh Bros. the exclusive right for a period of 1 year to sell the property for the sum of $110,000, for which they were to receive a 3 percent commission.

Grubaugh visited with prospective purchasers about the property and eventually accepted an agreement from Brezina for its purchase for the sum of $135,000. On September 20, 1973, Brezina signed an agreement for the purchase of the prop-

erty for the sum of $135,000, and paid Grubaugh the sum of $13,500 as a downpayment. The agreement was accepted by Grubaugh, who signed it "Everett Hill agent, by Dick Grubaugh broker." Grubaugh subsequently contacted Hill for his acceptance. Hill refused to sign the contract for the sale of property, essentially telling Grubaugh there were better offers. Grubaugh then signed the sales agreement as agent and filed his listing contract and the sales agreement with the register of deeds of Butler County, Nebraska.

Brezina filed his action for specific performance August 5, 1974, praying also for damages of $20,000 to compensate him for not being able to take possession of the farm on March 1, 1974, as called for in the contract. Grubaugh Bros. filed an answer and cross-complaint on August 26, 1974, in which they alleged they had performed their obligations under the listing contract and were entitled to a commission of $4,050 plus interest. On May 12, 1975, the District Court entered a judgment against Brezina on the pleadings, which this court affirmed.

On April 1, 1976, Grubaugh Bros. filed a motion for judgment on the mandate of the Supreme Court and a motion for summary judgment. Part of the summary judgment concerned the listing contract and the purchase agreement recorded October 3, 1973. Grubaugh Bros. requested that these contracts be stricken from the record of the register of deeds so as to remove any cloud which may have been cast upon the title to the real estate.

The District Court entered judgment on the mandate of July 7, 1976. It dismissed Brezina's petition with prejudice against all defendants except Grubaugh Bros. A motion for summary judgment against Brezina, filed by Grubaugh Bros., was overruled. The court ordered the listing contract and purchase agreement stricken from the records of the register of deeds. The only matters remaining

to be tried were Brezina's cause of action for damages against Grubaugh Bros., and the cross-complaint of Grubaugh Bros. against the property owners for their commission.

A further issue was added on September 22, 1977, when the District Court permitted the property owners to file an answer to the cross-complaint and to cross-petition for damages against Grubaugh Bros. in the amount of $16,210. The cross-petition alleged the Hill heirs had been required to expend the sum of $3,750 for attorneys' fees to obtain a dismissal of the action filed by Brezina and in clearing the title to the real estate. It was further alleged that they had sold the property to another buyer for the sum of $140,000 but because of litigation and the apparent cloud on the title, there was a delay in closing the sale. This delay, from March 1, 1975, to May 1976, allegedly resulted in a loss of $12,460, which figure represents the interest on the sum of $126,000, the purchase price less the 10 percent downpayment, at the rate of 8 percent.

Subsequently Brezina made an oral motion for leave to amend his petition to allege a cause of action for negligence and tortious interference of contract against Hill. This motion was denied. The court found the former judgment was res judicata to all matters raised and all matters that could have been raised. This ruling constitutes the principal assignment of error by Brezina. Brezina alleges this ruling deprived him of his right to put in issue the wrongful acts of defendant Hill, and the damages sustained by the plaintiff.

The trial court made the following findings: (1) All issues of damages raised or issues of damages that could have been raised as between plaintiff and defendant Hill have been finally decided in Brezina v. Hill, *supra*; (2) plaintiff failed to sustain his burden of proof with regard to damages suffered by reason of the wrongful acts of defendants Grubaugh;

(3) Everett J. Hill acted as agent for defendants Hill within the scope of his authority for said disclosed principals and entered into a valid and enforceable real estate contract with defendants Grubaugh; * * * (6) defendants Grubaugh thereafter acted in accordance with the terms and conditions of the real estate listing contract and secured a purchaser who was ready, willing, and able to purchase the property at a price of $135,000; (7) upon presentation of the offer to purchase to defendants Hill, the same was refused, thereby breaching the listing contract. Defendants Grubaugh Bros. are entitled to recover and are awarded judgment for a cash commission of 3 percent of the offer made by the plaintiff Brezina in the sum of $4,050, together with all court costs expended from and after February 26, 1976; and (8) defendants Hill incurred costs and attorneys' fees in this case, but there is no liability from defendants Grubaugh by reason that their damages were proximately caused by their breach of the real estate listing contract.

Plaintiff-appellant Brezina contests findings (1) and (2), while defendant-appellant property owners, the Hill heirs, contest findings (3), (6), (7), and (8). We believe the trial judge has misinterpreted the applicable law as applied to the facts in his findings (7) and (8). For an understanding of the issues involved, we believe it necessary to give a detailed recitation of additional facts.

Grubaugh testified Hill came to his office on July 24, 1973, and executed the listing contract. Grubaugh knew Hill was not the sole owner of the property, but he represented he was acting as agent for the other heirs. After Brezina signed the purchase agreement on September 20, 1973, Grubaugh contacted Hill for his acceptance. He met with Hill at Hill's place of employment on October 3, 1973.

A memo from Grubaugh to Hill, bearing the date "10-30-73," was received into evidence. It reads:

"Everett. When its convenient for you, you can sign papers on farm. Have it sold for 135,000^{00}. Sincerely. I can drive to Lincoln and see you at store if you prefer. Dick Grubaugh."

Grubaugh testified in his deposition and at trial that this memo was misdated, and he had actually written it and sent it on September 30, 1973. He had previously testified, however, at a hearing before the Nebraska Real Estate Commission that the date on the memo was correct. He stated at that hearing, which was conducted because of a complaint filed against him by Hill, that although he had already met with Hill on October 3, 1973, he wrote the memo because "I wanted something in writing I had notified him and he knew."

Grubaugh testified in his deposition that Hill refused to sign the contract for the sale of the property on October 3, 1973. Hill told him "I think I can get something better." Grubaugh testified that on this same day, following Hill's refusal, he "drove to David City and signed the purchase agreement as agent for Everett Hill and I filed the listing contract and the purchase agreement" with the Butler County register of deeds.

One of the first persons to contact Grubaugh about purchasing the property was Chester Guidinger, who eventually did buy the property together with Adolph Novacek for $140,000. Guidinger expressed an interest in the property on August 15, 1973. On August 20, 1973, Guidinger, his wife, and Mr. and Mrs. Novacek went to Grubaugh's home and offered to purchase the property for $129,000. They returned to Grubaugh's home on September 18, 1973, and increased the offer to $132,500. Before leaving, Novacek asked if Grubaugh would take $135,000. Grubaugh responded that he had to talk to someone else, but that he would get back to them. Grubaugh did not contact them again as he had promised.

Grubaugh testified he did not consider Guidinger

and Novacek as having made an offer of $135,000 because Novacek only asked "Would you take $135,000 for it tonight and sell it to us if we offered it to you?" Guidinger testified "before we left that night we told him that we would sign a contract for $135,000 if he would do it that night." Novacek's testimony is to the same effect.

Grubaugh testified he felt obligated to see another prospective purchaser, whom he intended to contact following an auction of a different farm the party was hoping to purchase. Grubaugh did contact this party on the morning of September 20, 1973. He then went to see Brezina, who was another prospect at the time. Brezina testified he saw Grubaugh on September 19, 1973, and was told about the other prospective purchaser who was awaiting the outcome of the auction. The next day Grubaugh came to his farm and told him he could buy the property for $135,000, which was "$2,500.00 more to $3,000.00 more, or somewhere, than the other parties were offering him * * *." Brezina had previously offered $127,000 or $128,000 on September 6, 1973.

At the hearing before the Nebraska Real Estate Commission, held on April 16, 1974, Hill testified Guidinger contacted him in the latter part of September 1973, and said he wanted to buy the property for $135,000. Hill referred him back to Grubaugh. He next received a carbon copy of a letter, dated October 30, 1973, which was sent to Grubaugh Bros. by Edward Asche, an attorney who had been contacted by Guidinger. The letter reads in part:

"Chester and Verna Guidinger have advised me they are having difficulty in communicating to you an offer they want to make for the lands belonging to the Hill estate * * *.

"Mr. and Mrs. Guidinger wish to communicate to the heirs of the Hill estate through you their offer of $140,000.00 for these lands * * *. Mr. and Mrs. Guidinger have indicated to me you have the ex-

clusive listing on this piece of land from the Hill heirs, and that it extends to June 1st of 1974 and for that reason this offer is being communicated to you. There has also been some contact made with Everett Hill relative to this offer for which reason a copy of this letter is being forwarded to Mr. Hill for his information.

"Mr. and Mrs. Guidinger would be willing to enter into a contract through your office for these lands at the above price and it appears that such a contract will be considered by those members of the Hill family that the Guidingers have contacted."

On the same day he received a copy of this letter, Hill received the memo from Grubaugh, also dated October 30, 1973. This was the first notice he had of the Brezina offer. A week or 10 days after he received a copy of the letter, Hill was contacted by Guidinger, who directly offered him $140,000. Hill attempted to contact Grubaugh but was unsuccessful. The first conversation Hill had with Grubaugh since listing the farm with him occurred sometime in December 1973. This was the conversation which took place at Hill's place of employment. At the meeting, Hill told Grubaugh he wanted to contact some of the other heirs to see if the Brezina offer would be acceptable. His next contact with Grubaugh was in February 1974.

Hill made several changes in his testimony when he gave his deposition on September 19, 1977. He agreed with Grubaugh that the correct date of Grubaugh's memo was September 30, 1973, and not October 30, 1973. Also, the meeting between Grubaugh and himself did occur on October 3, 1973. At this meeting he told Grubaugh he would have to telephone the other owners to see if the price of $135,000 was satisfactory. He received the call from Guidinger sometime around the 1st of October. Hill thought he knew about the Brezina offer when he received this call. Guidinger did not make an offer

but he explained he was having trouble contacting Grubaugh. He asked if it would be all right for him to see Edward Asche, who had done some work for the Hill family. Hill thought he saw Guidinger a few times during October, and the offer of $140,000 may have been communicated to him prior to the time he received the copy of the letter from Asche.

Guidinger testified he first called Hill on September 30, 1973, to inquire whether their offer to Grubaugh had been conveyed to Hill. Hill said it had not. Guidinger then went with his wife and Mr. and Mrs. Novacek to see Grubaugh on October 1, 1973. They were told the property had been sold. Guidinger again called Hill on October 2, 1973. Around October 15, 1973, he contacted Asche to make the offer of $140,000.

On February 12, 1974, one of the heirs, Mabel Fisher, wrote a letter to Grubaugh Bros. which reads in part:

"I learned that there are two firm bids for this farm, also that you have neglected to keep in touch with Mr. Hill. I would appreciate it if you would close the deal on the farm for one of the bids."

Grubaugh replied to this letter on February 23, 1974. His response reads in part as follows: "Yes, your brother Everett listed the farm with us on July 24th. On September the 20th I accepted a down payment and have in my possession a signed purchase agreement for the farm. Everett has three times refused to sign this purchase agreement. I saw him personally in October when I had the contracts with me and he refused to sign. Then I wrote to him two different times and he didn't acknowledge my letter. He also came to my home within this last month and refused to sign then also. After I had received this offer which I still have some people who had negotiated on the purchase of the farm but who did not offer enough money, since that time have offered a little more than what I had accepted. As far as I

was concerned I could not accept this but Everett thinks that he can." Hill testified the statements contained in the foregoing letter concerning his repeated refusals to sign were accurate.

Grubaugh also replied to Asche's letter. His letter in response, dated November 19, 1973, reads in part as follows: "In reply to your letter of October 30, 1973 with regards to an offer to purchase land belonging to the Hill heirs please be advised that an agreement to purchase said land has been entered into on the date of September 20, 1973. As you can easily see this offer comes 40 days after a previous offer has been accepted."

Brezina testified he telephoned Hill on September 26, 1973, to inform him he had purchased the property for $135,000. On September 30, 1973, Hill called him and asked, "Where the hell is Grubaugh?" Brezina asked if the deal was off, and Hill said it was. Brezina had several more conversations with Grubaugh and Hill. At one time he asked Grubaugh if he should offer Hill more money. Grubaugh advised him not to because he already had a binding contract. After learning of the Guidinger offer of $140,000, Brezina did offer Hill more money. On February 15, 1974, Brezina went to see Hill on the advice of his attorney to tender the balance of the purchase price before the closing date of March 1, 1974. It was at this time he learned from Hill that Grubaugh had signed the purchase agreement. Hill told him to wait until after the hearing before the Nebraska Real Estate Commission. Following the hearing, Brezina went to Hill and offered to beat Guidinger's offer. He offered Hill $190,000. Hill refused the offer, stating that Brezina was an S.O.B. and had not treated him right because of Grubaugh's signing of the contract. Brezina thereafter filed the action for specific performance.

Hill denied that Brezina ever made an offer of more than $135,000, and he could not recall any

meetings with Brezina. Grubaugh testified Brezina never talked about increasing his bid. Grubaugh admitted, however, he did have a conversation with Brezina in which he told Brezina the papers had been filed and as far as he was concerned Brezina had a contract.

The purchase agreement with Guidinger and Novacek was prepared on June 25, 1974, and was signed by the last of the heirs on August 5, 1974. The purchase price was $140,000. The contract called for a 10 percent downpayment, with the balance due at the time of closing, on March 1, 1975. Although the sale had not been closed, Guidinger and Novacek were given possession on March 1, 1975, because Hill's attorney was confident the cloud on the title would be removed. Closing was finally had on May 5, 1976, or about 2 months after this court affirmed the judgment on the pleadings.

We have set forth the evidence in great detail to show the conflict in the testimony of the witnesses. Some of the witnesses even testified differently as to the same facts on different occasions.

While this action was originally one for specific performance, that issue was settled in the first appeal. The trial court after the hearing on the mandate removed the cloud on the title. The continuation of the action was one for damages.

This started as an equitable action and although the previous case decided the equitable issue, the court retained jurisdiction for the purposes of a complete determination, and the parties tried the case to the court. In an equitable action where evidence on material issues of fact is in conflict, the reviewing court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Anderson v. Claussen, 200 Neb. 74, 262 N. W. 2d 438 (1978).

Considering the fact issues in the light of the fore-

going rule, we proceed to a determination of the questions presented. Brezina alleges the evidence is undisputed that Grubaugh retained $13,500 of his money from September 20, 1973, to May 17, 1975, and he should be entitled to interest for the some 20 months he contends Grubaugh wrongfully kept his money. The law is well settled, where money or property belonging to another was not paid or turned over to the person entitled to receive it at the time when it should have been paid or turned over, interest is generally allowed. Workman v. Workman, 174 Neb. 471, 118 N. W. 2d 764 (1962).

In Halbert v. Food Host U. S. A., Inc., 189 Neb. 346, 202 N. W. 2d 735 (1972), we said: "[I]nterest is allowable * * * where money or property belonging to another is wrongfully withheld to the enrichment of the debtor and to the detriment of the creditor." This rule of law, however, has no application here. Brezina testified he decided to leave the downpayment with Grubaugh Bros. pending the outcome of his suit for specific performance. When he finally made demand for the money, it was promptly returned. The downpayment was not wrongfully withheld by Grubaugh Bros. The denial of interest is fully sustained by the record.

Brezina contends he should recover damages from Grubaugh Bros. for the loss of his bargain. It seems to be his contention that Grubaugh Bros. delayed in communicating his offer to Hill during which time Hill received a better offer. However, no mention is made in his brief concerning his testimony at trial that Hill would not sell to him because Grubaugh signed the contract. In any event, the trial court determined this factual issue against him.

The proposed amendment to plaintiff's petition was not filed of record. Brezina's counsel in his offer explained the substance as follows: "The amendment which we would be requesting would be to add causes of action against the defendant Hill

only. Those causes of action would allege causes against Mr. Hill based on at least three theories to include a theory of negligence, a theory of tortious interference and wrongfully posing as the agent of another, and in each of these, the plaintiff would be requesting compensation in the form of damages from the defendant Hill."

The trial court denied the motion to amend for the reason that the former judgment was res judicata as to all issues raised or which could have been raised at the time plaintiff filed his petition. Actually, the judgment on the pleadings was res judicata only insofar as it determined that the listing contract did not constitute an offer to any third party but was merely an employment contract between the owner and broker and that the broker had no authority to execute a sales contract on behalf of the Hills. The proposed amendments involve theories presupposing the validity of the contract, in one form or another. We have found the sales contract was not binding on the Hills. Consequently, there could be no liability for Hill's refusal to accept it.

In the original action, Brezina sought not only specific performance of the alleged contract but also included a specific claim for damages. All of the damages growing out of the alleged breach of contract were litigable in the original suit in equity. The law does not permit the complete remedy by specific performance to be split into separate actions for different elements of damages flowing from a single breach of contract. See Waldo v. Lockard, 101 Neb. 797, 165 N. W. 154 (1917).

There is no question Grubaugh Bros. performed their part of the listing contract by finding a "ready, able, and willing" purchaser for the property at a price in excess of that called for in the listing contract. In Fleming Realty & Ins., Inc. v. Evans, 199 Neb. 440, 259 N. W. 2d 604 (1977), we held: "A broker is entitled to his commission in accordance

with the terms of his listing contract, and the right to compensation is not impaired by subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed."

The Hill heirs contend the listing contract is unenforceable. Section 36-107, R. R. S. 1943, provides: "Every contract for the sale of lands between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent. Such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent."

The issue presented is whether an agent of the owner may sign on his behalf in view of the requirement that the contract be subscribed by the owner of the land. If the section is construed to permit an agent to sign, must the agent have written authorization?

In this case, the contract was actually signed by one of the owners. It is true, he signed as agent for the heirs of Hattie E. Hill, of which he was one. The evidence is undisputed that he had acted as rental agent for several years for all of the Hattie Hill heirs. The record indicates that each of the heirs told Everett that he had started the sale of the Hattie Hill land and he should finish it. Grubaugh was familiar with the fact that Everett Hill was handling the property for all of the heirs. On the record, the trial court made a fact determination that Everett J. Hill acted as agent for the defendants Hill within the scope of his authority for said disclosed principals and entered into a valid and enforceable real estate listing contract with the defendants Grubaugh.

We agree Grubaugh Bros. earned their commission. That is not the problem. The Hill heirs contend Grubaugh Bros. are not entitled to their com-

mission because they breached their fiduciary duties. We held in Schepers v. Lautenschlager, 173 Neb. 107, 112 N. W. 2d 767 (1962): "A commission cannot be collected by the agent for his services if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency."

In Vogt v. Town & Country Realty of Lincoln, Inc., 194 Neb. 308, 231 N. W. 2d 496 (1975), we held: "A real estate broker is an agent owing a fiduciary duty (1) to use reasonable care, skill, and diligence in procuring the greatest advantage for his client, and (2) to act honestly and in good faith, making full disclosures to his client of all material facts affecting his interests. A neglect to do so renders him liable to his client for whatever loss the latter may suffer as a consequence thereof."

The testimony of the parties is conflicting and somewhat confused. However, it seems apparent Grubaugh was not operating in the best interests of the property owners but was more concerned with the protection of his buyer as well as his own interests. It could be inferred from the record that he was of the opinion he could choose who the purchaser would be and the price to be paid, and he was not obligated to communicate all offers to the owners. It is evident Grubaugh did not communicate all offers to Hill. In this regard, we quote from Schepers v. Lautenschlager, *supra*: "The rule requiring a broker to act with utmost good faith toward his principal places him under a legal obligation to make a full, fair, and prompt disclosure to his employer of all facts within his knowledge which are or may be material to the matter in connection with which he is employed, which might affect his principal's rights and interests or influence his action in relation to the subject matter of the employment, or which in any way pertain to the discharge of the agency which the broker has undertaken."

We do not agree with the trial court's determination that Grubaugh Bros. was not liable to the property owners for costs and attorneys' fees because those expenses were proximately caused by the owners' breach of the listing contract. The listing contract did not require the property owners to accept any offer tendered by the broker in excess of a stipulated amount. The property owners still had the right to accept or refuse any offer tendered. This does not mean that they would not have been liable for the broker's commission on any firm offer secured in excess of the stipulated amount.

As we view the record, the action for specific performance filed by Brezina can be attributed directly to the signing of the purchase agreement by Grubaugh and his filing of it with the register of deeds of Butler County. His signing of the agreement implied that he had authority to do so for the owners and gave Brezina the opportunity to attempt to hold the owners to the contract signed by Grubaugh.

By his own testimony, Grubaugh signed the purchase agreement and filed it after Hill refused to sell to Brezina because he thought it was possible to get a better offer. Hill was under no obligation to sell the land to Brezina and his refusal to sign the sales contract did not constitute a breach of the listing agreement. As suggested, at the very most it created a liability on the part of the Hill heirs to Grubaugh for the commission provided by the listing contract.

There is no justification to be found in the record, and we can think of none for the clouding of the title by the filing of the Brezina contract signed by Grubaugh as agent for Hill. It is obvious from the record that except for this act on the part of Grubaugh, the land could have been promptly sold by him or by the Hill heirs to the ultimate purchasers for $140,000. If Grubaugh had not signed the sales contract, there would have been no specific performance action.

We also note that Grubaugh admits he told Brezina the papers had been filed and so far as he was concerned Brezina had a contract.

There is no question Grubaugh was entitled to a commission for securing a ready, able, and willing purchaser for $135,000. The question presented, however, is whether or not he also is liable to the property owners for the costs and attorneys' fees he proximately caused them by his action. He should have known at the time he signed and filed the purchase agreement he was violating his fiduciary obligation to the Hills. Grubaugh specifically testified he filed the sales agreement to protect Brezina; that it would protect him from Hill signing the property to someone else. His obligation was to protect the owners of the property and not to take action against them to protect a prospective purchaser. Until the sales agreement was signed by Grubaugh as the purported agent of Hill, it was nothing more than an offer to purchase.

On the record the Hill heirs have sustained damages in excess of any commission earned by Grubaugh. The trial court was in error in dismissing their cross-petition against Grubaugh Bros.

We affirm the judgment insofar as it applies to the appellant Brezina. We reverse the judgment dismissing the cross-petition of the Hill heirs against Grubaugh Bros. as well as the judgment rendered against them in favor of Grubaugh Bros. We remand the action for further proceedings consistent with this opinion. Costs of this appeal are to be taxed equally to appellant Brezina and appellee Grubaugh Bros.

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

MARK PAULSEN, A MINOR, BY AND THROUGH RANDALL L. PAULSEN, HIS FATHER AND NEXT FRIEND, APPELLANT, V. ROBERT COURTNEY AND SUSAN COURTNEY, HUSBAND AND WIFE, APPELLEES.

277 N. W. 2d 233

Filed April 3, 1979. No. 41869.

1. **Statutes: Animals.** The Legislature, by enacting section 54-601, R. R. S. 1943, removed the common law restriction of proving scienter or knowledge of the dangerous propensities of dogs, but only as it applied to the actions of dogs specified in the statute.
2. **Animals: Strict Liability: Damages.** Dog owners are statutorily liable for any and all damage inflicted by their dog to any person, other than a trespasser, without proof of scienter or knowledge of the dangerous propensities of their dogs for biting, and by reason of such dog or dogs killing, wounding, worrying, or chasing domestic animals.
3. _____: _____: _____. In actions based upon statutory liability for injury by a dog, the injured person will be barred from recovering if he intentionally provoked the dog, and thereby caused it to attack him.
4. **Animals: Juries.** The question of whether one is guilty of intentionally provoking a dog, and is thus barred from recovering for a resulting injury by the dog, is generally considered a question of fact to be determined by the jury.

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

Roger R. Holthaus, for appellant.

Pilcher, Howard & Dustin, for appellees.

Heard before SPENCER, Retired Justice, MCCOWN, and BRODKEY, JJ., and BLUE and REAGAN, District Judges.

REAGAN, District Judge.

This is an action instituted by a minor through his father and next friend for personal injuries received from a dog bite. The action was filed pursuant to section 54-601, R. R. S. 1943, which provides as follows: "Dogs are hereby declared to be personal property for all intents and purposes, and the owner or owners of any dog or dogs shall be liable for any

and all damages that may accrue (1) to any person, other than a trespasser, by reason of having been bitten by any such dog or dogs, and (2) to any person, firm or corporation by reason of such dog or dogs killing, wounding, worrying, or chasing any person or persons or any sheep or other domestic animals belonging to such person, firm or corporation. Such damage may be recovered in any court having jurisdiction of the amount claimed."

The defendant filed an answer generally denying the allegation of the plaintiff's petition, and alleging the plaintiff was a trespasser. The defendant further alleged whatever injuries were sustained by the plaintiff were proximately caused by the negligence of him and his parents and that the plaintiff voluntarily assumed the risk of injury to himself.

At the close of the plaintiff's case, defendant moved for an order dismissing the petition for the reason that the evidence showed that the plaintiff was in fact a trespasser, thereby falling outside of the provisions of the act. Said motion was denied. Thereafter, plaintiff's counsel moved the court to exclude testimony presented by the defense on anything other than trespass. The court denied the motion and advised the parties the court would permit the testimony with reference to provocation. At the close of all the evidence, the court refused to instruct the jury on the defenses of assumption of risk or contributory negligence, but did instruct the jury as to provocation and trespass. The jury returned a verdict for the defendant and against the plaintiff.

The evidence discloses that on September 10, 1976, defendant, Susan Courtney, called the plaintiff's mother to make arrangements for defendant's 5-year-old son to be supervised by plaintiff's mother after school. Plaintiff's mother picked up her younger son and the defendant's son, both age 5, and brought them to the plaintiff's home. The plaintiff, Mark Paulsen, age 10, arrived home at the same

time, and the children had milk and cookies in the Paulsen kitchen before going outside to play in the plaintiff's backyard.

All three boys climbed over the fence enclosing the defendant's yard, which was located immediately adjacent to the plaintiff's yard. The evidence indicated the boys had scaled the fence before and had seen others going over it. At this point, the evidence appears in conflict. The plaintiff maintains the defendant's dog began licking the boys. The plaintiff then walked the dog for a few minutes, had the dog sit, and then said, "Come on, Freckles, let's go." At this time, the dog attacked the plaintiff, biting him about the face, head, and neck.

The defendant's evidence was to the effect that the plaintiff had been previously observed, by a witness, antagonizing the dog. On the day of the dog bite, this witness testified he saw the plaintiff gouging at the dog with a stick, "making the dog very, very angry" and "literally torturing the animal." He saw the plaintiff climb up the fence, reach toward the dog, and the dog got hold of him on the hand. The plaintiff acknowledged the hand injury from the dog in addition to the injuries for which recovery was sought.

The defendant, Robert Courtney, testified he had seen the plaintiff run at the dog, scream at him, poke sticks at him, and throw little rocks or dirt clods at the animal. Three or four times the defendant, Robert Courtney, had caught the plaintiff at the fence poking at the dog. Each time the defendant had caught him, defendant had asked the plaintiff to leave the dog alone. Defendant, Robert Courtney, testified that the effect of this treatment by the plaintiff caused the dog to have an extreme dislike for the plaintiff. The defendant, Susan Courtney, testified she had seen the plaintiff antagonizing the dog, throwing things at the dog. She would tell him five times a week to leave the dog alone. The de-

fendant, Susan Courtney, had also asked the plaintiff's father, Mr. Paulsen, to ask the Paulsen boys to leave the dog alone.

The plaintiff's position at the time of trial and apparently on appeal is that section 54-601, R. R. S. 1943, creates a cause of action for strict liability on the part of a dog owner, and the only defense to the action is one of trespass.

At common law, in the absence of negligence, the owner of a dog was not liable for injuries caused by the dog, unless the animal had a propensity for viciousness and the owner had knowledge of the same. Warrick v. Farley, 95 Neb. 565, 145 N. W. 1020; Herbert v. Katzberg, 104 Neb. 395, 177 N. W. 650; Netusil v. Novak, 120 Neb. 751, 235 N. W. 335. This common law was abrogated by our Legislature when they adopted the provisions of section 54-601, R. R. S. 1943. It is, however, a recognized rule of construction that statutes which effect a change in the common law or take away a common law right should be strictly construed, and a construction which restricts or removes a common law right should not be adopted unless the plain words of the act compel it. Bishop v. Bockoven, Inc., 199 Neb. 613, 260 N. W. 2d 488. On that basis, the provisions of section 54-601, R. R. S. 1943, must be construed strictly by the court.

We have previously had occasion to examine the provisions of section 54-601, R. R. S. 1943, in the case of Donner v. Plymate, 193 Neb. 647, 228 N. W. 2d 612. We there said, "The Legislature, by enacting section 54-601, R. R. S. 1943, removed the common law restriction of proving scienter or knowledge of the dangerous propensities of dogs, but only as it applied to the actions of dogs specified in the statute.

"Obviously the Legislature was fully aware of the need for protection from the intentional, deliberate, and purposeful acts of dogs and as a result restricted section 54-601, R. R. S. 1943, to

those acts manifesting such qualities.

"Dog owners are statutorily liable for any and all damage without proof of scienter or knowledge of dangerous propensities of their dog for biting and by reason of such dog or dogs killing, wounding, worrying, or chasing domestic animals and persons."

It is, therefore, beyond question that section 54-601, R. R. S. 1943, creates a cause of action based upon strict liability on the part of a dog owner. The question, however, which remains unanswered is whether there is any defense available to an action founded upon strict liability. The answer to that question must depend to some extent upon an analysis of the purpose of the "dog bite" statute and its reasonable application. As noted in Donner v. Plymate, *supra*, the purpose of the statute, as amended, was to apply to persons as well as animals and to eliminate the requirement of proving scienter and the owner's knowledge of his dog's propensities. Nevertheless, it would seem strange indeed if one could now intentionally provoke a dog under any circumstances and yet hold an owner liable under the provisions of the "dog bite" statute. Obviously, some defense must exist in such a case.

An examination of the legal treatises discloses there are defenses available in a dog bite case, even where the cause of action is founded upon strict liability similar to section 54-601, R. R. S. 1943. The courts are not unanimous in their rationale for the specific defense available, but all concur in one manner or another that an individual who knowingly and intentionally provokes a dog should be barred from recovering. For a detailed discussion see the annotation in 66 A. L. R. 2d 916 and following. In any event, it is clear that knowingly and intentionally provoking a dog will constitute a valid defense. In 4 Am. Jur. 2d, Animals, § 106, p. 355, it is stated: "In actions based on statutory liability for injury by an animal, it has been generally held that the in-

jured person will be barred from recovering if he intentionally provoked the animal and thereby caused it to attack him * * *." If, in fact, the rule has heretofore been undeclared in this jurisdiction, we now adopt that rule from 4 Am. Jur. 2d, Animals, § 106, p. 355, and declare it to be the law in this jurisdiction.

Likewise, it is further clear that whether such provocation was intentional and knowing is a question of fact to be determined by the jury. In 4 Am. Jur. 2d, Animals, § 110, p. 360, the author notes, "The question whether one is guilty of intentionally provoking an animal and is thus barred from recovering for a resulting injury by the animal is generally considered a question of fact * * *." With that rule, we likewise concur.

The trial court correctly instructed the jury on the question of provocation, and the judgment on the verdict may not, therefore, be disturbed. The judgment of the trial court, entered pursuant to the verdict of the jury, is affirmed.

AFFIRMED.

CLEARWATER CORPORATION, A NEBRASKA CORPORATION, ET AL., APPELLEES, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION OF THE STATE OF NEBRASKA, APPELLANT.

277 N. W. 2d 236

Filed April 3, 1979. No. 41890.

1. **Eminent Domain: Trial: Evidence.** Generally, in an eminent domain proceeding, evidence as to the sale of the identical property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant.
2. **Eminent Domain: Evidence: Time.** The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time.

3. **Eminent Domain: Trial: Evidence.** The trial court has a wide discretion as to whether evidence as to particular sale is admissible.
4. **Burden of Proof: Evidence: Damages.** The plaintiff's burden to prove the nature and amount of its damages can not be sustained by evidence which is speculative and conjectural.
5. **Witnesses.** An expert witness testifying from observation or personal knowledge may be required to disclose and testify to the facts on which his opinion is based.
6. _____. The opinion of an expert witness lacks probative value if assumptions for it are shown not to be true.
7. **Witnesses: Evidence.** The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. An opinion has no probative force if the assumptions upon which it is based are shown not to be true.
8. _____: _____. Expert testimony should not be received, or if received should be stricken, if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.
9. _____: _____. Where the opinion testimony of an expert witness does not have a sound and reasonable basis it should be stricken.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded for a new trial.

Dixon G. Adams, for appellant.

Thomas F. Dowd, P.C., for appellees.

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

PER CURIAM.

This is an appeal in a proceeding in eminent domain. The defendant, City of Lincoln, Nebraska, condemned a 122.037-acre tract of land in Sarpy County, Nebraska, owned by the plaintiff, Clearwater Corporation, for use as a water well field. The petition for the appointment of appraisers was filed in the county court on December 8, 1976.

The land condemned was part of a 180-acre tract owned by the plaintiff. It is situated along the east bank of the Platte River south of U. S. Highway No.

6 and north of Interstate Highway No. 80. The land was zoned for agricultural use. Approximately 65 to 80 acres of the land was tillable. There is a 20-acre lake on the property not taken which was formed when gravel was pumped at the time the interstate highway was being constructed. There are three cabins located on the property not taken.

The appraisers appointed by the county judge fixed the damages at $395,235.50. The defendant appealed to the District Court where the jury returned a verdict for $522,700. The defendant has appealed.

The assignments of error relate to evidentiary matters. The defendant contends the trial court erred in refusing to permit the defendant to show the amount which the plaintiff paid for the property, and in permitting the jury to consider the testimony of plaintiff's two expert witnesses.

As a part of its case the defendant called as a witness Joe Koziol, the president of the plaintiff. Koziol testified that the plaintiff purchased the 180 acres on April 20, 1971, from a Mrs. Short. He further testified that the physicial condition of the property now was approximately the same as in 1971 except some additional land had been cleared for farming. The access road to the property had been improved, some additional roads had been built on the property, and electric power lines had been installed around the property. Koziol estimated that land values had appreciated approximately 140 percent since 1971 but that economic conditions generally were about the same. When the defendant inquired as to the price paid for the property, an objection on the basis of foundation was sustained. The defendant made no offer of proof but a motion in limine filed by the plaintiff indicated the purchase price was $90,000. The motion further alleged that the seller had no immediate family and the property had not been placed on the market, but the seller had offered the property to Koziol whom the sell-

er had known since he was a child.

Generally, evidence as to the sale of the identical property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. Roush v. Nebraska P. P. Dist., 189 Neb. 785, 205 N. W. 2d 519.

Here the evidence did not show the circumstances surrounding the sale. A contention had been made that the sale was not an arms length transaction and there was no evidence to show what the circumstances were surrounding the sale. The sale had occurred more than 5 years previously, there had been some improvement made to the property, and there had been a substantial rise in property values.

The trial court has a wide discretion as to whether evidence as to particular sale is admissible. Morehead v. State, 195 Neb. 31, 236 N. W. 2d 623. The defendant's experts testified that the value of the entire tract was $252,000 and $292,050 respectively. Under these circumstances, evidence that the property had sold for $90,000 5 years earlier would have been of little probative value.

The objection as to foundation was meritorious and the ruling was clearly within the discretion of the trial court.

The plaintiff's first expert witness was Joseph Gerald Strawn, a licensed real estate appraiser. Strawn testified over objection that the land taken had a value of $3,650 per acre or $445,435 and that the damages to the remainder amounted to $95,638, the total damages being $542,000.

Strawn testified that the highest and best use of the property was for gravel mining followed by development and use for recreational purposes. Over

objection he was permitted to testify that he considered that 13,974,693 cubic yards of gravel could be removed from the land over a 40-year period at a royalty of 11 cents per cubic yard. In making this calculation the witness assumed there was 70 feet of gravel available in the 122.037 acres. This would be a production of approximately 350,000 cubic yards per year for 40 years. The witness was not qualified as a geologist and based his estimate of the gravel supply upon test wells that had been drilled upon adjacent property and his knowledge of the lake on the property, which had been dredged to a depth of 55 to 60 feet.

Strawn also testified that he considered sales of lots in developed recreational areas in reaching his opinion as to the value of the plaintiff's land.

Strawn further testified that he considered five sales of property in the area which he considered to be comparable sales. Of these he admitted that four were not arms length transactions involving a willing buyer.

The first sale was a 150-acre tract approximately 10 miles east of the plaintiff's land. This property had been used for gravel mining and the lake was in existence at the time of the sale in 1973 or 1974. This property had sold for $2,083 per acre.

The second sale was a tract purchased by the city of Papillion as a well field. Upon objection by the defendant the witness was not allowed to testify further in regard to this transaction.

The third sale was an 83-acre tract near Yutan, Nebraska, in eastern Saunders County, that had been purchased by Metropolitan Utilities District for well field purposes.

The fourth sale was a 25-acre tract located near the property involved in the first sale which had been purchased by the city of Papillion.

The fifth sale was a 150-acre tract located 3 miles northeast of Yutan, Nebraska, to Metropolitan Utili-

ties District. This was rough land suitable for pasturage but containing a large deposit of gravel.

On cross-examination the witness testified there had been no gravel mining on the property since 1965 and the only gravel mining in the immediate area was by the operator of a ready-mix business in Gretna, Nebraska. The cost of hauling gravel amounted to 6 to 10 cents per ton mile.

The defendant produced evidence that the entire production of gravel in Sarpy County for 1973 and 1974 was less than the 700,000 yards that the witness had assumed could be produced in a 2-year period from the plaintiff's land.

The plaintiff's second expert witness was James W. Warren, also a licensed real estate appraiser. Warren testified over objection that it was his opinion that the land taken had a value of $5,025 per acre or $613,235 and the damages to the remainder amounted to $115,926, the total damages being $708,-281.

Warren testified the highest and best use of the plaintiff's property was for gravel production followed by recreational development. The witness testified he considered sales of lots in developed recreational and residential areas along the river in arriving at his opinion as to the value of the plaintiff's land. This witness estimated the available gravel on the plaintiff's land to be something around 10 million cubic yards on which there would be a royalty of 10 to 11 cents a yard.

On cross-examination the witness testified he considered the comparable sales method as the most reliable method to value land, but in this case he believed the plaintiff's land was unique so he used a factors approach to determine its value. However, in a report prepared for the plaintiff, the witness used a comparable sales method to value the property. In addition to the sales testified to by Strawn, the witness used two sales north of the plaintiff's

property at $1,000 per acre and a sale in Douglas County, Nebraska, for $1,660 per acre.

The defendant moved to strike the testimony of the plaintiff's expert witnesses, which motions were overruled. The motions were renewed at the close of the evidence and again were overruled. The motions were made upon the ground that the opinions of the two witnesses were based upon improper and invalid assumptions and considerations, and upon facts not in evidence and which were beyond the knowledge and expertise of the witness; that the opinions assumed facts not in evidence; and that the opinions and testimony were so speculative and conjectural as to have no probative value. The defendant's principal assignments of error relate to the testimony of the plaintiff's expert witnesses and the rulings on the defendant's objections and motions to strike the testimony.

It is fundamental that the plaintiff's burden to prove the nature and amount of its damages can not be sustained by evidence which is speculative and conjectural.

Under prior law an expert witness testifying from observation or personal knowledge was ordinarily required to disclose and testify to the facts on which his opinion was based. Duling v. Berryman, 193 Neb. 409, 227 N. W. 2d 584. The opinion of an expert witness lacked probative value if the assumptions for it were shown to be not true. Blobaum v. State, 179 Neb. 304, 137 N. W. 2d 855.

The value of the opinion of an expert witness was dependent on, and was no stronger than, the facts on which it was predicated. Such an opinion had no probative force unless the assumptions upon which it was based were shown to be true. Magdaleno v. Nebraska Panhandle Community Action Agency, 195 Neb. 783, 241 N. W. 2d 114; Pueppka v. Iowa Mutual Ins. Co., 165 Neb. 781, 87 N. W. 2d 410.

Section 27-705 (1), R. R. S. 1943, now provides:

"(1) The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

Under section 27-705, R. R. S. 1943, an expert witness may "give his reasons" at the time he is allowed to testify as to his opinion, but he is not required to testify to "the underlying facts or data" before stating his opinion unless the trial court requires otherwise. In this case the plaintiff's expert witnesses were permitted to testify as to their opinion on value with little or no prior proof of the "reasons" for their opinions. The reasons and underlying facts and data were then developed on further direct and cross-examination of the witnesses.

This does not mean that an expert witness is no longer required to disclose the basis for his opinion if required to do so by the trial court or that the jury is entitled to consider the opinion of an expert witness if cross-examination discloses there is no adequate factual basis for the opinion.

In a recent opinion, Northern Nat. Gas Co. v. Beech Aircraft Corp., *ante* p. 300, 275 N. W. 2d 77, we held that the testimony of a witness, otherwise qualified as an expert, was properly excluded where it was speculative. In that case we said: "While under our rules of evidence the expert may not be required to disclose the underlying facts or data before rendering his opinion, the trial court on its own motion can require such disclosure. § 27-705, R. R. S. 1943. In this case the trial court made such a requirement, and upon hearing what the expert proposed to testify, concluded that neither the record nor the apparent qualifications of the expert would justify such an opinion. * * * The record in this case is totally devoid of any evidence that an expert in weather would attempt to render an opinion such as

that sought to be tendered by appellant's expert herein; or that the information relied upon by the expert was of such type that an expert on weather would rely upon such information in rendering an opinion. In the absence of such evidence we agree with the trial court that any opinion tendered by the expert in this case would be based on pure speculation and be solely without any basis or foundation. The action of the trial court in sustaining the objection to the opinion was in all respects correct."

Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. The witness should not be allowed to express an opinion on an inadequate basis or in respect to facts not disclosed to the jury. Gilbert v. Gulf Oil Corporation, 175 F. 2d 705 (4th Cir., 1949). See, also, Horton v. W. T. Grant Co., 537 F. 2d 1215 (4th Cir., 1976); Wilson v. Volkswagen of America, Inc., 561 F. 2d 494 (4th Cir., 1977); Polk v. Ford Motor Co., 529 F. 2d 259 (8th Cir., 1976); Omaha Indian Tribe, Treaty of 1854, Etc. v. Wilson, 575 F. 2d 620 (8th Cir., 1978); Tabatchnick v. G. D. Searle & Company, 67 F. R. D. 49. Where the opinion testimony of an expert witness does not have a sound and reasonable basis it should be stricken. Arkansas-Missouri Power Co. v. Sain, 262 Ark. 326, 556 S. W. 2d 441.

The witness Strawn based his opinion upon three principal factors: The value of the gravel deposits upon the property; sales of lots in developed recreational areas; and comparable sales of real estate. None of these factors supported the conclusion testified to by the witness.

The testimony concerning the quantity of the gravel in place and its effect upon the value of the land was at best conjectural and speculative. The quantity which the witness assumed was available for mining from the plaintiff's land was excessive

from a number of aspects because no allowance was made for slope, deviations in depth and quality, gravel already mined, and surface acreage that would be reserved for recreational use and development. There was no adequate proof by competent expert testimony from which the jury could conclude, with any degree of reliability, how much gravel could be removed from the property under the witnesses' theory of use and development of the property. Furthermore, there was no reliable evidence of any present demand for gravel to be mined from this property, or that it could be economically mined under present conditions of demand and transportation cost.

The evidence of the market value of lots in developed recreational areas had but a remote connection to the value of the plaintiff's land in an undeveloped state. The principal effect of this evidence was to show there was some demand for recreational property.

None of the sales used by the witness as comparable sales supported his conclusion that the plaintiff's land had a market value of $3,650 per acre at the time of the taking.

An analysis of the basis testimony shows that it did not support the value testified to by this witness. The motion to strike should have been sustained and the jury not permitted to consider the testimony as to value.

A similar situation existed as to the testimony of the witness Warren. Although this witness was not as precise in stating the underlying facts and data on which his opinion was based, the record shows his testimony as to value had no adequate basis and the motion to strike his testimony should have been sustained.

It is unnecessary to consider the other assignments of error.

The judgment of the District Court is reversed

and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

MARGARET HOHNEKE KRAUSE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HERBERT KRAUSE, DECEASED, APPELLANT, V. LAVERNE CROSSLEY ET AL., APPELLEES.

277 N. W. 2d 242

Filed April 3, 1979. No. 41930.

1. **Undue Influence.** The elements necessary to prove undue influence are: (1) That the individual is susceptible to such influence; (2) that the opportunity to exercise such influence existed; (3) that there was a disposition to exercise undue influence upon the individual; and (4) that the instrument was a result of such undue influence.
2. **Undue Influence: Burden of Proof.** The burden of proof on the issue of undue influence is upon the party contesting the document.
3. **Appeal and Error: Quiet Title: Statutes.** For consideration on appeal under our statute, section 25-21,115, R. R. S. 1943, governing pleadings in quiet title actions, it is not necessary to specify the nature of adverse claims but only that the defendants claim or appear to have some interest in the real estate and that the evidence reflect the question was considered by the trial court.
4. **Deeds: Joint Tenancy: Severance.** A deed which purportedly conveys all of the interest of one joint tenant, wherein he is both grantor and grantee, is not an act which will sever the joint tenancy.
5. **Joint Tenancy: Statutes: Severance.** Our statute which modifies the common law rules of cotenancy, section 76-118, R. R. S. 1943, does not change the common law rendering ineffective an attempted transfer of an interest in property by a joint tenant to himself as a single individual, for the purpose of severing the joint tenancy.
6. **Property: Words and Phrases: Conveyances.** Except where modified by statute, to "convey" means to pass or transmit title to property from one to another.

Appeal from the District Court for Wayne County: EUGENE C. MCFADDEN, Judge. Reversed and remanded with directions.

Kenneth M. Olds of Olds, Swarts & Ensz, for appellant.

B. B. Bornhoft, for appellees.

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and CASE and FUHRMAN, District Judges.

CASE, District Judge.

