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HAROLD H. THOMAS AND GARY AESOPH, DOING BUSINESS AS AESOPH & SONS CONSTRUCTION, APPELLANTS, V. BURLINGTON NORTHERN RAILROAD, INC., A CORPORATION, APPELLEE.

279 N W. 2d 369

Filed May 22, 1979. No. 42208.

1. **Evidence.** Generally a photograph is admissible if it is relevant and is shown to be a true and correct representation of the place or subject it purports to represent at a time pertinent to the inquiry.
2. **Negligence: Motor Vehicles: Railroads.** A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages resulting from a collision with a passing train.
3. **Railroads.** A railroad has no obligation to install signal devices or maintain flagmen under all conditions even at arterial crossings.
4. **Negligence: Motor Vehicles: Railroads.** All persons using a railroad crossing are required to exercise a degree of caution that is commensurate with the danger.

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

Marc J. Weinpel of Peetz, Peetz & Weinpel and James W. Ellison of Holtorf, Hansen, Kovarik & Nuttleman, P.C., for appellants.

Martin, Mattoon, Matzke & Mattoon, for appellee.

Heard before BOSLAUGH, BRODKEY, CLINTON, and HASTINGS, JJ., and BARTU, District Judge.

BOSLAUGH, J.

The plaintiff, Harold H. Thomas, was injured in a truck-train collision on July 15, 1974, while employed by Gary Aesoph, doing business as H. J. Aesoph & Sons Construction. The plaintiff was operating a dump truck loaded with wet concrete when the truck collided with a freight train of the defendant, Burlington Northern Railroad, Inc., at a temporary grade crossing near Sidney, Nebraska.

At the time the accident occurred the interstate highway west of Sidney, Nebraska, was being constructed. Western Contracting Corporation was the principal contractor. Gary Aesoph was a subcontractor hired by Western to do the trucking on the job.

The interstate highway bridge over the railroad was under construction but had not been completed. The plaintiff was hauling a truckload of concrete from the mixing plant which was several miles west of the railroad crossing to a point east of the crossing where the paving was being laid. To get from the mixing plant to the point where the paving was in process, the plaintiff drove along the interstate grade to a point west of the bridge which was under construction. The plaintiff then made a left turn and drove down the side of the fill near the bridge site. The plaintiff then followed a "haul road" which crossed the railroad track at grade at a 90-degree angle approximately 400 feet north of the interstate bridge site. The haul road then turned to the south and rejoined the interstate grade a short distance east of the bridge.

On July 15, 1974, the plaintiff came to work at about 6 a.m., and had hauled 10 or 12 loads of concrete before the accident happened. At about 3 p.m., he left the mixing plant with a load of wet concrete. When he reached the point west of the bridge where he turned left off of the interstate grade he put the truck in low gear. The truck went down the grade at between 5 and 7 miles per hour and he continued at that speed until he reached the crossing and started across the tracks.

As the plaintiff's truck approached the grade crossing from the west, a freight train consisting of 7 locomotives, 110 empty coal hopper cars and a caboose approached the crossing from the south at a speed of approximately 32 miles per hour. The train

was about 1¼ miles long and weighed about 5,650 tons.

The plaintiff testified that he did not stop at the crossing or look for approaching trains and did not see the train before the collision. The front of the locomotive struck the right side of the truck behind the cab.

The engineer who was operating the locomotive, Jacob J. Sewald, testified that he was looking straight ahead and did not see the truck until just before the impact. He placed the train's air brakes in "emergency" at about the time the impact occurred and the train stopped between ¼ and ½ mile north of the crossing.

This action was commenced by the plaintiff and Aesoph to recover damages for the injuries sustained by the plaintiff in the accident and the damages to the Aesoph truck which was destroyed in the accident. The defendant counterclaimed for the damages sustained by two of its locomotives in the accident.

At the close of the evidence the trial court found as a matter of law that the plaintiff was guilty of contributory negligence which was more than slight and dismissed the petition. The case was submitted on the cross-petition of the defendant and the jury returned a verdict for the defendant in the amount of $12,000.

The plaintiff and Aesoph have appealed. The assignments of error relate to the dismissal of the plaintiff's petition at the close of the evidence; the admission into evidence of photographs of the scene of the accident; and the instructions to the jury.

The photographs in question were taken by Darrell McCall, a claims representative of the defendant, on the morning after the accident. McCall testified in detail as to how the photographs were taken and an adequate foundation for the admission of the photographs was shown. Generally a photograph is ad-

missible if it is relevant and is shown to be a true and correct representation of the place or subject it purports to represent at a time pertinent to the inquiry. Markey v. Hunter, 170 Neb. 472, 103 N. W. 2d 221.

The photographs were taken from the center of the haul road at distances of 25, 50, 75, 100, and 125 feet west of the crossing and show the view from the crossing to the interstate bridge south of the crossing. The photographs were relevant because they established without question that there was no obstruction to the plaintiff's view of the train as he approached the crossing, and if the plaintiff had made the slightest effort to maintain a lookout he would have seen the train in time to avoid the collision.

The plaintiff claimed the photographs were inaccurate because they did not contain a view of the area to the left of the crossing. Since the train approached from the south and the plaintiff approached the crossing from the west, a view of the area to the left of the crossing would not have been relevant.

The plaintiff further objected to the photographs on the ground they had been "edited." The photographs were a series of still shots taken by turning the camera from left to right so that the pictures in each series would form a panoramic view of the area shown in the photographs. At the time the photographs were offered in evidence, the pictures in each series had been taped together with the detail along the edge of each picture matched to the detail on the adjoining picture. This "editing" formed no basis for excluding the photographs from evidence.

It is a well-established rule in Nebraska that a traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking

he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages resulting from a collision with a passing train. Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co., 161 Neb. 451, 73 N. W. 2d 679. See, also, Loudy v. Union P. R. R. Co., 146 Neb. 676, 21 N. W. 2d 431; McIntosh v. Union P. R. R. Co., 146 Neb. 844, 22 N. W. 2d 179; Mundt v. Chicago, R. I. & P. R. Co., 136 Neb. 478, 286 N. W. 691; Moreland v. Chicago & N. W. R. Co., 117 Neb. 456, 220 N. W. 692; Askey v. Chicago, B. & Q. R. Co., 101 Neb. 266, 162 N. W. 647; Chicago, B. & Q. R. Co. v. Schwanenfeldt, 75 Neb. 80, 105 N. W. 1101. The plaintiff argues that the rule was not applicable in this case because the plaintiff was entitled to expect that a flagman would be guarding the crossing if a train was in the vicinity; the other drivers did not stop, look, or listen at the crossing; and if he had looked he would not have been able to see the train.

The defendant had no independent duty to provide a flagman at the crossing. There is no obligation to install signal devices or maintain flagmen under all conditions even at arterial crossings. Sailors v. Lowden, 140 Neb. 206, 299 N. W. 510.

The evidence shows the contract between Western Contracting Corporation and the state placed the responsibility for obtaining flagmen upon Western. On request the railroad would furnish a flagman at the expense of Western. Requests were to be made to the depot agent who would then relay the request to the section foreman. There is no evidence that a flagman had been requested of the depot agent for July 15, 1974, although there was some evidence that the project superintendent for Western had told an unidentified railroad employee before the accident that, "we would be hauling there the next day and

every day from thereafter until the bridges were done and we were completed." The project superintendent also testified that a foreman working at the cement unloader told him that the foreman "had instructed the section foreman, I believe it was, that there was not a flagman there and that we were hauling."

The fact that there had been flagmen at the crossing on certain other days when the plaintiff had been working did not excuse the plaintiff from using ordinary care on the day of the accident. On the day the accident happened, the plaintiff had hauled 10 or 12 loads before the accident and knew or should have known there was no flagman at the crossing. The plaintiff had no right to assume that a flagman would be guarding the crossing when the collision occurred.

The failure of other drivers to use due care could not excuse the negligence of the plaintiff. All persons using a railroad crossing are required to exercise a degree of caution that is commensurate with the danger. Ecker v. Union P. R. R. Co., 164 Neb. 744, 83 N. W. 2d 551.

The plaintiff testified he would not have been able to see the train if he had looked, apparently because of the angle at which he approached the crossing. The evidence establishes conclusively that there was no obstruction to the view of a driver approaching the crossing for a distance of more than 400 feet south from the crossing and that the "haul road" crossed the railroad track at a 90-degree angle. The plaintiff's testimony that he could not have seen the train if he had looked "because of the angle" is contrary to the physical facts and did not create a jury question as to a reasonable excuse for failure to maintain a reasonable lookout.

The trial court instructed the jury that if it found for the defendant on its cross-petition the defendant was entitled to recover damages for the fair and rea-

sonable cost of making necessary repairs to its locomotives and the reasonable value of the loss of use of the locomotives while they were being repaired. The plaintiff contends the defendant's evidence was not sufficient to support the verdict for the defendant in the amount of $12,000.

The defendant established the cost of repairs by testimony from the assistant manager of its district accounting office. The information as to the cost of labor and materials used by the defendant in making the repairs was taken from the records of the company. The value of the loss of use of the damaged locomotives was determined by the rental charges for similar equipment when furnished by other railroads. This evidence established that the cost of repairs and loss of use exceeded $12,000 and was sufficient to establish the damages sustained by defendant as a result of the collision.

We have examined the other instructions which were assigned as error and find them to be not erroneous.

The judgment of the District Court is affirmed.

AFFIRMED.

BARTU, District Judge, concurring.

I concur with the result reached by the majority, but disagree with the comparative negligence principle enunciated.

For many years, in numerous railroad crossing comparative negligence cases cited by the majority opinion, and in other cases, which need no citation here, this court has upheld trial courts' directed verdicts and findings of contributory negligence in a degree greater than slight when compared with that of the adverse party, as a matter of law. These holdings have, in effect, granted jurisdiction to the trial courts to make that determination when, in fact, it has been expressly placed with the jury by the Legislature.

Section 25-1151, R. R. S. 1943, under which this

matter was tried, provided: "In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence and contributory negligence shall be for the jury."

The statute does not say "some questions of negligence and contributory negligence shall be for the jury," or "all questions of negligence and contributory negligence shall be for the jury, except in those cases where the court determines, as a matter of law, that contributory negligence is greater than slight when compared with that of the adverse party." It says, "all questions of negligence and contributory negligence shall be for the jury." "All" is defined as "the whole of; the whole number, quantity, or amount; every." Webster's New International Dictionary, Second Ed., Unabridged.

Obviously, in this case, the trial court found, and correctly so, that all parties were guilty of negligence in some degree in order to submit defendant's claim to the jury on a comparative negligence theory. It follows, inescapably, under the statute, that the plaintiffs' claim should also have been submitted. "All questions of negligence and contributory negligence shall be for the jury." The trial court was without jurisdiction to make the comparison negligence finding on plaintiff's claim against the defendant. No amount of interpretation or construction can change the plain meaning of the statute.

Reversal in this matter is avoided, however, not

because the trial court had jurisdiction to direct a verdict against the plaintiffs by finding, as a matter of law, that they were negligent in a degree greater than slight when compared with that of the defendant, but because the plaintiffs' negligence was, in effect, compared with that of the defendant upon the submission of defendant's claim to the jury on a comparative negligence theory.

Nevertheless, I feel compelled to disagree with the majority's enunciation and perpetuation of a principle that is contrary to law and, as such, results in a denial of substantive due process to litigants in a comparative negligence situation.

I, therefore, concur in the result only.

IN RE INTEREST OF DAVID METTEER, A CHILD UNDER EIGHTEEN YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JEANNETTE METTEER, APPELLANT.

279 N. W. 2d 374

Filed May 22, 1979. No. 42229.

1. **Statutes: Parent and Child: Minors: Constitutional Law.** Sections 43-202 and 43-209, R. S. Supp., 1978, which, respectively, define parental responsibilities and prescribe the conditions under which parental rights may be terminated, are sufficiently definite and are not void for vagueness. The constitutional requirement that statutory language must be reasonably certain or be held void for vagueness is satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding; the due process clause requires that the law give sufficient warning of conduct which is forbidden but it does not require a precise checklist of parental responsibilities and prohibited behavior.
2. **Statutes: Parent and Child: Minors.** Section 43-209, R. S. Supp., 1978, is not void because it allows the judge to consider the circumstances of individual cases in determining whether to terminate parental rights.
3. _____: _____: _____. The State has a compelling interest in protecting minor children from abuse and neglect, and that interest may be implemented by statutes such as sections 43-202 and 43-209, R. S. Supp., 1978.

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

T. Clement Gaughan, Lancaster County Public Defender, and Dennis G. Carlson, for appellant.

Ronald D. Lahners, Lancaster County Attorney, and Toni G. Thorson, for appellee.

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

CLINTON, J.

This is an appeal from an order of the Separate Juvenile Court of Lancaster County, made on June 12, 1978, terminating the parental rights of Jeannette Metteer as to her son, David, who was born on September 16, 1974. The contentions made in the appellant's first seven assignments of error may be stated as one, i.e., the evidence is insufficient to support the termination order. The eighth assignment relates to the contention that section 43-209, R. S. Supp., 1978, is void and unconstitutional because it is vague. We affirm.

The action out of which this appeal grew commenced on November 19, 1975, with the filing of a petition in the juvenile court under the provisions of section 43-202 (2), R. S. Supp., 1978. The petition alleged David was a child whose health and well-being was endangered in that his mother, Jeannette, had assaulted him and threatened to kill him. The evidence adduced at the adjudication hearing established that the assault and injuries to the child had occurred on October 15, 1975, when the child was 13 months old. It further showed Jeannette was hallucinating at the time of the assault and she believed that David was a lizard from which she had to protect herself. The assault was brought to an end by a third person then on the premises. Jeannette had experienced somewhat similar hallucinations on

other occasions. After the assault the child was removed from the home by the department of welfare and Jeannette was placed under psychiatric care.

On December 30, 1975, after hearing, the court entered an adjudication of neglect, placing David in the protective custody of the court and placing his legal custody in the Lancaster County department of public welfare. Thereafter, until the termination disposition, David resided in foster homes while his mother received a variety of psychiatric care including, at various times, hospitalization, day care, outpatient care, counseling, and medication. During portions of this period, sometimes on a regular and sometimes on an irregular basis, Jeannette exercised the right to visit David and sometimes had physical custody of him on weekends, pursuant to order of the court. The medical diagnosis was that, at the time of the assault, Jeannette was schizophrenic and psychotic. The ultimate diagnosis was schizophrenia, chronic undifferentiated type, meaning that Jeannette was not psychotic any longer, but her psychosis could return, especially during periods of stress.

In December 1976 and January 1977, a review hearing was held at which time the court found that Jeannette did not have the ability to care for David and the situation had not materially changed.

On March 30, 1978, a petition asking termination of the parental rights of Jeannette and of the child's father was filed. Its substance was that David continued to be without parental care because of the mental illness of the mother and there were reasonable grounds to believe the mental condition would continue for a prolonged and indefinite period of time; that Jeannette had been treated for a period of 2½ years since the assault episode with little improvement; and that the father had abandoned the child and his whereabouts were unknown.

Both Jeannette and David were represented by

guardians at litem and counsel throughout all the proceedings. Jeannette's position at the termination hearing was not that she should have custody of the child, but that the current arrangement of foster care and periodic visitations should continue until Jeannette could improve to the point where she might function as a parent. Jeannette did not testify at the termination proceeding. However, a psychiatrist who had examined her at the request of her counsel did testify on her behalf. He confirmed the diagnosis of schizophrenia, residual type, which he said was substantially the same as schizophrenia, chronic undifferentiated type. He admitted Jeannette could not meet the emotional needs of David, but thought the continuation of further therapy and counseling in parenting was worth a try, although he could not say for sure that Jeannette could ever function as a parent. After having called to his attention the types of treatment already administered and Jeannette's lack of motivation, he stated the prospects for change were very remote.

The evidence indicated the father of the child had never seen the boy nor supported him, and that the father's whereabouts were unknown.

We will not summarize the other evidence adduced at the termination hearing as it would serve no useful purpose. It was clearly sufficient to establish mental illness of the mother of such a degree and scope as to interfere in a very high degree with her ability to function as a parent and to show there was little or no prospect of improvement, in part because she could not or would not recognize she had a severe problem.

The court announced prior to making any determination that it would require clear and convincing proof of the allegations in the petition. Applying that standard, the evidence supported the judgment.

We now examine the claim that section 43-209, R. S. Supp., 1978, is void for vagueness. The appel-

lant's position is founded upon the following premises and reasoning. The integrity of the family unit, in this instance the continuing legal and social relationship of parent and minor child, is one of the fundamental rights guaranteed by the Constitution of the United States. Stanley v. Illinois, 405 U. S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551. A state, therefore, may not authorize the termination of that relationship absent a showing of a compelling state interest. Section 43-209, R. S. Supp., 1978, does not describe a compelling state interest and is so nonspecific in its requirements that it leaves determination of basic policy to those who must enforce the law, viz, policemen, welfare officers, prosecutors, and judges, and so denies the mother substantive due process. Some of the authorities which the appellant cites and relies upon are Grayned v. City of Rockford, 408 U. S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222; Alsager v. District Court of Polk Cty., Iowa, 406 F. Supp. 10 (S. D. Iowa, 1975); Smith v. Goguen, 415 U. S. 566, 94 S. Ct. 1242, 39 L. Ed. 2d 605.

Section 43-202, R. S. Supp., 1978, grants the juvenile court jurisdiction in the case, among others, of "any child under the age of eighteen years . . . (e) who is in a situation . . . dangerous to life or limb. . . ." Section 43-209, R. S. Supp., 1978, provides in part that the court may terminate parental rights when such action is in the best interests of the child and "one or more of the following conditions exist: . . . (5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period; or (6) Following upon a determination [of neglect or dependency] . . . , reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination."

The appellant contends that terms contained in

sections 43-202 and 43-209, R. S. Supp., 1978, such as "may," "parental responsibilities," "reasonable efforts," and "proper parental care," are insufficiently defined, do not give the parent adequate notice of what is required, and leave too much discretion in the enforcers of the law, and are on that account void.

We do not accept the appellant's contentions. Section 43-202, R. S. Supp., 1978, taken as a whole, defines "parental responsibilities" and "proper parental care" in general terms. These include providing a home, support, subsistence, education, and other care necessary for the health, morals, and well-being of the child. It commands special care for the children in special need because of mental condition. It commands that the child not be placed in situations dangerous to life or limb, and not be permitted to engage in activities injurious to his health or morals.

Section 43-209 (2), R. S. Supp., 1978, authorizes termination of parental rights not for merely slight or infrequent violations of parental responsibilities, but only for substantial and continuous or repeated neglect of the necessary care and protection. It further provides that when such neglect or prohibited conduct is the consequence of mental illness or deficiency and the condition is likely to continue for a prolonged and indeterminate period of time, then, under section 43-209 (5), R. S. Supp., 1978, the court may terminate the parental rights.

The argument of the appellant, carried to its logical extreme, would require that in order for a statute to meet constitutional standards it must contain a precise checklist of parental responsibilities as well as a list of prohibitions. Society does not operate in a historical, social, or moral vacuum. The terms used in the statute, while broad, must be interpreted in the light of our history, culture, generally accepted standards of morality, and the common

understanding of the behavior of reasonably conscientious and well-intentioned parents.

The following principles are applicable. The constitutional requirement that statutory language must be reasonably certain or be held void for vagueness is satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding. Horn v. Burns and Roe, 536 F. 2d 251 (8th Cir., 1976). Statutes are sufficiently definite when they use terminology which is commonly grasped. United States v. Maude, 481 F. 2d 1062 (D. C. Cir., 1973), see especially cases cited in footnote 45, p. 1068. Sections 43-202 and 43-209, R. S. Supp., 1978, meet these requirements.

Appellant's attack upon the vagueness of the word "may" is particularly interesting. The argument is not developed, but the inference apparently is that this word leaves some discretion in the court as to whether or not parental rights may be terminated and results in an unlawful and arbitrary delegation of power, particularly when that discretion coexists with the general language defining parental responsibilities and prohibited conduct. If this argument were to be accepted, then, of course, the cure is a precise checklist and mandatory termination. It would seem to us that such specificity would be more destructive of family integrity than any reasonable application of the statute. The word "may" in the statute is designed to allow the judge to weigh each individual case in the light of the degree of seriousness of the conduct, its effect upon the best interests of the child, the likelihood of continuation, and the results of attempted corrective measures, and then to determine whether or not parental rights must be terminated. Such discretion is not constitutionally impermissible.

There is no doubt that among the fundamental rights retained by the people under Article IX of the Bill of Rights of the Constitution of the United States

is that of integrity of the family. Stanley v. Illinois, *supra;* Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042; Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070. It also seems clear to us that the integrity of the family unit depends upon the protection of its individual members from abuse and neglect. Clearly the State has a compelling interest in protecting minor children from serious abuse and serious neglect and that interest may be implemented by statutes such as sections 43-202 and 43-209, R. S. Supp., 1978.

In its judgment the court said: "For over a period of more than two years following upon a determination of neglect by this Court, reasonable efforts under the direction of the Court have failed to correct the conditions leading to the determination of neglect. Jeannette Metteer is unable to discharge parental responsibility because of her mental illness and there are reasonable grounds to believe that such condition will last a prolonged indeterminate period of time. Jeannette Metteer suffers from schizophrenia, chronic undifferentiated type with episodic paranoid trends for which she has been treated since November, 1975, with little change or improvement and said mental condition makes her incapable of providing care for the above named child. Grounds exist for termination of the parental rights of Jeannette Metteer under the provisions of Section 43-209 (5) and (6)," R. S. Supp., 1978. Those conclusions are supported by clear and convincing evidence.

AFFIRMED.

ART-KRAFT SIGNS, INC., A CORPORATION, APPELLANT, V. THE COUNTY OF HALL, A BODY CORPORATE, AND DAN HOSTLER ET AL., APPELLEES, AND CHARLES HANNON ET AL., THIRD PARTY DEFENDANT APPELLEES.

279 N. W. 2d 159

Filed May 22, 1979. No. 42267.

1. **Counties: Highways: Statutes.** The county board is vested with general supervision and control of the public roads located in its county as provided in section 39-1402, R. R. S. 1943.
2. ____: ____: ____. The statutory definition of public roads makes no distinction between county roads and township roads for the general purposes prescribed in section 39-1402, R. R. S. 1943.
3. **Counties: Highways.** In counties operating under the township organization, the township board possesses the limited power of general supervision of road and culvert work.
4. ____: ____. The granting of any type of interest in a county road or a township road is vested in the county board in which such public road is situated.

Appeal from the District Court for Hall County: LLOYD W. KELLY, JR., Judge. Affirmed.

Vincent L. Dowding of Luebs, Dowding, Beltzer & Leininger, for appellant.

Sam Grimminger, Hall County Attorney, and Jack Zitterkopf, for appellees County of Hall and Dan Hostler.

Heard before KRIVOSHA, C. J., MCCOWN, AND WHITE, JJ., and RONIN and HAMILTON, DISTRICT JUDGES.

RONIN, District Judge.

This action was brought by the plaintiff, Art-Kraft Signs, Inc., a corporation, in the District Court for Hall County, Nebraska, on December 30, 1974, to enjoin the defendants, County of Hall, Nebraska, and its county engineer, Dan Hostler, from removing two large outdoor advertising signs owned and erected by plaintiff adjacent to Interstate Highway No. 80 in Hall County, Nebraska. The material facts in this case are not disputed.

The construction of interstate highway 80 caused

the dead-ending of many public roads at points where they would have otherwise intersected with interstate highway 80. One such public township road dead-ended at a location three-quarters of a mile west of U. S. Highway No. 281 and interstate highway 80 interchange. A third party defendant herein, Emil Schaaf, is an abutting owner of farmland to the said township road immediately north and adjacent to interstate highway 80. The dead-end portion of this township road, for some distance north of interstate highway 80, was seldom used by the public after the construction of interstate highway 80. The evidence further establishes that all maintenance of this portion of the township road was stopped, the road was closed, and its surface allowed to seed. Emil Schaaf, as the abutting landowner, used said public road area as pasture.

In 1968, plaintiff executed a ground lease agreement with Emil Schaaf for the purpose of securing the right to erect a sign on the township road area used by Emil Schaaf as pasture. The plaintiff then built a large billboard on the leased ground without the consent or knowledge of the defendant county. The plaintiff rented the use of the sign to the Bosselman Truck Plaza.

At approximately the same time plaintiff executed a similar lease agreement with third party defendant, Charles Hannon, who was an abutting landowner to a county road at a location approximately one-quarter mile east of the same interstate highway 80 interchange. Charles Hannon testified that previous to the erection of the sign this county road, adjacent to and for a considerable distance south of interstate highway 80, had been closed and was no longer maintained for road purposes. Hannon further testified he was verbally given permission by the county authorities to build a fence across the road. No assurance was given him, however, that any portion of the county road was or would be vacat-

ed. The plaintiff proceeded to construct a large billboard on the county road in accordance with his lease with abutting landowner Hannon. Plaintiff thereafter rented this sign to the Bosselman Truck Plaza.

In September 1974, and again in December 1974, the county notified plaintiff to remove both signs from their locations on the closed but not vacated public roads. The signs were not removed and plaintiff brought this action seeking to enjoin the county from having its signs removed. The trial court ordered the removal of both signs within 60 days and dismissed the previous injunction which had been entered. We affirm the judgment of the trial court.

The plaintiff contends that counties operating under a township organization are not only relieved of the responsibility for the supervision and maintenance of township roads, but the county has no jurisdiction over township roads and the county did not possess the authority to compel plaintiff to remove its sign from the township road. The west Bosselman sign was constructed on a township road and Hall County operated under a supervisor system whereby each township has a township board. Section 39-1520, R. R. S. 1943, cited by plaintiff in support of its position, provides that the township board possesses the limited power of having general supervision of road and culvert work on township roads.

Other statutes relating to public roads, however, vest general supervision and control of the public roads in each county with the county board. Section 39-1402, R. R. S. 1943, provides as follows: "General supervision and control of the public roads of each county is vested in the county board. The board shall have the power and authority of establishment, improvement, maintenance and abandonment of public roads of the county and of enforcement of the

laws in relation thereto as provided by the provisions of this act."

Section 39-1401 (2), R. R. S. 1943, provides: "Public roads shall mean all roads within this state which have been laid out in pursuance of any law of this state, and which have not been vacated in pursuance of law, and all roads located and opened by the county board * * * and traveled for more than ten years * * *."

This statutory definition of public roads makes no distinction between county and township roads for the purposes of section 39-1402, R. R. S. 1943, which expressly grants control over public roads with the county board of the county wherein they are located. See, also, Henneburg v. County of Burt, 160 Neb. 250, 69 N. W. 2d 920 (1955).

The only remaining contention of the plaintiff in support of its action is that under the facts in the record, equity requires the county to be restrained from removing the signs until the expiration of the plaintiff's lease agreements with Bosselman Truck Plaza.

The record in this case establishes that the only representation by the county to Hannon, relating to the county road adjacent to interstate highway 80 abutting his land, was that the county road was closed. There was no representation that the road would be abandoned and vacated. Sections 39-1722 to 39-1725, R. R. S. 1943, provide specific procedures for the abandonment of county roads. These procedures were not executed in either portion of the roads on which the two signs are situated. The granting to Hannon of verbal permission to erect a fence across the closed county road did not convey to him any type of legal interest in the county road.

The facts in this case do not warrant the application of equitable estoppel to create any type of equitable interest in the plaintiff or third party defendants in the subject public roads.

The county has general jurisdiction and control over both township and county roads within Hall County, Nebraska, and by reason thereof the county possesses the authority to compel the removal of both the signs of the plaintiff. Neither road on which the signs are located has been abandoned by law, and no prescriptive rights in the subject public roads were acquired by the third party defendants.

The judgment of the trial court is, in all respects, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ARCHIE L. BROWN, APPELLANT.

279 N. W. 2d 161

Filed May 22, 1979. No. 42288.

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.

Paul L. Douglas, Attorney General, and Sharon M. Brueggemann, for appellee.

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

BRODKEY, J.

In an information filed in the District Court for Douglas County on January 17, 1978, defendant, Archie L. Brown, was charged in count I of committing the offense of robbery under section 28-414, R. R. S. 1943, and charged in count II with the offense of using a firearm in the commission of a felony under section 28-1011.21, R. R. S. 1943. The District Court

thereafter, on August 18, 1978, sentenced the defendant to a minimum statutory term of 3 years imprisonment for robbery, and to 3 years imprisonment in the Nebraska Penal and Correctional Complex for the use of a firearm in the commission thereof, said sentences to be served consecutively. Defendant has appealed those sentences to this court, alleging as his sole assignment of error: "The defendant is entitled to have his minimum statutory sentences of three years imprisonment each for robbery and use of a firearm under Sections 28-414 and 28-1011.21, R. R. S. 1943, vacated and this cause remanded to the District Court for resentencing in view of the reduced statutory minimum sentence of one year's imprisonment for the same offense under Sections 28-324, 28-1205, and 28-105 (1), R. S. Supp. 1978, which became law on January 1, 1979."

The only issue raised by this appeal is whether the penalty provisions of the new Nebraska Criminal Code should be used to determine the sentences to be imposed for crimes committed prior to January 1, 1979, when a sentence has not become final by that date. We recently disposed of that issue in the case of State v. Weinacht, *ante* p. 124, 277 N. W. 2d 567 (1979). Our opinion in that case controls the instant case, and mandates affirmance of the sentences imposed by the District Court.

AFFIRMED.

BLANCHE E. WEBER, APPELLEE, V. LEROY WARING WEBER, APPELLANT.

279 N. W. 2d 379

Filed May 22, 1979. No. 42294.

Divorce: Child Support: Accord and Satisfaction. An oral agreement to suspend a right to enforce a judgment for child support

may constitute an accord and satisfaction entitling a party to a release and satisfaction of a judgment for child support.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Stanley H. Foster and Van A. Schroeder, for appellant.

Dixon G. Adams, for appellee.

Heard before BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KNAPP, District Judge.

MCCOWN, J.

This case involves the determination of amounts due under a judgment in a dissolution of marriage proceeding. The District Court granted the husband a credit of $1,950 against the judgment for temporary alimony and support paid during pendency of an appeal, and also ordered payment of $3,250 of temporary support payments under a temporary support order entered prior to the original judgment in the District Court. The husband has appealed.

This is the second appearance of this case in this court. See Weber v. Weber, 200 Neb. 659, 265 N. W. 2d 436. In the first appeal the District Court entered a money judgment against the husband for $160,000 in lieu of property division. The judgment provided for interest at 8 percent from April 1, 1977. Principal was payable $8,000 on April 1, 1977, and $8,000 on each April 1 thereafter, plus interest at 8 percent on the unpaid balance. This court affirmed that judgment on appeal and our mandate was filed in the District Court on June 22, 1978.

On June 26, 1978, the husband filed a motion in the District Court to stay execution on the judgment pending determination of the amount then due. The motion was overruled on June 30, 1978. Meanwhile,

the wife had instituted various garnishments in execution of the judgment. On July 6, 1978, on the joint application of the husband and wife for the determination of the then current liability of the husband on the judgment, the District Court entered its order finding that the sum of $34,271.12 had been paid to the clerk of the District Court, and that the husband had promised to pay the balance remaining due on the judgment of $4,602.82, and had waived any further rights he might have with regard to the garnishment proceedings, and requested the court to enter an order directing the payment of the garnished amounts to the wife. The order of July 6, 1978, therefore directed the sum held by the clerk to be paid to the wife and ordered the release of the garnishments as of the date of issue of the husband's check for payment of the balance remaining due. The garnishments were thereafter released.

On July 7, 1978, the husband filed a second motion requesting the right to offset against the judgment the amount of temporary support and alimony paid by the husband during the pendency of the appeal in the Supreme Court. Hearing on this motion was held on July 21, 1978. At the hearing the parties stipulated that the husband had paid the total sum of $38,873.94 on the judgment, which was the total amount then due on the judgment and made the judgment current until April 1, 1979. Hearing on the motion then proceeded and the husband established that he had also paid and should be allowed credit of $1,950 for support payments during the pendency of the appeal. The wife conceded those payments but also asserted there was a $3,250 delinquency in support payments under a previous temporary support order of October 24, 1975, entered prior to the original decree.

On August 3, 1978, the District Court entered its order directing the husband to pay $3,250 unpaid support required by the order of October 24, 1975, and

also ordered that the husband be given credit against the principal judgment in the sum of $1,950 for support paid during the pendency of the appeal.

On August 3, 1978, the husband filed a motion for new trial or reconsideration of the order in which he alleged the parties had agreed to an accord and satisfaction with respect to the amounts due under the temporary support order of October 24, 1975. The husband asserted that the wife had relinquished custody of the minor daughter to the husband in 1976, and had agreed that such custody would be accepted as an accord and satisfaction of the support order for such child. It was also asserted that the husband had no notice that any issue of arrearages under the support order of October 24, 1975, would be raised at the hearing on July 21, 1978, and the husband was not present at that hearing. It was also asserted that his counsel was not aware of the facts with respect to any accord and satisfaction.

Hearing on the motion for new trial or reconsideration was held on August 24, 1978. The court sustained a continuing objection to all evidence as to any accord and satisfaction but permitted the husband to introduce evidence as an offer of proof. The offer of proof, if the evidence were accepted, tended to establish an accord and satisfaction. At the conclusion of the hearing the District Court denied the motion.

The husband has appealed from the order of June 30, 1978, overruling the motion to stay execution on the judgment, and from the order of the District Court overruling his motion for new trial or reconsideration directed against the order of August 3, 1978, ordering him to pay $3,250 in arrearages on the temporary support order of October 24, 1975.

With respect to the order of June 30, 1978, the husband contends that interest on the 1977 judgment of the District Court did not begin to run until June 22, 1978, when the mandate of this court was filed with

the clerk of the District Court, and that execution on the judgment should have been stayed to determine the correct amount due. Neither proposition is supportable. The judgment of the District Court specified the amount of the monetary award, the rate of interest and the date from which it was to be computed, and the dates of payment of principal and interest. The affirmance of that judgment by this court on appeal relates back to the original rendition of the judgment and makes the judgment effective as of that date in accordance with its terms.

Ordinarily after affirmance on appeal a judgment for the recovery of money only is not subject to a stay of execution. Even if there were any doubt on that issue, however, the stipulation of the parties as to the amount due on the judgment and the order of the court based on that stipulation make the issue moot. The order of June 30, 1978, overruling the motion for stay of execution was correct and is affirmed.

The second motion and order involved in this appeal follow a mass of interrelated pleadings and overlapping hearings, and the order of August 3, 1978, relates to two different judgments. One is the principal judgment in this case and the other is a preliminary order for temporary support entered before the entry of the original decree. The motion of July 7, 1978, sought credit against the principal judgment for support payments made during the appeal under an order dated April 15, 1977, which by its terms allowed a credit against the judgment for such payments. The pleadings did not introduce any other issue. On its face the motion, and presumably the hearing, was limited to the issues raised by the pleadings. The evidence produced established that the husband had paid $1,950 for support during the pendency of the appeal and was entitled to credit for that amount against the judgment. The wife tacitly conceded that issue, but in-

troduced a new issue at the hearing. She contended that there were arrearages in temporary support payments ordered prior to the original decree, and argued that the husband should be ordered to pay them. The husband was not present at the hearing and his counsel was not aware of the facts with respect to the support order of October 24, 1975.

The order of the District Court of August 3, 1978, granted the husband's motion and credited the sum of $1,950 against the judgment for support payments made under the 1977 order during the pendency of the appeal. The order also required the husband to pay the sum of $3,250 as required by the temporary support order dated October 24, 1975. The husband immediately objected to that portion of the order requiring payments on the temporary support order of 1975 and filed his motion for new trial or reconsideration.

At the hearing on that motion the husband was denied the right to introduce any evidence as to any accord and satisfaction but was permitted to make an offer of proof. Without expressing any view as to the weight and validity of the facts presented in the offer of proof, it was sufficient, if believed, to establish a prima facie case of accord and satisfaction. The District Court overruled the motion for new trial or reconsideration and the only real issue on this appeal is whether the husband had a right to be heard on the issue of an accord and satisfaction with respect to any portion of the support payments required by the temporary support order of October 24, 1975.

An oral agreement to suspend a right to enforce a judgment for child support may constitute an accord and satisfaction entitling a party to a release and satisfaction of a judgment for child support. See Ruehle v. Ruehle, 161 Neb. 691, 74 N. W. 2d 689. The husband here was entitled to plead and prove that his child support obligations as to one of the minor

children of the parties had been discharged by an agreement between husband and wife amounting to an accord and satisfaction.

The husband's absence from the original hearing may not have constituted an adequate ground to claim accident or surprise as to an issue raised by the pleadings or necessarily involved in the hearing. Nevertheless, it is clear that arrearages in support under the temporary order of October 24, 1975, were not within the issues of the pleadings at the hearing on the motion involved here. If the husband is to be ordered to pay a specific liability as to which he may have a valid defense, he should at least have notice and an opportunity to be heard and to present evidence in his defense. Whether the motion be treated as a motion for new trial or a motion for reconsideration of an order, the husband was entitled to due process and to have the evidence considered by the court.

The order of the District Court of August 3, 1978, was correct in granting the husband a credit of $1,950 for support paid during the pendency of the appeal. The remainder of the order of August 3, 1978, including the provision for $75 attorney's fees, is vacated and the cause remanded to the District Court for further proceedings as to amounts due under the temporary support order of October 24, 1975. No attorney's fees are allowed in this court.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KRIVOSHA, C. J., concurring.

I would add only that in Ruehle, *supra*, we pointed out that "An accord and satisfaction is predicated upon an agreement between the parties *based upon a consideration* * * *." (Emphasis supplied.) We in no way depart from that essential requirement of sufficient consideration. A mere oral agreement absent consideration would not be sufficient.

STATE OF NEBRASKA, APPELLEE, V. DELWYN L. SPEICHER AND ELMER J. HERRICK, APPELLANTS.

279 N. W. 2d 162

Filed May 22, 1979. Nos. 42397, 42398.