This action started with a petition filed by Herbert Krause on October 8, 1976, against LaVerne Crossley and Natalie Smith as individuals and Natalie Smith as Administratrix CTA of the estate of Fred Kleensang. The petition alleged undue influence in the execution of a deed and will and prayed for the quieting of title to a described 160 acres of farmland in Wayne County, Nebraska.

The plaintiff departed this life on October 9, 1977, prior to trial and the action was revived in the name of Margaret Hohneke Krause as personal representative of the estate of the former plaintiff and in her individual capacity as the widow of Herbert Krause. Thereafter on October 27, 1977, the matter proceeded to trial to the court which entered a judgment on December 7, 1977, for the defendants.

The original plaintiff, Herbert Krause, and the defendants, Crossley and Smith, are brother and sisters, the plaintiff having lived with Mr. and Mrs. Fred Kleensang from 14 years of age to the time of the death of each of them. The defendant, LaVerne Crossley, had lived with the Kleensangs for a period of approximately 9 years prior to high school but had been a resident of California for approximately 40 years prior to the death of Fred Kleensang. Natalie Smith lived nearby in the village of Hoskins, Nebraska, and none of the parties were related by blood to the deceased.

Mrs. Kleensang died in August of 1971 devising the premises here in question to the plaintiff. Her surviving husband, Fred, made an election to take un-

der the statute and the real estate was assigned to the plaintiff and Fred Kleensang as tenants in common. Plaintiff and Fred Kleensang thereafter executed a deed on January 30, 1976, placing the premises in joint tenancy with right of survivorship. On the 19th of February 1976, 20 days later, Fred Kleensang, in the company of the defendant Crossley, executed another deed and a will, the deed being a standard warranty deed which purported to convey all of the grantor's interest in the jointly owned premises to himself as grantee. The will further devised the premises to Crossley and Smith with contingent devises which have no bearing on the issues here. Fred Kleensang died March 31, 1976.

With respect to the issue of undue influence, the law is well settled that the elements to be proved are: (1) That the individual was susceptible to such influence; (2) that the opportunity to exercise such influence existed; (3) that there was a disposition to exercise undue influence upon the individual; and (4) that the will or deed was the result of such undue influence. In re Estate of Goist, 146 Neb. 1, 18 N. W. 2d 513. We have closely examined the evidence here and fail to find any adequate proof that there was a disposition to exercise undue influence or that the documents were the result of such. In accordance with our holdings in McGowan v. McGowan, 197 Neb. 596, 250 N. W. 2d 234; and Loomis v. Estate of Davenport, 192 Neb. 461, 222 N. W. 2d 369, the burden of proof on the issue of undue influence is upon the party contesting the document. The proofs being absent, we are in agreement with the holdings of the District Court on this issue.

The plaintiff's petition prayed that the deed be set aside and canceled as a result of undue influence, further praying that the title be quieted and confirmed in the plaintiff. The appellees take the position that the only issue in this lawsuit is the question of undue influence and that the effect of the deed

executed by Fred Kleensang to himself was not raised by the pleadings.

We have previously held that a court has no power to decide questions except as presented by the parties in the pleadings. National Fire Ins. Co. v. Evertson, 153 Neb. 854, 46 N. W. 2d 489; and Drieth v. Dormer, 148 Neb. 422, 27 N. W. 2d 843. The issues then raised are: Did the trial court pass upon the legal effect of the deed from Fred Kleensang as grantor to himself as grantee and did this deed terminate the prior existing joint tenancy?

Our statute, section 25-21,115, R. R. S. 1943, governing pleadings in quiet title actions, provides in substance: "It shall be sufficient to allege generally in the petition that the defendants claim or appear to have some interest in, right or title to, * * * and it shall not be necessary to allege the nature of any adverse claim or that the value of plaintiff's title or estate is lessened thereby."

Here the plaintiff in his petition specifically sets out the execution of the deed in question and the prayer prays for the quieting of title in himself. The relief prayed for under the allegation of undue influence was to set aside the deed.

The scrivener who was a witness was specifically asked by the court: "What, in your opinion as a lawyer, was the legal effect of the deed from Fred Kleensang to Fred Kleensang?" To which the witness answered: "To break up the joint tenancy which he wanted to do." This witness and others testified extensively as to the events surrounding the execution of the deed.

In view of the liberal wording of our statute with respect to quiet title actions, we are of the opinion that the pleadings were sufficient to raise the question and the evidence indicates that it was considered by the court. Having determined that the trial court considered the effect of the deed, we turn to the issue here.

In discussing the issue of whether one joint tenant can unilaterally sever the joint tenancy by conveying to himself, we deem it advisable to set out some of the history of cotenancies, both under the common law and under the law of this state. When a tract of land is owned by two or more persons, the owners are known as cotenants. Under the common law, cotenancy was divided into three main categories: tenancy in common, joint tenancy, and tenancy by the entirety. The latter is a joint tenancy created by a grant to a husband and wife. The main characteristic of a joint tenancy is the right of survivorship. As soon as one joint tenant dies, his title automatically passes to the surviving joint tenant. Conversely, upon the death of a tenant in common, the decedent's interest passes to his heirs or devisees and not to the surviving tenant in common.

Joint tenancies, in common law, and tenancies by the entirety were similar as to the right of survivorship but differed in that only a joint tenant could sever tenancy by his unilateral act as an inter vivos transaction and thus destroy such right of survivorship. Under tenancies by the entirety, the act of both parties was required to sever the tenancy.

The common law rule that a joint tenancy must contain the four unities of time, title, interest, and possession still persists unless modified by statute. Or in other words, joint tenants have one and the same interest accruing by one and the same conveyance commencing at one and the same time and held by one and the same undivided possession. See, Flick Abstract & Titles 2d, Tenancies in Common and Joint Tenancies, § 461, p. 415; United States v. Jacobs, 306 U. S. 363, 59 S. Ct. 551, 83 L. Ed. 763.

To color match cases from different jurisdictions, it must first be determined whether they are true joint tenancies and that the common law is followed. For example, in Iowa the existence of a joint tenancy is determined by the intention of the parties

rather than the common law "four unities rule." In re Estate of Baker, 247 Iowa 1380, 78 N. W. 2d 863.

We have previously held that prior to the enactment of section 76-118, R. R. S. 1943, the attempted creation of a joint tenancy, where one or more of the unities were absent, resulted in a tenancy in common. See, Stuehm v. Mikulski, 139 Neb. 374, 297 N. W. 595; and Anson v. Murphy, 149 Neb. 716, 32 N. W. 2d 271.

It is fundamental that an existing estate in joint tenancy can be destroyed by the act of one joint tenant which is inconsistent with joint tenancy and such act has the effect of destroying a right of survivorship incidental to it. The creation as well as the continued existence of an estate in joint tenancy under the common law, which is recognized in this state, is subject to the right of the Legislature to modify, which it has done by section 76-118, R. R. S. 1943.

Any act of a joint tenant which destroys one or more of the coexisting unities operates as a severance and extinguishes the right of survivorship. See, White v. Ogier, 175 Neb. 883, 125 N. W. 2d 68; and Cofer v. Perkins, 199 Neb. 327, 258 N. W. 2d 807. A close reading of section 76-118, R. R. S. 1943, does not indicate any intention to permit severance by a conveyance from one joint tenant to himself, he being both the grantor and grantee. For a discussion of the law of severance as applied to joint tenancies, see "Panel Discussion" by Herman Ginsburg, Wilbur S. Aten, Robert G. Simmons, Jr., and John R. Fike, reported at 34 Neb. L. Rev. 280-301 (1954).

A transaction involving the transfer of title to real estate presupposes the participation of two or more parties. For every alienation there must be an alienor and an alienee; for every grant, a grantor and a grantee; and for every gift, a donor and a donee. The words "convey," "transfer," and similar words employed in conveyancing signify the

passing of title from one person to another. See Black's Law Dictionary 402 (4th Ed., 1951). To make a deed effective, the grantor is divested of and the grantee is vested with the title. The requisites of a deed purporting to grant an immediate estate in possession are that there be a grantor and a grantee and a thing granted. A person cannot convey or deliver to himself that which he already possesses. He cannot by deed convey an estate to himself or take an estate from himself. Deslauriers v. Senesac, 331 Ill. 437, 163 N. E. 327; 26 C. J. S., Deeds, § 13, p. 600.

At common law, livery of seisin was necessary to pass the title to real property and it was recognized that a person could not make livery of seisin to himself. Livery of seisin has been rendered unnecessary; but the muniments of title, namely the deed, must still be delivered. See Deslauriers v. Senesac, *supra*.

Here the cotenant, Fred Kleensang, attempted to sever the joint tenancy by a deed from himself as grantor to himself as grantee. We now hold that this act does not constitute a severance of the joint tenancy and that the right of survivorship at the time of the death of Fred Kleensang was in the plaintiff, Herbert Krause.

The decision of the District Court is reversed with instructions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. VERNON NEWBOLD, SHERIFF OF BUFFALO COUNTY, NEBRASKA, APPELLANT, V. COUNTY OF BUFFALO, NEBRASKA, ET AL., APPELLEES.

277 N. W. 2d 246

Filed April 3, 1979. No. 41953.

1. **Mandamus.** Mandamus is an extraordinary remedy which is not awarded as a matter of right.
2. _____. A writ of mandamus should not issue where there is another plain and adequate remedy available.
3. _____. The relator must show clearly and conclusively that he is entitled to the particular relief requested and the respondents are legally obligated to act.
4. _____. The duty to act must exist at the time the writ is applied for and the duty to act must be clear.
5. **Administrative Law: Claims.** Generally, a county board acts quasi-judicially in determining whether claims filed against the county should be allowed.
6. **Mandamus.** Mandamus may not be used to control the exercise of judicial discretion.

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

Donald J. Loftus, P.C., for appellant.

James M. Knapp of Knapp, State, Yeagley, Mues & Sidwell, for appellees.

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

BOSLAUGH, J.

This was an action for a writ of mandamus against five members of the county board of Buffalo County, Nebraska, to compel the defendants to "approve and/or pay" five claims against the county. The relator was the sheriff of Buffalo County. The claims were for merchandise or services that had been furnished to the sheriff's office by the claimants at the request of the sheriff.

The trial court found that except for one claim and part of another the claims had been disallowed for just cause; that the defendants' refusal to approve

the remaining claims was not for the purpose of interfering with the relator in the reasonable performance of the duties of his office and the evidence did not show that the disallowance of the claims unreasonably interfered with the relator's performance of his duties; and that a writ of mandamus should not issue. The relator appeals from the dismissal of the action.

The evidence shows the claims were for the rental and supplies for a copying machine used in the sheriff's office; psychological evaluation of prospective employees performed by Selection Research Institute; and a book entitled Encyclopedia Collective Bargaining—Contract Clauses. The claims had been filed by the vendors who had furnished the merchandise or services to the county and the sheriff had no financial interest in any of the claims.

At the time this action was brought none of the claims were then pending before the board. Each claim had been filed, examined, and disallowed by the county board, and no appeal had been taken from the disallowance.

The defendants filed a lengthy demurrer and answer alleging many grounds for the denial of the relief sought by the relator. The relator's brief alleges 29 assignments of error. It is necessary to consider but a few of the contentions made by the parties.

Mandamus is an extraordinary remedy which is not awarded as a matter of right. State, ex rel. Read v. Farmers Irrigation District, 116 Neb. 373, 217 N. W. 607. The writ should not issue where there is another plain and adequate remedy available. Watts v. City of Omaha, 184 Neb. 41, 165 N. W. 2d 104.

Before the writ may issue the relator must show clearly and conclusively that he is entitled to the particular relief requested and the respondents are legally obligated to act. State ex rel. School Dist. v.

Board of Equalization, 166 Neb. 785, 90 N. W. 2d 421.

The duty to act must exist at the time the writ is applied for and the duty to act must be clear. State ex rel. Goetz v. Lundak, 199 Neb. 585, 260 N. W. 2d 589.

The evidence in this case shows that each claim had been examined and disallowed by the county board at the time the action was brought. There was nothing pending before the board on which the respondents could be compelled to act.

Generally, a county board acts quasi-judicially in determining whether claims filed against the county should be allowed. State ex rel. Clark v. Buffalo County, 6 Neb. 454. Mandamus may not be used to control the exercise of judicial discretion. Watts v. City of Omaha, *supra*. The statutory remedy of appeal from the action of the board was an adequate remedy which was available to the claimants who were interested in the claims involved in this case.

The evidence shows there had been no substantial or unreasonable interference with the relator's conduct of his office or the performance of his duties and mandamus was not an appropriate remedy under the facts and circumstances of this case.

The judgment of the District Court dismissing the action is affirmed.

AFFIRMED.

PAUL GREENWADE, APPELLEE, V. ALLEN W. DRAKE ET AL., APPELLANTS.

277 N. W. 2d 248

Filed April 3, 1979. No. 41973.

1. **Motor Vehicles: Highways: Negligence.** It is generally negligence, as a matter of law, for a motorist to drive his vehicle on a highway in such manner that he is unable to stop or turn aside in time to avoid a collision with an object within his range of vision.

2. _____: _____: _____. An exception exists to the foregoing rule but only when the object struck is such that it blends into the surrounding area and cannot ordinarily be observed by the exercise of ordinary care in time to avoid a collision.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Affirmed.

Con M. Keating and Gary L. Nedved of Marti, Dalton, Bruckner, O'Gara & Keating, for appellants.

A. James McArthur, for appellee.

Heard before BOSLAUGH, CLINTON, and WHITE, JJ., and RIST and WINDRUM, District Judges.

RIST, District Judge.

This is an action in which plaintiff recovered judgment against defendant for personal injuries arising out of a rear-end motor vehicle collision. Defendant appeals from that judgment.

On October 18, 1976, at approximately 7 a.m., plaintiff was driving a road grader upon U.S. Highway No. 6 within the city limits of Waverly, Nebraska, proceeding east on said highway in the south or eastbound lane. It was dark and plaintiff proceeded with his lights on, two headlights to the front and one red rear taillight on the right side. The left taillight of the grader was not working. No other lights were in operation on the grader. The grader had a light-colored triangular slow-moving vehicle sign mounted on the grader and facing to the rear. This sign was faded, with little reflective quality. The grader was yellow in color with dark rear tires. The yellow part on the rear of the grader was worn to some extent. Pictures of the rear of the grader are in evidence.

Highway No. 6 was a two-lane blacktop highway, one lane for each direction of traffic and was dry and level for several miles each way from the scene of the accident. A vapor street light was on approximately ½ block east of the point of collision.

Plaintiff had entered the highway from the north approximately 1 block west of the point of collision. He stopped, saw car lights about a mile to the west, and proceeded onto the highway, turning east. At the time of the accident he had proceeded approximately 1 block and was going about 10 miles per hour.

Defendant was proceeding easterly on said Highway No. 6 from his home in Dorchester, Nebraska, to his place of employment northeast of Waverly and had been driving for approximately 1 hour prior to the accident. As he entered Waverly he slowed to approximately 45 miles per hour, which was the posted speed limit, and proceeded easterly until he collided with the rear of the grader in the south or eastbound lane of the highway.

The investigating officer testified defendant told him he was approximately 20 feet from the grader when he first saw it, applied his brakes, and the collision occurred. The officer further testified it was dark at the accident scene and with a flashlight he could see the outline of objects. He looked for skid marks with relation to defendant's vehicle and recalled seeing none. He testified the rear light of the grader was dim.

Defendant testified he had his headlights on low beam and the first thing he saw of the grader was "a big * * * yellow drawbar," and simultaneously applied his brakes and collided with the grader. He testified there had been no glare of oncoming headlights affecting him prior to the accident.

The trial court determined as a matter of law that defendant was guilty of negligence in failing to keep a proper lookout and in failing to have his vehicle under reasonable control, but submitted to the jury the issue of whether such negligence was a proximate or proximately contributing cause of the collision, the issue of whether plaintiff was negligent in failing to warn defendant and other traffic of his

presence on the highway during darkness, and the matter of comparative negligence, giving appropriate instructions therefor. The trial court refused defendant's request to submit NJI No. 7.03A on range of vision.

Defendant's motion for new trial raised the issues of the court's determination of defendant's negligence and the refusal to give the requested instruction on range of vision, which motion was overruled and this appeal followed. These issues are the only ones raised as error in this court.

In the outline of facts and evidence set forth above we have stated all the pertinent facts, including all that would inure to defendant's benefit, and have reviewed all the pertinent exhibits. The issues raised on appeal are interrelated and will be considered together.

This court has clearly stated the rule to be that it is generally negligence, as a matter of law, for a motorist to drive his vehicle on a highway in such manner that he is unable to stop or turn aside in time to avoid a collision with an object within the range of his vision. Vrba v. Kelly, 198 Neb. 723, 255 N. W. 2d 269; C. C. Natvig's Sons, Inc. v. Summers, 198 Neb. 741, 255 N. W. 2d 272. With respect to nighttime driving this rule has been stated to be that it is negligence, as a matter of law, for a motorist to drive so fast on a highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights. Bartosh v. Schlautman, 181 Neb. 130, 147 N. W. 2d 492; Wrasse v. Gustavson, 193 Neb. 41, 225 N. W. 2d 274.

The exception to the above rule is in situations where the object or obstruction is of the same color as the roadway, and for that or other such reasons, cannot ordinarily be observed by the exercise of ordinary care in time to avoid a collision. McClellen v. Dobberstein, 189 Neb. 669, 204 N. W. 2d 559; Bartosh v. Schlautman, *supra*. As stated in McClellen,

supra, "* * * the question is usually presented as to whether a driver, in order to escape the rule of stopping within the range of vision of a discernible object, is excused for not seeing the vehicle or object in the road ahead of him sooner than he actually did and was unable to escape the collision."

In light of the above rules the issue is whether the trial court was correct in determining defendant did not come within the exception to the general rule. This determination turns upon the facts in evidence. As stated earlier, we have outlined all pertinent evidence with special attention to all facts which might benefit defendant.

Our conclusion is the trial court was correct. A review of the evidence, including the photographs of the highway and the grader, shows a long, level stretch of dry, dark-colored pavement with a street light within ½ block of the accident. There was nothing to obscure or hamper defendant's vision; the basic color of the grader was yellow which was in contrast to the dark color of the pavement; and the wearing of the paint on the grader was not such as to effectively detract from this contrast in color; indeed, defendant admitted his first sight of the grader was a big yellow drawbar. The slow-moving vehicle sign, while not of good reflective quality, was nonetheless light in color and clearly visible, and the taillight of the grader was lighted and visible.

Taken as a whole, the grader, with its lights and sign, constituted an object clearly visible which, with ordinary care, could have been seen within the range of defendant's headlights.

We note also that defendant did not see the grader until approximately 20 feet from it. Under the evidence, this was clearly a failure of defendant to see what he could and should have seen in ample time and at a sufficient distance to avoid the accident.

The trial court could and did correctly determine the general rule, as set forth in Vrba and C. C. Nat-

vig's Sons, Inc., *supra*, applied, and properly ruled defendant was negligent as a matter of law. The case was properly submitted to the jury and both the verdict and judgment thereon are hereby affirmed.

AFFIRMED.

MARTHA OTT, PERSONAL REPRESENTATIVE OF FRED OTT, JR., DECEASED, APPELLEE, V. DOROTHEA E. FRANK, APPELLANT.

277 N. W. 2d 251

Filed April 3, 1979. No. 42026.

1. **Summary Judgments.** Where there is no genuine issue of material fact, it is proper for the trial court to render summary judgment on the pleadings and admissions.
2. **Negligence: Damages: Juries.** In an action for loss of support it properly comes within the province of the jury to take into account the purchasing power of money with respect to the commodities that are in use by the public generally.
3. **Trial: Juries: Instructions.** The value of money, i.e. its purchasing power, is elemental within the knowledge and experience of man generally, and is not a proper subject for an instruction.
4. **Trial: Juries: Verdicts.** Where a party has sustained the burden of a trial and has succeeded in securing the verdict of a jury on controverted issues of fact, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.

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

Raymond, Olsen & Coll and Rick L. Ediger, for appellant.

Robert P. Chaloupka of VanSteenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

Heard before BOSLAUGH, CLINTON, WHITE, and MCCOWN, JJ., and REIMER, District Judge.

REIMER, District Judge.

This action against the defendant, Dorothea E.

Frank, was brought by Martha Ott, personal representative of the estate of Fred Ott, Jr., under the first cause of action for the wrongful death of her husband, the decedent, and under the second cause of action for damages suffered by decedent during his lifetime. Plaintiff alleged that defendant negligently operated her automobile by driving it through the front door of Henry's Market in Scottsbluff, Nebraska, thereby striking and injuring plaintiff's decedent who died as a result of such injuries. The accident occurred on January 29, 1977, and the decedent died on February 13, 1977, with death caused by a pulmonary embolism secondary to thrombophlebitis and blood clots in the right leg which had been excessively bruised in the accident.

The trial court sustained plaintiff's motion for summary judgment and directed a finding of negligence against defendant on the issue of liability. After a jury trial on the issues of proximate cause and damages, the court further directed a finding against the defendant on proximate cause and submitted only the issue of damages to the jury. The jury returned a verdict on the first cause of action for $180,075.75 and on the second cause of action for $7,500. Defendant has appealed.

Defendant on her appeal assigned as error: (1) Granting a summary judgment in favor of plaintiff; (2) allowing testimony based upon gross earnings rather than net income or take-home pay as the measure of damages for decedent's statutory beneficiaries; (3) overruling the defendant's motion in limine with regard to projected future rates of economic inflation and income figures; and (4) excessive damages appearing to have been given under the influence of passion or prejudice, or contrary to law.

With regard to the first assignment of error, the defendant pleaded that decedent had an opportunity to "step out of the way," but the evidence introduced

on the motion for summary judgment showed no such opportunity. "[T]he purpose of a motion for summary judgment is to pierce the allegations of the pleadings and to show that the controlling facts are clear and that no genuine issue of fact remains for trial." Johnson v. Evers, 195 Neb. 426, 238 N. W. 2d 474.

The second and third assignments are discussed together. The testimony complained of is that given by Dr. Curtis Cramer, who identified himself as a full professor in the Department of Economics at the University of Wyoming, and as a doctor of philosophy, with a degree in economics and statistics from the University of Maryland. Dr. Cramer, using as a basis for his testimony the work record of the 59-year-old decedent for the past 20 years and his income records for the past 4 years, made a projection of the future earnings which the decedent could have been expected to have earned during a "work life expectancy" of 8.2 years and a remaining "life expectancy" of 17.1 years. In arriving at these several computations, the witness stated he did not reduce the projected figure for the possible burden of income taxes because, in this case, he had found that in spite of decedent's increased earnings during the past 4 years, his actual federal income tax paid had declined substantially because of decedent's use of a tax shelter plan. The witness did testify that the decedent's tax burden had been 9.7 percent over the past 4 years, but that to project the tax liability in the future would be too speculative in view of the availability "of tax loopholes and the ability to shelter certain types of projects."

Using the fact that in 1976 and 1977 the decedent had been granted 8 percent increases in salary and otherwise justifying the same, the witness further used an 8 percent salary increase factor in predicting the future earnings of the decedent, from a base wage of $11,321 for 11 months in 1977, to wages of

$20,564 in a predicted final year of full employment in 1984.

The jury was properly instructed by instruction No. 5, given in the general form contained in NJI No. 4.60, concerning the proper elements of pecuniary loss or damages applicable to the case, and was further instructed by instruction No. 12, given in the general form contained in NJI No. 14.55, concerning the weight of the evidence to be given to the testimony of the expert witness.

Factors constituting the different portions of an expert witness' computation of projected future damages or losses are not the subject of special instructions by the court, whether the same be projected tax liability or projected rate of pay increase based upon improved performance or upon a projected rate of inflation. This subject is discussed, with reference to the purchasing power of money, in Segebart v. Gregory, 160 Neb. 64, 69 N. W. 2d 315: "Juries have the right to take into consideration the purchasing power of money with respect to commodities that are in use by the public generally and may reasonably be said to constitute the necessaries of life. * * * From that it does not follow that a court is required to instruct on that subject matter. The value of money is a representative one. It is fixed by the value of the thing or things for which it can be exchanged. Whether that value has depreciated or appreciated with reference to some other period is not material. The value of money, i.e. its purchasing power, is elemental within the knowledge and experience of men generally. It is one of the facts of life which jurors are presumed to know. It is not error for failure to instruct relative to the purchasing power of money. It is not a proper subject for an instruction."

We think that prospective increases in wages that a worker might have merited had he lived, and his potential liability for income taxes, are likewise

proper matters to be covered in the evidence, but are not subjects for special instructions.

Defendant's fourth assignment of error raises the question of whether the verdict of the jury was based upon the influence of passion and prejudice. In this case we are dealing with the loss to the family of a wage earner who had pursued steady and gainful employment for his entire adult life and who had a life expectancy of 17.1 years. The decedent was in general good health at the time of the accident and it is for the jury to determine the amount of earnings loss. The evidence showed that he was a man of many skills in plumbing, carpentry, and the general ability to maintain and keep up his properties and those of his sons. He was frequently sought out by family members as both companion and counselor. The loss of services and companionship are likewise within the province of the jury to determine under proper instructions.

The verdict and judgment are sustained by sufficient evidence. We find no prejudicial error in the record and affirm the judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALBERT WAYNE TWEEDY, APPELLANT.

277 N. W. 2d 254

Filed April 3, 1979. Nos. 42188, 42189.

Post Conviction: Courts: Statutes: Hearings: Minors. Where a juvenile defendant is being prosecuted in the District Court and has not had an opportunity for a hearing on the matter of transfer to juvenile jurisdiction as required by section 43-202.02, R. S. Supp., 1978, ordinarily the proper procedure to cure the procedural defect is to hold such a hearing and to determine whether or not such transfer should have been granted. If the court, based upon sufficient evidence, finds the evidence did not require the transfer, then the conviction need not be set aside in post conviction proceedings.

Appeals from the District Court for Saunders County: BRYCE BARTU, Judge. Affirmed.

Albert Tweedy, pro se.

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.

This is an appeal by Albert Wayne Tweedy in a post conviction proceeding commenced under the provisions of section 29-3001 et seq., R. R. S. 1943. The application alleges that the applicant is confined in the Nebraska Penal and Correctional Complex serving consecutive sentences of 1 year for escape from jail and 2 to 5 years for auto theft. It alleges further that the conviction and sentence are constitutionally infirm because Tweedy was deprived of effective assistance of counsel in violation of the pertinent provisions of the Constitutions of the United States and the State of Nebraska. The substance of these claims is that at the time Tweedy entered pleas of guilty and was sentenced on the charges, he was not yet 18 years old; that the pleas of guilty were entered pursuant to a plea bargain which he did not understand; and that before entering such pleas he was entitled to make a motion under the provisions of section 43-202.02, R. S. Supp., 1978, to have the proceedings transferred to juvenile jurisdiction and to have a hearing on such motion and that his court-appointed counsel failed to advise him of his rights in this respect. The District Court held an evidentiary hearing and found that the sentencing judge had not advised Tweedy of his right to file the motion and to have a hearing as required by section 43-202.02, R. S. Supp., 1978, and that Tweedy had thus been deprived of due process. The order then granted Tweedy 30 days to file a motion in accordance

with the provisions of section 43-202.02, R. S. Supp., 1978. This Tweedy did and a further evidentiary hearing was held.

At these hearings Tweedy and his counsel in the criminal proceedings testified and documentary evidence was introduced. Tweedy testified he did not understand the plea bargain, and he did not know and was not advised of his right to file a motion and have a hearing on the matter of transfer to juvenile jurisdiction. His counsel testified the plea bargain consisted of the dismissal of one of two charges of auto theft and the entry of a plea of guilty to the two charges on which Tweedy was sentenced and that Tweedy was informed of the nature of the bargain. The record of the arraignment and sentencing corroborates that testimony.

Counsel further testified he considered the matter of filing a motion to transfer jurisdiction and determined the county attorney would oppose the motion; Tweedy's prior record made it unlikely such motion would be granted; and he advised Tweedy of his right to file the motion and Tweedy rejected it because it would cause a delay and Tweedy wanted to get out of the Saunders County jail as soon as possible and back to the penal complex.

The record establishes the following: (1) A long history of Tweedy's incorrigibility as a juvenile; (2) a prior conviction for the felony of auto theft; (3) violation of the conditions of parole while on parole for that offense; (4) commission of the next two felonies of auto theft within 48 hours of his release from parole; (5) Tweedy's prior commitment to the Nebraska Penal and Correctional Complex at age 16 was necessitated by the fact the Kearney institution for male juvenile offenders would not accept him because, among other things, during a period of 13 months as an inmate there, Tweedy had escaped from the institution six times; and (6) the escape from jail occurred while Tweedy was incarcerated

awaiting trial on the last two auto theft charges.

The record also shows at the time of the sentencing the District Judge was aware of Tweedy's age, made inquiry as to why there had been no request for transfer to juvenile jurisdiction, and that his counsel, in open court in the presence of Tweedy, waived the right; the record further establishes the county attorney, in determining whether to prosecute Tweedy as an adult or as a juvenile, took into consideration the matters listed in section 43-202.01, R. S. Supp., 1978.

After the second evidentiary hearing, the court found the nature of the offenses, Tweedy's prior record, and the security of the public all require the probable confinement of Tweedy beyond the time he could be held as a minor, and therefore the retention of jurisdiction in the District Court had been proper and Tweedy had not established a basis for transfer of jurisdiction.

We hold that where a juvenile defendant is being prosecuted in the District Court and has not had an opportunity for a hearing on the matter of transfer to juvenile jurisdiction as required by section 43-202.02, R. S. Supp., 1978, ordinarily the proper procedure to cure the procedural defect is to hold such a hearing and to determine whether or not such transfer should have been granted. If the court, based upon sufficient evidence, finds the evidence did not require the transfer, then the conviction need not be set aside in post conviction proceedings. Precedent for such curative procedure in somewhat similar circumstances may be found in our decision in State v. Steinmark, 201 Neb. 200, 266 N. W. 2d 751; and Jackson v. Denno, 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908.

AFFIRMED.

ERWIN CHARLES SIMANTS, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

277 N. W. 2d 217

Filed April 3, 1979. No. 42206.

1. **Criminal Law: Coram Nobis.** A writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment and not discoverable by him with reasonable diligence, which fact or facts are of such a nature that, if known to the court, would have prevented entry of the judgment.
2. **Criminal Law: Jurors: Burden of Proof.** When an improper communication with a juror or jurors is shown to have taken place in a criminal case, a rebuttable presumption of prejudice arises and the burden is on the State to prove that the communication was not prejudicial.
3. **Criminal Law: Jurors: Witnesses: Verdicts.** Unauthorized communications between jurors and third persons or witnesses during the course of jury deliberations are absolutely forbidden and invalidate the verdict unless their harmlessness is made to appear.
4. **Trial: Constitutional Law.** A fair trial in a fair tribunal is a basic requirement of constitutional due process.
5. **Criminal Law: Juries.** It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated.
6. **Trial: Juries: Evidence: Constitutional Law.** The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.
7. **Jurors: Testimony: Statutes.** Under section 27-606(2), R. R. S. 1943, a juror may testify as to whether extraneous prejudicial information was improperly brought to the jury's attention. No evidence may be received as to the effect of any statement upon a juror's mind, its influence one way or another, or the mental processes of a juror in connection therewith.
8. **Constitutional Law: Burden of Proof.** Where an error of constitutional dimensions has occurred, the State has the burden of proving beyond a reasonable doubt that such error was harmless.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Convictions and sentences vacated. Cause remanded for further proceedings.

Keith N. Bystrom and Scott P. Helvie, Lincoln County Public Defenders, for appellant.

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

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

MCCOWN, J.

Erwin Charles Simants filed a petition bearing the caption, "Writ of Error Coram Nobis," in which he sought to set aside his conviction and sentence on each of six counts of murder in the first degree. The petition alleged irregularities and misconduct in connection with the sequestration and deliberations of the jury at trial which were not known to the petitioner or his counsel at the time of his trial, conviction, and sentence. Following a hearing in the District Court for Lincoln County, the court denied the petition for writ of error coram nobis, and the petitioner has appealed.

Erwin Charles Simants was charged with six counts of murder in the first degree. The plea to each count was not guilty by reason of insanity. Trial to a jury began on January 8, 1976, and continued through January 16, 1976. The jury returned a verdict of guilty on all counts on January 17, 1976, and on January 29, 1976, Erwin Charles Simants was sentenced to death by electrocution.

On January 5, 1978, Simants filed the petition in this case alleging that the Lincoln County sheriff, Gordon D. Gilster, was a principal and necessary witness for the State of Nebraska in prosecuting the murder case against petitioner; that during the trial the sheriff visited the motel in which the members of the jury and alternates were sequestered, and conversed, played cards, and associated with members of the jury and alternates. The petition also alleged that during the trial the judge who presided over the

trial visited the motel where the jury was sequestered and may have made communications with members of the jury.

The petition alleged that the petitioner and his attorneys had no knowledge of such actions at the time of trial or sentencing but obtained knowledge by subsequent interviews with members of the jury, and that the facts concerning such conduct, if known to the trial court prior to judgment and sentence, would have prevented the rendition of the judgment. The petition also alleged that the facts constituted a denial of defendant's constitutional rights such as to render the judgment void. The petition prayed that the conviction, judgment, and sentence of death by electrocution be set aside and the petitioner be granted a new trial.

The answer of the State alleged that although the trial judge was present at the motel on two occasions, he did not discuss the case or attempt to do so. The answer alleged that although the sheriff was present at the motel three times during sequestration, he did not discuss the case nor attempt to do so.

The judge at the original trial withdrew from this proceeding, and another judge presided thereafter. Some factual background as to the original trial is necessary in order to put the testimony at the present hearing in perspective. The facts are set out in full in State v. Simants, 197 Neb. 549, 250 N. W. 2d 881. The defendant was charged with the mass murder of six individuals on October 18, 1975. The plea of the defendant was not guilty by reason of insanity. There was little, if any, doubt as to all the essential facts of the killings. The critical issue was whether or not the defendant was legally responsible for his actions at the time. Expert witnesses for the State testified that the defendant was legally sane at the time of the murders, while expert testimony for the defendant was that the defendant was not legally sane at the time of the slayings.

Sheriff Gilster testified on two separate occasions during the trial. The sheriff's first appearance as a witness was on January 12, 1976. The sheriff's second appearance as a witness was on January 15, 1976, the next to last day of trial, when he was called as a rebuttal witness. On this occasion he testified principally about the actions of the defendant during his confinement, with particular reference to his mental condition. In answer to a question: "Has there ever been any act of the defendant in your presence which would indicate to you that he might have a mental problem?", the sheriff answered: "No." On cross-examination the sheriff admitted that he was not schooled in determining or looking for those things which would indicate a mental problem, but said that he had observed a number of people in transporting them back and forth from the Nebraska state institution. The sheriff testified that he knew the defendant pretty well because the defendant had been in his jail several times. It should be noted also that the defendant was in the personal custody of the sheriff during trial sessions, and Sheriff Gilster was therefore present in uniform inside the bar of the courtroom throughout the entire trial.

The jury was sequestered from January 8, 1976, until the conclusion of the case, at the Howard Johnson Motel in North Platte, Nebraska, under the orders of the presiding judge. The jurors occupied rooms in one wing of the motel that was closed and had two adjoining rooms that were used as recreation rooms. The jurors were fed in a dining room separated from the rest of the restaurant by a folding door partition.

In the present proceeding the trial judge testified that he went to the motel on two occasions to see that the sequestration orders were being properly carried out. The first visit was on January 8, the first night the jury was sequestered, and the second

visit was on the early evening of January 10, when he made an unannounced inspection trip. On each occasion the judge checked the jurors' accommodations and services and conferred with the motel manager or the bailiffs with respect to arrangements. He had no conversations with jurors except a cursory acknowledgement or response to a greeting or comment. He was at the motel for 10 to 20 minutes. The testimony of all the witnesses confirmed the testimony of the judge.

Sheriff Gilster testified that he made three visits to the motel during the period the jury was sequestered there. His first visit was on the evening of January 8, 1976, when he went to the motel to deliver a suitcase to a juror. He left the suitcase with a bailiff and then went to the jurors' private dining area and visited with the bailiff and with four or five jurors at a nearby table for 10 or 15 minutes.

Sheriff Gilster testified that his second visit to the motel was about 9 p.m., on a date somewhere near the middle of the trial. He went upstairs to the jurors' quarters and one of the jurors' recreation rooms. He testified that he saw and had conversations with several of the jurors while he was there, and that he stayed for approximately an hour.

The sheriff testified that his third visit at the motel was on Thursday night, January 15, 1976, the same day on which he had testified as a rebuttal witness in the case. He went upstairs to the jurors' quarters and one of the recreation rooms. There were four or five jurors in the room and the sheriff testified that he engaged in a general conversation. These conversations lasted approximately 30 minutes. After this visit the sheriff went into the adjoining recreation room where several other jurors were sitting. Some of the jurors were playing cards and invited the sheriff to join them. He did and played three games of blackjack for an estimated period of 6 or 7 minutes.

Although there were several minor conflicts, the major area of conflict in the testimony of the sheriff and that of the jurors involves the subject matter of their conversations. The sheriff testified the conversations were general and that he did not recall speaking of his experiences as sheriff which the jurors recalled that he did. The jurors' recollections were that he talked mostly about his experiences as sheriff. Some jurors recalled that the sheriff related to them an incident in which the sheriff was a witness at a trial in the county court. The sheriff told them that when an attorney objected to the sheriff's testimony, the county judge overruled the objection and made the comment that the sheriff was the only one who knew what he was talking about.

At the conclusion of 2 days of testimony at the hearing on the petition, the District Court found that the jury did not deliberate except in the jury room; that the presiding judge acknowledged greetings from members of the jury and tersely answered one personal question of a juror; and if either or both combined were determined to be communications to the jury or any members thereof, it was not prejudicial error.

The District Court found that Sheriff Gilster made unwarranted contacts with members of the jury on three occasions, which the court found constituted error since Sheriff Gilster was a witness in the murder trial. The court determined, however, that the unwarranted contacts were not prejudicial and the testimony of the sheriff as a rebuttal witness in the murder trial, although it was controverted, was cumulative and not crucial. The District Court therefore denied the petition for writ of error coram nobis and the petitioner has appealed.

The present proceeding was brought in the form of a petition for writ of error coram nobis. This court has consistently held that a writ of error coram

nobis reaches only matters of fact unknown to the applicant at the time of judgment and not discoverable by him with reasonable diligence, which fact or facts are of such a nature that, if known to the court, would have prevented entry of the judgment. State v. Turner, 194 Neb. 252, 231 N. W. 2d 345; State v. Wilson, 194 Neb. 587, 234 N. W. 2d 208.

If the evidence in the record now before us had been available and brought to the attention of the trial court prior to judgment, that evidence would have constituted grounds for a mistrial, but would not necessarily have prevented the entry of judgment. The petition, however, did allege a denial or infringement of constitutional rights of the petitioner such as to render the judgment void or voidable under the Nebraska Post Conviction Act, sections 29-3001 to 29-3004, R. R. S. 1943. Post conviction relief is cumulative, and under the facts and evidence in this record the proceeding will be treated as one for post conviction relief. See State v. Turner, *supra*.

At the conclusion of the evidentiary hearing in this proceeding, the District Court found that the jury did not deliberate except in the jury room. The court also found that even if the two minor contacts with the jury by the judge who presided at the trial were determined to be communications, they were not prejudicial. The evidence supports both of those findings. The actions of the presiding judge in personally verifying that his orders as to sequestration of the jury were being carried out were appropriate, and did not constitute unwarranted or improper communications with the jury.

The fraternization of Sheriff Gilster with the members of the jury during the course of the trial presents problems of constitutional dimensions. The sheriff was an important lay witness on the issue of the sanity of the defendant, which was the only real issue in the murder trial. The jury had to decide the question of Simants' sanity. The expert testimony

was conflicting on that point. The jury had to weigh that testimony. In deciding the issue, the opinion testimony of a lay witness in whom the jury may have had special confidence because of unwarranted contacts such as are shown by the evidence may have been the critical factor in determining the one key issue which was determinative of the defendant's guilt or innocence. Sheriff Gilster had no valid reason or excuse for communicating or fraternizing with the jury. An inference may be drawn that the sheriff was attempting to enhance his credibility and reliability as a witness in the eyes of the jury. There can be no doubt whatever that the trial court was correct in finding that the sheriff's contacts with the jury on the three occasions disclosed by the evidence were unwarranted, as well as erroneous.

The critical issue in this case is whether the conviction must be reversed because of unauthorized and unwarranted communications and fraternization between the jurors and an important witness in a criminal trial. All courts agree that such conduct is improper but the courts are not in agreement as to the appropriate rules to be applied. Some courts take the view that in the absence of a showing of actual prejudice to the defendant arising from the unauthorized communication the conviction should be affirmed notwithstanding the impropriety. Other courts hold that there is a presumption of prejudice arising from the unauthorized communications which, unless successfully repudiated by the prosecution, taints the conviction and entitles the defendant to a reversal. See, 75 Am. Jur. 2d, Trial, § 1008, p. 849; Annotation, 9 A. L. R. 3d 1275.

We believe the better view to be that when an improper communication with a juror or jurors is shown to have taken place in a criminal case, a rebuttable presumption of prejudice arises and the burden is on the State to prove that the communication was not prejudicial. See, State v. Brown, 84

S. D. 201, 169 N. W. 2d 239; State v. Jones, 363 Mo. 998, 255 S. W. 2d 801; Sunderland v. United States, 19 F. 2d 202 (8th Cir., 1927).

The rule is almost universal that unauthorized private communications between jurors and third persons or witnesses during the course of jury deliberations are absolutely forbidden and invalidate the verdict unless their harmlessness is made to appear. See, Cooney v. State, 61 Neb. 342, 85 N. W. 281; Clyde Mattox v. United States, 146 U. S. 140, 13 S. Ct. 50, 36 L. Ed. 917.

The case of Turner v. State of Louisiana, 379 U. S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424, extended the rule of presumption of prejudice to communications and fraternization between jurors and key witnesses outside the course of jury deliberations but while the jury was sequestered. The two witnesses in that case were also bailiffs who were in charge of the sequestered jury during a 3-day trial. In reversing the murder conviction, the United States Supreme Court said: "And even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution. * * *

"It would have undermined the basic guarantees of trial by jury to permit this kind of an association between the jurors and two key prosecution witnesses who were *not* deputy sheriffs. But the role that Simmons and Rispone played as deputies made the association even more prejudicial." The principle set out in Turner was followed by the Supreme Court in the later case of Gonzales v. Beto, 405 U. S. 1052, 92 S. Ct. 1503, 31 L. Ed. 2d 787.

The foundational basis for the rule of presumptive prejudice is that a fair trial in a fair tribunal is a basic requirement of constitutional due process.

The reasons for the rule have been variously expressed by the courts. " 'The verdict of a jury * * * should represent the concurring judgment, reason and intelligence of the entire jury, free from outside influence from any source whatever.' " Bramlett v. State, 129 Neb. 180, 261 N. W. 166.

"It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiassed judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated." Clyde Mattox v. United States, *supra*.

"The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. 'The jury is an essential instrumentality—an appendage —of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law.' " Turner v. State of Louisiana, *supra*.

At the hearing in the present proceeding the parties and the court proceeded on the premise that any unwarranted or unauthorized communications with the jurors were improper and erroneous. The trial court found, however, that the unwarranted and erroneous communication and fraternization by the sheriff with the jurors was not prejudicial. The State's position is that it has established a lack of prejudice because each of the jurors, in answer to a question by the State as to whether he or she had been influenced or affected by the presence of the sheriff at the motel, over objection by the defendant, said "no."

The defendant contends that such evidence was inadmissible and was improperly admitted. Section 27-606(2), R. R. S. 1943, specifically provides that upon an inquiry into the validity of a verdict in a

case such as this "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. * * *."

In State v. Steinmark, 201 Neb. 200, 266 N. W. 2d 751, this court said: "Under this statute a juror may testify as to whether 'extraneous prejudicial information was improperly brought to the jury's attention.' No evidence may be received as to the effect of any statement upon a juror's mind, its influence one way or another, or the mental processes of a juror in connection therewith."

The trial court quite properly found that the communications and fraternization of the sheriff with the jurors here was unwarranted and erroneous, but also found that it was not prejudicial to the defendant because the sheriff's testimony on the controverted issue of sanity was cumulative. Such a conclusion bypasses entirely the crucial issue of whether the sheriff's conduct might have influenced the jury verdict. It may be reasonably inferred, on the basis of the record here, that the sheriff's conduct was intended to persuade the jurors that he was conscientious in the performance of his official duties and to convince them of his reliability and credibility as a witness. Whatever its motivation, the sheriff's conduct was unwarranted, erroneous, and presumptively prejudicial. Under such circumstances, the State has the burden of showing beyond a reasonable doubt that such conduct was harmless. See, Chapman v. California, 386 U. S. 18, 87 S. Ct.

824, 17 L. Ed. 2d 705; State v. Rice, 188 Neb. 728, 199 N. W. 2d 480.

To support its contention that the erroneous conduct here was harmless, the State relies upon several cases involving improper witness contacts with a jury in which courts have held that the State had successfully overcome the presumption of prejudice. Those cases are clearly distinguishable in that they involve cases where the contacts of the witnesses with the jurors were minimal or cases where the testimony of the witness at the trial involved only formal or uncontroverted issues. Under the evidence in the case now before us actual prejudice or a lack of prejudice can be determined only by inference or by speculation. Under such circumstances the State has failed to overcome the presumption of prejudice, and has failed to meet the burden of showing that the unwarranted and erroneous conduct of the sheriff was harmless.

A fair trial before a fair and impartial jury is a basic requirement of constitutional due process. To condone the conduct of Sheriff Gilster in this case would violate the fundamental integrity of all that is embraced in the constitutional concept of a fair trial by a fair and impartial jury. The stability and integrity of the American system of justice demands that those principles be maintained inviolate. Under the circumstances here the convictions and sentences of the defendant must be vacated and the cause remanded to the District Court for further proceedings.