Motor Vehicles: Statutes. The classification of a vehicle as a truck-tractor under section 39-602, R. S. Supp., 1978, is not changed by the addition of a box to the vehicle if the design and primary use of the vehicle is to draw other vehicles, and any load carried by the truck-tractor, other than a part of the weight of the vehicle and the load so drawn, is merely incidental to its primary use.

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

John P. Murphy of Ruff & Murphy, for appellants.

Paul L. Douglas, Attorney General, and Sharon M. Brueggemann, for appellee.

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

BOSLAUGH, J.

The defendants were charged in separate complaints with violating section 39-6,179 (1) (b), R. S. Supp., 1978, which prohibits the operation of a tractor and semitrailer having a combined length in excess of 60 feet. The defendants were found guilty in county court and the judgments were affirmed in the District Court. They have now appealed to this court.

The parties stipulated that the tractor and semitrailer operated by the defendant Speicher was 64 feet in length and the tractor and semitrailer operated by the defendant Herrick was 63 feet, 11 inches in length.

The defendants claim that the vehicles which they were operating were a combination of a truck and trailer which under the statute may be 65 feet in length. § 39-6,179 (1) (c), R. S. Supp., 1978. Section 39-602, R. S. Supp., 1978, defines a semitrailer, trailer, truck, and truck-tractor as follows: "(88)

Semitrailer shall mean any vehicle, with or without motive power, designed to carry persons or property and to be drawn by a motor vehicle and so constructed that some part of its weight and that of its load rests upon or is carried by another vehicle; * * * (107) Trailer shall mean any vehicle, with or without motive power, designed for carrying persons or property and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle; * * * (109) Truck shall mean any motor vehicle designed, used, or maintained primarily for the transportation of property; (110) Truck-tractor shall mean any motor vehicle designed and primarily used for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn; * * *."

A photograph of the vehicle operated by the defendant Herrick is in evidence. It is apparent that the vehicle was a tractor and semitrailer with a box approximately the size of the cab located behind the cab of the tractor. The box was equipped with doors and was of sufficient size that property could be carried in it. The defendant contends that the addition of the box required the tractor to be classified as a truck because the tractor could now be used to carry a load other than a part of the weight of the trailer drawn by it.

The difficulty with the defendant's theory is that the statute defines a truck as a motor vehicle designed, used, or maintained *primarily* for the transportation of property. It is obvious that the use of the vehicle to haul objects in the box behind the cab was incidental to the primary use of the vehicle which was to draw trailers. Since the vehicle was designed and primarily used for drawing other vehicles, it was a truck-tractor under the statute.

The record indicates that photographs of the vehicle operated by the defendant Speicher were fur-

nished to the county court after the hearing. Since the photographs do not appear in the bill of exceptions, we presume the evidence was sufficient to sustain the decision of the county court.

The judgments are affirmed.

AFFIRMED.

ERVIN E. IMIG, PERSONAL REPRESENTATIVE OF THE ESTATE OF LOIS B. SCHAAP, DECEASED, APPELLANT, V. WILLIAM MARCH, PERSONAL REPRESENTATIVE OF THE ESTATE OF OTTO F. SCHAAP, DECEASED, APPELLEE.

279 N. W. 2d 382

Filed May 29, 1979. No. 41941.

1. **Torts: Husband and Wife: Negligence: Case Overruled.** The common law doctrine of interspousal tort immunity pronounced in Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N. W. 297 (1927), is abrogated.
2. **Torts: Husband and Wife: Negligence.** The personal representative of a decedent may maintain a wrongful death action based on the alleged negligence of decedent's spouse.

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

M. J. Bruckner and Gary J. Nedved of Marti, Dalton, Bruckner, O'Gara & Keating, for appellant.

Patrick H. McDonnell, for appellee.

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

HASTINGS, J.

This is a wrongful death action brought by the personal representative of a deceased wife against the personal representative of her deceased husband. Lois B. Schaap was the only other passenger in an airplane piloted by Otto F. Schaap, and the petition

alleged that his acts of negligence and gross negligence were the proximate cause of the crash which occurred on February 26, 1977, resulting in these deaths. Defendant filed a demurrer questioning plaintiff's capacity to sue because of the marriage relationship which existed between the two decedents at the time of the accident. The trial court, although expressing the opinion that its decision might be overturned, felt that it was bound by the law as previously established by this court and sustained the demurrer. Plaintiff appealed. The issue is whether we should adhere to the traditional rule of interspousal immunity as it applies to tort liability.

Essentially, plaintiff argues that the doctrine of interspousal tort immunity is of judicial origin and this court has the power to modify or abolish it in the absence of legislative action to the contrary. Defendant insists that the doctrine was adopted by the Legislature when it adopted the common law of England by virtue of section 49-101, R. R. S. 1943, and its predecessor, the Revised Statutes of the Territory of Nebraska, July 1, 1866.

The doctrine was first judicially pronounced in Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N. W. 297 (1927). In that case, this court held that the statutes which granted married women certain independent contract and property rights and the right to sue and be sued did not authorize a suit by a wife against her husband to recover damages for injuries to her person. In a somewhat simplistic justification of its position, the court expressed itself with this language: "The legislation of this state apparently was designed to remove disabilities from married women, so as to place the sexes in equal position before the law. This was fully attained. The husband may not sue the wife for tort. Both spouses have the same disability and the equality is complete."

Although, as indicated, the court in Emerson re-

lied to a certain extent on the so-called "married woman's act," as did Skinner v. Skinner, 38 Neb. 756, 57 N. W. 534 (1894), it did not cite Skinner. The holding in Skinner was limited to permitting a wife to sue her husband in contract for the use of real estate belonging to her, but its language was of considerably greater breadth. This was manifested by an answer to a non sequitur advanced by the husband's counsel that the act, which permits a married woman to sue in the same manner as if she were unmarried, does not authorize her to sue her husband because if she were unmarried she would have none to sue. The court replied: "The answer to this proposition is, 'that if this woman was unmarried, she could at common law sue this man; being a married women, she could not at common law sue her husband, or any one else; but the statute having removed her common law disability in that respect, she may now sue any person whom she could sue, either at common law or under the statute, if she were unmarried. Her legal ability to sue and be sued is not limited to matters having reference to her separate property, trade, or business, as is her legal ability to make contracts.' "

In an even earlier case, May v. May, 9 Neb. 16, 2 N. W. 221 (1879), this court, in permitting suit by a wife against her husband on a promissory note, cited with approval this rather broad and liberating language from an 1856 California case: " 'The present policy of the law is to recognize the separate legal and civil existence of the wife, and separate rights of property, and the very recognition by the law of such separate existence and rights at law, as well as in equity, to hold and enjoy separate property, involves a necessity for opening the doors of the judicial tribunals to her in order that the rights guaranteed to her may be protected and enforced.' "

Both Emerson and Skinner cited the progenitor of section 25-1201, R. R. S. 1943, now repealed, which

prohibited a husband or wife from testifying "concerning any communication made by one to the other during the marriage." What effect that had in Emerson is not revealed with any certainty, but in any event, that statute has been repealed and replaced by section 27-505, R. R. S. 1943, which limits the prohibition to "any confidential communication."

The real basis for the decision in Emerson may be found in the following language from the opinion: "An examination of the decisions of other jurisdictions discloses a great weight of opinion opposed to opening a field of litigation between spouses in tort actions by means of judicial interpretation and without unmistakable legislative action. The procedural difficulties, the dangers of disrupting the secrecy and serenity of marital relations, the avenue for fraud, the startling innovation in permitting such controversies, and the lack of clear legislative indorsement have all been assigned as ample reasons for the refusal of the courts to sanction, by supplying statutory interpretation, a new form of litigation manifestly requiring unequivocal legislation for its existence." These considerations include all of the traditional reasons advanced by the courts of the United States for prohibiting tort suits between spouses. These suits are now rejected in approximately one-half of the states.

However, Nebraska seems to have been unique in assigning "procedural difficulties" as a reason for adopting the doctrine. It is difficult to envision what these "difficulties" might be which are any different than those arising in either a marriage dissolution case, a criminal charge, or a suit involving contract or property rights.

Perhaps the best answer to the "secrecy and serenity" argument is the response of Professor Prosser, cited with approval in many cases, including Brooks v. Robinson, 259 Ind. 16, 284 N. E. 2d 794

(1972): " 'The chief reason relied upon by all these courts, however, is that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy — and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquillity if she sues him for a tort to her property, or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it.' Prosser, Law of Torts, 863 (4th Ed. 1971)."

The "avenue for fraud" objection is likewise rationally answered in Brooks v. Robinson, *supra:* "Those who advocate this view have simply concluded that since the *possibility* exists that tort litigation between husband and wife will not constitute a truly adversary proceeding, we should therefore close the courtroom doors to these parties and leave the injured to suffer his loss and the wrongdoer to escape his liability. To adopt such a view requires the blanket assumption that our court system is so ill-fitted to deal with such litigation that the only reasonable alternative to allowing husband-wife tort litigation is to summarily deny all relief to this class of litigants. It should be noted that this 'reasonable alternative' is absolutely contrary to the spirit of our legal system — namely, that an injured party may seek redress for his injuries in our courts." It is the regular business of the courts to find the truth. We ought not deny what should be due the many for fear that the judicial process cannot weed out the spur-

ious claims of a few. Immer v. Risko, 56 N. J. 482, 267 A. 2d 481 (1970).

It is somewhat difficult to know just what the court in Emerson was referring to in its "startling innovation" reason for denying this type of action. Undoubtedly it was tied up in the old common law doctrine of the unity of husband and wife, or as Professor Prosser states in his Law of Torts, s. 122 (4th Ed., 1971): "It has been said, whether humorously or not, that at common law husband and wife were one person, and that person was the husband * * *. It is perhaps idle to speculate at this late date as to how far the historical basis of these rules is a mixture of the Bible and medieval metaphysics, the position of the father of the family in Roman law, the natural law concept of the family as an informal unit of government with the physically stronger person at the head, or the property law of feudalism. A combination of all these incidents made it impossible to maintain a tort action between husband and wife. If the man were the tort-feasor, the woman's right would be a chose in action which the husband would have the right to reduce to possession, and he must be joined as a plaintiff against himself and the proceeds recovered must be paid to him; and if the tort involved property, the wife had no right of possession to support the action. If the wife committed the tort, the huband would be liable to himself for it, and must be joined as a defendant in his own action. As a result, it was held that neither spouse could maintain an action against the other for either a personal or a property tort, whether it was committed before or during marriage; and the action was not maintainable even after divorce, which came late in the English law, after these rules were well established."

It would appear that in light of the so-called "married woman's act" the historical basis for inter-

spousal immunity no longer exists. If this be a "startling innovation," so be it.

Finally, according to Emerson, there is a "lack of clear legislative indorsement." The Michigan court in Mosier v. Carney, 376 Mich. 532, 138 N. W. 2d 343 (1965), discussed the interpretations placed by various courts on the married woman's act vis-a-vis interspousal immunity, and came to this conclusion: "The fact that virtually the same statutory language is subject to varying interpretations by these courts suggests strongly that the actual basis for many of their decisions is a reappraisal of the common law and its rejection because no longer applicable to the facts of modern civilization.

"We shall pursue a more forthright course in our disposition of the cases at bar. Since the doctrine of interspousal tort immunity is a creation of the common law and since such doctrine has never been codified in this State, it is our duty to re-examine it and, if necessary to avoid continuing injustice, to change it."

Actually, we need not go outside our own jurisdiction. The rule exempting governmental subdivisions from tort liability was grounded on the common law, adopted by this court in Gillespie v. City of Lincoln, 35 Neb. 34, 52 N. W. 811 (1892), and abrogated in Brown v. City of Omaha, 183 Neb. 430, 160 N. W. 2d 805 (1968). The words justifying the court's action in the latter case are these: " 'The dozen or so state supreme courts that have recently abrogated the immunity doctrine have recognized that an unjust and irrational principle cannot be allowed to persist on the hollow ground that changing an antiquated rule is a job for the legislature.' "

In Duncan v. Nebraska Sanitarium & Benevolent Ass'n., 92 Neb. 162, 137 N. W. 1120 (1912), this court adopted the rule of charitable institution immunity with these final words: "While there is a diversity of opinion as to the reasons for the rule, the doctrine

itself is *firmly established.*" (Emphasis supplied.) In Myers v. Drozda, 180 Neb. 183, 141 N. W. 2d 852 (1966), this "firmly established" doctrine was repealed: "If this exemption formerly met a need, it has had its day. * * * If we endorsed legislation by silence, we erred. * * * Stare decisis 'was intended, not to effect a "petrifying rigidity," but to assure the justice that flows from certainty and stability. * * * we would be abdicating "our own function, in a field peculiarly nonstatutory," were we to insist on legislation and "refuse to reconsider an old and unsatisfactory court-made rule."

" ' * * * judges of an earlier generation declared the immunity simply because they believed it to be a sound instrument of judicial policy which would further the moral, social and economic welfare of the people of the State. When judges of a later generation firmly reach a contrary conclusion they must be ready to discharge their own judicial responsibilities in conformance with modern concepts and needs.' "

Restatement, Torts 2d, § 895 F, p. 423, adopted and promulgated May 19, 1977, but published and released in 1979, provides as follows: "Husband and Wife (1) A husband or wife is not immune from tort liability to the other solely by reason of that relationship." It perhaps is obvious, but in adopting such a rule this court is aware of the existence of some problems which are covered in Comment h. of section 895 F, and Comment k. of section 895 G, i.e., the intimacy of the family relationship may affect the determination of whether conduct is negligent or not, whereas if the conduct giving rise to an injury does not grow out of the family relationship, the existence of negligence may be determined as if the parties were not related. In other words, negligence in some instances may depend upon the conduct of an "ordinary, prudent spouse" rather than an "ordinary, prudent person."

Having concluded that the reasons for adopting

the doctrine in the first instance are no longer judicially sound, and finding no legislative barriers existing, we hereby abrogate the common law doctrine of interspousal tort immunity. This approach completely reflects both the spirit and the letter of section 25-305, R. R. S. 1943, "A woman may while married sue and be sued in the same manner as if she were unmarried" and Article 1, section 13 of the Constitution of the State of Nebraska which provides: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

Section 30-809, R. R. S. 1943, provides in part: "Whenever the death of a person shall be caused by the wrongful act * * * of any person * * * and the act * * * is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages * * * the person who * * * would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured * * *." Having held today that plaintiff's decedent, if death had not ensued, would have been entitled to maintain an action against defendant's decedent, the plaintiff does have capacity to sue in this instance and the petition states a cause of action.

The judgment is reversed and the cause remanded to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CLINTON, J., dissenting.

I respectfully dissent from the majority opinion. The court abolishes the doctrine of interspousal immunity for negligent torts by means of examining and demolishing the various specious reasons which the courts have used in the past to support the doctrine, or by demonstrating the present inapplicabil-

ity of reasons formerly relied upon. The shortcoming of the opinion, I believe, is that it does not even once ask nor attempt to determine whether there still exist sound reasons which support the doctrine. I believe such reasons exist and are of sufficient importance to continue the immunity as a matter of policy.

If one spouse is to respond in money damages to the other spouse or the estate of a spouse or, as in this case, the estate of one to the estate of the other for the benefit of those who suffered economically by the death of the wife, it must be assumed the judgment may, in whole or in part, be paid by either the tort-feasor or his or her estate. Such payment obviously will affect, perhaps seriously, the financial integrity and security of the family as a whole and bring with it other concomitant disharmonies. If one could be sure an insurer is going to pay the bill in every case, then, of course, these objections are removed. Of that though we cannot be sure.

One can conjure various factual situations in which bad results will occur from abolition of immunity. We will give only a few illustrations. One may concur under the apparent facts of this case. The beneficiaries of Mrs. Schaap's estate are her children by a prior marriage, not the children of the deceased couple. It also appears her children are all of legal age. Does Mr. Schaap have children who are dependent upon him for support? Are they the ones who might suffer because of a judgment which might be rendered? We do not know.

Let us assume another situation. A family has a handicapped child. Their estate plan calls for this child's needs to be first met or, perhaps because the estate is relatively small, to be met exclusive of the needs of other children who are or soon will be capable of supporting themselves. An estate plan such as this may be completely disrupted by a judgment which the estate or one spouse must pay.

One might argue that no suit will be filed if the judgment will be paid from family funds. We cannot be sure of this, especially where, as is common these days, each spouse has children of whom the other is not the parent, adoptive or biological. That may be this very case.

I would abolish interspousal immunity in the case of negligent torts only in those cases where, and to the extent that, the risk is one covered by liability insurance. I would further make the pleading of coverage an element of the cause of action — for to the extent that insurance covers the liability, the policy provisions behind the immunity doctrine do not apply. This is what has been done in some cases where the doctrine of governmental or charitable immunity has been modified.

Intentional torts involve somewhat different considerations. They are not covered by liability insurance and what should be done in those cases presents a different question which can be solved when the question arises. The quotation in the opinion from Professor Prosser is irrelevant to the case before us.

IN RE ESTATE OF DONALD L. CHILDS, DECEASED. JOLENE A. WALLACE, PERSONAL REPRESENTATIVE OF THE ESTATE OF LESLEY L. CHILDS, DECEASED, APPELLANT, V. ESTATE OF DONALD L. CHILDS ET AL., APPELLEES.

279 N. W. 2d 388

Filed May 29, 1979. No. 41855.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded.

Luebs, Dowding, Beltzer & Leininger, for appellant.

Baylor, Evnen, Baylor, Curtiss & Grimit, for appellees.

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

PER CURIAM.

This is a wrongful death action brought by the personal representative of a deceased wife against the personal representative of her deceased husband. Lesley L. Childs was the only other passenger in an airplane piloted by Donald L. Childs, her husband, and the petition alleged that the husband's acts of negligence and gross negligence were the proximate cause of an airplane crash which occurred on August 15, 1976, killing both husband and wife.

The District Court, on appeal from a disallowance of the claim by the county court, sustained a demurrer and dismissed the amended petition on appeal. The plaintiff has appealed to this court and the issue is whether the traditional rule of interspousal immunity should be retained in tort actions.

This case is controlled by the case of Imig v. March, *ante* p. 537, 279 N. W. 2d 382, released on the 29th day of May 1979. The judgment is reversed and the cause remanded to the District Court for further proceedings consistent with the opinion in Imig v. March, *supra*.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., dissenting.

I dissent for the reasons stated in my dissent in Imig v. March, *ante* p. 537, 279 N. W. 2d 382.

SAMUEL JONES, APPELLEE, V. RICHARD NORVAL ET AL., APPELLEES, IMPLEADED WITH FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, APPELLANT.

279 N. W. 2d 388

Filed May 29, 1979. No. 42043.

1. **Insurance: Negligence: Damages: Intent.** An injury is "expected or intended" from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury or if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law.
2. **Assault and Battery: Insurance: Intent.** Where an 18-year-old man intentionally hits another person in the face with his fist, with force enough to knock the person unconscious, an intent to cause bodily injury can be inferred as a matter of law, and the subjective intent of the actor is immaterial.

Appeal from the District Court for Seward County: WILLIAM H. NORTON, Judge. Reversed and remanded with directions to dismiss.

Barlow, Johnson, DeMars & Flodman and John F. Recknor, for appellant.

Michael O. Johanns and Scott T. Robertson of Peterson, Bowman, Larsen & Swanson, for appellee Jones.

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

MCCOWN, J.

This is an action for a declaratory judgment that a homeowner's insurance policy provided coverage for a judgment against an assured for a willful and intentional assault. The District Court, after trial, granted plaintiff's motion for a directed verdict and entered judgment for the plaintiff and against the defendant, Farmers Mutual Insurance Company of Nebraska, for $5,000, the amount of the assault judgment, less a stipulated credit. The insurance company has appealed.

In November 1975, plaintiff, Samuel Jones, recov-

ered a judgment against the defendant, Richard Norval, for $5,000 and costs for a willful, intentional assault in which Norval hit Jones in the face with his fist and broke Jones' jaw. Richard Norval was an 18-year-old minor who resided with his parents in their home and was an insured person under a homeowner's insurance policy, issued by the defendant, Farmers Mutual Insurance Company of Nebraska. Plaintiff's demand for payment of the judgment was rejected by the insurance company upon the ground that the insurance policy excluded coverage for the assault. This action for declaratory judgment followed.

The matter was tried by stipulation of the parties on the basis of the testimony in the prior assault trial and on the depositions of the plaintiff and the defendant, Richard Norval. The evidence established that on October 4, 1973, Richard Norval went to Jones' residence to talk to him about certain derogatory remarks about Norval that Jones had supposedly made to Norval's girl friend. Norval was 18 years old and a 3-sport athlete who had graduated from high school the preceding spring. Jones was a senior in high school. When Norval arrived at the Jones' residence, he asked Jones to come out on the porch and the two discussed the matter for approximately 10 minutes. At that time Jones attempted to go into the house, but Norval placed his hand against the door to prevent it. Jones pushed Norval's hand away and Norval hit Jones in the face, striking him with his closed fist, knocking him out, and breaking his jaw. Norval's testimony was that he did not intend to injure Jones, that he reacted instinctively, and that he did not expect to hurt Jones. The following question and answer are crucial. "Q. * * * whether or not you intended to cause harm, you intended to hit him? That's true, isn't it? A. Yes, that's true." Essentially Norval's testimony was that although he intended to hit Jones, he only in-

tended to cause a sting or a bruise but not a serious injury that would require medical attention.

The insurance policy contained an exclusion providing: "This policy does not apply: * * * to bodily injury or property damage which is either expected or intended from the standpoint of the Insured." The District Court specifically found that Norval did not expect or intend to cause injury or damage to the plaintiff and did not act with the specific intent to cause harm. The District Court sustained plaintiff's motion for directed verdict and entered judgment against the defendant insurance company in the amount of $5,000 less a stipulated $984 credit. The court also taxed attorney's fees and costs to the defendant.

The critical issue in this case is whether Norval expected or intended to cause bodily injury to Jones and whether or not the subjective testimony of Norval that he did not intend to injure Jones is sufficient to raise a factual issue of intent for submission to the fact finder.

In State Farm Fire & Cas. Co. v. Muth, 190 Neb. 248, 207 N. W. 2d 364, this court specifically considered the language of the exclusion involved here. In that case we affirmed the trial court's determination that a youth who fired a B-B gun from a slowly moving automobile without specific aim and struck a schoolmate did not intend or expect to do bodily injury to the schoolmate, but only intended to scare him. In that case we held that: "[U]nder the language of the exclusion in question, an injury is either expected or intended if the insured acted with the specific intent to cause harm to a third party. It seems to us to be immaterial whether the injury which results was specifically intended, i.e., the exclusion would apply even though the injury is different from that intended or anticipated." This court recognized that it was difficult to precisely delineate the scope of the rule and it cited and discussed nu-

merous cases illustrating the scope of the rule. We said: "The term 'expected' when used in association with 'intended' carries the connotation of a high degree of certainty or probability and seems to be used to practically equate with 'intended,' because one expects the consequences of what one intends." This court pointed out in the Muth case the practical factual differences which distinguish that case from the one now before us. In the Muth case we said: "If, in the situation before us, the trial court had found that Allen had intended to hit James, even though he might have intended no serious injury, the language of the exclusion would have eliminated coverage."

In the case now before us there is no way in which Norval can avoid his specific admission that he intended to hit Jones, and there is no escape from the fact that he hit him hard enough to break his jaw and knock him out. A physically mature 18-year-old athlete who intentionally hits another person in the face with his fist hard enough to break his jaw and render him unconscious must be said to expect or intend the natural, normal consequences of his own intentional act. In the language of the Muth case, such a rule "will tend to promote the public policy of excluding coverage where there is a deliberate intention to cause physical harm or where, * * * such intention must be attributed as a matter of law because the acts are of such a nature that the injury must necessarily be expected." Numerous cases support that position. In Rankin v. Farmers Elevator Mutual Insurance Company, 393 F. 2d 718 (10th Cir., 1968), the insured deliberately sideswiped a motorcycle causing personal injuries to the rider. The court said: "Where an intentional act results in injuries which are the natural and probable consequences of the act, the injuries as well as the act are intentional."

In Hins v. Heer, 259 N. W. 2d 38 (N. D., 1977), an

intentional blow to the jaw was involved as well as the same language in an exclusionary clause. The court dismissed the action against the insurance company and said: "Nothing in the record before us supports a finding that Heer's blow was an accident or unintentional. Further, we find no merit in Hins's assertion that a distinction exists between Heer's intentional act of assaulting Hins and the consequences of such assault. * * * The 'occurrence' giving rise to the instant case falls clearly within the purview of Exclusion Clause 1 (f) of Heer's homeowner's insurance policy."

In Steinmetz v. Nat. Am. Ins. Co., 589 P. 2d 911 (Ariz. App., 1978), the identical exclusionary clause was involved. The facts are likewise virtually identical in that the insured struck the plaintiff in the face causing serious injuries. The court upheld a summary judgment for the insurer and held that notwithstanding the actor's statement to the contrary, the act of striking another in the face was an act so certain to cause a particular kind of harm that the actor who performed such an act intended the resulting harm for purposes of the liability policy provision. The Arizona court stated: "The exclusion here is unambiguous. By its language it excludes from coverage the intentional acts of the insured which result in injury. It follows that if the injury results from the natural and probable consequences of the intentional act, the subjective intent of the actor is simply immaterial — the exclusion applies."

The case of Clark v. Allstate Insurance Company, 22 Ariz. App. 601, 529 P. 2d 1195, also involved an insured intentionally striking the plaintiff in the face with his fist. The insured maintained that he had no subjective intent to injure. The court said: "The contention of young Clark [insured] that he did not intend to injure Niemi does not make the question of intention an issue of material fact which must go to

the trier of fact." The court said: "[T]he act of striking another in the face is one which we recognize as an act so certain to cause a particular kind of harm that we can say a person who performed the act intended the resulting harm, and his statement to the contrary does nothing to refute that rule of law."

The cases overwhelmingly indicate that an injury is "expected or intended" from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury or if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law. Continental Western Ins. Co. v. Toal, 309 Minn. 169, 244 N. W. 2d 121 (1976).

In Iowa Kemper Ins. Co. v. Stone, 269 N. W. 2d 885 (Minn., 1978), the Minnesota court made it clear that there is no substantial distinction in meaning between policies which exclude injuries "expected or intended" and those excluding injuries "caused intentionally." The Minnesota court said: " 'Superficial analysis would suggest that this is an acceptance of the "natural consequences of the act" rule, but it is not. It is a much more narrow gauge that recognizes the correlation only where reason mandates that from the very nature of the act, harm to the injured party must have been intended. A defendant may assert the rock was accidentally released or was not aimed at the victim, but he will not be heard to say he intended to throw the rock softly.' Home Insurance Company v. Neilsen, 332 N. E. 2d 240, 243-44 (Ind. App. 1975)."

In the case at bar the evidence established that the defendant Norval intentionally hit the plaintiff in the face with his fist. The blow knocked plaintiff unconscious and broke his jaw. To hold that under such circumstances the testimony of the insured that he did not intend to injure the plaintiff is sufficient to permit the fact finder to find that no harm to the injured party was intended, simply ignores reality.

Any reasonable analysis requires the conclusion that from the very nature of the act harm must have been intended.

Although Norval may not have intended the specific injury which resulted, such specific subjective intent is not required to exclude coverage under the policy. The "intent" which is necessary to exclude coverage is not the intent to act nor the intent to cause the specific injury. Instead it is the intent to cause bodily injury to the person acted upon and it makes no difference if the actual injury is more severe or of a different nature than the injury intended.

Where an 18-year-old man intentionally hits another person in the face with his fist, with force enough to knock the person unconscious, an intent to cause bodily injury can be inferred as a matter of law, and the subjective intent of the actor is immaterial. From the very nature of the act, no reasonable man could doubt that harm to the person struck must have been intended.

The public policy against "licensing" intentional and unlawful assault bolsters our conclusion. In the case before us the direct and inferential evidence from the very nature of the act permits only one conclusion, that Norval intended to injure the plaintiff.

The judgment of the District Court is reversed and the cause is remanded to the District Court with directions to dismiss plaintiff's petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

BRODKEY, J., dissenting.

I must respectfully part company with the majority of the court in their conclusion that as a matter of law Richard Norval intended to cause bodily injury to Samuel Jones, notwithstanding the presence of conflicting and contradictory evidence on that point in the record. Under the facts of this case a

jury question was presented which the trial judge, as the trier of facts, after hearing and observing the witnesses, believed. A closer case, factually, than those cited in the majority opinion is the case of Farmers Ins. Exchange v. Sipple, 255 N. W. 2d 373 (Minn., 1977), which case also involved conflicting evidence, which the Supreme Court of Minnesota held was properly submitted to the jury, rather than being decided as a matter of law. That case involved an assault on a farmer by the insured, a state highway department employee, who struck the farmer with his fist after becoming involved in a heated discussion with him regarding a new highway allegedly creating drainage problems for his land. The homeowner's policy issued by the insurance company in that case also contained an exclusion of " * * * bodily injury or property damage which is either expected or intended from the standpoint of the Insured." The insurance company brought the action against the insured and the party assaulted seeking a judgment determining its obligation to defend or indemnify the insured. The trial court submitted to the jury the issue of the insured's intent to injury under the exclusion clause of the policy, since the insured testified that he struck the farmer instinctively, in the form of a reflex, after the farmer had turned suddenly or advanced menacingly toward him. I quote from the opinion in that case: "The insurance company on appeal contends that the issue whether the assault by Baud upon Sipple was an intentional act was a question of law and that the trial court improperly submitted the issue of intent to the jury.

"We hold that under the particular facts of this case the trial court was correct in submitting the issue of whether the injury was either expected or intended to the jury. The facts were in dispute. Sipple testified that he had not turned suddenly nor advanced menacingly toward Baud. Baud, on the

other hand, testifies as follows: 'Q. What did you think when he turned around and said ["you sons of bitches"] to you? A. I didn't. It was more of a reflex. Q. Did you think he was going to attack you? A. No, not really. I don't know, it just seems like he came right to me. Q. Did it make you angry? A. I was angry, but I didn't have any intentions of hurting the man. I think he was more angry than I was. Q. You intended to hit him, but you didn't intend to hurt him? A. I did not intend to hit him. I came up and I didn't intend to hurt him. In fact, I don't think I did hurt him. Q. Did you lose control of your bodily reflexes at that point? A. If I would have lost control — Q. Did you hit him? A. Yes. Q. Did you hit him with your right hand or your left hand? A. Left hand. Q. Was your fist opened or closed? A. It was like this (indicating). Q. Are your [sic] right-handed or left-handed? A. Right-handed. Q. Were you holding anything at the time? A. No. Q. And you didn't intend to hit the man? A. That's correct. Q. This was just a reflex action over which you had no control at that point? A. Correct. Q. You think you did it because you were mad? A. No. Q. Why do you think you did it? A. Like I said, the man came at me and it was just more or less a defense. Q. Were you trying to stop him from coming at you further? A. Correct. Q. The best way to do that is to strike him in the face? A. I have never done this before, but it was one of those things.' " The court also stated that if Baud's testimony is to be believed, there is doubt he had any time to form an intent, but rather acted instinctively in the form of a reflex; and that, accordingly, the question of intent was properly presented to the jury. There is evidence in the record in the instant case, which apparently the trial judge believed, that the defendant Norval did not intend to cause harm to the plaintiff, even assuming that his act of striking the plaintiff on the face was intention-

al. Without being exhaustive, the following evidence is illustrative. As previously stated, the defendant testified in this action by deposition and also previous testimony. On recross examination in his deposition he was asked: "Q. All right, now I gather from your answers that the swing was almost contemporraneous [sic] with Mr. Jones putting his hand on your shoulder or on your arm to push, isn't that right. A. Yes. Q. Did you actually think about what you were doing or would you characterize it as an instinctive reaction, reacted without thinking about it? A. I'd say it was more of an instinctive reaction." The record also contains previous testimony of Richard Norval in the original action in the District Court for Seward County. He was asked the following questions and made the following answers: "Q. Did you expect that your action would injure him? A. No. * * * Q. Immediately before you struck him, was it your intention at that time to — try to recall what you were thinking about, did you intend to cause him any injury? A. No. Q. Did you go there with the intention that you would injure Mr. Jones? A. No."

While there is little doubt that the defendant intended to hit Jones, I believe that the question of whether he intended to cause physical harm to him was a disputed fact. In Insurance Co. of North America v. Hawkins, 197 Neb. 126, 246 N. W. 2d 878 (1976), we stated: "In a law action tried to the court without a jury, it is not within the province of this court to weigh or resolve conflicts in the evidence. The credibility of the witnesses and the weight to be given to their testimony are for the trier of fact. Snay v. Snarr, 195 Neb. 375, 238 N. W. 2d 234. The judgment of a trial court in an action at law tried to the court without a jury has the effect of a verdict of a jury and should not be set aside on appeal unless clearly wrong. Henkle & Joyce Hardware Co. v. Maco, Inc., 195 Neb. 565, 239 N. W. 2d

772." Also, in Libbey-Owens Ford Glass Co. v. L & M Paper Co., 189 Neb. 792, 205 N. W. 2d 523 (1973), we stated: "Where evidence is conflicting, or where reasonable minds may draw different inferences or conclusions from the evidence, it is within the province of the jury or the court, when the case is tried without a jury, to decide the issues of fact, and the Supreme Court may not set aside or direct a verdict in such situation." There is evidence in the record in this case to sustain the findings of the trial court, acting as the trier of fact, and its judgment ought to be affirmed.

GRAND ISLAND SCHOOL DISTRICT #2 OF HALL COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, APPELLANT, V. THE CELOTEX CORPORATION ET AL., APPELLEES.

279 N. W. 2d 603

Filed May 29, 1979. No. 42052.

1. **Supreme Court: Appeal and Error.** Consideration of the cause in this court is generally limited to errors assigned and discussed.
2. **Statute of Limitations: Time.** Ordinarily, a statute of limitations begins to run as soon as the plaintiff has a right to bring suit. This is true even though the plaintiff may be ignorant of the existence of the cause of action.
3. **Statute of Limitations: Statutes: Time.** The statute of limitations for an action based on alleged deficiencies in improvements to real property does not run during the time when the plaintiff reasonably could not discover the existence of the cause of action. § 25-223, R. S. Supp., 1978.
4. **Statute of Limitations: Time: Legislature.** It is competent for the Legislature to change statutes subject to the limitation that an action already barred may not be revived and that an action may not be unreasonably cut off. The applicable statute of limitations is the one in force at the time the suit is brought.
5. **Statute of Limitations: Summary Judgments.** Where pleadings and evidence presented conclusively indicate that the statute of limitations has run, summary judgment is appropriate.
6. **Statute of Limitations: Fraud: Pleadings.** In order to avail himself of the rule that the statute of limitations for an action based on fraud does not begin to run until discovery of the facts constituting the fraud, plaintiff must allege in his petition the failure to discover.

7. **Statute of Limitations: Uniform Commercial Code: Warranty: Time.** An action for breach of warranty in the sale of goods must be commenced within 4 years of tender of delivery. Failure to discover the breach prevents the running of the statute only when the warranty explicitly extends to future performance. § 2-725, U. C. C.
8. **Uniform Commercial Code: Warranty.** An implied warranty cannot "explicitly" extend to future performance. § 2-725, U. C. C.
9. **Statute of Limitations: Negligence: Statutes: Time.** An action grounded in tort must be commenced within 4 years of accrual of the cause of action. § 25-207 (3), R. R. S. 1943.
10. **Statute of Limitations: Contracts: Statutes: Time.** An action based on breach of an implied contract must be commenced within 4 years of accrual of the cause of action. § 25-206, R. R. S. 1943.
11. _____: _____: _____: _____. An action based on breach of a written contract must be commenced within 5 years of accrual of the cause of action. § 25-205, R. R. S. 1943.

Appeal from the District Court for Hall County: LLOYD W. KELLY, JR., Judge. Affirmed.

Clayton H. Shrout of Shrout, Christian, Krieger & Merwald, for appellant.

James A. Beltzer of Luebs, Dowding, Beltzer & Leininger, for appellees Johnson Builders, Inc. and St. Paul Fire & Marine Insurance Company; Robert L. Berry of Kennedy, Holland, DeLacy & Svoboda, for appellee Shaver and Company; John B. Henley of Henley & Henley, for appellees The Celotex Corporation, The Travelers Indemnity Company, and the Jim Walter Corporation; and W. G. Blackburn of Cunningham, Blackburn, VonSeggern, Livingston & Francis, for appellee Krause Roofing and Sheet Metal, Inc.

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

WHITE, J.

Appellant, Grand Island School District #2, brought this action to recover damages arising from a leaky roof installed on the Barr Junior High School building. The appellees, defendants below, were sued un-

der various theories of liability. Those involved in the design, supervision, construction, or supply of materials for the building or the roof were Johnson Builders, Inc. (hereinafter Johnson), Shaver and Company (hereinafter Shaver), Krause Roofing and Sheet Metal, Inc. (hereinafter Krause), and The Celotex Corporation (hereinafter Celotex). Johnson entered into a written contract with the school district as general contractor on the building. Johnson was to construct the building in accordance with the specifications of Shaver, the architect. Shaver also had the duty to inspect the work at intermittent stages. Johnson subcontracted the roofing work to Krause. Celotex supplied to Krause the roofing material known as the "Bond Ply" system. Also joined as defendants were: The Travelers Indemnity Company, which issued a limited guaranty bond on the roof; the St. Paul Fire and Marine Insurance Company, surety for Johnson under a performance and maintenance bond; and the Jim Walter Corporation, parent corporation to Celotex.

The defendant Krause demurred to plaintiff's amended petition, alleging it did not state facts sufficient to constitute a cause of action. The sustaining of the demurrer was not assigned as error in this court nor was it discussed in the plaintiff's extensive brief or its reply brief. The order sustaining the demurrer is therefore affirmed. Consideration of the cause in this court is generally limited to errors assigned and discussed. Rule 8 a 2 (3), Revised Rules of the Supreme Court, 1977; Cofer v. Perkins, 199 Neb. 327, 258 N. W. 2d 807.

Each of the other defendants moved for summary judgment on the basis that the various statutes of limitations had run. The District Court sustained the motions. We affirm.

Construction on Barr Junior High School began in 1966. In 1967, the roof on the building was completed. The building was occupied in the summer of

that year and all construction was completed shortly after classes started in the fall. The first leaks in the roof appeared in late 1968. Then, according to the plaintiff, there began a cycle of complaints by the plaintiff to the defendants and independent parties, repairs to the roof which alleviated the leaks for a period of months, and then the appearance of new leaks. This cycle continued until July 1976 when an engineering consultant took samples of the roof and related to the school board its opinion that the insulation boards beneath the roofing membrane had not been taped; that the insulation and membrane were not in compliance with specifications; that there was little or no adhesion between the insulation boards and the underlying concrete deck; and that the roof had not been properly vented. This suit was instituted a month later on August 4, 1976, and about that same time the school board authorized replacement of the old roof. Other evidence of careless and improper installation was allegedly found when the old roof was removed.

The plaintiff alleged that the defendants, Johnson and Shaver, breached implied warranties and their written contracts with the plaintiff, and that they were negligent in failing to supervise and inspect the installation of the roof to insure that it would meet the contract specifications. Unless a more specific statute of limitations is applicable, actions in tort and actions upon implied contracts, (which would include implied warranty) must be brought within 4 years. § 25-206 and 25-207 (3), R. R. S. 1943. Actions on written contracts can only be brought within 5 years. § 25-205, R. R. S. 1943. The arguments of the plaintiff raise the question of when these statutes of limitations start to run.

The traditional rule is that the statute begins to run as soon as the action accrues, and the cause is said to accrue when the aggrieved party has the right to institute and maintain a suit. In a contract

action this means as soon as breach occurs, and in tort, as soon as the act or omission occurs. These rules would apply even though the plaintiff was then ignorant of the injury sustained or could not ascertain the amount of his damages. See 51 Am. Jur. 2d, Limitation of Actions, § 109, p. 681.

In 1976, the Legislature modified this "accrual" rule as it applies to improvements to real property and adopted instead a partial "discovery" rule.

Section 25-223, R. S. Supp., 1978, provides, in part: "Any action to recover damages based on any alleged breach of warranty on improvements to real property or based on any alleged deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property shall be commenced within *four years* after any alleged act or omission constituting such breach of warranty or deficiency. If such cause of action is not discovered and could not be reasonably discovered within such four-year period, or within one year preceding the expiration of such four-year period, then the cause of action may be commenced within two years from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier." (Emphasis supplied.) The statute's effective date was July 10, 1976, which was prior to the date on which this suit was commenced.

" 'It is well settled that it is competent for the legislature to change statutes prescribing limitations to actions, and that the one in force at the time suit is brought is applicable to the cause of action. The only restriction on the exercise of this power is, that the legislature cannot remove a bar or limitation which has already become complete, and that no limitation shall be made to take effect on existing claims without allowing a reasonable time for parties to bring action before these claims are absolutely barred by a new enactment.' In this case the

court held that there was a reasonable and sufficient time given to bring the action between the time of the passage of the act and the time when it took effect." Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc., 192 Neb. 431, 222 N. W. 2d 125, citing Horbach v. Miller, 4 Neb. 31 (1875).

It is clear that if the contract and warranty actions against Johnson and Shaver had accrued at the time of the breach, they were barred by sections 25-205 and 25-206, R. R. S. 1943, prior to the passage of section 25-223, R. S. Supp., 1978. The passage of the latter act would be ineffective to revive those actions.

The applicability of section 25-223, R. S. Supp., 1978, to the cause of action in negligence is less clear, for this court had, prior to its passage, already adopted a discovery rule in certain classes of tort cases. The rule was first applied in workmen's compensation cases alleging latently appearing industrial diseases. The statute was said to run, not from the time of the initial injury, but from the date of discovery of a compensable disability. See Dryden v. Omaha Steel Works, 148 Neb. 1, 26 N. W. 2d 293. In 1955, a federal court speculated that Nebraska would apply "the same liberal rule" when an action was brought in tort for a late blooming case of berylliosis caused by exposure to defendant's product where the defendant was a supplier to plaintiff's employer. See Sylvania Electric Products v. Barker, 228 F. 2d 842 (1st Cir., 1955). In 1962, this court held that the statute of limitations on a medical malpractice action did not begin to run until the plaintiff discovered or through the exercise of reasonable diligence could have discovered that a foreign object had been left in her body after surgery. See Spath v. Morrow, 174 Neb. 38, 115 N. W. 2d 581.

Counsel has not cited, nor do we find, any Nebraska cases where a discovery rule has, without statutory direction, been applied to a statute of limitations question in a cause of action not involving phy-

sical injury. We are prepared to say, however, that even without section 25-223, R. S. Supp., 1978, a discovery rule is applicable to a tort action based on latent defects in improvements to real property. But, even when that point is granted, we are unable to say that the trial court was incorrect in ruling that the statute of limitations had run.

First of all, the period of 4 years after discovery which we would have applied under section 25-207, R. R. S. 1943, was shortened to 2 years after discovery by section 25-222, R. R. S. 1943, and according to the rule of Educational Service Unit No. 3 v. Mammel, O., S., H. & S, Inc., *supra*. It was well within the power of the Legislature to do so. Since the date of enactment and the effective date of the statute were separated by a period of nearly 4 months, the plaintiff was subjected to no unfair surprise. See Horbach v. Miller, *supra*.

In Omaha Paper Stock Co., Inc. v. Martin K. Eby Constr. Co., Inc., 193 Neb. 848, 230 N. W. 2d 87, the plaintiff argued for a discovery rule in a suit against a general contractor. Defendant built a warehouse including a sprinkler system for the plaintiff in 1960. The sprinkler failed to work during a fire on October 1, 1968, and the warehouse was destroyed. In October 1971, the plaintiff discovered that the sprinkler malfunction had been caused by a broken waterline which had in turn been caused by the settling of a sewer alleged to have been negligently installed by defendant at the time of construction. Plaintiff waited until March 1973 to file suit. It was faced by section 25-207, R. R. S. 1943, the general statute of limitations for negligence: "The following actions can only be brought within four years: * * * (3) an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; * * *."

In the above opinion by Spencer, J., this court held that even if a discovery rule was applied, the plain-

tiff's action was commenced too late. What was said there is instructive on the case at bar: "Plaintiff knew by October 1, 1968, that a break had occurred in its waterline. It would seem reasonable to believe when plaintiff discovered that 'no water flowed from the 8-inch water line to the automatic sprinkler systems' some attempt would have been made promptly to trace the cause. Plaintiff slept on whatever rights it may have had for 3 years. * * * Even in malpractice and fraud cases where a discovery rule is applied, it is not the actual discovery of the reason for the injury which is the criteria. In those cases we have consistently held that discovery means discovery of facts constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. Patterson v. Renstrom (1972), 188 Neb. 78, 195 N. W. 2d 193."

Applying this rule to the instant case, the actions based on the alleged negligence of defendants Johnson and Shaver were barred unless the school district could not reasonably have discovered the negligence prior to August 4, 1974, 2 years prior to the commencement of the suit.

The evidence presented to the trial court on the motion for summary judgment was so replete with evidence that the plaintiff could have discovered the defects prior to that date, that we feel no real issue of fact could be said to exist. Depositions of the superintendent of the school district and the principal of Barr Junior High School indicated leaks appeared in 1968 soon after occupation of the building and continued intermittently until this action was commenced. Beginning in 1969, buckets had to be strategically placed to catch the water which leaked through for several days after each heavy rain. No later than 1971, it was observed that sections of the roof were cracked and blistered and that water pooled in certain areas. These problems were noted

in a 1971 report to the school board by the architectural firm of Wilson & Company. The report expressed the opinion that "the initial application [of the roofing and flashings] shows evidence of carelessness." In 1970, the school board directed its attorney to write letters to Shaver threatening suit. All this indicates that the board was well aware of the problem long before the crucial date of August 4, 1974. The negligence actions against Johnson and Shaver are barred.

Next we turn to the plaintiff's argument that, as against defendant Shaver, its action is not barred because it is based on fraud. An action for relief on the ground of fraud is subject to a 4-year statute of limitations which does not begin to run until discovery of the fraud or of facts sufficient to put a person on inquiry, which, if pursued, would lead to discovery. § 25-207 (4), R. R. S. 1943; Hollenbeck v. Guardian Nat. Life Ins. Co., 144 Neb. 684, 14 N. W. 2d 330. We first note that under the facts disclosed and discussed above, in relation to the negligence claim, the plaintiff was in possession of facts sufficient to put in on inquiry. Furthermore, we do not feel that fraud was properly alleged. The allegation that Shaver "incorrectly represented to the owner by issuing certificates of payment that the work had progressed to the point indicated * * * " was just one of many allegations contained in the breach of contract cause of action. Finally, the allegation fails to state, as it must, that the facts were not discovered within the initial 4-year period. See Lee v. Brodbeck, 196 Neb. 393, 243 N. W. 2d 331.

Two causes of action were brought against defendant Celotex, the manufacturer of the roofing system. The first alleged that Celotex breached its implied warranty that the roofing system was fit for the purpose intended. An action for breach of warranty or other breaches of a contract for the sale of goods are subject to the statute of limitations found at § 2-725,

U. C. C. The action must be commenced within 4 years after tender of delivery is made, regardless of the aggrieved party's lack of knowledge of the breach. Under that rule, the breach of warranty action against Celotex would clearly be barred since the suit was not commenced until 9 years had passed after delivery of the roofing. There is, however, an exception to the rule stated above, and plaintiff claims it is operable here: "* * * where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." § 2-725 (2), U. C. C. The exception applies only where the seller *explicitly* states, for example, that the product will "last for 10 years." Although its reason for doing so is not clear, the plaintiff contends that the 20-year guaranty bond on the roof "is an explicit, express warranty that the roof on Barr would be trouble-free for that period of time, except for ordinary wear and tear," and that it "is an explicit reference to the future performance of the roof." This contention is not supported by a reading of the bond. Under the bond, the surety guarantees that for 20 years it will "repair or cause to be repaired, leaks developing in the Roof which are caused by ordinary wear and tear by the elements." The bond is further expressly limited to an aggregate amount of $3,045. No action is brought on the bond itself, and the argument that it constitutes a general warranty on the goods explicitly extending to future performance is rejected. Any action based on breach of warranty for the sale of the roofing materials, not having been commenced within 4 years of tender of delivery, was barred by § 2-725, U. C. C.

In its second cause of action against Celotex, plaintiff alleges that Celotex was negligent in manufacturing, testing, and marketing the roofing materials. We are not certain that the cause of action,

despite its label, does not sound in warranty for loss of benefit of the bargain rather than tort. See Hawkins Constr. Co. v. Matthews Co., Inc., 190 Neb. 546, 209 N. W. 2d 643. But even if it is a properly stated cause of action, it alleges ordinary negligence. It does not fall within the category of causes to which a discovery rule is applicable under section 25-223, R. S. Supp., 1978. Therefore, the action is barred by the 4-year statute of limitations for tort actions. § 25-207, R. R. S. 1943. That statute, with certain exceptions already mentioned, and not pertinent here, begins to run on the date the cause of action accrues and not on the date of its later discovery.

The record reveals a long and exasperating experience with what was, for whatever reason, a clearly defective roof. The school board attempted to solve the problem, but it did not, as the law requires, commence this action in time. Under every conceivable statute of limitations, and as to all defendants, this action is barred. The judgment of the District Court is therefore affirmed.

AFFIRMED.

COMMUTER DEVELOPMENTS AND INVESTMENTS, INC., APPELLEE, V. LEONARD F. GRAMLICH AND LAURA ANN GRAMLICH, APPELLANTS.

279 N. W. 2d 394

Filed May 29, 1979. No. 42061.

1. **Evidence.** A duplicate of a writing is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original or in the circumstances it would be unfair to admit the duplicate in lieu of the original.
2. **Contracts: Options.** An option to purchase real estate is a unilateral contract by which the optionor agrees with the optionee that the optionee has the right to buy certain property according to the terms and conditions of the option.
3. **Contracts: Options: Time.** An option does not constitute an es-

tate or interest in land but it is a mere right of election to accept or reject a present offer within the time and upon the terms designated.

4. **Contracts: Options.** A consideration for an agreement requires that there be a benefit on one side or a detriment suffered or a service done on the other.

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

Finlayson, McKie & Fisk and L. R. Brodkey, for appellants.

Chris M. Arps, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, and WHITE, JJ., and KORTUM and FAHRNBRUCH, District Judges.

KORTUM, District Judge.

This is an action for the specific performance, or in the alternative, for damages, for breach of an option contract for the purchase of real estate. The District Court found for the plaintiff on the basis that a valid enforceable option existed and assessed damages against the defendants.

The plaintiff, Commuter Developments and Investments, Inc., is a corporation engaged in oil well promotion and land development. In 1965 the plaintiff purchased the land in question for $700 an acre. In 1971 the parties commenced a series of transactions involving the north 49 acres of the property.

On April 19, 1971, the plaintiff gave Leonard Gramlich, one of the defendants, a note for $10,000. Leonard, a real estate salesman, took a second mortgage on the property and also received a "firm listing for sale" of the real estate.

On May 5, 1971, the plaintiff gave a second note to Leonard, this note being for $5,000. Chronologically the next matter of significance occurred on July 31, 1971. The president of the plaintiff corporation wrote a letter to the board of directors stating that he planned to sell the real estate with a 5-year repur-

chase option "as previously discussed."

On August 1, 1971, the defendants executed the option in question. Leonard then gave the plaintiff a check dated August 2, 1971, for $15,000 as part of the sales price. The plaintiff executed a quitclaim deed to a small portion of the property and on October 18, 1971, executed a corporation warranty deed to the balance of the land. The deeds were notarized on October 18, 1971, and filed on November 17, 1971. On November 23, 1971, Leonard paid plaintiff $2,283.83. Cancellation of two notes for $15,000 was part of the purchase price of the property.

On May 31, 1974, the defendants sold the land to third parties for $1,200 an acre. The plaintiff attempted to exercise the option on May 3, 1976, and upon defendants' refusal to honor the option, this litigation ensued.

The original option was not produced at trial. Plaintiff's witness testified that it was lost and he could not find it. A copy of the option was admitted by the trial court and, in addition, the trial judge admitted testimony as to the intent of the parties surrounding the transaction.

The defendants first contend the trial court erred in admitting the option into evidence. Defendants urge that no consideration existed for such option and that the one dollar consideration recited in the option was never paid. Under the general principles of contract law, the consideration for an option may consist of some benefit to the promisor, some loss to the promisee, or some money or other thing of value given, paid, or exchanged. 77 Am. Jur. 2d, Vendor and Purchaser, § 35, pp. 215, 216. A consideration for an agreement to become a binding contract requires a benefit on one side or a detriment on the other. Grady v. Denbeck, 197 Neb. 795, 251 N. W. 2d 164 (1977); Adair v. Adair, 192 Neb. 571, 222 N. W. 2d 908 (1974).

The consideration in this case is apparent. The

terms of the option provided for a repurchase by the plaintiff at the original sales price plus a 10 percent raise in evaluation each year for the 5 years the option was to exist. In addition, the defendants received an additional $15,000 in oil interests which they still retain. The defendants collected the rents from the property and Leonard paid himself a commission upon the sale of the land from plaintiff.

The plaintiff benefited by getting out of debt, by cancellation of the outstanding notes to defendants, and by eliminating the second mortgage, but suffered a detriment of 10 percent appreciation to the value of the property each year. In addition the evidence is clear that the plaintiff would not have deeded the land in question to the defendants without the option.

The defendants further contend the trial court erred in admitting the copy of the option into evidence, over timely objections, under the best evidence rule. Section 27-1003, R. R. S. 1943, provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." The record discloses there is no question as to the authenticity of the option agreement itself. The defendant, Leonard Gramlich, admitted the instrument bore the signatures of both defendants. Under section 27-1004, R. R. S. 1943, the burden was on the plaintiff to show that the original of the option was lost or destroyed and the testimony of the plaintiff's president establishes that the original was looked for but could not be found. We cannot say under the circumstances that it was error to admit the duplicate copy into evidence.

Defendants next contend the trial court erred in finding that on the date of the option agreement, the defendants were the owners of the tract in question. While it is true that on August 2, 1971, the plaintiff

had by quitclaim deed conveyed 4.65 acres of the premises to the defendants, which consisted of a railroad right-of-way, the major portion, or 44.35 acres, of the tract was not conveyed until October 18, 1971, by warranty deed. Such a finding is neither crucial nor controlling to the decision rendered by the trial court. It is not necessary to the validity of the option agreement that the title rest in the party giving the option.

In Phillips Petroleum Co. v. City of Omaha, 171 Neb. 457, 106 N. W. 2d 727 (1960), this court defined an option as follows: " 'An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the holder of the option that he has the right to buy the property according to the terms and conditions of the contract. By such agreement the owner does not sell the land, nor does he at the time contract to sell. He does, however, agree that the person to whom the option is given shall have the right at his election or option to demand the conveyance in the manner specified. It is merely the right to an election which has been sold and the owner of this right is not bound to complete the sale.' " The court further explains: " 'An option to purchase land does not constitute an interest in the land itself, but it is a mere right of election to accept or reject a present offer within the time fixed * * *.' " See, also, Fletcher v. Brewer, 88 Neb. 196, 129 N. W. 288 (1911), in which the court said: " * * * [T]he fact that the defendant [the vendor] did not own the land at the time he made it [the contract] is not important. He made a written agreement to sell and convey, and must abide by his contract. He is in the position of every other vendor who sells for future delivery property of which he is not in possession. The buyer is entitled to rely upon the contract, and the seller takes the chances of not being able to perform."

Defendants contend the trial court erred in finding

that the option was not waived, surrendered, abandoned, or merged into the deeds given by plaintiff to the defendants. There was an obvious conflict in the evidence as to the intent of the parties in these respects. Our review is subject to the rule that when credible evidence on material questions of fact is in irreconcilable conflict. this 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. Booth v. Wilkinson, 195 Neb. 730, 240 N. W. 2d 578 (1976); Harre v. White, 189 Neb. 404, 203 N. W. 2d 99 (1972).

We conclude the assignments of error and the contentions made thereunder are without persuasive support in the record and the judgment of the District Court was correct.

AFFIRMED.

ERNEST J. PECK, APPELLEE, V. AUGUSTIN BROS. CO., A CORPORATION, APPELLANT.

279 N. W. 2d 397

Filed May 29, 1979. No. 42160.

1. **Jurisdiction: Pleadings: Damages.** A prayer for affirmative relief, such as damages, is a general appearance and waives any objection to jurisdiction over the person.
2. **Replevin: Supreme Court.** The 1972 decision of the United States Supreme Court in Fuentes v. Shevin, 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, will not be applied retroactively to a replevin action commenced in 1967.
3. **Uniform Commercial Code: Sales: Livestock.** A cash seller of cattle may reclaim the cattle from the buyer where the buyer dishonors the draft drawn on the buyer by the seller pursuant to the understanding of the parties.
4. **Replevin: Sales: Bankruptcy: Livestock.** A reclamation of cattle sold to a cash purchaser is not a voidable preference in bankruptcy.

Appeal from the District Court for Polk County: BRYCE BARTU, Judge. Affirmed as modified.

Paul F. Festersen and Thomas F. Flaherty of Zweiback, Brady, Kasher, Festersen & Pavel, P. C., for appellent.

Noyes W. Rogers of Walter, Albert, Leininger & Grant, for appellee.

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

BOSLAUGH, J.

This is a replevin action initiated on September 29, 1967. On that date, 315 head of cattle were replevined by the plaintiff-seller, Ernest Peck, from the defendant-buyer, Augustin Bros. Co. of Shelby, Nebraska. Subsequent to the replevin, the defendant was adjudicated a bankrupt. The action remained pending on a special appearance filed by the defendant until May 31, 1977. The bankruptcy proceedings were completed on November 30, 1975.

After a trial on the merits in April 1978, the trial court directed a verdict for the plaintiff, except for the amount of defendant's downpayment. The defendant has appealed.

The evidence shows two contracts between the parties dated July 22, 1967, for the sale of cattle, with delivery to be made between September 15-20 "F. O. B. trucks" in Burlington, Kansas. A downpayment of $3,180 was given toward the purchase price of the cattle which were delivered by the plaintiff in Burlington, Kansas, on September 18, 1967. On the following day, the cattle arrived at the defendant's yards near Shelby, Nebraska. On that same day the seller prepared a draft on the defendant for the remainder of the sale price, $56,785, and deposited the draft at his bank in Thayer, Kansas. The draft was forwarded through normal banking channels and arrived in Columbus, Nebraska, on or about September 25, 1967. At about the time the draft arrived at the defendant's bank in Columbus, Nebraska, the defendant's line of credit was revoked and the draft

was dishonored by the defendant. The plaintiff came to Shelby on September 26, 1967, and demanded payment for the cattle or return of the cattle. When the defendant refused, the plaintiff commenced this action. The cattle were returned to the plaintiff on September 29, 1967.

The assignments of error allege that the trial court erred in finding that the plaintiff owned the cattle and had demanded payment or return of the cattle prior to replevin. The defendant also contends there was no valid service of summons upon the defendant; the plaintiff had no right to possession after delivery; the plaintiff had no security interest in the cattle and was not a secured creditor; the replevin was a voidable preference in bankruptcy; and the 1967 replevin procedure was unconstitutional. Finally, the assignments of error allege the trial court erred in refusing to allow damages to the defendant for its expenses in transporting and caring for the cattle and for interest on its downpayment.

After the defendant's special appearance had been overruled, the defendant answered and prayed for affirmative relief including damages. This constituted a general appearance and waived any objections to jurisdiction over the defendant's person. Schleuter v. McCuiston, *ante* p. 101, 277 N. W. 2d 667; Tietsort v. Ranne, 200 Neb. 651, 264 N. W. 2d 860 (1978); Swick v. Coslor, 194 Neb. 781, 235 N. W. 2d 639 (1975); Abel v. Southwest Cas. Ins. Co., 182 Neb. 605, 156 N. W. 2d 166 (1968); Graff v. Graff, 179 Neb. 345, 138 N. W. 2d 644 (1965). It is unnecessary to consider the defendant's contentions in regard to the special appearance.

The defendant argues that the Nebraska replevin statutes in 1967 were unconstitutional based upon the decision in 1972 in Fuentes v. Shevin, 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). The defendant has not cited any case that would apply Fuentes, a

1972 decision, to a 1967 transaction. Constitutional invalidity is generally held to be prospective because "a retroactive application of Fuentes v. Shevin, *supra,* would work an injustice and a hardship upon [parties] who have lawfully acquired vested rights in the form of their state judgments." Douglas-Guardian Warehouse Corporation v. Posey, 486 F. 2d 739, at p. 743 (10th Cir., 1973). See, also, Kacher v. Pittsburgh Nat. Bank, 545 F. 2d 842 (3rd Cir., 1976). Furthermore, the replevin statutes as they existed in 1967 have since been amended and the constitutionality of the 1967 statutes is now a moot question. See §§ 25-1093 to 25-10,110, R. R. S. 1943 (Reissue 1975).

In deciding that the plaintiff had the right to reclaim the cattle, the trial court found that the plaintiff owned the cattle at the time of sale and had demanded their return prior to replevin. The defendant contends these findings are erroneous.

The record shows the plaintiff had purchased the cattle from a rancher in Kansas. The plaintiff then entered into a sales contract with another cattle feeder, Jay Crofoot of Lubbock, Texas. Crofoot testified at the trial that he had agreed to release the plaintiff from the contract for a share of the profits from the sale to the defendant. After the replevin, Crofoot purchased the cattle from the plaintiff. The evidence sustains the finding that the plaintiff owned the cattle and had demanded their return prior to the replevin.

The trial court also found that the sale was a credit transaction; that the seller was entitled to reclamation under the Uniform Commercial Code; that the seller had a perfected purchase money security interest in the cattle; and that the replevin was not a voidable preference under the Bankruptcy Act.

We reach the same result as the trial court did but for a different reason. The transaction was not a

credit sale. The contract provided the "balance of purchase price to be paid upon completion of contract." There was no extension of credit contemplated. Payment was due upon delivery and a statement for the balance due accompanied the cattle. The evidence is undisputed that both parties contemplated payment would be made by a draft drawn on the defendant by the plaintiff.

The concept of conditional payment by check is recognized by the Uniform Commercial Code. See §§ 2-507 (2), 2-511 (2), 2-511 (3), U. C. C. See, also, § 2-511, U. C. C., Comment 4: "This article recognizes that the taking of a seemingly solvent party's check is commercially normal and proper and, if due diligence is exercised in collection, is not to be penalized in any way. * * * Similarly the reason of this subsection should apply and the same result should be reached where the buyer 'pays' by sight draft on a commercial firm which is financing him." The code supplements "private agreements, including course of dealing, usage of trade, and course of performance." White & Summers, Uniform Commercial Code, § 2, p. 7 (1972). And the commercial meaning of the parties' agreement or conduct should reflect both their expectations as evidenced by their "course of dealing" and the understanding imparted to persons involved in particular commercial transactions in a given locality as a "usage of trade." See § 1-205, U. C. C., and Comments.

The plaintiff introduced evidence of his prior dealings with the defendant. All prior sales had been paid by drafts drawn by the plaintiff upon the defendant. Every draft had been deposited at the plaintiff's bank, forwarded through regular banking channels, and had always been paid. Glen Augustin, defendant's vice president, testified that all of its cattle purchases were paid by such customer drafts. The result in this case would have been the same if the defendant had paid for the cattle by its

check and the plaintiff would have deposited it in the Thayer, Kansas, bank on September 19, 1967.

A cash sale was pleaded in the reply and evidence of a cash sale was admissible. See § 1-205 (6), U. C. C., and Comment 10. A cattle marketing expert, Hugh Mactier, testified that legal tender is not a customary method of payment in the trade but that drafts and checks are commonly used because of the logistics of cattle transactions. Buyers are usually absent at the time of delivery which typically involves great distances and possibly several days of shipping preparations and weighing to determine the price of the cattle.

The testimony indicates that the parties intended their performance of this sale was to be no different than their prior transactions. The evidence establishes, as a matter of law, that such conditional sales, paid by drafts drawn in a commercially immediate time frame and treated as money in hand by the parties, are cash sales. The drawer of a dishonored draft is entitled to the legal remedies afforded an unpaid conditional cash seller. Compare cases involving checks drawn by cattle buyers within a similar time frame. Ranchers & Farmers Auction Co. v. Honey, 38 Colo. App. 69, 552 P. 2d 313 (1976); Matter of Samuels & Co., Inc., 526 F. 2d 1238 (5th Cir., 1976), wherein checks were apparently drawn several days later as discussed in Wiseman, Cash Sellers, Secured Financers and the Meat Industry: An Analysis of Articles Two and Nine of the Uniform Commercial Code, 19 B. C. L. Rev. 101, at p. 119 (1977).

The replevin statutes in conjunction with the code, §§ 25-1093 et seq., R. R. S. 1943, provide a means for the seller to repossess his goods if the buyer defaults on a conditional cash sale. See § 2-507 (2), U. C. C.: "Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of

them is conditional upon his making the payment due." See, also, § 2-511 (3), U. C. C.: "Subject to the provisions of this act on the effect of an instrument on an obligation (section 3-802), payment by check [or instrument] is conditional and is defeated as between the parties by dishonor of the check on due presentment." See, also, § 2-511, U. C. C., Comment 4. See, e. g., Gicinto v. Credithrift of America, 219 Kan. 766, 549 P. 2d 870 (1976); Martin Buick v. Colo. Spgs. Bk., 184 Colo. 166, 519 P. 2d 354 (1974); Greater Louisville Auto Auction v. Ogle Buick, Inc., 387 S. W. 2d 17 (Ky., 1965); Ranchers & Farmers Auction Co. v. Honey, *supra;* Ranchers & Farm Liv. Auc. Co. v. First St. Bank, 531 S. W. 2d 167 (Tex. Civ. App., 1975); In re Helms Veneer Corporation, 287 F. Supp. 840 (D. C. Va., 1968); 2 Anderson, Uniform Commercial Code (2d Ed., 1971), §§ 2-507:8 and 2-507:13; Nordstrom, Law of Sales, §§ 166, 170, and 171 (1970).

Reliance on the above authority and section 2-507 (2), U. C. C., to establish the cash seller's rights is specifically limited to the present circumstances. There is no question of the cash seller's priority under article 9 of the Uniform Commercial Code, as no secured creditor is claiming against the seller's interest. Although there may be support for the lower court's determination that a purchase money security interest arose by virtue of section 9-113, U. C. C., we do not reach that issue. See Wiseman, Cash Sellers, Secured Financers and the Meat Industry: An Analysis of Articles Two and Nine of the Uniform Commercial Code, 19 B. C. L. Rev. 101, at pp. 146-52 (1977).

As a final argument, defendant asserts that reclamation is a voidable preference in bankruptcy. See Bankruptcy Act, Chapter 6, Title 11 U. S. C., § 96 (1970). "A voidable preference is a transfer of nonexempt property made or suffered by the bankrupt for or on account of an antecedent debt within four

months of bankruptcy to or for the benefit of a creditor and while the debtor was insolvent, if the effect of the transfer was to enable the transferee to obtain a greater percentage of his debt than other creditors of the same class and if the transferee, at the time of the transfer, had reasonable cause to believe that the debtor was insolvent. Although it would appear possible to fit the right to reclamation within this definition, the major commentators are in almost unanimous agreement that the seller's right to reclaim normally is not a voidable preference." Sebert, The Seller's Right to Reclaim: Another Conflict between the Uniform Commercial Code and the Bankruptcy Act?, 52 Notre Dame Law. 219, at p. 233 (1976).

Here, the reclamation under section 2-507 (2), U. C. C., voided the buyer's ownership rights in the cattle and "the return thereof does not constitute a preferential transfer of property to a *creditor* of the bankrupt." 3, Part 2, Collier on Bankruptcy, ¶ 60.18, at p. 844 (14th Ed., 1977). Application of the bankrupt's voidable preference would actually be a windfall to the buyer and his creditors because the estate would be enlarged, without cost, to the extent of the proceeds from the sale of the delivered goods. King, Voidable Preferences and the Uniform Commercial Code, 52 Cornell L. Q. 925, at p. 939, n. 53 (1967). Reclamation is not a voidable preference because the title is voidable; thus, there is no transfer on account of an antecedent debt. See, Matter of Telemart Enterprises, Inc., 524 F. 2d 761, at p. 764 (9th Cir., 1975), cert. denied sub nom. Holzman v. Alfred M. Lewis, Inc., 424 U. S. 969, 96 S. Ct. 1466, 47 L. Ed. 2d 736 (1976).

The defendant was entitled to a return of the downpayment by the seller's decision to reclaim the cattle. The trial court awarded judgment to the defendant for the $3,180 downpayment but denied interest because no demand for repayment was made.

The failure to demand return of the downpayment does not preclude the recovery of interest. The award of $3,180 to the defendant is affirmed but the defendant should be allowed interest at the statutory rate of 6 percent from the date of reclamation, September 29, 1967, i. e., the time when defendant had no further interest in the cattle. See § 45-102, R. R. S. 1943 (Reissue 1968); and § 2-507 (2), U. C. C.

The matter of damages for care and transportation of the cattle was not argued in the defendant's brief. The issue need not be considered on appeal. Rule 8 a 2 (3), Revised Rules of the Supreme Court, 1977.

The judgment of the District Court is modified to allow interest to the defendant at the rate of 6 percent from September 29, 1967, on $3,180. As modified the judgment is affirmed.

AFFIRMED AS MODIFIED.

EUGENE W. KURKOWSKI, APPELLANT, V. MABEL M. BAILEY, APPELLEE.

279 N. W. 2d 401

Filed May 29, 1979. No. 42203.

1. **Trial: Appeal and Error.** Where during the trial of a case, both parties treat an affirmative defense as denied, it will be so considered in this court, although plaintiff did not file a reply.
2. **Accord and Satisfaction: Intent.** The principal questions in determining whether a discharge by accord and satisfaction has taken place are: (1) Did the parties in fact agree that the performance rendered should operate as a final discharge and satisfaction; and (2) does that performance constitute a sufficient consideration for a return promise or for a discharge?
3. **Accord and Satisfaction.** The question of whether a payment rendered by the obligor, and later asserted to be in satisfaction, was so tendered to the claimant that he knew or should have known that it was tendered as full satisfaction is a question of fact.

Appeal from the District Court for Keith County: HUGH STUART, Judge. Affirmed.

Maupin, Dent, Kay & Satterfield and David A. Bush, for appellant.

Firmin Q. Feltz, for appellee.

Heard before BOSLAUGH, WHITE, and HASTINGS, JJ., and GRANT and SPRAGUE, District Judges.

GRANT, District Judge.

Plaintiff sues defendant for real estate commissions due on a listing agreement as later amended by a purchase agreement between defendant and a buyer. Defendant answered denying any indebtedness to plaintiff and pleading that plaintiff had been paid for any service rendered to defendant. Plaintiff did not file a reply to the answer.

The parties waived jury trial, and the matter was tried to the court. The court found generally for the defendant and further found there had been an accord and satisfaction between the parties. The court dismissed plaintiff's petition. Motion for new trial was duly filed and denied, and this appeal by plaintiff followed. We affirm the judgment of the trial court.

In view of defendant's answer asserting payment and plaintiff's failure to file a reply, "[w]e are met at the threshold of this case with the defendant's assertion that the plea of payment stands undisputed, and the verdict therefore should be sustained notwithstanding the evidence." Crilly v. Ruyle, 87 Neb. 367, 127 N. W. 251. That case goes on to fully dispose of defendant's contention in this regard, and we readopt the language of that case to the effect that "while section 134 [now section 25-842, R. R. S. 1943] of the code provides that every material allegation of new matter in an answer not controverted by a reply shall for the purpose of the action be taken as true, yet a litigant will not be permitted to

try his case in the district court as though a reply traversing the allegation in his answer were on file and insist in this court that no reply was filed." Crilly v. Ruyle, *supra,* at p. 370.

Evidence adduced at the trial showed that plaintiff and defendant entered into a written real estate listing agreement on January 20, 1973, and an agreement for the sale of real estate on February 5, 1973. This original listing agreement provided in part that defendant would pay a real estate commission of all amounts in excess of the "net listing" of $128,000. Later plaintiff prepared a purchase agreement which provided for the sale of the property for "the total sum of $128,000" on the face of the instrument, and which further provided in an attached addendum: " * * * (2) Buyer agrees to pay $128,000.00 of which $110,000.00 will be paid to owner, as sale price of real estate. The remainder to be paid in assuming all expenses of sale including charges of broker and release of rights to present renter. (3) $18,000.00 of the sale price will be charged to growing wheat, improvements, fences, and wells for cattle." This purchaser had discussed buying the property with defendant before the date of the listing agreement, but there had been no discussion of price.

Defendant and purchaser executed this purchase agreement. Plaintiff then obtained an agreement from the renters of the real estate (the son-in-law and daughter of defendant) to dispose of their rights and growing crops for $12,000. Plaintiff contends that the balance of the $18,000, or $6,000, should be his commission.

Further evidence showed that on May 4, 1973, plaintiff came to the office of defendant's attorney and had a discussion with the attorney and defendant. There is a dispute as to what was actually said, but there is competent evidence showing that defendant made various offers to plaintiff, ending up

with a $2,000 offer and that plaintiff accepted that amount "in full payment." It is undisputed that defendant drew a check in the amount of $2,000 payable to plaintiff; that on the check there was the notation "Commission in full"; and that plaintiff took such check, endorsed it, and then left the office with the check. It is also undisputed that plaintiff did not cash the check, but gave it to the buyer who returned it to the defendant on May 24, 1973, when the buyer completed his part of the purchase agreement.

On this set of facts, the trial court found there had been an accord and satisfaction between the parties. We agree. As stated in Schulze v. Jensen, 191 Neb. 253, 214 N. W. 2d 591, "The principal questions to be asked in determining whether a discharge by accord and satisfaction has taken place are: (1) Did the parties in fact agree that the performance rendered should operate as a final discharge and satisfaction; and (2) does that performance constitute a sufficient consideration for a return promise or for a discharge? 6 Corbin on Contracts, § 1276 (1962). And the question of whether a payment rendered by the obligor, and later asserted to be in satisfaction, was so tendered to the claimant that he knew or should have known that it was tendered as full satisfaction is a question of fact. 6 Corbin on Contracts, § 1277 (1962)." Jury having been waived, the trial court sat as the trier of facts. If believed, those facts showed that the parties agreed that the performance by defendant in giving plaintiff a $2,000 check in full payment should operate as a final discharge; and that such performance constituted a sufficient consideration for a discharge. Under the circumstances as shown the requirements of an accord and satisfaction, as set out in Crilly v. Ruyle, 87 Neb. 367, 127 N. W. 251, were fully complied with. The agreement was made, there was consideration, and the agreement was fully executed by defendant.

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

AFFIRMED.

STATE OF NERASKA, APPELLEE, V. RICKY J. COSTANZO, APPELLANT.

279 N. W. 2d 404

Filed May 29, 1979. No. 42303.

1. **Criminal Law: Verdicts: Evidence.** In a criminal action, this court will not interfere with a verdict of guilty unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt.
2. **Criminal Law: Evidence.** 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.

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

Anthony S. Troia of Troia Law Offices, P. C., for appellant.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter, for appellee.

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

WHITE, J.

After a jury trial in the District Court, the defendant was convicted of the crime of robbery and sentenced to imprisonment for a term of 5 to 7 years in the Nebraska Penal and Correctional Complex. Defendant appeals. We affirm.

On appeal the defendant assigns a single error; that the evidence was insufficient to warrant the jury finding the defendant guilty beyond a reasonable doubt of the crime charged.

In a criminal action, this court will not interfere with a verdict of guilty unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt.

"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. Journey, 201 Neb. 607, 271 N. W. 2d 320.