CONVICTIONS AND SENTENCES VACATED.
CAUSE REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., dissenting in part.

I dissent from that part of the opinion which holds that under the evidence in this case prejudice or lack of prejudice can be determined only by inference and speculation. It seems to me that this

amounts to an application of the prejudice per se rule rather than the mere presumption of prejudice rule which the court declares is the applicable rule.

The trial court held a full, fair, and complete hearing on the petition of the defendant at which he was represented by able counsel. All of the jurors were examined during the hearing. At the conclusion of 2 days of testimony the trial court found that the contacts between the sheriff and the jury did not affect the verdict and were not prejudicial to the defendant. This court now finds as a matter of law that the record does not support the decision of the trial court.

The sheriff's testimony for the most part related to factual matters which he had observed and was not disputed or contradicted. It was to some extent cumulative. There is no contention that the sheriff at any time discussed the case then being tried with any of the jurors. None of the contacts occurred after the case had been submitted to the jury. I am unable to say that the decision of the trial court was clearly wrong.

STATE OF NEBRASKA, APPELLEE, V. DENNIS LEE SELL, APPELLANT.

277 N. W. 2d 256

Filed April 3, 1979. Nos. 42217, 42218, 42219.

1. **Criminal Law: Statutes: Sexual Sociopath.** Under the provisions of section 29-2909, R. R. S. 1943, a person who believes himself to be a sexual sociopath may initiate proceedings under the Nebraska Sexual Sociopath Act even though he has not been found guilty of a sexual offense.
2. **Supreme Court: Appeal and Error.** The Supreme Court, on appeal, will not interpret the meaning of a statutory provision if such interpretation is not necessary for the disposition of the case.
3. **Criminal Law: Sexual Sociopath: Trial: Evidence.** In order for a trial court to find that a defendant "can benefit by treatment"

within the meaning of the Nebraska Sexual Sociopath Act so as to require his confinement to a regional center, the court must find by a preponderance of the evidence that such treatment will result in the cure of the defendant. In the absence of such a finding the court must determine that the defendant cannot benefit from such treatment and should be confined in the Nebraska Penal and Correctional Complex as prescribed by the Nebraska Sexual Sociopath Act.

4. **Criminal Law: Confinement.** The laws of the State of Nebraska under which an individual is confined to the Nebraska Penal and Correctional Complex specifically impose upon the chief executive officer of such facility the duty to provide each inmate appropriate medical care.

Appeals from the District Court for Dawson County: KEITH WINDRUM, Judge. Affirmed as modified.

Keith N. Bystrom, for appellant.

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

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

KRIVOSHA, C. J.

This appeal presents to the court further questions concerning the provisions of the Nebraska Sexual Sociopath Act, section 29-2901 et seq., R. R. S. 1943. We have previously ruled on various provisions of the Sexual Sociopath Act. See State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595; State v. Wells, 197 Neb. 584, 249 N. W. 2d 904; State v. Little, 199 Neb. 772, 261 N. W. 2d 847; and State v. Shaw, *ante* p. 766, 277 N. W. 2d 106.

The appeal herein involves three separate cases which were consolidated for hearing before this court by agreement of the parties and upon order of this court.

The first case, No. 42217, arises out of defendant's plea of guilty to charges of murder in the second degree, in violation of section 28-402, R. R. S. 1943, and first degree sexual assault, in violation of section 28-408.03, R. R. S. 1943, upon Ruth Eby. It will

hereafter be referred to as the "Eby case."

The second case, No. 42218, arises out of the defendant's plea of guilty to a charge of murder in the second degree of Judith Dangler, in violation of section 28-402, R. R. S. 1943, hereafter referred to as the "Dangler case."

The third case, No. 42219, arises by reason of the defendant's plea of guilty to a charge of burglary with the intent to commit a sexual assault on one Pat Yung, in violation of section 28-532, R. R. S. 1943. It will hereafter be referred to as the "Yung case."

Following Sell's plea of guilty first in the Yung case and later in the Eby case, the trial court, on motion of the State, pursuant to section 29-2902, R. R. S. 1943, suspended further criminal proceedings in both cases. It then ordered proceedings under the provisions of the Nebraska Sexual Sociopath Act.

While these proceedings were pending, Sell was charged with murder in the second degree in the Dangler case. After waiving preliminary hearing, Sell entered a plea of guilty to the information in the Dangler case.

On February 16, 1978, a hearing to determine whether Sell was a sexual sociopath was held, pursuant to section 29-2902(6), R. R. S. 1943, in the Yung and Eby cases. There was no evidence of a sexual assault in the Dangler case, and therefore neither the State nor the court on its own motion included the Dangler case in the proceedings under the Sexual Sociopath Act. Evidence disclosed that Sell murdered Mrs. Dangler some 11 months prior to the time of entering his plea. The condition of the body was such that no determination could be made as to whether there had been a sexual assault upon Mrs. Dangler prior to her being murdered. The record also reveals that Sell denied ever having committed a sexual assault upon Mrs. Dangler.

Sell was examined by two psychiatrists who filed a report with the trial court. From that report the

court found Sell to be a sexual sociopath in the Eby and Yung cases, and ordered him to the Lincoln Regional Center for evaluation as required under the provisions of section 29-2903(1), R. R. S. 1943. At that time the defendant waived trial by jury on the issue of whether or not he was a sexual sociopath. § 29-2903(2), R. R. S. 1943.

On May 26, 1978, after the evaluations conducted at the Lincoln Regional Center were completed, Sell appeared for further hearing as provided by section 29-2903(3), R. R. S. 1943. Our decision in State v. Shaw, *supra*, had not yet been released, and therefore the trial court was unaware of the requirement to impose a sentence in all three cases. The trial court proceeded to impose sentence in the Dangler case, and suspended further proceedings in Yung and Eby.

Before the court pronounced sentence in the Dangler case, Sell filed a motion asking to be declared a sexual sociopath and treated accordingly. In his motion filed in the Dangler case, Sell alleged that his conviction for murder in the second degree met the statutory definition of a sexual offense as prescribed under the provisions of the Nebraska Sexual Sociopath Act, section 29-2901 et seq., R. R. S. 1943. Furthermore, reports from the Lincoln Regional Center filed in the Eby and Yung cases indicated the defendant Sell was a sexual sociopath with regard to all three crimes.

Following conviction of a sexual offense, the Nebraska Sexual Sociopath Act provides for three ways in which proceedings thereunder can be instituted. The court on its own motion may do so, the State on its motion may do so, or the defendant may do so. § 29-2902, R. R. S. 1943.

Before the provisions of section 29-2902, R. R. S. 1943, may be invoked, it is necessary that the defendant first be in fact convicted of a sexual offense as defined by the act. However, if the defend-

ant desires to seek the benefit of the act voluntarily, he may do so even in the absence of a conviction. § 29-2909, R. R. S. 1943. As we pointed out in State v. Wells, *supra*, Nebraska is one of the few states in the Union which provides for a voluntary proceeding. Section 29-2909, R. R. S. 1943, provides as follows: "Any person *whether or not he is guilty of a sexual offense* who believes himself to be a sexual sociopath may initiate proceedings under sections 29-2901 to 29-2910 by filing a petition in the district court of any county alleging that he believes himself to be a sexual sociopath. The judge of such court shall thereupon order such person to be examined by two psychiatrists in the manner provided by section 29-2902 and thereafter proceedings shall be held in the same manner as if such person had committed the sex offense except (a) the petitioner shall be deemed to have waived a jury trial and no jury shall be called to determine whether the petitioner is a sexual sociopath and (b) the proceedings shall be confidential in nature and no publicity shall be permitted concerning the filing of the petition or the proceedings thereunder. The records of such proceeding shall be available to any attorney representing the petitioner but shall not be available to the public." (Emphasis supplied.)

Defendant argues that all three cases should have been considered under the provisions of the Nebraska Sexual Sociopath Act even though murder in the second degree does not specifically require commission of a sexual offense. This court is urged to find that section 29-2901(1), R. R. S. 1943, does not require sexual motivation to be the primary motivating factor but only to be a substantial motivating factor. There is no question that the definitions contained within section 29-2901(1), R. R. S. 1943, might have been drafted with greater clarity to advise the court of the offenses intended to be within coverage of the act. However, in view of the record in this

case it is not necessary for us to interpret that section, and we shall not do so. American Fed. of S., C. & M. Emp. v. State, 200 Neb. 171, 263 N. W. 2d 643; Jeffries v. Chicago, B. & Q. R. Co., 88 Neb. 268, 129 N. W. 273; Murray v. Omaha Transfer Co., 95 Neb. 175, 145 N. W. 360.

It is clear that in the Yung and Eby cases a sexual offense had been committed, and the provisions of the Nebraska Sexual Sociopath Act were applicable. § 29-2901, R. R. S. 1943. In the Dangler case, the defendant voluntarily submitted himself to the provisions of the Nebraska Sexual Sociopath Act, and therefore the commission of a sexual offense was not required. § 29-2909, R. R. S. 1943. While it is true that section 29-2909, R. R. S. 1943, provides that such request should be made by petition in the District Court, we shall consider the motion filed by defendant to have met that requirement. The trial court should have considered the defendant's motion in Dangler, as well as ordering him examined in Eby and Yung. However, in view of what we have now said in State v. Shaw, *supra*, and in view of the record in this case, the trial court's failure to order a specific sexual sociopath examination in the Dangler case did not result in any prejudicial error. In effect defendant was examined with regard to all three cases. The medical reports included the events in the Dangler case as well as in Yung and Eby. The trial court, in keeping with the rule announced in State v. Shaw, *supra*, was required to impose sentence on Sell in the Dangler case, as it did. It must now impose sentence on Sell in the Yung and Eby cases as well.

The trial court further determined that Sell was an untreatable sexual sociopath in the Yung and Eby cases, and ordered Sell kept and maintained separately at the Nebraska Penal and Correctional Complex for an indefinite time, pursuant to section 29-2903(3), R. R. S. 1943. The trial court of necessity

must likewise find that Sell is an untreatable sexual sociopath in the Dangler case as well.

Defendant assigns as error the trial court's original finding that Sell was untreatable and subsequent order confining him to the Nebraska Penal and Correctional Complex. Rather, defendant contends the trial court should have found Sell treatable and confined him to the Lincoln Regional Center. This claim is based on defendant's belief that before one may be confined to the Nebraska Penal and Correctional Complex under the provisions of the Nebraska Sexual Sociopath Act, it must be found "beyond a reasonable doubt" that treatment will not provide *any* benefit to the defendant. With that interpretation we do not agree.

There are two separate sections in the Nebraska Sexual Sociopath Act which must be examined in connection with this matter. Section 29-2903(3), R. R. S. 1943, provides in part: "If, after such further hearing at least ten of the twelve jurors find that beyond a reasonable doubt the defendant is a sexual sociopath *and* the court finds from the evidence offered at such hearing that the defendant cannot be benefited by treatment, the court shall commit the defendant for an indefinite period in the Nebraska Penal and Correctional Complex * * *." (Emphasis supplied.)

Two separate duties are imposed by this statute. The first duty requires *the jury* to find that defendant is a sexual sociopath. The second duty requires *the court* to find that defendant cannot benefit from treatment. A reading of section 29-2903(3), R. R. S. 1943, makes clear that the requirement to find "beyond a reasonable doubt" that defendant is a sexual sociopath is only imposed upon the jury. Such requirement is not found in the phrase directing the trial court to determine whether defendant can benefit from treatment.

This difference is further established by exam-

ining section 29-2904, R. R. S. 1943, where again the jury's duty is prescribed. It is therein provided that "The burden of proof shall be on the state to establish *such issue* beyond a reasonable doubt." (Emphasis supplied.) A reading of section 29-2904, R. R. S. 1943, leaves no doubt that "such issue," which must be proved beyond a reasonable doubt, is whether defendant is a sexual sociopath and has nothing to do with the matter of treatability. A further reading of section 29-2903(3), R. R. S. 1943, likewise leads to the conclusion that the phrase "benefited by treatment" must mean a program leading to cure and discharge and not simply one which facilitates the defendant's ability to live with his condition.

A trial court has two choices once it is determined a defendant is a sexual sociopath. If the defendant can benefit by treatment, the court is to commit him to a regional center. § 29-2903(3), R. R. S. 1943. On the other hand, if the defendant cannot benefit by treatment, the trial court is to send the defendant to the Nebraska Penal and Correctional Complex. § 29-2903(3), R. R. S. 1943. If we hold that "benefit by treatment" means permitting the defendant to adjust to his condition so as to live with less pain but not to be cured, then the provisions of section 29-2903 (3), R. R. S. 1943, with regard to whether commitment should be in a regional center or the Nebraska Penal and Correctional Complex, would be meaningless. It seems clear and beyond question that all persons can, to some extent no matter how minor, benefit from treatment. Even persons afflicted with a terminal illness can be made more comfortable by treatment. Were we to hold that evidence of any benefit from treatment would require the placing of an individual in a regional center, there would never be an instance where anyone would be committed to the Nebraska Penal and Correctional Complex. We cannot believe that was the intention of the Legisla-

ture in enacting the Sexual Sociopath Act. We therefore hold in the absence of evidence that defendant can benefit by treatment to the extent of being cured, it must be found that defendant is untreatable and must be committed for an indefinite period in the Nebraska Penal and Correctional Complex. The finding as to whether one can benefit from treatment is a question of fact to be determined by the trial court. We do not disturb such finding on appeal unless it can be said that there was no evidence upon which such conclusion could be based and such declaration was an abuse of discretion. See, Courtnay v. Price, 12 Neb. 188, 10 N. W. 698; Glass v. Harper, 195 Neb. 724, 240 N. W. 2d 48.

We have examined the record in this case and must conclude a finding that defendant cannot benefit from treatment is fully supported by the evidence and was not error. Dr. William Robert Stone, Jr., a clinical psychologist testifying on behalf of the State, indicated he was not aware of any treatment alternatives that would benefit defendant. The most he could say was that defendant could benefit in terms of personal adjustment to the correctional setting by involvement in long-term physiotherapy, having as its objective the development of insight and anxiety reduction. Dr. Leonard Woytassek, a psychiatrist employed by the Lincoln Regional Center, testified in his opinion defendant could not benefit from treatment at the Lincoln Regional Center because there was no way that success of the treatment could be tested. Defendant's own expert, Dr. Ronald Franks, a psychiatrist, testified his proposed program of treatment would not necessarily require defendant's release. His opinion was that defendant could benefit from treatment even though he would not necessarily be cured. In view of what we have said as to the meaning of "cannot be benefited by treatment," the evidence clearly established that defendant could not benefit by treatment. We find the trial

court correct in directing defendant to be confined to the Nebraska Penal and Correctional Complex for an indefinite period.

Defendant finally argues he has a right to treatment for his infirmity which would preclude any incarceration in the Nebraska Penal and Correctional Complex since no treatment is provided there. The record, however, fails to support that contention. We have no evidence before us that defendant will not receive such care and treatment as may be appropriate to him under the circumstances. Quite to the contrary, in State v. Little, 199 Neb. 772, 261 N. W. 2d 847, we emphasized that even individuals confined to the Nebraska Penal and Correctional Complex were entitled to care, saying "The 'care' of such an individual must include, at the very least, some effort to make the possibility of treatment open to him." Moreover, the laws of the State of Nebraska, under which an individual is confined to the Nebraska Penal and Correctional Complex, specifically impose upon the chief executive officer of such facility the duty to provide each inmate appropriate medical care. Such official must further evaluate each person so committed with regard to appropriate treatment for his rehabilitation, including medical and psychological treatment and educational and vocational training. §§ 83-179, 83-178, and 83-181, R. R. S. 1943. In the absence of evidence in the record indicating that the defendant Sell is, in this regard, being abused or is not receiving such treatment as is necessary for his proper care and rehabilitation while confined in the Nebraska Penal and Correctional Complex, we are unable to pass upon that question. For that reason, such error is without merit.

We therefore find that defendant should be returned to the District Court in which he was convicted and that the trial court should sentence Sell in the Eby and Yung cases; after which he shall be re-

turned to the Nebraska Penal and Correctional Complex for an indefinite period, pursuant to the Nebraska Sexual Sociopath Act. In all other respects, we affirm the decisions of the trial court.

AFFIRMED AS MODIFIED.

TERRY G. PARKER, APPELLANT, V. RICHARD ROTH, SHERIFF OF DOUGLAS COUNTY, NEBRASKA, APPELLEE.

278 N. W. 2d 106

Filed April 3, 1979. No. 42561.

1. **Constitutional Law: Criminal Law: Bail.** Neither the Eighth Amendment nor the Fourteenth Amendment to the Constitution of the United States requires that everyone charged with a state offense must be given his liberty on bail pending trial. While it is inherent in our American concept of liberty that a right to bail shall generally exist, this has never been held to mean that a state must make every criminal offense subject to such a right or that the right provided as to offenses made subject to bail must be so administered that every accused will always be able to secure his liberty pending trial.
2. **Constitutional Law: Criminal Law.** One's right to life, liberty, and property and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. Nor can a citizen's constitutional rights be infringed simply because a majority of the people choose that it be.
3. **Constitutional Law: Supreme Court: Statutes.** It is incumbent upon the Supreme Court, when reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality. If possible, a statute should be construed in such a way as to negative any constitutional infirmity. State laws are accorded a presumption of constitutionality.
4. **Constitutional Law.** The traditional standard of review of state law under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States requires only that the state law be shown to bear some rational relationship to legitimate state purposes. It is enough that the state's action be rationally based and free from invidious discrimination.
5. **Constitutional Law: Courts.** There are two recognized tests to review state action as it relates to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. If

the matter involved is a "fundamental right" guaranteed by the Constitution of the United States, the courts will engage in a strict judicial scrutiny of the act in question. If the state action under examination is not such a fundamental right, the court examines the matter in question to determine that there is a rational basis for the classification which does not involve a suspect class.

6. **Constitutional Law: Bail.** The right to bail is not a fundamental right guaranteed under the Constitution of the United States, and does not require a court to engage in a strict judicial scrutiny of a state action denying the right to bail in a particular case.
7. **Constitutional Law.** It is not the province of a court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. If there are to be such fundamental rights, they must be found either explicitly or implicitly guaranteed by the Constitution.
8. **Constitutional Law: Criminal Law: Bail: Sexual Assault.** Article I, section 9, of the Constitution of the State of Nebraska does not prohibit the right to bail to every individual charged with a sexual offense involving penetration by force or against the will of the victim. In order for one so charged to be ineligible for bail, it must appear to the trial court that either the proof of the charge is evident or the presumption is great. In any instance in which the court is not convinced that either the proof is evident or the presumption great, then the court is not prohibited from granting bail to one so charged.
9. **Constitutional Law: Criminal Law: Burden of Proof.** Presumption of innocence is a recognition under American jurisprudence that one charged with the commission of a crime is presumed innocent until proven guilty beyond a reasonable doubt. A defendant may rely upon the presumption and require the state to prove (1) that he committed the act charged; and (2) his legal culpability, if that is also an issue.
10. **Constitutional Law: Criminal Law: Bail.** The question of whether a defendant is released on bail pending trial is of no relevance to the "presumption of innocence." One charged with a crime, whether it is bailable or not, enjoys a presumption of innocence.
11. **Constitutional Law: Criminal Law: Confinement.** Detention is a usual feature of every case of arrest on a criminal charge even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense, nor does it constitute punishment, and therefore is not cruel and unusual punishment in violation of the Constitution of the United States.

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

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

Tim Sindelar of Smith, Sindelar, Smith & Gooch, for amicus curiae, Nebraska Civil Liberties Union.

Paul L. Douglas, Attorney General, Terry R. Schaaf, Paul E. Hofmeister, and Lynne Rae Fritz;

Donald L. Knowles, Douglas County Attorney, and Rockford G. Meyer, for appellee.

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

KRIVOSHA, C. J.

By this appeal appellant, Terry G. Parker, attacks the constitutionality of Article I, section 9, of the Constitution of the State of Nebraska, as the same was amended by vote of the people on November 7, 1978 (1978 bail amendment). Article I, section 9, of the Nebraska Constitution now provides as follows: "All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." The amendment added the phrase "sexual offenses involving penetration by force or against the will of the victim" to an article which otherwise has existed since the Nebraska Constitution was first adopted. For reasons set out herein, we find that the 1978 bail amendment is in all respects valid and we affirm the decision of the District Court for Douglas County, Nebraska, denying bail to appellant.

As the basis for his attack on the constitutionality of Article I, section 9, appellant maintains (1) That the 1978 bail amendment violates the excessive bail prohibition of the Eighth Amendment to the United States Constitution; (2) that the 1978 bail amend-

ment violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; (3) that the 1978 bail amendment violates appellant's presumption of innocence protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution; (4) that the 1978 bail amendment violates appellant's rights to the effective assistance of counsel and to freedom to prepare his defense under the Sixth and Fourteenth Amendments to the United States Constitution; and (5) that the 1978 bail amendment violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution.

For purposes of this appeal the facts have been stipulated by the parties. Therefore, no factual dispute exists. On April 21, 1978, L. B. 553 was enacted by the Nebraska Legislature, proposing, subject to approval by the electorate, that Article I, section 9, of the Constitution of the State of Nebraska be amended to further exclude from bail persons charged with "sexual offenses involving penetration by force or against the will of the victim" where the proof was evident or the presumption great. Prior to that time under Article I, section 9, of our State Constitution only treason and murder were nonbailable offenses where the proof was evident or the presumption great. On November 7, 1978, the people of the State of Nebraska duly enacted the proposed amendment by a vote of 355,949 in favor and 79,179 opposed.

Appellant in this case was charged with having subjected another person to sexual penetration by force, threat of force, or implied coercion or deception on January 10, 1979. Appellant, after entering a plea of not guilty, sought release on bail. The municipal court for the City of Omaha, Nebraska, denied the request on the basis that Article I, section 9, of the Constitution of Nebraska did not permit bail in a case of this nature.

Appellant then filed a petition for writ of Habeas

Corpus, in the District Court for Douglas County, Nebraska, alleging that he was being unlawfully imprisoned and deprived of his liberty by virtue of the court's refusal to set bail. Following hearing, the District Court for Douglas County, Nebraska, concluded that Article I, section 9, of the Constitution of Nebraska was valid and denied bail to the appellant. From that order denying bail appellant has appealed to this court. Without admitting his guilt, appellant has stipulated for purposes of this appeal that the proof was evident or the presumption was great that appellant committed a sexual offense involving penetration by force or against the will of the victim.

The Supreme Court of the United States has never expressly held the Eighth Amendment to the Constitution of the United States binding on the states through the Fourteenth Amendment. However, in State v. Pilgrim, 182 Neb. 594, 156 N. W. 2d 171, we have held the federal prohibition against excessive bail applicable to the states. See Mastrian v. Hedman, 326 F. 2d 708 (8th Cir., 1964). We examine this appeal as if the Eighth Amendment did apply to the states.

We turn first to appellant's contention that Article I, section 9, of the Constitution of Nebraska violates the Eighth Amendment to the United States Constitution. Neither a reading of the provisions of the Eighth Amendment nor an examination of the history of bail, either in this country or in Europe, leads to the conclusion urged by appellant.

The Eighth Amendment to the United States Constitution provides as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Nothing contained in that single sentence can sustain an argument that bail is required in every case.

Appellant has directed our attention to an extensive, two-part law review article on the subject by Professor Caleb Foote, entitled "The Coming Consti-

tutional Crisis in Bail: I and II," 113 U. Pa. L. Rev. 959 and 1125 (1965). Professor Foote therein maintains that early English bail history and early American bail history lead to the inescapable conclusion that the language of the Eighth Amendment requires the granting of bail in every case. After careful review of the arguments contained in Professor Foote's law review article and reviewing the history of the Eighth Amendment, we are of the opinion that such a conclusion cannot be reached.

Certainly the plain meaning of the words of the Eighth Amendment does not support the position that bail is required in all cases. Even appellant acknowledges this. In his brief appellant argues: "With the exception of capital offenses, and possibly noncapital murder and treason, wholesale legislative denial of bail to an entire class of criminal defendants charged with any given lesser offense is constitutionally impermissible." Appellant acknowledges that capital offenses and noncapital murder may be made nonbailable. Yet we find nothing in the Eighth Amendment which would exclude capital offenses and noncapital murder. Either the Eighth Amendment by its language requires bail in all cases or the Eighth Amendment by its language does not require bail in any case. The plain words of the Eighth Amendment merely stand for the proposition that if the legislative body has provided that certain offenses be bailable, the court may not in effect deny defendant's freedom through imposing an excessive amount of bail. That is not to say that the denial of bail in all instances may not be a violation of some other provision of either the federal Constitution or our state Constitution. It is simply to say that the Eighth Amendment to the federal Constitution does not stand for the proposition that one has a constitutional right to bail.

If one examines the history of bail in Europe as well as in this country at the time of the adoption of

the Constitution of the United States and the amendments thereto, one is further convinced that the Eighth Amendment was not intended to guarantee bail in all cases. For an extensive and detailed analysis of the history of bail, see a two-part article by Meyer, "Constitutionality of Pretrial Detention," 60 Geo. L. J. 1139 and 1382; and Duker, "The Right to Bail: a Historical Inquiry," 42 Alb. L. Rev. 33 (1977).

In summary, an examination of the early history of bail, particularly in England, discloses that there was no right to bail, such concept not being a part of the English legal system. The history of the English Star Chamber where prisoners were held indefinitely and tried in secret is well known to any student of the law. In 1641, the Long Parliament, which initiated the Cromwell Revolution, passed an act to abolish the Court of the Star Chamber. 16 Car. 1,c.10(1640). The act further provided that if a person was imprisoned by any court exercising jurisdiction similar to the Star Chamber, such person could file a motion with the judges of the Court of King's Bench or Common Pleas for a writ of Habeas Corpus upon payment of ordinary fees. The prisoner was then brought before the court which by law was required to examine the facts and do justice "either by delivering, bailing or remanding the prisoner." The act did not, however, grant an absolute right to bail.

In an effort to avoid the provisions of this act, the Stuarts found indirect ways to imprison persons found politically objectionable for considerable periods of time by taking advantage of defects in the Act. To remedy these defects, the Habeas Corpus Act of 1679 was enacted. 31 Car. 2, c. 2 (1679). A reading of the Habeas Corpus Act of 1679 discloses, however, that it did not grant a right to bail in every case. It merely enabled a prisoner, before conviction, except one committed for treason *or felony*, to secure an early appearance before the chancellor or a judge and a discharge upon bail if the return

showed that by law the offense was bailable. In an effort to get around the Habeas Corpus Act, judges simply imposed excessive bail, thereby again preventing the release of persons charged with bailable crimes. By imposing excessive bail, judges made the Habeas Corpus Act inoperative with respect to those prisoners whom the King did not want released. It was this abuse of the Habeas Corpus Act that caused the Bill of Rights of 1689 to be enacted. Said Bill of Rights of 1689 provided "that excessive bail ought not to be required * * *." 1 W. & M., § 2, c. 2 (1689).

The framers of the Constitution were well aware of the problems of bail in England, and could quite easily have provided that bail should be permitted for all offenses had they so intended. They were not, however, attempting to provide a new right in the new country, but instead were transferring an accepted, recognized principle that if an offense was bailable, the individual's right to freedom could not be defeated by requiring bail in excessive amounts.

This is further established by examining the history of bail as it existed in the colonies at the time the Constitution was being drafted. Some colonies enacted laws providing for bail early in their history. Massachusetts did so in 1641, Pennsylvania in 1682, and New York in 1683. 60 Geo. L. J. 1140 at p. 1191. The framers of the Constitution and the members of the first Congress knew exactly how to provide for bail in such cases as determined by the legislative body. Yet with that knowledge they made no such provision in either the Constitution or the amendments. History discloses that there was no constitutional right to bail in England, nor was there any constitutional right to bail in the colonies, nor had there ever been such an absolute guaranteed right known in any Anglo-American jurisprudence prior to the adoption of the Bill of Rights.

When Congress met to adopt the Bill of Rights in

June of 1789, an amendment was suggested which read: "Excessive bail shall not be required * * *." It would have taken little imagination or draftsmanship to simply provide, as had earlier been provided in certain of the colonies, that "bail shall be allowable in all cases except * * *." Having failed to do so, it must be concluded that they did not intend to grant bail in every case through the provisions of the Eighth Amendment.

In any event, the history of bail does not disclose how or in what manner the exceptions, for murder or treason, found in most state constitutions can be read into the Eighth Amendment. Once a recognition that legislative bodies had the right to exclude murder, treason, or capital offenses from bail is made, one is left with the inescapable conclusion that the Eighth Amendment simply prohibited excessive bail *where* allowed and did not guarantee the right to bail in every instance.

What was a capital offense at the time this country was founded is far different from that which is so included today. As an example, the capital laws of colonial Massachusetts included idolatry, witchcraft, blasphemy, willful murder, slaying in anger or cruelty of passion, poisoning, beastiality, sodomy, adultery, man stealing, false witness, conspiring or attempting invasion, insurrection, or public rebellion against the Commonwealth, or treacherously attempting the alteration or subversion of the frame of government, a child over 16 years old cursing or smiting his parent, a son over 16 rebelling against his parents, or rape. See Laws and Liberties Concerning the Inhabitants of Massachusetts, 5 M. Farrand, (1648). There is nothing in the history of our laws, including the ordinance to govern the Northwest Territory (an Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, July 13, 1787, art. ii), which would support the claim that bail had historically and tradi-

tionally been a guaranteed constitutional right or was intended to be such a right under the Eighth Amendment to the Constitution of the United States.

Though this country is now more than 200 years old, there appears to have been no case directly decided by the United States Supreme Court on this issue. In 1951 the United States Supreme Court decided two cases, Stack v. Boyle, 342 U. S. 1, 72 S. Ct. 1, 96 L. Ed. 3; and Carlson v. Landon, 342 U. S. 524, 72 S. Ct. 525, 96 L. Ed. 547. Appellant argues that Stack v. Boyle, *supra*, established the principle that bail is a constitutionally guaranteed right. While it is true that one may find comfort in language contained in the Stack decision, *supra*, a careful reading of the decision discloses that, at best, the declaration is obiter dictum and unsupported by the law. Stack did not involve the denial of bail. It involved the question of excessive bail; therefore, any language in the opinion announcing a "traditional right to freedom before conviction" is without legal support and was not at issue in the case. The opinion specifically recognizes that the right to bail is as provided by law and not by any inherent constitutional right. Mr. Chief Justice Vinson, therein, said: "From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46 (a) (1), *federal law* has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail." (Emphasis supplied.) It must therefore be kept in mind that the Chief Justice recognized the right to bail had its inception in the Judiciary Act of 1789, and not in either the Constitution of the United States or the amendments thereto. For that reason we do not believe that Stack v. Boyle, *supra*, is authority for the proposition that a constitutional right to bail exists.

Carlson v. Landon, *supra*, on the other hand, did involve the denial to bail. In an opinion by Mr. Justice Reed in which Mr. Chief Justice Vinson joined,

the court addressed the Eighth Amendment argument saying "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases." In Mastrian v. Hedman, *supra*, cert. denied, 376 U. S. 965, 84 S. Ct. 1128, 11 L. Ed. 2d 982, the question of a constitutional right to bail was addressed. "Neither the Eighth Amendment nor the Fourteenth Amendment requires that everyone charged with a state offense must be given his liberty on bail pending trial. While it is inherent in our American concept of liberty that a right to bail shall generally exist, this has never been held to mean that a state must make every criminal offense subject to such a right or that the right provided as to offenses made subject to bail must be so administered that every accused will always be able to secure his liberty pending trial. Traditionally and acceptably, there are offenses of a nature as to which a state properly may refuse to make provisions for a right to bail." See, also, Turco v. State of Maryland, 324 F. Supp. 61 (D. Md., 1971). In view of these authorities, we must reject appellant's contention that the 1978 bail amendment violates the excessive bail prohibition of the Eighth Amendment.

We turn then to appellant's second contention that

the 1978 bail amendment is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It should be kept in mind that we are here examining the constitutionality of a provision of the Nebraska Constitution approved by an overwhelming vote of the people. We recognize that " 'one's right to life, liberty, and property * * * and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.' " Nor can a citizen's constitutional rights be infringed simply because a majority of the people choose that it be. Lucas v. Colorado General Assembly, 377 U. S. 713, 84 S. Ct. 1472, 12 L. Ed. 2d 632. Yet we have said that it is incumbent on this court, when reasonably possible and consistent with constitutional rights, to resolve all doubts as to a statute in favor of its constitutional validity. If possible, a statute should be construed in such a way as to negative any constitutional infirmity. Prendergast v. Nelson, 199 Neb. 97, 256 N. W. 2d 657. If such rule properly applies to a statute adopted by the Legislature, all the more should it apply to an amendment to the Constitution approved by an overwhelming majority of the people.

Over the years the United States Supreme Court has developed specific rules for determining whether state laws deny any citizen the equal protection of the law guaranteed by the federal Constitution. Under the traditional standard of judicial review of state action, a state's laws are accorded a presumption of constitutionality. Only where the state action impinges upon the exercise of fundamental constitutional rights or liberties must the state be found to have chosen the least restrictive alternative in so acting. The traditional standard of review of a state law under the Equal Protection Clause of the Fourteenth Amendment requires only that the state law be shown to bear some rational relationship to legitimate state purposes. See San Antonio School

District v. Rodriguez, 411 U. S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16.

The decisions of the United States Supreme Court reviewing state action as it related to the Equal Protection Clause of the United States Constitution discloses that there are basically two tests. If the matter involved is a "fundamental right" guaranteed by the Constitution of the United States, then the court will engage in a strict judicial scrutiny of the act in question. Massachusetts Board of Retirement v. Murgia, 427 U. S. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520. On the other hand, if the state action under examination is not a "fundamental right" guaranteed by the Constitution of the United States, the court merely examines the matter in question to determine whether there is a rational basis for the classification which does not involve either a "fundamental constitutionally guaranteed right" or involve a "suspect class." See Shapiro v. Thompson, 394 U. S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600; Griswold v. Connecticut, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510; Baker v. Carr, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663; Terminiello v. Chicago, 337 U. S. 1, 69 S. Ct. 894, 93 L. Ed. 1131; Prince v. Massachusetts, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645; Nyquist v. Mauclet, 432 U. S. 1, 97 S. Ct. 2120, 53 L. Ed. 2d 63; Graham v. Richardson, 403 U. S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534; Loving v. Virginia, 388 U. S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010; Bolling v. Sharpe, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884. See, also, Voichahoske v. City of Grand Island, 194 Neb. 175, 231 N. W. 2d 124.

In view of what we have said about the history of bail under the Eighth Amendment to the Constitution of the United States, we must conclude that the right to bail is not a fundamental right guaranteed under the Constitution. That is not to say that under every circumstance a denial of bail will have a rational basis and therefore not be violative of the

right to equal protection of the law. In this case, however, we are unable to conclude that the right to bail is a constitutionally guaranteed fundamental right requiring strict scrutiny on review or that there is no rational basis for the action taken.

The United States Supreme Court has held that it is not the province of that court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. If there is to be such a fundamental right, it must be found to be either explicitly or implicitly guaranteed by the Constitution. San Antonio School District v. Rodriguez, *supra*. We find nowhere in the Constitution that a right to bail is guaranteed. The strict scrutiny test is thus inapplicable to the present case.

If, under the circumstances, the strict scrutiny rule is not applicable, state legislatures will be presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See McGowan v. Maryland, 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393.

The fact that the bail amendment may affect a particular class of person charged with a crime differently than it affects other persons charged with other crimes does not of itself violate the guarantee to equal protection of the laws.

"The standards under which this proposition [the Equal Protection Clause] is to be evaluated have been set forth many times by this [the United States Supreme] Court. Although no precise formula has been developed, the court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the

achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, *supra*; Kotch v. Riverport Pilot Comrs., 330 U. S. 552, 67 S. Ct. 910, 91 L. Ed. 1093; Metropolitan Co. v. Brownell, 294 U. S. 580, 55 S. Ct. 538, 79 L. Ed. 1070; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 31 S. Ct. 337, 55 L. Ed. 369. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. Tigner v. Texas, 310 U. S. 141, 60 S. Ct. 879, 84 L. Ed. 1124. Evils in the same field may be of different dimensions and proportions requiring different remedies or so the Legislature may think. McGowan v. Maryland, *supra*. "[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. * * * The legislature may select one phase of one field and apply a remedy there, neglecting the others." Williamson v. Lee Optical of Okla., Inc., 348 U. S. 483, 75 S. Ct. 461, 99 L. Ed. 563. "No finicky or exact conformity to abstract correlation is required of legislation. The Constitution is satisfied if a legislature responds to the practical living facts with which it deals. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial reexamination. It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded." McGowan v. Maryland, *supra*.

"Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the Equal Protection Clause, rather, is simply to measure the validity of *classifications* cre-

ated by state laws. There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes. And with respect to such legislation, it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory—only by classifications that are wholly arbitrary or capricious." See concurring opinion of Mr. Justice Stewart, San Antonio School District v. Rodriguez, *supra*.

We have likewise recognized that distinctions and classifications may be appropriate. Such distinctions do not, of themselves, result in a denial of equal protection. The appropriate examination when a state statute operates to single out a class of people for special treatment is whether the classification bears some rational relationship to the legitimate purposes of the legislation. Botsch v. Reisdorff, 193 Neb. 165, 226 N. W. 2d 121. A class need not be all inclusive. The Legislature is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. The classification may be, to some extent, arbitrary in its nature, but it is difficult to draw the line. The court does not sit to review the wisdom of legislative acts. Bridgeford v. U-Haul Co., 195 Neb. 308, 238 N. W. 2d 443. The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the state's action be rationally based and free from invidious discrimination. Botsch v. Reisdorff, *supra*; Prendergast v. Nelson, 199 Neb. 97, 256 N. W. 2d 657. Equal protection does not require that all persons be dealt with identically, but it does require that the distinction may have some relevance to the purpose for which the classification is made. State

v. Little, 199 Neb. 772, 261 N. W. 2d 847.

With these various principles in mind we examine the provisions of Article I, section 9, of the Nebraska Constitution as amended to determine if a rationale existed for the Legislature's action as ratified by the people.

It should be clearly recognized that the 1978 bail amendment does not prohibit bail in every case where an individual is charged with a sexual offense involving penetration by force or against the will of the victim. In order for one so charged to be ineligible for bail, it must appear to the trial court that either the proof of the charge is evident or the presumption great. In any instance in which the court is not convinced that either the proof is evident or the presumption great, then the court is not prohibited from granting bail. A claim that the mere filing of a charge denies the individual his right of liberty is not supported by a reading of the 1978 bail amendment. It is clear that bail can only be denied if the proof is evident or the presumption great. A frivolous charge will not result in an individual being incarcerated so long as he demands a bail hearing.

We are therefore left with the question of whether the Legislature in the first instance, and the people thereafter, acted rationally and reasonably in concluding that, where the proof was evident or the presumption great that an individual had committed a sexual offense involving penetration by force or against the will of the individual, such person should not be free on bail pending trial.

Certainly the record before us would not in any manner disclose that the classification was unreasonable. Forcible rape has been recognized as a heinous crime committed not by one seeking sexual gratification but rather by one disposed to violence and seeking to inflict harm and violence upon the victim. See Groth, et al. "Rape: Power, Anger,

and Sexuality," 134 Am. J., Psychiatry, p. 1239; Gebhard, "Sex Offenders," Harper and Rowe (1965). The victim of a violent forceful rape is not easily rehabilitated. Rape victims are often emotionally scarred for long periods of time, if not for life. Rape is one of the ugliest of crimes. Its very nature is humiliating to the victim and it is frequently accompanied by violence, forced sodomy, and similar acts that additionally traumatize and humiliate. The victimization of the woman does not necessarily cease with the termination of the attack itself. Pregnancy, venereal disease, hospitalization, loss of employment, imputations of wantonness and even ostracism by family or neighbors may follow. See "Rape and its Victims, a Report for Citizens, Health Facilities and Criminal Justice Agencies," National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U. S. Department of Justice (1975). Rape is a violent crime because it normally involves force, or the threat of force, or intimidation to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. See, Note, The Victim in a Forcible Rape Case: A Feminist's View, 11 Am. Crim. L. Rev. 335; Comment, Rape and Rape Laws: Sexism in Society and Law, 61 Cal. L. Rev. 919. The nature of the injury, both physically and emotionally, often committed on a rape victim is of concern to the state. Rape victims often are unable to return to the mainstream of life and more often than not require extensive therapy and counseling. The state does have a legitimate concern in this area. Nor can we say either under the record as we have it or by common knowledge, that the Legislature was wrong in believing that violent rapists repeat their crimes, motivated by emotional forces over which they have no control. See State v. Sell, *ante* p. 840,

277 N. W. 2d 256. In our view, it is not without rational basis for the Legislature and the people to want to protect society by removing therefrom persons accused of violent rape where the proof is evident or the presumption is great. On balance, such a decision does not appear unreasonable. We cannot say that the Legislature in the first instance and the people thereafter were without any rational basis in suggesting that a person who has committed a violent, psychologically motivated crime is not as likely to commit a similar crime while free on bail.

We totally reject the notion that rape is not a serious crime. Next to murder there is none which ranks higher; and for reasons which we have already noted, perhaps in some cases, death itself would be easier for the victim to handle than continued life. Appellant argues that denial of bail may be acceptable in a noncapital murder, but not in rape. Appellant's basis for that position is that there are crimes which are punishable by far more severe penalties than rape, but are yet crimes which are bailable. We do not accept that argument. The minimum penalty is not the issue in a determination that violent rape, where the proof is evident or the presumption is great, should not be bailable. The real possibility of repeated acts and further victims pending trial is the issue. Society deserves more. In noncapital murder the penalty may be a statutory sentence of as little as 10 years and actual incarceration for something less. § 28-402, R. R. S. 1943. Would anyone suggest that the denial of bail where one is merely charged with murder, including murder in the second degree, would be a violation of the Equal Protection Clause? We think not, and likewise we think it cannot be said that there is no rational basis for the denial of bail in a forcible rape case where the proof is evident or the presumption great. We therefore hold that Article I, section 9, of the Nebraska Constitution as amended does not vio-

late the Equal Protection Clause of the Constitution of the United States.

Appellant further maintains that the 1978 bail amendment violates appellant's presumption of innocence protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. With that position we do not agree. Presumption of innocence has nothing to do with confinement or release prior to trial. Presumption of innocence is only a recognition that, under our American jurisprudence, one charged with a criminal offense is presumed innocent until proven guilty beyond a reasonable doubt. State v. Fisher, 190 Neb. 742, 212 N. W. 2d 568. Where a plea of not guilty is interposed by defendant in a criminal trial, he is clothed with the presumption of innocence which stands as evidence in his favor. Such presumption remains until the state, by the evidence it presents, shows defendant to be guilty beyond a reasonable doubt. The burden of furnishing such proof is with the prosecution throughout the trial and never shifts. State v. Hizel, 179 Neb. 661, 139 N. W. 2d 832; Bourne v. State, 116 Neb. 141, 216 N. W. 173. It is the constitutional right of a defendant to rely upon this presumption of innocence and to require the state to prove (1) that he committed the act charged; and (2) his legal culpability, if that is also an issue. State v. Simants, 194 Neb. 783, 236 N. W. 2d 794.

Whether the defendant is released on bail pending trial has no relationship to the presumption of innocence he is clothed in. One charged with murder, a nonbailable offense, enjoys the presumption of innocence. Likewise, one eligible for bail who cannot make bail, enjoys the presumption of innocence. We are unable to see how one confined to jail loses a presumption of innocence because of his incarceration. We therefore reject appellant's claim that the 1978 bail amendment violates appellant's presumption of innocence.

Appellant further argues that the 1978 bail amendment violates his rights to the effective assistance of counsel and to freedom to prepare his defense under the Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment does not in any manner guarantee to the accused the unlimited right to prepare his own defense, including the right to come and go as he pleases. As we have pointed out in this opinion, in the most serious of crimes, murder, the defendant is not granted the right to bail. If indeed it is a constitutional right as suggested by appellant, would it not all the more be required in the case of one charged with murder and subject to possible execution upon conviction? Clearly this would follow, yet no such requirement exists. The same may be said of those individuals charged with lesser crimes who are unable to make bail. In the absence of such requirements, we must find that appellant's claim with regard to the denial of effective assistance of counsel is without support.

Finally, appellant maintains that the 1978 bail amendment constitutes cruel and unusual punishment. It was early recognized that detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense. Wong Wing v. United States, 163 U. S. 228, 16 S. Ct. 977, 41 L. Ed. 140. Confinement, where the proof is evident or the presumption great that the individual has committed a sexual offense involving penetration by force or against the will of the victim, is not cruel and unusual punishment because at that point under our system of jurisprudence it is not punishment. It cannot constitute punishment unless and until defendant, having been found guilty, is sentenced. See McGinnis v. Royster, 410 U. S. 263, 93 S. Ct. 1055, 35 L. Ed. 2d 282. Likewise, not every restraint of movement or liberty constitutes punishment. See, also, Nebraska sexual sociopath laws, §§

29-2901 et seq.; 83-306, R. R. S. 1943; State v. Little, *supra*.

We have carefully and thoughtfully examined the 1978 bail amendment to the Nebraska Constitution in light of the attack raised by the appellant. We believe that there does in fact exist a reasonable and rational basis for the action by the Legislature and by the people of the State of Nebraska. While there may be disagreement among groups as to this question and there may be those who would take issue with the solution proposed or the scope of its effect, it cannot be said that no rational basis exists. In view of what we have here said, in light of the legal principles under which this matter must be decided, we find that the 1978 bail amendment to the Nebraska Constitution, Article I, section 9, is in all respects valid and proper. It therefore meets all the constitutional tests under both the Constitution of the State of Nebraska and the Constitution of the United States. Based upon the stipulation entered into in this case, appellant was not eligible for bail and the judgment of the trial court was correct. Judgment is affirmed.