Irene Majeed, a clerk at a 7-Eleven Food Store at 1502 South 60th Street, Omaha, was alone in the store at approximately 1 a.m., on May 30, 1978. Two white male youths came into the store. Mrs. Majeed did not see the faces of the youths as they entered. The youths turned the corner of the counter and confronted Mrs. Majeed. At that time, she noticed that the taller youth had a nylon stocking over his head and the shorter youth had a shirt pulled up to conceal his face. The shorter one held a knife and forced the victim into a back room, while the taller one took money from the cash register. In addition to currency, the robber took a number of quarters from the register, some of which dropped to the floor as the robbers ran from the store. Mrs. Majeed estimated the number of quarters to be less than $13 or $14. Mrs. Majeed immediately called the Omaha police. Three cruisers responded. Officer Larry Lutton heard the call at 1:10 a.m., and proceeded to the store, determined that the suspects had left, and searched the area. The officer found two shirts and part of a nylon stocking. One of the shirts was identified as belonging to one of the robbers. On examination, two human hairs were found in the stocking mask and, by stipulation, the State laboratory serologist testified: "The hair of Ricky Constanzo [sic] was microscopically similar to the

hairs in Exhibit #1 and they could have come from a common source."

Officer John Wilson, also a cruiser officer, heard the call about 1:10 a.m. At that time he was at 55th and Center Streets in Omaha. He testified he anticipated the escape route. "I figured they might go west." He knew the suspects were two Caucasian males. At approximately 63rd and Center Streets, he observed an automobile traveling at a relatively high rate of speed with two white males inside it, who appeared "nervous." Officer Wilson also noticed the vehicle had an unlighted taillight. He pursued and stopped the car. He observed that the parties had on shirts similar to the description given him. A knife was found on the defendant's companion, Ralph Costanzo, which was subsequently identified by Mrs. Majeed as similar to the knife used in the robbery. A large quantity of quarters was found on the floor of the car on the passenger side. The suspects were taken back to the store and Mrs. Majeed told the officers the Costanzos "could possibly be the suspects" and that they were the "same height and size."

After arrest, the Costanzos were subject to a more complete search. A quantity of currency was found inside the underwear briefs of Ralph Costanzo.

Counsel on appeal draws our attention to the fact that, in her first report to the police, Mrs. Majeed stated the robbers were 5 feet 5 inches and 5 feet 8 inches tall when, in fact, the defendant, the taller of the suspects, was 6 feet 2 inches tall.

The defendant did not testify. It is obvious that, in view of the overwhelming evidence, the jury was amply justified in returning the verdict it did.

The judgment and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. LEONARD DUNKER, RESPONDENT.

279 N. W. 2d 609

Filed June 5, 1979. No. 41434.

1. **Attorneys at Law: Licenses and Permits.** Lawyers who are granted licenses to practice their profession in this state thereby voluntarily assume certain obligations and duties as officers of the courts, and in the performance thereof they must conform to certain standards in relation to clients, to the courts, to the profession, and to the public.
2. **Attorneys at Law: Disciplinary Proceedings: Canons.** In determining the sanction to be applied for violations of the Code of Professional Responsibility of the Nebraska State Bar Association, this court may properly consider the respondent's history and record in this regard.

Original action. Judgment of suspension.

James W. Hewitt, for appellant.

Paul L. Douglas, Attorney General, and C. C. Sheldon, for appellee.

Heard before KRIVOSHA, C. J., BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and STUART, District Judge, and KUNS, Retired District Judge.

BRODKEY, J.

This is an original disciplinary proceeding brought in the name of the State of Nebraska on relation of the Nebraska State Bar Association against Leonard Dunker, a lawyer duly admitted and licensed to practice his profession in this state. Following hearings held before the Committee on Inquiry of the Third Judicial District and the Advisory Committee, formal charges against the respondent were filed in the Supreme Court of Nebraska on May 6, 1977. This court then appointed a referee to hear the matter, who then held a hearing on the charges. The testimony adduced at that hearing, by stipulation of the parties, consisted principally of the testimony adduced at the hearing held before the Committee

on Inquiry of the Third Judicial District. The referee filed his report in this court on October 11, 1978. The respondent filed his exceptions to the report of the referee on October 13, 1978, and thereafter perfected his appeal to this court.

The formal charge, as filed in this matter, consists of 14 separate paragraphs containing specific allegations of misconduct on the part of the respondent, plus an unnumbered concluding paragaph alleging violations of certain sections of the Code of Professional Responsibility. In his report, the referee summarized the factual allegations of the formal charge against the respondent into 12 separate items, alphabetically designated as A through L, as follows:

"A. Filed an Affidavit of Mailing Notice that is claimed to have been back-dated.

"B. Threatened more expense and delay if they got their own lawyer.

"C. Filed a waiver of notice and recommendation in the District Court of Saunders County, Nebraska, signed by Reynold M. Kubik, when the Respondent was guardian of Reynold M. Kubik and knew Reynold M. Kubik to be incompetent.

"D. Filed in the County Court of Saunders County a recommendation that Respondent not be removed as Administrator signed by Reynold M. Kubik, when Respondent knew Kubik to be incompetent and knew that Respondent was Reynold M. Kubik's guardian.

"E. Respondent filed with the County Court of Saunders County an approval of settlement agreement signed by Reynold M. Kubik without informing the Court that Reynold M. Kubik was incompetent and that Respondent was his guardian.

"F. Respondent filed with the County Court of Saunders County a stipulation and consent of heirs signed by Reynold M. Kubik without informing the Court that Reynold was incompetent and that Re-

spondent was his guardian.

"G. Respondent filed with the County Court of Saunders County a waiver of notice of hearing on petition for final settlement, approval of final report, determination of fees and commissions, payments of mortgages and notes, distribution of estate, and discharge, signed by Reynold M. Kubik without informing the Court that Reynold M. Kubik was incompetent and that Respondent was his guardian.

"H. That the estate of which Respondent was administrator and acting as attorney was required to file a Federal Estate Tax Return on September 24, 1970. That Respondent made no arrangements to file the Federal Estate Tax Return or pay the Federal Estate Tax until after the due date. That Respondent finally arranged for another attorney to prepare and file the Federal Estate Tax Return, which was done on June 9, 1972. That the late filing and payment resulted in penalties and interest in the amount of $3,826.64 assessed against the estate.

"I. That on April 30, 1973, Judith R. Kubik, as an heir of the estate, assigned a portion of her proceeds of the estate to Gateway Bank and that respondent ignored the assignment and made payment direct to Judith R. Kubik.

"J. That Respondent failed to promptly pay premiums on his surety bond, payment not being made until March 1, 1974.

"K. That the Judge of Saunders County Court, claiming failure on the part of Respondent to render an account of his administration within the time ordered by the Court, ordered the Respondent to show cause why he should not be removed as Administrator.

"L. That the Administrator in making distribution from the estate deducted from the share of certain of the beneficiaries an amount of $400 each, which was to be withheld to apply on another attorney's fees in the land sale proceeding." In his report, the referee has also added an additional item

M in summary of the foregoing items A to L, reading as follows: "That all of the allegations, if true, would establish a pattern of neglect, misrepresentation, conflict of interest, and conduct that adversely reflects on Respondent's fitness to practice law in violation of Section 7-104 R. R. S. and Canon I Dr. 1-102A 4 and 6, Canon V Dr. 5-105A and B, Canon VI Dr. 6-101A 3." In his report, the referee found that the charges designated as A, B, and I, were not established by clear and convincing evidence; but that the charges referred to as C, D, E, F, G, H, J, K, and L were all established by clear and convincing evidence. The referee also found that the evidence established a pattern of neglect reflecting on respondent's fitness and competence to practice law; and recommended that respondent be suspended from the practice of law for 3 years.

In his brief, respondent alleges only two assignments of error: (1) The referee erred in failing to consider evidence favorable to respondent on charges H and K set forth in the referee's report; and (2) the discipline recommended by the referee is excessive. It is the latter issue that we are principally concerned with in this case, as it appears that there is no real dispute as to the underlying facts of what transpired, nor of the fact that respondent was guilty of infractions of the Code of Professional Responsibility of the Nebraska State Bar Association. In his argument on appeal, counsel for respondent concedes this is true, but alleges that the referee failed to take into consideration certain mitigating circumstances and evidence on certain of the charges, and that the recommended period of suspension for a term of 3 years is excessive and unjustified.

By way of a general factual background to aid in understanding this case, it appears from the record that William Kubik, Sr., who was a farmer living near Prague, Nebraska, died intestate on June 24, 1969, leaving as his heirs his widow Judith; his sons

Wilfred, Reynold, and William, Jr.; and his daughters Rita, Ramona, Marie, and Judith Ann. Shortly before the death of the decedent, respondent had filed divorce proceedings against him on behalf of Mrs. Kubik. Shortly thereafter, respondent was asked by the surviving widow, Judith, to serve as the administrator of decedent's estate, and he accepted.

During the course of the estate proceedings, William, Jr., and Wilfred, two of the sons of the decedent, filed lawsuits in the District Court for Saunders County, alleging an oral agreement with their father to convey certain lands to them. Another attorney represented the sons in the action. Respondent filed a motion to make more definite and certain in each lawsuit and then recommended to the heirs that they engage William L. Walker, a Lincoln attorney, as their attorney. A settlement agreement was finally reached and the real estate in question was sold on August 5, 1972.

One of the principal categories of charges, found by the referee to be substantiated by the evidence, involved respondent's dealings with another son of the deceased, Reynold Kubik. There is little question in the evidence but that Reynold was lacking in intellect and mentally slow, the degree thereof, however, being a matter of dispute. On February 9, 1971, Reynold was committed to the Lincoln Regional Center by the mental health board of Lancaster County. On November 11, 1971, he was placed on convalescent leave by the Regional Center, and was discharged from the Regional Center on August 17, 1972. On October 24, 1972, he was readmitted to the Regional Center a second time, following a second determination of incompetency by the mental health board. Prior to this time, however, on March 16, 1971, respondent was appointed the guardian of Reynold Kubik by the county court of Lancaster County, and he continued in that capacity until he was dis-

charged on October 2, 1973. While acting as administrator of the estate of William Kubik, Sr., and during the time the estate proceeding was pending in Saunders County, respondent presented various filings and papers, on one occasion to the District Court and on four instances to the county court of Saunders County, which filings and papers did not reveal that Reynold was under guardianship as an incompetent. In his report the referee found five of the violations, supported by the evidence, involved Reynold Kubik. Specifically, on March 31, 1972, respondent filed with the county court of Saunders County a recommendation that he not be removed as administrator. The recommendation was signed by Reynold M. Kubik. On April 25, 1972, respondent filed with the Saunders County court an approval of settlement agreement, which was also signed by Reynold Kubik. On March 14, 1973, respondent filed a stipulation and consent of heirs signed by Reynold Kubik. On June 27, 1973, respondent filed with the Saunders County court a waiver of notice on the petition for final settlement, which was also signed by Reynold Kubik. At no time did respondent notify the county court of Saunders County that Reynold Kubik had been declared incompetent or that he, respondent, was Reynold Kubik's guardian. Counsel for respondent concedes that respondent did not advise the court of Reynold Kubik's guardianship, but points out that everyone knew Reynold's condition and that the other heirs also signed the various pleadings and documents along with Reynold. Counsel for respondent argues that respondent's sins were sins of omission and not commission, and that no one suffered financial loss as a result thereof. In his report, however, the referee found that the respondent lacked an accurate understanding of a guardian's duties to his ward, an attorney's duty to his client, and an administrator's duty to the court and to the beneficiaries of the estate.

Item H of the referee's report refers to respondent's failure to file a federal estate tax return, which was due on September 24, 1970. Respondent's explanation for this failure was that he knew such a return would have to be made but because of his inexperience in dealing with estates of that size he did not know the date such a return would be required, and the matter slipped his mind until attorney William L. Walker, who was consulting with him about the estate, inquired about the return. The record reveals that the estate tax return was prepared by attorney Walker, although it is not completely clear whether in so doing he was actually employed by the heirs, or was assisting respondent. In any event, attorney Walker prepared the estate tax return in June 1972, and on October 12, 1972, respondent paid the Internal Revenue Service $11,914.73, of which $3,098.72 was penalty and interest. Respondent contends that the referee failed to take into consideration certain ameliorating circumstances, to wit, that he advised the heirs by letter that he would reduce his fee for his services (estimated to be in the neighborhood of $10,000) to the figure of $7,000, in order to reimburse the heirs for the penalties and interest assessed against the estate as the result of the late filing of the federal estate tax return. In a subsequent meeting in April 1974, respondent testified he told the heirs he would reduce his fees; and the heirs present at the meeting, with their respective counsel, Walker and Inbody, agreed to the plan. The record also reveals respondent did not file the Nebraska or federal fiduciary returns in the estate when they were due, and, as a result, penalties and interest in the amount of $1,095.33 were assessed against the estate. Respondent paid the penalties and interest out of his own funds. He also points out that neither the heirs nor the estate suffered any loss as the result of the late filing.

Item K of the referee's summary of charges con-

cerns the allegations contained in paragraph XIII of the charges themselves with reference to the respondent's citation by County Judge Edstrom for failure to render an account of his administration within the time ordered by the court, and also the order to show cause issued on January 21, 1972, why respondent should not be removed from office as the administrator of the estate for the reasons stated therein. Respondent points out that the hearing was never held on the order to show cause nor was he ever removed as administrator; and he further contends he did not receive a copy of the citation entered by Judge Edstrom, and that the first time he was aware of the citation was when he received the order to show cause some 3 weeks later, at which time he immediately went to Wahoo and discussed the matter with Judge Edstrom.

We now turn to a consideration of the proper sanction to be imposed in this case. As previously stated, the referee recommended that respondent be suspended from the practice of law for a period of 3 years. The Attorney General's office, as counsel for the State of Nebraska ex rel. Nebraska State Bar Association, relator, in its brief, finds merit in respondent's assignment of error with regard to the excessiveness of the discipline recommended by the referee; and, notwithstanding its conclusion that the matters in this case were handled in an irregular fashion and with inexcusable disregard for potential conflicts of interest, states: "that suspension for a period of no more than six months would be appropriate." The Attorney General's brief also states, however: "It is neither our province nor desire to advocate rejection of the referee's recommendation as being clearly wrong."

In this case, respondent is 59 years of age and has been practicing law in this state for approximately 35 years. Respondent points out that were we to follow the recommendations of the referee and suspend

him for 3 years, he would be 62 or 63 years of age by the time his suspension expired, with scarce hope of retaining his present clients, and would be faced with the necessity of attempting to reestablish his law practice at an advanced age. The records of this court, however, reveal that respondent has had prior disciplinary problems with the Nebraska State Bar Association. In 1955, respondent was subjected to a judgment of censure by this court because of his professional misconduct. State ex rel. Nebraska State Bar Assn. v. Dunker, 160 Neb. 779, 71 N. W. 2d 502 (1955). In determining the sanction to be applied for violations of the Code of Professional Responsibility we may properly consider respondent's history and record in this regard. State ex rel. Nebraska State Bar Assn. v. Hollstein, 202 Neb. 40, 274 N. W. 2d 508 (1979); Bluestein v. The State Bar of California, 13 Cal. 3d 162, 118 Cal. Rptr. 175, 529 P. 2d 599 (1975). It is a well-established rule in this state that lawyers who are granted licenses to practice their profession in this state thereby voluntarily assume certain obligations and duties as officers of the courts, and in the performance thereof they must conform to certain standards in relation to clients, to the courts, to the profession, and to the public. State ex rel. Nebraska State Bar Assn. v. Dunker, *supra*. In view of the totality of the circumstances existing in this case, we conclude that the recommendation of the referee for suspension of respondent for a period of 3 years is, perhaps, too severe; on the other hand, we also feel that suspension for a period of only 6 months, as recommended by the Attorney General, is, under the facts of this case, inadequate. We think the ends of justice will be properly served by suspending respondent from the further practice of law in this state for a period of 1 year, to commence 30 days after our judgment herein becomes effective. If, at the end of 1 year from the effective day of his suspension, respondent makes an affirma-

tive showing, sufficient to satisfy this court, that he has fully complied with the order of suspension and that he will not, in the future, engage in any practices offensive to the legal profession, then he will be reinstated and allowed to engage in the practice of law; however, if he fails to do so, then the suspension herein provided for is to become permanent. Judgment of suspension accordingly. All costs of this proceeding are taxed to respondent.

JUDGMENT OF SUSPENSION.

IN RE ESTATE OF LORNE A. FOOTE, DECEASED. MARGARET E. SCHISSLER, APPELLANT, V. DOROTHY R. FOOTE, CO-EXECUTRIX OF THE ESTATE OF LORNE A. FOOTE, DECEASED, AND JAMES R. MCGREEVY, ADMINISTRATOR, C.T.A., APPELLEES.

279 N. W. 2d 614

Filed June 5, 1979. No. 41903.

Wills: Personal Representative: Statutes. While it is not mandatory that the county court appoint as personal representative of the estate the person or persons nominated in a will, it is required that the court adhere to all of the applicable provisions of section 30-2412, R. R. S. 1943, in making an appointment.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded with directions.

James P. Miller, for appellant.

Harry L. Welch of Gross, Welch, Vinardi, Kauffman, Day & Langdon, for appellees.

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

RICHLING, District Judge.

Lorne A. Foote died on March 3, 1977, leaving a last will and testament which devised a sum to his sister, Mrs. Margaret Foote Schissler, and the re-

mainder to his wife, Dorothy R. Foote. The will named the widow and the sister as co-executrixes, with the provision that should one of them predecease him, or decline for any reason to serve, the other would act alone as executrix.

On March 9, 1977, the sister filed a petition in county court for formal probate of the will, determination of heirs, and appointment of personal representative. The petition was duly noticed for hearing. Evidentiary hearing was had on April 21, 1977, before one of the judges of the county court of Douglas County, Nebraska. The widow and the sister appeared, together with their respective counsel. Both the widow and sister gave testimony. The bill of exceptions discloses that, at the termination of the testimony, adjournment was had without ruling, determination, or comment from the court.

No objection was filed to the probate of the will, nor to the appointment of either the widow or the sister of the deceased as executrix or co-executrix. In their testimony each indicated their willingness to serve as co-executrixes.

The testimony disclosed that during the lifetime of the deceased he had rented two bank safe-deposit boxes. One was in joint tenancy with the wife, and one with his sister.

The widow testified that on March 4, the day after the decedent's death, she went to the box that was jointly in their names and removed the abstract to some rental real estate and certain bonds, all of which were in joint tenancy.

The sister testified that on March 4 she went to the box, which was in joint tenancy with the right of survivorship in her name and that of the decedent, and removed some diamond earrings which had been her mother's and which she had placed in the box about 2 years before, as well as an envelope on which, she testified, was the legend, in the decedent's handwriting, "Personal Property of Margaret

Schissler" and which contained $1,000 in cash. She testified that she furnished part of the cash to the decedent and he had furnished the balance and placed it in the box. The box contained other items which were in the name of the decedent. These she did not remove. Both the widow and the sister expressed a willingness to have the respective boxes examined and inventoried.

The record in this case indicates that no further filings or hearings were had. On April 29, 1977, a different judge of the county court of Douglas County, Nebraska, entered an order admitting the will to formal probate and making a determination of heirs. The order further provided, "The Court also finds that the Co-Executrixes named in Decedent's Will are not suitable to serve together" and appointed a third person as personal representative of the decedent's estate in unsupervised administration with bond fixed. On the same day, the judge that signed the order aforesaid signed an additional order wherein it was recited that the court on its own motion ordered that no person other than the appointed personal representative be allowed access to either safe-deposit box except in the presence of said personal representative.

On May 6, 1977, Margaret Schissler filed objections to the appointment of the named personal representative. The transcript fails to disclose the disposition, if any, of said objection. However, on May 19, 1977, Margaret Schissler filed notice of appeal to the District Court.

The District Court upon review of the court file and transcript of testimony taken in county court found that the petition on appeal of Margaret E. Schissler should be dismissed and the cause remanded to the county court for further proceedings. Order was entered accordingly. Timely appeal was taken to this court.

Section 30-302, R. R. S. 1943, was repealed and re-

placed by section 30-2412, R. R. S. 1943, which became operative on January 1, 1977. Section 30-2412 provides: "(a) Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order: (1) the person with priority as determined by a probated will including a person nominated by a power conferred in a will; (2) the surviving spouse of the decedent who is a devisee of the decedent; (3) other devisees of the decedent; (4) the surviving spouse of the decedent; (5) other heirs of the decedent; * * *."

However, subsection (f) provides: "No person is qualified to serve as a personal representative who is: (1) under the age of nineteen; (2) a person whom the court finds unsuitable in formal proceedings."

Subsection (b) of section 30-2412, R. R. S. 1943, provides: "An objection to an appointment can be made only in formal proceedings. In case of objection the priorities stated in (a) apply except that (1) * * *; (2) in case of objection to appointment of a person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than half of the probable distributable value or, in default of this accord, any suitable person."

The county court's order of April 29, 1977, did not find in formal proceedings either the widow, Dorothy Foote, or the sister, Margaret Schissler, unsuitable to serve as personal representative of the estate, but only that they were not suitable to serve together. There was no recitation of cause or findings as to the basis of the finding that they were unsuitable to serve together. The record discloses neither a recommendation nor acceptance, by the heirs and devisees, of the stranger appointed as personal representative.

We find that the county court of Douglas County, Nebraska, in its order of April 29, 1977, appointing James R. McGreevy as personal representative of the decedent's estate, rather than the widow, Dorothy Foote, or the sister, Margaret Schissler, to serve as executrix or the two of them to serve as co-executrixes was in error.

The order of the District Court for Douglas County, Nebraska, is reversed and the cause remanded for further proceedings with directions to vacate the order of the county court and remand the cause in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MABEL L. ALLEN ET AL., APPELLEES, V. CRYSTAL W. MAYO, APPELLANT.

279 N. W. 2d 617

Filed June 5, 1979. No. 42008.

1. **Contracts: Trusts: Equity: Conveyances.** An agreement to devise and bequeath property is, where supported by consideration, valid and enforceable. In such a case, equity will impress a trust upon the property, which trust will follow it into the hands of the personal representatives of the promisor or into the hands of a grantee who has not given consideration for the conveyance.
2. **Contracts.** A promise to convey or devise property made in consideration of marriage is valid and enforceable.
3. **Witnesses: Evidence: Equity.** On appeals in equity, the Supreme Court will, in determining the weight of the testimony of the witnesses, consider that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other.

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

Frost & Meyers, for appellant.

Alfred G. Ellick and David L. Buelt of Ellick, Spire & Jones, for appellees.

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

CLINTON, J.

This is an action in equity by the heirs at law of Florence E. Mayo (two sisters and a brother) to impress a trust upon an undivided one-half interest in certain real and personal property, legal title to the whole of which stands in the name of the defendant, Crystal W. Mayo, second wife and surviving widow of Ralph D. Mayo. Crystal acquired the property in question through various conveyances and transfers from Ralph during their marriage.

The basis of the claim of trust is a written contract made on April 3, 1965, between Ralph and Florence, his then wife since deceased, which provided, among other things, that the survivor would devise and bequeath one-half of their property to the heirs at law of the other. The petition alleged that unless the transfers to Crystal by Ralph after their marriage were for valuable consideration, the transfers were ineffective to defeat the rights of the plaintiffs as beneficiaries of the contract. The petition also prayed for an accounting between the parties. The answer of the defendant was a general denial.

Florence and Ralph were married for more than 30 years and were childless. Florence died September 5, 1966. About 2 years after Florence's death, Ralph married Crystal. Ralph died October 11, 1975. At various times during the marriage, property owned by Ralph at the time of his marriage to Crystal was transferred to joint tenancy with her.

After trial the court entered a judgment in which it found the contract between Florence and Ralph, of which plaintiffs were the beneficiaries, was valid and enforceable; the transfers to Crystal by Ralph were not supported by any valuable consideration; Crystal had no knowledge of the agreement between Florence and Ralph; and Crystal took her interest in

the property subject to the rights of the plaintiff. The court ordered the plaintiffs to take a one-half interest in certain property: (1) Shares of stock of the Omaha National Corporation, plus one-half of the income therefrom received after Ralph's death; (2) a residential property subject to Crystal's life estate therein; (3) the proceeds from a certain land contract; and (4) a certain rental residential property, subject to the balance of an existing mortgage. The court granted a lien to Crystal in the approximate amount of $6,100, representing the amount which Crystal had contributed from her own funds to the improvement of the residential property after the marriage and also credited Crystal with certain specified payments which she had made upon the mortgage after Ralph's death. It rendered judgment against Crystal for the sum of $3,661.81, which represented one-half of the net income from the property since Ralph's death, less a 20 percent management fee.

Crystal makes and argues the following assignments of error: (1) The trial court erred in not finding that the transfers from Ralph to Crystal were supported by valuable consideration and therefore Crystal stood in the position of an innocent purchaser and took the property free of the claims of the plaintiffs under the contract. (2) The contract should not in any event be enforced because it is inequitable and oppressive for the reason that, except for Crystal's contribution to the support of Ralph, the property would not have been preserved. (3) Enforcement of the contract would be inequitable because Crystal sacrificed some pension rights by reason of early retirement in order to care for Ralph during his illness.

Ralph and Florence Mayo were married in 1932. No children were born to that union and, although each had been married previously, there were no surviving children of those marriages. In 1965 the

couple consulted an Omaha lawyer concerning a plan which they had agreed upon for disposition of their properties upon the death of each. They disclosed their plan to the lawyer and asked his advice as to whether it could be made binding on both. They were assured it could, and on April 3, 1965, they entered into a written contract.

At that time Ralph and Florence had a substantial amount of real and personal property, all of which was held in their joint names except their residence which was held in the name of Florence alone. The plan provided that upon the death of Florence, whether or not she survived Ralph, certain legacies and charitable bequests and debts to relatives of Florence would be paid. It also provided that, upon the death of the survivor, $5,000 would be paid to a sister-in-law of Ralph, if she then survived. The same day the contract was made, each executed wills to implement the plan. The plan also provided that the residence owned by Florence would be conveyed to the parties as joint tenants. This conveyance was made, executed, and delivered the same day. There is no dispute about any of the above facts and it is clear the contracts, wills, and deeds were entered into voluntarily and understandingly by the parties.

On the death of Florence in 1966, Ralph satisfied the bequests as required by the plan. The debt which the plan required to be paid was one owed to Florence's father. The latter, however, did not wish to be paid but wanted to continue to collect interest and so the old obligation was discharged by a new note.

On Decoration Day, 1968, Crystal and Ralph met when Crystal, at the request of one of Ralph's fellow members in the Eastern Star, made a social visit to Ralph who was then a patient in an Omaha hospital. As a result of this visit, Ralph later called Crystal and invited her to go out to dinner and she accepted. Thereafter Ralph took Crystal to dinner and to vari-

ous social functions. In November of 1968, he proposed marriage in the following fashion, quoting Crystal's testimony: "He came over in November, early in November, and when he came in he said, 'Would you get a piece of paper and a pencil.' And we sat down at the kitchen table and he said, 'Now, I am going to give you my assets and their worth, and I wish you would write them down.' So I did. I got the pencil and paper and he recited them one by one. 'And now,' he said, 'add them up.' So I added them up. And he sat back in his chair and he said, 'I am asking you to marry me. This is what I have to offer. If it is not enough, I will understand.' And I said, 'Jack, I think that would be very fine, and I appreciate your offer.' Then he said do you have any feeling about moving into the home where he and Florence had their home. And I said, 'No, I have nothing against it. I didn't know her and I have no feelings against it.' " Crystal, in her testimony, then described the property which she had written down on a piece of paper on that occasion, which property included that which is the subject of this action, as well as other property no longer in existence or as to which the plaintiffs have chosen to exert no claim. Ralph and Crystal were married on December 20, 1968.

On March 19, 1969, Ralph conveyed the residence to himself and Crystal as joint tenants with right of survivorship. In the spring of 1970, Ralph consulted the attorney who had drafted the contract between him and Florence and the other instruments which implemented that contract. Ralph asked the attorney to make a new property disposition plan for him in which all of the property would, on Ralph's death, be placed in a trust with the income therefrom being payable to Crystal for her life, and upon Crystal's death, one-third of the corpus would pass to Ralph's side of the family, one-third to Florence's side, and one-third to Crystal's heirs. The attorney declined

to draft and implement such a plan, saying he could not ethically do so because it would violate the terms of the contract between Ralph and Florence which he had drawn.

On September 15, 1970, Ralph conveyed the rental property to himself and Crystal as joint tenants with right of survivorship and on the same date conveyed the third item of property here involved, a land contract, to himself and Crystal as joint tenants with right of survivorship. On September 26, 1975, shortly before his death, Ralph conveyed his remaining interest in the real estate in the same fashion. At some time not precisely shown by the evidence but which was during his last illness, the Omaha National Bank shares were transferred to joint tenancy with Crystal. It is stipulated that Crystal paid no specific monetary consideration for any of these transfers. She did not testify that the various conveyances were made pursuant to any agreement. At the time this litigation was begun, Crystal held sole title to the above-listed and other property acquired from Ralph.

Ralph was retired at the time he and Crystal were married. His income was from social security and income from the rental property, the land contract, and interest from bonds and savings accounts. Crystal, at the time of the marriage, was employed as a teacher in the Omaha public schools. She continued in that occupation until the end of the 1973-74 school term when she took a leave of absence in order to care for Ralph who was in failing health. When she reached retirement age of 65, she retired and began to draw retirement pay. The taking of the leave of absence resulted in Crystal receiving substantially less retirement income than she would have received had she continued to teach an additional 2 years before mandatory retirement.

Shortly after the marriage Crystal sold her own home and the equity from that sale, approximately

$6,100, was used to improve the residential property belonging to Ralph in which the parties made their home. The parties also mortgaged that property for about $8,000 to make additional improvements.

During the marriage Crystal's income was greater than that of Ralph. The couple did not keep their income entirely separate. Savings bonds and savings accounts which Ralph had at the time of the marriage were exhausted, partly in payment of the mortgage indebtedness and in maintenance and repair of the rental property, as well as for travel to the Mayo Clinic where Ralph sought treatment for his health problems.

The rules of law which are applicable to the evidence and issues in this case are clear and covered by existing precedent. An agreement to devise and bequeath property is, where supported by consideration, valid and enforceable. Teske v. Dittberner, 70 Neb. 544, 98 N. W. 57; Crinkley v. Rogers, 100 Neb. 647, 160 N. W. 974. In such a case equity will impress a trust upon the property, which trust will follow it into the hands of the personal representatives of the promisor or into the hands of a grantee who has not given consideration for the conveyance. Teske v. Dittberner, *supra;* Crinkley v. Rogers, *supra.* A promise to convey or devise property made in consideration of marriage is valid and enforceable. Benson v. Burgess, 214 Iowa 1220, 243 N. W. 188. On appeals in equity, the Supreme Court will, in determining the weight of the testimony of the witnesses, consider that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Nestle v. Welsh, 192 Neb. 71, 218 N. W. 2d 544.

The evidence in this case supports without dispute the contract between Ralph and Florence. The primary question of substance is a factual one, i.e., whether or not the conveyance and transfers to Crystal by Ralph were supported by valuable consid-

eration and whether Crystal took without notice of the contract of Ralph to devise and bequeath one-half of the property to Florence's heirs at law. The trial court found that Crystal did not know of the agreement. Hence, if the conveyance and transfer to her were made by Ralph pursuant to a promise by him that if Crystal would marry him he would convey or devise to her all of his property, then Crystal would take that property free of the claims of the plaintiffs. The trial court resolved the fact question against Crystal and, even though this case is triable de novo in this court, we will consider the fact that the trial court observed the witness and was in the best position to determine the facts.

The following items of evidence clearly tend to support the trial court's determination. We have set forth Crystal's testimony as to what occurred at the time the parties engaged to marry. She did not testify that at that time Ralph stated or promised if she would marry him he would convey or devise and bequeath to her all of his property if she should survive him. It is plain that two inferences might be drawn from what occurred. One would be that Ralph was saying: "This is all I own. It won't support us very well, you will get your statutory share of what is left when I die." The second inference would be: "If you marry me I will convey the property to you so that on my death you will have it all." Had the latter been Ralph's intention and had Crystal so understood it, then it would seem likely a contract to that effect would have been made, or immediately after the marriage conveyances would have been accomplished. Instead, what actually happened was the transfers were made at four different times, and such transfers do not appear to have been made pursuant to any agreement, but rather were motivated by developments during the marriage. The fact that Ralph consulted his lawyer about a new plan which did not conform to either his agreement with

Florence or the purported agreement with Crystal tends to support the conclusion there was no contract between Crystal and Ralph founded upon the marriage and her only expectations were those which the law gives her under the statutes of descent and distribution.

It is to be noted that the decision of the trial court respected fully Crystal's right to take her statutory share. We do not have before us and therefore need not decide the question of whether a contract such as is here involved could operate to defeat a wife's statutory share.

Crystal argues that specific performance of the contract should not be granted for the reasons which we have already referred to because the result is inequitable and oppressive to her. We find the trial court did not err in enforcing the agreement. It did return to her that contribution which she made to the homestead of the parties. The evidence was insufficient to show with any specificity whatever any other amounts which she may have put into any of the property. When Crystal married Ralph she was charged with knowledge that he had the right (the contract with Florence apart) to dispose of his estate but for her marital share. Tod v. Fuller, 78 So. 2d 713 (Fla.).

AFFIRMED.

IN RE APPLICATION TO HAVE RICHARD HILL ADJUDGED MENTALLY ILL. RICHARD HILL, APPELLANT, V. COUNTY BOARD OF MENTAL HEALTH, DOUGLAS COUNTY, NEBRASKA, APPELLEE.

279 N. W. 2d 838

Filed June 5, 1979. No. 42095.

1. **Mental Health: Appeal and Error.** Mental commitment proceedings are judicial in nature and the District Court must review the

determination of the mental health board de novo on the record.

2. ___: ___. This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless this court can say as a matter of law that it is not supported by clear and convincing proof.

3. **Mental Health: Words and Phrases: Time.** An act within the meaning of the Nebraska Mental Health Commitment Act is "recent" if the time interval between it and the hearing of the mental health board is not greater than that which would indicate processing of the complaint was carried on with reasonable diligence under the circumstances existing, having due regard for the rights and welfare of the alleged mentally ill dangerous person and the protection of society in general.

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

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

Donald L. Knowles, Douglas County Attorney, Jerry L. Stejskal, and Jerry W. Katskee, for appellee.

Heard before KRIVOSHA, C. J., WHITE, and HASTINGS, JJ., and REIMER and HIPPE, District Judges.

HASTINGS, J.

This is an appeal under the provisions of section 83-1043, R. R. S. 1943, from an order of the District Court for Douglas County, affirming the order of the county mental health board. That board found that Richard Hill was a mentally ill dangerous person as defined by section 83-1009, R. S. Supp., 1978, and committed him to the Lincoln Regional Center for treatment under the provisions of section 83-1037, R. R. S. 1943.

Upon appeal to this court it is assigned as error that the evidence was insufficient to support the finding that Richard Hill was a mentally ill dangerous person in need of board-ordered treatment.

Mental commitment proceedings are judicial in nature and the District Court must review the determination of the mental health board de novo on the record. Lux v. Mental Health Board of Polk County, 202 Neb. 106, 274 N. W. 2d 141 (1979); § 83-1043, R. R. S. 1943. The trial court's "Finding and Order" indicate that this was done. The same statute requires that the "order of the district court may be appealed to the Supreme Court in accordance with the procedure in criminal cases." Therefore, this court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding as provided by section 83-1043, R. R. S. 1943, unless this court can say as a matter of law that it is not supported by clear and convincing proof. § 83-1037, R. R. S. 1943; Lux v. Mental Health Board of Polk County, *supra;* State v. Sommers, 201 Neb. 809, 272 N. W. 2d 367 (1978).

"Mentally ill dangerous person shall mean any mentally ill person or alcoholic person who presents: (1) A substantial risk of serious harm to another person or persons within the near future, as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm; or (2) A substantial risk of serious harm to himself within the near future, as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm, or evidence of inability to provide for his basic human needs, including food, clothing, shelter, essential medical care, or personal safety." § 83-1009, R. S. Supp., 1978. "A final hearing shall be held by the mental health board to determine whether there is clear and convincing proof that the subject of a petition is a mentally ill dangerous person and that neither voluntary hospitalization nor other alternatives less restrictive of his or her liberty than a mental health board ordered treatment disposition are available or would suffice to prevent the harm

described in section 83-1009. * * *." § 83-1035, R. R. S. 1943.

The hearing before the mental health board was held on February 14, 1978, and Hill was represented throughout by counsel. Two psychiatrists, Dr. David Goldberg and Dr. Frank Menolascino, testified, the latter having been called by Hill. Without going into a great amount of detail, the histories obtained by the two physicians indicated a 25-year-old male Caucasian who was first committed to the Lincoln Regional Center in 1959 at the age of 6 years. Since 1965 he has been institutionalized, sometimes on leave, until the present time with the exception of approximately 3 to 4 years. Dr. Goldberg diagnosed him as having a personality disorder of an explosive type which he said carried with it the possibility of "dangerousness" as in a true psychotic personality. Dr. Menolascino essentially agreed with the findings and diagnosis of Dr. Goldberg, agreed that Mr. Hill was suffering from a form of mental illness, and gave as his opinion that Hill could not function outside of a structured institutional setting. Both physicians testified that the "personality disorder" of the type from which Mr. Hill is suffering is classified by the Diagnostic and Statistical Manual edited by the American Psychiatric Association as a mental illness, and that this manual is used as a handbook by psychiatrists in determining the existence of mental illnesses.

It appears obvious that the evidence presented by the two medical witnesses clearly and convincingly establishes that Hill is "mentally ill" within the meaning of section 83-1009, R. S. Supp., 1978.

In making the findings that Hill presented a substantial risk of serious harm to another or to himself as evidenced by recent acts or threats of violence, the board and the District Court considered several incidents.

On May 24, 1977, while an inmate in the Douglas

County jail, Hill was found sitting on his bunk with a rope, braided from torn strips of bedsheets, fastened around his neck. Sergeant Podjenski of the Douglas County sheriff's department testified that the rope was, in his opinion, of sufficient strength to hold a man's body and there was a shelf approximately 7 feet off the floor to which the rope could be tied. Hill stated to the sergeant that he wanted to kill himself.

On October 13, 1977, Sergeant Richard Lubash, also of the Douglas County sheriff's department, after receiving information of an alleged overdose of self-administered medicine, talked to Hill who admitted he had been saving up 200-milligram Thorazine pills and had taken seven of them all at once. There is no direct evidence of the possible effect of such a dosage. However, Dr. Menolascino in his testimony referred to them as tranquilizers and that his regular dosage was 200 milligrams a day. This must be viewed against additional testimony of Dr. Menolascino that in the past, while at the Regional Center, Hill had used staples and other sharp instruments to stick in his arm and pump ink from ink refills into his veins which required periods of hospitalization at Lincoln General Hospital. Although the witness testified that Hill's actions were not deliberately suicidal, but rather an attempt at recognition and change of environment, they would have endangered his life if not discovered in time and met with medical attention.

The point is, of course, that although Hill may not be suicidal in the true sense, he is capable of taking extreme steps which admittedly could endanger his life or health.

Deputy Sheriff Clemens testified that on January 5, 1978, Hill told him that he would gladly blow up his car for $50 and if he, Clemens, tried to stop him, he would blow him up for free. Hill had also told this same deputy on several occasions that it didn't bother him to hurt people.

The violent acts described above occurred within periods of 9 months, 4 months, and 6 weeks, respectively, of the hearing. The question presented by this appeal is whether they were sufficiently "recent" within the meaning of the law. It should be said at the outset that they all happened while Hill was in custody.

Furthermore, the court can not blindly disregard other incidents more remote in time which give some insight into this man's mental state. The incidents with the ink have been previously mentioned. In addition, in 1970, while Hill was working for a used car dealer, he became angry at his employer over a wage dispute and set fire to one of his vehicles. This incident led to a mental commitment. Also, and although the record is not all that clear, it appears that Mr. Hill's present contact with mental health proceedings stems from a murder charge dating back to July of 1974. Dr. Goldberg, in his report, states: "Mr. Hill was transferred from the Douglas County Jail to the Douglas County Hospital following a successful plea of not guilty for reasons of insanity on the charges brought in connection with a crime committed in Omaha, Nebraska on July 24, 1970, [sic] this crime involved both murder and rape." Quoting from Dr. Menolascino's report, he said: "I was asked to examine him in regards to assessing his competency to stand trial for an alleged murder charge."

The final question: Does he present a substantial risk of serious harm to another or himself as manifested by recent acts or threats of violence? Looking at his entire psychiatric background it appears obvious that he presents a potentially substantial risk of harm both to others and to himself. What, then, is a recent act? There is no way to establish a definite time-oriented period such as 1 week or 1 month, or for that matter, 1 year. Each case must be decided on the basis of the surrounding facts and

circumstances. If a person commits an act and nothing at all is done for 1 year, we would be hard pressed to define that as a "recent act." On the other hand, if a person kills another and is tried for murder and a year later, after having been held in custody all that time, is finally adjudged innocent by reason of insanity, it would be ridiculous to say that the killing was not a "recent violent act."

Although not entirely on point, Kraemer v. Mental Health Board of the State of Nebraska, 199 Neb. 784, 261 N. W. 2d 626 (1978), contains some appropriate language and reasoning. In that case, Kraemer had committed an act or threat in May of 1975. He was committed under the previous mental health law of Nebraska, which had been declared unconstitutional. The reported case does not indicate when he was recommitted upon rehearing under the present Nebraska Mental Health Commitment Act, but the transcript on file in the clerk's office indicates that it was in August of 1976. Quoting from the case itself: "The essence of Kraemer's second assignment is that the record shows no *recent* violent act, or threat of violence, or the placing of a person in reasonable fear of harm. We have earlier reviewed the evidence. We hold that the incident of May 1975 was sufficiently recent to conform to the meaning of the statute. Any other view would require, as to those already committed when the enforcement of the former act was enjoined and who were entitled to a new hearing under section 83-1072, R. R. S. 1943, the discontinuance of treatment and release in order to afford an opportunity for a more recent act of violence before any rehearing and further commitment could take place. Such would be contrary to the evidence and expressed purposes of section 83-1072, R. R. S. 1943, when read in conjunction with the entire act." In Lux v. Mental Health Board of Polk County, 202 Neb. 106, 274 N. W. 2d 141, the act occurred on November 23, 1976, and the hearing commenced on

February 16, 1977. In that case, objection was made that evidence of only one act was tendered whereas the statutes speak in terms of evidence of "recent violent *acts*." (Emphasis supplied.) This court's answer was: "The contention of Lux that the evidence is insufficient because the evidence shows only one violent act against a person is also without merit. It is true that section 83-1009 (1), R. R. S. 1943, refers to 'recent violent acts.' However, to read the statute as requiring evidence of more than one violent act or threat would be ridiculous. It obviously contemplates the admission of evidence of as many recent violent acts or threats as there may be."

The term recent should be given a reasonable construction. We hold that an act or threat is "recent" within the meaning of section 83-1009, R. S. Supp., 1978, if the time interval between it and the hearing of the mental health board is not greater than that which would indicate processing of the complaint was carried on with reasonable diligence under the circumstances existing, having due regard for the rights and welfare of the alleged mentally ill dangerous person and the protection of society in general.

The acts and threats in this case were "recent" and the judgment of the District Court was correct and is affirmed.

AFFIRMED.

HIPPE, District Judge, concurs in result.

IN RE APPLICATION TO HAVE MYRTLE JONES ADJUDGED MENTALLY ILL. MYRTLE JONES, APPELLANT, V. COUNTY BOARD OF MENTAL HEALTH, DOUGLAS COUNTY, NEBRASKA, APPELLEE.

279 N. W. 2d 841

Filed June 5, 1979. No. 42146.

Mental Health. The existence of mental illness and the presence of a threat of violence cannot be examined in isolated vacuums of semantics under the Nebraska Mental Health Commitment Act. Although either standing alone may be insufficient to support a commitment, the two considered together, under all the circumstances, may compel a finding that there is clear and convincing proof that one is a mentally ill dangerous person.

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

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

Donald L. Knowles, Douglas County Attorney, and Jerry L. Stejskal, for appellee.

Heard before KRIVOSHA, C. J., WHITE, and HASTINGS, JJ., and REIMER and HIPPE, District Judges.

HASTINGS, J.

Although docketed separately, by agreement of the parties this case was consolidated for argument with Hill v. County Board of Mental Health, *ante* p. 610, 279 N. W. 2d 838 (1979), and is controlled by that case. Myrtle Jones has appealed from an order of the District Court for Douglas County affirming the action of the Douglas County board of mental health finding her to be a mentally ill dangerous person in need of board-ordered treatment. Error is assigned in that it is claimed the evidence was insufficient as a matter of law to establish these findings by clear and convincing proof.

The hearing was held before the mental health board on January 23, 1978, and arose out of a written complaint signed by the subject's mother, Mosie Lee

Jones, who claimed that Myrtle Jones talked about killing her "kids and mother on New Years." Myrtle Jones was represented by counsel throughout all of the proceedings.

Dr. David J. Goldberg, a physician and psychiatrist, testified he had examined the subject on January 19, 1978, consisting of a clinical interview and review of the available records. She was initially incoherent, but as the interview progressed she became most pleasant. She described a series of incidents occurring during the immediately preceding few weeks wherein she felt mistreated at home and reacted against her mother and stepfather, sometimes by hitting them in anger. On one occasion she told Dr. Goldberg her son was misbehaving and she said "I will kill you," and that it just came out in the heat of trying to reprimand the child. It was claimed by her to be merely a figure of speech since she didn't mean to kill him.

The diagnosis of Dr. Goldberg was as follows: "The diagnostic impression I have on this patient is one of a schizophrenic illness and I have contemplated two subtypes. One is a chronic undifferentiated. It is based mostly on the history this patient forwarded. It seems that the history of this illness goes back three or four years now in time. Second, of course, was schizophrenia, schizo-affective, agitated type because the affective component of this illness is quite noticeable. In any case, these are subtypes of the same illness, which is basically a schizophrenic process. My recommendation at this time is to continue psychiatric treatment * * * I certainly would recommend to continue in-patient treatment at this time." The witness defined schizophrenia as a mental illness. Another witness, a onetime fiance, testified he had heard the subject threaten to reprimand her children if they disobeyed her; and that he observed her spank the children from time to time, but none of them, to his knowledge, ever required

medical attention because of the spankings.

Myrtle Jones testified in her own behalf and admitted she made the statement "if you don't obey me I'm going to kill you" to her 10-year-old girl and 11-year-old son. She went on to say, presumably concerning the same incident, "Because one night we were going to a friends of mine and they were going into the house and on the way into the house my little girl fell down on the ground. She turned around and she goes back to the car and goes back to where my mother is and then I said mother, when I get those kids I'm going to kill them and she said don't be hasty and I said if you can whip them, why can't I. Those are my exact words."

Perhaps some further insight into the mental state of the subject can be found in her statement in open hearing immediately after the board chairman announced the order of commitment. She said: "Simply because I said I was going to kill my God Damn kids? God Damn, Mama, you put me in a bad situation. You take me out of here."

The board found there was clear and convincing evidence of mental illness and dangerousness as manifested by the threats to the children. The District Court, hearing the appeal de novo on the record, affirmed the action of the board of mental health. We in turn must affirm unless we find as a matter of law that the order of the District Court is not supported by clear and convincing proof. Hill v. County Board of Mental Health, *supra.*

Again, as in Hill v. County Board of Mental Health, *supra,* and Petersen v. County Board of Mental Health, *post* p. 622, 279 N. W. 2d 844, the medical evidence establishes by clear and convincing proof that Myrtle Jones is suffering from a mental illness. That fact is not contested. Also, the threat, if in fact it qualified as a threat under the Nebraska Mental Health Commitment Act, was recent, having been made only 12 days prior to the

filing of the petition. This, too, is not questioned.

The only question on appeal is whether the evidence establishing the threat demonstrates by clear and convincing proof that it manifested a "substantial risk of serious harm to another person." Myrtle Jones described the death threat as a "figure of speech." Her counsel, in appellant's brief, dismisses it as "common usage by angry parents of meaningless 'death threats' in disciplining their misbehaving children." We think the matter cannot be dismissed that lightly. The existence of mental illness and the presence of a threat of violence cannot be examined in isolated vacuums of semantics. An extant mental illness with no manifestations of anger or violence, either verbal or physical, hardly presents a committable situation. Likewise, a "death threat" by a parent with no demonstrable mental illness, following an episode with a rebellious child, very probably should give no cause for concern. However, the two together, under the circumstances then existing, may very well require immediate action rather than additional time to change the threat into an act.

From an examination of all of the evidence we cannot say as a matter of law that the District Court was wrong in finding the proof to be clear and convincing that Myrtle Jones was a mentally ill dangerous person as defined by law, and its judgment is affirmed.

AFFIRMED.

IN RE APPLICATION TO HAVE DAVID PETERSEN ADJUDGED MENTALLY ILL. DAVID PETERSEN, APPELLANT, V. COUNTY BOARD OF MENTAL HEALTH, DOUGLAS COUNTY, NEBRASKA, APPELLEE.

279 N. W. 2d 844

Filed June 5, 1979. No. 42212.

1. **Mental Health.** As a general rule, spendthriftiness and improvidence, with nothing more, do not establish inability to provide for basic human needs, including food, clothing, shelter, essential medical care, or personal safety, within the meaning of the Nebraska Mental Health Commitment Act.
2. ____. A final order of the District Court in a mental health commitment proceeding which is not supported by clear and convincing proof must be set aside on appeal.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Reversed and remanded with instructions.

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

Donald L. Knowles, Douglas County Attorney, and Jerry L. Stejskal, for appellee.

Heard before KRIVOSHA, C. J., WHITE, and HASTINGS, JJ., and REIMER and HIPPE, District Judges.

HASTINGS, J.

Although docketed separately, by agreement of the parties this case was consolidated for argument with Hill v. County Board of Mental Health, *ante* p. 610, 279 N. W. 2d 838 (1979), and is controlled by that case. David Petersen has appealed from an order of the District Court for Douglas County affirming the action of the Douglas County board of mental health finding him to be a mentally ill dangerous person in need of board-ordered treatment. Error is assigned in that it is claimed the evidence was insufficient as a matter of law to establish these findings by clear and convincing proof.

The hearing before the mental health board was

held on April 14, 1978, and Petersen was represented by counsel. Dr. David K. Kentsmith, a psychiatrist, testified he had examined Petersen on April 11, 1978, and found him to have a major mental disorder. It was diagnosed as schizophrenia, classified as paranoid. He defined this as a mental illness. At the present time the witness found no suicidal ideation or significant depression present in Petersen. The findings of Dr. Kentsmith were neither attacked nor refuted and it can be said that there is clear and convincing proof that Petersen is a mentally ill person. However, the critical question is whether because of that illness, by clear and convincing proof, he presents a substantial risk of serious harm to another person or to himself as manifested by evidence of recent violent acts or threats or "of inability to provide for his basic human needs, including food, clothing, shelter, essential medical care, or personal safety." § 83-1009, R. S. Supp., 1978.

There was evidence of a violently vocal argument between Petersen and his married sister, Linda Kneifel, which occurred on March 17, 1978. Mrs. Kneifel had stopped at Petersen's house to give him a ride. As she ran up to her brother's room to get him, one of her children, a 3½-year-old left in the car, began honking the horn. Upon returning to the car, she spanked the errant child which greatly upset Petersen. He explained in no uncertain terms that spanking does no good and that she should have taken the child in her arms until he calmed down. He said she should show more love and that wasn't showing love. Mrs. Kneifel told Petersen to mind his own business and that she was the child's mother and would discipline her children as she saw fit. The sister said both of them yelled at each other and then things finally calmed down.

Later in the day, after Mrs. Kneifel had picked up Petersen and their mother, they were all in the car running some errands. The mother started remon-

strating Petersen, who was 29 years old at the time, about spending or giving his money away. About this time Mrs. Kneifel said something to Petersen about the fact that his ex-wife, from whom he was divorced some 5 months earlier, has "probably got a honey by now." In her words, Petersen "just went berserk," yelling at her that she had been following his ex-wife around and she had no right to do so. She finally asked him to leave the car which he did and, in her words, Petersen said in leaving, "Sleep on it or something and you'll be begging me — you'll be calling me, begging me, something, and he was yelling l-o-v-e, love, love. It ended on kind of a sour note. And that was about it." The witness admitted that the yelling didn't bother her driving because "I'm used to yelling in the car because my kids fight in the back seat and do things like that. I just have to kind of block that out."

On further questioning by the county attorney, Mrs. Kneifel gave the following testimony: "Q. Do you remember telling me you were scared? A. Oh, yes. * * * Q. Could you tell the Board what you were scared of? He wasn't threatening you or anything? A. I don't like to be around my brother when he's angry. I don't like to be around anyone when they're yelling and angry, because I think things - - - Q. When you say on this particular occasion you were scared something in particular would happen, like maybe he might hit your boy? A. No, I was not afraid he would hit my boy. * * * Mr. Fahey: He wants to know if you were afraid for yourself. * * * A. I did not know, but I did not want to get that far. That's why I kept asking him to get out of my car. * * * Q. In that regard, have there been any recent occasions in the past where he may have attempted to do something like that to support your belief? A. No. I have — we've never had any occasion where I felt he was going to hit me."

Mrs. LaVonne Petersen, the mother, testified as to the argument just mentioned. She said the two of them were shouting at each other and she was scared too. When asked what she was scared of, she said, "The way he was yelling." She said that "I thought if the argument would have kept on, he would have harmed Linda. That was the first time I've seen him so upset. Really upset. And Christmas time he was very upset." Upon being asked what happened after Petersen got out of the car, the witness said, "He was just shouting crazy words at Linda." When asked what the words were, she answered, "love."

It would be pure speculation to assume that the incidents just related approach the level of "evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm;" as required by section 83-1009, R. S. Supp., 1978. As a matter of fact, the chairman of the mental health board sustained Petersen's motion to dismiss that part of the petition for commitment alleging that he was dangerous to himself or others. In announcing the final findings, the chairman stated: "After deliberation, I think the Board is in agreement as to the patient's inability to provide for his basic human needs. Specifically, the patient's consistence [sic] of giving away his money and then having to depend on his family to shore up his needs. We also will find clear and convincing evidence of mental illness and dangerousness — excuse me, mental illness based on the findings and diagnosis of Dr. Kentsmith. I might add that there was a tremendous amount of concern as to the conduct of the patient in confrontation on that particular date that Mrs. Kneifel testified to. I think it bears mentioning. Two of the Board members felt there was enough to find evidence of the risk of serious harm in both of those cases. Because of the fear that he put his mother

and his sister in on that occasion."

Although apparently the board did not find Petersen to be a "mentally ill dangerous person" as to another person, in spite of the recitation that two of the three board members had such feeling, this is perhaps a good place to mention a proposition of law cited by appellant in this case as well as in Hill v. County Board of Mental Health, *ante* p. 610, 279 N. W. 2d 838; and Jones v. County Board of Mental Health, *ante* p. 618, 279 N. W. 2d 841, although the same was argued but not assigned as error. That has to do with the failure of the board to make written statements as to the evidence relied upon in finding clear and convincing proof that a subject is a "mentally ill dangerous person" as required by section 83-1060, R. R. S. 1943. Such written statements should, as a matter of course, be made in each case.

The remainder of the hearing and the evidence upon which the board based its findings of the necessity of commitment had to do with his generosity, or more appropriately his spendthriftiness, resulting from what Dr. Kentsmith termed "delusions of grandeur and excessive religiosity."

According to Dr. Kentsmith, from information given him by Petersen himself, Petersen receives approximately $400 per month in social security mental disability payments and gives away $200 of those payments to anyone who happens to be walking along and needs it. He also gives them a cross and says he does this because he has read a sign in the church that says to give to the poor. He admitted sometimes toward the end of the month he runs out of money, has no groceries, and has to ask his mother for money, which upsets her. The mother corroborated this evidence by testifying she knows her son gets $462 per month because she has cashed checks for him. After acknowledging she was aware of the fact that he had been giving away some of his money, when she was asked how many such

instances she knew of, she replied: "I've really noticed it in the last month, when he comes to me, called me and didn't have any money." She went on to say that she took groceries over and filled up his cupboard just the last month. Apparently, according to her further testimony, both she and her husband have had to give him money in the past several months. Petersen's explanation to her was "that he has to give it away to the poor people. He can't stand to see poor people." Mrs. Petersen went on to say that her son had lost some weight, maybe 10 or 15 pounds. "I really think that his nerves were getting him down and he wasn't eating right, because when he's upset he won't eat." She also testified she was afraid for her son's safety because he would pick people up off the street and bring them home and feed them.

As previously stated, there is no question but what David Petersen is a mentally ill person, and, by the same token, there is no clear and convincing proof that he presents a substantial risk of serious harm to another as manifested by evidence of any recent violent acts or threats, and both the board and the District Court so found. There is also no question but what he is spendthrifty and improvident. However, this is not equivalent to being a "dangerous person * * * who presents * * * a substantial risk of serious harm to himself * * * as manifested by * * * evidence of inability to provide for his basic human needs, including food, clothing, shelter, essential medical care, or personal safety." § 83-1009, R. S. Supp., 1978. "The disposition ordered by the mental health board shall represent the alternative which imposes the least restraint upon the liberty of the subject required to successfully treat the particular mental illness and prevent the particular harm which was the basis for the board's finding the person to be a mentally ill dangerous person * * *." § 83-

1038, R. R. S. 1943. The treatment for improvidence lies in conservatorship or guardianship proceedings, not mental health commitment.

The order of the mental health board was not supported by clear and convincing proof, and as a matter of law, the evidence was such that the District Court should have made such a finding.

The order of the District Court is reversed and the cause is remanded with orders to dismiss the petition.

REVERSED AND REMANDED WITH INSTRUCTIONS.

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, UNIVERSITY OF NEBRASKA AT OMAHA CHAPTER, APPELLEE, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, APPELLANT, UNIVERSITY OF NEBRASKA AT OMAHA COLLEGE OF BUSINESS ADMINISTRATION FACULTY ASSOCIATION, INTERVENOR-APPELLANT.

279 N. W. 2d 621

Filed June 5, 1979. No. 42214.

1. **Court of Industrial Relations: Labor and Labor Relations: Colleges and Universities.** The Court of Industrial Relations may acquire jurisdiction of an industrial dispute between the Board of Regents of the University of Nebraska and its employees for the purpose of resolving the dispute.
2. ___: ___: ___. Under the facts in this case a bargaining unit consisting of employees holding academic rank and administratively assigned to the University of Nebraska-Omaha was appropriate.
3. ___: ___: ___. Department chairmen are properly included in bargaining units of faculty employees where their powers are effectively diffused among the department faculty pursuant to the principle of collegiality.
4. **Court of Industrial Relations: Evidence: Appeal and Error.** An order of the Court of Industrial Relations that is supported by substantial evidence and is not arbitrary or capricious will not be disturbed on appeal.
5. **Court of Industrial Relations: Intervention.** An intervenor in a proceeding before the Court of Industrial Relations may be re-

quired to make a reasonable showing of interest in support of the intervention.

Appeal from the Nebraska Court of Industrial Relations. Affirmed.

L. Bruce Wright of Cline, Williams, Wright, Johnson & Oldfather, for appellant. William E. Pfeiffer of Spielhagen, Pfeiffer, Miller & Moore, Associates, for intervenor-appellant.

David J. Cullan of Cullan, Cullan & Morrison, for appellee.

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

BOSLAUGH, J.

The Board of Regents of the University of Nebraska (Regents) appeals from an order of the Court of Industrial Relations (CIR) finding and determining that all full time A-line faculty employed by the University of Nebraska at Omaha, including counselors, librarians, and assistant instructors, but excluding intercollegiate athletic coaches and trainers, all persons holding rank of associate or assistant dean or higher, as well as those specific individuals excluded by stipulation as having management duties, constitute an appropriate bargaining unit for collective bargaining purposes. The University of Nebraska at Omaha College of Business Administration Faculty Association also appeals from the order dismissing its petition in intervention.

The Regents contend that the CIR has no jurisdiction over industrial disputes between the Regents and their employees; that the bargaining unit is inappropriate because it includes only employees administratively assigned to the University of Nebraska-Omaha (UNO); and that department chairmen, librarians, academic personnel holding special appointments, assistant instructors, and counselors should be excluded from the bargaining unit.

In a recent case, University Police Officers Union v. University of Nebraska, *ante* p. 4, 277 N. W. 2d 529, decided April 10, 1979, we held that the CIR may acquire jurisdiction of an industrial dispute between the Regents and its employees. The issue was fully considered in that case and the decision in that case is controlling here.

The Regents' contention that the bargaining unit is inappropriate because it includes only employees administratively assigned to UNO presents an issue very similar to that considered and determined in American Assn. of University Professors v. Board of Regents, 198 Neb. 243, 253 N. W. 2d 1, decided April 13, 1977. In that case the Regents contended that the bargaining unit should be a multicampus unit including all university employees holding academic rank. We held that the members of the faculty of the University of Nebraska at Lincoln constituted an appropriate bargaining unit, with separate units for the faculties of the College of Law and College of Dentistry. The contention of the Regents that the members of the faculty at UNO should have been included within the bargaining unit established in that case was rejected.

The factual situation in this case is similar to that involved in the previous case. We believe the principles discussed in that case are applicable here and that a bargaining unit consisting of employees holding academic rank and administratively assigned to UNO is appropriate.

The remaining assignments of error relate to the composition of the unit. The Regents contend that department chairmen should be excluded from the bargaining unit because they are supervisory personnel and a part of management. A similar contention was rejected in American Assn. of University Professors v. Board of Regents, *supra*. In that case we held that where the powers of the chairmen are effectively diffused among the department faculty

pursuant to the principle of collegiality, chairmen should be included within the faculty bargaining unit.

The evidence here is that the department chairmen at UNO are faculty members who serve as chairmen at the pleasure of the dean of the college. To compensate for the additional administrative responsibilities which the chairmen assume, it is customary to reduce their teaching load while they serve as chairmen. In performing their duties, the chairmen consult with the other members of the faculty and, generally, there is little or no disagreement between the chairmen and the faculty of the department concerning recommendations and other decisions which the chairmen make. The evidence sustains the finding of the CIR that chairmen of the department should be included within the faculty bargaining unit.

Although the library at UNO is not a college, it is considered to be an academic unit in some respects. The librarians do not perform instructional duties but their work is related to the teaching and research functions performed by the faculty. To that extent there is a community of interest between the faculty and the librarians. A document, Guidelines for Reappointment, Promotion, and Tenure of Faculty Members of the University Library, has been under consideration at UNO since 1973. We think the record sustains the finding by the CIR that librarians should be included in the faculty bargaining unit.

Academic personnel holding special appointments are members of the faculty who engage in all the normal academic pursuits that other members of the faculty engage in while they are serving at UNO. In some cases their period of service may be of relatively short duration, but others serve for extended periods of time and some become regular members of the faculty. During their period of service the

personnel holding special appointments function in the same manner as regular members of the faculty.

The assistant instructors are members of the faculty with the lowest academic rank. Although assistant instructors are considered to have an interim position, they teach and do research in much the same manner as other members of the faculty. While there is a relatively high turnover rate among assistant instructors, the evidence indicates the assistant instructors are a necessary part of the instructional staff.

There is little in the record concerning the exact nature of the duties performed by the counselors. There is nothing to indicate they are management or supervisory personnel. The title suggests that the counselors work with the students in academic matters, and might be presumed to have some community of interest with the faculty. In the present state of the record we hesitate to interfere with the finding of the CIR.

We conclude that finding of the CIR as to the composition of the bargaining unit is supported by substantial evidence and was not arbitrary or capricious.

The appellee filed its petition in the CIR on January 18, 1978. The appellant filed its answer on February 14, 1978. The case was set for trial on May 18, 1978. On May 16, 1978, 2 days before the date set for trial, the University of Nebraska at Omaha College of Business Administration Faculty Association filed a petition in intervention.

The petition in intervention prayed that the faculty of the College of Business Administration of UNO be designated as a separate bargaining unit. The clerk of the CIR dismissed the petition in intervention because the 20 persons listed in the intervenor's showing of interest was less than 10 percent of the membership in the appellee's claimed bargaining unit as

required by Rule 4 (B) (7) of the CIR. Upon appeal to the determination panel of the CIR the ruling of the clerk was affirmed. The intervenor has now appealed to this court.

The intervenor contends that CIR Rule 4 (B) (7) is illegal and void and that the order dismissing the petition in intervention was contrary to law.

Section 48-812, R. R. S. 1943, provides that, except as modified by the CIR or other provisions of sections 48-801 to 48-823: "* * * proceedings before the court shall conform to the code of civil procedure applicable to the district courts of the state * * *." There is no provision in sections 48-801 to 48-823 relating to intervention in proceedings before the CIR and the record does not show any modification by the CIR except with respect to the showing of interest required by CIR Rule 4 (B) (7) referred to in the order of the CIR and the briefs of the parties.

Since Rule 4 (B) (7) of the CIR does not appear in the record we decline to consider its validity or application to the facts in this case at this time. It would appear that the CIR may require that an intervenor make a reasonable showing of interest. Under the National Labor Relations Act a petition must be supported by a substantial number of employees and this requirement is applied to a cross-petitioner or intervenor seeking approval of a substantially different unit. See Morris, The Developing Labor Law, p. 155; Sanderson and Porter, 100 NLRB 1487; Boeing Airplane Co., 86 NLRB 368.

In view of the result which we have reached in this case, and the strong policy against undue fragmentation of bargaining units in the public sector, it is doubtful that the ruling of the CIR prejudiced any substantial right of the intervenor. In any event, the issue may again be presented to the CIR by the intervenor in a new proceeding.

The order of the CIR is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

NATIONAL BANK OF COMMERCE TRUST & SAVINGS ASSOCIATION, A CORPORATION, APPELLANT, V. LARRY D. MITCHELL, JOANN MITCHELL, ADRIAN L. MITCHELL, AND EVA L. MITCHELL, APPELLEES.

279 N. W. 2d 625

Filed June 5, 1979. No. 42215.

Instructions: Appeal and Error. This court may take cognizance of prejudicial error in instructions indicative of probable miscarriage of justice.

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

Knudsen, Berkheimer, Endacott & Beam, for appellant.

William W. Griffin, for appellees.

Heard before KRIVOSHA, C. J., CLINTON, and WHITE, JJ., and STANLEY and GITNICK, District Judges.

STANLEY, District Judge.

This is an action on an installment sale contract. On August 10, 1973, defendants, Larry D. Mitchell; his wife, JoAnn Mitchell; and his parents, Adrian L. Mitchell and Eva L. Mitchell, signed an installment sale contract with Harvestgro Irrigation Systems, Inc. This contract involved two Lockwood pivot irrigation systems and accessories. A portion of the cash sale price was financed. On September 26, 1973, the contract was assigned by Harvestgro Irrigation Systems, Inc., to the National Bank of Commerce Trust & Savings Association. There was an eventual default in payments under the contract, and this action was brought to recover the balance

due on the contract from Adrian Mitchell and Eva Mitchell, whose names appeared as cosignors on the contract.

Prior to trial of the matter it was stipulated and agreed between plaintiff, National Bank of Commerce Trust & Savings Association, and defendants, Larry Mitchell and JoAnn Mitchell, that there was due and owing from these defendants the balance due on the installment sale contract. The defendants, Adrian Mitchell and Eva Mitchell, denied they were indebted to the plaintiff; denied they were purchasers of the property described in the contract; and denied they were makers, guarantors, or sureties on the contract. These defendants also interposed the affirmative defenses that the sole reason for their execution of the contract was for the purpose of allowing the seller of the equipment to obtain a perfected security interest in the property sold, and that they received no consideration for their signatures. The jury found for the defendants, Adrian Mitchell and Eva Mitchell. Plaintiff's motion for new trial was overruled and plaintiff appealed.

One of the plaintiff's assignments of error was the trial court's instruction No. 7: "The burden of proof is upon the Plaintiff to establish by a preponderance of the evidence that Defendants Adrian L. Mitchell and Eva L. Mitchell signed the said instrument with the intent to be bound thereon as co-signers with the Defendants Larry D. Mitchell and JoAnn Mitchell. In making that determination you must duly consider the credible evidence tending to establish the claim of Defendants Adrian L. Mitchell and Eva L. Mitchell that they signed the said instrument for the sole purpose of allowing the Plaintiff to obtain a perfect [sic] security interest in the property sold against any claim of Defendants Adrian L. Mitchell and Eva L. Mitchell by reason of the fact that these Defendants owned the real estate upon which said property was to be installed and affixed."

This instruction, with others, was submitted to counsel and was approved by both parties. Defendants contend the correctness of instructions, after they have been submitted to counsel and approved, cannot be considered on appeal in the Supreme Court unless first challenged in the trial court by motion for a new trial. Defendants cite Breiner v. Olson, 195 Neb. 120, 237 N. W. 2d 118. Plaintiff contends there is an exception to this rule and, when the record reflects noncompliance with the requirement that counsel is under a duty to object to proposed jury instructions submitted to him for review, the court may take cognizance of plain error in instructions indicative of a probable miscarriage of justice, citing Barta v. Betzer, 190 Neb. 752, 212 N. W. 2d 352.

Larry Mitchell and JoAnn Mitchell are husband and wife and own a farm in Holt County, Nebraska. Adrian Mitchell and Eva Mitchell are his parents, and they own a farm adjoining that of their son. Sometime during the year of 1967, all of the defendants entered into a purchase contract with William Meusch and his wife to purchase a farm adjoining that of Adrian Mitchell. This was a 10-year contract and had not been paid off by 1973.

On August 10, 1973, two Lockwood 10-tower center pivot systems were purchased from Harvestgro Irrigation Systems, Inc., by the defendants. These were standard size pivot systems and covered approximately 130 acres each. One of these machines operated on approximately 80 acres of the Adrian Mitchell land, and the balance was on the Meusch land. The other machine operated on approximately 100 acres of the Meusch land and 30 acres of the Adrian Mitchell land.

The purchase of the irrigation system was negotiated by Larry Mitchell with Bob Litz, who worked for Harvestgro Irrigation Systems, Inc. Neither Adrian Mitchell nor Eva Mitchell took part in these negotiations. On March 9, 1973, two documents were signed

with respect to the purchase of the equipment. First, a fixtures disclaimer was signed by William Meusch, Elizabeth Meusch, Adrian Mitchell, and Eva Mitchell. Also signed on that day was a statement of disclosure with respect to the financing of the purchase price, and this statement was signed by Larry Mitchell, JoAnn Mitchell, Adrian Mitchell, and Eva Mitchell.

Larry Mitchell, Adrian Mitchell, Eva Mitchell, and Bob Litz were present at the home of Adrian Mitchell at the time the installment sale contract was signed on August 10, 1973. The equipment had actually been delivered and placed in operation approximately the last week in June of 1973. The uncontroverted evidence is that Larry Mitchell told his parents their signatures were necessary in order for the sale to be completed. There is some additional evidence that there was a further explanation of the installment sale contract. Larry Mitchell testified the document was folded over at the time of execution so that the defendants, Adrian and Eva Mitchell, would not actually see the large figures involved.

This being a contract action, plaintiff's prima facie case consists of proof of the execution of a contract, performance, failure to pay, and amount due. Matters involving lack of intent, no legal or valuable consideration, or no interest in the property under a sale contract must be pleaded by a defendant, who thereafter has the burden of proof respecting such issues.

Instruction No. 7 placed the burden of proof upon the plaintiff to establish by a preponderance of the evidence the untruth of the defendants' defenses. This instruction was clearly erroneous, a misstatement of the law, and so prejudicial to the plaintiff that it requires reversal.

It is not necessary to consider plaintiff's other as-

signments of error in view of the court's finding.

REVERSED AND REMANDED FOR A NEW TRIAL.

GUY R. PATTON, APPELLEE, V. ELIZABETH A. PATTON, APPELLANT.

279 N. W. 2d 627

Filed June 5, 1979. No. 42271.

1. **Divorce: Appeal and Error: Witnesses.** In an appeal of an action for dissolution of a marriage, the Supreme Court is required to try the case de novo and reach independent conclusions on the issues presented by the appeal without referring to the conclusions or judgment reached in the District Court. While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of facts rather than the opposite.
2. **Divorce: Alimony: Property.** The rule for determination of alimony or division of property in dissolution actions provides no mathematical formula by which such an award can be determined and, generally speaking, awards vary from one-third to one-half the property involved depending on the facts and circumstances in each particular case.
3. ____: ____: ____. A judgment of the trial court making a distribution of property and fixing the amount of alimony will not be disturbed on appeal unless it is patently unfair on the record.

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

William M. Connolly of Conway and Connolly, for appellant.

State & Yeagley, for appellee.

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

KNEIFL, District Judge.

This is an action for dissolution of marriage brought by Guy R. Patton, petitioner and appellee, against Elizabeth A. Patton, respondent and appellant. The trial court found the marriage to be irre-

trievably broken, made a property division between the parties, and awarded the respondent alimony and attorney's fees. The respondent filed a motion for new trial which was overruled and she now appeals. We affirm the decree of the District Court. The question on appeal was the division of the property and the amount of alimony granted the respondent.

Guy R. Patton, hereinafter referred to as petitioner, and Elizabeth A. Patton, hereinafter referred to as respondent, were married at Lusk, Wyoming, on the 10th day of September 1947. At the time of the trial of the dissolution proceedings, both were 57 years of age. The petitioner had completed the eighth grade and the respondent had received a high school education. It was the petitioner's first marriage and respondent's second marriage. The respondent's first husband was killed during World War II while in the military service. After the marriage of the parties, they resided at Franklin, Nebraska, where the petitioner was employed as a body and fender man at a motor company located in Franklin, Nebraska. Neither party brought into the marriage any real property. The respondent had some proceeds from her deceased husband's life insurance policy in a disputed amount. Immediately after the marriage the parties rented their home and petitioner continued his employment as a body and fender man for a short time. He subsequently purchased equipment and opened a body and fender shop. Some of the respondent's money from the insurance proceeds was used to purchase equipment for the shop. The petitioner sold the body and fender business in 1951, rented some farm ground, and commenced a farming operation. The petitioner borrowed farm machinery from his father to begin the farming operation. The parties continued a ranching and farming operation until the time of the commencement of the dissolution action in December of

1977. The respondent and her brothers received an inheritance in 1956. In 1957, the respondent and her brothers divided the inheritance and, as respondent's share, she received 320 acres of pastureland and $6,500 in cash. During the marriage the parties also acquired the following real estate: 294 acres of farm ground and an additional 480 acres of pastureland. In 1967 and 1969, the parties purchased a home and 6 acres surrounding it. They also acquired personal property. There is a conflict in the evidence as to the value of the parties' holdings at the time of the commencement of the dissolution action.

Evidence was received as to the value of the parties' holdings from petitioner's appraiser as follows: The 320 acres of pastureland inherited by Mrs. Patton, $81,600; the resident property (6 acres), $28,500; a 1977 Chevrolet Caprice automobile, $5,000; household goods and personal effects of the parties, $8,563; the 294 acres, $161,575; the 480 acres of pastureland, $115,200; and farm machinery, a 1978 Chevrolet pickup, and a 1963 Ford truck, $33,900.

Evidence was received as to the value of the parties' holdings from respondent's appraiser as follows: The 320 acres inherited by Mrs. Patton, $81,600; the resident property (6 acres), $28,000; the 1977 Chevrolet Caprice automobile, $5,000; the household goods and personal property, not appraised; the 294 acres, $169,150; the 480 acres of pastureland, $127,200; and the farm machinery, the 1978 Chevrolet pickup, and the 1963 Ford truck, $38,615.

In addition, the parties had, in cash, $109,773.21, and respondent had either $3,000 or $3,600 in her checking account depending upon which version of the testimony was accepted.

Respondent, during the marriage, was not employed outside the home, but she performed the duties of a housewife and assisted her husband in the farming and ranching operation. From 1951, peti-

tioner devoted his full time to the farming and ranching operation.

No children were born of the marriage. However, during the marriage a retarded child was adopted by the parties, who at the time of trial was a ward of the state, and neither party had any obligation for the support of the child. At the time of the trial the parties owed no debts.