AFFIRMED.

MCCOWN, J., concurring in result.

The majority opinion asserts that a "right to bail" does not involve a "fundamental right" guaranteed by the Constitution of the United States. It is clear that a denial of any "right to bail," of necessity, involves a loss of liberty and that the constitutional guaranty that no person shall be deprived of liberty without due process of law is a "fundamental right." The United States Supreme Court said: "From the passage of the Judiciary Act of 1789 * * * to the present Federal Rules of Criminal Procedure * * * federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional *right to freedom* before conviction permits the unhampered preparation of a de-

fense, and serves to prevent the infliction of punishment prior to conviction." (Emphasis supplied.) Stack v. Boyle, 342 U. S. 1, 72 S. Ct. 1, 96 L. Ed. 3. The right to bail is a "fundamental right" of every person, and any constitutional or legislative enactment dealing with it must be strictly construed.

Article I, section 9, of the Nebraska Constitution, since the inception of the state, has always granted every person a right to bail and for all offenses with specified exceptions. The Constitution, even as amended, does not prohibit granting bail in *all* cases of treason, murder, and the specified sexual offenses. It does not authorize the denial of bail in *all* cases of treason, murder, and the specified sexual offenses. The Constitution authorizes denial of bail in such cases *only* where the proof is evident or the presumption great. The judge having jurisdiction to grant or deny a request for bail must make that determination and he cannot make such a determination simply because a charge has been filed. Any attempted restriction on such a constitutional right must necessarily be strictly construed. The critical facts were stipulated here.

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Abatement.

A purchaser, in an action for partial specific performance of a land contract, is entitled to an abatement of the purchase price with respect to seller's deficiency of title, even though purchaser, at the time of contracting, knew of such deficiency, when (1) seller contracted to sell the entire interest in the land, and (2) purchaser had reasonable grounds to believe seller could fulfill the contract. Egle v. Kitt 735

Administrative Law.

1. The Real Estate Commission of the State of Nebraska, in imposing penalties for violation of state law, may consider the relative culpability of parties to the same transaction. Grubaugh v. State ex rel. State Real Estate Commission 75
2. There was no violation of the Nebraska open meeting law, sections 84-1408 to 84-1414, R. R. S. 1943, where at a recess taken during a lawful public meeting called by the board of county commissioners of Lancaster County, certain of the commissioners and others present, retired to an adjoining room, the door to which was open at all times, with no one being excluded, and an informal conversation was had by the commissioners and others with reference to an item of business on the agenda of the meeting, but where no formal action or vote was taken thereon until the board of commissioners reconvened in regular session following the recess. Copple v. City of Lincoln 152
3. In a proceeding to review an order of the State Real Estate Commission the questions to be determined are whether the order of the commission was supported by substantial evidence, whether the commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. Johnson & Hartman v. State ex rel. State Real Estate Commission 182
4. In an appeal to this court from an order of the Nebraska Motor Vehicle Industry Licensing Board denying an application to terminate a dealers franchise agreement, under the provisions of section 84-918, R. R. S. 1943, we determine only whether the District Court and the board applied the proper criteria and if there was substantial evidence to support the findings and orders of the board. Chrysler Motors Corp. v. Nebraska Mo-

tor Vehicle Industry Licensing Bd. 230
5. Section 60-1429, R. R. S. 1943, provides that good cause to terminate a motor vehicle dealer franchise cannot be established on the sole fact that the franchisor desires further penetration of the market. Chrysler Motors Corp. v. Nebraska Motor Vehicle Industry Licensing Bd. 230
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9. The Public Service Commission may reconsider an order on its own motion during the 30 days after the mailing of a copy of the order and before an appeal to the Supreme Court has been taken. Upon the expiration of 30 days from the mailing of a copy of the order, or upon an appeal being perfected to the Supreme Court, the power of the Public Service Commission to reconsider its order upon its own motion, or upon the motion of an interested party who should otherwise have perfected an appeal, terminates and such order becomes final and binding. Nebraska P. P. Dist. v. Huebner 587
10. Minimum visual acuity standards promulgated by the Personnel Department of the City of Omaha with the concurrence of the Fire Division for the employment of firefighters are held to be reasonable, and not arbitrary or capricious; and to bear a reasonable relationship to fitness of applicants and their capacity to discharge the duties of a city firefighter. Such standards are directly related to the health and safety of both the firemen and the public; and constitute a proper exercise of the police power of the state, and are not unconstitutional. McCrea v. Cunningham 638
11. Generally, a county board acts quasi-judicially in determining whether claims filed against the county should be allowed. State ex rel. Newbold v. County of Buffalo 813

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2. The retention of benefits secured by an unauthorized act of an agent with knowledge of the source of such benefits and the means by which they were obtained is a ratification of the act of the agent. D & J Hatchery, Inc. v. Feeders Elevator, Inc. 69

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Section 3-136, R. R. S. 1943, specifically exempts restricted landing areas designed for personal use from licensing requirements, and therefore the Department of Aeronautics is without authority to issue licenses for such restricted landing areas designed for personal use. Nebraska P. P. Dist. v. Huebner 587

Alimony.

1. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Erickson v. Erickson 345
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3. When dissolution of a marriage is decreed, the court may order the payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment. Berry v. Berry 540
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5. In determining the question of alimony and division of property, the court shall have 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. Campbell v. Campbell 575

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3. In actions based upon statutory liability for injury by a dog, the injured person will be barred from recovering if he intentionally provoked the dog, and thereby caused it to attack him. Paulsen v. Courtney 791
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10. 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. Brady 221
11. In an appeal to this court from an order of the Nebraska Motor Vehicle Industry Licensing Board denying an application to terminate a dealers franchise agreement, under the provisions of section 84-918, R. R. S. 1943, we determine only whether the District Court and the board applied the proper criteria and if there was substantial evidence to support the findings and orders of the board. Chrysler Motors Corp. v. Nebraska Motor Vehicle Industry Licensing Bd. 230
12. The determination of the trial court with respect to awarding or changing the custody and support of minor children is subject to review but will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. McCurry v. McCurry 235
13. A division of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion will not be disturbed on appeal. McCurry v.

McCurry 235
14. This court will give weight to the fact that the trial court saw and observed the witnesses and evaluated the parents as custodians. Its findings will not be reversed on appeal unless shown to be clearly against the weight of the evidence or the result of an abuse of discretion. Fleharty v. Fleharty 245
15. A sentence imposed within statutory limits will not be disturbed upon appeal unless there appears to be an abuse of discretion. State v. Welsh 249
16. The Department of Labor Appeal Tribunal exercises quasi-judicial power as distinguished from legislative power. Consequently, the statutory provision for a trial de novo is valid. Neaman v. Northwestern Bell Telephone Co. 255
17. The action of the trial court, in either requesting an expert witness to disclose the underlying data or information upon which his opinion is based or refusing such a request, will not be disturbed on appeal in the absence of a showing that the trial court abused its discretion. Northern Nat. Gas Co. v. Beech Aircraft Corp. 300
18. There is no right to appeal to this court from a decision binding the defendant over for trial after a preliminary hearing. State v. Price 308
19. In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. In determining these circumstances, the financial position of the husband as well as the estimated costs of support of the children must be taken into account. A decision on this matter rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion. Erickson v. Erickson 345
20. A division of property which is not patently unfair will not ordinarily be disturbed by this court on appeal. Erickson v. Erickson 345
21. Where the record clearly shows an oral request for a jury instruction, and full understanding of the requested instruction by the trial court, review of the court's ruling on the instruction will not be precluded by failure to reduce the request to writing. § 25-1111, R. R. S. 1943. State v. Hegwood 379
22. Where a plea of guilty is made pursuant to a plea bargain and the sentence is in complete conformity with the plea agreement, it is not reversible error for the attorney to fail to advise the defendant of appeal possibilities. State v. Hoppes 383

23. The Supreme Court may, at its option, consider plain error not specified in appellant's brief. Weiss v. Union Ins. Co. 469
24. Quo warranto is an action in equity and is triable de novo in this court on appeal. State v. Jones 488
25. Evidence which does not appear in the record cannot be considered by the Supreme Court on appeal. Moninger v. Moninger 494
26. An appeal to this court in an equity action is reviewed de novo. Theobald v. Agee 524
27. 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. Becker v. Natl. American Ins. Co. 545
28. In an appeal of an action for the dissolution of marriage, the Supreme Court is required to try a case de novo and reach independent conclusions on the issues presented by the appeal, without reference to conclusion or judgment reached in the District Court. Campbell v. Campbell 575
29. The Public Service Commission may reconsider an order on its own motion during the 30 days after the mailing of a copy of the order and before an appeal to the Supreme Court has been taken. Upon the expiration of 30 days from the mailing of a copy of the order, or upon an appeal being perfected to the Supreme Court, the power of the Public Service Commission to reconsider its order upon its own motion, or upon the motion of an interested party who should otherwise have perfected an appeal, terminates and such order becomes final and binding. Nebraska P. P. Dist. v. Huebner 587
30. In determining the sufficiency of evidence to sustain a conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Pankey 595
31. It is prejudicial error for the trial court to include in its instructions to the jury allegations of fact found in the pleadings which have not been supported by the evidence. Milliron Ranch Corp. v. Brinkman 703
32. 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. The judgment of the trial court will be

upheld on appeal unless there is an abuse of discretion. State v. Chant 750
33. Valuation of property is a matter of judgment, and a contract based upon inadequate consideration will not be set aside on that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself evidence of fraud. West Gate Bank v. Eberhardt 762
34. Before a criminal matter may be appealed to the Supreme Court, it must be a final judgment, and no judgment will be regarded as final unless the sentence is pronounced. State v. Shaw 766
35. For consideration on appeal under our statute, section 25-21,115, R. R. S. 1943, governing pleadings in quiet title actions, it is not necessary to specify the nature of adverse claims but only that the defendants claim or appear to have some interest in the real estate and that the evidence reflect the question was considered by the trial court. Krause v. Crossley 806
36. The Supreme Court, on appeal, will not interpret the meaning of a statutory provision if such interpretation is not necessary for the disposition of the case. State v. Sell 840

Assignments.

1. An assignee of a contract generally acquires no greater right than that possessed by the assignor. Griffeth v. Sawyer Clothing, Inc. 631
2. Assignments of contracts containing clauses restricting competition will be strictly construed and the assignment limited to the intent of the parties as disclosed by the terms of the instrument if they are complete and unambiguous. Where the language in the contract regarding assignment is susceptible of more than one construction, or is vague or ambiguous, extrinsic evidence may be received for the purpose of determining the intent of the parties. Griffeth v. Sawyer Clothing, Inc. 631

Athletic Code of Conduct.

1. A student has a significant interest in participation in interscholastic athletics which may be the subject of Fourteenth Amendment protections. French v. Cornwell 569
2. As a general rule a school official, in exercising the power of suspending a student, is liable for a compensating award only if the official acted with such an impermissible motivation or with such disregard of the

student's clearly established constitutional rights that the action could not be reasonably characterized as being in good faith. French v. Cornwell 569

Attorney and Client.

1. The present test of the effective assistance of counsel is that counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client. State v. Lang 9
2. Prejudice is an essential element of a claim of ineffective assistance of counsel and a defendant must show that he was prejudiced in the defense of the case by the actions or inactions of his counsel. State v. Lang 9
3. It is the duty of a defense attorney in a criminal case to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. Ordinarily, a reasonably competent attorney will conduct an in-depth investigation of the case, which includes an independent interviewing of the witnesses. State v. Lang 9
4. Where defendant's trial counsel performs at least as well as a lawyer with ordinary training and skill in the criminal law and conscientiously protects his client's interest, he has met the criteria of effective trial counsel. State v. Hoppes 383
5. A communication between a lawyer and a client is not privileged under the provisions of section 27-503, R. R. S. 1943, if the services of the lawyer are sought or obtained to enable or aid anyone to commit or plan to commit what the client knew, or reasonably should have known, to be a fraud. Doyle v. Union Ins. Co. 599

Attorneys at Law.

1. In disciplinary proceedings of members of the bar, the relator must establish the allegations in the formal charges by a preponderance of the evidence, so that the court is satisfied to a reasonable certainty that the charges are true. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
2. In disciplinary proceedings of members of the bar the findings must be sustained by a higher degree of proof than that required in civil actions yet falling short of the proof required to sustain a conviction in a criminal action. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
3. In a proceeding for the disbarment of an attorney at

law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
4. An attorney should not only avoid impropriety but should avoid the appearance of impropriety. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
5. DR7-104 (A) (1) provides that during the course of his representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
6. Ignorance of the law is no excuse. It applies with even greater emphasis to an attorney at law who is expected to be learned in the law. It should be particularly applicable to a city attorney who should make himself conversant with the duties of his office. A city attorney should also be aware of disciplinary rules and advisory opinions, particularly those applicable to his duties as a public officer such as a county or city attorney. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
7. The evidence adduced in a disciplinary proceeding is reviewed de novo in this court to determine if discipline should be imposed, and, if it should, the extent thereof. State ex rel. Nebraska State Bar Assn. v. Hollstein 40

Attorney's Fees.

1. Attorney's fees, if recoverable by the terms of an agreement, are included in the judgment and are not taxable as costs. Haerry v. Hoffschneider 534
2. Attorney's fees may be allowed and taxed as costs only when provided by statute or a uniform course of procedure. Haerry v. Hoffschneider 534
3. In an action for dissolution of marriage the award of attorney's 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. Campbell v. Campbell 575
4. Award of attorney's fees is discretionary with the trial court. Quigley v. Quigley 677

Bail.

1. Neither the Eighth Amendment nor the Fourteenth

Amendment to the Constitution of the United States requires that everyone charged with a state offense must be given his liberty on bail pending trial. While it is inherent in our American concept of liberty that a right to bail shall generally exist, this has never been held to mean that a state must make every criminal offense subject to such a right or that the right provided as to offenses made subject to bail must be so administered that every accused will always be able to secure his liberty pending trial. Parker v. Roth 850

2. The right to bail is not a fundamental right guaranteed under the Constitution of the United States, and does not require a court to engage in a strict judicial scrutiny of a state action denying the right to bail in a particular case. Parker v. Roth 850

3. Article I, section 9, of the Constitution of the State of Nebraska does not prohibit the right to bail to every individual charged with a sexual offense involving penetration by force or against the will of the victim. In order for one so charged to be ineligible for bail, it must appear to the trial court that either the proof of the charge is evident or the presumption is great. In any instance in which the court is not convinced that either the proof is evident or the presumption great, then the court is not prohibited from granting bail to one so charged. Parker v. Roth 850

4. The question of whether a defendant is released on bail pending trial is of no relevance to the "presumption of innocence." One charged with a crime, whether it is bailable or not, enjoys a presumption of innocence. Parker v. Roth 850

Banks and Banking.

Before a bank is liable in negligence to a maker for accepting a check from an agent or employee of the maker who has obtained the check from the maker by giving to the maker the name of the payee, not intending the payee to have any interest in the check, it must appear that the bank either was placed on such notice as would justify one in believing that further investigation was necessary or otherwise in some manner acted, in accepting the check, in a commercially unreasonable manner. Travelers Indemnity Co. v. Center Bank 294

Blood, Breath, and Urine Tests.

1. Fact that appellant consumed alcohol subsequent to time of accident does not make officer's request for blood test unreasonable. Rudat v. Pearson 331

2. Fact that appellant consumed alcohol subsequent to time of accident does not make his refusal to take blood test reasonable. Rudat v. Pearson 331

Breach of Contract.

The law does not permit the complete remedy by specific performance to be split into separate actions for different elements of damages flowing from a single breach of contract. Brezina v. Hill 773

Brokers.

1. A broker is entitled to his commission in accordance with the terms of his listing contract, and the right to compensation is not impaired by subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed. Brezina v. Hill 773
2. A commission cannot be collected by the agent for his services if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency. Brezina v. Hill 773
3. A real estate broker is an agent owing a fiduciary duty (1) to use reasonable care, skill, and diligence in procuring the greatest advantage for his client, and (2) to act honestly and in good faith, making full disclosures to his client of all material facts affecting his interests. A neglect to do so renders him liable to his client for whatever loss the latter may suffer as a consequence thereof. Brezina v. Hill 773
4. The rule requiring a broker to act with utmost good faith toward his principal places him under a legal obligation to make a full, fair, and prompt disclosure to his employer of all facts within his knowledge which are or may be material to the matter in connection with which he is employed, which might affect his principal's rights and interests or influence his action in relation to the subject matter of the employment, or which in any way pertain to the discharge of the agency which the broker has undertaken. Brezina v. Hill 773

Burden of Proof.

1. The burden of proof is ordinarily on the party who would suffer if no evidence at all were introduced. Bishop Buffets, Inc. v. Westroads, Inc. 171
2. The burden is on the defendant to establish the manifest injustice by clear and convincing evidence. State v. Miller 443
3. Proof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating

to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The burden of establishing both these essential elements rests upon the plaintiff's introduction of expert medical testimony. Anderson v. Moore 453

4. The burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice. Citizens State Bank v. Sparks 661
5. Unless specifically denied in the pleadings, signatures on a promissory note are admitted, and when the signatures are admitted, production of the instrument entitles the holder to recover unless the defendant establishes a defense. Columbus Bank & Trust Co. v. High Country Stable 724
6. When signatures are admitted, the burden is upon the defendant to plead and prove a defense. Columbus Bank & Trust Co. v. High Country Stable 724
7. When signatures are admitted and the defendant has failed to plead a defense, no fact issue is presented. Columbus Bank & Trust Co. v. High Country Stable 724
8. Where there is a conveyance between close relatives without adequate consideration, the burden is upon the parties to the transaction to establish that it was done in good faith. West Gate Bank v. Eberhardt 762
9. The plaintiff's burden to prove the nature and amount of its damages can not be sustained by evidence which is speculative and conjectural. Clearwater Corp. v. City of Lincoln 796
10. The burden of proof on the issue of undue influence is upon the party contesting the document. Krause v. Crossley 806
11. When an improper communication with a juror or jurors is shown to have taken place in a criminal case, a rebuttable presumption of prejudice arises and the burden is on the State to prove that the communication was not prejudicial. Simants v. State 828
12. Where an error of constitutional dimensions has occurred, the State has the burden of proving beyond a reasonable doubt that such error was harmless. Simants v. State 828
13. Presumption of innocence is a recognition under American jurisprudence that one charged with the commission of a crime is presumed innocent until

proven guilty beyond a reasonable doubt. A defendant may rely upon the presumption and require the state to prove (1) that he committed the act charged; and (2) his legal culpability, if that is also an issue. Parker v. Roth 850

Canons.

DR7-104 (A) (1) provides that during the course of his representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. State ex rel. Nebraska State Bar Assn. v. Hollstein 40

Certificate of Title Act.

1. The execution of the certificate of title is the exclusive method of conveying ownership to a motor vehicle, but the certificate is not in itself conclusive of ownership. Weiss v. Union Ins. Co. 469
2. In determining whether there has been delivery of an executed certificate of title, the ordinary rules pertaining to the delivery of a written instrument apply. Weiss v. Union Ins. Co. 469
3. The delivery of a written instrument is largely a question of intent, which is to be determined from all the facts and circumstances of the particular case. There must be an intent on the part of the grantor that the instrument operate as a muniment of title to take effect presently and an acceptance by the grantee with the intent to take title. Weiss v. Union Ins. Co. 469
4. Where a third party has the duty to hold an executed certificate of title on behalf of the seller of a motor vehicle until the performance of the conditions of the sale and then deliver the certificate to the buyer, that party is acting as an escrow agent. Weiss v. Union Ins. Co. 469
5. When an executed certificate of title is held in escrow, legal title to the motor vehicle remains in its seller until performance of the conditions of the contract by the buyer. Weiss v. Union Ins. Co. 469

Child Support.

1. In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. In determining these circumstances, the financial position of the husband as well as the estimated

costs of support of the children must be taken into account. A decision on this matter rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion. Erickson v. Erickson 345

2. Allowances for child support are not final but are subject to modification when required, after notice and hearing. Erickson v. Erickson 345
3. An application for modification or change with respect to allowance for child support in a divorce decree may be made subsequent to the time of the decree, but must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res judicata. Quigley v. Quigley 677

Claims.

Generally, a county board acts quasi-judicially in determining whether claims filed against the county should be allowed. State ex rel. Newbold v. County of Buffalo 813

Class Actions.

A party having interest adverse to the interests of the parties he seeks to represent may not sue as representative of a class under the provisions of section 25-319, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513

Collective Bargaining.

1. A union workman's refusal of a job offer because of a union rule prohibiting such acceptance as a result of the workman's status on a union out-of-work list created solely by union action, is a failure without good cause to accept suitable work within the meaning and purview of the Nebraska unemployment compensation statute, section 48-628, R. R. S. 1943. Wentz Heating & Air Conditioning Co. v. Kiene 202
2. The provisions of section 48-628 (c)(2)(iii), R. R. S. 1943, refer to conditions attached to a job offer by an employer and not to other conditions unilaterally imposed upon the employment process by a labor union. Wentz Heating & Air Conditioning Co. v. Kiene 202

Comity.

In an extradition proceeding, where an examination of prior judicial precedent of the demanding state makes it at least doubtful that the demanding state is attempting to retroactively apply a judicial enlargement

of criminal statutes, the asylum state ought, as a matter of comity, to refrain from determining the issue in analogy to the principle that the constitutionality of the statutes of a sister state defining a crime should be tested in the sister state. West v. Janing 141

Commissions.

1. A broker is entitled to his commission in accordance with the terms of his listing contract, and the right to compensation is not impaired by subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed. Brezina v. Hill 773
2. A commission cannot be collected by the agent for his services if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency. Brezina v. Hill 773

Confinement.

1. The laws of the State of Nebraska under which an individual is confined to the Nebraska Penal and Correctional Complex specifically impose upon the chief executive officer of such facility the duty to provide each inmate appropriate medical care. State v. Sell 840
2. Detention is a usual feature of every case of arrest on a criminal charge even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense, nor does it constitute punishment, and therefore is not cruel and unusual punishment in violation of the Constitution of the United States. Parker v. Roth 850

Consent.

Where a victim's resistance to a sexual assault would obviously be useless, fruitless, or foolhardy, it is wholly unrealistic to require affirmative direct demonstration of the utmost physical resistance as proof of the victim's opposition and lack of consent. It is only required that the victim make reasonable resistance in good faith under all the circumstances and that the resistance be such as to make nonconsent and actual opposition genuine and real. State v. Pankey 595

Consideration.

No consideration is necessary for an instrument given as security for a debt already owed by the party giving it or by a third person. First Nat. Bank of Omaha v. Kizzier 369

Constitutional Law.

1. The Legislature may not prescribe a de novo standard of review for judicial review of an exercise of legislative authority as this would violate the constitutional requirement of separation of powers. Lux v. Mental Health Board of Polk County 106
2. The constitutional requirement for acceptance of a guilty plea is that the plea be voluntary and intelligent. State v. Curnyn 135
3. An unforeseeable judicial enlargement of a criminal statute applied retroactively is impermissible under the Fourteenth Amendment to the Constitution of the United States. West v. Janing 141
4. Courts will presume that the legislative body, in enacting ordinances, acted within their authority, and the burden rests upon those who challenged their validity to show that, in the matter called in question, the action of the municipal authorities was arbitrary, unreasonable, and without substantial relation to public safety, health, morals, or the general welfare. Copple v. City of Lincoln 152
5. Under the doctrine of separation of powers, courts should not inquire into the motives of legislators whenever an adopted ordinance is legislative in character. Copple v. City of Lincoln 152
6. In neither the Constitution of the United States nor the Constitution of Nebraska is there any prohibition against successive prosecutions if the wrongful act is the cause of separate and distinct offenses. State v. Robinson 210
7. Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. State v. Brady 221
8. When materials are seized in violation of the First Amendment to the Constitution of the United States, the appropriate remedy is return of the seized property. State v. Tara Enterprises, Inc. and Zachary Productions, Ltd. 260
9. The requirement of Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), that a defendant be informed of his constitutional rights applies only to in-custody interrogations. State v. Price 308

10. The right of a defendant to remain silent is not overcome by a mere recitation of Fifth Amendment rights; but that rule is not violated where the subsequent statements are clearly shown to have been made voluntarily. State v. Price 308
11. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. The dividing line between what is lawful and unlawful cannot be left to conjecture. State v. Huffman 434
12. Adoption and incorporation into the 1943 revision of the statutes of an act which, as originally passed, may have been in violation of the constitutional provision prohibiting statutory amendments without reference to the section amended cures the constitutional defect. Art. III, section 14, Constitution of Nebraska. § 49-601, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513
13. A citizen taxpayer has standing to maintain an action for a declaratory judgment to challenge the accuracy and validity of the proclamation, publication, and incorporation of an amendment to Article VII, section 11, Constitution of Nebraska. Cunningham v. Exon 563
14. A student has a significant interest in participation in interscholastic athletics which may be the subject of Fourteenth Amendment protections. French v. Cornwell 569
15. Participation in interscholastic athletics ordinarily has significantly less important constitutional dimensions than does participation in traditional academic education. French v. Cornwell 569
16. As a general rule a school official, in exercising the power of suspending a student, is liable for a compensating award only if the official acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that the action could not be reasonably characterized as being in good faith. French v. Cornwell 569
17. The acts of legislative bodies, whether state or municipal, if performed within the prescribed limits, are not subject to revision or control by the courts on the ground of inexpediency, injustice, or impropriety. Such are purely functions of legislative power. McCrea v. Cunningham 638
18. Section 79-548.01, R. R. S. 1943, is not an unconstitutional delegation of legislative authority. Banks v. Board of Education of Chase County 717

19. The tax authorized by section 79-548.01, R. R. S. 1943, provides a necessary revenue within the meaning of Article VIII, section 1, of the Nebraska Constitution. Banks v. Board of Education of Chase County 717
20. Article VII, section 5, of the Constitution of Nebraska, which provides in part that all fines and penalties shall be appropriated exclusively to the use of the common schools in the counties where the fines or penalties are imposed, applies only to penalties which are pecuniary punishments inflicted by laws, ordinances, or police regulations for their violation. DeCamp v. City of Lincoln 727
21. Court costs are not fines or penalties within the meaning of Article VII, section 5, of the Constitution of Nebraska. DeCamp v. City of Lincoln 727
22. A fair trial in a fair tribunal is a basic requirement of constitutional due process. Simants v. State 828
23. The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. Simants v. State 828
24. Where an error of constitutional dimensions has occurred, the State has the burden of proving beyond a reasonable doubt that such error was harmless. Simants v. State 828
25. Neither the Eighth Amendment nor the Fourteenth Amendment to the Constitution of the United States requires that everyone charged with a state offense must be given his liberty on bail pending trial. While it is inherent in our American concept of liberty that a right to bail shall generally exist, this has never been held to mean that a state must make every criminal offense subject to such a right or that the right provided as to offenses made subject to bail must be so administered that every accused will always be able to secure his liberty pending trial. Parker v. Roth 850
26. One's right to life, liberty, and property and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. Nor can a citizen's constitutional rights be infringed simply because a majority of the people choose that it be. Parker v. Roth 850
27. It is incumbent upon the Supreme Court, when reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality. If possible, a statute should be construed in such a way as to negative any

constitutional infirmity. State laws are accorded a presumption of constitutionality. Parker v. Roth 850
28. The traditional standard of review of state law under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States requires only that the state law be shown to bear some rational relationship to legitimate state purposes. It is enough that the state's action be rationally based and free from invidious discrimination. Parker v. Roth 850
29. There are two recognized tests to review state action as it relates to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. If the matter involved is a "fundamental right" guaranteed by the Constitution of the United States, the courts will engage in a strict judicial scrutiny of the act in question. If the state action under examination is not such a fundamental right, the court examines the matter in question to determine that there is a rational basis for the classification which does not involve a suspect class. Parker v. Roth 850
30. The right to bail is not a fundamental right guaranteed under the Constitution of the United States, and does not require a court to engage in a strict judicial scrutiny of a state action denying the right to bail in a particular case. Parker v. Roth 850
31. It is not the province of a court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. If there are to be such fundamental rights, they must be found either explicitly or implicitly guaranteed by the Constitution. Parker v. Roth 850
32. Article I, section 9, of the Constitution of the State of Nebraska does not prohibit the right to bail to every individual charged with a sexual offense involving penetration by force or against the will of the victim. In order for one so charged to be ineligible for bail, it must appear to the trial court that either the proof of the charge is evident or the presumption is great. In any instance in which the court is not convinced that either the proof is evident or the presumption great, then the court is not prohibited from granting bail to one so charged. Parker v. Roth 850
33. Presumption of innocence is a recognition under American jurisprudence that one charged with the commission of a crime is presumed innocent until proven guilty beyond a reasonable doubt. A defendant may rely upon the presumption and require the state to prove (1) that he committed the act charged; and (2) his legal

culpability, if that is also an issue. Parker v. Roth 850
34. The question of whether a defendant is released on bail pending trial is of no relevance to the "presumption of innocence." One charged with a crime, whether it is bailable or not, enjoys a presumption of innocence. Parker v. Roth 850
35. Detention is a usual feature of every case of arrest on a criminal charge even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense, nor does it constitute punishment, and therefore is not cruel and unusual punishment in violation of the Constitution of the United States. Parker v. Roth 850

Contracts.

1. An exclusion in an automobile liability insurance policy which excludes coverage under uninsured motorist coverage for an insured while occupying an owned highway vehicle, other than an insured automobile, is valid. Herrick v. Liberty Mut. Fire Ins. Co. 116
2. In the construction of the terms of an agreement, effect must be given, if possible, to all portions of the contract in order to determine and effectuate the intention of the parties. Bishop Buffets, Inc. v. Westroads, Inc. 171
3. Real estate taxes will not be deemed to be a cost of "operating and maintaining common areas" within the meaning of a shopping center lease clause where a separate clause specifically addresses the payment of taxes. Bishop Buffets, Inc. v. Westroads, Inc. 171
4. The practical construction put upon a lease contract cannot control the express, unambiguous provisions of the instrument itself. Bishop Buffets, Inc. v. Westroads, Inc. 171
5. Contracts are to be construed according to the usual meaning of the words used. Bishop Buffets, Inc. v. Westroads, Inc. 171
6. Where the language of an instrument is susceptible of two or more meanings, an interpretation evincing an underlying rational purpose will be favored. Bishop Buffets, Inc. v. Westroads, Inc. 171
7. Ambiguities in a contract should be construed most strongly against its author. Bishop Buffets, Inc. v. Westroads, Inc. 171
8. If the language used in a contract drafted by one of the parties is susceptible of more than one meaning, it should be given the construction which the other party would be fairly justified in giving it. Bishop Buffets, Inc. v. Westroads, Inc. 171

9. Where labor or material has been furnished by a party under distinct contracts, the claim for a mechanic's lien under each contract must be filed within the time limited by the statutes for that purpose. Omaha Nat. Bank v. Continental Western Corp. 238
10. A contract for the purchase of a water supply which creates a 40-year obligation on the part of a reclamation district must, under section 46-564, R. R. S. 1943, be submitted to the voters of the district for approval. Twin Loups Reclamation & Irr. District v. Blessing ... 513
11. The power of an irrigation district to enter into a contract with the United States for the construction, operation, and maintenance of the necessary works for the delivery and distribution of water is not limited by a requirement that the contract be approved by the voters of the district. § 46-156, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513
12. A contract for a supply of water which provides for payment to be made by an irrigation district for a period of more than 1 year from the date of making the contract must be submitted to the legal voters of the district for approval or disapproval. § 46-1,145, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513
13. In an action for specific performance of an oral contract to convey real estate where partial performance is relied upon to avoid the defense of the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear, satisfactory, and unequivocal evidence, they are unenforceable unless it is also proved by evidence of like character that there has been such performance as the law requires. The acts constituting performance must be such as are referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract or relation. They must be something that the claimant would not have done unless and on account of the contract and with the direct view to its performance so that nonperformance by the other party would amount to fraud upon him. Theobald v. Agee 524
14. The words "referable solely to the contract," as used in the foregoing rule, properly interpreted and applied mean that, if the evidence as a whole of a party seeking specific performance of an oral contract to convey real estate indicates that it is referable solely to the con-

tract sought to be enforced and not to some other or different contract, then the burden of the rule has been satisfied. In determining whether or not the acts were referable solely to the contract, the acts of performance must be considered as a whole in their own light and in the light of all other material and relevant facts and circumstances, present, antecedent, and subsequent as shown by evidence with no part excluded. Theobald v. Agee 524

15. A contract between two persons is not rendered testamentary by the fact that some provisions are to be performed at the time of or subsequent to the death of one of the parties. Haerry v. Hoffschneider 534

16. When several documents are executed successively as a part of the same general transaction, the language of each document and the order of their execution may be considered as indications of the intention of the makers. Haerry v. Hoffschneider 534

17. A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions, or where the language employed is vague or ambiguous. Griffeth v. Sawyer Clothing, Inc. 631

18. Parol evidence is admissible to explain and show the true nature of the transaction between the parties. Griffeth v. Sawyer Clothing, Inc. 631

19. An assignee of a contract generally acquires no greater right than that possessed by the assignor. Griffeth v. Sawyer Clothing, Inc. 631

20. Assignments of contracts containing clauses restricting competition will be strictly construed and the assignment limited to the intent of the parties as disclosed by the terms of the instrument if they are complete and unambiguous. Where the language in the contract regarding assignment is susceptible of more than one construction, or is vague or ambiguous, extrinsic evidence may be received for the purpose of determining the intent of the parties. Griffeth v. Sawyer Clothing, Inc. 631

21. A bargain in whole or in part for or in consideration of illicit sexual intercourse or of a promise thereof is illegal; but subject to this exception, such intercourse between parties to a bargain previously or subsequently formed does not invalidate it. Taylor v. Frost 652

22. Where a contract is silent with respect to time of performance, a reasonable time for performance will be presumed or implied by law. Gustav Thieszen Irr. Co., Inc. v. Meinberg 666

23. Where a contract is silent with respect to time of per-

formance, the reasonable time which is presumed by law is a rebuttable presumption, and parol or extrinsic evidence may be received to rebut that presumption. Gustav Thieszen Irr. Co., Inc. v. Meinberg 666

24. Whether a specific delivery date was agreed upon or the question of whether delivery was affected within a reasonable time is ordinarily a question of fact for the jury, not a question of law for the court. Gustav Thieszen Irr. Co., Inc. v. Meinberg 666

25. An oral agreement to make a will is unenforceable under the statute of frauds, section 36-105, R. R. S. 1943. However, nothing contained in sections 36-101 to 36-106, R. R. S. 1943, shall be construed to bridge the powers of a court of equity to compel specific performance of agreements in cases of part performance. Rudolph v. Hartung 678

26. One seeking specific performance of an oral contract for the conveyance of real estate has the burden of proving by a preponderance of the evidence a contract that is clear, satisfactory, and unequivocal in its terms. Rudolph v. Hartung 678

27. It is very proper that the assertion of such a contract, especially when it is claimed to be entirely in parol, should be regarded by the court with grave suspicion, and the establishment thereof required by evidence which clearly indicates the minds of the parties met upon the terms of the contract sought to be established. Rudolph v. Hartung 678

28. In order to enforce an oral contract for the conveyance of a part of the estate of a deceased person the evidence of the contract and its terms must be clear and satisfactory; and the thing done constituting performance must be such as is referable solely to the contract sought to be enforced and not such as might be referable to some other and different contract. Rudolph v. Hartung 678

29. The part performance necessary to render an oral contract to make a will enforceable must be referable solely to the oral agreement. Rudolph v. Hartung 678

30. A purchaser, in an action for partial specific performance of a land contract, is entitled to an abatement of the purchase price with respect to seller's deficiency of title, even though purchaser, at the time of contracting, knew of such deficiency, when (1) seller contracted to sell the entire interest in the land, and (2) purchaser had reasonable grounds to believe seller could fulfill the contract. Egle v. Kitt 735

31. Valuation of property is a matter of judgment, and a

contract based upon inadequate consideration will not be set aside on that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself evidence of fraud. West Gate Bank v. Eberhardt 762

32. A broker is entitled to his commission in accordance with the terms of his listing contract, and the right to compensation is not impaired by subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed. Brezina v. Hill 773

Conveyances.

1. Where there is a conveyance between close relatives without adequate consideration, the burden is upon the parties to the transaction to establish that it was done in good faith. West Gate Bank v. Eberhardt 762
2. Except where modified by statute, to "convey" means to pass or transmit title to property from one to another. Krause v. Crossley 806

Coram Nobis.

A writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment and not discoverable by him with reasonable diligence, which fact or facts are of such a nature that, if known to the court, would have prevented entry of the judgment. Simants v. State 828

Corporations.

1. Unauthorized acts of an officer of a corporation may be ratified by the corporation by conduct implying approval and adoption of the acts in question. D & J Hatchery, Inc. v. Feeders Elevator, Inc. 69
2. Ratification of unauthorized acts may be express or may be inferred from silence and inaction; if the corporation, with knowledge of the unauthorized act or of facts putting it upon notice thereof, does not disavow the agency and disaffirm the transaction within a reasonable time, it will be deemed to have ratified it. D & J Hatchery, Inc. v. Feeders Elevator, Inc. 69
3. In a proceeding by a dissenting shareholder seeking a finding and determination of the fair value of shares of stock under the provisions of section 44-133.06, R. R. S. 1943, the statutory provisions as to a judgment against the insurance company for the fair value of the shares, together with interest, are mandatory. Becker v. Natl. American Ins. Co. 545
4. A shareholders' suit proceeding as a cause for damages

on behalf of the policyholders and based upon the premise that the corporate directors violated their fiduciary duties is an equitable action and triable de novo in this court. Doyle v. Union Ins. Co. 599

5. Section 44-224.05, R. R. S. 1943, which authorizes the Director of Insurance of the State of Nebraska to approve or disapprove contracts of bulk reinsurance, by which a domestic insurance company operating on other than the stock plan, may cede its business to another licensed insurer, and which statute requires that such contract of bulk reinsurance make a fair and equitable provision for distribution to policyholders of the ceding company of their equity in the surplus funds, does not abrogate the common law duties of corporate directors to policyholders of a mutual insurance company and the approval of the contract by the Director of Insurance does not insulate the directors of the company from liability for violation of their fiduciary duties. Doyle v. Union Ins. Co. 599

6. Directors are fiduciaries or trustees and must comply with the applicable fiduciary duties in their dealings with the corporation. Doyle v. Union Ins. Co. 599

7. Where a director has acted in complete good faith and breached no fiduciary duties, then he is not liable for mere mistakes in judgment; but a violation by a director of a duty required by law, whether willful, fraudulent, or negligent, is a breach of trust and the director is liable for any damages proximately caused by the breach. Doyle v. Union Ins. Co. 599

8. Directors should have a general knowledge of the manner in which the corporate business is conducted; and, where the duty of knowing exists, ignorance because of neglect of duty on the part of a director creates the same liability as actual knowledge and failure to act on that knowledge. Doyle v. Union Ins. Co. 599

9. The issue of whether void or voidable acts of corporate directors may be ratified by an approving vote of the shareholders arises only when there has been full disclosure to the shareholders of all material facts. Doyle v. Union Ins. Co. 599

10. The word "maintain," within the statute providing that no foreign corporation transacting business in the state without a certificate of authority shall be permitted to maintain any action, suit, or proceeding in any court of the state until such corporation shall have obtained a certificate of authority, does not inhibit the institution of the action, and a foreign corporation may at any time after the action is brought maintain and prosecute

it by first complying with the terms of the statute. Rigid Component Systems v. Nebraska Component Systems, Inc. 658

Counties.

1. The county board by statute is made the overseer of the poor and the county has a mandatory duty to provide for poor persons whether they are residents or nonresidents of the county. Creighton-Omaha Regional Health Care Corp. v. Douglas County 686
2. A county may be liable for the reasonable value of necessary hospital services furnished to a poor person where the county board after receiving notice of the situation neglects or refuses to make any arrangements for the care of the poor person. Creighton-Omaha Regional Health Care Corp. v. Douglas County 686
3. A hospital which furnishes hospital services to a poor person without prior authorization by the county board acts at its peril with respect to reimbursement from county funds. Creighton-Omaha Regional Health Care Corp. v. Douglas County 686
4. Article VII, section 5, of the Constitution of Nebraska, which provides in part that all fines and penalties shall be appropriated exclusively to the use of the common schools in the counties where the fines or penalties are imposed, applies only to penalties which are pecuniary punishments inflicted by laws, ordinances, or police regulations for their violation. DeCamp v. City of Lincoln 727

Court of Industrial Relations.

In attempting to determine the appropriate unit for exclusive bargaining purposes under the provisions of the Nebraska Court of Industrial Relations Act, the mutuality of interest in wages, hours and working conditions, duties and skills of employees, extent of union organization among employees, the desires of employees, a policy against fragmentation of units, the established policies of the employees, and the statutory mandate to insure proper functioning and operation of governmental service, are to be considered. Those factors, however, are not the only factors to be considered, nor must each such factor be given equal weight. The factors appropriate to a bargaining unit consideration and the weight to be given each such factor must vary from case to case depending upon its particular applicability in each case. Sheldon Station Employees Assn. v. Nebraska P.P. Dist. 391

Courts.

1. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment, except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943. Bokelman v. Bokelman 17
2. The better practice is for the trial court to inquire whether counsel desire to present closing arguments, but in the absence of a request the right to make a closing argument is waived. State v. Rojewski 34
3. An adjudicative fact to be judicially noticed must be one not subject to reasonable dispute in that it is either (a) generally known within the jurisdiction of the court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. § 27-201 (2), R. R. S. 1943. Grubaugh v. State ex rel. State Real Estate Commission 75
4. Commitment proceedings are judicial in nature, and District Courts must review the decisions of mental health boards de novo on the records. Lux v. Mental Health Board of Polk County 106
5. Courts will presume that the legislative body, in enacting ordinances, acted within their authority, and the burden rests upon those who challenged their validity to show that, in the matter called in question, the action of the municipal authorities was arbitrary, unreasonable, and without substantial relation to public safety, health, morals, or the general welfare. Copple v. City of Lincoln 152
6. However, even where the acts of a public body are legislative in character, courts must consider and apply statutes and ordinances disqualifying a public official from voting on or participating in actions taken by a public body, because of an existing conflict of interest on the part of the official. Copple v. City of Lincoln ... 152
7. A division of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion will not be disturbed on appeal. McCurry v. McCurry 235
8. The granting of declaratory relief is discretionary with the trial court. Stahmer v. Marsh 281
9. A trial court may either on its own motion or in response to an objection require an expert to disclose the underlying facts or data upon which the opinion is to be based before permitting the expert to render his opinion. Northern Nat. Gas Co. v. Beech Aircraft Corp. ... 300
10. The action of the trial court, in either requesting an ex-

pert witness to disclose the underlying data or information upon which his opinion is based or refusing such a request, will not be disturbed on appeal in the absence of a showing that the trial court abused its discretion. Northern Nat. Gas Co. v. Beech Aircraft Corp. 300

11. A magistrate is not required to set out specific findings of fact after a preliminary hearing. State v. Price 308

12. The District Court has inherent power to vacate or modify its own judgment at any time during the term at which it is rendered. Such action rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be interfered with. Campbell v. Campbell 575

13. Taxation of costs is a matter resting in the sound discretion of the trial court. Banks v. Board of Education of Chase County 717

14. In a proceeding in juvenile court under sections 43-202 (2) and 43-209, R. S. Supp., 1978, the court may terminate all parental rights of the parents if the court finds it would be in the best interests of the child to so terminate parental rights. The decision to terminate parental rights need not be based upon proof beyond a reasonable doubt. State v. Chant 750

15. 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. The judgment of the trial court will be upheld on appeal unless there is an abuse of discretion. State v. Chant 750

16. Where a juvenile defendant is being prosecuted in the District Court and has not had an opportunity for a hearing on the matter of transfer to juvenile jurisdiction as required by section 43-202.02, R. S. Supp., 1978, ordinarily the proper procedure to cure the procedural defect is to hold such a hearing and to determine whether or not such transfer should have been granted. If the court, based upon sufficient evidence, finds the evidence did not require the transfer, then the conviction need not be set aside in post conviction proceedings. State v. Tweedy 824

17. There are two recognized tests to review state action as it relates to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. If the matter involved is a "fundamental right" guaranteed by the Constitution of the United States, the courts will engage in a strict judicial scrutiny of the act in question. If the state action un-

der examination is not such a fundamental right, the court examines the matter in question to determine that there is a rational basis for the classification which does not involve a suspect class. Parker v. Roth 850

Criminal Law.