The trial court, in June of 1978, entered an order dividing the property as follows: To the respondent, Mrs. Patton, the 320 acres of pastureland valued at $81,600, a lump sum award in the amount of $50,000, the 1977 Chevrolet Caprice automobile valued at $5,000, the residence and 6 acres valued at $28,500, the household furnishings and personal property in her possession valued at $5,353, and her checking account valued at $3,000 or $3,600, whichever testimony was accepted by the trial court. She was also awarded alimony in the amount of $300 per month to continue until such time as she remarries, becomes deceased, or there is further order of the court.

To the petitioner, the remainder of the real estate which was 294 acres of farmland and the 480 acres of pastureland, personal property in the petitioner's possession in the amount of $3,210, the farm machinery and equipment, including the pickup and truck, valued at $33,900, and the balance of cash on hand in the amount of $56,173.21.

The record discloses that during the marriage all business was transacted from a joint banking account. The net income of the parties for the year 1975 was $9,662, for the year 1976 was $18,995, and for the year 1977 was $14,523.

At the time the trial court entered its order dividing the property, the petitioner had disposed of all the livestock from the ranching operation. However, he had planted the 1978 crop.

There is a dispute in the record as to the relative contribution by the petitioner and respondent to the

farming and ranching operation during the marriage. Evidence was received by the trial court to the effect that for the past 15 years, prior to the commencement of the dissolution proceedings, respondent was in poor health suffering either from a nervous condition or addicted to the use of alcohol.

Respondent contends on appeal that the division of the marital property and award of alimony is patently unfair and indicates the trial court abused its discretion in awarding the division of property and the amount of alimony.

In an appeal of an action for dissolution of a marriage, the Supreme Court is required to try the case de novo and reach independent conclusions on the issues presented by the appeal without referring to the conclusions or judgment reached in the District Court. § 25-1925, R. R. S. 1943; Barnes v. Barnes, 192 Neb. 295, 220 N. W. 2d 22; Seybold v. Seybold, 191 Neb. 480, 216 N. W. 2d 179. However, this court has said while in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of facts rather than the opposite. Tavlin v. Tavlin, 194 Neb. 98, 230 N. W. 2d 108.

The trial court in this case divided the property and gave the respondent an award of alimony as hereinbefore set forth. In Mangum v. Mangum, 197 Neb. 350, 249 N. W. 2d 207, and Sullivan v. Sullivan, 192 Neb. 841, 224 N. W. 2d 542, this court held that the division of property and the issue of alimony may be considered together.

Using the mortality tables in volume 2A of Nebraska Reissue Revised Statutes of 1943, p. 997, the respondent has a life expectancy of 15.59 years and the alimony granted the respondent at $300 per month computes to a total of $56,124. Considering the alimony awarded with the real and other personal property granted the respondent, regardless of

which appraisal was accepted by the trial court, it amounts to approximately a 40-60 split between the respondent and the petitioner. The rule for determination of alimony or division of property in dissolution actions provides no mathematical formula by which such an award can be determined and, generally speaking, awards vary from one-third to one-half the property involved depending on the facts and circumstances in each particular case. Kula v. Kula, 181 Neb. 531, 149 N. W. 2d 430; Grummert v. Grummert, 195 Neb. 148, 237 N. W. 2d 126; Blome v. Blome, 201 Neb. 687, 271 N. W. 2d 466.

The division made by the District Court in this case falls well within the guidelines established by the numerous decisions of this court. At the time the trial court entered its order dividing the property, the petitioner had disposed of the livestock in the ranching operation. The trial court in its decree awarded the petitioner the balance of the cash, the farmland, the 410 acres of pastureland, and the machinery, all of which are necessary if the petitioner is to continue his farming and ranching operation. The record reveals that the parties' income is derived 50 percent from raising cattle in the ranching operation and 50 percent from the farming operation. In Olson v. Olson, 195 Neb. 8, 236 N. W. 2d 618, this court stated that where a wife is awarded alimony the court should divide the property in such a manner as to permit the husband the means of paying the judgment awarded to the wife. The record in this case clearly reflects that the petitioner, without the ranching and farming operation, has no means of producing income to pay the alimony award to the respondent.

A judgment of the trial court making a distribution of property and fixing the amount of alimony will not be disturbed on appeal unless it is patently unfair on the record. Tavlin v. Tavlin, *supra*.

In reviewing the division of the property and the

award of alimony made by the trial court, and considering the record as a whole, it is well within the guidelines established by this court. The decree of the District Court is correct and is therefore affirmed.

AFFIRMED.

GEORGE W. SLAMA, APPELLANT, V. WILMA M. SLAMA, APPELLEE.

280 N. W. 2d 633

Filed June 5, 1979. No. 42287.

1. **Divorce: Property: Decrees.** In a contested proceeding for dissolution of marriage, upon proper and timely request being made for determination of value of property being awarded to the parties, the trial court shall state in writing the conclusions of fact found separately from the conclusions of law.
2. **Divorce: Property: Jurisdiction.** Where one of the parties to a marriage places property beyond the reach of the other party, and thus forestalls a division of the property, that action does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets.
3. **Divorce: Property: Alimony.** The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts in each case and the courts will consider all pertinent facts in reaching an award that is just and equitable.
4. **Divorce: Alimony.** When a 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. The ultimate test of alimony provisions is one of reasonableness.
5. **Divorce: Witnesses: Appeal and Error.** In an appeal from a decree of dissolution of marriage, 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.
6. **Divorce: Alimony: Property: Appeal and Error.** An award of alimony or distribution of property may be altered on appeal where the record reflects good cause.

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

Miles W. Johnston, Jr. and Johnston, Grossman, Johnston, Barber & Wherry, for appellant.

Jerry L. Snyder, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and TESAR, District Judge.

TESAR, District Judge.

This is an appeal by the petitioner-husband from a division of property and an award of alimony pursuant to a decree for dissolution of marriage.

The parties had been married for 30 years at the time of trial. Three children were born of the marriage, all of whom are of legal age or emancipated. Both parties at the time of trial were age 51, and the husband was self-employed and engaged in the grading business. Respondent-wife was employed as a waitress, having no special skills, and her only training or experience for future employment would be working at a soda fountain or in a restaurant. She is presently employed at the Nebraska Student Union and earns a salary of $180 every 2 weeks. She has health problems, which include a nervous condition for which she is taking medication, and she is suffering from varicose veins, aggravated by her present employment which requires standing on her feet for long periods of time. The petitioner, on the other hand, recently underwent a physical examination and was found to be in good health. He owns and operates his own grading business, which is seasonal in nature, but in winter months he engages in snow removal for local business establishments.

At the time of trial the only witnesses who testified with reference to the parties' property, their earnings, and the value of their holdings were the two litigants. During the course of the marriage the par-

ties accumulated a great number of valuable antiques. Among these properties was a 1907 Ford automobile which had been given to petitioner by his father during the course of the marriage, but which the petitioner reconveyed to his father after the divorce proceedings were instituted. Petitioner also removed many other valuable antiques from the residence of the parties, and the court was asked to determine their value, without the aid of expert advice. A decree was entered granting a division of the parties' assets and granting alimony to respondent in the sum of $200 per month for a period of 5 years.

At the very outset, we wish to point out that the evidence with reference to the value of various items of property, both real and personal, is conflicting and is less than satisfactory for the purpose of making an absolutely accurate determination as to the fairness of the division and the award by the trial court. While it is difficult to determine with absolute accuracy from the record before us, without expert advice, the value of the property of the parties, the record would support as follows:

Awarded to wife	**Valuation**
House of parties	$ 22,500
Automobile (equity)	700
Household furnishings, including antique pump organ and antique dishes	5,500
Antique watches	500
Awarded to husband	
Balance due on land contract	10,000 to 10,400
Business and business assets	12,000
Automobiles	800
Coin collections (antique)	3,000
Gun collection (antique)	2,500
Antique (1) canes, (2) marble game, (3) desk, and a movie camera, projector, and screen	no valuation shown
Antique 1907 Ford auto	5,000

In addition to the above distribution, petitioner was required to pay the indebtedness for back taxes and special assessments on the real property awarded to respondent, which amounted to approximately $1,300, and to pay her counsel fees in the sum of $750.

Petitioner's first assignment of error relates to the court's failure to set forth in its decree specific findings as requested by him, on motion, subsequent to trial, relative to the value of the real and personal property divided between the parties. This court is aware of section 25-1127, R. R. S. 1943, which provides, in substance, that when requested the court shall state in writing the conclusions of fact found separately from the conclusions of law in a law action tried to the court without a jury. It is true that said findings and conclusions are for the benefit of the litigants, their counsel, and for a reviewing court. In Dormer v. Dreith, 145 Neb. 742, 18 N. W. 2d 94, this court held that when such request is made, *even in an equity case*, the court should accede to the request. In this case, the only witnesses as to value were the petitioner and respondent, and since this is a trial de novo on the record made, we find no prejudicial error and proceed to decide the matter. We do now hold, however, in future contested proceedings for dissolution of marriage, that upon proper and timely request being made for determination of value of property being awarded to the parties, the trial court shall state in writing the conclusions of fact found separately from the conclusions of law. In this connection, this court finds that the 1907 Ford automobile, which was conveyed back to petitioner's father after the divorce proceedings were commenced, must be charged against the petitioner's share of the marital estate. In Baker v. Baker, 201 Neb. 409, 267 N. W. 2d 756, this court said: "The determination of one of the parties to a marriage to place property beyond the reach of the other party,

and thus forestall a division of the property, does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets."

Since the main thrust of petitioner's appeal centers on the propriety of the property division and the award of alimony, we cite the established holdings of this court in that regard. In Pfeiffer v. Pfeiffer, *ante* p. 137, 277 N. W. 2d 575, we said: "The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts in each case and the courts will consider all pertinent facts in reaching an award that is just and equitable." To the same effect, see Hanisch v. Hanisch, 195 Neb. 204, 237 N. W. 2d 407. In Baker v. Baker, *supra,* this court said: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be *reasonable,* having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment. The ultimate test of alimony provisions in a decree of dissolution is one of reasonableness." (Emphasis supplied.)

In Brus v. Brus, *ante* p. 161, 277 N. W. 2d 683, this court said: "In an appeal from a decree of dissolution of marriage, 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." See, also, Blome v. Blome, 201 Neb. 687, 271 N. W. 2d 466.

And finally, in Hermance v. Hermance, 194 Neb. 720, 235 N. W. 2d 231, we said: "An award of alimony or distribution of property may be altered on appeal where the record reflects good cause."

While it is difficult to determine accurately from the record the value of the property awarded to each

party, it would seem that the court intended the additional award of alimony to be considered as part of the total adjustment between the parties. The most important consideration here is whether the income of the petitioner is sufficient to carry out the court's intention as expressed in the decree. We do not think petitioner can "cut the mustard" on the basis of this record of his earnings. In order to provide him some measure of relief, in view of the fact he must pay the back taxes on the realty awarded to respondent as well as the attorney's fee awarded in the decree, we feel the alimony award should be reduced to $100 per month for a period of 5 years. For all practical purposes, this division of the property and alimony results in an even distribution of the assets of the parties. We feel that the facts of this case constitute good cause for modifying the decree of the trial court in order to accomplish the objective sought by the court for the benefit of both parties.

Accordingly, the decree of the trial court is modified to require petitioner to pay alimony at the rate of $100 per month for a period of 5 years. Costs are taxed to petitioner, including a $350 attorney's fee for respondent's counsel for services in this court.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. SHERMAN WILLIAMS, APPELLANT.

279 N. W. 2d 847

Filed June 5, 1979. No. 42299.

1. **Evidence: Hearsay.** Hearsay evidence is not admissible except as otherwise provided by the statutes of this state.
2. **Evidence: Appeal and Error.** An error in ruling on the admissibility of evidence will not constitute ground for reversal unless the evidence is prejudicial.

3. **Witnesses: Appeal and Error.** The credibility of witnesses is for the trier of fact to determine and not for the Supreme Court on appeal.

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

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

Gary P. Bucchino, Omaha City Prosecutor, Robert Spagnola, and Richard M. Jones, for appellee.

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

CLINTON, J.

The defendant was charged in the municipal court of the city of Omaha with violation of section 25.61.010 of the city code in that, on May 29, 1978, at or near 1802 Farnam Street in the city of Omaha, he "did unlawfully loiter or prowl in a place, at a time or in a manner not usual for law abiding individuals under circumstances that warranted alarm for the safety of persons or property in the vicinity." The ordinance here involved is apparently the loitering ordinance which was the basis of one of the charges in State v. Korf, 201 Neb. 64, 266 N. W. 2d 86. Defendant was found guilty in the municipal court and sentenced to a term of 30 days in jail. He appealed to the District Court where the judgment was affirmed.

On appeal to this court he makes the following assignments of error: (1) The court erred in admitting hearsay evidence. (2) The evidence was insufficient to support the conviction.

The evidence shows that, on May 29, 1978, at about 5:30 a.m., Omaha police officers responded to a call from the ticket agent at the bus terminal located at the address described in the charge. The officers were advised by the ticket agent that a man had entered the women's restroom in the station and at-

tempted to enter a stall occupied by a female patron. The court overruled an objection to the testimony of the officer as to what the complaint of the agent was. The trial court's ruling on the objection indicated that it regarded the testimony as merely foundational for the apparent purpose of showing why the officer went to the bus depot on that particular occasion. The evidence further showed the agent gave the officers a description of the individual involved and also told them that when he last saw the man he was climbing the staircase toward the restrooms. The officers then went to the ladies' restroom. One of them knocked and shouted and, receiving no response, entered the restroom. The officer found the defendant in one of the stalls. The defendant was asked to identify himself which he did by producing a social security card. He was then asked to explain his presence in the ladies' restroom. He answered he had entered the restroom to sleep, believing he would not be disturbed.

At trial the defendant took the stand in his own behalf and explained his presence in the depot at the time of the alleged offense by saying he had received a telephone call from an acquaintance asking that he come to the station to "see them off." He further stated that when he got to the station the person, whose last name he did not know and whose first name was Robinson, was not there. The defendant accounted for his presence in the women's restroom by explaining he had diarrhea, the men's restroom stalls were all occupied, and he entered the women's room out of necessity. He stated he did not make that explanation to the officers at the time he was found because he was embarrassed at having been found in the ladies' restroom. He had been at the bus depot for about 2 hours and knew that at that time no buses were running.

During the direct examination of the officer, the prosecutor, referring to the time immediately after

the defendant had been found and arrested, asked: "What happened next?" to which the officer responded: "We took the party downstairs and had the ticket agent verify that this was the party that he had seen and had been asked to leave by the off duty officer earlier in the morning. As we were taking the party outside after being placed under arrest, we were approached by a female who lives in Cleveland, Ohio, if I'm not mistaken, and she stated that the party had tried to enter the stall while she was . . ." At that point objection was made by counsel and the objection was sustained.

The statements of what the ticket agent told the officers were hearsay as were the statements of what the officer was told by the lady from Cleveland. Objection to the latter's statement was sustained by the court and, since trial was to the judge without a jury, it will be presumed the court disregarded that evidence.

Section 27-802, R. R. S. 1943, provides: "Hearsay is not admissible except as provided by these rules or by other rules adopted by the statutes of the State of Nebraska." The hearsay statement of the ticket agent did not come within any of the exceptions described in the pertinent sections of the statute, to wit, sections 27-803 and 27-804, R. R. S. 1943. The question, therefore, is whether the erroneous admission of the evidence was prejudicial. We find it was not for these reasons: (1) The undisputed fact is that the defendant was found in the women's restroom and admitted it. (2) The fact that the hearsay statement tended to establish the defendant had done the same thing earlier could have had no significant bearing on the court's finding, especially in the light of the defendant's contradictory explanation of his activities. It was for the judge as the trier of fact to determine the credibility of the defendant's explanations. He obviously did not believe them.

The defendant's claim that the evidence is insuffi-

cient to support the charge really argues credibility. Defendant points to these factors in the evidence. The bus station is a public place; it appears not to have been crowded; there is no evidence there were any females in the station at the time; and the defendant's explanation of his presence in the women's restroom is not unreasonable, as there was no evidence to contradict his statement that the men's restroom was fully occupied. He concludes, therefore, there was no evidence the defendant was causing alarm for the safety of persons or that he was in a place not usual for law-abiding citizens.

Questions of credibility, as we have noted, are for the trier of fact and not for this court on appeal. There is no requirement in the ordinance that any person be actually alarmed by the conduct, only that the circumstances, to wit, time, place, or manner of the loitering or prowling, are not usual for law-abiding individuals and warrants alarm for safety. The presence of a male in the public female restroom where women are likely to enter at any time is, in the absence of a credible explanation, sufficient to warrant alarm.

The finding of the trial court is supported by the evidence.

AFFIRMED.

ILA M. MUELLER, APPELLEE, V. OTTO MUELLER, APPELLANT.

279 N. W. 2d 631

Filed June 5, 1979. No. 42342.

1. **Divorce: Conciliation.** It is only when there exists a reasonable possibility of reconciliation that the statutes require efforts to effect reconciliation to be made.
2. **Divorce: Witnesses: Appeal and Error.** In an appeal from a decree of dissolution of marriage, this court, in reaching its own find-

ings, 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.

3. **Divorce: Property.** The rules for determining a division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be determined.
4. ____: ____. This court on appeal is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.
5. ____: ____. The distribution 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.

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

William J. Panec, for appellant.

John McArthur, for appellee.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and TESAR, District Judge.

TESAR, District Judge.

This is an appeal by respondent-husband from the division of property pursuant to a decree for dissolution of marriage.

The trial court entered a decree finding the marriage was irretrievably broken, and that the parties contributed approximately equal efforts in the accumulation of the real and personal property which they possess. Petitioner-wife was awarded her personal effects, furniture and furnishings in her possession, and her Ford automobile, with the following investments to also be hers: Checking account, $228; savings account, $693.88; savings certificate, $4,258.99; savings certificate, $3,289.18; and savings certificate, $1,798.70. The last certificate, the evidence discloses, was being held by the petitioner as trustee for her brother.

The respondent was given his Plymouth automobile, a Schwinn bicycle, his personal effects, and the following investments: Checking account, $15,000;

savings account, $8,000; farmers co-op stock, $25; policy, cash value, $13,800; and policy, cash value, $534.37.

The court found that each party was responsible for his or her respective debts except the appraisal fee for appraising their realty which was to be paid equally. The court found the value of their real estate to be $432,000 and that respondent would have the option to retain the real estate, if he wished to do so, by paying the petitioner the sum of $216,000 on or before November 1, 1978, and, if respondent elected to do so, he would receive the landlord's share of the 1978 income from the farm. The court found that if respondent did not elect to purchase the petitioner's share, then the farm should be sold at auction and, after deducting the expenses of sale, the remaining proceeds should be equally divided between the parties and the 1978 net income from the landlord's share should be divided equally. Each party was held to be responsible for his or her attorney's fees.

The parties were married for nearly 37 years at time of trial. It was the first marriage for each of them. Two children were born as a result of the union, a son and daughter. The son was killed in a car-train accident in 1969. The respondent was by occupation a farmer until he became ill with multiple sclerosis in 1965. He was 62 years of age at trial time. The petitioner was 58 years of age, not in good health, but not under a doctor's care at time of trial. She was employed, and had been for many years, and earned approximately $3.50 per hour for a 40-hour week. Respondent for many years had collected and kept all the farm and interest income, and the petitioner kept her earnings from her work in Lincoln, Nebraska, while the respondent stayed in Fairbury, Nebraska.

The evidence conclusively shows the husband was a good farmer, but the wife worked alongside of him, doing farmwork plus her household work.

They worked together, earned the money to buy all of their land, and owned 320 acres at the time of trial. It is true the husband had some farm equipment at the time of the marriage and he did inherit approximately $13,500 from his parents' estates. In 1965, the husband took sick with multiple sclerosis and never worked again. It was then that he appeared to give up. It was a case of a young couple starting with practically nothing, working diligently, and acquiring, by their joint efforts, a sizeable farm. Respondent became afflicted by an unfortunate disease, but from the record it appears that he has overreacted. He refused to help himself or let anyone help him. He assumed the role of a total cripple, and his personality became unbearable. The petitioner was compelled to leave the house, but she did everything possible to help her husband and try to preserve the marriage.

Respondent now urges two main assignments of error: (1) That reasonable efforts to effect reconciliation were not made, and (2) division of the property was not just.

With reference to the attempts at reconciliation, the record indicates the petitioner made every possible effort to save her marriage and met nothing but rebuffs from her attempts. After respondent contracted multiple sclerosis, he was depressed and took no interest in anyone or anything. It was at his urging that she was required to get a job. She consulted the minister and the doctor to help save the marriage, and ultimately had counseling with the conciliation court, all to no avail. The record nowhere indicates the slightest attempt or desire on his part to reconcile, or to do anything constructive. The situation in this case is governed by what we said in Condreay v. Condreay, 190 Neb. 513, 209 N. W. 2d 357: "It is only when there exists a reasonable possibility of reconciliation that the statutes require efforts to effect reconciliation to be made."

There was no such possibility in this case, and that assignment of error is without merit.

With reference to respondent's assignment of error relative to the division of property, we have but to quote what this court has so many times announced as the law, most recently repeated in Brus v. Brus, *ante* p. 161, 277 N. W. 2d 683: "In an appeal from a decree of dissolution of marriage, 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 rules for determining a division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be determined. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record." To the same effect in Pfeiffer v. Pfeiffer, *ante* p. 137, 277 N. W. 2d 575, we said: "The * * * distribution 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." See, Tavlin v. Tavlin, 194 Neb. 98, 230 N. W. 2d 108; Fanning v. Fanning, 194 Neb. 821, 235 N. W. 2d 878.

There has been no abuse of discretion here. The rules above announced are especially applicable in this case. Respondent complains that the court should have, in some manner, permitted him to buy out petitioner's interest in the farm. The court actually did that very thing, but respondent chose to ignore it. This case in no fashion whatsoever meets the criteria of being patently unfair. It is apparent, however, that a great deal of careful thought went into the court's determination of this case in its attempt to properly distribute the parties' assets.

We therefore affirm the court's decision in this case in all particulars, but find that the decree must be now modified with reference to the sale of the

real estate and the division of the 1978 farm income. Respondent is hereby given 30 days from the date of the filing of the mandate in the District Court to exercise his option, in writing, to purchase the petitioner's share of the real estate. The farm income for 1978 shall be divided equally between the parties. Costs, including an attorney's fee of $750 allowed petitioner's attorney for services in this court, are taxed to the respondent.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH KRAMER, APPELLANT.

279 N. W. 2d 634

Filed June 5, 1979. No. 42384.

1. **Criminal Law: Judges: Sentences.** 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 the punishment to be imposed and the judge may consider probation reports, police reports, affidavits, and other information, including his own personal observations.
2. **Criminal Law: Sentences.** Disparity in sentences of codefendants does not of itself indicate denial of due process.
3. **Criminal Law: Sentences: Witnesses.** Failure of the trial court to disclose prior to sentencing that it does not accept defendant's statement that he was not the mastermind of crime involving several defendants does not preclude the court from considering that fact in sentencing.

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

Larry R. Baumann, for appellant.

Paul L. Douglas, Attorney General, and Linda A. Akers, for appellee.

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

WHITE, J.

This is an appeal from a denial of post conviction relief. After hearing, the trial court refused to grant relief and the defendant appeals.

The defendant makes two assignments of error in this court: (1) That the defendant was denied due process of law by the failure of the trial court to advise the defendant of the court's feelings that the defendant was the leader in a series of grand larcenies for which the defendant was being sentenced; and (2) that the defendant was denied due process in that he was more severely punished than a codefendant when no basis existed for a disparity in sentence. We affirm.

The defendant, as part of a plea bargain, plead guilty to one count of grand larceny and one count of aiding and abetting a grand larceny in connection with a series of thefts and subsequent sales to salvage yards of aluminum products from Kroy Metal Products of York, Nebraska. Two other counts of grand larceny were dropped. The total value of the aluminum stolen in the various thefts was in excess of $5,000.

The defendant was sentenced to terms of from 2 to 5 years imprisonment on each of the two counts, the sentences to run concurrently. Delbert Kramer, brother of the defendant, was a codefendant below. At the hearing on the defendant's unsuccessful motion for new trial, the trial judge at one point said: "I don't believe there is any question, there was no question in my mind that Kenneth Kramer was the person who masterminded the complete operation, on that basis, I felt that the sentence that was imposed on him was justified." It is that statement which prompted assignment of error No. 1. At the presentence hearing, the following conversation took place: "THE COURT: Mr. Kramer, I have reviewed the presentence investigation that I ordered and that was prepared by the adult probation officer and that your attorney has reviewed.

"In this presentence investigation, the reason that was given by you at that time for the commission of the crime was that you had money problems and that you were placed in the position by your brother that made it necessary for you to participate in this crime or these crimes.

"Now there seems to be some variance of opinion between your brother and yourself as to who was responsible for these matters. Do you have anything you want to add on that? MR. KRAMER: Your Honor, all I can say is that it was started before I even knew anything about it and at the time that it was started, I was working and then I was laid off and placed in a position of not having a place to stay, no money for the place to stay, I was thoroughly confused, it was done out of the action of a need of a place to stay and that was about it. THE COURT: Well, are you maintaining your position that you were prevailed upon to participate in these crimes? MR. KRAMER: Yes, Your Honor. THE COURT: That you had nothing to do with the planning? MR. KRAMER: Yes, Sir. THE COURT: You did have a choice, didn't you? MR. KRAMER: Yes."

The defendant thus had ample opportunity and did present his position that he was pressured into a crime which was planned by someone else. The sentencing judge did not believe him. The fact that this was not announced at the time of defendant's statement was not prejudicial. In considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to demeanor, attitude, and all facts and circumstances surrounding the life of the defendant. See State v. Miller, 199 Neb. 19, 255 N. W. 2d 860. A sentencing judge has broad discretion as to the source and type of evidence or information which may be used as as-

sistance in determining the kind and extent of the punishment to be imposed and the judge may consider probation officer reports, police reports, affidavits, and other information, including his own personal observations. See, State v. Holzapfel, 192 Neb. 672, 223 N. W. 2d 670; State v. Miller, *supra*. The defendant asks us, in effect, to promulgate a rule that the trial court be disqualified from sentencing when, after assertions are made on the relative involvement of the parties in a crime, the court makes a judgment based on the information available to it, and that the court should somehow be thereafter prohibited from sentencing. There is no such rule and we do not propose to promulgate one. Defendant has no previous felony record; however, as stated by the court: "The presentence investigation report, Mr. Kramer, indicates that while you have not been convicted of any felonies, that you have had a considerable amount of contact with law enforcement officers involving problems with infractions of the law or law enforcement agencies.

"It leads me to believe that you really have not adjusted to any kind of a regulated society that we live in and presently, doesn't appear to me that you are a contributing citizen to the society that we live in."

The defendant previously had two misdemeanor convictions and had been the subject of numerous complaints, many later withdrawn and some dropped, involving destruction of property, disorderly conduct, and fighting. In addition, it was the opinion of the probation officer and amply demonstrable from the presentence investigation report that the defendant had lied to the probation officer concerning the term of his employment with his last employer and the reason for its termination. We find there is no merit to the first assignment of error.

We find no basis in the record on which we could examine the second assignment of error. The de-

fendant makes reference in his brief to the fact that a codefendant, his brother, had a previous conviction and penitentiary sentence some 15 years before. It is on this basis that he claims there was a disparity of sentence amounting to a violation of due process of law. In State v. Javins, 199 Neb. 38, 255 N. W. 2d 872, this court set aside a sentence as excessive on comparing it with a sentence of a codefendant in the same crime. In State v. Javins, *supra,* we were supplied in this court with a transcript of the record of the codefendant, of which we agreed to take judicial notice. We have no method of comparing the record and sentence of the defendant in this case with that of his codefendant. We are not prepared to state that the sentence was excessive. A sentence imposed within statutory limits and an order which denies probation will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court. See State v. Freeman, 201 Neb. 382, 267 N. W. 2d 544.

Section 29-2261, R. R. S. 1943, sets out a number of factors to be considered prior to imposition of a prison term as opposed to probation. It is obvious from the record and the presentence investigation report that the trial court considered each of these matters and resolved them against the defendant. The defendant's sentence is not excessive and regardless of any disparity with the sentence of the codefendant we are not prepared to say that the sentence should not be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN F. KRETCHMAR, APPELLANT.

280 N. W. 2d 46

Filed June 12, 1979. No. 41730.

1. **Motor Vehicles: Stop and Check: Searches and Seizures: Constitutional Law.** Except where there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for a violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment to the Constitution of the United States.
2. **Motor Vehicles: Stop and Check: Searches and Seizures.** A state may develop acceptable methods for spot checking the validity of motor vehicle registrations and operators' licenses that involve little intrusion or do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one acceptable alternative.

Opinion of July 5, 1978, withdrawn. Judgment of trial court reversed and remanded with instructions to dismiss.

KRIVOSHA, C. J.

On July 5, 1978, this court filed its opinion in the case of State v. Kretchmar, 201 Neb. 308, 267 N. W. 2d 740, affirming the conviction of the defendant for possession of marijuana weighing more than 1 pound; possession of marijuana with intent to manufacture, distribute, deliver, or dispense; and possession of cocaine. Thereafter, the United States Supreme Court granted the defendant's petition for a writ of certiorari, and the case was duly filed with the Supreme Court.

While pending, the Supreme Court of the United States decided the case of Delaware v. Prouse, 440 U. S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). The decision of the Supreme Court in the Prouse case has direct effect upon our decision in State v. Kretchmar, *supra*. The Supreme Court of the United States vacated and remanded for further consideration the

instant case on the basis of its decision in the Prouse case.

Accordingly, our opinion entered in the above-entitled matter on July 5, 1978, is now withdrawn, and the judgment of the trial court is reversed and the cause remanded with instructions to dismiss.

OPINION OF JULY 5, 1978, WITHDRAWN. JUDGMENT OF TRIAL COURT REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.

WARD BRANHAM, APPELLEE, V. RICHARD MCGINNIS, APPELLEE, IMPLEADED WITH GILBERT GIBREAL, APPELLANT.

280 N. W. 2d 47

Filed June 12, 1979. No. 42073.

1. **Corporations: Fraud.** The general rule is that a corporation will be looked on as a legal entity until sufficient reason to the contrary appears; that is, when the notion of legal entity is used to justify wrong and protect fraud.
2. _____: _____. Where various corporations, substantially owned by one individual, are but instrumentalities through which such individual transacts his business, and, where such corporations are used as a cloak or shield to perpetrate a fraud, a court of law will examine the whole transaction, looking through corporate forms to the substance of things to protect the rights of innocent parties and to circumvent fraud.
3. **Frauds, Statute of: Agreements.** Where the leading object or main purpose of a party promising to pay the debt of another is to promote his own interests, and not to become a guarantor, and the promise is made on sufficient consideration, the statute of frauds is not applicable and the promise will be valid although not in writing.

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

Marks, Clare, Hopkins & Rauth, for appellant.

Joseph A. Troia of Troia Law Offices, P.C., for appellee Branham.

Heard before KRIVOSHA, C. J., MCCOWN, and WHITE, JJ., and KORTUM and FAHRNBRUCH, District Judges.

KORTUM, District Judge.

This is an action brought by plaintiff, Ward Branham, for a money judgment against the defendants, Richard McGinnis and Gilbert Gibreal. The municipal court of the city of Omaha entered judgment against both defendants. Upon appeal the District Court affirmed the municipal court judgment.

In August of 1975, the defendant McGinnis wanted to borrow $3,500 from the defendant Gibreal to start a horse feed-store business. At that time McGinnis owed $1,200 to the Gibreal Auto Leasing company. Before Gibreal would loan the $3,500 to McGinnis, Gibreal wanted the $1,200 loan repaid. McGinnis asked the plaintiff Branham to loan him, McGinnis, the $1,200 owed to Gibreal Auto Leasing company. McGinnis told Branham that he would pay Branham back out of the proceeds of the new $3,500 loan he was to receive from Gibreal.

Branham testified that when he contacted Gibreal about the transaction, Gibreal orally promised that if the $3,500 loan was not made to McGinnis, he, Gibreal, would return the $1,200 to Branham. Branham further testified that Gibreal guaranteed the repayment to him if McGinnis failed to pay back the $1,200 or any part thereof.

McGinnis only paid $500 back to Branham. Branham then went to Gibreal for the additional $700. Gibreal gave Branham a $700 draft on Gibreal Auto in exchange for Branham's undated personal check for $700. Branham testified that Gibreal agreed not to cash his check until such time as McGinnis paid $700 to Branham. The $700 draft on Gibreal Auto was not honored by Gibreal's bank, and Branham then returned to Gibreal who exchanged that draft for a $700 check drawn on Gibreal Auto Leasing. This $700 check was cashed by Branham on October 30, 1975. On December 22, 1975, Gibreal cashed Bran-

ham's $700 personal check although McGinnis had not paid Branham. The defendant McGinnis made no appearance in any of the proceedings herein.

On appeal the defendant Gibreal contends as follows: (1) That the District Court erred in determining that Gibreal was a proper party defendant in his individual capacity instead of Gibreal Auto Sales, Inc.; and (2) that the District Court erred in holding that the statute of frauds was not applicable to the facts in this lawsuit.

It is clear that the $1,200 check which plaintiff Branham gave to defendant Gibreal on August 29, 1975, was made out personally to Gilbert Gibreal and not to any corporation. There are other documentary exhibits which would support the contention of Gibreal that this was a corporate transaction. However, the trial court was entitled to look at the entire transaction to determine the actual relationship between the parties as opposed to the claims made by them.

It is also clear that where various corporations, substantially owned by one individual, are but instrumentalities through which such individual transacts his business, and, where such corporations are used as a cloak or shield to perpetrate a fraud, a court of law will examine the whole transaction, looking through corporate forms to the substance of things to protect the rights of innocent parties and to circumvent fraud. Massachusetts Bonding & Ins. Co. v. Master Laboratories, 143 Neb. 617, 10 N. W. 2d 501.

There is nothing inherent in the transaction between plaintiff Branham and defendant Gibreal which automatically catagorized the transaction as corporate business. The trial court properly disregarded the corporate fiction where its retention would have produced injustice and inequitable consequences.

The defendant Gibreal further contends that the

statute of frauds was applicable in this action. The promise to answer for the debt, default, or misdoings of another has been defined as an undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the original debtor continues to be liable. The purpose of section 36-202, R. R. S. 1943, as amended, is to require satisfactory evidence of such promises.

However, where the leading object of a party promising to pay the debt of another is to promote his own interests, and not to become a guarantor or surety, and the promise is made on sufficient consideration, it will be valid although not in writing. Under these facts in such a case, the promisor assumes payment of the debt. Fitzgerald v. Morrissey, 14 Neb. 198, 15 N. W. 233.

The trial court correctly admitted evidence of the transaction. This evidence discloses that the benefit derived by the defendant Gibreal was not remote or incidental but was, in fact, substantial. The $1,200 was paid directly to Gibreal and thus the consideration flowed directly to him. A review of the record shows the transaction was not an oral agreement to pay the primary debt of defendant McGinnis but that new and sufficient consideration moved to the promisor Gibreal. The case is therefore not within the statute of frauds.

The judgment of the District Court is correct in all respects and is affirmed.

AFFIRMED.

COMMODITY TRADERS, INC., A NEBRASKA CORPORATION, APPELLEE, V. KAY PALMER, APPELLANT.

280 N. W. 2d 49

Filed June 12, 1979. No. 42098.

1. **Contracts: Fraud.** Generally in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens.

2. **Courts: Appeal and Error.** It is not the province of this court to weigh or resolve conflicts in the evidence, the credibility of witnesses, or the weight to be given their testimony.

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

Terry M. Anderson and David S. Lathrop of Lathrop, Albracht & Swenson, for appellant.

James M. Woodruff and Ephraim L. Marks of Marks, Clare, Hopkins & Rauth, for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, and WHITE, JJ., and KORTUM and FAHRNBRUCH, District Judges.

FAHRNBRUCH, District Judge.

Plaintiff, Commodity Traders, Inc., brought an action against the defendant-appellant, Kay Palmer, to recover money advanced to an exchange clearinghouse to cover losses in Palmer's account by reason of Palmer's trading in futures contracts and for commissions earned. Trial was to the court, a jury having been waived, and judgment in favor of the plaintiff in the sum of $20,236.94 was entered. We affirm.

Prior to trading in futures contracts through plaintiff, defendant executed a "Commodity Signature Card" and a futures account letter.

On the commodity signature card defendant acknowledged that all transactions executed for his account would be subject to the rules and customs of the commodity exchange, that defendant would keep plaintiff secure against fluctuations of the market price of the commodities in his account, and that "in case of my failure to maintain with you at all times such margin as you may deem adequate for your protection, you may, without prior demand or notice to me, Sell and/or Purchase such commodities as you may consider necessary to fully protect my account."

In the futures account letter, defendant stated that

his futures account with plaintiff would be used for speculating, and it would be subject to speculating margin and to other regulations as prescribed for speculating accounts by the Chicago Board of Trade.

The same day the defendant executed the commodity signature card and the futures account letter, he began trading in futures contracts. A "futures contract" is a contract made on an exchange for the purchase or sale of any commodity for delivery at a future time. Basically, there are two types of accounts, a "hedging account" and a "speculating account." In each type of account, the trader must deposit with the broker a specified amount of money which is a predetermined percentage of the consideration for the futures contract. Because a "hedging" trader has the commodity on hand in which he is trading, the amount of money he must deposit is approximately 50 percent of the amount that the speculating trader would be required to deposit with the broker.

Between April 23, 1976, and June 22, 1976, defendant engaged in a substantial number of futures transactions. Until the final sales on June 22, 1976, each transaction was initiated by the defendant. At times, during fluctuations in the commodity market, defendant was undermargined. When this was brought to his attention, defendant deposited additional money with the plaintiff. For approximately 3 days prior to June 22, 1976, plaintiff's employee attempted to contact defendant due to defendant's precarious position in the market. Being unable to locate defendant, plaintiff on June 22, 1976, liquidated defendant's position, which resulted in a loss to defendant in the amount of $18,445. The difference between that figure and the amount of the judgment is prejudgment interest. Plaintiff paid the amount of defendant's losses to the clearinghouse through which it was operating and thereafter made demand upon the defendant for reimbursement. Defendant failed

and refused to reimburse plaintiff.

At time of trial, defendant primarily raised two defenses: (1) That plaintiff had illegally "churned" his account to generate extra commissions; and (2) that the claim of the plaintiff was based on an illegal wagering contract under section 28-954, R. R. S. 1943. The trial court found that plaintiff was entitled to recover commissions and other sums paid out on defendant's behalf and further found that section 28-954, R. R. S. 1943, was not applicable to this case.

Defendant assigns only one error in his appeal: "The Court below erred in finding Section 28-954 R. R. S. Neb. inapplicable to the present case."

Section 28-954, R. R. S. 1943, was in full force and effect at all times relevant hereto, but has since been repealed. Such statute provided in substance that anyone who in any way is connected with a bucket shop, including patrons, is guilty of a felony. The statute further provides: "A bucket shop is defined to be an office, store, board of trade room, or other place wherein the proprietor or keeper thereof or other person or agent, either in his or its own behalf or as an agent or correspondent of any other person, corporation, association or copartnership within or without the state, conducts the business of making or offering to make contracts, agreements, trades or transactions respecting the purchase, or purchase and sale, of any stocks, grains, provisions, cotton or other commodity or personal property, wherein such proprietor or keeper or patron contemplates or intends that the contracts, agreements, trades or transactions shall be, or may be, closed, adjusted or settled according to or upon the basis of the market quotations or prices made on any board of trade or exchange where there is competitive buying and selling, and upon which the commodities or securities referred to in such contracts, agreements, trades or transactions are dealt in, *and without a bona fide transaction on such board of trade*;

* * *." (Emphasis supplied.)

In the case at bar each transaction was a bona fide transaction on a board of trade and such definition does not apply to the case at bar.

A "bucket shop" is further defined by the statutes: "* * * or wherein such keeper, proprietor or patron shall contemplate or intend that such contracts, agreements, trades or transactions shall be or may be deemed closed or terminated, when the market quotations of prices made on such board of trade or exchange for the articles or securities named in such contracts, agreements, trades or transactions shall reach a certain figure; * * *."

There is no evidence in this case to reflect that there was a predetermined figure when it was contemplated by defendant or plaintiff that the transactions would be deemed to be closed or terminated, nor was it intended that such transactions would be deemed to be closed or terminated when the market quotations reached a predetermined figure.

A "bucket shop" is further defined by the statute: "* * * and also any office, store or other place where the keeper, person or agent or proprietor thereof, either in his or its own behalf, or as an agent as aforesaid therein, makes or offers to make, with others, contracts, trades or transactions for the purchase or sale of any such commodity, wherein either party thereto does not contemplate or intend the actual or bona fide receipt or delivery of such property, but does contemplate or intend a settlement thereof based upon differences in the price at which such property is or is claimed to be bought and sold."

Defendant testified to a silent unilateral intent not to be bound to deliver or accept commodities arising from his contracts. The credibility of defendant's testimony in that regard is for the trier of fact. Defendant agreed in writing to be bound by the rules and customs of the Chicago Mercantile Exchange

and the Chicago Board of Trade. Those rules and customs require that a seller deliver and that a buyer accept delivery of the commodity sold or bought. Furthermore, defendant testified he knew that delivery of a commodity would occur unless he or the broker did something about it. Defendant was reminded of that cold reality each time he received an invoice. On the back of such invoice, it is stated: "It is understood and agreed that all futures transactions made by us for your account are either hedges *or contemplate actual delivery and receipt of the property and payment therefor*; and that all property sold for your account is sold upon the representation that you have the same in your possession actually or potentially." (Emphasis supplied.)

Defendant was not a novice in the commodities market. He had traded in commodities for several years prior to his contract with the plaintiff. He knew the rules of both the Chicago Mercantile Exchange and the rules and regulations of the Board of Trade of the city of Chicago. As a matter of fact, he had relied upon those rules and regulations in a previous lawsuit to defeat the claim of another broker. First Mid America, Inc. v. Palmer, 197 Neb. 224, 248 N. W. 2d 30. He had visited the floor of the commodities market in Chicago.

Defendant testified he did not read the documents he signed at plaintiff's office. In this state, in the absence of fraud, one who does not read a contract before signing it cannot later relieve himself of its burdens. Abbott v. Abbott, 188 Neb. 61, 195 N. W. 2d 204. No fraud was proven here.

Defendant testified he had no facilities for accepting or delivering the commodities called for in his contracts. Under those circumstances, the rules and regulations of the Exchange and the Board of Trade provide the necessary facilities.

Several Nebraska cases are cited by defendant in support of his contention that this case is covered by

the "bucket shop" act. In none of those cases were all of the rules and regulations of the Board of Trade of the city of Chicago and the rules of the Chicago Mercantile Exchange as they existed at the time of the transactions here considered by the court or introduced in evidence. In this case, they are an integral part of the contract between the plaintiff and defendant and were received in evidence in their entirety. Throughout the line of cases cited by defendant, it has been explicitly stated or uniformly held by inference that a bona fide contract for future delivery of goods is a legally enforceable contract where the parties contemplate actual delivery. The "bucket shop" act deals with "pretended purchases and sales, or contracts and agreements for the pretended purchase and sale of the commodities * * * wherein there is, in fact, no actual purchase and sale of such commodities for or on account of the party or parties thereto * * *." § 28-955, R. R. S. 1943.

In all of the transactions of defendant there was nothing pretended about them. There was an identifiable buyer and an identifiable seller; the sales involved goods of a specified kind, quantity, and quality at a specified price; there was a specified time and place for delivery; and the contracts were legally enforceable.

Whether each of the parties at the time of entering the transactions here involved contemplated and intended delivery of commodities was a question of fact for the trier of fact. The circumstantial and direct evidence is in irreconcilable conflict on this material issue. The trial court, after weighing the evidence and the credibility of the witnesses, found adversely to the defendant. It is not the province of this court to weigh or resolve conflicts in the evidence, the credibility of witnesses, or the weight to be given to their testimony. Snay v. Snarr, 195 Neb. 375, 238 N. W. 2d 234. There was evidence in this case whereby the trial court could find that the par-

ties at the time the contracts were entered into contemplated and intended actual delivery.

The judgment of the trial court is affirmed.

AFFIRMED.

IN RE ESTATE OF C. E. WEINBERGER, DECEASED.
EDWARD HOOKER ET AL., APPELLEES, V. ESTATE OF C. E. WEINBERGER, DECEASED, APPELLANT.
IN RE ESTATE OF C. E. WEINBERGER, DECEASED.
EDWIN H. HEFT ET AL., APPELLEES, V. ESTATE OF C. E. WEINBERGER, DECEASED, APPELLANT.

279 N. W. 2d 849

Filed June 12, 1979. Nos. 42200, 42201.

1. **Probate and Administration: Claims.** A contingent claim against a decedent's estate is one upon which the liability depends upon some future event which may or may not happen and which makes it uncertain whether it will ever be a liability. Until that future event happens a right of action upon the contingent claim does not arise.
2. **Contracts: Time.** A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury occasioned him, but not until then.
3. **Contracts: Warranty.** A cause of action on a covenant of warranty or for quiet enjoyment does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title.
4. **Contracts: Time: Intent.** An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or actions evincing an intention to refuse performance in the future.
5. **Contracts: Time: Damages.** Where a party bound by an executory contract repudiates his obligation before the time for performance, the promisee has an option to treat the contract as ended so far as further performance is concerned and to maintain an action at once for damages occasioned by such anticipatory breach.

Appeals from the District Court for Greeley County: JAMES R. KELLY, Judge. Affirmed.

George H. Moyer, Sr., of Moyer, Moyer & Egley and Frederick M. Deutsch of Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellant.

Donald R. Treadway of Brower, Treadway & Bird, P.C., for appellees.

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

MCCOWN, J.

In these two consolidated cases the claimants filed contingent claims against the estate of a decedent for an anticipated breach of contract. The claims were filed after the time limited for creditors to present their claims and the issue is whether such claims were properly allowed. The county court found that the claims were contingent claims incapable of being exhibited within the time limited for creditors to file claims and ordered the executor to retain sufficient funds to pay the contingent claims when they became absolute. On appeal the District Court affirmed the action of the county court. The personal representative of the decedent's estate has appealed.

On January 19, 1970, Edward Hooker and his wife, Myrtle, entered into a contract with C. E. Weinberger to purchase certain farmland in Greeley County, Nebraska. On February 9, 1970, Edwin Heft and his wife, Gloria M., also entered into a contract with C. E. Weinberger for the purchase of certain described farmland in Boone County, Nebraska. C. E. Weinberger was married at the time the contracts were executed and his wife, Viola Weinberger, did not sign the contracts. Relevant terms of both contracts are the same. Each contract required a downpayment of 29 percent of the total purchase price by a specified day in March 1970, and annual installment payments of principal and interest on March 1 of each year thereafter until March 1, 1981, at which time the final installment was due. The seller agreed

to furnish a merchantable abstract of title as soon as possible and to submit it to the buyers for examination and approval. The contracts provided that after the real estate title was examined the abstracts were to be kept in the possession of the attorney for the seller and were to be delivered to the purchasers upon the completion of all payments of interest and principal due under the contracts. The seller agreed to convey by warranty deed, including homestead rights, free and clear of encumbrances, and the contracts provided that the deeds were to be delivered "as soon as title is approved and the entire principal and interest paid."

The contracts were drawn by Raymond P. Medlin, Jr., who represented the seller and notarized the signatures of all parties. The Hookers and Hefts were not represented by counsel. Medlin rendered a title opinion to the purchasers on March 1, 1971, showing that the purchasers had merchantable title.

Subsequent to the execution of the contracts the purchasers took possession and have farmed and improved the land and have had undisturbed possession and quiet enjoyment to the present time. Purchasers have paid all taxes and made all annual installment payments required by the contracts to and including the March 1, 1977, installment. The 1971 payment was paid to and accepted by C. E. Weinberger and subsequent payments were paid to and accepted by the personal representative of the Weinberger estate until December 1977, when the March 1, 1977, payment was returned to the purchasers.

C. E. Weinberger died testate February 19, 1972, and Raymond P. Medlin, Jr. was appointed executor. The final date for filing claims of creditors against the estate was July 17, 1972, and decree barring claims was entered July 18, 1972. No notice of probate or of the date for filing claims was given to the purchasers. In December 1972 the decedent's widow, Viola Weinberger, elected to renounce the

will and take her statutory share of the decedent's property. The purchasers received no notice of the election, and had no notice of any prospective breach of contract until the late summer or early fall of 1975, when the purchasers here learned that Viola Weinberger had filed a partition action against a purchaser of other real estate under a similar installment sales contract executed by C. E. Weinberger. In that partition action Viola Weinberger alleged she was the sole owner of an undivided one-half interest in the property involved.

Because of the action of Viola Weinberger and statements of her counsel, purchasers filed contingent claims in the estate of C. E. Weinberger on September 25, 1975. The claims alleged the facts recited above and copies of the contracts were attached. The purchasers also alleged that the purchasers would have a contingent cause of action against the estate for any and all damages occurring by reason of any future action of Viola Weinberger and by reason of the fact that the title was not merchantable.

Raymond P. Medlin, Jr., as executor of the estate, filed an answer and objections to the claims alleging that the purchasers had knowledge of the death of the decedent, and that their claims were barred under the statutes because they were not presented by July 17, 1972, nor within 2 years after the death of the decedent, or February 19, 1974. The answer also alleged that the claims were not contingent and prayed that they be denied.

On January 13, 1976, after hearing and submission of briefs, the county court found that the claims were contingent claims not capable of being exhibited within the time limited for creditors to present their claims; allowed the claims; and ordered the executor to retain in his hands sufficient funds to pay these contingent claims when they became absolute. The executor appealed to the District Court.

Meanwhile, Viola Weinberger died in 1975, and

Henrietta Martensen was appointed executrix of her estate. In August 1976, the heirs of Viola Weinberger filed a partition action against Edward Hooker and his wife, and in November 1976, they filed a partition action against Edwin H. Heft and his wife.

On March 14, 1977, Raymond P. Medlin, Jr., resigned as executor of the C. E. Weinberger estate and Ralph E. Brown was appointed as administrator de bonis non and substituted as appellant in the District Court. On May 24, 1978, the District Court affirmed the action of the county court. The personal representative of the C. E. Weinberger estate has appealed.

The estate contends that the purchasers' claims are general rather than contingent claims; that the liability of the estate was fixed at the time the contracts were entered into; and that these claims should have been exhibited within the time limited for creditors to present their claims. The estate also contends that even if the claims here are contingent claims, they were not presented within 1 year after the claims became absolute.

The purchasers contend that the claims involved here are contingent claims and that a cause of action based upon a possible future breach of the contract or of title warranties does not accrue until an actual or anticipatory breach occurs; that a cause or right of action accrues so as to start the running of a statute of limitations when the right to institute and maintain the action arises and not before; and that under the provisions of section 30-704, R. R. S. 1943 (now repealed), if a claim not capable of being exhibited within the time limited for creditors to present their claims becomes absolute at any time thereafter, the person having such a claim may present and prove the same at any time within 1 year after the claim becomes absolute. Purchasers also assert that the doctrine of equitable estoppel should bar the estate from asserting any defense relating

to the time of filing the claims.

The controlling statutes here were sections 30-701 and 30-704, R. R. S. 1943, now repealed. Both sections dealt with contingent claims. Section 30-701 provided in part: "If any person shall be liable as security for the deceased, or have any other contingent claim against his estate which cannot be proved as a debt, the same may be presented, with the proper proof, to the county court, which, if satisfied that such claim is a legal demand against the estate, may order the executor or administrator to retain in his hands sufficient to pay such contingent claim, when the same shall become absolute, * * *."

Section 30-704 provided in part: "If the claim of any person not capable of being exhibited within the time limited for creditors to present their claims, shall become absolute at any time thereafter, the person having such claim may present it to the court, and prove the same at any time within one year after it shall become absolute; and if established in the manner provided in sections 30-701 to 30-715, the executor or administrator shall be required to pay it, * * *."

Under these statutes a contingent claim against a decedent's estate is one upon which the liability depends upon some future event which may or may not happen and which makes it uncertain whether it will ever be a liability. See, In re Estate of Golden, 120 Neb. 232, 231 N. W. 837; 31 Am. Jur. 2d, Executors and Administrators, § 283, p. 145.

The contingency does not relate simply to the amount which may be recovered but to the uncertainty of whether or not the future event will ever occur to thereby effect a right of action or liability. Until that future event happens a right of action upon the contingent claim does not arise. See Rehn v. Bingaman, 151 Neb. 196, 36 N. W. 2d 856.

In the cases now before us the only performance remaining to be done by the seller under the sale con-

tract, which was binding upon the heirs, executors, administrators, personal representatives, successors, and assigns of the decedent, was the delivery of a warranty deed to the purchasers conveying merchantable title to the premises. That performance was not required under the contracts until the purchasers completed payment for the land in 1981. At the time of the death of the decedent there was no breach of contract on the part of the seller, nor did the purchasers have any claim or cause of action against the decedent which could be presented or exhibited to the county court. A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury occasioned him, but not until then. See 1 Am. Jur. 2d, Actions, § 89, p. 618. Similarly, a cause of action on a covenant of warranty or for quiet enjoyment does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title. See, Campbell v. Gallentine, 115 Neb. 789, 215 N. W. 111; Burling v. Estate of Allvord, 77 Neb. 861, 110 N. W. 683.

In the present cases if Viola Weinberger had executed a warranty deed to the property before or after her husband's death, or had elected to take under the decedent's will or elected in some other way to carry out the contract, no cause of action would have arisen in favor of the purchasers against the estate of the decedent. The estate and the heirs and personal representatives succeeded to the rights and obligations of the decedent under the contract and until there was a breach of contract, or an anticipatory breach or repudiation of it, the purchasers had no cause of action or valid claim against the estate. There was no further performance due from the seller until 1981. An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome

of words or acts evincing an intention to refuse performance in the future. See 17 Am. Jur. 2d, Contracts, § 448, p. 910.

Restatement 2d, Contracts, T.D. 9, § 274, p. 3, states when a statement or an act is a repudiation of a contract. "A repudiation is

"(a) a statement by the obligor to the obligee indicating that he will commit a breach that would of itself give the obligee a claim for damages for total breach under § 268, or

"(b) a voluntary affirmative act which renders him unable or apparently unable to perform without such a breach."

Comment (a), following, makes it clear that such a statement or act, even if it occurs before any breach by nonperformance, may give rise to a claim for damages for total breach.

Restatement 2d, Contracts, T.D. 9, § 277, p. 22, subsection (1) states: "(1) Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach."

In the cases now before us the record fails to establish that the purchasers had any notice or knowledge that Viola Weinberger had elected not to take under the will. The record establishes that the purchasers received no notice of any proceedings in the estate of C. E. Weinberger. Neither is there any evidence that any representative or attorney for the C. E. Weinberger estate advised the purchasers, prior to the filing of their contingent claims, that the estate could not or would not perform the contract. In fact, the executor continued to accept the annual contract payments from the purchasers even after the contingent claims of the purchasers were filed. Such an acceptance may well have constituted an equitable estoppel. In any event, the acceptance of payments without objection and with full knowledge

of all the facts was certainly not a repudiation of the contracts in any sense. The acceptance of such payments constituted an affirmance of the contracts, not a repudiation of them. Until the purchasers discovered that Viola Weinberger had instituted a partition action against other purchasers and by further inquiry obtained knowledge of a probable or apparent inability to comply with the title warranty provisions of the contract by the estate, they had no cause of action against the estate, contingent or otherwise.

Where a party bound by an executory contract repudiates his obligation before the time for performance, the promisee has an option to treat the contract as ended so far as further performance is concerned, and to maintain an action at once for the damages occasioned by such anticipatory breach. Selig v. Wunderlich Contracting Co., 160 Neb. 215, 69 N. W. 2d 861. See, also, 17A C. J. S., Contracts, § 472, p. 652.

The record in the present cases establishes that the purchasers had contingent claims against the C. E. Weinberger estate which could not be proved as a debt or legal demand against the estate until the purchasers had knowledge of facts sufficient to constitute an anticipatory breach or repudiation of the contracts. The record also establishes that the claims were not capable of being exhibited within the time limited for creditors to present their claims, and that they were filed and presented to the court within 1 year after they became absolute.

The order of the District Court affirming the action of the county court was correct and is affirmed.

AFFIRMED.

IN RE ESTATE OF C. E. WEINBERGER, DECEASED. HAROLD V. LESLIE ET AL., APPELLEES, V. ESTATE OF C. E. WEINBERGER, DECEASED, APPELLANT.

279 N. W. 2d 854

Filed June 12, 1979. No. 42202.

Appeal from the District Court for Greeley County: JAMES R. KELLY, Judge. Affirmed.

George H. Moyer, Sr., of Moyer, Moyer & Egley and Frederick M. Deutsch of Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellant.

Robert F. Peterson of Lydick & Peterson, for appellees.

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

MCCOWN, J.

This case involves contingent claims against the estate of a decedent for an anticipated breach of a contract for the sale of real estate by the estate. The relevant terms and provisions of the contract here were the same as those involved in the cases of Hooker and Heft v. Estate of Weinberger, *ante* p. 674, 279 N. W. 2d 849. The county court disallowed the contingent claims. On appeal the District Court reversed the order of the county court and ordered allowance of the claims. The personal representative of the estate has appealed.

The relevant facts and circumstances in this case are the same as in those cases with the following exceptions. The contract here was executed February 9, 1970, and involved two parcels of real estate. The title opinion rendered by Medlin to the purchasers in this case showed that title to the property was vested in C. E. Weinberger rather than in the purchasers. No partition action has been filed as to the property involved in this case. The purchasers here received the first notice of an anticipatory breach in

the late fall of 1976, when they learned of the partition case involving the Heft real estate. The purchasers in this case then checked with the attorney for the C. E. Weinberger estate, apparently in December 1976, and were told to get an attorney because the contract would not be honored.

The purchasers obtained a lawyer and filed their contingent claim in the county court on January 26, 1977. The claim was disallowed by the county court on May 25, 1977. On appeal the District Court reversed the order of the county court, ordered allowance of the claim, and directed the personal representative of the estate of C. E. Weinberger to retain sufficient funds to pay the amount of damages sustained by the purchasers here when that amount is ascertained.

The cases of Hooker and Heft v. Estate of Weinberger, *supra*, are controlling here. The order of the District Court was correct and is affirmed.

AFFIRMED.

WILLIAM G. BUCHANAN, APPELLANT, V. PRICKETT & SON, INC., ET AL., APPELLEES.

279 N. W. 2d 855

Filed June 12, 1979. No. 42246.

1. **Firemen: Negligence.** The fireman's rule negates liability to firemen by one whose negligence causes or contributes to a fire which in turn causes injury or death of a fireman.
2. **Rescue Doctrine: Negligence.** The rescue doctrine contemplates a voluntary act by one who, in an emergency and prompted by spontaneous human motives to save human life, attempts a rescue which he had no duty to attempt by virtue of the legal obligation or duty fastened on him by his employment. It is not contributory negligence for a volunteer to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value of the advantage

to be realized from meeting the danger and attempting to remove or eliminate the hazard, i.e., the less the danger to the third party, the less risk the volunteer is justified in taking.

3. **Firemen: Negligence.** The underlying basis of the fireman's rule is that the ordinary risks which a fireman encounters in the performance of his duty in fighting fires and protecting life and property are those which he has assumed a duty to perform and to which he has assumed the risk in a "primary" sense; that is, the risk is one which the fireman has engaged to encounter by virtue of his employment and one which it is his duty to perform and thus the person who negligently caused the fire has not breached a duty owed the fireman. In the absence of any statute or ordinance prescribing a duty on the part of the owner or possessor of the property to members of a public fire department, the owner is not liable for such injuries to firemen except those proximately resulting from willful or wanton negligence or a designed injury, except in certain cases where there may be the duty to warn of hidden danger or peril known to the owner or occupant but unknown to or unobservable by the fireman in the exercise of ordinary care.

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

William J. Ross of Ross, Schroeder & Fritzler, for appellant.

Knudsen, Berkheimer, Endacott & Beam, for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and TESAR, District Judge.

CLINTON, J.

This is an action for personal injuries suffered by the plaintiff, a member of the Elm Creek volunteer fire department, when he, along with other members of the department, responded to a call to the scene of a collision between two motor vehicles, one of which was a gasoline tanker. After plaintiff arrived at the scene and while he was in the process of trying to extricate the transport driver from the tractor cab in which he was pinned, an explosion and fire occurred and the plaintiff was badly burned. The defendants are the persons—owners, operators,

or lessees of the second vehicle—whose negligence was allegedly the cause of the collision. The primary legal question involved in this case is whether the plaintiff's claimed right of recovery is barred by the operation of the so-called "fireman's rule," or whether the "rescue doctrine" should apply and the plaintiff be permitted to recover if there be proof that the negligence of all or some of the defendants was a proximate cause of the collision, the fire, and the plaintiff's injuries. The defendants filed a motion for summary judgment which was granted and the plaintiff has appealed to this court. We affirm.

The alleged facts of the collision as set forth in the petition of the plaintiff are these. On July 8, 1974, the defendants' truck was traveling westward on Interstate Highway No. 80 and entered the exit ramp on the northeast quadrant of the Elm Creek interchange and stopped for a stop sign at the west end of the ramp where it intersects U. S. Highway No. 183 which runs north and south over the interstate highway. At the time the defendants' truck was stopped at the traffic sign, the loaded tanker, operated by Dale L. Damon, was moving north on highway 183 toward the junction of the ramp and the highway. As the tanker neared the junction, the defendants' truck drove onto highway 183 and made a left turn to go south on that highway. Damon was unable to avoid a collision with defendants' truck and went down the embankment on the east side of highway 183, and the tanker overturned.

The following facts are established by the deposition of the plaintiff and are undisputed. The plaintiff was, at all times here involved, a duly elected and appointed member of the Elm Creek volunteer fire department. The job of the department and its members was to fight fires and do rescue work. The plaintiff received no compensation for his services as a volunteer fireman. When, on the occasion here involved, he and the other volunteer firemen,

together with firefighting equipment, arrived at the scene of the collision, the plaintiff observed that Damon was pinned in the tractor with one leg trapped between the seat and the floor. At the time, gasoline was leaking from the tanker and running through the cab and onto the ground where it was forming pools of gasoline. As the day was hot, the gasoline was vaporizing in considerable volume and, when the plaintiff reached Damon, he found it difficult to breathe. He was acutely concerned about the danger of fire. Because of the fumes, he occasionally had to leave briefly and then renew his attempts to free Damon. During his second or third effort, the explosion and fire occurred. Damon was burned to death and the plaintiff was severely burned. The plaintiff has received and perhaps is still receiving workmen's compensation benefits as provided by section 48-115, R. R. S. 1943, as amended. He has suffered additional damages by reason of pain and suffering and time lost from his regular employment as an electrical lineman and a moonlighting job in a feed mill. To this latter employment he has been unable to return.

The fireman's rule, although not referred to by that name in this jurisdiction, has been applied in Wax v. Co-Operative Refinery Assn., 154 Neb. 805, 49 N. W. 2d 707; and Fentress v. Co-Operative Refinery Assn., 149 Neb. 355, 31 N. W. 2d 225. The fireman's rule negates liability to firemen by one whose negligence causes or contributes to the fire which in turn causes injury or death of the fireman. Giorgi v. Pacific Gas & Elec. Co., 266 Cal. App. 2d 355, 72 Cal. Rptr. 119. The rescue rule as applied in Nebraska has been stated thus: It is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the

imminence of the danger and the value of the advantage to be realized from meeting the danger and attempting to remove or eliminate the hazard; that is, the less the danger to the third party, the less the risk the volunteer is justified in taking. Wolfinger v. Shaw, 138 Neb. 229, 292 N. W. 731. The rescue doctrine contemplates a voluntary act by one who, in an emergency and prompted by spontaneous human motives to save human life, attempts a rescue which he had no duty to attempt by virtue of a legal obligation or duty fastened on him by his employment. Nastasio v. Cinnamon, 295 S. W. 2d 117 (Mo., 1956).

The principal point which the plaintiff urges is that, because a volunteer fireman is unpaid and because in this instance the plaintiff was not fighting a fire but attempting to save a human life, the rescue rule should apply to the exclusion of the fireman's rule.

The rationale of the fireman's rule varies somewhat from jurisdiction to jurisdiction. In Nebraska the rule has been stated at least twice. In Fentress v. Co-Operative Refinery Assn., *supra*, we said: "The rule is that in the absence of any statute or ordinance prescribing a duty on the part of the owner of premises to members of a public fire department, the owner is not liable for injuries to such a fireman except those proximately resulting from willful or wanton negligence or a designed injury. . . . We are not here dealing with a hidden danger or peril. The condition of the burning transport was an obvious one. The danger was a patent one and one which the plaintiff realized as his own testimony discloses. He discounted the danger of explosion from the trailer tanks because the tanks were vented and the vents open." In Wax v. Co-Operative Refinery Assn., *supra*, we said: "Each authority cited in the Fentress case affirms the fact that a fireman or individual fighting a fire on the premises of an owner or occupant is a bare licensee to whom the owner or

occupant owes no greater duty than to refrain from injuring him by willful or wanton negligence or a designed injury, except in certain cases where there may be the duty to warn of hidden danger or peril known to the owner or occupant but unknown to or unobservable by the fireman in the exercise of ordinary care. Here the danger was not only obvious, but also defendant gave warning that there was danger of a second explosion which caused the injuries to and death of decedent." We also there said: "It is generally held that a fireman, or individual who goes to assist in putting out a fire upon premises and is injured, cannot establish liability of the property owner or occupant therefor by simply establishing negligence in starting the fire, but only by showing that his injuries were designed or proximately caused by willful or wanton negligence of such owner or occupant or by some hidden danger or peril upon the premises, known by the occupant or owner but unknown by the fireman or individual, and not, if reasonable opportunity is given, disclosed to such persons or their superiors, who were unable to observe the same by exercising ordinary care. Therefore, it is immaterial whether or not the fire was started by negligence or that such was continuing negligence as argued by plaintiff, since a fireman or individual who undertakes to fight a fire knows that it exists and as licensee ordinarily assumes the risk of the premises as he finds them. 141 A. L. R. 585."

The rule, although phrased with reference to liability of owners or occupants of real property, applies to circumstances where the property, which is afire or from which the danger arises, is personal property and not located on real property owned or occupied by the owner of the personal property. Wax v. Co-Operative Refinery Assn., *supra*. We have used the same "licensee" rationale in the case of injury to policemen, saying: "The occupier of

the premises owes to the licensee the duty to warn, if an opportunity is afforded, of hidden dangers known to the occupier but unknown to and not readily observable by the licensee." Nared v. School Dist. of Omaha, 191 Neb. 376, 215 N. W. 2d 115.

Other jurisdictions have made a more penetrating analysis of the public policy considerations underlying the fireman's rule and have placed the rule upon the ground that the ordinary risks which a fireman encounters in the performance of his duty in fighting fires and protecting life and property are those which he has assumed a duty to perform and to which he has assumed the risk in a "primary" sense. Armstrong v. Mailand, 284 N. W. 2d 343 (Minn., 1979); Walters v. Sloan, 20 Cal. 3d 199, 142 Cal. Rptr. 152, 571 P. 2d 609; Krauth v. Israel Geller and Buckingham Homes, Inc., 31 N. J. 270, 157 A. 2d 129. What the courts mean by this is that the risk is one which the fireman has engaged to encounter by virtue of his employment and one which it is his duty to accept and that the person who negligently causes the fire has therefore not breached a duty owed the fireman. The reason for the rule is that fires will inevitably occur and it is not desirable as a matter of public policy to fasten the cost of the risk involved in firefighting on the owner or user of the property. Rather, firemen's pay and reimbursement, or at least partial indemnification for losses incurred as a consequence of meeting the risks of fire, should be borne by government. The undesirability of imposing this cost upon the property owner was one of the factors recognized in Wax v. Co-Operative Refinery Assn., *supra*. However, the above-mentioned cases differ from Wax in that the courts which have adopted the doctrine of assumption of the risk in the primary sense have ceased to define duties of care with respect to categories of property users such as invitees, licensees, and trespassers.

The term "assumption of the risk in the primary

sense" has apparently not been used in this jurisdiction although the rationale which this court has used does not seem to be inconsistent with the doctrine. In both Fentress and Wax, the former involving a volunteer fireman and the latter a professional fireman who had volunteered, we noted that a public fire department was the agency performing the duty. We were thus indicating that the duty of the firemen was one which they had assumed by membership or service in the firefighting organization. We also noted that whether or not the fire was caused by negligence was immaterial since the person who undertook to fight the fire assumed the known risks. We then pointed out in those cases, both of which grew out of the same accident, that the risk of explosion was known and obvious. Thus, the Wax rationale seems to include an imprecisely developed assumption of the risk in the primary sense doctrine although the doctrine was not so designated. Whether one relies upon the limitation of duty owed a licensee or upon the theory of assumption of the risk in the primary sense, the result is the same in that the person causing the fire has breached no duty owed to the firefighters.

In Armstrong v. Mailand, *supra*, the Minnesota Supreme Court stated that firemen are owed a duty of care unless they have assumed the risk of the hazard in the primary sense, but that firemen assume all risks reasonably apparent to them in firefighting. The import and rationale of Krauth and Sloan are similar. However, there were elements involved in all three of these cases which are not present in the one before us. We should not, therefore, be understood as adopting in toto the complete rationale of those opinions. We are not persuaded and do not hold in this opinion that the policy of defining the extent of the duty of care, by use of the categories invitee, licensee, or trespasser, should be abrogated. Such classifications still have a rational function.

See, e.g., Nared v. School Dist. of Omaha, *supra*. Moreover, under the facts of this case, a reconsideration of those categories is unnecessary.

In the present instance, the plaintiff went to the scene of the collision for the apparent purpose of fighting or preventing fire as a member of a fire department. The record establishes the fire department does rescue work and this is one of the duties of its members. The record shows without contradiction the danger of fire or explosion was fully recognized by the plaintiff. That was the very reason he undertook his heroic efforts to free Damon. The risks causing the injury in this case were those encountered by firemen generally and were not unknown or concealed risks of which warning needed to be given if opportunity afforded.

Attempting to distinguish between "firefighting" and "rescue" operations is unacceptable for another reason. Any aspect of firefighting may involve rescue if there is a person or persons in the endangered building or, as in this case, trapped in a vehicle. In such instances, the firemen who man the hoses or pumps are in fact as much a part of the rescue effort as those who man the ladders or the nets or who carry victims to safety. It is not possible to draw a substantive distinction founded upon the particular task being performed.

The plaintiff was not being paid for his services. This was also true of the plaintiffs in Fentress and Wax. Volunteer firemen, although uncompensated, undertake the same duties as paid firemen. We may even take note of the fact that in Nebraska some fire departments consist of both paid and volunteer members. It would be impractical to distinguish between volunteers and paid firemen in those cases. Nebraska affords both workmen's compensation coverage and perhaps other benefits to paid firemen. For volunteer firemen it provides only workmen's compensation benefits. Whether more

of the burden of injury resulting from the risks involved should be assumed by government is a question for the public policymakers to determine.

The fireman's rule and not the rescue doctrine applies under the facts of this case. The motion for summary judgment was properly sustained.

AFFIRMED.

TESAR, District Judge, not participating in the decision.

STATE OF NEBRASKA EX REL. ETHEL F. SIMPSON, APPELLANT, V. HONORABLE ROBERT C. VONDRASEK, JUDGE OF THE OMAHA MUNICIPAL COURT, APPELLEE.

279 N. W. 2d 860

Filed June 12, 1979. No. 42247.

1. **Juries.** As a general rule, the right to a jury trial is part of our fundamental law.
2. **Courts: Rules of Court: Time.** A suit brought in small claims court and transferred to the regular docket of the municipal court prior to the time set for hearing in the small claims court shall be subject to all of the provisions of law and rules of court applicable to proceedings in municipal court.
3. _____: _____: _____. A municipal court rule which provides that a party desiring a jury trial in a civil case must demand the same in writing on or before the answer day refers to the answer date as established in the municipal court after the transfer of the case from the small claims court and not to the "appearance" date specified in the notice to the defendant in the small claims court.
4. **Courts: Mandamus.** Mandamus will lie to compel an inferior court to hear and determine a cause, if within its jurisdiction and when properly brought into the court. Mandamus will not lie to coerce judicial discretion of an inferior court, nor to predetermine the character of the judgment that the court shall enter.
5. **Courts: Juries.** If a demand for a jury trial in municipal court is timely filed, a jury trial is mandated and no discretion upon the part of the court is involved.
6. **Mandamus: Appeal and Error.** It is a general rule in this jurisdiction that mandamus will not issue to review the action of an inferior court where there is an adequate remedy at law, and the

writ may not be used to usurp or take the place of a writ of error or an appeal. However, when the remedy, though available, is inadequate, mandamus will lie.

7. **Mandamus.** Where a specific duty is provided for by statute, mandamus may be invoked to enforce it, if denied; and the party entitled to such relief will not be forced to pursue his remedy by circuitous and dilatory action.

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

D. Nick Caporale and Michael A. Nelsen of Schmid, Ford, Mooney, Frederick & Caporale, for appellant.

Herbert M. Fitle, Omaha City Attorney, and James E. Fellows, Deputy City Attorney, for appellee.

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

BRODKEY, J.

On or about April 5, 1978, Thomas K. Moore filed a claim against Ethel F. Simpson, the relator and appellant herein, in the small claims court of the Omaha municipal court claiming damages allegedly resulting from an automobile accident between the parties. Pursuant to statute, Ethel Simpson was notified of the pendency of the claim and was served with official form No. 1A of the small claims court which notified her: "You must *appear* before this court on April 24, 1978 at Two P.M., at Courtroom No. 6, Main Floor, if you do not *appear,* a judgment may be entered against you. Cost of this action also may be charged against you." (Emphasis supplied.)

On April 17, 1978, Ethel Simpson filed a written request for the removal of the case from the small claims court to the ordinary docket of the municipal court of the city of Omaha, and on that date the case was transferred to the regular docket of the municipal court. The clerk of the municipal court then filed official municipal court form "M.C. 171 (75-1)"

entitled, "Notice of Answer Day and Notice of Hearing," setting May 5, 1978, as the "answer day," and mailed the form to the respective parties. No issue is raised in this case that the transfer to the municipal court docket was not timely and properly done. On May 5, 1978, the answer date set in the foregoing notice, Ethel Simpson filed her answer and also a counterclaim in the municipal court action, and also filed a demand for a jury trial. The case, designated as "Thomas K. Moore, Plaintiff vs. Ethel F. Simpson, Defendant, Docket 272, Page No. 95" was assigned to the Honorable Robert C. Vondrasek, judge of the Omaha municipal court, the respondent-appellee in this appeal.

Thereafter, on May 11, 1978, respondent ordered relator to show cause why her request for a trial by jury should not be denied because of the fact that her demand for a jury trial was filed subsequent to April 24, 1978, which was the appearance date originally scheduled in the small claims court. A hearing was had on the order to show cause on May 19, 1978, and on May 23, 1978, respondent entered an order denying relator the jury trial she had requested, rejecting her argument that the proper answer day for filing a request for a jury trial was May 5, 1978, the answer day established by the municipal court when the case was transferred from the small claims court, and not April 24, 1978, the date originally scheduled for her appearance in the small claims court.

Relator then filed her petition for a writ of mandamus in the District Court for Douglas County to compel respondent to grant her a trial by jury. Trial of the mandamus action was held on June 22, 1978, at which time respondent appeared and testified. On July 11, 1978, the District Court entered its order denying relator's petition for a writ of mandamus, basing its decision upon State, ex rel. Garton v. Fulton, 118 Neb. 400, 225 N. W. 28 (1929). Relator

then perfected her appeal to this court. The issues presented are whether relator was entitled to a jury trial of her action, still pending in the municipal court of the city of Omaha, and whether she was entitled to a writ of mandamus to obtain such jury trial.