1. The present test of the effective assistance of counsel is that counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client. State v. Lang 9
2. It is the duty of a defense attorney in a criminal case to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. Ordinarily, a reasonably competent attorney will conduct an in-depth investigation of the case, which includes an independent interviewing of the witnesses. State v. Lang 9
3. A city or village attorney whose duties include prosecuting violations of ordinances and state statutes may not voluntarily represent anyone charged with a crime, unless his employment as attorney for a defendant is approved by an order of the court in which the case is pending. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
4. To release a person from a sentence of imprisonment by habeas corpus it must appear that the sentence was absolutely void. Piercy v. Parratt 102
5. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose, unless the sentence has been fully served and the prisoner is being illegally held. Piercy v. Parratt 102
6. A court may properly deny an evidentiary hearing upon a motion to vacate a conviction filed under section 29-3001, R. R. S. 1943, upon a determination after an examination of the files and records of the case that the petitioner is entitled to no relief. State v. Miles 126
7. The standard for accepting a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Curnyn 135
8. Before accepting a guilty plea a judge should sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea. State v. Curnyn 135

9. The constitutional requirement for acceptance of a guilty plea is that the plea be voluntary and intelligent. State v. Curnyn 135
10. Whether or not the state demanding extradition has violated the right of a fugitive to a speedy trial is a question for the demanding state to determine. West v. Janing 141
11. It is the obligation of the asylum state in extradition proceedings to determine whether the requisition charges a crime under the law of the demanding state. West v. Janing 141
12. An unforeseeable judicial enlargement of a criminal statute applied retroactively is impermissible under the Fourteenth Amendment to the Constitution of the United States. West v. Janing 141
13. In an extradition proceeding, where an examination of prior judicial precedent of the demanding state makes it at least doubtful that the demanding state is attempting to retroactively apply a judicial enlargement of criminal statutes, the asylum state ought, as a matter of comity, to refrain from determining the issue in analogy to the principle that the constitutionality of the statutes of a sister state defining a crime should be tested in the sister state. West v. Janing 141
14. The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. State v. Whitney 149
State v. Classen 324
15. In a penal statute it is not necessary that it be written as to be beyond the mere possibility of more than one construction. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden. State v. Robinson 210
16. Although a penal statute is required to be strictly construed, it should be given a sensible construction and general terms therein should be limited in their construction and application so as not to lead to injustice, oppression, or an absurd consequence. State v. Robinson 210
17. In neither the Constitution of the United States nor the Constitution of Nebraska is there any prohibition against successive prosecutions if the wrongful act is the cause of separate and distinct offenses. State v. Robinson 210

18. In determining if two charges constitute the same offense, the test to be applied is whether each charge requires proof of additional facts or evidence. State v. Robinson 210
19. The general rule is that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. State v. Robinson 210
20. 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. Robinson 210
State v. Brady 221
State v. Booth 692
21. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Robinson 210
22. Testimony that an officer smelled a strong odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to the expertise of the officer. State v. Daly 217
23. Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. State v. Brady 221
24. Section 29-822, R. R. S. 1943, provides that any person aggrieved by an unlawful search and seizure may move for return of the property so seized and to suppress its use as evidence. However, the motion must be filed at least 10 days before trial or at the time of arraignment, whichever is the later, unless otherwise permitted by the court for good cause shown. State v. Brady 221
25. A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial. State v. Brady 221
26. A sentence imposed within statutory limits will not be disturbed upon appeal unless there appears to be an abuse of discretion. State v. Welsh 249
27. In adopting sections 29-2521.01 to 29-2522, R. S. Supp., 1978, the Legislature intended to establish a procedure

whereby the death penalty would be applied uniformly throughout the state. That procedure is not called into play where the death penalty is not imposed. State v. Welsh 249

28. An odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant if the expertise of the officer is shown. State v. Ruzicka 257

29. Evidence that material submitted for analysis was sent to a laboratory in a sealed envelope by registered mail and received at the laboratory in sealed condition where it was opened by the chemist performing the analysis is sufficient to establish a chain of custody. State v. Ruzicka 257

30. A warrant which authorizes a search for and seizure of films specifically named and described, and items of equipment or material aiding or used in the exhibition or dissemination of those films, is not a general warrant authorizing an exploratory search of the premises for evidence of any crime. State v. Tara Enterprises, Inc. and Zachary Productions, Ltd. 260

31. Where items unspecified in the warrant are seized in a valid search, the fact that the unspecified items are not admissible in evidence does not require suppression of property seized in accordance with the warrant. State v. Tara Enterprises, Inc. and Zachary Productions, Ltd. 260

32. When materials are seized in violation of the First Amendment to the Constitution of the United States, the appropriate remedy is return of the seized property. State v. Tara Enterprises, Inc. and Zachary Productions, Ltd. 260

33. A six-member jury provides an adequate and representative cross section of the community which is sufficient to determine and apply community standards in obscenity cases. State v. Tara Enterprises, Inc. and Zachary Productions, Ltd. 260

34. An agreement that charges will be dropped if an accused person passes a polygraph test is not binding unless it has been approved by the trial court. State v. Joseph 268

35. The determination as to whether identification procedures conducted by the police were unnecessarily suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be made by a consideration of the totality of the circumstances. State v. Joseph 268

36. An error in overruling a plea in abatement is cured if the evidence at trial is sufficient to permit the jury to

find guilt beyond a reasonable doubt. State v. Price .. 308
37. There is no right to appeal to this court from a decision binding the defendant over for trial after a preliminary hearing. State v. Price 308
38. A magistrate is not required to set out specific findings of fact after a preliminary hearing. State v. Price 308
39. The requirement of Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), that a defendant be informed of his constitutional rights applies only to in-custody interrogations. State v. Price 308
40. The right of a defendant to remain silent is not overcome by a mere recitation of Fifth Amendment rights; but that rule is not violated where the subsequent statements are clearly shown to have been made voluntarily. State v. Price 308
41. The decision to allow endorsement of a new witness by the prosecutor is addressed to the sound discretion of the trial court. State v. Price 308
42. Testimony presented by a prosecutor with a view toward subsequent impeachment does not come within the prohibition against the knowing use of perjured testimony. State v. Price 308
43. Where the need for impeachment is small or nonexistent and the danger that the prior inconsistent statement will be considered substantively is great, the statement should be excluded. State v. Price 308
44. Errors in rulings on the admissibility of evidence which do not injuriously affect the substantial rights of the accused are not grounds for reversal. State v. Price 308
45. The foundational requirement of section 27-613, R. R. S. 1943, that a witness to be impeached be given an opportunity to explain or deny an apparently inconsistent statement, may be met either before or after the introduction of the impeaching evidence. State v. Price ... 308
46. Nebraska Jury Instruction No. 14.52A pertaining to Miranda rights need not be given even if requested by the defendant. State v. Price 308
47. 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. State v. Classen 324
48. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed, and the judge may

consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Harrington 356
49. Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Harrington 356
50. Where a criminal defendant requests a jury instruction on a lesser-included offense and presents evidence which, if believed, would provide a rational basis for acquitting the defendant of the offense charged and convicting him of the lesser offense, the requested instruction must be given. State v. Hegwood 379
51. Where the record clearly shows an oral request for a jury instruction, and full understanding of the requested instruction by the trial court, review of the court's ruling on the instruction will not be precluded by failure to reduce the request to writing. § 25-1111, R. R. S. 1943. State v. Hegwood 379
52. Where a plea of guilty is made pursuant to a plea bargain and the sentence is in complete conformity with the plea agreement, it is not reversible error for the attorney to fail to advise the defendant of appeal possibilities. State v. Hoppes 383
53. Matters relating to sentences imposed within statutory limits do not form a basis for post conviction relief. State v. Hoppes 383
54. Where defendant's trial counsel performs at least as well as a lawyer with ordinary training and skill in the criminal law and conscientiously protects the client's interest, he has met the criteria of effective trial counsel. State v. Hoppes 383
55. A violation of the "Nebraska Rules of the Road" is a crime, and the prosecution for such violation is a criminal action. State v. Huffman 434
56. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. The dividing line between what is lawful and unlawful cannot be left to conjecture. State v. Huffman 434
57. The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose in advance what course it is lawful for him to pursue. State v. Huffman 434
58. A motion to withdraw a guilty plea addresses itself to

the direction of the trial judge, and, in the absence of a clear abuse of that discretion, the appellate court will not interfere. State v. Miller 443

59. It is not proper for a trial judge to permit the withdrawal of a guilty plea which was knowingly, intelligently, and voluntarily made unless such withdrawal is necessary to correct a manifest injustice. State v. Miller 443

60. The burden is on the defendant to establish the manifest injustice by clear and convincing evidence. State v. Miller 443

61. When the defendant waives his state court remedies and admits his guilt, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. State v. Miller 443

62. A guilty plea may not be withdrawn as a matter of right solely because the defendant chose to withhold facts from his attorney and the court which, if believed, might have prevented the attorney from recommending that the plea be entered or the court from accepting it. State v. Miller 443

63. Newly discovered evidence must be relevant and credible, and not merely cumulative. It must involve something other than credibility of witnesses who testified at the former trial. § 29-2101 (5), R. R. S. 1943. State v. Smith 501

64. A plea of guilty or nolo contendere is not involuntary because it is induced by the filing of an habitual criminal charge. State v. Country 509

65. Questioning the defendant as to the factual basis for the charge is not required where the defendant enters a plea of nolo contendere. State v. Country 509

66. A plea of guilty or nolo contendere waives every defense to the charge, whether the defense is procedural, statutory, or constitutional. State v. Country 509

67. Where a victim's resistance to a sexual assault would obviously be useless, fruitless, or foolhardy, it is wholly unrealistic to require affirmative direct demonstration of the utmost physical resistance as proof of the victim's opposition and lack of consent. It is only required that the victim make reasonable resistance in good faith under all the circumstances and that the resistance be such as to make nonconsent and actual opposition genuine and real. State v. Pankey 595

68. While the purpose of committing the crime of kidnapping may be to make it possible to commit some other crime, the crime of kidnapping is a separate and distinct crime for which prosecution may be had.

State v. Pankey 595
69. Before evidence of previous sexual activity may be introduced into evidence, in order to establish a pattern of conduct or behavior on the part of the victim, it must be shown that such earlier involvement was voluntary. State v. Pankey 595
70. 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. State v. Booth 692
71. The existence of probable cause for a warrantless search must be determined on the particular facts and circumstances of each case which must be determined by a practical and not by any technical standard, and where time is of the essence it is a highly relevant factor in evaluating the circumstances. State v. Booth ... 692
72. Probable cause for search or arrest without a warrant can rest upon the collective knowledge of the police rather than solely on that of the officer who actually makes the search or arrest, when there is some degree of communication between the two. State v. Booth 692
73. A furtive gesture when coupled with prior reliable information may constitute probable cause for search or arrest. State v. Booth 692
74. Circumstances and conduct which may very well not excite the suspicion of the ordinary person might be highly significant to a law enforcement officer trained in the habits and conduct and paraphernalia of users of drugs. State v. Booth 692
75. Probable cause for searching a motor vehicle is to be determined in view of its mobility and by a practical and not a technical standard, and differs from that required to search a fixed structure. State v. Booth 692
76. Given probable cause to search, from a constitutional standpoint there is no difference between on the one hand seizing and holding a car at the station house before presenting the probable cause issue to the magistrate and on the other hand carrying out an immediate search without a warrant. State v. Booth 692
77. Before a criminal matter may be appealed to the Supreme Court, it must be a final judgment, and no judgment will be regarded as final unless the sentence is pronounced. State v. Shaw 766
78. Pursuant to section 29-2902, R. R. S. 1943, criminal proceedings in a case in which there is probable cause to believe that the defendant is a sexual sociopath may be adjourned and the sentence suspended until proceed-

ings pursuant to the sexual sociopath law have been completed. Upon completion of those proceedings, at the earliest possible time thereafter, the defendant is to be returned to the District Court wherein he was convicted. At that time an appropriate sentence on the criminal charges is to be imposed. Such sentence shall be deemed to commence from such time as the defendant is committed to either the Nebraska Regional Center or the Nebraska Penal and Correctional Complex, less any credit for time already spent in incarceration. No defendant shall be required to remain in custody for a period of time longer than the sentence imposed for the criminal charge or until such time as defendant is determined to be a subject fit for release pursuant to the provisions of the sexual sociopath law, whichever later occurs. State v. Shaw 766

79. A writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment and not discoverable by him with reasonable diligence, which fact or facts are of such a nature that, if known to the court, would have prevented entry of the judgment. Simants v. State 828

80. When an improper communication with a juror or jurors is shown to have taken place in a criminal case, a rebuttable presumption of prejudice arises and the burden is on the State to prove that the communication was not prejudicial. Simants v. State 828

81. Unauthorized communications between jurors and third persons or witnesses during the course of jury deliberations are absolutely forbidden and invalidate the verdict unless their harmlessness is made to appear. Simants v. State 828

82. It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated. Simants v. State 828

83. Under the provisions of section 29-2909, R. R. S. 1943, a person who believes himself to be a sexual sociopath may initiate proceedings under the Nebraska Sexual Sociopath Act even though he has not been found guilty of a sexual offense. State v. Sell 840

84. In order for a trial court to find that a defendant "can benefit by treatment" within the meaning of the Nebraska Sexual Sociopath Act so as to require his confinement to a regional center, the court must find by a preponderance of the evidence that such treatment will

result in the cure of the defendant. In the absence of such a finding the court must determine that the defendant cannot benefit from such treatment and should be confined in the Nebraska Penal and Correctional Complex as prescribed by the Nebraska Sexual Sociopath Act. State v. Sell 840

85. The laws of the State of Nebraska under which an individual is confined to the Nebraska Penal and Correctional Complex specifically impose upon the chief executive officer of such facility the duty to provide each inmate appropriate medical care. State v. Sell 840

86. Neither the Eighth Amendment nor the Fourteenth Amendment to the Constitution of the United States requires that everyone charged with a state offense must be given his liberty on bail pending trial. While it is inherent in our American concept of liberty that a right to bail shall generally exist, this has never been held to mean that a state must make every criminal offense subject to such a right or that the right provided as to offenses made subject to bail must be so administered that every accused will always be able to secure his liberty pending trial. Parker v. Roth 850

87. One's right to life, liberty, and property and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. Nor can a citizen's constitutional rights be infringed simply because a majority of the people choose that it be. Parker v. Roth 850

88. Article I, section 9, of the Constitution of the State of Nebraska does not prohibit the right to bail to every individual charged with a sexual offense involving penetration by force or against the will of the victim. In order for one so charged to be ineligible for bail, it must appear to the trial court that either the proof of the charge is evident or the presumption is great. In any instance in which the court is not convinced that either the proof is evident or the presumption great, then the court is not prohibited from granting bail to one so charged. Parker v. Roth 850

89. Presumption of innocence is a recognition under American jurisprudence that one charged with the commission of a crime is presumed innocent until proven guilty beyond a reasonable doubt. A defendant may rely upon the presumption and require the state to prove (1) that he committed the act charged; and (2) his legal culpability, if that is also an issue. Parker v. Roth 850

90. The question of whether a defendant is released on bail

pending trial is of no relevance to the "presumption of innocence." One charged with a crime, whether it is bailable or not, enjoys a presumption of innocence. Parker v. Roth 850

91. Detention is a usual feature of every case of arrest on a criminal charge even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense, nor does it constitute punishment, and therefore is not cruel and unusual punishment in violation of the Constitution of the United States. Parker v. Roth 850

Custody.

1. The requirement of Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), that a defendant be informed of his constitutional rights applies only to in-custody interrogations. State v. Price 308
2. A trial court may exercise the statutory power to take custody of the minor children of a marriage when it is uncertain that an award of custody to one parent or the other will be in the best interests of the children. Berry v. Berry 540
3. A decree placing custody of minor children in the court with possession in one of the parents is not required to state specific provisions for the monitoring of that possession. Berry v. Berry 540

Damages.

1. Claims for damages which do not arise from the issues pleaded should not be submitted to the jury. Suhr v. City of Scribner 364
2. Claims for damages should not be submitted to the jury when the evidence relating thereto is not sufficient to enable the jury to determine the amounts of such damage with reasonable certainty. Suhr v. City of Scribner 364
3. A party seeking damages must furnish appropriate data to enable the trier of fact to find such damages without resort to conjecture or speculation. Suhr v. City of Scribner 364
4. The measure of general damages for wrongful eviction of a lessee is the rental value of the leased premises less the amount of rent reserved for the remaining portion of the term. If no amount of damage is proved, nominal damages will be allowed. Suhr v. City of Scribner 364
5. Special damages for wrongful eviction may be awarded when such damages are certain and the natural result of the wrong. Suhr v. City of Scribner 364

6. Proof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The burden of establishing both these essential elements rests upon the plaintiff's introduction of expert medical testimony. Anderson v. Moore 453
7. Under a claim of damages for personal injuries, the evidence in proof of damages must be direct and certain. Proof that damage might or could have been caused by an accident is not sufficient to sustain a verdict for the claimant. Lintner v. Roos 476
8. Although damages for the wrongful death of a child may include loss of society, comfort, and companionship, the same must be shown by the evidence to have a monetary value. Garvin v. Coover 582
9. Damages for loss of society, comfort, and companionship resulting from the wrongful death of a child being by their very nature problematical, the amount is peculiarly for the jury to determine, and unless clearly wrong, a reviewing court will not interfere with its verdict. Garvin v. Coover 582
10. A shareholders' suit proceeding as a cause for damages on behalf of the policyholders and based upon the premise that the corporate directors violated their fiduciary duties is an equitable action and triable de novo in this court. Doyle v. Union Ins. Co. 599
11. Where a director has acted in complete good faith and breached no fiduciary duties, then he is not liable for mere mistakes in judgment; but a violation by a director of a duty required by law, whether willful, fraudulent, or negligent, is a breach of trust and the director is liable for any damages proximately caused by the breach. Doyle v. Union Ins. Co. 599
12. Directors should have a general knowledge of the manner in which the corporate business is conducted; and, where the duty of knowing exists, ignorance because of neglect of duty on the part of a director creates the same liability as actual knowledge and failure to act on that knowledge. Doyle v. Union Ins. Co. 599
13. A trustee is required to dispose of trust property on the most advantageous terms which it is reasonably possible for him to secure for the benefit of those whom he represents. Where he breaches this duty, the measure

of damages is the difference between the price for which the property was sold and its fair and reasonable market value at the time of the sale. Doyle v. Union Ins. Co. 599
14. The law does not permit the complete remedy by specific performance to be split into separate actions for different elements of damages flowing from a single breach of contract. Brezina v. Hill 773
15. Dog owners are statutorily liable for any and all damage inflicted by their dog to any person, other than a trespasser, without proof of scienter or knowledge of the dangerous propensities of their dogs for biting, and by reason of such dog or dogs killing, wounding, worrying, or chasing domestic animals. Paulsen v. Courtney 791
16. In actions based upon statutory liability for injury by a dog, the injured person will be barred from recovering if he intentionally provoked the dog, and thereby caused it to attack him. Paulsen v. Courtney 791
17. The plaintiff's burden to prove the nature and amount of its damages can not be sustained by evidence which is speculative and conjectural. Clearwater Corp. v. City of Lincoln 796
18. In an action for loss of support it properly comes within the province of the jury to take into account the purchasing power of money with respect to the commodities that are in use by the public generally. Ott v. Frank 820

Death Penalty.

In adopting sections 29-2521.01 to 29-2522, R. S. Supp., 1978, the Legislature intended to establish a procedure whereby the death penalty would be applied uniformly throughout the state. That procedure is not called into play where the death penalty is not imposed. State v. Welsh 249

Declaratory Judgments.

1. As a general rule declaratory relief is not available where a statutory remedy has been provided with another tribunal given exclusive jurisdiction over the action. Peak v. Bosse 1
2. It is a fundamental requirement of the right to declaratory relief that there be a justiciable issue between the parties. Stahmer v. Marsh 281
3. A requisite precedent condition for obtaining declaratory relief is that the parties seeking declaratory relief have a legally protectible interest or right in the controversy. Stahmer v. Marsh 281

4. The granting of declaratory relief is discretionary with the trial court. Stahmer v. Marsh 281
Westside Community Schools v. State Department of Education 712
5. A citizen taxpayer has standing to maintain an action for a declaratory judgment to challenge the accuracy and validity of the proclamation, publication, and incorporation of an amendment to Article VII, section 11, Constitution of Nebraska. Cunningham v. Exon 563
6. The granting of declaratory relief is discretionary with the trial court, and there is no absolute mandate compelling it to exercise its jurisdiction to grant such relief. Millard School Dist. v. State Department of Education 707
7. A court may refuse to enter a declaratory judgment on the validity of an administrative rule when the petition essentially presents a claim against the state for money. § 84-911, R. R. S. 1943; §§ 77-2406 et seq., R. R. S. 1943. Millard School Dist. v. State Department of Education 707
Westside Community Schools v. State Department of Education 712
8. A court may refuse to enter a declaratory judgment where it would not terminate the uncertainty or controversy giving rise to the proceedings. Millard School Dist. v. State Department of Education 707
9. Proceedings for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law for the character of action in hand. Westside Community Schools v. State Department of Education 712

Deeds.

A deed which purportedly conveys all of the interest of one joint tenant, wherein he is both grantor and grantee, is not an act which will sever the joint tenancy. Krause v. Crossley 806

Disciplinary Proceedings.

1. In disciplinary proceedings of members of the bar, the relator must establish the allegations in the formal charges by a preponderance of the evidence, so that the court is satisfied to a reasonable certainty that the charges are true. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
2. In disciplinary proceedings of members of the bar the findings must be sustained by a higher degree of proof than that required in civil actions yet falling short of the proof required to sustain a conviction in a criminal

action. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
3. In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
4. An attorney should not only avoid impropriety but should avoid the appearance of impropriety. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
5. DR7-104 (A) (1) provides that during the course of his representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
6. A city or village attorney whose duties include prosecuting violations of ordinances and state statutes may not voluntarily represent anyone charged with a crime, unless his employment as attorney for a defendant is approved by an order of the court in which the case is pending. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
7. Ignorance of the law is no excuse. It applies with even greater emphasis to an attorney at law who is expected to be learned in the law. It should be particularly applicable to a city attorney who should make himself conversant with the duties of his office. A city attorney should also be aware of disciplinary rules and advisory opinions, particularly those applicable to his duties as a public officer such as a county or city attorney. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
8. The evidence adduced in a disciplinary proceeding is reviewed de novo in this court to determine if discipline should be imposed, and, if it should, the extent thereof. State ex rel. Nebraska State Bar Assn. v. Hollstein 40

Divorce.

1. A property division in a dissolution of marriage decree from which no appeal is taken is not subject to modification, and ordinarily will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity. Bokelman v. Bokelman 17
2. 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 un-

fit for that purpose or that the best interests of the children require such action. Bokelman v. Bokelman 17
3. A decree 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 requiring modifications in the best interests of the children. White v. White 199
4. Where the trial court specifically rejects the child support provisions of a property settlement agreement and reserves determination of the amount of child support, its subsequent order pursuant to that reservation is an initial determination, and not a modification of the original decree. White v. White 199
5. In determining the amount of child support, all attendant circumstances including the status, situation, and character of the parties must be considered. White v. White 199
6. A decree for the payment of child support may be modified only when a subsequent change in circumstances requires such modification in the best interests of the children. Tilden v. Tilden 226
7. The amount of child support ordered to be paid by a parent should be determined according to the status, situation, and character of the parties; the anticipated needs of the children; and the financial position and ability of both parents. Tilden v. Tilden 226
8. The determination of an amount of child support should be reasonable according to the discretion of the court in view of the circumstances; there is no mathematical formula for the calculation of such amount. Tilden v. Tilden 226
9. In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. McCurry v. McCurry 235
10. The determination of the trial court with respect to awarding or changing the custody and support of minor children is subject to review but will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. McCurry v. McCurry 235
11. A division of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion will not be disturbed on appeal. McCurry v. McCurry 235
12. The best interests of the children is the paramount consideration in determining issues of custody. Fleharty

v. Fleharty 245
13. No preference in awarding custody of children shall be given either parent on account of the sex of such parent, and there is no presumption that either parent is more fit than the other to have such custody. § 42-364, R. S. Supp., 1976. Fleharty v. Fleharty 245
14. This court will give weight to the fact that the trial court saw and observed the witnesses and evaluated the parents as custodians. Its findings will not be reversed on appeal unless shown to be clearly against the weight of the evidence or the result of an abuse of discretion. Fleharty v. Fleharty 245
15. In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. In determining these circumstances, the financial position of the husband as well as the estimated costs of support of the children must be taken into account. A decision on this matter rests in the sound discretion of the trial court and will not be disturbed on appeal unless it appears that the court abused its discretion. Erickson v. Erickson 345
16. Allowances for child support are not final but are subject to modification when required, after notice and hearing. Erickson v. Erickson 345
17. A division of property which is not patently unfair will not ordinarily be disturbed by this court on appeal. Erickson v. Erickson 345
18. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Erickson v. Erickson 345
19. The ultimate test of alimony provisions in a decree of dissolution is one of reasonableness. Erickson v. Erickson 345
20. In a dissolution action, the distribution of property rests in the sound discretion of the trial court and, in the absence of an abuse of that discretion, will not be disturbed on appeal. Davis v. Davis 482
21. In determining the question of who should have the

care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children. Moninger v. Moninger 494

22. Ordinarily, alternating custody of young children should be avoided. Moninger v. Moninger 494

23. A trial court may exercise the statutory power to take custody of the minor children of a marriage when it is uncertain that an award of custody to one parent or the other will be in the best interests of the children. Berry v. Berry 540

24. A decree placing custody of minor children in the court with possession in one of the parents is not required to state specific provisions for the monitoring of that possession. Berry v. Berry 540

25. When dissolution of a marriage is decreed, the court may order the payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment. Berry v. Berry 540

26. In an appeal of an action for the dissolution of marriage, the Supreme Court is required to try a case de novo and reach independent conclusions on the issues presented by the appeal, without reference to conclusion or judgment reached in the District Court. Campbell v. Campbell 575

27. A judgment of the trial court fixing the amount of alimony or making distribution of property will not be disturbed on appeal unless it is patently unfair on the record. Campbell v. Campbell 575

28. In determining the question of alimony and division of property, the court shall have 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. Campbell v. Campbell 575

29. In an action for dissolution of marriage the award of attorney's 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. Campbell v. Campbell 575

30. A party to a property settlement agreement entered into pursuant to section 42-366, R. R. S. 1943, may not, as a matter of right, withdraw therefrom prior to approval or disapproval of the agreement by the trial court. Sebesta v. Sebesta 624
31. A property settlement agreement by the parties to an action for dissolution of marriage will be considered in the light of the economic circumstances of the parties and the evidence at the hearing to decide whether or not it is unconscionable; if it is not found unconscionable, it binds both the parties and the court. Sebesta v. Sebesta 624
32. An application for modification or change with respect to allowance for child support in a divorce decree may be made subsequent to the time of the decree, but must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res judicata. Quigley v. Quigley 677
33. Award of attorney's fees is discretionary with the trial court. Quigley v. Quigley 677

Drainage.

1. An owner of land has a right in the interest of good husbandry to drain ponds or basins thereon of a temporary character which have no natural outlet or course of flow by discharging the waters thereof by means of an artificial channel into a natural surface water drain on his own property and through such drain over the land of another proprietor in the general course of drainage in that locality even though the flow of such natural drain is thereby increased over the lower estate and provided that this is done in a reasonable and careful manner and without negligence. The same rule applies to the collection and discharge of other surface waters on the owner's land. Nickman v. Kirschner ... 78
2. An artificial drain constructed for the disposition of surface waters need not itself follow the precise course of drainage. It is sufficient if it follows the general course of drainage and drains into a natural watercourse which is reasonably accessible. Nickman v. Kirschner 78
3. Continuous use of a prescriptive right of drainage is the uninterrupted use of such right as the need therefor requires, even if such required use is intermittent in nature. Nickman v. Kirschner 78
4. When a trial court has determined the right to dispose of surface waters into an artificial drain under the rule

of Arthur v. Glover, and the construction of said drain has not been completed, such court should retain jurisdiction of the cause to determine the proper criteria for the construction of the drain and until the construction has been done in accordance therewith. Nickman v. Kirschner 78

Due Process.

1. In a penal statute it is not necessary that it be written as to be beyond the mere possibility of more than one construction. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden. State v. Robinson 210
2. Although a penal statute is required to be strictly construed, it should be given a sensible construction and general terms therein should be limited in their construction and application so as not to lead to injustice, oppression, or an absurd consequence. State v. Robinson 210
3. The right to full and free use and enjoyment of one's property in a manner and for such purposes as the owner may choose, so long as it is not for the maintenance of a nuisance or injurious to others, is a privilege protected by law, and one of which a property owner may not be deprived without due process of law. Eckstein v. City of Lincoln 741

Easements.

Continuous use of a prescriptive right of drainage is the uninterrupted use of such right as the need therefor requires, even if such required use is intermittent in nature. Nickman v. Kirschner 78

Elections.

1. A contract for the purchase of a water supply which creates a 40-year obligation on the part of a reclamation district must, under section 46-564, R. R. S. 1943, be submitted to the voters of the district for approval. Twin Loups Reclamation & Irr. District v. Blessing ... 513
2. The power of an irrigation district to enter into a contract with the United States for the construction, operation, and maintenance of the necessary works for the delivery and distribution of water is not limited by a requirement that the contract be approved by the voters of the district. § 46-156, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513
3. A contract for a supply of water which provides for

payment to be made by an irrigation district for a period of more than 1 year from the date of making the contract must be submitted to the legal voters of the district for approval or disapproval. § 46-1,145, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513

4. Authority to direct the purchase of a site for a schoolhouse or other school buildings in a Class VI district is reserved to the voters of the district. Banks v. Board of Education of Chase County 717

Eminent Domain.

1. Generally, in an eminent domain proceeding, evidence as to the sale of the identical property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. Clearwater Corp. v. City of Lincoln 796
2. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. Clearwater Corp. v. City of Lincoln 796
3. The trial court has a wide discretion as to whether evidence as to particular sale is admissible. Clearwater Corp. v. City of Lincoln 796

Employer and Employee.

In attempting to determine the appropriate unit for exclusive bargaining purposes under the provisions of the Nebraska Court of Industrial Relations Act, the mutuality of interest in wages, hours and working conditions, duties and skills of employees, extent of union organization among employees, the desires of employees, a policy against fragmentation of units, the established policies of the employees, and the statutory mandate to insure proper functioning and operation of governmental service, are to be considered. Those factors, however, are not the only factors to be considered, nor must each such factor be given equal weight. The factors appropriate to a bargaining unit consideration and the weight to be given each such factor must vary from case to case depending upon its particular applicability in each case. Sheldon Station Employees Assn. v. Nebraska P.P. Dist. 391

Equity.

1. Quo warranto is an action in equity and is triable de novo in this court on appeal. State v. Jones 488

2. Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. State v. Jones 488
3. An appeal to this court in an equity action is reviewed de novo. Theobald v. Agee 524
4. 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. Becker v. Natl. American Ins. Co. 545
5. Equitable estoppels operate as effectually as technical estoppels. They cannot in the nature of things be subjected to fixed and settled rules of universal application, like legal estoppels, nor hampered by the narrow confines of a technical formula. So, while the attempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case, and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances. County of Scotts Bluff v. Hughes 551
6. The essential elements of equitable estoppel are: As to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. County of Scotts Bluff v. Hughes 551
7. The doctrine of equitable estoppel will not be invoked

against a governmental entity, except under compelling circumstances where right and justice so demand. The doctrine is to be applied with caution in such cases and only for the purpose of preventing manifest injustice. County of Scotts Bluff v. Hughes 551

8. The doctrine that one who seeks the help of a court of equity must come into equity with clean hands is founded upon public policy, and conflicting public policy considerations may require relaxation or limitation of the application of that equitable maxim. Taylor v. Frost 652

9. An oral agreement to make a will is unenforceable under the statute of frauds, section 36-105, R. R. S. 1943. However, nothing contained in sections 36-101 to 36-106, R. R. S. 1943, shall be construed to bridge the powers of a court of equity to compel specific performance of agreements in cases of part performance. Rudolph v. Hartung 678

10. Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Rudolph v. Hartung 678
West Gate Bank v. Eberhardt 762

11. In an equitable action where evidence on material issues of fact is in conflict, the reviewing court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Brezina v. Hill 773

Escrows.

1. Where a third party has the duty to hold an executed certificate of title on behalf of the seller of a motor vehicle until the performance of the conditions of the sale and then deliver the certificate to the buyer, that party is acting as an escrow agent. Weiss v. Union Ins. Co. 469

2. When an executed certificate of title is held in escrow, legal title to the motor vehicle remains in its seller until performance of the conditions of the contract by the buyer. Weiss v. Union Ins. Co. 469

Estoppel.

1. Equitable estoppels operate as effectually as technical estoppels. They cannot in the nature of things be subjected to fixed and settled rules of universal application, like legal estoppels, nor hampered by the narrow confines of a technical formula. So, while the at-

tempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case, and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances. County of Scotts Bluff v. Hughes 551

2. The essential elements of equitable estoppel are: As to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. County of Scotts Bluff v. Hughes 551
3. The doctrine of equitable estoppel will not be invoked against a governmental entity, except under compelling circumstances where right and justice so demand. The doctrine is to be applied with caution in such cases and only for the purpose of preventing manifest injustice. County of Scotts Bluff v. Hughes 551

Evidence.

1. In disciplinary proceedings of members of the bar, the relator must establish the allegations in the formal charges by a preponderance of the evidence, so that the court is satisfied to a reasonable certainty that the charges are true. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
2. In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
3. The evidence adduced in a disciplinary proceeding is reviewed de novo in this court to determine if discipline should be imposed, and, if it should, the extent thereof.

State ex rel. Nebraska State Bar Assn. v. Hollstein 40
4. 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. Brahatcek v. Millard School District 86
5. In an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was a proximate cause of the plaintiff's injury or a cause which proximately contributed to it. Brahatcek v. Millard School District ... 86
6. The requirements of section 83-1009, R. R. S. 1943, which defines a mentally ill dangerous person, are met when medical diagnoses of paranoid schizophrenia and an unprovoked assault and threatening behavior are shown by clear and convincing proof. Lux v. Mental Health Board of Polk County 106
7. The opinion of a general practitioner of medicine as to mental condition is admissible in commitment proceedings, § 83-1010, R. R. S. 1943, provided a proper foundation is laid. Lux v. Mental Health Board of Polk County 106
8. The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. State v. Whitney 149
State v. Classen 324
9. In determining if two charges constitute the same offense, the test to be applied is whether each charge requires proof of additional facts or evidence. State v. Robinson 210
10. The general rule is that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. State v. Robinson 210
11. 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. Robinson 210
State v. Brady 221
12. A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial. State v. Brady 221

13. Evidence that material submitted for analysis was sent to a laboratory in a sealed envelope by registered mail and received at the laboratory in sealed condition where it was opened by the chemist performing the analysis is sufficient to establish a chain of custody. State v. Ruzicka 257
14. Where items unspecified in the warrant are seized in a valid search, the fact that the unspecified items are not admissible in evidence does not require suppression of property seized in accordance with the warrant. State v. Tara Enterprises, Inc. and Zachary Productions, Ltd. 260
15. In the determination of whether all the evidence in a specific case is sufficient to submit the issue of gross negligence to the jury, the presence of imminent danger visible to, known by, or made known to a driver, together with a persistence in negligence heedless of the consequences, are factors to be given material, if not controlling, consideration. Liston v. Bradshaw 272
16. If an expert witness desires to render an opinion without first disclosing the underlying data or information upon which the opinion is based, he must first establish by competent evidence that the matter involved in the opinion is of such nature that experts within the specific field could render such an opinion; and likewise that experts within the specific field would rely upon the data or information relied upon by the testifying expert in rendering the opinion. Northern Nat. Gas Co. v. Beech Aircraft Corp. 300
17. An error in overruling a plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt. State v. Price .. 308
18. Where the need for impeachment is small or nonexistent and the danger that the prior inconsistent statement will be considered substantively is great, the statement should be excluded. State v. Price 308
19. Errors in rulings on the admissibility of evidence which do not injuriously affect the substantial rights of the accused are not grounds for reversal. State v. Price 308
20. The foundational requirement of section 27-613, R. R. S. 1943, that a witness to be impeached be given an opportunity to explain or deny an apparently inconsistent statement, may be met either before or after the introduction of the impeaching evidence. State v. Price ... 308
21. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence. § 27-401, R. R. S. 1943. State v. Classen 324
22. The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prevented from having a fair trial. State v. Classen ... 324
23. 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. State v. Classen 324
24. A workmen's compensation award can not be based on possibility or speculation, but an ultimate fact fairly and reasonably inferable from facts and circumstances proved may be taken as established. Fite v. Ammco Tools, Inc. 351
25. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Harrington 356
26. Claims for damages should not be submitted to the jury when the evidence relating thereto is not sufficient to enable the jury to determine the amounts of such damage with reasonable certainty. Suhr v. City of Scribner 364
27. A party seeking damages must furnish appropriate data to enable the trier of fact to find such damages without resort to conjecture or speculation. Suhr v. City of Scribner 364
28. Where a criminal defendant requests a jury instruction on a lesser-included offense and presents evidence which, if believed, would provide a rational basis for acquitting the defendant of the offense charged and convicting him of the lesser offense, the requested instruction must be given. State v. Hegwood 379
29. Before the statutory restrictions prescribed by section 48-838 (2), R. S. Supp., 1976, against undue fragmentation in the public employment area can be overcome, there must be strong evidence justifying the need and propriety of such additional division. Sheldon Station Employees Assn. v. Nebraska P. P. Dist. 391
30. An owner of household goods used for family purposes is competent to express an opinion as to its value. State v. Rush 425
31. Value of personal property is a question of fact for determination of the jury. It is for the jury to resolve

conflicts in the evidence on this issue and to pass on the credibility of witnesses. State v. Rush 425

32. Evidence of other crimes, wrongs, or acts may be admissible in evidence as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. § 27-404 (2), R. R. S. 1943. State v. Rush 425

33. The burden is on the defendant to establish the manifest injustice by clear and convincing evidence. State v. Miller 443

34. The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside on appeal unless clearly wrong. In determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he is entitled to the benefit of any inferences reasonably deducible from it. Weiss v. Union Ins. Co. 469

35. A jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though not contradicted by direct evidence. Lintner v. Roos 476

36. Under a claim of damages for personal injuries, the evidence in proof of damages must be direct and certain. Proof that damage might or could have been caused by an accident is not sufficient to sustain a verdict for the claimant. Lintner v. Roos 476

37. Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. State v. Jones 488

38. Evidence which does not appear in the record cannot be considered by the Supreme Court on appeal. Moninger v. Moninger 494

39. Courts will not consider evidence which is not relevant. Moninger v. Moninger 494

40. Newly discovered evidence must be relevant and credible, and not merely cumulative. It must involve something other than credibility of witnesses who testified at the former trial. § 29-2101 (5), R. R. S. 1943. State v. Smith 501

41. Newly discovered evidence must be of such a nature as to create strong probabilities of a different result had it been offered and admitted in the former trial. State v. Smith 501
42. Hearsay statements made immediately prior to an incident which results in the death of the declarant are admissible as a statement of the declarant's then existing state of mind and emotion to prove the declarant's intent, plan, motive, or conduct under section 27-803 (2), R. R. S. 1943. State v. Smith 501
43. In an action for specific performance of an oral contract to convey real estate where partial performance is relied upon to avoid the defense of the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear, satisfactory, and unequivocal evidence, they are unenforceable unless it is also proved by evidence of like character that there has been such performance as the law requires. The acts constituting performance must be such as are referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract or relation. They must be something that the claimant would not have done unless and on account of the contract and with the direct view to its performance so that nonperformance by the other party would amount to fraud upon him. Theobald v. Agee 524
44. The findings of the trial court will be upheld unless shown to be clearly against the weight of the evidence or the result of an abuse of discretion. Berry v. Berry 540
45. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Pankey 595
46. Before evidence of previous sexual activity may be introduced into evidence, in order to establish a pattern of conduct or behavior on the part of the victim, it must be shown that such earlier involvement was voluntary. State v. Pankey 595
47. The testimony of expert witnesses is not treated any differently in the fact-finding process than that of witnesses generally when it comes to determining the weight and credibility of the testimony, whether the fact finder is the judge or the jury. Doyle v. Union Ins. Co. 599
48. A written instrument is open to explanation by parol evidence when its terms are susceptible to two con-

structions, or where the language employed is vague or ambiguous. Griffeth v. Sawyer Clothing, Inc. 631
49. Parol evidence is admissible to explain and show the true nature of the transaction between the parties. Griffeth v. Sawyer Clothing, Inc. 631
50. Assignments of contracts containing clauses restricting competition will be strictly construed and the assignment limited to the intent of the parties as disclosed by the terms of the instrument if they are complete and unambiguous. Where the language in the contract regarding assignment is susceptible of more than one construction, or is vague or ambiguous, extrinsic evidence may be received for the purpose of determining the intent of the parties. Griffeth v. Sawyer Clothing, Inc. 631
51. Where a contract is silent with respect to time of performance, the reasonable time which is presumed by law is a rebuttable presumption, and parol or extrinsic evidence may be received to rebut that presumption. Gustav Thieszen Irr. Co., Inc. v. Meinberg 666
52. One seeking specific performance of an oral contract for the conveyance of real estate has the burden of proving by a preponderance of the evidence a contract that is clear, satisfactory, and unequivocal in its terms. Rudolph v. Hartung 678
53. It is very proper that the assertion of such a contract, especially when it is claimed to be entirely in parol, should be regarded by the court with grave suspicion, and the establishment thereof required by evidence which clearly indicates the minds of the parties met upon the terms of the contract sought to be established. Rudolph v. Hartung 678
54. Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Rudolph v. Hartung 678
West Gate Bank v. Eberhardt 762
55. Any statement made by or attributable to a party to an action which constitutes an admission against his interest and tends to establish or disprove any material fact in the case is competent evidence against him. Ferlise v. Raznick 745
56. In a proceeding in juvenile court under sections 43-202 (2) and 43-209, R. S. Supp., 1978, the court may terminate all parental rights of the parents if the court finds it would be in the best interests of the child to so terminate parental rights. The decision to terminate

parental rights need not be based upon proof beyond a reasonable doubt. State v. Chant 750
57. 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. The judgment of the trial court will be upheld on appeal unless there is an abuse of discretion. State v. Chant 750
58. In an equitable action where evidence on material issues of fact is in conflict, the reviewing court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Brezina v. Hill 773
59. Generally, in an eminent domain proceeding, evidence as to the sale of the identical property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. Clearwater Corp. v. City of Lincoln 796
60. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. Clearwater Corp. v. City of Lincoln 796
61. The trial court has a wide discretion as to whether evidence as to particular sale is admissible. Clearwater Corp. v. City of Lincoln 796
62. The plaintiff's burden to prove the nature and amount of its damages can not be sustained by evidence which is speculative and conjectural. Clearwater Corp. v. City of Lincoln 796
63. The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. An opinion has no probative force if the assumptions upon which it is based are shown not to be true. Clearwater Corp. v. City of Lincoln 796
64. Expert testimony should not be received, of if received should be stricken, if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. Clearwater Corp. v. City of Lincoln 796
65. Where the opinion testimony of an expert witness does not have a sound and reasonable basis it should be stricken. Clearwater Corp. v. City of Lincoln 796
66. The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the

fundamental integrity of all that is embraced in the constitutional concept of trial by jury. Simants v. State 828

67. In order for a trial court to find that a defendant "can benefit by treatment" within the meaning of the Nebraska Sexual Sociopath Act so as to require his confinement to a regional center, the court must find by a preponderance of the evidence that such treatment will result in the cure of the defendant. In the absence of such a finding the court must determine that the defendant cannot benefit from such treatment and should be confined in the Nebraska Penal and Correctional Complex as prescribed by the Nebraska Sexual Sociopath Act. State v. Sell 840

Extradition.

1. Whether or not the state demanding extradition has violated the right of a fugitive to a speedy trial is a question for the demanding state to determine. West v. Janing 141
2. It is the obligation of the asylum state in extradition proceedings to determine whether the requisition charges a crime under the law of the demanding state. West v. Janing 141
3. In an extradition proceeding, where an examination of prior judicial precedent of the demanding state makes it at least doubtful that the demanding state is attempting to retroactively apply a judicial enlargement of criminal statutes, the asylum state ought, as a matter of comity, to refrain from determining the issue in analogy to the principle that the constitutionality of the statutes of a sister state defining a crime should be tested in the sister state. West v. Janing 141

Fees and Costs.

1. Architectural fees are general expenses, not expenses of building which must be submitted to the voters. Banks v. Board of Education of Chase County 717
2. Taxation of costs is a matter resting in the sound discretion of the trial court. Banks v. Board of Education of Chase County 717
3. Court costs are not fines or penalties within the meaning of Article VII, section 5, of the Constitution of Nebraska. DeCamp v. City of Lincoln 727
4. Where the record shows that an ordinance prescribes uniform court costs for a range of offenses irrespective of the amount of the fine and that the costs are actually collected pursuant to a court proceeding and nothing in

the record shows that the costs collected are not compensatory, then the sums collected as court costs will not be held to be penalties. DeCamp v. City of Lincoln 727

Foreclosure.

Where a secured party in a mortgage foreclosure action seeks only to sell the real estate and to apply the sale proceeds against the debt of the mortgagors, the action is a proceeding against collateral pledged by the mortgagor and is not an action for a deficiency judgment. First Nat. Bank of Omaha v. Kizzier 369

Fraud.

1. A property division in a dissolution of marriage decree from which no appeal is taken is not subject to modification, and ordinarily will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity. Bokelman v. Bokelman 17
2. A communication between a lawyer and a client is not privileged under the provisions of section 27-503, R. R. S. 1943, if the services of the lawyer are sought or obtained to enable or aid anyone to commit or plan to commit what the client knew, or reasonably should have known, to be a fraud. Doyle v. Union Ins. Co. 599
3. The essential elements required to sustain an action for fraudulent misrepresentation are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage. Negus-Sweenie, Inc. v. Beaver Lake Corp. 671
4. Valuation of property is a matter of judgment, and a contract based upon inadequate consideration will not be set aside on that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself evidence of fraud. West Gate Bank v. Eberhardt 762

Frauds, Statute of.

1. In an action for specific performance of an oral contract to convey real estate where partial performance is relied upon to avoid the defense of the statute of frauds, the evidence of the alleged contract and its terms must be clear, satisfactory, and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though

proved by clear, satisfactory, and unequivocal evidence, they are unenforceable unless it is also proved by evidence of like character that there has been such performance as the law requires. The acts constituting performance must be such as are referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract or relation. They must be something that the claimant would not have done unless and on account of the contract and with the direct view to its performance so that nonperformance by the other party would amount to fraud upon him. Theobald v. Agee 524

2. An oral agreement to make a will is unenforceable under the statute of frauds, section 36-105, R. R. S. 1943. However, nothing contained in sections 36-101 to 36-106, R. R. S. 1943, shall be construed to bridge the powers of a court of equity to compel specific performance of agreements in cases of part performance. Rudolph v. Hartung 678

Governmental Subdivisions.

The doctrine of equitable estoppel will not be invoked against a governmental entity, except under compelling circumstances where right and justice so demand. The doctrine is to be applied with caution in such cases and only for the purpose of preventing manifest injustice. County of Scotts Bluff v. Hughes 551

Guardian and Ward.

1. Before a guardian may proceed to sell the real estate of his ward he must comply with the statutes in effect at the time of sale. Albert v. Stueber 408
2. When a guardian is sued in his official capacity only, a judgment cannot be rendered against him personally. Albert v. Stueber 408

Guilty Pleas.

1. The standard for accepting a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Curnyn 135
2. Before accepting a guilty plea a judge should sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea. State v. Curnyn 135
3. The constitutional requirement for acceptance of a guilty plea is that the plea be voluntary and intelligent. State v. Curnyn 135

4. A motion to withdraw a guilty plea addresses itself to the direction of the trial judge, and, in the absence of a clear abuse of that discretion, the appellate court will not interfere. State v. Miller 443
5. It is not proper for a trial judge to permit the withdrawal of a guilty plea which was knowingly, intelligently, and voluntarily made unless such withdrawal is necessary to correct a manifest injustice. State v. Miller 443
6. When the defendant waives his state court remedies and admits his guilt, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. State v. Miller 443
7. A guilty plea may not be withdrawn as a matter of right solely because the defendant chose to withhold facts from his attorney and the court which, if believed, might have prevented the attorney from recommending that the plea be entered or the court from accepting it. State v. Miller 443
8. A plea of guilty or nolo contendere is not involuntary because it is induced by the filing of an habitual criminal charge. State v. Country 509
9. Questioning the defendant as to the factual basis for the charge is not required where the defendant enters a plea of nolo contendere. State v. Country 509
10. A plea of guilty or nolo contendere waives every defense to the charge, whether the defense is procedural, statutory, or constitutional. State v. Country 509

Habeas Corpus.

1. To release a person from a sentence of imprisonment by habeas corpus it must appear that the sentence was absolutely void. Piercy v. Parratt 102
2. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose, unless the sentence has been fully served and the prisoner is being illegally held. Piercy v. Parratt 102

Habitual Criminals.

A plea of guilty or nolo contendere is not involuntary because it is induced by the filing of an habitual criminal charge. State v. Country 509

Hearings.

1. A court may properly deny an evidentiary hearing

upon a motion to vacate a conviction filed under section 29-3001, R. R. S. 1943, upon a determination after an examination of the files and records of the case that the petitioner is entitled to no relief. State v. Miles 126
2. There is no right to appeal to this court from a decision binding the defendant over for trial after a preliminary hearing. State v. Price 308
3. A magistrate is not required to set out specific findings of fact after a preliminary hearing. State v. Price 308
4. Allowances for child support are not final but are subject to modification when required, after notice and hearing. Erickson v. Erickson 345
5. When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the children require that a final dispositional hearing be held without delay. State v. Chant 750
6. Where a juvenile defendant is being prosecuted in the District Court and has not had an opportunity for a hearing on the matter of transfer to juvenile jurisdiction as required by section 43-202.02, R. S. Supp., 1978, ordinarily the proper procedure to cure the procedural defect is to hold such a hearing and to determine whether or not such transfer should have been granted. If the court, based upon sufficient evidence, finds the evidence did not require the transfer, then the conviction need not be set aside in post conviction proceedings. State v. Tweedy 824

Hearsay.

Hearsay statements made immediately prior to an incident which results in the death of the declarant are admissible as a statement of the declarant's then existing state of mind and emotion to prove the declarant's intent, plan, motive, or conduct under section 27-803 (2), R. R. S. 1943. State v. Smith 501

Highways.

1. It is generally negligence, as a matter of law, for a motorist to drive his vehicle on a highway in such manner that he is unable to stop or turn aside in time to avoid a collision with an object within his range of vision. Greenwade v. Drake 815
2. An exception exists to the foregoing rule but only when the object struck is such that it blends into the surrounding area and cannot ordinarily be observed by the exercise of ordinary care in time to avoid a collision. Greenwade v. Drake 815

Hospitals.

1. A county may be liable for the reasonable value of necessary hospital services furnished to a poor person where the county board after receiving notice of the situation neglects or refuses to make any arrangements for the care of the poor person. Creighton-Omaha Regional Health Care Corp. v. Douglas County 686
2. A hospital which furnishes hospital services to a poor person without prior authorization by the county board acts at its peril with respect to reimbursement from county funds. Creighton-Omaha Regional Health Care Corp. v. Douglas County 686

Implied Consent Law.

1. Fact that appellant consumed alcohol subsequent to time of accident does not make officer's request for blood test unreasonable. Rudat v. Pearson 331
2. Fact that appellant consumed alcohol subsequent to time of accident does not make his refusal to take blood test reasonable. Rudat v. Pearson 331

Incarceration.

1. To release a person from a sentence of imprisonment by habeas corpus it must appear that the sentence was absolutely void. Piercy v. Parratt 102
2. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose, unless the sentence has been fully served and the prisoner is being illegally held. Piercy v. Parratt 102

Indictments and Informations.

An agreement that charges will be dropped if an accused person passes a polygraph test is not binding unless it has been approved by the trial court. State v. Joseph 268

Infants.

1. The best interests of the children is the paramount consideration in determining issues of custody. Fleharty v. Fleharty 245
2. No preference in awarding custody of children shall be given either parent on account of the sex of such parent, and there is no presumption that either parent is more fit than the other to have such custody. § 42-364, R. S. Supp., 1976. Fleharty v. Fleharty 245

Instructions.

1. Nebraska Jury Instruction No. 14.52A pertaining to Miranda rights need not be given even if requested by the defendant. State v. Price 308
2. Where a criminal defendant requests a jury instruction on a lesser-included offense and presents evidence which, if believed, would provide a rational basis for acquitting the defendant of the offense charged and convicting him of the lesser offense, the requested instruction must be given. State v. Hegwood 379
3. Where the record clearly shows an oral request for a jury instruction, and full understanding of the requested instruction by the trial court, review of the court's ruling on the instruction will not be precluded by failure to reduce the request to writing. § 25-1111, R. R. S. 1943. State v. Hegwood 379
4. The trial court may refuse a requested instruction where the substance of the request is covered in the instructions given. State v. Booth 692
5. It is prejudicial error for the trial court to include in its instructions to the jury allegations of fact found in the pleadings which have not been supported by the evidence. Milliron Ranch Corp. v. Brinkman 703
6. The value of money, i.e. its purchasing power, is elemental within the knowledge and experience of man generally, and is not a proper subject for an instruction. Ott v. Frank 820

Insurance.

1. An exclusion in an automobile liability insurance policy which excludes coverage under uninsured motorist coverage for an insured while occupying an owned highway vehicle, other than an insured automobile, is valid. Herrick v. Liberty Mut. Fire Ins. Co. 116
2. A shareholders' suit proceeding as a cause for damages on behalf of the policyholders and based upon the premise that the corporate directors violated their fiduciary duties is an equitable action and triable de novo in this court. Doyle v. Union Ins. Co. 599
3. Section 44-224.05, R. R. S. 1943, which authorizes the Director of Insurance of the State of Nebraska to approve or disapprove contracts of bulk reinsurance, by which a domestic insurance company operating on other than the stock plan, may cede its business to another licensed insurer, and which statute requires that such contract of bulk reinsurance make a fair and equitable provision for distribution to policyholders of the ceding company of their equity in the surplus funds, does not

abrogate the common law duties of corporate directors to policyholders of a mutual insurance company and the approval of the contract by the Director of Insurance does not insulate the directors of the company from liability for violation of their fidiciary duties. Doyle v. Union Ins. Co. 599

Intent.

1. The intent of the lien law is to protect the materialman. The law puts the burden on the owner at his own risk to make certain that payment has been made for all materials delivered to the job. The Wickes Corporation v. Frye 23
2. In the construction of the terms of an agreement, effect must be given, if possible, to all portions of the contract in order to determine and effectuate the intention of the parties. Bishop Buffets, Inc. v. Westroads, Inc. 171
3. The addition of interior walls does not constitute "expansion or enlargement" of a shopping center unless it is otherwise clear that the parties intended such a construction under the terms of their lease. Bishop Buffets, Inc. v. Westroads, Inc. 171
4. The cardinal rule in constructing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to the law. Page, Higgins, Clyde & Avery v. Buchfinck 411
5. Where the question is one of ascertaining the intention of the testator, any hard and fast rule is inappropriate. The modern view favors recognizing that a will should be construed in accordance with the language used in each particular case as interpreted in the light of all the circumstances. Page, Higgins, Clyde & Avery v. Buchfinck 411
6. A devise which charges the devisee thereof personally with the duty of paying the testator's debts, or of paying a legacy, or of performing any other onerous act is significant as indicating an intent to create in the devisee an estate in fee simple absolute. Page, Higgins, Clyde & Avery v. Buchfinck 411
7. In the construction of a statute, no sentence, clause, or word should be rejected as meaningless or superfluous; rather, the plain and ordinary meaning of all the language employed should be taken into account in order to determine the legislative will. Weiss v. Union Ins. Co. 469
8. The delivery of a written instrument is largely a question of intent, which is to be determined from all the facts and circumstances of the particular case. There

must be an intent on the part of the grantor that the instrument operate as a muniment of title to take effect presently and an acceptance by the grantee with the intent to take title. Weiss v. Union Ins. Co. 469
9. When several documents are executed successively as a part of the same general transaction, the language of each document and the order of their execution may be considered as indications of the intention of the makers. Haerry v. Hoffschneider 534
10. Assignments of contracts containing clauses restricting competition will be strictly construed and the assignment limited to the intent of the parties as disclosed by the terms of the instrument if they are complete and unambiguous. Where the language in the contract regarding assignment is susceptible of more than one construction, or is vague or ambiguous, extrinsic evidence may be received for the purpose of determining the intent of the parties. Griffeth v. Sawyer Clothing, Inc. 631
11. It is very proper that the assertion of such a contract, especially when it is claimed to be entirely in parol, should be regarded by the court with grave suspicion, and the establishment thereof required by evidence which clearly indicates the minds of the parties met upon the terms of the contract sought to be established. Rudolph v. Hartung 678

Interest.

1. Where money or property belonging to another was not paid or turned over to the person entitled to receive it at the time when it should have been paid or turned over, interest is generally allowed. Brezina v. Hill 773
2. Interest is allowable where the conduct of a party justifies its allowance, particularly where money or property belonging to another is wrongfully withheld to the enrichment of the debtor and to the detriment of the creditor. Brezina v. Hill 773

Joint Tenancy.

1. A deed which purportedly conveys all of the interest of one joint tenant, wherein he is both grantor and grantee, is not an act which will sever the joint tenancy. Krause v. Crossley 806
2. Our statute which modifies the common law rules of cotenancy, section 76-118, R. R. S. 1943, does not change the common law rendering ineffective an attempted transfer of an interest in property by a joint tenant to himself as a single individual, for the purpose of

severing the joint tenancy. Krause v. Crossley 806

Judges.

1. An adjudicative fact to be judicially noticed must be one not subject to reasonable dispute in that it is either (a) generally known within the jurisdiction of the court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. § 27-201 (2), R. R. S. 1943. Grubaugh v. State ex rel. State Real Estate Commission 75
2. A judge or court may take judicial notice, whether requested or not. Bank of Mead v. St. Paul Fire & Marine Ins. Co. 403

Judgments.

1. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment, except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943. Bokelman v. Bokelman 17
2. If the language used in a judgment is ambiguous, there is room for construction, but if the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect of the decree must be declared in the light of the literal meaning of the language used. Bokelman v. Bokelman 17
3. 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. Brahatcek v. Millard School District 86
4. A verdict may be set aside as excessive by the trial court or on appeal when, and not unless, it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law. Brahatcek v. Millard School District 86
5. Where a correct judgment or order has been made, the mere fact that it contains erroneous declarations of law does not require reversal. Lux v. Mental Health Board of Polk County 106
6. A decree 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 requiring modifications in the best interests of the children. White v. White 199
7. Where the trial court specifically rejects the child support provisions of a property settlement agreement and reserves determination of the amount of child support, its subsequent order pursuant to that reservation is an initial determination, and not a modification of the original decree. White v. White 199
8. 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. Brady 221
State v. Booth 692
9. The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong. Hudson Foods, Inc. v. L & B Corp. & Estate of Clark 291
10. Where trial is to the court, a general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts. Hudson Foods, Inc. v. L & B Corp. & Estate of Clark 291
11. Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. Bank of Mead v. St. Paul Fire & Marine Ins. Co. 403
12. Where a second action is on the same cause of action and between the same parties as the first action, the judgment in the former action ordinarily is conclusive in the second action as to every question which was or might have been presented in determining the former. Bank of Mead v. St. Paul Fire & Marine Ins. Co. 403
13. When a guardian is sued in his official capacity only, a judgment cannot be rendered against him personally. Albert v. Stueber 408
14. The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside on appeal unless clearly wrong. In determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party,

every controverted fact must be resolved in that party's favor, and he is entitled to the benefit of any inferences reasonably deducible from it. Weiss v. Union Ins. Co. 469

15. Attorney's fees, if recoverable by the terms of an agreement, are included in the judgment and are not taxable as costs. Haerry v. Hoffschneider 534
16. The findings of the trial court will be upheld unless shown to be clearly against the weight of the evidence or the result of an abuse of discretion. Berry v. Berry 540
17. 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. Becker v. Natl. American Ins. Co. 545
18. The District Court has inherent power to vacate or modify its own judgment at any time during the term at which it is rendered. Such action rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be interfered with. Campbell v. Campbell 575
19. In determining the sufficiency of evidence to sustain a conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Pankey 595
20. 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. The judgment of the trial court will be upheld on appeal unless there is an abuse of discretion. State v. Chant 750
21. Before a criminal matter may be appealed to the Supreme Court, it must be a final judgment, and no judgment will be regarded as final unless the sentence is pronounced. State v. Shaw 766

Judicial Notice.

1. A judge or court may take judicial notice, whether requested or not. Bank of Mead v. St. Paul Fire & Marine Ins. Co. 403
2. Judicial notice may be taken at any stage of the proceeding. Bank of Mead v. St. Paul Fire & Marine Ins. Co. 403

Juries.

1. A verdict may be set aside as excessive by the trial court or on appeal when, and not unless, it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law. Brahatcek v. Millard School District 86
2. A six-member jury provides an adequate and representative cross section of the community which is sufficient to determine and apply community standards in obscenity cases. State v. Tara Enterprises, Inc. and Zachary Productions, Ltd. 260
3. In an action based on gross negligence under the Nebraska guest statute, courts cannot hesitate in directing a verdict where the conviction is clear that negligence in a very high degree is not present. Liston v. Bradshaw 272
4. However, if there is adequate proof of negligence, a verdict should only be directed where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. Liston v. Bradshaw 272
5. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence. Liston v. Bradshaw 272
6. Issues of liability which have not been pleaded should not be submitted to the jury for determination. Suhr v. City of Scribner 364
7. Claims for damages which do not arise from the issues pleaded should not be submitted to the jury. Suhr v. City of Scribner 364
8. Claims for damages should not be submitted to the jury when the evidence relating thereto is not sufficient to enable the jury to determine the amounts of such damage with reasonable certainty. Suhr v. City of Scribner 364
9. A party seeking damages must furnish appropriate data to enable the trier of fact to find such damages without resort to conjecture or speculation. Suhr v. City of Scribner 364
10. Value of personal property is a question of fact for determination of the jury. It is for the jury to resolve conflicts in the evidence on this issue and to pass on the credibility of witnesses. State v. Rush 425
11. A jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though not contradicted by direct evi-

dence. Lintner v. Roos 476
12. Damages for loss of society, comfort, and companionship resulting from the wrongful death of a child being by their very nature problematical, the amount is peculiarly for the jury to determine, and unless clearly wrong, a reviewing court will not interfere with its verdict. Garvin v. Coover 582
13. In determining the sufficiency of evidence to sustain a conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Pankey 595
14. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Pankey 595
15. Whether a specific delivery date was agreed upon or the question of whether delivery was affected within a reasonable time is ordinarily a question of fact for the jury, not a question of law for the court. Gustav Thieszen Irr. Co., Inc. v. Meinberg 666
16. The court should eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend. Ferlise v. Raznick 745
17. The question of whether one is guilty of intentionally provoking a dog, and is thus barred from recovering for a resulting injury by the dog, is generally considered a question of fact to be determined by the jury. Paulsen v. Courtney 791
18. In an action for loss of support it properly comes within the province of the jury to take into account the purchasing power of money with respect to the commodities that are in use by the public generally. Ott v. Frank 820
19. The value of money, i.e. its purchasing power, is elemental within the knowledge and experience of man generally, and is not a proper subject for an instruction. Ott v. Frank 820
20. Where a party has sustained the burden of a trial and has succeeded in securing the verdict of a jury on controverted issues of fact, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Ott v. Frank 820
21. It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment.

Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated. Simants v. State 828

22. The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. Simants v. State 828

Jurisdiction.

1. The Nebraska Workmen's Compensation Court has exclusive original jurisdiction in actions arising under the Workmen's Compensation Act. Peak v. Bosse 1
2. As a general rule declaratory relief is not available where a statutory remedy has been provided with another tribunal given exclusive jurisdiction over the action. Peak v. Bosse 1
3. When a trial court has determined the right to dispose of surface waters into an artificial drain under the rule of Arthur v. Glover, and the construction of said drain has not been completed, such court should retain jurisdiction of the cause to determine the proper criteria for the construction of the drain and until the construction has been done in accordance therewith. Nickman v. Kirschner 78
4. The probate court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will. It has no jurisdiction to construe wills to determine the rights of devisees or legatees as between themselves, or between the executor and persons claiming adversely to the estate. Such latter jurisdiction is in the District Court. Page, Higgins, Clyde & Avery v. Buchfinck 411
5. A plaintiff must plead and prove the jurisdictional facts, the facts which show that the court has jurisdiction of the subject matter of the action. Creighton-Omaha Regional Health Care Corp. v. Douglas County 686

Jurors.

1. When an improper communication with a juror or jurors is shown to have taken place in a criminal case, a rebuttable presumption of prejudice arises and the burden is on the State to prove that the communication was not prejudicial. Simants v. State 828
2. Unauthorized communications between jurors and third persons or witnesses during the course of jury deliberations are absolutely forbidden and invalidate the verdict unless their harmlessness is made to appear.

Simants v. State 828
3. Under section 27-606(2), R. R. S. 1943, a juror may testify as to whether extraneous prejudicial information was improperly brought to the jury's attention. No evidence may be received as to the effect of any statement upon a juror's mind, its influence one way or another, or the mental processes of a juror in connection therewith. Simants v. State 828

Kidnapping.

While the purpose of committing the crime of kidnapping may be to make it possible to commit some other crime, the crime of kidnapping is a separate and distinct crime for which prosecution may be had. State v. Pankey 595

Labor and Labor Relations.

1. A union workman's refusal of a job offer because of a union rule prohibiting such acceptance as a result of the workman's status on a union out-of-work list created solely by union action, is a failure without good cause to accept suitable work within the meaning and purview of the Nebraska unemployment compensation statute, section 48-628, R. R. S. 1943. Wentz Heating & Air Conditioning Co. v. Kiene 202
2. The provisions of section 48-628 (c) (2) (iii), R. R. S. 1943, refer to conditions attached to a job offer by an employer and not to other conditions unilaterally imposed upon the employment process by a labor union. Wentz Heating & Air Conditioning Co. v. Kiene 202
3. In attempting to determine the appropriate unit for exclusive bargaining purposes under the provisions of the Nebraska Court of Industrial Relations Act, the mutuality of interest in wages, hours and working conditions, duties and skills of employees, extent of union organization among employees, the desires of employees, a policy against fragmentation of units, the established policies of the employees, and the statutory mandate to insure proper functioning and operation of governmental service, are to be considered. Those factors, however, are not the only factors to be considered, nor must each such factor be given equal weight. The factors appropriate to a bargaining unit consideration and the weight to be given each such factor must vary from case to case depending upon its particular applicability in each case. Sheldon Station Employees Assn. v. Nebraska P.P. Dist. 391
4. Before the statutory restrictions prescribed by section

48-838 (2), R. S. Supp., 1976, against undue fragmentation in the public employment area can be overcome, there must be strong evidence justifying the need and propriety of such additional division. Sheldon Station Employees Assn. v. Nebraska P. P. Dist. 391
5. The mere fact that a public employer voluntarily creates employee committees, for the purpose of meeting and conferring about matters of mutual interest between the public employer and the public employee, does not establish that the public employer has recognized such units as the exclusive collective bargaining agent. Sheldon Station Employees Assn. v. Nebraska P. P. Dist. 391

Leases.

1. Real estate taxes will not be deemed to be a cost of "operating and maintaining common areas" within the meaning of a shopping center lease clause where a separate clause specifically addresses the payment of taxes. Bishop Buffets, Inc. v. Westroads, Inc. 171
2. The practical construction put upon a lease contract cannot control the express, unambiguous provisions of the instrument itself. Bishop Buffets, Inc. v. Westroads, Inc. 171
3. The addition of interior walls does not constitute "expansion or enlargement" of a shopping center unless it is otherwise clear that the parties intended such a construction under the terms of their lease. Bishop Buffets, Inc. v. Westroads, Inc. 171
4. The measure of general damages for wrongful eviction of a lessee is the rental value of the leased premises less the amount of rent reserved for the remaining portion of the term. If no amount of damage is proved, nominal damages will be allowed. Suhr v. City of Scribner 364
5. Special damages for wrongful eviction may be awarded when such damages are certain and the natural result of the wrong. Suhr v. City of Scribner 364

Legislature.

1. The Legislature may not prescribe a de novo standard of review for judicial review of an exercise of legislative authority as this would violate the constitutional requirement of separation of powers. Lux v. Mental Health Board of Polk County 106
2. In adopting sections 29-2521.01 to 29-2522, R. S. Supp., 1978, the Legislature intended to establish a procedure whereby the death penalty would be applied uniformly

throughout the state. That procedure is not called into play where the death penalty is not imposed. State v. Welsh 249
3. Determination of the feasibility of a water reclamation project is a legislative function and is not within the scope of the judicial review authorized by section 46-568, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513
4. Determination of the adequacy of a supply of water for a reclamation project is a legislative function and is not within the scope of the judicial review authorized by section 46-568, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513

Liability.

An exclusion in an automobile liability insurance policy which excludes coverage under uninsured motorist coverage for an insured while occupying an owned highway vehicle, other than an insured automobile, is valid. Herrick v. Liberty Mut. Fire Ins. Co. 116

Limitations of Actions.

1. The right to collaterally attack orders made in contravention of the Public Meetings Act for a period of 1 year is specifically provided by section 84-1414, R. R. S. 1943. Witt v. School District No. 70 63
2. Where labor or material has been furnished by a party under distinct contracts, the claim for a mechanic's lien under each contract must be filed within the time limited by the statutes for that purpose. Omaha Nat. Bank v. Continental Western Corp. 238
3. A change in a statute of limitations which does not impair existing substantive rights but only alters the procedural enforcement of those rights operates on all proceedings instituted after its passage, whether the rights accrued before or after that date. Denver Wood Products Co. v. Frye 286
4. Laws prescribing the time within which particular rights may be enforced relate to remedies only and not substantive rights. Denver Wood Products Co. v. Frye 286

Malpractice.

1. Malpractice may consist in the lack of skill or care in diagnosis as well as in treatment. Anderson v. Moore 453
2. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a doctor in a particular community, the test is that which physicians or surgeons in the same neighborhood and in

similar communities engaged in the same or similar lines of work would ordinarily exercise for the benefit of their patients. Anderson v. Moore 453
3. Proof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in questioning negligently departed from that standard in his treatment of the plaintiff. The burden of establishing both these essential elements rests upon the plaintiff's introduction of expert medical testimony. Anderson v. Moore 453

Mandamus.

1. Mandamus is an extraordinary remedy which is not awarded as a matter of right. State ex rel. Newbold v. County of Buffalo 813
2. A writ of mandamus should not issue where there is another plain and adequate remedy available. State ex rel. Newbold v. County of Buffalo 813
3. The relator must show clearly and conclusively that he is entitled to the particular relief requested and the respondents are legally obligated to act. State ex rel. Newbold v. County of Buffalo 813
4. The duty to act must exist at the time the writ is applied for and the duty to act must be clear. State ex rel. Newbold v. County of Buffalo 813
5. Mandamus may not be used to control the exercise of judicial discretion. State ex rel. Newbold v. County of Buffalo 813

Mechanic's Liens.

1. The intent of the lien law is to protect the materialman. The law puts the burden on the owner at his own risk to make certain that payment has been made for all materials delivered to the job. The Wickes Corporation v. Frye 23
2. The lien of a materialman for materials furnished for the erection of a building, by virtue of an agreement with the contractor, extends to such materials only as are used in or delivered at the building for use therein. The Wickes Corporation v. Frye 23
3. An architect who furnishes plans and specifications for an improvement on real estate is entitled to a mechanic's lien upon such real estate. Omaha Nat. Bank v. Continental Western Corp. 238

4. Where labor or material has been furnished by a party under distinct contracts, the claim for a mechanic's lien under each contract must be filed within the time limited by the statutes for that purpose. Omaha Nat. Bank v. Continental Western Corp. 238
5. The mechanic's lien statutes require a liberal construction so as to effectuate their objects, and they should enforce the equitable principle that everyone who, by his labor and materials, contributes to the enhancement of the property of another should be compensated. Omaha Nat. Bank v. Continental Western Corp. 238
6. One who furnishes material used in the construction of an improvement is not excluded from the benefits of the mechanic's lien law solely because the materials so used were furnished to a subcontractor of a contractor. Vince Kess, Inc. v. Krueger Constr. Co. 673
7. The object of the mechanic's lien law being to secure the claims of those who have contributed to the erection of a building, it should receive the most liberal construction to give full effect to its provisions. Vince Kess, Inc. v. Krueger Constr. Co. 673
8. The object of the statute in permitting an account for labor and materials furnished to be filed for record is to apprise persons dealing with the real estate of the existence of such claim for a lien. Vince Kess, Inc. v. Krueger Constr. Co. 673

Mental Health.

1. It is the nature of the function, and not merely its statutory origin, which determines whether a governmental function is legislative or judicial. Lux v. Mental Health Board of Polk County 106
2. The determination of whether a function is legislative or judicial must necessarily be made on a case-by-case basis as it is not possible to define precisely the line between the functions. Lux v. Mental Health Board of Polk County 106
3. Commitment proceedings are judicial in nature, and District Courts must review the decisions of mental health boards de novo on the records. Lux v. Mental Health Board of Polk County 106
4. The requirements of section 83-1009, R. R. S. 1943, which defines a mentally ill dangerous person, are met when medical diagnoses of paranoid schizophrenia and an unprovoked assault and threatening behavior are shown by clear and convincing proof. Lux v. Mental Health Board of Polk County 106
5. The opinion of a general practitioner of medicine as to

mental condition is admissible in commitment proceedings, § 83-1010, R. R. S. 1943, provided a proper foundation is laid. Lux v. Mental Health Board of Polk County 106

6. Section 83-1009(1), R. R. S. 1943, although it refers to "recent violent acts," does not require evidence of more than one violent act or threat. § 49-802, R. R. S. 1943. Lux v. Mental Health Board of Polk County 106

Minority Shareholders.

In a proceeding by a dissenting shareholder seeking a finding and determination of the fair value of shares of stock under the provisions of section 44-133.06, R. R. S. 1943, the statutory provisions as to a judgment against the insurance company for the fair value of the shares, together with interest, are mandatory. Becker v. Natl. American Ins. Co. 545

Minors.

1. 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. Bokelman v. Bokelman 17
2. Whether or not a minor 14 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact for the jury. Brahatcek v. Millard School District 86
3. A decree for the payment of child support may be modified only when a subsequent change in circumstances requires such modification in the best interests of the children. Tilden v. Tilden 226
4. The amount of child support ordered to be paid by a parent should be determined according to the status, situation, and character of the parties; the anticipated needs of the children; and the financial position and ability of both parents. Tilden v. Tilden 226
5. The determination of an amount of child support should be reasonable according to the discretion of the court in view of the circumstances; there is no mathematical formula for the calculation of such amount. Tilden v. Tilden 226
6. In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. McCurry v. McCurry 235

7. The determination of the trial court with respect to awarding or changing the custody and support of minor children is subject to review but will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. McCurry v. McCurry 235
8. The best interests of the children is the paramount consideration in determining issues of custody. Fleharty v. Fleharty 245
9. No preference in awarding custody of children shall be given either parent on account of the sex of such parent, and there is no presumption that either parent is more fit than the other to have such custody. § 42-364, R. S. Supp., 1976. Fleharty v. Fleharty 245
10. In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children. Moninger v. Moninger 494
11. Ordinarily, alternating custody of young children should be avoided. Moninger v. Moninger 494
12. A trial court may exercise the statutory power to take custody of the minor children of a marriage when it is uncertain that an award of custody to one parent or the other will be in the best interests of the children. Berry v. Berry 540
13. A decree placing custody of minor children in the court with possession in one of the parents is not required to state specific provisions for the monitoring of that possession. Berry v. Berry 540
14. In determining the question of alimony and division of property, the court shall have 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. Campbell v. Campbell 575
15. Although damages for the wrongful death of a child may include loss of society, comfort, and companionship, the same must be shown by the evidence to have a monetary value. Garvin v. Coover 582
16. Damages for loss of society, comfort, and companionship resulting from the wrongful death of a child being by their very nature problematical, the amount is peculiarly for the jury to determine, and unless clearly

wrong, a reviewing court will not interfere with its verdict. Garvin v. Coover 582
17. The right of parental custody and control is a natural but not an inalienable right. The public also has a paramount interest in the protection of the rights of children. State v. Chant 750
18. In a proceeding in juvenile court under sections 43-202 (2) and 43-209, R. S. Supp., 1978, the court may terminate all parental rights of the parents if the court finds it would be in the best interests of the child to so terminate parental rights. The decision to terminate parental rights need not be based upon proof beyond a reasonable doubt. State v. Chant 750
19. Where a juvenile defendant is being prosecuted in the District Court and has not had an opportunity for a hearing on the matter of transfer to juvenile jurisdiction as required by section 43-202.02, R. S. Supp., 1978, ordinarily the proper procedure to cure the procedural defect is to hold such a hearing and to determine whether or not such transfer should have been granted. If the court, based upon sufficient evidence, finds the evidence did not require the transfer, then the conviction need not be set aside in post conviction proceedings. State v. Tweedy 824

Motions, Rules, and Orders.

1. A city or village attorney whose duties include prosecuting violations of ordinances and state statutes may not voluntarily represent anyone charged with a crime, unless his employment as attorney for a defendant is approved by an order of the court in which the case is pending. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
2. Section 29-822, R. R. S. 1943, provides that any person aggrieved by an unlawful search and seizure may move for return of the property so seized and to suppress its use as evidence. However, the motion must be filed at least 10 days before trial or at the time of arraignment, whichever is the later, unless otherwise permitted by the court for good cause shown. State v. Brady 221
3. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the District Court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief.

State v. Newton 361
4. A motion to withdraw a guilty plea addresses itself to the direction of the trial judge, and, in the absence of a clear abuse of that discretion, the appellate court will not interfere. State v. Miller 443
5. A pretrial order, entered following a pretrial conference, controls the subsequent course of the action unless modified. Egle v. Kitt 735

Motor Vehicles.

1. An exclusion in an automobile liability insurance policy which excludes coverage under uninsured motorist coverage for an insured while occupying an owned highway vehicle, other than an insured automobile, is valid. Herrick v. Liberty Mut. Fire Ins. Co. 116
2. Testimony that an officer smelled a strong odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to the expertise of the officer. State v. Daly 217
3. Failure to stop before entering an intersection, as directed by a traffic signal or stop sign, is not, when standing alone, sufficient to constitute gross negligence. Liston v. Bradshaw 272
4. Several acts of negligence may, in combination, amount to gross negligence within the meaning of the automobile guest statute. Liston v. Bradshaw 272
5. In an action based on gross negligence under the Nebraska guest statute, courts cannot hesitate in directing a verdict where the conviction is clear that negligence in a very high degree is not present. Liston v. Bradshaw 272
6. However, if there is adequate proof of negligence, a verdict should only be directed where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. Liston v. Bradshaw 272
7. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence. Liston v. Bradshaw 272
8. In the determination of whether all the evidence in a specific case is sufficient to submit the issue of gross negligence to the jury, the presence of imminent danger visible to, known by, or made known to a driver, together with a persistence in negligence heedless of the consequences, are factors to be given material, if not controlling, consideration. Liston v. Bradshaw 272

9. "Gross negligence" within the meaning of the automobile guest statute is great and excessive negligence, or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty. Liston v. Bradshaw 272
10. Fact that appellant consumed alcohol subsequent to time of accident does not make officer's request for blood test unreasonable. Rudat v. Pearson 331
11. Fact that appellant consumed alcohol subsequent to time of accident does not make his refusal to take blood test reasonable. Rudat v. Pearson 331
12. A violation of the "Nebraska Rules of the Road" is a crime, and the prosecution for such violation is a criminal action. State v. Huffman 434
13. The execution of the certificate of title is the exclusive method of conveying ownership to a motor vehicle, but the certificate is not in itself conclusive of ownership. Weiss v. Union Ins. Co. 469
14. Probable cause for searching a motor vehicle is to be determined in view of its mobility and by a practical and not a technical standard, and differs from that required to search a fixed structure. State v. Booth 692
15. It is generally negligence, as a matter of law, for a motorist to drive his vehicle on a highway in such manner that he is unable to stop or turn aside in time to avoid a collision with an object within his range of vision. Greenwade v. Drake 815
16. An exception exists to the foregoing rule but only when the object struck is such that it blends into the surrounding area and cannot ordinarily be observed by the exercise of ordinary care in time to avoid a collision. Greenwade v. Drake 815

Municipal Corporations.

1. Courts will presume that the legislative body, in enacting ordinances, acted within their authority, and the burden rests upon those who challenged their validity to show that, in the matter called in question, the action of the municipal authorities was arbitrary, unreasonable, and without substantial relation to public safety, health, morals, or the general welfare. Copple v. City of Lincoln 152
2. A city ordinance adopting a comprehensive plan is a legislative act. Copple v. City of Lincoln 152
3. Under the doctrine of separation of powers, courts should not inquire into the motives of legislators whenever an adopted ordinance is legislative in character. Copple v. City of Lincoln 152

4. However, even where the acts of a public body are legislative in character, courts must consider and apply statutes and ordinances disqualifying a public official from voting on or participating in actions taken by a public body, because of an existing conflict of interest on the part of the official. Copple v. City of Lincoln ... 152
5. The majority vote of a city council need not be invalidated where the alleged disqualifying interest of a member, in regard to the subject matter being considered, is general or of a minor character. Copple v. City of Lincoln ... 152
6. The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case. Copple v. City of Lincoln ... 152
7. A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. It is the zoning resolution which has the force of law. Copple v. City of Lincoln ... 152
8. Where notice is required, a notice of a special meeting of a city council posted in three public places at 10 p.m., on the day preceding the meeting is not reasonable advance publicized notice of the meeting as required by section 84-1411, R. R. S. 1943. Pokorny v. City of Schuyler ... 334
9. Negotiations for the purchase of land need not be conducted at an open meeting but deliberations of a city council as to whether an offer to purchase real estate should be made should take place in an open meeting. Pokorny v. City of Schuyler ... 334
10. An agenda which gives reasonable notice of the matters to be considered at a meeting of a city council complies with section 84-1411, R. R. S. 1943. Pokorny v. City of Schuyler ... 334
11. Any defect in the call for a special meeting of the council of a city of the second class is immaterial if all members of the council are present and participate in the meeting without objection. Pokorny v. City of Schuyler ... 334
12. Where a defect occurs in proceedings of a governmental body, ordinarily the defect may be cured by new proceedings commencing at the point where the defect occurred. Pokorny v. City of Schuyler ... 334
13. The delegation of the performance of a ministerial act by a principal to an agent, and the performance by the agent consistent with his instructions, makes the act that of the principal. Hanson v. City of Omaha ... 342
14. Minimum visual acuity standards promulgated by the

Personnel Department of the City of Omaha with the concurrence of the Fire Division for the employment of firefighters are held to be reasonable, and not arbitrary or capricious; and to bear a reasonable relationship to fitness of applicants and their capacity to discharge the duties of a city firefighter. Such standards are directly related to the health and safety of both the firemen and the public; and constitute a proper exercise of the police power of the state, and are not unconstitutional. McCrea v. Cunningham 638

15. In the exercise of police power delegated to a city, it is generally for municipal authorities to determine what rules, regulations, and ordinances are required for the health, comfort, and safety of the people. McCrea v. Cunningham 638
16. Sections 48-1101 and 48-1102(8), R. R. S. 1943, of the Nebraska Fair Employment Practice Act, do not mandate the employment of firemen with visual defects which affect their ability to engage in their occupation. McCrea v. Cunningham 638
17. Sections 20-126 and 20-131, R. R. S. 1943, setting forth the policy of this state to employ the blind and visually handicapped do not require the employment of firemen with visual handicaps where that disability prevents the performance of the work involved. McCrea v. Cunningham 638

Negligence.

1. In an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was a proximate cause of the plaintiff's injury or a cause which proximately contributed to it. Brahatcek v. Millard School District ... 86
2. Negligence must be measured against the particular set of facts and circumstances which are present in each case. Brahatcek v. Millard School District 86
3. Negligence is defined as doing something which an ordinary, prudent person would not have done under similar circumstances or failing to do something which an ordinary, prudent person would have done under similar circumstances. Brahatcek v. Millard School District 86
4. Where lack of supervision by an instructor is relied on to impose liability, such lack must appear as the proximate cause of the injury. Brahatcek v. Millard School District 86
5. Inattention to the duty to exercise care in a situation which reasonably may be regarded as hazardous is evi-

dence of negligence, notwithstanding the act or omission involved would not in all cases, or even ordinarily, be productive of injurious consequences. Brahatcek v. Millard School District 86
6. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care. Brahatcek v. Millard School District ... 86
7. "Proximate cause" as used in the law of negligence is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the injury would not have occurred. Brahatcek v. Millard School District 86
Travelers Indemnity Co. v. Center Bank 294
8. 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. Brahatcek v. Millard School District 86
9. The law does not recognize 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. Brahatcek v. Millard School District 86
10. Whether or not a minor 14 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be subject to the defense of contributory negligence is generally a question of fact for the jury. Brahatcek v. Millard School District 86
11. The doing of an act with appreciation of the amount of danger is necessary in order to say as a matter of law a person is negligent. Brahatcek v. Millard School District 86
12. Failure to stop before entering an intersection, as directed by a traffic signal or stop sign, is not, when standing alone, sufficient to constitute gross negligence. Liston v. Bradshaw 272
13. Several acts of negligence may, in combination, amount to gross negligence within the meaning of the automobile guest statute. Liston v. Bradshaw 272
14. In an action based on gross negligence under the Nebraska guest statute, courts cannot hesitate in directing a verdict where the conviction is clear that negligence in a very high degree is not present. Liston v. Bradshaw 272
15. However, if there is adequate proof of negligence, a

verdict should only be directed where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. Liston v. Bradshaw 272

16. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence. Liston v. Bradshaw 272

17. In the determination of whether all the evidence in a specific case is sufficient to submit the issue of gross negligence to the jury, the presence of imminent danger visible to, known by, or made known to a driver, together with a persistence in negligence heedless of the consequences, are factors to be given material, if not controlling, consideration. Liston v. Bradshaw 272

18. "Gross negligence" within the meaning of the automobile guest statute is great and excessive negligence, or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty. Liston v. Bradshaw 272

19. Before a bank is liable in negligence to a maker for accepting a check from an agent or employee of the maker who has obtained the check from the maker by giving to the maker the name of the payee, not intending the payee to have any interest in the check, it must appear that the bank either was placed on such notice as would justify one in believing that further investigation was necessary or otherwise in some manner acted, in accepting the check, in a commercially unreasonable manner. Travelers Indemnity Co. v. Center Bank 294

20. One is not negligent in failing to perform an act which it did not in the first instance have a duty or obligation to perform. Travelers Indemnity Co. v. Center Bank 294

21. Even where conduct is negligent, it is still required that the conduct be a substantial factor in bringing about the harm. Causation in this sense inevitably involves the idea of responsibility, and it is not enough that the harm would not have occurred had the individual defendant not been negligent. Travelers Indemnity Co. v. Center Bank 294

22. Malpractice may consist in the lack of skill or care in diagnosis as well as in treatment. Anderson v. Moore 453

23. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a doctor in a particular community, the test is that which physicians or surgeons in the same neighborhood and in similar communities engaged in the same or similar lines of work would ordinarily exercise for the benefit

of their patients. Anderson v. Moore 453
24. Proof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The burden of establishing both these essential elements rests upon the plaintiff's introduction of expert medical testimony. Anderson v. Moore 453
25. Although damages for the wrongful death of a child may include loss of society, comfort, and companionship, the same must be shown by the evidence to have a monetary value. Garvin v. Coover 582
26. Damages for loss of society, comfort, and companionship resulting from the wrongful death of a child being by their very nature problematical, the amount is peculiarly for the jury to determine, and unless clearly wrong, a reviewing court will not interfere with its verdict. Garvin v. Coover 582
27. A real estate broker is an agent owing a fiduciary duty (1) to use reasonable care, skill, and diligence in procuring the greatest advantage for his client, and (2) to act honestly and in good faith, making full disclosures to his client of all material facts affecting his interests. A neglect to do so renders him liable to his client for whatever loss the latter may suffer as a consequence thereof. Brezina v. Hill 773
28. It is generally negligence, as a matter of law, for a motorist to drive his vehicle on a highway in such manner that he is unable to stop or turn aside in time to avoid a collision with an object within his range of vision. Greenwade v. Drake 815
29. An exception exists to the foregoing rule but only when the object struck is such that it blends into the surrounding area and cannot ordinarily be observed by the exercise of ordinary care in time to avoid a collision. Greenwade v. Drake 815
30. In an action for loss of support it properly comes within the province of the jury to take into account the purchasing power of money with respect to the commodities that are in use by the public generally. Ott v. Frank 820

Negotiable Instruments.

1. Before a bank is liable in negligence to a maker for ac-

cepting a check from an agent or employee of the maker who has obtained the check from the maker by giving to the maker the name of the payee, not intending the payee to have any interest in the check, it must appear that the bank either was placed on such notice as would justify one in believing that further investigation was necessary or otherwise in some manner acted, in accepting the check, in a commercially unreasonable manner. Travelers Indemnity Co. v. Center Bank 294

2. An instrument is not delivered until it has passed beyond the dominion, control, and authority of its maker and is no longer capable of being recalled; and where the maker gives the instrument to a third party to hold until the happening of some contingency, there is no delivery. Weiss v. Union Ins. Co. 469

3. Unless specifically denied in the pleadings, signatures on a promissory note are admitted, and when the signatures are admitted, production of the instrument entitles the holder to recover unless the defendant establishes a defense. Columbus Bank & Trust Co. v. High Country Stable 724

4. When signatures are admitted, the burden is upon the defendant to plead and prove a defense. Columbus Bank & Trust Co. v. High Country Stable 724

Notice.

1. Participation in the hearing required under section 79-1254, R. R. S. 1943, is ordinarily a waiver of any defect in the notice of the hearing. Witt v. School District No. 70 63

2. Any person who has notice of a meeting and attends the meeting should be required to object specifically to the lack of public notice at the meeting, or be held to have waived his right to object on that ground at a later date. A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given. Witt v. School District No. 70 63

3. A tenured teacher whose position has been abolished has a right to be retained to fill any vacancy for which she is qualified for the next school year which occurs after notice of the elimination of her position. Witt v. School District No. 70 63

4. Where notice is required, a notice of a special meeting of a city council posted in three public places at 10 p.m., on the day preceding the meeting is not reasonable advance publicized notice of the meeting as re-

quired by section 84-1411, R. R. S. 1943. Pokorny v. City of Schuyler 334
5. An agenda which gives reasonable notice of the matters to be considered at a meeting of a city council complies with section 84-1411, R. R. S. 1943. Pokorny v. City of Schuyler 334
6. Allowances for child support are not final but are subject to modification when required, after notice and hearing. Erickson v. Erickson 345
7. Compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency. Citizens State Bank v. Sparks 661
8. The burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice. Citizens State Bank v. Sparks 661
9. Where a secured party conducts a private sale of repossessed collateral security, the notice required by section 9-504 (3), U. C. C., is reasonable notification of the time after which any private sale is to be made. Citizens State Bank v. Sparks 661
10. Relinquishment of keys to an automobile being held as collateral, for a limited purpose, and execution of title to that automobile, which execution is unauthorized, does not constitute a waiver by the debtor of reasonable notice required by section 9-504 (3), U. C. C. Citizens State Bank v. Sparks 661
11. The notice provisions of section 79-501 et seq., R. R. S. 1943, do not apply to a board of education meeting to approve general expenses such as a contract for architectural services. Banks v. Board of Education of Chase County 717

Officers and Directors.

1. Unauthorized acts of an officer of a corporation may be ratified by the corporation by conduct implying approval and adoption of the acts in question. D & J Hatchery, Inc. v. Feeders Elevator, Inc. 69
2. Ratification of unauthorized acts may be express or may be inferred from silence and inaction; if the corporation, with knowledge of the unauthorized act or of facts putting it upon notice thereof, does not disavow the agency and disaffirm the transaction within a reasonable time, it will be deemed to have ratified it. D & J Hatchery, Inc. v. Feeders Elevator, Inc. 69
3. The retention of benefits secured by an unauthorized act of an agent with knowledge of the source of such

benefits and the means by which they were obtained is a ratification of the act of the agent. D & J Hatchery, Inc. v. Feeders Elevator, Inc. 69

4. A shareholders' suit proceeding as a cause for damages on behalf of the policyholders and based upon the premise that the corporate directors violated their fiduciary duties is an equitable action and triable de novo in this court. Doyle v. Union Ins. Co. 599
5. Section 44-224.05, R. R. S. 1943, which authorizes the Director of Insurance of the State of Nebraska to approve or disapprove contracts of bulk reinsurance, by which a domestic insurance company operating on other than the stock plan, may cede its business to another licensed insurer, and which statute requires that such contract of bulk reinsurance make a fair and equitable provision for distribution to policyholders of the ceding company of their equity in the surplus funds, does not abrogate the common law duties of corporate directors to policyholders of a mutual insurance company and the approval of the contract by the Director of Insurance does not insulate the directors of the company from liability for violation of their fiduciary duties. Doyle v. Union Ins. Co. 599
6. Directors are fiduciaries or trustees and must comply with the applicable fiduciary duties in their dealings with the corporation. Doyle v. Union Ins. Co. 599
7. Where a director has acted in complete good faith and breached no fiduciary duties, then he is not liable for mere mistakes in judgment; but a violation by a director of a duty required by law, whether willful, fraudulent, or negligent, is a breach of trust and the director is liable for any damages proximately caused by the breach. Doyle v. Union Ins. Co. 599
8. Directors should have a general knowledge of the manner in which the corporate business is conducted; and, where the duty of knowing exists, ignorance because of neglect of duty on the part of a director creates the same liability as actual knowledge and failure to act on that knowledge. Doyle v. Union Ins. Co. 599
9. The issue of whether void or voidable acts of corporate directors may be ratified by an approving vote of the shareholders arises only when there has been full disclosure to the shareholders of all material facts. Doyle v. Union Ins. Co. 599

Ordinances.

1. Courts will presume that the legislative body, in enacting ordinances, acted within their authority, and the

burden rests upon those who challenged their validity to show that, in the matter called in question, the action of the municipal authorities was arbitrary, unreasonable, and without substantial relation to public safety, health, morals, or the general welfare. Copple v. City of Lincoln 152
2. A city ordinance adopting a comprehensive plan is a legislative act. Copple v. City of Lincoln 152
3. Under the doctrine of separation of powers, courts should not inquire into the motives of legislators whenever an adopted ordinance is legislative in character. Copple v. City of Lincoln 152
4. Where the record shows that an ordinance prescribes uniform court costs for a range of offenses irrespective of the amount of the fine and that the costs are actually collected pursuant to a court proceeding and nothing in the record shows that the costs collected are not compensatory, then the sums collected as court costs will not be held to be penalties. DeCamp v. City of Lincoln 727
5. The test of legitimacy is the existence of a real and substantial relationship between the exercise of those powers in a particular manner, and the peace, public health, public morality, public safety, or the general welfare of the city. Eckstein v. City of Lincoln 741
6. A police regulation cannot arbitrarily invade private property or personal rights. Eckstein v. City of Lincoln 741
7. There must be a reasonable relationship between the object the ordinance seeks to accomplish and the means by which it operates. Eckstein v. City of Lincoln 741
8. There must be a clear, real, and substantial connection between the assumed purpose of the enactment and its actual provisions. Eckstein v. City of Lincoln 741

Parent and Child.

1. 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. Bokelman v. Bokelman 17
2. A decree 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 requiring modifications in the best interests of the children. White v. White 199
3. Where the trial court specifically rejects the child support provisions of a property settlement agreement and

reserves determination of the amount of child support, its subsequent order pursuant to that reservation is an initial determination, and not a modification of the original decree. White v. White 199
4. In determining the amount of child support, all attendant circumstances including the status, situation, and character of the parties must be considered. White v. White 199
5. A decree for the payment of child support may be modified only when a subsequent change in circumstances requires such modification in the best interests of the children. Tilden v. Tilden 226
6. The amount of child support ordered to be paid by a parent should be determined according to the status, situation, and character of the parties; the anticipated needs of the children; and the financial position and ability of both parents. Tilden v. Tilden 226
7. The determination of an amount of child support should be reasonable according to the discretion of the court in view of the circumstances; there is no mathematical formula for the calculation of such amount. Tilden v. Tilden 226
8. In determining the question of who should have the care and custody of a child upon the dissolution of a marriage, the paramount consideration must be the best interests and welfare of the child. McCurry v. McCurry 235
9. The determination of the trial court with respect to awarding or changing the custody and support of minor children is subject to review but will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. McCurry v. McCurry 235
10. The best interests of the children is the paramount consideration in determining issues of custody. Fleharty v. Fleharty 245
11. No preference in awarding custody of children shall be given either parent on account of the sex of such parent, and there is no presumption that either parent is more fit than the other to have such custody. § 42-364, R. S. Supp., 1976. Fleharty v. Fleharty 245
12. In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. In determining these circumstances, the financial position of the husband as well as the estimated costs of support of the children must be taken into account. A decision on this matter rests in the sound discretion of the trial court and will not be disturbed on

appeal unless it appears that the court abused its discretion. Erickson v. Erickson 345
13. In determining the question of who should have the care and custody of children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children. Moninger v. Moninger 494
14. Ordinarily, alternating custody of young children should be avoided. Moninger v. Moninger 494
15. A trial court may exercise the statutory power to take custody of the minor children of a marriage when it is uncertain that an award of custody to one parent or the other will be in the best interests of the children. Berry v. Berry 540
16. A decree placing custody of minor children in the court with possession in one of the parents is not required to state specific provisions for the monitoring of that possession. Berry v. Berry 540
17. The right of parental custody and control is a natural but not an inalienable right. The public also has a paramount interest in the protection of the rights of children. State v. Chant 750
18. In a proceeding in juvenile court under sections 43-202 (2) and 43-209, R. S. Supp., 1978, the court may terminate all parental rights of the parents if the court finds it would be in the best interests of the child to so terminate parental rights. The decision to terminate parental rights need not be based upon proof beyond a reasonable doubt. State v. Chant 750
19. 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. The judgment of the trial court will be upheld on appeal unless there is an abuse of discretion. State v. Chant 750
20. When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the children require that a final dispositional hearing be held without delay. State v. Chant 750

Parties.

1. The Real Estate Commission of the State of Nebraska, in imposing penalties for violation of state law, may consider the relative culpability of parties to the same transaction. Grubaugh v. State ex rel. State Real Estate Commission 75

2. In the construction of the terms of an agreement, effect must be given, if possible, to all portions of the contract in order to determine and effectuate the intention of the parties. Bishop Buffets, Inc. v. Westroads, Inc. 171
3. The addition of interior walls does not constitute "expansion or enlargement" of a shopping center unless it is otherwise clear that the parties intended such a construction under the terms of their lease. Bishop Buffets, Inc. v. Westroads, Inc. 171
4. If the language used in a contract drafted by one of the parties is susceptible of more than one meaning, it should be given the construction which the other party would be fairly justified in giving it. Bishop Buffets, Inc. v. Westroads, Inc. 171
5. Before any party can invoke the jurisdiction of the court he must have standing to sue. He must have some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. Stahmer v. Marsh 281
6. A plaintiff must have some remedial interest which the law of the forum can recognize and enforce. Stahmer v. Marsh 281
7. In order to maintain an action to enforce private rights the plaintiff must show that he will be benefited by the relief to be granted. Stahmer v. Marsh 281
8. It is a fundamental requirement of the right to declaratory relief that there be a justiciable issue between the parties. Stahmer v. Marsh 281
9. A requisite precedent condition for obtaining declaratory relief is that the parties seeking declaratory relief have a legally protectible interest or right in the controversy. Stahmer v. Marsh 281
10. Separate causes of action may not be joined in a single petition unless each cause affects all parties. § 25-702, R. R. S. 1943. Stahmer v. Marsh 450
11. A party having interest adverse to the interests of the parties he seeks to represent may not sue as representative of a class under the provisions of section 25-319, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513

Penalties.

The Real Estate Commission of the State of Nebraska, in imposing penalties for violation of state law, may consider the relative culpability of parties to the same transaction. Grubaugh v. State ex rel. State Real Estate Commission 75

Personal Representative.

The personal representative of a deceased person acting reasonably for the benefit of the interested persons may sell any real property of the estate following a court order with notice given in the manner prescribed by statute. § 30-2476 (23), R. R. S. 1943. Booth v. Reisdorff 6

Pleadings.

1. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the District Court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief. State v. Newton 361
2. Issues of liability which have not been pleaded should not be submitted to the jury for determination. Suhr v. City of Scribner 364
3. Claims for damages which do not arise from the issues pleaded should not be submitted to the jury. Suhr v. City of Scribner 364
4. Affirmative allegations made by a defendant in his answer to a cross-claim against him by a codefendant, which allegations are in essence denials of allegations of the cross-claim, are not to be treated as judicial admissions upon which the plaintiff may rely in his claim against the defendant, where the rights of the cross-claiming defendant against his codefendant arise from an independent contract between them. Cook v. Beermann 447
5. Separate causes of action may not be joined in a single petition unless each cause affects all parties. § 25-702, R. R. S. 1943. Stahmer v. Marsh 450
6. A plaintiff must plead and prove the jurisdictional facts, the facts which show that the court has jurisdiction of the subject matter of the action. Creighton-Omaha Regional Health Care Corp. v. Douglas County 686

Plea in Abatement.

An error in overruling a plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt. State v. Price 308

Pleas.

Where a plea of guilty is made pursuant to a plea bargain and the sentence is in complete conformity with

the plea agreement, it is not reversible error for the attorney to fail to advise the defendant of appeal possibilities. State v. Hoppes 383

Police Officers and Sheriffs.

1. Testimony that an officer smelled a strong odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to the expertise of the officer. State v. Daly 217
2. The determination as to whether identification procedures conducted by the police were unnecessarily suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be made by a consideration of the totality of the circumstances. State v. Joseph 268
3. The requirement of Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), that a defendant be informed of his constitutional rights applies only to in-custody interrogations. State v. Price 308
4. 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. State v. Booth 692
5. Probable cause for search or arrest without a warrant can rest upon the collective knowledge of the police rather than solely on that of the officer who actually makes the search or arrest, when there is some degree of communication between the two. State v. Booth 692
6. Circumstances and conduct which may very well not excite the suspicion of the ordinary person might be highly significant to a law enforcement officer trained in the habits and conduct and paraphernalia of users of drugs. State v. Booth 692

Police Powers.

1. Minimum visual acuity standards promulgated by the Personnel Department of the City of Omaha with the concurrence of the Fire Division for the employment of firefighters are held to be reasonable, and not arbitrary or capricious; and to bear a reasonable relationship to fitness of applicants and their capacity to discharge the duties of a city firefighter. Such standards are directly related to the health and safety of both the firemen and the public; and constitute a proper exercise of the police power of the state, and are not unconstitutional. McCrea v. Cunningham 638

2. In the exercise of police power delegated to a city, it is generally for municipal authorities to determine what rules, regulations, and ordinances are required for the health, comfort, and safety of the people. McCrea v. Cunningham 638
3. A legal presumption exists in favor of the validity of such rules, regulations, and ordinances, and the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence that it is arbitrary, unreasonable, or confiscatory. McCrea v. Cunningham 638
4. The owner's right to use his property is subject, however, to reasonable regulation, restriction, and control by the state in the legitimate exercise of its police powers. Eckstein v. City of Lincoln 741
5. The test of legitimacy is the existence of a real and substantial relationship between the exercise of those powers in a particular manner, and the peace, public health, public morality, public safety, or the general welfare of the city. Eckstein v. City of Lincoln 741

Poor and Indigent.

1. The county board by statute is made the overseer of the poor and the county has a mandatory duty to provide for poor persons whether they are residents or nonresidents of the county. Creighton-Omaha Regional Health Care Corp. v. Douglas County 686
2. A county may be liable for the reasonable value of necessary hospital services furnished to a poor person where the county board after receiving notice of the situation neglects or refuses to make any arrangements for the care of the poor person. Creighton-Omaha Regional Health Care Corp. v. Douglas County 686
3. A hospital which furnishes hospital services to a poor person without prior authorization by the county board acts at its peril with respect to reimbursement from county funds. Creighton-Omaha Regional Health Care Corp. v. Douglas County 686

Post Conviction.

1. A court may properly deny an evidentiary hearing upon a motion to vacate a conviction filed under section 29-3001, R. R. S. 1943, upon a determination after an examination of the files and records of the case that the petitioner is entitled to no relief. State v. Miles 126
2. After a first motion for post conviction relief has been judicially determined, any subsequent motion for post conviction relief from the same conviction and sentence may be dismissed by the District Court, unless

the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for post conviction relief. State v. Newton 361

3. Matters relating to sentences imposed within statutory limits do not form a basis for post conviction relief. State v. Hoppes 383

4. Where a juvenile defendant is being prosecuted in the District Court and has not had an opportunity for a hearing on the matter of transfer to juvenile jurisdiction as required by section 43-202.02, R. S. Supp., 1978, ordinarily the proper procedure to cure the procedural defect is to hold such a hearing and to determine whether or not such transfer should have been granted. If the court, based upon sufficient evidence, finds the evidence did not require the transfer, then the conviction need not be set aside in post conviction proceedings. State v. Tweedy 824

Principal and Agent.

1. The delegation of the performance of a ministerial act by a principal to an agent, and the performance by the agent consistent with his instructions, makes the act that of the principal. Hanson v. City of Omaha 342

2. A broker is entitled to his commission in accordance with the terms of his listing contract, and the right to compensation is not impaired by subsequent inability or unwillingness of the owner to consummate the sale on the terms prescribed. Brezina v. Hill 773

3. A commission cannot be collected by the agent for his services if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency. Brezina v. Hill 773

4. A real estate broker is an agent owing a fiduciary duty (1) to use reasonable care, skill, and diligence in procuring the greatest advantage for his client, and (2) to act honestly and in good faith, making full disclosures to his client of all material facts affecting his interests. A neglect to do so renders him liable to his client for whatever loss the latter may suffer as a consequence thereof. Brezina v. Hill 773

5. The rule requiring a broker to act with utmost good faith toward his principal places him under a legal obligation to make a full, fair, and prompt disclosure to his employer of all facts within his knowledge which are or may be material to the matter in connection with which he is employed, which might affect his principal's rights and interests or influence his action in rela-

tion to the subject matter of the employment, or which in any way pertain to the discharge of the agency which the broker has undertaken. Brezina v. Hill 773

Probable Cause.

1. Testimony that an officer smelled a strong odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to the expertise of the officer. State v. Daly 217
2. Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. State v. Brady 221
3. An odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant if the expertise of the officer is shown. State v. Ruzicka 257
4. Proof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The burden of establishing both these essential elements rests upon the plaintiff's introduction of expert medical testimony. Anderson v. Moore 453
5. 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. State v. Booth 692
6. The existence of probable cause for a warrantless search must be determined on the particular facts and circumstances of each case which must be determined by a practical and not by any technical standard, and where time is of the essence it is a highly relevant factor in evaluating the circumstances. State v. Booth ... 692
7. Probable cause for search or arrest without a warrant can rest upon the collective knowledge of the police rather than solely on that of the officer who actually makes the search or arrest, when there is some degree

of communication between the two. State v. Booth 692
8. A furtive gesture when coupled with prior reliable information may constitute probable cause for search or arrest. State v. Booth 692
9. Probable cause for searching a motor vehicle is to be determined in view of its mobility and by a practical and not a technical standard, and differs from that required to search a fixed structure. State v. Booth 692
10. Given probable cause to search, from a constitutional standpoint there is no difference between on the one hand seizing and holding a car at the station house before presenting the probable cause issue to the magistrate and on the other hand carrying out an immediate search without a warrant. State v. Booth 692

Probate and Administration.

1. The personal representative of a deceased person acting reasonably for the benefit of the interested persons may sell any real property of the estate following a court order with notice given in the manner prescribed by statute. § 30-2476 (23), R. R. S. 1943. Booth v. Reisdorff 6
2. The probate court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will. It has no jurisdiction to construe wills to determine the rights of devisees or legatees as between themselves, or between the executor and persons claiming adversely to the estate. Such latter jurisdiction is in the District Court. Page, Higgins, Clyde & Avery v. Buchfinck 411
3. Where an executor does not request a construction of the will, the court has no authority to bind the heirs or legatees by any construction. Page, Higgins, Clyde & Avery v. Buchfinck 411

Proof.

1. In disciplinary proceedings of members of the bar, the relator must establish the allegations in the formal charges by a preponderance of the evidence, so that the court is satisfied to a reasonable certainty that the charges are true. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
2. In disciplinary proceedings of members of the bar the findings must be sustained by a higher degree of proof than that required in civil actions yet falling short of the proof required to sustain a conviction in a criminal action. State ex rel. Nebraska State Bar Assn. v. Hollstein 40

3. In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
4. The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. State v. Whitney 149
5. Evidence of other crimes, wrongs, or acts may be admissible in evidence as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. § 27-404 (2), R. R. S. 1943. State v. Rush 425

Property.

1. The personal representative of a deceased person acting reasonably for the benefit of the interested persons may sell any real property of the estate following a court order with notice given in the manner prescribed by statute. § 30-2476 (23), R. R. S. 1943. Booth v. Reisdorff 6
2. A property division in a dissolution of marriage decree from which no appeal is taken is not subject to modification, and ordinarily will not thereafter be vacated or modified as to such property provisions in the absence of fraud or gross inequity. Bokelman v. Bokelman ... 17
3. A division of property rests in the sound discretion of the District Court, and in the absence of an abuse of discretion will not be disturbed on appeal. McCurry v. McCurry 235
4. An architect who furnishes plans and specifications for an improvement on real estate is entitled to a mechanic's lien upon such real estate. Omaha Nat. Bank v. Continental Western Corp. 238
5. Negotiations for the purchase of land need not be conducted at an open meeting but deliberations of a city council as to whether an offer to purchase real estate should be made should take place in an open meeting. Pokorny v. City of Schuyler 334
6. A division of property which is not patently unfair will not ordinarily be disturbed by this court on appeal. Erickson v. Erickson 345
7. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reason-

able, 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. Erickson v. Erickson 345

8. Where a secured party in a mortgage foreclosure action seeks only to sell the real estate and to apply the sale proceeds against the debt of the mortgagors, the action is a proceeding against collateral pledged by the mortgagor and is not an action for a deficiency judgment. First Nat. Bank of Omaha v. Kizzier 369
9. Before a guardian may proceed to sell the real estate of his ward he must comply with the statutes in effect at the time of sale. Albert v. Stueber 408
10. If the property which is attempted to be put in trust is so uncertain that it cannot be separated or distinguished from the individual property of the trustee, the trust will be void for uncertainty. No trust will be created where the property to be the subject of the trust is left uncertain. Page, Higgins, Clyde & Avery v. Buchfinck 411
11. In a dissolution action, the distribution of property rests in the sound discretion of the trial court and, in the absence of an abuse of that discretion, will not be disturbed on appeal. Davis v. Davis 482
12. A judgment of the trial court fixing the amount of alimony or making distribution of property will not be disturbed on appeal unless it is patently unfair on the record. Campbell v. Campbell 575
13. In determining the question of alimony and division of property, the court shall have 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. Campbell v. Campbell 575
14. A trustee is required to dispose of trust property on the most advantageous terms which it is reasonably possible for him to secure for the benefit of those whom he represents. Where he breaches this duty, the measure of damages is the difference between the

price for which the property was sold and its fair and reasonable market value at the time of the sale. Doyle v. Union Ins. Co. 599
15. One seeking specific performance of an oral contract for the conveyance of real estate has the burden of proving by a preponderance of the evidence a contract that is clear, satisfactory, and unequivocal in its terms. Rudolph v. Hartung 678
16. In order to enforce an oral contract for the conveyance of a part of the estate of a deceased person the evidence of the contract and its terms must be clear and satisfactory; and the thing done constituting performance must be such as is referable solely to the contract sought to be enforced and not such as might be referable to some other and different contract. Rudolph v. Hartung 678
17. The right to full and free use and enjoyment of one's property in a manner and for such purposes as the owner may choose, so long as it is not for the maintenance of a nuisance or injurious to others, is a privilege protected by law, and one of which a property owner may not be deprived without due process of law. Eckstein v. City of Lincoln 741
18. The owner's right to use his property is subject, however, to reasonable regulation, restriction, and control by the state in the legitimate exercise of its police powers. Eckstein v. City of Lincoln 741
19. A police regulation cannot arbitrarily invade private property or personal rights. Eckstein v. City of Lincoln 741
20. Valuation of property is a matter of judgment, and a contract based upon inadequate consideration will not be set aside on that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself evidence of fraud. West Gate Bank v. Eberhardt 762
21. Where money or property belonging to another was not paid or turned over to the person entitled to receive it at the time when it should have been paid or turned over, interest is generally allowed. Brezina v. Hill 773
22. Interest is allowable where the conduct of a party justifies its allowance, particularly where money or property belonging to another is wrongfully withheld to the enrichment of the debtor and to the detriment of the creditor. Brezina v. Hill 773
23. Except where modified by statute, to "convey" means to pass or transmit title to property from one to another. Krause v. Crossley 806

Property Settlement Agreements.

1. Where the trial court specifically rejects the child support provisions of a property settlement agreement and reserves determination of the amount of child support, its subsequent order pursuant to that reservation is an initial determination, and not a modification of the original decree. White v. White 199
2. A party to a property settlement agreement entered into pursuant to section 42-366, R. R. S. 1943, may not, as a matter of right, withdraw therefrom prior to approval or disapproval of the agreement by the trial court. Sebesta v. Sebesta 624
3. A property settlement agreement by the parties to an action for dissolution of marriage will be considered in the light of the economic circumstances of the parties and the evidence at the hearing to decide whether or not it is unconscionable; if it is not found unconscionable, it binds both the parties and the court. Sebesta v. Sebesta 624

Prosecuting Attorneys.

1. A city or village attorney whose duties include prosecuting violations of ordinances and state statutes may not voluntarily represent anyone charged with a crime, unless his employment as attorney for a defendant is approved by an order of the court in which the case is pending. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
2. Ignorance of the law is no excuse. It applies with even greater emphasis to an attorney at law who is expected to be learned in the law. It should be particularly applicable to a city attorney who should make himself conversant with the duties of his office. A city attorney should also be aware of disciplinary rules and advisory opinions, particularly those applicable to his duties as a public officer such as a county or city attorney. State ex rel. Nebraska State Bar Assn. v. Hollstein 40
3. An agreement that charges will be dropped if an accused person passes a polygraph test is not binding unless it has been approved by the trial court. State v. Joseph 268
4. The decision to allow endorsement of a new witness by the prosecutor is addressed to the sound discretion of the trial court. State v. Price 308
5. Testimony presented by a prosecutor with a view toward subsequent impeachment does not come within the prohibition against the knowing use of perjured testimony.

State v. Price 308

Proximate Cause.

1. In an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was a proximate cause of the plaintiff's injury or a cause which proximately contributed to it. Brahatcek v. Millard School District ... 86
2. Where lack of supervision by an instructor is relied on to impose liability, such lack must appear as the proximate cause of the injury. Brahatcek v. Millard School District 86
3. "Proximate cause" as used in the law of negligence is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the injury would not have occurred. Brahatcek v. Millard School District 86
4. 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. Brahatcek v. Millard School District 86
5. The law does not recognize 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. Brahatcek v. Millard School District 86

Public Meetings.

1. There was no violation of the Nebraska open meeting law, sections 84-1408 to 84-1414, R. R. S. 1943, where at a recess taken during a lawful public meeting called by the board of county commissioners of Lancaster County, certain of the commissioners and others present, retired to an adjoining room, the door to which was open at all times, with no one being excluded, and an informal conversation was had by the commissioners and others with reference to an item of business on the agenda of the meeting, but where no formal action or vote was taken thereon until the board of commissioners reconvened in regular session following the recess. Copple v. City of Lincoln 152
2. The purpose of the open meeting law is to insure that public policy is formulated at open meetings of the bodies to which the law is applicable. Pokorny v. City of Schuyler 334
3. Where notice is required, a notice of a special meeting

of a city council posted in three public places at 10 p.m., on the day preceding the meeting is not reasonable advance publicized notice of the meeting as required by section 84-1411, R. R. S. 1943. Pokorny v. City of Schuyler 334

4. Negotiations for the purchase of land need not be conducted at an open meeting but deliberations of a city council as to whether an offer to purchase real estate should be made should take place in an open meeting. Pokorny v. City of Schuyler 334
5. An agenda which gives reasonable notice of the matters to be considered at a meeting of a city council complies with section 84-1411, R. R. S. 1943. Pokorny v. City of Schuyler 334
6. Any defect in the call for a special meeting of the council of a city of the second class is immaterial if all members of the council are present and participate in the meeting without objection. Pokorny v. City of Schuyler 334
7. Where a defect occurs in proceedings of a governmental body, ordinarily the defect may be cured by new proceedings commencing at the point where the defect occurred. Pokorny v. City of Schuyler 334

Public Meetings Act.

1. Any person who has notice of a meeting and attends the meeting should be required to object specifically to the lack of public notice at the meeting, or be held to have waived his right to object on that ground at a later date. A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given. Witt v. School District No. 70 63
2. The right to collaterally attack orders made in contravention of the Public Meetings Act for a period of 1 year is specifically provided by section 84-1414, R. R. S. 1943. Witt v. School District No. 70 63

Public Officers and Employees.

1. However, even where the acts of a public body are legislative in character, courts must consider and apply statutes and ordinances disqualifying a public official from voting on or participating in actions taken by a public body, because of an existing conflict of interest on the part of the official. Copple v. City of Lincoln ... 152
2. The majority vote of a city council need not be invalidated where the alleged disqualifying interest of a member, in regard to the subject matter being con-

sidered, is general or of a minor character. Copple v. City of Lincoln 152
3. The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case. Copple v. City of Lincoln 152
4. Any defect in the call for a special meeting of the council of a city of the second class is immaterial if all members of the council are present and participate in the meeting without objection. Pokorny v. City of Schuyler 334
5. The delegation of the performance of a ministerial act by a principal to an agent, and the performance by the agent consistent with his instructions, makes the act that of the principal. Hanson v. City of Omaha 342
6. Before the statutory restrictions prescribed by section 48-838 (2), R. S. Supp., 1976, against undue fragmentation in the public employment area can be overcome, there must be strong evidence justifying the need and propriety of such additional division. Sheldon Station Employees Assn. v. Nebraska P. P. Dist. 391
7. The mere fact that a public employer voluntarily creates employee committees, for the purpose of meeting and conferring about matters of mutual interest between the public employer and the public employee, does not establish that the public employer has recognized such units as the exclusive collective bargaining agent. Sheldon Station Employees Assn. v. Nebraska P. P. Dist. 391

Public Policy.

1. The purpose of the open meeting law is to insure that public policy is formulated at open meetings of the bodies to which the law is applicable. Pokorny v. City of Schuyler 334
2. Sections 20-126 and 20-131, R. R. S. 1943, setting forth the policy of this state to employ the blind and visually handicapped do not require the employment of firemen with visual handicaps where that disability prevents the performance of the work involved. McCrea v. Cunningham 638
3. A bargain in whole or in part for or in consideration of illicit sexual intercourse or of a promise thereof is illegal; but subject to this exception, such intercourse between parties to a bargain previously or subsequently formed does not invalidate it. Taylor v. Frost 652
4. The doctrine that one who seeks the help of a court of equity must come into equity with clean hands is founded upon public policy, and conflicting public policy

considerations may require relaxation or limitation of the application of that equitable maxim. Taylor v. Frost 652

Public Service Commission.

1. In granting an application to obtain telephone service from an adjacent service area under the provisions of sections 75-612 through 75-615, R. R. S. 1943, the Nebraska Public Service Commission may include in the service territory change an applicant whose service is reasonably adequate when inclusion is necessary to avoid a duplication of facilities within the meaning of section 75-613 (2), R. R. S. 1943, and when service to other applicants in that territory is inadequate. Reis v. Glenwood Telephone Membership Corp. 187
2. An easily correctible defect in service is not alone sufficient to support a finding of no "reasonably adequate" service within the meaning of section 75-613 (1), R. R. S. 1943. Reis v. Glenwood Telephone Membership Corp. 187
3. In determining the economic soundness of the proposed revision as required by section 75-613 (2), R. R. S. 1943, the Nebraska Public Service Commission must consider the financial condition of the protestant telephone company, the effect of the revision on its income and ability to service its debt, the likelihood that the revision will require future rate increases by the affected company, the fact that subscribers other than the applicants may have equally meritorious claims, and the general effect of economic erosion and waste, as well as other matters which may be material and relevant to the issue of economic soundness. Reis v. Glenwood Telephone Membership Corp. 187
4. The Public Service Commission may reconsider an order on its own motion during the 30 days after the mailing of a copy of the order and before an appeal to the Supreme Court has been taken. Upon the expiration of 30 days from the mailing of a copy of the order, or upon an appeal being perfected to the Supreme Court, the power of the Public Service Commission to reconsider its order upon its own motion, or upon the motion of an interested party who should otherwise have perfected an appeal, terminates and such order becomes final and binding. Nebraska P. P. Dist. v. Huebner 587

Quiet Title.

For consideration on appeal under our statute, section 25-21, 115, R. R. S. 1943, governing pleadings in quiet

title actions, it is not necessary to specify the nature of adverse claims but only that the defendants claim or appear to have some interest in the real estate and that the evidence reflect the question was considered by the trial court. Krause v. Crossley 806

Ratification.

1. Unauthorized acts of an officer of a corporation may be ratified by the corporation by conduct implying approval and adoption of the acts in question. D & J Hatchery, Inc. v. Feeders Elevator, Inc. 69
2. Ratification of unauthorized acts may be express or may be inferred from silence and inaction; if the corporation, with knowledge of the unauthorized act or of facts putting it upon notice thereof, does not disavow the agency and disaffirm the transaction within a reasonable time, it will be deemed to have ratified it. D & J Hatchery, Inc. v. Feeders Elevator, Inc. 69
3. The retention of benefits secured by an unauthorized act of an agent with knowledge of the source of such benefits and the means by which they were obtained is a ratification of the act of the agent. D & J Hatchery, Inc. v. Feeders Elevator, Inc. 69
4. The issue of whether void or voidable acts of corporate directors may be ratified by an approving vote of the shareholders arises only when there has been full disclosure to the shareholders of all material facts. Doyle v. Union Ins. Co. 599

Right to Counsel.

For the purpose of determining whether a defendant is entitled to the appointment of counsel at public expense, indigency is defined as the inability to retain counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family. § 29-1804.04, R. R. S. 1943. State v. Radford 440

Sales.

1. Where a secured party in a mortgage foreclosure action seeks only to sell the real estate and to apply the sale proceeds against the debt of the mortgagors, the action is a proceeding against collateral pledged by the mortgagor and is not an action for a deficiency judgment. First Nat. Bank of Omaha v. Kizzier 369
2. Under the Uniform Commercial Code, the adequacy of the price and the reasonableness of the expense for which collateral is sold at private sale after default and repossession are relevant along with other issues

in determining whether the sale was commercially reasonable. First Nat. Bank of Omaha v. Kizzier 369
3. The Uniform Commercial Code requires the creditor to proceed in a commercially reasonable manner to liquidate accounts receivable. First Nat. Bank of Omaha v. Kizzier 369
4. Before a guardian may proceed to sell the real estate of his ward he must comply with the statutes in effect at the time of sale. Albert v. Stueber 408
5. Where a secured party conducts a private sale of repossessed collateral security, the notice required by section 9-504 (3), U. C. C., is reasonable notification of the time after which any private sale is to be made. Citizens State Bank v. Sparks 661

Schools and School Districts.
1. Participation in the hearing required under section 79-1254, R. R. S. 1943, is ordinarily a waiver of any defect in the notice of the hearing. Witt v. School District No. 70 63
2. A tenured teacher whose position has been abolished has a right to be retained to fill any vacancy for which she is qualified for the next school year which occurs after notice of the elimination of her position. Witt v. School District No. 70 63
3. Legal voters of school districts have the right to maintain legal action in their own names to determine the boundaries of the district. Stahmer v. Marsh 450
4. A student has a significant interest in participation in interscholastic athletics which may be the subject of Fourteenth Amendment protections. French v. Cornwell 569
5. Participation in interscholastic athletics ordinarily has significantly less important constitutional dimensions than does participation in traditional academic education. French v. Cornwell 569
6. As a general rule a school official, in exercising the power of suspending a student, is liable for a compensating award only if the official acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that the action could not be reasonably characterized as being in good faith. French v. Cornwell 569
7. Section 79-548.01, R. R. S. 1943, is not an unconstitutional delegation of legislative authority. Banks v. Board of Education of Chase County 717
8. The tax authorized by section 79-548.01, R. R. S. 1943, provides a necessary revenue within the meaning of

Article VIII, section 1, of the Nebraska Constitution. Banks v. Board of Education of Chase County 717
9. A school athletic facility is a schoolhouse or other building within the meaning of section 79-506, R. R. S. 1943. Banks v. Board of Education of Chase County 717
10. Authority to direct the purchase of a site for a schoolhouse or other school buildings in a Class VI district is reserved to the voters of the district. Banks v. Board of Education of Chase County 717
11. Section 79-548.01, R. R. S. 1943, is a revenue measure which makes no change in school site selection procedure. Banks v. Board of Education of Chase County 717
12. Architectural fees are general expenses, not expenses of building which must be submitted to the voters. Banks v. Board of Education of Chase County 717
13. The notice provisions of section 79-501 et seq., R. R. S. 1943, do not apply to a board of education meeting to approve general expenses such as a contract for architectural services. Banks v. Board of Education of Chase County 717
14. Article VII, section 5, of the Constitution of Nebraska, which provides in part that all fines and penalties shall be appropriated exclusively to the use of the common schools in the counties where the fines or penalties are imposed, applies only to penalties which are pecuniary punishments inflicted by laws, ordinances, or police regulations for their violation. DeCamp v. City of Lincoln 727

Searches and Seizures.

1. Testimony that an officer smelled a strong odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant, at least where there is sufficient foundation as to the expertise of the officer. State v. Daly 217
2. Under the Fourth Amendment to the Constitution of the United States the standard for determining probable cause for arrest and for search and seizure is the same. Probable cause exists in the Fourth Amendment sense where the facts and circumstances, within the officers' knowledge and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. State v. Brady 221
3. Section 29-822, R. R. S. 1943, provides that any person aggrieved by an unlawful search and seizure may move for return of the property so seized and to sup-

press its use as evidence. However, the motion must be filed at least 10 days before trial or at the time of arraignment, whichever is the later, unless otherwise permitted by the court for good cause shown. State v. Brady 221

4. A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial. State v. Brady 221
5. An odor of marijuana is sufficient to furnish probable cause to search a vehicle without a warrant if the expertise of the officer is shown. State v. Ruzicka 257
6. A warrant which authorizes a search for and seizure of films specifically named and described, and items of equipment or material aiding or used in the exhibition or dissemination of those films, is not a general warrant authorizing an exploratory search of the premises for evidence of any crime. State v. Tara Enterprises, Inc. and Zachary Productions, Ltd. 260
7. Where items unspecified in the warrant are seized in a valid search, the fact that the unspecified items are not admissible in evidence does not require suppression of property seized in accordance with the warrant. State v. Tara Enterprises, Inc. and Zachary Productions, Ltd. 260
8. When materials are seized in violation of the First Amendment to the Constitution of the United States, the appropriate remedy is return of the seized property. State v. Tara Enterprises, Inc. and Zachary Productions, Ltd. 260
9. The existence of probable cause for a warrantless search must be determined on the particular facts and circumstances of each case which must be determined by a practical and not by any technical standard, and where time is of the essence it is a highly relevant factor in evaluating the circumstances. State v. Booth 692
10. Probable cause for search or arrest without a warrant can rest upon the collective knowledge of the police rather than solely on that of the officer who actually makes the search or arrest, when there is some degree of communication between the two. State v. Booth 692
11. A furtive gesture when coupled with prior reliable information may constitute probable cause for search or arrest. State v. Booth 692
12. Probable cause for searching a motor vehicle is to be determined in view of its mobility and by a practical and not a technical standard, and differs from that

required to search a fixed structure. State v. Booth ... 692
13. Given probable cause to search, from a constitutional standpoint there is no difference between on the one hand seizing and holding a car at the station house before presenting the probable cause issue to the magistrate and on the other hand carrying out an immediate search without a warrant. State v. Booth 692

Sentences.

1. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Robinson 210
2. A sentence imposed within statutory limits will not be disturbed upon appeal unless there appears to be an abuse of discretion. State v. Welsh 249
3. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Harrington 356
4. Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Harrington 356
5. Matters relating to sentences imposed within statutory limits do not form a basis for post conviction relief. State v. Hoppes 383
6. Before a criminal matter may be appealed to the Supreme Court, it must be a final judgment, and no judgment will be regarded as final unless the sentence is pronounced. State v. Shaw 766
7. Pursuant to section 29-2902, R. R. S. 1943, criminal proceedings in a case in which there is probable cause to believe that the defendant is a sexual sociopath may be adjourned and the sentence suspended until proceedings pursuant to the sexual sociopath law have been completed. Upon completion of those proceedings, at the earliest possible time thereafter, the defendant is to be returned to the District Court wherein he was convicted. At that time an appropriate sentence on the criminal charges is to be imposed. Such sentence shall be deemed to commence from such time as the defendant is committed to either the Nebraska Regional Center or the Nebraska Penal and

Correctional Complex, less any credit for time already spent in incarceration. No defendant shall be required to remain in custody for a period of time longer than the sentence imposed for the criminal charge or until such time as defendant is determined to be a subject fit for release pursuant to the provisions of the sexual sociopath law, whichever later occurs. State v. Shaw 766

Separation of Powers.

1. It is the nature of the function, and not merely its statutory origin, which determines whether a governmental function is legislative or judicial. Lux v. Mental Health Board of Polk County 106
2. The determination of whether a function is legislative or judicial must necessarily be made on a case-by-case basis as it is not possible to define precisely the line between the functions. Lux v. Mental Health Board of Polk County 106

Severance.

1. A deed which purportedly conveys all of the interest of one joint tenant, wherein he is both grantor and grantee, is not an act which will sever the joint tenancy. Krause v. Crossley 806
2. Our statute which modifies the common law rules of cotenancy, section 76-118, R. R. S. 1943, does not change the common law rendering ineffective an attempted transfer of an interest in property by a joint tenant to himself as a single individual, for the purpose of severing the joint tenancy. Krause v. Crossley 806

Sexual Assault.

1. Where a victim's resistance to a sexual assault would obviously be useless, fruitless, or foolhardy, it is wholly unrealistic to require affirmative direct demonstration of the utmost physical resistance as proof of the victim's opposition and lack of consent. It is only required that the victim make reasonable resistance in good faith under all the circumstances and that the resistance be such as to make nonconsent and actual opposition genuine and real. State v. Pankey 595
2. Article I, section 9, of the Constitution of the State of Nebraska does not prohibit the right to bail to every individual charged with a sexual offense involving penetration by force or against the will of the victim. In order for one so charged to be ineligible for bail, it must appear to the trial court that either the proof of the charge is evident or the presumption is great.

In any instance in which the court is not convinced that either the proof is evident or the presumption great, then the court is not prohibited from granting bail to one so charged. Parker v. Roth 850

Sexual Sociopaths.

1. Pursuant to section 29-2902, R. R. S. 1943, criminal proceedings in a case in which there is probable cause to believe that the defendant is a sexual sociopath may be adjourned and the sentence suspended until proceedings pursuant to the sexual sociopath law have been completed. Upon completion of those proceedings, at the earliest possible time thereafter, the defendant is to be returned to the District Court wherein he was convicted. At that time an appropriate sentence on the criminal charges is to be imposed. Such sentence shall be deemed to commence from such time as the defendant is committed to either the Nebraska Regional Center or the Nebraska Penal and Correctional Complex, less any credit for time already spent in incarceration. No defendant shall be required to remain in custody for a period of time longer than the sentence imposed for the criminal charge or until such time as defendant is determined to be a subject fit for release pursuant to the provisions of the sexual sociopath law, whichever later occurs. State v. Shaw 766
2. Under the provisions of section 29-2909, R. R. S. 1943, a person who believes himself to be a sexual sociopath may initiate proceedings under the Nebraska Sexual Sociopath Act even though he has not been found guilty of a sexual offense. State v. Sell 840
3. In order for a trial court to find that a defendant "can benefit by treatment" within the meaning of the Nebraska Sexual Sociopath Act so as to require his confinement to a regional center, the court must find by a preponderance of the evidence that such treatment will result in the cure of the defendant. In the absence of such a finding the court must determine that the defendant cannot benefit from such treatment and should be confined in the Nebraska Penal and Correctional Complex as prescribed by the Nebraska Sexual Sociopath Act. State v. Sell 840

Specific Performance.

1. In an action for specific performance of an oral contract to convey real estate where partial performance is relied upon to avoid the defense of the statute of frauds, the evidence of the alleged contract and its

terms must be clear, satisfactory, and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear, satisfactory, and unequivocal evidence, they are unenforceable unless it is also proved by evidence of like character that there has been such performance as the law requires. The acts constituting performance must be such as are referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract or relation. They must be something that the claimant would not have done unless and on account of the contract and with the direct view to its performance so that nonperformance by the other party would amount to fraud upon him. Theobald v. Agee 524

2. The words "referable solely to the contract," as used in the foregoing rule, properly interpreted and applied mean that, if the evidence as a whole of a party seeking specific performance of an oral contract to convey real estate indicates that it is referable solely to the contract sought to be enforced and not to some other or different contract, then the burden of the rule has been satisfied. In determining whether or not the acts were referable solely to the contract, the acts of performance must be considered as a whole in their own light and in the light of all other material and relevant facts and circumstances, present, antecedent, and subsequent as shown by evidence with no part excluded. Theobald v. Agee 524

3. A purchaser, in an action for partial specific performance of a land contract, is entitled to an abatement of the purchase price with respect to seller's deficiency of title, even though purchaser, at the time of contracting, knew of such deficiency, when (1) seller contracted to sell the entire interest in the land, and (2) purchaser had reasonable grounds to believe seller could fulfill the contract. Egle v. Kitt 735

4. The law does not permit the complete remedy by specific performance to be split into separate actions for different elements of damages flowing from a single breach of contract. Brezina v. Hill 773

Standing.

1. Before any party can invoke the jurisdiction of the court he must have standing to sue. He must have some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. Stahmer v. Marsh 281

2. A requisite precedent condition for obtaining declaratory relief is that the parties seeking declaratory relief have a legally protectible interest or right in the controversy. Stahmer v. Marsh 281

States.

1. It is the obligation of the asylum state in extradition proceedings to determine whether the requisition charges a crime under the law of the demanding state. West v. Janing 141
2. In an extradition proceeding, where an examination of prior judicial precedent of the demanding state makes it at least doubtful that the demanding state is attempting to retroactively apply a judicial enlargement of criminal statutes, the asylum state ought, as a matter of comity, to refrain from determining the issue in analogy to the principle that the constitutionality of the statutes of a sister state defining a crime should be tested in the sister state. West v. Janing 141

Statutes.

1. The personal representative of a deceased person acting reasonably for the benefit of the interested persons may sell any real property of the estate following a court order with notice given in the manner prescribed by statute. § 30-2476 (23), R. R. S. 1943. Booth v. Reisdorff 6
2. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment, except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943. Bokelman v. Bokelman 17
3. Participation in the hearing required under section 79-1254, R. R. S. 1943, is ordinarily a waiver of any defect in the notice of the hearing. Witt v. School District No. 70 63
4. The right to collaterally attack orders made in contravention of the Public Meetings Act for a period of 1 year is specifically provided by section 84-1414, R. R. S. 1943. Witt v. School District No. 70 63
5. An adjudicative fact to be judicially noticed must be one not subject to reasonable dispute in that it is either (a) generally known within the jurisdiction of the court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. § 27-201 (2), R. R. S. 1943. Grubaugh v. State ex rel. State Real Estate Commission 75

6. The requirements of section 83-1009, R. R. S. 1943, which defines a mentally ill dangerous person, are met when medical diagnoses of paranoid schizophrenia and an unprovoked assault and threatening behavior are shown by clear and convincing proof. Lux v. Mental Health Board of Polk County 106
7. The opinion of a general practitioner of medicine as to mental condition is admissible in commitment proceedings, § 83-1010, R. R. S. 1943, provided a proper foundation is laid. Lux v. Mental Health Board of Polk County 106
8. Section 83-1009 (1), R. R. S. 1943, although it refers to "recent violent acts," does not require evidence of more than one violent act or threat. § 49-802, R. R. S. 1943. Lux v. Mental Health Board of Polk County 106
9. A court may properly deny an evidentiary hearing upon a motion to vacate a conviction filed under section 29-3001, R. R. S. 1943, upon a determination after an examination of the files and records of the case that the petitioner is entitled to no relief. State v. Miles 126
10. An unforeseeable judicial enlargement of a criminal statute applied retroactively is impermissible under the Fourteenth Amendment to the Constitution of the United States. West v. Janing 141
11. There was no violation of the Nebraska open meeting law, sections 84-1408 to 84-1414, R. R. S. 1943, where at a recess taken during a lawful public meeting called by the board of county commissioners of Lancaster County, certain of the commissioners and others present, retired to an adjoining room, the door to which was open at all times, with no one being excluded, and an informal conversation was had by the commissioners and others with reference to an item of business on the agenda of the meeting, but where no formal action or vote was taken thereon until the board of commissioners reconvened in regular session following the recess. Copple v. City of Lincoln 152
12. In granting an application to obtain telephone service from an adjacent service area under the provisions of sections 75-612 through 75-615, R. R. S. 1943, the Nebraska Public Service Commission may include in the service territory change an applicant whose service is reasonably adequate when inclusion is necessary to avoid a duplication of facilities within the meaning of section 75-613 (2), R. R. S. 1943, and when service to other applicants in that territory is inadequate. Reis v. Glenwood Telephone Membership Corp. 187
13. An easily correctible defect in service is not alone suf-

ficient to support a finding of no "reasonably adequate" service within the meaning of section 75-613 (1), R. R. S. 1943. Reis v. Glenwood Telephone Membership Corp. 187

14. In determining the economic soundness of the proposed revision as required by section 75-613 (2), R. R. S. 1943, the Nebraska Public Service Commission must consider the financial condition of the protestant telephone company, the effect of the revision on its income and ability to service its debt, the likelihood that the revision will require future rate increases by the affected company, the fact that subscribers other than the applicants may have equally meritorious claims, and the general effect of economic erosion and waste, as well as other matters which may be material and relevant to the issue of economic soundness. Reis v. Glenwood Telephone Membership Corp. 187

15. A union workman's refusal of a job offer because of a union rule prohibiting such acceptance as a result of the workman's status on a union out-of-work list created solely by union action, is a failure without good cause to accept suitable work within the meaning and purview of the Nebraska unemployment compensation statute, section 48-628, R. R. S. 1943. Wentz Heating & Air Conditioning Co. v. Kiene 202

16. The provisions of section 48-628 (c) (2) (iii), R. R. S. 1943, refer to conditions attached to a job offer by an employer and not to other conditions unilaterally imposed upon the employment process by a labor union. Wentz Heating & Air Conditioning Co. v. Kiene 202

17. In a penal statute it is not necessary that it be written as to be beyond the mere possibility of more than one construction. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is forbidden. State v. Robinson 210

18. Although a penal statute is required to be strictly construed, it should be given a sensible construction and general terms therein should be limited in their construction and application so as not to lead to injustice, oppression, or an absurd consequence. State v. Robinson 210

19. Section 29-822, R. R. S. 1943, provides that any person aggrieved by an unlawful search and seizure may move for return of the property so seized and to suppress its use as evidence. However, the motion must be filed at least 10 days before trial or at the time of arraignment, whichever is the later, unless other-

wise permitted by the court for good cause shown. State v. Brady 221

20. In an appeal to this court from an order of the Nebraska Motor Vehicle Industry Licensing Board denying an application to terminate a dealers franchise agreement, under the provisions of section 84-918, R. R. S. 1943, we determine only whether the District Court and the board applied the proper criteria and if there was substantial evidence to support the findings and orders of the board. Chrysler Motors Corp. v. Nebraska Motor Vehicle Industry Licensing Bd. 230

21. Section 60-1429, R. R. S. 1943, provides that good cause to terminate a motor vehicle dealer franchise cannot be established on the sole fact that the franchisor desires further penetration of the market. Chrysler Motors Corp. v. Nebraska Motor Vehicle Industry Licensing Bd. 230

22. No preference in awarding custody of children shall be given either parent on account of the sex of such parent, and there is no presumption that either parent is more fit than the other to have such custody. § 42-364, R. S. Supp., 1976. Fleharty v. Fleharty 245

23. Several acts of negligence may, in combination, amount to gross negligence within the meaning of the automobile guest statute. Liston v. Bradshaw 272

24. "Gross negligence" within the meaning of the automobile guest statute is great and excessive negligence, or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty. Liston v. Bradshaw 272

25. The general saving statute, section 49-301, R. R. S. 1943, relates to substantive and not procedural law. Denver Wood Products Co. v. Frye 286

26. A change in a statute of limitations which does not impair existing substantive rights but only alters the procedural enforcement of those rights operates on all proceedings instituted after its passage, whether the rights accrued before or after that date. Denver Wood Products Co. v. Frye 286

27. The simultaneous repeal and reenactment of substantially the same statutory provisions is ordinarily construed to be an affirmation or continuance of the original provisions rather than a true repeal. Denver Wood Products Co. v. Frye 286

28. Where a statute has been repealed and substantially reenacted with additions or changes, the additions or

changes are treated as amendments effective from the time the new statute goes into effect. Denver Wood Products Co. v. Frye 286

29. Laws prescribing the time within which particular rights may be enforced relate to remedies only and not substantive rights. Denver Wood Products Co. v. Frye 286

30. The foundational requirement of section 27-613, R. R. S. 1943, that a witness to be impeached be given an opportunity to explain or deny an apparently inconsistent statement, may be met either before or after the introduction of the impeaching evidence. State v. Price ... 308

31. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. § 27-401, R. R. S. 1943. State v. Classen 324

32. Where notice is required, a notice of a special meeting of a city council posted in three public places at 10 p.m., on the day preceding the meeting is not reasonable advance publicized notice of the meeting as required by section 84-1411, R. R. S. 1943. Pokorny v. City of Schuyler 334

33. An agenda which gives reasonable notice of the matters to be considered at a meeting of a city council complies with section 84-1411, R. R. S. 1943. Pokorny v. City of Schuyler 334

34. Where the record clearly shows an oral request for a jury instruction, and full understanding of the requested instruction by the trial court, review of the court's ruling on the instruction will not be precluded by failure to reduce the request to writing. § 25-1111, R. R. S. 1943. State v. Hegwood 379

35. Before the statutory restrictions prescribed by section 48-838 (2), R. S. Supp., 1976, against undue fragmentation in the public employment area can be overcome, there must be strong evidence justifying the need and propriety of such additional division. Sheldon Station Employees Assn. v. Nebraska P. P. Dist. 391

36. Evidence of other crimes, wrongs, or acts may be admissible in evidence as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. § 27-404 (2), R. R. S. 1943. State v. Rush 425

37. For the purpose of determining whether a defendant is entitled to the appointment of counsel at public expense, indigency is defined as the inability to retain counsel

without prejudicing one's financial ability to provide economic necessities for one's self or one's family. § 29-1804.04, R. R. S. 1943. State v. Radford 440

38. Separate causes of action may not be joined in a single petition unless each cause affects all parties. § 25-702, R. R. S. 1943. Stahmer v. Marsh 450

39. In the construction of a statute, no sentence, clause, or word should be rejected as meaningless or superfluous; rather, the plain and ordinary meaning of all the language employed should be taken into account in order to determine the legislative will. Weiss v. Union Ins. Co. 469

40. Newly discovered evidence must be relevant and credible, and not merely cumulative. It must involve something other than credibility of witnesses who testified at the former trial. § 29-2101 (5), R. R. S. 1943. State v. Smith 501

41. Hearsay statements made immediately prior to an incident which results in the death of the declarant are admissible as a statement of the declarant's then existing state of mind and emotion to prove the declarant's intent, plan, motive, or conduct under section 27-803 (2), R. R. S. 1943. State v. Smith 501

42. Determination of the feasibility of a water reclamation project is a legislative function and is not within the scope of the judicial review authorized by section 46-568, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513

43. Determination of the adequacy of a supply of water for a reclamation project is a legislative function and is not within the scope of the judicial review authorized by section 46-568, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513

44. A contract for the purchase of a water supply which creates a 40-year obligation on the part of a reclamation district must, under section 46-564, R. R. S. 1943, be submitted to the voters of the district for approval. Twin Loups Reclamation & Irr. District v. Blessing ... 513

45. The power of an irrigation district to enter into a contract with the United States for the construction, operation, and maintenance of the necessary works for the delivery and distribution of water is not limited by a requirement that the contract be approved by the voters of the district. § 46-156, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513

46. A contract for a supply of water which provides for

payment to be made by an irrigation district for a period of more than 1 year from the date of making the contract must be submitted to the legal voters of the district for approval or disapproval. § 46-1,145, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513

47. Adoption and incorporation into the 1943 revision of the statutes of an act which, as originally passed, may have been in violation of the constitutional provision prohibiting statutory amendments without reference to the section amended cures the constitutional defect. Art. III, section 14, Constitution of Nebraska. § 49-601, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513

48. A party having interest adverse to the interests of the parties he seeks to represent may not sue as representative of a class under the provisions of section 25-319, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513

49. In a proceeding by a dissenting shareholder seeking a finding and determination of the fair value of shares of stock under the provisions of section 44-133.06, R. R. S. 1943, the statutory provisions as to a judgment against the insurance company for the fair value of the shares, together with interest, are mandatory. Becker v. Natl. American Ins. Co. 545

50. Section 3-136, R. R. S. 1943, specifically exempts restricted landing areas designed for personal use from licensing requirements, and therefore the Department of Aeronautics is without authority to issue licenses for such restricted landing areas designed for personal use. Nebraska P. P. Dist. v. Huebner 587

51. Section 44-224.05, R. R. S. 1943, which authorizes the Director of Insurance of the State of Nebraska to approve or disapprove contracts of bulk reinsurance, by which a domestic insurance company operating on other than the stock plan, may cede its business to another licensed insurer, and which statute requires that such contract of bulk reinsurance make a fair and equitable provision for distribution to policyholders of the ceding company of their equity in the surplus funds, does not abrogate the common law duties of corporate directors to policyholders of a mutual insurance company and the approval of the contract by the Director of Insurance does not insulate the directors of the company from liability for violation of their fiduciary duties. Doyle v. Union Ins. Co. 599

52. A communication between a lawyer and a client is

not privileged under the provisions of section 27-503, R. R. S. 1943, if the services of the lawyer are sought or obtained to enable or aid anyone to commit or plan to commit what the client knew, or reasonably should have known, to be a fraud. Doyle v. Union Ins. Co. 599

53. A party to a property settlement agreement entered into pursuant to section 42-366, R. R. S. 1943, may not, as a matter of right, withdraw therefrom prior to approval or disapproval of the agreement by the trial court. Sebesta v. Sebesta 624

54. Sections 48-1101 and 48-1102 (8), R. R. S. 1943, of the Nebraska Fair Employment Practice Act, do not mandate the employment of firemen with visual defects which affect their ability to engage in their occupation. McCrea v. Cunningham 638

55. Sections 20-126 and 20-131, R. R. S. 1943, setting forth the policy of this state to employ the blind and visually handicapped do not require the employment of firemen with visual handicaps where that disability prevents the performance of the work involved. McCrea v. Cunningham 638

56. An oral agreement to make a will is unenforceable under the statute of frauds, section 36-105, R. R. S. 1943. However, nothing contained in sections 36-101 to 36-106, R. R. S. 1943, shall be construed to bridge the powers of a court of equity to compel specific performance of agreements in cases of part performance. Rudolph v. Hartung 678

57. The county board by statute is made the overseer of the poor and the county has a mandatory duty to provide for poor persons whether they are residents or nonresidents of the county. Creighton-Omaha Regional Health Care Corp. v. Douglas County 686

58. A court may refuse to enter a declaratory judgment on the validity of an administrative rule when the petition essentially presents a claim against the state for money. § 84-911, R. R. S. 1943; §§ 77-2406 et seq., R. R. S. 1943. Millard School Dist. v. State Department of Education 707
Westside Community Schools v. State Department of Education 712

59. Section 79-548.01, R. R. S. 1943, is not an unconstitutional delegation of legislative authority. Banks v. Board of Education of Chase County 717

60. The tax authorized by section 79-548.01, R. R. S. 1943, provides a necessary revenue within the meaning of Article VIII, section 1, of the Nebraska Constitution. Banks v. Board of Education of Chase County 717

61. A school athletic facility is a schoolhouse or other building within the meaning of section 79-506, R. R. S. 1943. Banks v. Board of Education of Chase County 717
62. Section 79-548.01, R. R. S. 1943, is a revenue measure which makes no change in school site selection procedure. Banks v. Board of Education of Chase County 717
63. The notice provisions of section 79-501 et seq., R. R. S. 1943, do not apply to a board of education meeting to approve general expenses such as a contract for architectural services. Banks v. Board of Education of Chase County 717
64. In a proceeding in juvenile court under sections 43-202 (2) and 43-209, R. S. Supp., 1978, the court may terminate all parental rights of the parents if the court finds it would be in the best interests of the child to so terminate parental rights. The decision to terminate parental rights need not be based upon proof beyond a reasonable doubt. State v. Chant 750
65. Pursuant to section 29-2902, R. R. S. 1943, criminal proceedings in a case in which there is probable cause to believe that the defendant is a sexual sociopath may be adjourned and the sentence suspended until proceedings pursuant to the sexual sociopath law have been completed. Upon completion of those proceedings, at the earliest possible time thereafter, the defendant is to be returned to the District Court wherein he was convicted. At that time an appropriate sentence on the criminal charges is to be imposed. Such sentence shall be deemed to commence from such time as the defendant is committed to either the Nebraska Regional Center or the Nebraska Penal and Correctional Complex, less any credit for time already spent in incarceration. No defendant shall be required to remain in custody for a period of time longer than the sentence imposed for the criminal charge or until such time as defendant is determined to be a subject fit for release pursuant to the provisions of the sexual sociopath law, whichever later occurs. State v. Shaw 766
66. The Legislature, by enacting section 54-601, R. R. S. 1943, removed the common law restriction of proving scienter or knowledge of the dangerous propensities of dogs, but only as it applied to the actions of dogs specified in the statute. Paulsen v. Courtney 791
67. For consideration on appeal under our statute, section 25-21,115, R. R. S. 1943, governing pleadings in quiet title actions, it is not necessary to specify the nature of adverse claims but only that the defendants claim or appear to have some interest in the real estate

and that the evidence reflect the question was considered by the trial court. Krause v. Crossley 806

68. Our statute which modifies the common law rules of cotenancy, section 76-118, R. R. S. 1943, does not change the common law rendering ineffective an attempted transfer of an interest in property by a joint tenant to himself as a single individual, for the purpose of severing the joint tenancy. Krause v. Crossley 806

69. Where a juvenile defendant is being prosecuted in the District Court and has not had an opportunity for a hearing on the matter of transfer to juvenile jurisdiction as required by section 43-202.02, R. S. Supp., 1978, ordinarily the proper procedure to cure the procedural defect is to hold such a hearing and to determine whether or not such transfer should have been granted. If the court, based upon sufficient evidence, finds the evidence did not require the transfer, then the conviction need not be set aside in post conviction proceedings. State v. Tweedy 824

70. Under section 27-606(2), R. R. S. 1943, a juror may testify as to whether extraneous prejudicial information was improperly brought to the jury's attention. No evidence may be received as to the effect of any statement upon a juror's mind, its influence one way or another, or the mental processes of a juror in connection therewith. Simants v. State 828

71. Under the provisions of section 29-2909, R. R. S. 1943, a person who believes himself to be a sexual sociopath may initiate proceedings under the Nebraska Sexual Sociopath Act even though he has not been found guilty of a sexual offense. State v. Sell 840

72. It is incumbent upon the Supreme Court, when reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality. If possible, a statute should be construed in such a way as to negative any constitutional infirmity. State laws are accorded a presumption of constitutionality. Parker v. Roth 850

Strict Liability.

1. Dog owners are statutorily liable for any and all damage inflicted by their dog to any person, other than a trespasser, without proof of scienter or knowledge of the dangerous propensities of their dogs for biting, and by reason of such dog or dogs killing, wounding, worrying, or chasing domestic animals. Paulsen v. Courtney 791

2. In actions based upon statutory liability for injury by a

dog, the injured person will be barred from recovering if he intentionally provoked the dog, and thereby caused it to attack him. Paulsen v. Courtney 791

Summary Judgments.

1. The moving party is not entitled to summary judgment except where there exists no geniune issue as to any material fact and where under the facts he is entitled to judgment as a matter of law. Farro v. Rubottom 120
2. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party. Farro v. Rubottom 120
3. 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. In this respect the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. If, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits. Farro v. Rubottom 120
4. The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. Properly used it can accomplish that purpose. French v. Cornwell 569
5. A motion for summary judgment can be granted where there is no genuine issue as to any material fact in the case and where, under the facts, movant is entitled to judgment as a matter of law. Griffeth v. Sawyer Clothing, Inc. 631
6. Summary judgment shall be rendered forthwith if the pleadings, depositions, and admissions are on file, together with the affidavit, if any, showing that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Negus-Sweenie, Inc. v. Beaver Lake Corp. 671
7. When signatures are admitted and the defendant has failed to plead a defense, no fact issue is presented. Columbus Bank & Trust Co. v. High Country Stable 724
8. Existence of a factual dispute relative to issues not framed by the pleadings cannot preclude the rendi-

tion of a summary judgment otherwise appropriate. Columbus Bank & Trust Co. v. High Country Stable 724
9. The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity, expense, and delay of trial, those cases where there is no genuine claim or defense. Partridge v. Younghein 756
10. In consideration of a motion for summary judgment, the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may be drawn from the evidence. Partridge v. Younghein 756
11. Where there is no genuine issue of material fact, it is proper for the trial court to render summary judgment on the pleadings and admissions. Ott v. Frank .. 820

Supreme Court.

1. The Supreme Court may take note of plain errors not assigned. Bishop Buffets, Inc. v. Westroads, Inc. 171
2. The Supreme Court may, at its option, consider plain error not specified in appellant's brief. Weiss v. Union Ins. Co. 469
3. Evidence which does not appear in the record cannot be considered by the Supreme Court on appeal. Moninger v. Moninger 494
4. The Supreme Court, on appeal, will not interpret the meaning of a statutory provision if such interpretation is not necessary for the disposition of the case. State v. Sell 840
5. It is incumbent upon the Supreme Court, when reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality. If possible, a statute should be construed in such a way as to negative any constitutional infirmity. State laws are accorded a presumption of constitutionality. Parker v. Roth 850

Taxes.

1. Real estate taxes will not be deemed to be a cost of "operating and maintaining common areas" within the meaning of a shopping center lease clause where a separate clause specifically addresses the payment of taxes. Bishop Buffets, Inc. v. Westroads, Inc. 171
2. Section 79-548.01, R. R. S. 1943, is not an unconstitutional delegation of legislative authority. Banks v. Board of Education of Chase County 717

3. The tax authorized by section 79-548.01, R. R. S. 1943, provides a necessary revenue within the meaning of Article VIII, section 1, of the Nebraska Constitution. Banks v. Board of Education of Chase County 717
4. Section 79-548.01, R. R. S. 1943, is a revenue measure which makes no change in school site selection procedure. Banks v. Board of Education of Chase County 717

Tenure.

A tenured teacher whose position has been abolished has a right to be retained to fill any vacancy for which she is qualified for the next school year which occurs after notice of the elimination of her position. Witt v. School District No. 70 63

Testimony.

Under section 27-606 (2), R. R. S. 1943, a juror may testify as to whether extraneous prejudicial information was improperly brought to the jury's attention. No evidence may be received as to the effect of any statement upon a juror's mind, its influence one way or another, or the mental processes of a juror in connection therewith. Simants v. State 828

Time.

1. It is the duty of a defense attorney in a criminal case to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. Ordinarily, a reasonably competent attorney will conduct an in-depth investigation of the case, which includes an independent interviewing of the witnesses. State v. Lang 9
2. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment, except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943. Bokelman v. Bokelman 17
3. Errors at trial should be called to the attention of the trial court at the earliest practicable time so that appropriate remedial action may be taken. State v. Rojewski 34
4. Any person who has notice of a meeting and attends the meeting should be required to object specifically to the lack of public notice at the meeting, or be held to have waived his right to object on that ground at a later date. A timely objection will permit the public

body to remedy its mistake promptly and defer formal action until the required public notice can be given. Witt v. School District No. 70 63

5. Section 29-822, R. R. S. 1943, provides that any person aggrieved by an unlawful search and seizure may move for return of the property so seized and to suppress its use as evidence. However, the motion must be filed at least 10 days before trial or at the time of arraignment, whichever is the later, unless otherwise permitted by the court for good cause shown. State v. Brady 221
6. A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial. State v. Brady 221
7. Where labor or material has been furnished by a party under distinct contracts, the claim for a mechanic's lien under each contract must be filed within the time limited by the statutes for that purpose. Omaha Nat. Bank v. Continental Western Corp. 238
8. The District Court has inherent power to vacate or modify its own judgment at any time during the term at which it is rendered. Such action rests in the sound discretion of the court and, in the absence of an abuse of discretion, will not be interfered with. Campbell v. Campbell 575
9. The Public Service Commission may reconsider an order on its own motion during the 30 days after the mailing of a copy of the order and before an appeal to the Supreme Court has been taken. Upon the expiration of 30 days from the mailing of a copy of the order, or upon an appeal being perfected to the Supreme Court, the power of the Public Service Commission to reconsider its order upon its own motion, or upon the motion of an interested party who should otherwise have perfected an appeal, terminates and such order becomes final and binding. Nebraska P. P. Dist. v. Huebner 587
10. Where a contract is silent with respect to time of performance, a reasonable time for performance will be presumed or implied by law. Gustav Thieszen Irr. Co., Inc. v. Meinberg 666
11. Where a contract is silent with respect to time of performance, the reasonable time which is presumed by law is a rebuttable presumption, and parol or extrinsic evidence may be received to rebut that presumption. Gustav Thieszen Irr. Co., Inc. v. Meinberg 666
12. Whether a specific delivery date was agreed upon or the question of whether delivery was effected within a

reasonable time is ordinarily a question of fact for the jury, not a question of law for the court. Gustav Thieszen Irr. Co., Inc. v. Meinberg 666

13. An application for modification or change with respect to allowance for child support in a divorce decree may be made subsequent to the time of the decree, but must be founded upon new facts and circumstances which have arisen subsequent to the entry of the decree. In the absence of such facts and circumstances the matter will be deemed res judicata. Quigley v. Quigley 677

14. When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the children require that a final dispositional hearing be held without delay. State v. Chant 750

15. Pursuant to section 29-2902, R. R. S. 1943, criminal proceedings in a case in which there is probable cause to believe that the defendant is a sexual sociopath may be adjourned and the sentence suspended until proceedings pursuant to the sexual sociopath law have been completed. Upon completion of those proceedings, at the earliest possible time thereafter, the defendant is to be returned to the District Court wherein he was convicted. At that time an appropriate sentence on the criminal charges is to be imposed. Such sentence shall be deemed to commence from such time as the defendant is committed to either the Nebraska Regional Center or the Nebraska Penal and Correctional Complex, less any credit for time already spent in incarceration. No defendant shall be required to remain in custody for a period of time longer than the sentence imposed for the criminal charge or until such time as defendant is determined to be a subject fit for release pursuant to the provisions of the sexual sociopath law, whichever later occurs. State v. Shaw 766

16. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. Clearwater Corp. v. City of Lincoln 796

Trial.

1. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment, except for the reasons stated and within the time limited in section 25-2001, R. R. S. 1943. Bokelman v.

Bokelman 17
2. In a trial de novo this court, in reaching its own findings, 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. The Wickes Corporation v. Frye 23
3. Errors at trial should be called to the attention of the trial court at the earliest practicable time so that appropriate remedial action may be taken. State v. Rojewski 34
4. The better practice is for the trial court to inquire whether counsel desire to present closing arguments, but in the absence of a request the right to make a closing argument is waived. State v. Rojewski 34
5. 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. Brahatcek v. Millard School District 86
6. In an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was a proximate cause of the plaintiff's injury or a cause which proximately contributed to it. Brahatcek v. Millard School District ... 86
7. Whether or not the state demanding extradition has violated the right of a fugitive to a speedy trial is a question for the demanding state to determine. West v. Janing 141
8. 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. Robinson 210
9. The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong. Hudson Foods, Inc. v. L & B Corp. & Estate of Clark 291
10. Where trial is to the court, a general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts. Hudson Foods, Inc. v. L & B Corp. & Estate of Clark 291
11. An error in overruling a plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt. State v. Price .. 308

12. There is no right to appeal to this court from a decision binding the defendant over for trial after a preliminary hearing. State v. Price 308
13. The decision to allow endorsement of a new witness by the prosecutor is addressed to the sound discretion of the trial court. State v. Price 308
14. Testimony presented by a prosecutor with a view toward subsequent impeachment does not come within the prohibition against the knowing use of perjured testimony. State v. Price 308
15. The admission of irrelevant evidence is not reversible error unless there is prejudice to the defendant or he is prevented from having a fair trial. State v. Classen 324
16. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of punishment to be imposed, and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Harrington 356
17. Where the punishment of an offense created by statute is left to the discretion of the court, to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. State v. Harrington 356
18. Issues of liability which have not been pleaded should not be submitted to the jury for determination. Suhr v. City of Scribner 364
19. Claims for damages which do not arise from the issues pleaded should not be submitted to the jury. Suhr v. City of Scribner 364
20. Claims for damages should not be submitted to the jury when the evidence relating thereto is not sufficient to enable the jury to determine the amounts of such damage with reasonable certainty. Suhr v. City of Scribner 364
21. A party seeking damages must furnish appropriate data to enable the trier of fact to find such damages without resort to conjecture or speculation. Suhr v. City of Scribner 364
22. Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies

whether the claim or demand, purpose, or subject matter of the two suits is the same or not. Bank of Mead v. St. Paul Fire & Marine Ins. Co. 403

23. Where a second action is on the same cause of action and between the same parties as the first action, the judgment in the former action ordinarily is conclusive in the second action as to every question which was or might have been presented in determining the former. Bank of Mead v. St. Paul Fire & Marine Ins. Co. 403

24. Judicial notice may be taken at any stage of the proceeding. Bank of Mead v. St. Paul Fire & Marine Ins. Co. 403

25. A motion to withdraw a guilty plea addresses itself to the direction of the trial judge, and, in the absence of a clear abuse of that discretion, the appellate court will not interfere. State v. Miller 443

26. It is not proper for a trial judge to permit the withdrawal of a guilty plea which was knowingly, intelligently, and voluntarily made unless such withdrawal is necessary to correct a manifest injustice. State v. Miller 443

27. Affirmative allegations made by a defendant in his answer to a cross-claim against him by a codefendant, which allegations are in essence denials of allegations of the cross-claim, are not to be treated as judicial admissions upon which the plaintiff may rely in his claim against the defendant, where the rights of the cross-claiming defendant against his codefendant arise from an independent contract between them. Cook v. Beermann 447

28. A motion for a directed verdict or its equivalent must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Anderson v. Moore 452

29. A jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though not contradicted by direct evidence. Lintner v. Roos 476

30. Under a claim of damages for personal injuries, the evidence in proof of damages must be direct and certain. Proof that damage might or could have been caused by an accident is not sufficient to sustain a verdict for the claimant. Lintner v. Ross 476

31. Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite. State v. Jones 488
32. Courts will not consider evidence which is not relevant. Moninger v. Moninger 494
33. Newly discovered evidence must be of such a nature as to create strong probabilities of a different result had it been offered and admitted in the former trial. State v. Smith 501
34. Hearsay statements made immediately prior to an incident which results in the death of the declarant are admissible as a statement of the declarant's then existing state of mind and emotion to prove the declarant's intent, plan, motive, or conduct under section 27-803 (2), R. R. S. 1943. State v. Smith 501
35. The trial court may refuse a requested instruction where the substance of the request is covered in the instructions given. State v. Booth 692
36. It is prejudicial error for the trial court to include in its instructions to the jury allegations of fact found in the pleadings which have not been supported by the evidence. Milliron Ranch Corp. v. Brinkman 703
37. A pretrial order, entered following a pretrial conference, controls the subsequent course of the action unless modified. Egle v. Kitt 735
38. The court should eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend. Ferlise v. Raznick 745
39. Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. West Gate Bank v. Eberhardt 762
40. In an equitable action where evidence on material issues of fact is in conflict, the reviewing court will consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Brezina v. Hill 773
41. Generally, in an eminent domain proceeding, evidence as to the sale of the identical property is admissible as evidence of market value, provided there is adequate

foundation to show the evidence is material and relevant. Clearwater Corp. v. City of Lincoln 796
42. The trial court has a wide discretion as to whether evidence as to particular sale is admissible. Clearwater Corp. v. City of Lincoln 796
43. The value of money, i.e. its purchasing power, is elemental within the knowledge and experience of man generally, and is not a proper subject for an instruction. Ott v. Frank 820
44. Where a party has sustained the burden of a trial and has succeeded in securing the verdict of a jury on controverted issues of act, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Ott v. Frank ... 820
45. A fair trial in a fair tribunal is a basic requirement of constitutional due process. Simants v. State 828
46. The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. Simants v. State .. 828
47. In order for a trial court to find that a defendant "can benefit by treatment" within the meaning of the Nebraska Sexual Sociopath Act so as to require his confinement to a regional center, the court must find by a preponderance of the evidence that such treatment will result in the cure of the defendant. In the absence of such a finding the court must determine that the defendant cannot benefit from such treatment and should be confined in the Nebraska Penal and Correctional Complex as prescribed by the Nebraska Sexual Sociopath Act. State v. Sell 840

Trusts.

1. If the property which is attempted to be put in trust is so uncertain that it cannot be separated or distinguished from the individual property of the trustee, the trust will be void for uncertainty. No trust will be created where the property to be the subject of the trust is left uncertain. Page, Higgins, Clyde & Avery v. Buchfinck .. 411
2. A trustee is required to dispose of trust property on the most advantageous terms which it is reasonably possible for him to secure for the benefit of those whom he represents. Where he breaches this duty, the measure of damages is the difference between the price for which the property was sold and its fair and reasonable market value at the time of the sale. Doyle v. Union Ins. Co. 599

Undue Influence.

1. The elements necessary to prove undue influence are: (1) That the individual is susceptible to such influence; (2) that the opportunity to exercise such influence existed; (3) that there was a disposition to exercise undue influence upon the individual; and (4) that the instrument was a result of such undue influence. Krause v. Crossley 806
2. The burden of proof on the issue of undue influence is upon the party contesting the document. Krause v. Crossley 806

Uniform Commercial Code.

1. No consideration is necessary for an instrument given as security for a debt already owed by the party giving it or by a third person. First Nat. Bank of Omaha v. Kizzier 369
2. Under the Uniform Commercial Code, the adequacy of the price and the reasonableness of the expense for which collateral is sold at private sale after default and repossession are relevant along with other issues in determining whether the sale was commercially reasonable. First Nat. Bank of Omaha v. Kizzier 369
3. The Uniform Commercial Code requires the creditor to proceed in a commercially reasonable manner to liquidate accounts receivable. First Nat. Bank of Omaha v. Kizzier 369
4. Compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency. Citizens State Bank v. Sparks 661
5. The burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice. Citizens State Bank v. Sparks 661
6. Where a secured party conducts a private sale of repossessed collateral security, the notice required by section 9-504 (3), U. C. C., is reasonable notification of the time after which any private sale is to be made. Citizens State Bank v. Sparks 661
7. Relinquishment of keys to an automobile being held as collateral, for a limited purpose, and execution of title to that automobile, which execution is unauthorized, does not constitute a waiver by the debtor of reasonable notice required by section 9-504 (3), U. C. C. Citizens State Bank v. Sparks 661

Verdicts.

1. A verdict may be set aside as excessive by the trial court or on appeal when, and not unless, it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or it is clear that the jury disregarded the evidence or rules of law. Brahatcek v. Millard School District 86
2. 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. Robinson 210
3. In an action based on gross negligence under the Nebraska guest statute, courts cannot hesitate in directing a verdict where the conviction is clear that negligence in a very high degree is not present. Liston v. Bradshaw 272
4. However, if there is adequate proof of negligence, a verdict should only be directed where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. Liston v. Bradshaw 272
5. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence. Liston v. Bradshaw 272
6. A motion for a directed verdict or its equivalent must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Anderson v. Moore 452
7. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Pankey 595
8. Where a party has sustained the burden of a trial and has succeeded in securing the verdict of a jury on controverted issues of fact, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Ott v. Frank 820
9. Unauthorized communications between jurors and third persons or witnesses during the course of jury deliberations are absolutely forbidden and invalidate the verdict unless their harmlessness is made to appear. Simants v. State 828

Voters.

Legal voters of school districts have the right to maintain legal action in their own names to determine the boundaries of the district. Stahmer v. Marsh 450

Waiver.

1. The better practice is for the trial court to inquire whether counsel desire to present closing arguments, but in the absence of a request the right to make a closing argument is waived. State v. Rojewski 34
2. Participation in the hearing required under section 79-1254, R. R. S. 1943, is ordinarily a waiver of any defect in the notice of the hearing. Witt v. School District No. 70 63
3. Any person who has notice of a meeting and attends the meeting should be required to object specifically to the lack of public notice at the meeting, or be held to have waived his right to object on that ground at a later date. A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given. Witt v. School District No. 70 63
4. A waiver of objections to evidence on the ground that it was seized in an unreasonable search occurs when no objection is made at least 10 days before trial. State v. Brady 221
5. When the defendant waives his state court remedies and admits his guilt, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. State v. Miller 443
6. Relinquishment of keys to an automobile being held as collateral, for a limited purpose, and execution of title to that automobile, which execution is unauthorized, does not constitute a waiver by the debtor of reasonable notice required by section 9-504 (3), U. C. C. Citizens State Bank v. Sparks 661

Waters.

1. An owner of land has a right in the interest of good husbandry to drain ponds or basins thereon of a temporary character which have no natural outlet or course of flow by discharging the waters thereof by means of an artificial channel into a natural surface water drain on his own property and through such drain over the land of another proprietor in the general course of drainage in that locality even though the flow of such natural drain is thereby increased over the lower estate and provided that this is done in a

reasonable and careful manner and without negligence. The same rule applies to the collection and discharge of other surface waters on the owner's land. Nickman v. Kirschner 78

2. An artificial drain constructed for the disposition of surface waters need not itself follow the precise course of drainage. It is sufficient if it follows the general course of drainage and drains into a natural watercourse which is reasonably accessible. Nickman v. Kirschner 78

3. Continuous use of a prescriptive right of drainage is the uninterrupted use of such right as the need therefor requires, even if such required use is intermittent in nature. Nickman v. Kirschner 78

4. When a trial court has determined the right to dispose of surface waters into an artificial drain under the rule of Arthur v. Glover, and the construction of said drain has not been completed, such court should retain jurisdiction of the cause to determine the proper criteria for the construction of the drain and until the construction has been done in accordance therewith. Nickman v. Kirschner 78

5. Determination of the feasibility of a water reclamation project is a legislative function and is not within the scope of the judicial review authorized by section 46-568, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513

6. Determination of the adequacy of a supply of water for a reclamation project is a legislative function and is not within the scope of the judicial review authorized by section 46-568, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513

7. A contract for the purchase of a water supply which creates a 40-year obligation on the part of a reclamation district must, under section 46-564, R. R. S. 1943, be submitted to the voters of the district for approval. Twin Loups Reclamation & Irr. District v. Blessing ... 513

8. The power of an irrigation district to enter into a contract with the United States for the construction, operation, and maintenance of the necessary works for the delivery and distribution of water is not limited by a requirement that the contract be approved by the voters of the district. § 46-156, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513

9. A contract for a supply of water which provides for payment to be made by an irrigation district for a period of more than 1 year from the date of making the contract must be submitted to the legal voters of

the district for approval or disapproval. § 46-1,145, R. R. S. 1943. Twin Loups Reclamation & Irr. District v. Blessing 513

Wills.

1. The probate court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will. It has no jurisdiction to construe wills to determine the rights of devisees or legatees as between themselves, or between the executor and persons claiming adversely to the estate. Such latter jurisdiction is in the District Court. Page, Higgins, Clyde & Avery v. Buchfinck 411
2. Where an executor does not request a construction of the will, the court has no authority to bind the heirs or legatees by any construction. Page, Higgins, Clyde & Avery v. Buchfinck 411
3. The cardinal rule in constructing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to the law. Page, Higgins, Clyde & Avery v. Buchfinck 411
4. Where the question is one of ascertaining the intention of the testator, any hard and fast rule is inappropriate. The modern view favors recognizing that a will should be construed in accordance with the language used in each particular case as interpreted in the light of all the circumstances. Page, Higgins, Clyde & Avery v. Buchfinck 411
5. A devise which charges the devisee thereof personally with the duty of paying the testator's debts, or of paying a legacy, or of performing any other onerous act is significant as indicating an intent to create in the devisee an estate in fee simple absolute. Page, Higgins, Clyde & Avery v. Buchfinck 411
6. A testamentary disposition is the act or will of a person granting property or rights effective at the death of such person. Haerry v. Hoffschneider 534
7. A contract between two persons is not rendered testamentary by the fact that some provisions are to be performed at the time of or subsequent to the death of one of the parties. Haerry v. Hoffschneider 534
8. When several documents are executed successively as a part of the same general transaction, the language of each document and the order of their execution may be considered as indications of the intention of the makers. Haerry v. Hoffschneider 534
9. An oral agreement to make a will is unenforceable under the statute of frauds, section 36-105, R. R. S.

1943. However, nothing contained in sections 36-101 to 36-106, R. R. S. 1943, shall be construed to bridge the powers of a court of equity to compel specific performance of agreements in cases of part performance. Rudolph v. Hartung 678
10. The part performance necessary to render an oral contract to make a will enforceable must be referable solely to the oral agreement. Rudolph v. Hartung 678

Witnesses.
1. It is the duty of a defense attorney in a criminal case to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. Ordinarily, a reasonably competent attorney will conduct an in-depth investigation of the case, which includes an independent interviewing of the witnesses. State v. Lang 9
2. In an appropriate case an expert may render an opinion without first disclosing the underlying data upon which the opinion is based. Northern Nat. Gas Co. v. Beech Aircraft Corp. 300
3. An expert can render an opinion in an appropriate case in response to a direct question and is not required to have a hypothetical question presented to him. Northern Nat. Gas Co. v. Beech Aircraft Corp. 300
4. Before an expert opinion can be rendered it must be shown that such an opinion is of a scientific, technical, or other specialized knowledge which would assist the trier of fact to understand the evidence or to determine a fact in issue, and that the witness qualifies as such expert by knowledge, skill, experience, training, or education. Northern Nat. Gas Co. v. Beech Aircraft Corp. 300
5. A trial court may either on its own motion or in response to an objection require an expert to disclose the underlying facts or data upon which the opinion is to be based before permitting the expert to render his opinion. Northern Nat. Gas Co. v. Beech Aircraft Corp. 300
6. The action of the trial court, in either requesting an expert witness to disclose the underlying data or information upon which his opinion is based or refusing such a request, will not be disturbed on appeal in the absence of a showing that the trial court abused its discretion. Northern Nat. Gas Co. v. Beech Aircraft Corp. 300
7. If an expert witness desires to render an opinion with-

out first disclosing the underlying data or information upon which the opinion is based, he must first establish by competent evidence that the matter involved in the opinion is of such nature that experts within the specific field could render such an opinion; and likewise that experts within the specific field would rely upon the data or information relied upon by the testifying expert in rendering the opinion. Northern Nat. Gas Co. v. Beech Aircraft Corp. 300

8. The decision to allow endorsement of a new witness by the prosecutor is addressed to the sound discretion of the trial court. State v. Price 308
9. Testimony presented by a prosecutor with a view toward subsequent impeachment does not come within the prohibition against the knowing use of perjured testimony. State v. Price 308
10. The foundational requirement of section 27-613, R. R. S. 1943, that a witness to be impeached be given an opportunity to explain or deny an apparently inconsistent statement, may be met either before or after the introduction of the impeaching evidence. State v. Price 308
11. An owner of household goods used for family purposes is competent to express an opinion as to its value. State v. Rush 425
12. Value of personal property is a question of fact for determination of the jury. It is for the jury to resolve conflicts in the evidence on this issue and to pass on the credibility of witnesses. State v. Rush 425
13. A jury is not required to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though not contradicted by direct evidence. Lintner v. Roos 476
14. The testimony of expert witnesses is not treated any differently in the fact-finding process than that of witnesses generally when it comes to determining the weight and credibility of the testimony, whether the fact finder is the judge or the jury. Doyle v. Union Ins. Co. 599
15. Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Rudolph v. Hartung 678
16. An expert witness testifying from observation or personal knowledge may be required to disclose and testify to the facts on which his opinion is based. Clearwater Corp. v. City of Lincoln 796

17. The opinion of an expert witness lacks probative value if assumptions for it are shown not to be true. Clearwater Corp. v. City of Lincoln 796
18. The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. An opinion has no probative force if the assumptions upon which it is based are shown not to be true. Clearwater Corp. v. City of Lincoln 796
19. Expert testimony should not be received, or if received should be stricken, if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. Clearwater Corp. v. City of Lincoln 796
20. Where the opinion testimony of an expert witness does not have a sound and reasonable basis it should be stricken. Clearwater Corp. v. City of Lincoln 796
21. Unauthorized communications between jurors and third persons or witnesses during the course of jury deliberations are absolutely forbidden and invalidate the verdict unless their harmlessness is made to appear. Simants v. State 828

Words and Phrases.

1. Prejudice is an essential element of a claim of ineffective assistance of counsel and a defendant must show that he was prejudiced in the defense of the case by the actions or inactions of his counsel. State v. Lang 9
2. Where lack of supervision by an instructor is relied on to impose liability, such lack must appear as the proximate cause of the injury. Brahatcek v. Millard School District 86
3. "Proximate cause" as used in the law of negligence is that cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the injury would not have occurred. Brahatcek v. Millard School District 86
Travelers Indemnity Co. v. Center Bank 294
4. Section 83-1009(1), R. R. S. 1943, although it refers to "recent violent acts," does not require evidence of more than one violent act or threat. § 49-802, R. R. S. 1943. Lux v. Mental Health Board of Polk County 106
5. Real estate taxes will not be deemed to be a cost of "operating and maintaining common areas" within the meaning of a shopping center lease clause where a separate clause specifically addresses the payment of

taxes. Bishop Buffets, Inc. v. Westroads, Inc. 171
6. The addition of interior walls does not constitute "expansion or enlargement" of a shopping center unless it is otherwise clear that the parties intended such a construction under the terms of their lease. Bishop Buffets, Inc. v. Westroads, Inc. 171
7. A common use of the word "other" is as meaning one of two or more of a class. Thus, the general phrase "or other property of the tenant" places a limitation on a list of more specific items which precede it. Bishop Buffets, Inc. v. Westroads, Inc. 171
8. In granting an application to obtain telephone service from an adjacent service area under the provisions of sections 75-612 through 75-615, R. R. S. 1943, the Nebraska Public Service Commission may include in the service territory change an applicant whose service is reasonably adequate when inclusion is necessary to avoid a duplication of facilities within the meaning of section 75-613 (2), R. R. S. 1943, and when service to other applicants in that territory is inadequate. Reis v. Glenwood Telephone Membership Corp. 187
9. An easily correctible defect in service is not alone sufficient to support a finding of no "reasonably adequate" service within the meaning of section 75-613 (1), R. R. S. 1943. Reis v. Glenwood Telephone Membership Corp. 187
10. In determining the economic soundness of the proposed revision as required by section 75-613 (2), R. R. S. 1943, the Nebraska Public Service Commission must consider the financial condition of the protestant telephone company, the effect of the revision on its income and ability to service its debt, the likelihood that the revision will require future rate increases by the affected company, the fact that subscribers other than the applicants may have equally meritorious claims, and the general effect of economic erosion and waste, as well as other matters which may be material and relevant to the issue of economic soundness. Reis v. Glenwood Telephone Membership Corp. 187
11. Failure to stop before entering an intersection, as directed by a traffic signal or stop sign, is not, when standing alone, sufficient to constitute gross negligence. Liston v. Bradshaw 272
12. Several acts of negligence may, in combination, amount to gross negligence within the meaning of the automobile guest statute. Liston v. Bradshaw 272
13. In the determination of whether all the evidence in a specific case is sufficient to submit the issue of gross

negligence to the jury, the presence of imminent danger visible to, known by, or made known to a driver, together with a persistence in negligence heedless of the consequences, are factors to be given material, if not controlling, consideration. Liston v. Bradshaw 272

14. "Gross negligence" within the meaning of the automobile guest statute is great and excessive negligence, or negligence in a very high degree. It indicates the absence of even slight care in the performance of a duty. Liston v. Bradshaw 272

15. In the construction of a statute, no sentence, clause, or word should be rejected as meaningless or superfluous; rather, the plain and ordinary meaning of all the language employed should be taken into account in order to determine the legislative will. Weiss v. Union Ins. Co. 469

16. The words "referable solely to the contract," as used in the foregoing rule, properly interpreted and applied mean that, if the evidence as a whole of a party seeking specific performance of an oral contract to convey real estate indicates that it is referable solely to the contract sought to be enforced and not to some other or different contract, then the burden of the rule has been satisfied. In determining whether or not the acts were referable solely to the contract, the acts of performance must be considered as a whole in their own light and in the light of all other material and relevant facts and circumstances, present, antecedent, and subsequent as shown by evidence with no part excluded. Theobald v. Agee 524

17. The word "maintain," within the statute providing that no foreign corporation transacting business in the state without a certificate of authority shall be permitted to maintain any action, suit, or proceeding in any court of the state until such corporation shall have obtained a certificate of authority, does not inhibit the institution of the action, and a foreign corporation may at any time after the action is brought maintain and prosecute it by first complying with the terms of the statute. Rigid Component Systems v. Nebraska Component Systems, Inc. 658

18. Except where modified by statute, to "convey" means to pass or transmit title to property from one to another. Krause v. Crossley 806

Workmen's Compensation.

1. The Nebraska Workmen's Compensation Court has exclusive original jurisdiction in actions arising under the

Workmen's Compensation Act. Peak v. Bosse 1
2. A workmen's compensation award can not be based on possibility or speculation, but an ultimate fact fairly and reasonably inferable from facts and circumstances proved may be taken as established. Fite v. Ammco Tools, Inc. 351

Wrongful Death.
1. Although damages for the wrongful death of a child may include loss of society, comfort, and companionship, the same must be shown by the evidence to have a monetary value. Garvin v. Coover 582
2. Damages for loss of society, comfort, and companionship resulting from the wrongful death of a child being by their very nature problematical, the amount is peculiarly for the jury to determine, and unless clearly wrong, a reviewing court will not interfere with its verdict. Garvin v. Coover 582

Zoning.
A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. It is the zoning resolution which has the force of law. Copple v. City of Lincoln 152