We first review certain constitutional provisions, statutes, and rules which we believe to be relevant to this case. We start with our own constitutional provision regarding the right to trial by jury. Article I, section 6, Constitution of the State of Nebraska provides: "The right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of less number than twelve in courts inferior to the District Court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury." Certain minor exceptions to the above provision have been allowed in the past, as, for example, in the trial of petit offenses in violation of city ordinances. State v. Johnson, 191 Neb. 535, 216 N. W. 2d 517 (1974). Generally, however, the right to a jury trial is part of our fundamental law. Fugate v. State, 169 Neb. 420, 99 N. W. 2d 868 (1959). Section 24-536, R. R. S. 1943, specifically provides: "Either party to any case in county or municipal court, except criminal cases arising under city or village ordinances and traffic infractions, and except any matter arising under the provisions of the Nebraska Probate Code, may demand a trial by jury. In civil cases, the demand must be in writing and *must be filed on or before answer day.* All provisions of law relating to juries in the district courts shall apply to juries in the county and municipal courts and the district court jury list shall be used, except that juries in the county and municipal courts shall consist of six persons." (Emphasis supplied.) Rule 4g(1) of the Omaha municipal court rules of practice, adopted pursuant to the authority granted under section 26-1,202, R. R. S. 1943, and in effect at all times material to this case,

provides as follows: "Parties desiring a jury trial in civil cases must demand same in writing on or before answer day, pursuant to Section 25-536, R. S. Supp. 1974." There seems to be little question, and respondent concedes the fact in his testimony in District Court, that if the relator demanded a trial before "answer date" she would be entitled to it, and the court would have no discretion to refuse it. The difference of opinion between the relator and the respondent arises in the determination of the correct and applicable date on or before which the request for the jury trial must have been made. Respondent claims that the applicable date was the appearance date before the small claims court, which was April 24, 1978. Relator contends the applicable date was the answer date set by the municipal court after the transferal of the case to municipal court, which was May 5, 1978.

The solution to this problem requires an examination of the statutes applicable to the small claims court, being sections 24-521 to 24-527, R. R. S. 1943. Section 24-524, R. R. S. 1943, provides, among other things, that: "(1) Actions in the Small Claims Court shall be commenced by the filing of a *claim* by the plaintiff on a form provided by the clerk of the county court or municipal court. * * * (3) Upon filing of a *claim* in the Small Claims Court, the court shall set a time for hearing and shall cause notice to be served upon the defendant. * * * Notice shall consist of a copy of the complaint and a summons directing the defendant *to appear* at the time set for hearing and informing the defendant that if he fails to appear, judgment will be entered against him. * * * (4) The defendant may file a setoff or counterclaim in an amount not in excess of five hundred dollars, exclusive of interest and costs. * * *." (Emphasis supplied.) Section 24-525, R. R. S. 1943, provides: "All matters in the Small Claims Court shall be tried

to the court without a jury. If the defendant in any action desires to transfer the case to the regular docket, he shall give notice to the court *prior to the time set for the hearing,* and the case shall be transferred to the regular docket of the county or municipal court *and shall thereafter be subject to all provisions of law and rules of court applicable to proceedings in the county and municipal court.* * * *." (Emphasis supplied.) Section 24-526, R. R. S. 1943, provides: "No formal pleadings other than the *claim and notice,* and the *counterclaim or setoff and notice,* if appropriate, shall be required in the Small Claims Court * * *." (Emphasis supplied.) It is to be noted that no mention is made in any of the foregoing statutes either of "an answer day," or the filing of an "answer;" the only pleadings mentioned are the claim and notice of the plaintiff, and the counterclaim or setoff and notice of the defendant. Moreover, the statutes do not require the defendant to file an answer by any particular date, but only that he "appear," or suffer a judgment to be taken against him. The entire matter is handled in the small claims court on a very informal basis, with a minimum of procedural requirements. It is only after the matter is transferred to the formal municipal docket, if this is desired, that the requirements for formal pleadings and pleading dates, being the regular procedure established for cases originally filed in the municipal court, come into play. It is at this point that the regular municipal court rules of procedure govern, including rule 4g(1), that: "Parties desiring a jury trial in civil cases must demand same in writing *on or before answer day,* pursuant to Section 24-536, R. S. Supp. 1974." (Emphasis supplied.) It seems clear that to be meaningful, the "answer day" referred to in the above rule must of necessity mean the answer day set in the municipal court after the transfer of the case from the small claims court, and we so hold.

Relator's request for a jury trial was, therefore, timely made, and should have been granted.

We turn next to the consideration of whether the relator was entitled to use the remedy of a petition for a writ of mandamus to enforce her right to a jury trial. Counsel for respondent argues that the statutes in question are vague and required interpretation, that the trial judge had the "judicial discretion" to interpret them in the manner he understood them, and that mandamus may not be used to control the exercise of judicial discretion. It is, indeed, the duty of the court to interpret and apply the applicable law. However, we do not believe it can be said that a judge has judicial discretion to apply incorrect law. "Judicial discretion" has been frequently defined in many different ways. In 27 C. J. S., Discretion, pp. 292-293, it is stated: "In a broad sense, 'judicial discretion' is the option which a judge may exercise either to do or not to do that which is proposed to him that he shall do; choosing between the doing and not doing of a thing, the doing of which cannot be demanded as an absolute right of the party asking it to be done; the exercise of the right legally to determine between two or more courses of action." An eminent authority, Professor Maurice Rosenberg of Columbia University Law School, who has conducted many seminars exploring the meaning and ramifications of the term "judicial discretion," has arrived at the following pragmatic definition of the term: "Judicial discretion is a limited right to be wrong in the eyes of the appellate court and still not be reversed." Applying that definition to the instant case, we do not believe that, sitting as the appellate court, we may close our eyes to the application of the trial court of a wrong rule of law, and sustain the error on appeal on the theory that the choice was within the judge's "judicial discretion." It is probably true that all judges, at some time during their service on the bench, make erroneous in-

terpretations of the law; but when that occurs, the errors should be, and are, subject to correction. In State ex rel. Herman v. City of Grand Island, 145 Neb. 150, 15 N. W. 2d 341 (1944), we quoted with approval from 34 Am. Jur., § 72, p. 862, as follows: "Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and must, therefore, in a certain sense, construe it in order to form a judgment from its language as to what duties he is directed by statutes to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer."

In denying relief on her petition for a writ of mandamus, the District Court strongly relied upon the previous opinion of this court in State, ex rel. Garton v. Fulton, 118 Neb. 400, 225 N. W. 28 (1929), and counsel for respondent also puts great emphasis upon this case in his brief and argument in support of the action of the court in denying the writ of mandamus. It is true that in State, ex rel. Garton v. Fulton, *supra,* we enunciated the rule that: "Mandamus will lie to compel an inferior court to hear and determine a cause, if within its jurisdiction and when properly brought into the court. Mandamus will not lie to coerce judicial discretion of an inferior court, nor to predetermine the character of the judgment that the court shall enter. Mandamus will not issue to review the action of an inferior court where there is an adequate remedy at law, and the writ may not be used to usurp or take the place of an appeal or writ of error." We believe, however, that Garton is clearly distinguishable from the instant

case. In that case the relator was charged in the county court of Fillmore County with the unlawful sale of intoxicating liquors as a second offense. She pleaded not guilty to the charge and demanded a jury trial, which the county court denied. In denying the jury trial, the trial judge relied on a specific former statute, being section 3287, Comp. St. 1922, which reads in part as follows: "Magistrates and police courts are hereby vested with jurisdiction to try without a jury all violations of this act and of all such ordinances wherein the penalty does not exceed a fine of one hundred dollars or imprisonment for a period of three months, and upon the conviction such magistrates and police judges shall impose sentence." It is clear that by virtue of the foregoing statute, Garton clearly involved the exercise of judicial discretion of an inferior court, and in that case we correctly stated that mandamus will not lie to coerce the judicial discretion of an inferior court. In the instant case, as previously discussed, there is no discretion under the statutes and rules providing for a jury trial in a municipal court. If a demand for a jury trial is timely filed, a jury trial is mandated, and no discretion of any kind is involved. Respondent argues, however, that it is well-established law in this jurisdiction that mandamus will not issue to review the action of an inferior court where there is an adequate remedy at law, and that the writ may not be used to usurp or take the place of a writ of error or an appeal. State, ex rel. Garton v. Fulton, *supra;* Watts v. City of Omaha, 184 Neb. 41, 165 N. W. 2d 104 (1969); § 25-2156, R. R. S. 1943. This is unquestionably the general rule. However, relator argues that an appeal at this late date and after an abortive trial is a wholly inadequate remedy, and will not save her from the expense and harassment of a trial, nor save the court system from additional expense, time, and duplication of effort. We have held that where a specific duty is provided by stat-

ute, mandamus may be invoked to enforce it if denied; and the party entitled to such relief will not be forced to pursue his remedy by circuitous and dilatory action at law. State ex rel. Agricultural Extension Service v. Miller, 182 Neb. 285, 154 N. W. 2d 469 (1967); State ex rel. Herman v. City of Grand Island, 145 Neb. 150, 15 N. W. 2d 341 (1944). Under the facts of this case, we are inclined to agree with relator; and in the interest of conserving further expenditure of time, expense, and effort, we conclude that justice requires this matter be remanded to the District Court with directions to issue a writ of mandamus to respondent, granting relator a jury trial.

REVERSED AND REMANDED WITH DIRECTIONS.

LARRY K. MONROE ET AL., APPELLEES, V. LINCOLN CITY EMPLOYEES CREDIT UNION, APPELLANT.

279 N. W. 2d 866

Filed June 12, 1979. No. 42253.

Property: Vendor and Purchaser: Liens. Where judgment is recovered against one who has agreed to sell land but made no deed nor received the whole of the purchase money, it is a lien on the vendor's interest in the land.

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

James A. Cada of Bailey, Polsky, Huff, Cada & Todd, for appellant.

Baylor, Evnen, Baylor, Curtiss & Grimit, for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and TESAR, District Judge.

WHITE, J.

This is an appeal from a declaratory judgment determining the rights and interests of the parties in

certain real estate. A single question is presented: Does a judgment against the vendor of real estate, obtained subsequent to the making of an executory contract for sale of the land but prior to execution of the deed, operate as a lien on the land?

The case was tried on a stipulated set of facts. The plaintiffs, Monroe and Barton, contracted on June 29, 1977, with Rocky Olson and Susan Olson (not parties to this action) for the purchase of property located at 1526 Pawnee, Lincoln, Lancaster County, Nebraska. On July 7, 1977, Lincoln City Employees Credit Union, defendant in this action, filed suit against the Olsons in the municipal court of Lancaster County, and on July 29 following obtained a default judgment in the amount of $3,679.02, together with costs. On August 1, 1977, a transcript of the judgment was filed with the clerk of the District Court for Lancaster County, Nebraska. On or about August 8, 1977, the judgment-debtors, Susan and Rocky Olson, executed a warranty deed transferring the property to the plaintiffs, Monroe and Barton. Defendant, Lincoln City Employees Credit Union, claims a lien on the real estate.

At trial, the court held: "The question presented in this litigation is whether the transcribed judgment is a lien against the subject real estate under Section 25-1504." That section provides as follows: "The lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof only from the day on which such judgments are rendered." The same rule applies when the transcript from the municipal or county court is transcribed to the District Court. §§ 26-122 and 24-539, R. R. S. 1943. The judgment becomes a lien on real estate owned by the debtor within that county.

The plaintiffs contend, and the trial court held, that at the time the judgment was filed in the District Court, the Olsons' interest had been equitably

converted into personalty under the holding in Buford v. Dahlke, 158 Neb. 39, 62 N. W. 2d 252, and therefore the judgment did not become a lien against the realty.

The trial court's reliance on Buford v. Dahlke, *supra*, is misplaced. That case involved a controversy between the surviving spouse of Ernest R. Dahlke and the administrator of his estate over the proceeds of a certain contract for the sale of real estate owned by husband and wife as joint tenants. The spouse claimed she was entitled to all remaining payments under the contract by reason of her right of survivorship in the realty. This court rejected that claim, holding that the contract to convey equitably converted the interest of the Dahlkes from realty to personalty and severed the joint tenancy. The administrator of the estate was therefore entitled to half the proceeds. This court, Boslaugh, J., said: "* * * if the owner of real estate enters into a contract of sale whereby the purchaser agrees to buy and the owner agrees to sell it and the vendor retains the legal title until the purchase money or some part of it is paid, the ownership of the real estate as such passes to and vests in the purchaser, and that from the date of the contract the vendor holds the legal title as security for a debt as trustee for the purchaser. The interest or estate acquired by the vendee is land and the rights conferred by the contract upon and vested in the vendor are personal property." That rule has also been applied in risk of loss cases. See McGinley v. Forrest, 107 Neb. 309, 186 N. W. 74. But the doctrine of equitable conversion does not apply for all purposes and in every situation where there is a contract for the purchase of land.

Equitable conversion is merely "a name given to results reached on other grounds, not a fact from which we may reason for all purposes and with respect to the rights of all parties." Pound, The Prog-

ress of the Law, 33 Harvard L. Rev., p. 813, at p. 832. The present case presents a situation where the doctrine is clearly inapplicable. The general rule, where there is an executory contract for the sale of real estate and an intervening judgment lien prior to the execution and delivery of a deed, is set forth in 87 A. L. R. 1506: "Specifically, apart from contrary statutory provisions, the lien of a judgment or attachment against the vendor in an executory contract does not attach to any interest in excess of the real interest of the vendor as of the time of the judgment * * *." Cited thereunder are a number of Nebraska cases including Courtnay v. Parker, 16 Neb. 311, 20 N. W. 120; Doe v. Startzer, 62 Neb. 718, 87 N. W. 535. The rule as set forth in syllabus No. 2 of Doe v. Startzer, *supra*, is as follows: "Where a judgment is recovered in the district court against the vendor of real estate in the same county, who has not made a deed for such real estate, nor received the whole of the purchase money therefor, such judgment is a lien on whatever interest the vendor had in the land at the time the lien attached." Also, as said in Courtnay v. Parker, *supra*, where a judgment is recovered in the District Court against a vendor who has sold certain real estate in the same county but has not made a deed therefor nor received the whole of the purchase money, such judgment is a lien on the vendor's interest in the land. Neither of these cases was cited in the briefs of the parties. They have never been modified or overruled and remain the law of the State of Nebraska. Other cases cited by the parties relating to specific enforceability of the contract and related issues are inapposite.

We do not know from the record the interest, if any, of the vendor in the real estate at the time the judgment was transcribed to the District Court. The judgment must be reversed and the cause remanded to the District Court for proceedings

in conformity with this opinion.

REVERSED AND REMANDED.

TESAR, District Judge, not participating in the decision.

JOHN R. TURNER ET AL., APPELLANTS, V. CITY OF NORTH PLATTE, LINCOLN COUNTY, NEBRASKA, ET AL., APPELLEES.

279 N. W. 2d 868

Filed June 12, 1979. No. 42283.

1. **Taxation.** In the execution of the power to tax, the taxing officers must be able to show legislative authority for every levy of taxes.
2. **Taxation: Property: Constitutional Law.** It is constitutionally required that there be notice to the property owners of a special assessment and an opportunity to contest the amount and validity of the assessment before it becomes a charge on the property.
3. **Taxation: Municipal Corporations: Appeal and Error: Streets and Alleys.** Validity of special assessment for street improvement was properly challenged by petition in error timely filed after appearance before city council sitting as board of equalization.
4. **Taxation: Municipal Corporations: Statutes: Streets and Alleys.** The authorization for special assessment for street improvements found at sections 18-2001 to 18-2003, R. R. S. 1943, does not extend to a street section already paved.
5. **Taxation: Municipal Corporations: Streets and Alleys.** The legislative power and authority delegated to a city to construct local improvements and levy assessments for payments thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer.
6. **Taxation: Municipal Corporations: Property: Streets and Alleys.** Where special assessments against property to pay the costs of paving are void, knowledge of the proceedings and of the construction of the improvement will not estop the owner from avoiding liability therefor, and they cannot be enforced solely on the ground of the benefits of the improvements to the owners of abutting lots or lands.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Reversed.

Murphy, Pederson & Piccolo and LeRoy Anderson, for appellants.

Maupin, Dent, Kay & Satterfield, for appellees.

Heard before BOSLAUGH, WHITE, and HASTINGS, JJ., and GRANT and SPRAGUE, District Judges.

WHITE, J.

This is an appeal from the dismissal by the District Court of plaintiffs' petition in error. The plaintiffs-appellants are the owners of property abutting West "E" Street in the defendant City of North Platte. The petition in error was filed after the city council, sitting as a board of equalization, levied special assessments for improvements to West "E" Street. The special assessments were levied pursuant to Nebraska's "gap and extend" law, sections 18-2001 to 18-2005, R. R. S. 1943. Briefly stated, it is the position of the plaintiffs that the "gap and extend" procedure may be used only in the case of previously unimproved street sections, that the street abutting their property was already paved, and that the special assessments are therefore void. Before addressing that argument, however, we are faced with the City's contention that the question is not properly raised. This contention is based both on the claim that this petition in error was not timely filed, and that there is no support in the record for the plaintiffs' claim that West "E" was already paved.

On March 7, 1972, the city council passed a resolution creating street improvements Nos. 125 through 132 and finding that "it is necessary and advisable that the City, under the authority granted by Sections 18-2001 to 18-2003 inclusive, Reissue Revised Statutes of Nebraska, 1943 as amended, cause the following unpaved streets * * * to be improved by grading, curbing, guttering and paving, together with necessary appurtenances, to-wit: * * * West 'E' Street from

the existing pavement at Buffalo Bill Avenue extending west to Bay Tree Avenue which improvement shall be known as Street Improvement No. 131."

No notice was given to the affected property owners at this time and none was required by the statute. In the months following, bids on the project were let, one was accepted, and some time prior to May 15, 1973, the work on West "E" Street was completed. On that date, the city council accepted the work and, pursuant to section 16-707, R. R. S. 1943, published notice that the council would sit as a board of equalization on June 5, 1973. Counsel for the plaintiffs appeared at the June 5, 1973, meeting and protested the proposed special assessments. Because of the protest, the council (quoting from the council's minutes) voted "to hold the matter of the assessment of Street Improvement District No. 131 and return it to the Public Works Committee for a report back at the next regular Council meeting." On August 7, 1973, the council voted that "Street Improvement District No. 131 be assessed as presented to the Council on June 5, 1973." This petition in error was filed on September 6, 1973.

Error proceedings must be commenced within 1 month from rendition of the judgment or final order. § 25-1931, R. R. S. 1943. The City concedes that this action was commenced within 1 month of the order by the city council, sitting as a board of equalization, levying the assessments complained of. It contends, however, that the board of equalization order is not the "judgment or final order" of which plaintiffs are actually complaining. The factual finding that West "E" Street could be improved under the "gap and extend" law was made, so the argument goes, when the council first ordered the improvements on March 7, 1972. The board of equalization did not have the authority to determine whether West "E" Street was a paved street or a continuation of a paved street. In other words, the alleged errors complained

of in this suit were made at that 1972 council meeting, and this petition was filed 1½ years too late. For two reasons, we think this argument cannot be sustained.

First, we are cited no cases and, after extensive search, find none which say the power of a board of equalization is so limited. Instead, we find the familiar rule that, in the execution of the power to tax, the taxing officers must be able to show legislative authority for every levy of taxes. See Loup County v. Rumbaugh, 151 Neb. 563, 38 N. W. 2d 745.

Second, we doubt that the "gap and extend" law would pass constitutional muster if the City's interpretation was followed. It is constitutionally required that there be notice to the property owners of a special assessment and an opportunity to contest not only its amount but also its validity before the assessment becomes a charge on the property. First Assembly of God Church v. City of Scottsbluff, *ante* p. 452, 279 N. W. 2d 126. On the other hand, "a notice of proceedings merely to determine whether the contemplated improvement should be made is not required by due process of law, provided a hearing upon the assessment itself is afforded." 14 McQuillin, Municipal Corporations, § 38.98, p. 247. Thus, no problem of constitutionality is encountered if, as plaintiffs argue, the petition in error may be filed after appearance before the board of equalization. For the reasons stated, we believe that plaintiffs' petition in error was timely filed to raise the issues presented by this appeal.

The other element of defendants' argument that the issues are not properly raised is their claim that the plaintiffs did not appear before the board of equalization and present evidence in support of their contentions. We find the record quite clear on the matter. The minutes of the June 5, 1973, meeting of the city council sitting as a board of equalization state: "Attorney Donald Pederson representing the

property owners in Street Improvement District No. 131 appeared regarding the matter.

"He stated he had written a letter regarding Street Improvement No. 131 dated November 27, 1972, to Mayor Phares. Said letter to be filed and made a part of Street Improvement No. 131 file."

The defendant City of North Platte argues that the letter referred to, which appears in the transcript, should not be considered. Without accepting that argument, we merely note the record is abundantly clear, without the letter, for the minutes go on to state: "He [Mr. Pederson, attorney for the property owners] stated the paving was allowed by resolution and the property owners were not notified until the paving was begun. They felt the action should be in keeping with a regular paving district. Also *the existing paving was torn up* and grade of the street lowered. He stated State law says once the street grade is established it cannot be changed without the consent of the landowner.

"He felt the people had not received special benefit and that the Council has failed to meet the conditions precedent, that the Council should not levy an assessment against this property involved and the paving district should be abandoned.

"City Engineer Jack Carlson stated the reason for *replacing the paving* was that the existing paving did not meet city standards, such as grade, not wide enough or safe enough. It was part of the city's street improvement program.

"Mayor Phares stated following Mr. Pederson's letter of November 17, 1972, the City Attorney reviewed the letter and the fiscal agent and bond counsel also reviewed the matter. The Engineering Committee, City Attorney, Mr. Pederson and City Engineer also met on the matter.

'Mr. Claude Faulkner of 420 Buffalo Bill spoke regarding the notification of property owners in

the district." (Emphasis supplied.)

The matter was held over and referred back to the committee on public works. At the meeting on August 7, 1973, the minutes reflect: "Councilman Schell stated that it was the recommendation of the Public Works Committee to assess Street Improvement District No. 131 as presented to the Council on June 5, 1973. He stated they had been asked to confer with the bonding company with regard to this matter which was done. * * * Councilman Schell moved and Councilman Miller seconded the motion that Street Improvement District No. 131 be assessed as presented to the Council on June 5, 1973. All Councilmen present voted 'AYE.' "

From the record, it is apparent that the property owners, by their attorney, testified that West "E" was paved prior to the improvements in question. That fact was not contested; in fact, we think the minutes fairly reflect that it was conceded. When the council voted to levy the assessments, it had no doubt that the section was already paved. It was acting instead on its legal opinion that this fact did not preclude special assessment under the "gap and extend" law. If it was incorrect in that opinion, the error of law may properly be corrected by petition in error.

We come, then, to the question which lies at the heart of this action. May a city of the first class, using the procedure provided in sections 18-2001 to 18-2003, R. R. S. 1943, repave or replace a street section already covered with a hard surface? The plaintiffs claim that it may not, that procedure being available only for a previously unpaved section. We agree.

The question of whether the term "pave" can include repaving has been answered both ways by courts of other jurisdictions. See, for example, Loewenbach v. Milwaukee, 139 Wis. 49, 119 N. W. 888, holding that "paving" was just as applicable to a

second or third construction as to the first, and Terrill v. City of Lawrence, 193 Kan. 229, 392 P. 2d 909, reaching a contrary view. The cases are not much help, in any event, because the decision is always made with a view to the purpose and language of the particular statute or covenant involved.

We turn then to an examination of Nebraska's street improvement statutes. A city of the first class desiring to specially assess abutting property for the cost of street improvements must generally rely on one of three procedures. Two of the methods involve the formal creation of street improvement districts. Under the "objection method," the street improvement district is created by ordinance of the mayor and city council. Notice must then be published one time each week for 20 days. If written objections to the district or the work are filed by the owners of more than 50 percent of the front footage of the affected property, the ordinance is repealed; otherwise bids will be let, the work will be done, and cost of the improvements will be assessed according to benefits received. §§ 16-619 to 16-622, R. R. S. 1943. Under the "petition method," the street improvement district must be created if the owners of "three-fourths of the front footage" of the property along a street petition therefor. The district is created, the work is done, and the costs are assessed in the same manner as under the objection method. § 16-624, R. R. S. 1943. Neither of those methods are involved here, but they are instructive on the use and scope of the third, or "gap and extend" method. The important thing to note is that both of the first two methods are of long standing, having been available since at least 1917, and that both require approval, or at least the acquiescence of the affected property owners in the proposed improvement and the resultant assessment.

The "gap and extend" law requires no approval by the property owners. But both the lan-

guage of the statute and its legislative history indicate that it is an exception to the rule, and that the exception is a limited one. Section 18-2001, R. R. S. 1943, provides that: "Any city or village may, *without petition or creating a street improvement district,* grade, curb, gutter and pave any portion of a street *otherwise paved* so as to make one continuous paved street, but the portion to be so improved shall not exceed two blocks including intersections or thirteen hundred and twenty-five feet whichever is the lesser, and such city or village may also grade, curb, gutter and pave any unpaved street or alley which intersects a paved street for a distance of not to exceed one block on either side of such paved street." (Emphasis supplied.)

Section 18-2003, R. R. S. 1943, authorizes the special assessments for the improvements made pursuant to section 18-2001, R. R. S. 1943.

The "gap and extend" law was introduced as L.B. 243 in 1963. At that time, street improvement districts had long been utilized. The following is the introducer's statement of intent: "Hard surface paving in most cities and villages was constructed one district at a time and consequently there are frequently gaps in municipal paving systems of one or two blocks and due to the owner's unwillingness to cooperate in completing this improvement, it remains a traffic hazard as well as remaining an incompleted improvement." Senator Albert A. Kjar, quoted by way of explanation in Committee on Public Works, Statement on L.B. 243, 1963.

It is clear that the Legislature expected the "gap and extend" procedure to be used only in the case of a section which was not otherwise paved. Neither the City nor this court is free to expand this intent to include a section which is paved but not up to standards — standards which the City is free to set. The legislative power and authority delegated to a city to construct local improvements and levy assessments

for payments thereof is to be strictly construed, and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer. See Matzke v. City of Seward, 193 Neb. 211, 226 N. W. 2d 340.

Although it is less than clear, we think this rule of strict construction also rules out the City's argument that an assessment for curbing and guttering may stand even though the assessment for paving is void. Referring again to the statute, it permits the City to "curb, gutter and pave any portion of a street *otherwise paved.*" (Emphasis supplied.) § 18-2001, R. R. S. 1943. The Legislature could have reached the result argued for by the defendants by allowing the City to "curb, gutter and pave any portion of a street *otherwise curbed, guttered, or paved.*" It appears the words "curb" and "gutter" were put in in recognition of the strict construction rule, i.e., to make it clear that the improvement which the statute allows need not be limited to a flattop road. This does not change the fact that *none* of the improvements may be made under this method on a section which is already paved. The City, having failed to comply with the requisites of the various statutes authorizing special assessments, was without authority to make the levy in question.

The City argues, however, that the plaintiffs, having seen the work in progress and accepting the benefits, are now estopped to protest the special assessments. It must be remembered, though, that no notice was given to the property owners prior to the commencement of work. In any event, "We have held in numerous cases, where special assessments against property to pay the cost of paving are void, knowledge of the proceedings and of the construction of the improvement will not estop the owner from avoiding liability therefor, and they cannot be enforced solely on the ground of the benefits of the improvements to the owners of abutting lots or

lands. Harmon v. City of Omaha, 53 Neb. 164, 73 N. W. 671; Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524; Batty v. City of Hastings, 63 Neb. 26, 88 N. W. 139; Henderson v. City of South Omaha, 60 Neb. 125, 82 N. W. 315; John v. Connell, 61 Neb. 267, 85 N. W. 82; Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734." City of McCook v. Red Willow County, 133 Neb. 380, 275 N. W. 396.

The plaintiffs also argue that the grade of the street was changed in disregard of section 16-615, R. R. S. 1943. Without comment on any action they may have for damages, we simply state that the record does not adequately reflect that there was a change in grade nor that any damages were sustained.

The special assessment being void for the reasons stated, the order dismissing the plaintiffs' petition is reversed.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE C. CHIPPS, APPELLANT.

279 N. W. 2d 874

Filed June 12, 1979. No. 42297.

Post Conviction: Right to Counsel: Appeal and Error: New Trial. In a post conviction proceeding where the evidence establishes a denial or infringement of the right to counsel which occurred only at the appeal stage of the former criminal proceedings, the District Court has jurisdiction and power to grant a new direct appeal without granting a new trial or setting aside the original conviction and sentence.

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

Donald J. Loftus, for appellant.

Paul L. Douglas, Attorney General, and Robert F. Bartle, for appellee.

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

MCCOWN, J.

The defendant, George C. Chipps, filed a petition for post conviction relief seeking to vacate and set aside a judgment and sentence of 1 to 3 years imprisonment following his conviction on a charge of shooting with intent to kill, wound, or maim. Following an evidentiary hearing on May 24, 1978, the District Court denied the motion for post conviction relief. On June 12, 1978, the District Court appointed counsel for the defendant. On July 6, 1978, after a hearing on a motion for new trial, the District Court vacated its order denying post conviction relief and granted the defendant a new direct appeal from his criminal conviction and sentence, without vacating and setting aside the original conviction and sentence.

The former direct appeal was dismissed by this court September 16, 1977, on the ground that the defendant's motion for new trial was filed out of time. The District Court, in the current proceeding, granted the defendant a new direct appeal from his conviction on the charge of shooting with intent to kill, wound, or maim. The defendant also appeals from the order of the District Court in the post conviction action upon the ground that the granting of a new direct appeal was insufficient and the District Court should have set aside his conviction and sentence and granted a new trial. We consider both appeals.

Briefly summarized, the evidence at defendant's trial established that in November 1975, after 30 years of marriage, the defendant moved out of the residence occupied by him and his wife in Ravenna, Nebraska. They lived separately thereafter. Early in the morning of July 28, 1976, the defendant's wife received a telephone call from the defendant. At

about 4 a.m., she heard a knock on the door and went to see who was there. The door was locked but the top half of the door was glass. The defendant, standing outside, asked to be let in but his wife refused. The defendant lifted his hand which was covered by a paper sack. Sparks flew from the paper sack, and the defendant's wife was shot in the right breast. She ran out the back door, heard another shot as she ran, went to the neighbor's house, and an ambulance was called. Police officers arrived at the house shortly afterwards and found the defendant inside the house. A .38-caliber revolver was found on a shelf in the bedroom closet. Two bullets were found imbedded in the house walls. Both bullets had been fired from the revolver. The paper bag, through which the gun had been fired, was also found at the scene.

The defendant admitted firing the shots, but his defense was that the shooting of his wife was accidental. His version was that he took the gun and shells to his wife's house because he wanted her to have them for protection. He testified that he had the gun and shells in a paper sack, and that he accidentally dropped the sack outside the door. When he picked it up he hit the screen door with it, causing the gun to accidentally discharge. When he realized that his wife had been shot, he shot at the lock on the door in an attempt to get in and help her. When that attempt was unsuccessful, he broke the window on the top half of the door, reached in, and unlocked the door. He denied that he ever had any intention to shoot, kill, or wound his wife.

The only eyewitnesses were the defendant and his wife. Several persons testified that they did not believe the defendant would ever intentionally harm his wife. Two witnesses also testified that after the shooting the defendant's wife had told them the shooting was an accident, and that the defendant would not shoot her intentionally. There was other

testimony, however, that the defendant had been abusive to his wife in the past, and that he had at one time attempted to strangle her when he had been drinking. There was evidence that he had been drinking on the night of the shooting.

The jury found the defendant guilty. After a presentence investigation, he was sentenced to not less than 1 nor more than 3 years imprisonment. Defendant's motion for new trial asserted that the verdict was contrary to the evidence, and also alleged prejudicial conduct on the part of the county attorney in communicating nonverbally with the complaining witness during the defendant's testimony.

The evidence is clearly more than sufficient to support the jury's verdict. There is likewise no evidence in the bill of exceptions of the criminal trial to support the allegations of misconduct of the county attorney. Affidavits were filed in the motion for new trial alleging that such conduct was observed by the jury. In the post conviction evidentiary hearing extensive evidence was taken with respect to the allegations of misconduct on the part of the county attorney. Rather than supporting the claims of the defendant, the record establishes, by the testimony of the court reporter, deputy clerks of the District Court, the prosecution attorney, and the defense attorney, that the allegations were unsupportable. The findings by the District Court in the post conviction action confirm that determination. The direct criminal appeal might well be termed frivolous.

The defendant's allegations in the post conviction proceeding, aside from the allegations as to the misconduct of the prosecuting attorney at the trial, dealt entirely with alleged incompetence of trial counsel. There were 14 witnesses called at the evidentiary hearing and the record contains almost 140 pages of testimony. The District Court found the evidence was clear and convincing that the defendant had the benefit of the effective assistance of coun-

sel at all stages of the trial proceedings. That finding is fully supported by the record.

The District Court also found that by reason of the failure to file a motion for new trial within time, the defendant was deprived of his right to appeal. The court therefore granted the direct appeal which we have previously discussed. The defendant's argument that he is entitled to have the judgment and sentence set aside and to have a new trial merely because of the loss of the right of direct appeal is answered by State v. Blunt, 197 Neb. 82, 246 N. W. 2d 727. In that case we held: "In a post conviction proceeding where the evidence establishes a denial or infringement of the right to counsel which occurred only at the appeal stage of the former criminal proceedings, the District Court has jurisdiction and power to grant a new direct appeal without granting a new trial or setting aside the original conviction and sentence." That case is controlling here.

On the direct appeal from the original conviction and sentence for shooting with intent to kill, wound, or maim, the conviction and sentence is affirmed. In the post conviction proceeding, the judgment of the District Court is affirmed in all respects.

AFFIRMED.

MITCH RIKER, APPELLANT, V. JOSEPH C. VITEK, DIRECTOR OF CORRECTIONAL SERVICES, APPELLEE.

279 N. W. 2d 876

Filed June 12, 1979. No. 42349.

1. **Criminal Law: Prisoners: Due Process.** Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.
2. **Criminal Law: Probation and Parole: Due Process.** Before a

parolee's liberty can be taken and his parole revoked, certain minimal due process requirements need be met. They are: (1) A written notice of the claimed parole violation; (2) disclosure to the parolee of evidence against him; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (6) a written statement by the fact finders as to the evidence relied on and the reasons for revoking the parole.

3. _____: _____: _____. Once the seriousness of the misconduct of a parolee has been disposed of and the individual has been afforded his minimal due process with regard to that determination, then the remaining statutory provisions may properly be imposed.

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

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos, for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

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

KRIVOSHA, C. J.

This matter comes to us by reason of the appellant having filed an application for writ of habeas corpus in the District Court for Lancaster County, Nebraska. At the time of the filing of the application, the appellant was confined to the Nebraska Penal and Correctional Complex. Appellant maintained that he was being illegally and unlawfully confined to the Nebraska Penal and Correctional Complex in that when taking into account the accumulation of statutory good time, as provided by section 83-1,107, R. R. S. 1943, and meritorious good time, as provided by section 83-1,107.01, R. R. S. 1943, appellant had served his maximum sentence and should therefore be re-

leased. Further, the appellant claimed that the good time had been illegally taken from him without affording him the requisite due process and that the good time must therefore be considered in determining whether the appellant had, in fact, served his full sentence.

After hearing, the trial court concluded that, in fact, the appellant had not been afforded all of the necessary requirements set forth in the decision of the Supreme Court of the United States in the case of Wolff v. McDonnell, 418 U. S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935, in that appellant had not been advised that if his parole was revoked he might lose his good time as provided in sections 83-1,107 and 83-1,107.01, R. R. S. 1943. Therefore, the court ordered that unless appellant was granted an appropriate hearing on the question of the forfeiture of his good time within 30 days of the date of the court order, appellant should stand discharged. Appellant has appealed maintaining that in view of the court's finding that he was denied his due process, his release cannot be delayed and the defects cannot be cured by ordering a subsequent hearing.

We have now examined the record, scant as it may be, and have concluded that the trial court was in error in finding appellant's due process rights had been violated. As will be set out in further detail, the record discloses that appellant was afforded all of his required due process, and therefore we find the decision of the trial court should be reversed and the matter remanded with instructions to dismiss the application for a writ of habeas corpus.

The material facts in this case are virtually without dispute. The record discloses that appellant was originally sentenced to the Nebraska Penal and Correctional Complex by the District Court for Hall County, Nebraska, on September 17, 1975, for a term of 2 to 4 years on two counts of forgery. On July 6, 1977, the appellant was granted a parole, having

served his minimum sentence, taking into account the then earned good time. On September 30, 1977, appellant was charged with possession of stolen goods in the municipal court of Lincoln, Nebraska, and did then enter a plea of guilty to the charge. On October 6, 1977, a preliminary hearing was held to determine whether probable cause existed to revoke the appellant's parole. At that time probable cause was determined to exist and the appellant was ordered to a further hearing.

Exhibit 4 was offered in evidence without objection. It consists of a letter from the Board of Parole to the Director of the Department of Correctional Services, and sets out in detail much of the facts as we have related them here. The letter of October 18, 1977, (exhibit 4) recites that a further hearing was held on October 18, 1977, at which time it was the unanimous vote of the Board of Parole to revoke appellant's parole and recommend forfeiture of good time awarded him, pursuant to the provisions of sections 83-1,107 and 83-1,107.01, R. R. S. 1943. The letter further discloses that the documents which the Board of Parole used in making its decision to revoke parole were enclosed with exhibit 4 when it was delivered to the Director of the Department of Correctional Services. Moreover, at the hearing held in the District Court for Lancaster County, Nebraska, on August 28, 1978, appellant admitted that he had received notice of a parole revocation hearing, presumably the one held on October 18, 1977.

Under the provisions of sections 83-1,107 and 83-1,107.01, R. R. S. 1943, an offender, while in the custody of the Board of Parole, may suffer the forfeiture of good time previously received after the offender has been consulted *regarding the charges of misconduct or breach of the conditions of his parole.* In addition, the Board of Parole may recommend to the Director of Correctional Services that good time be forfeited.

Following the hearing on the revocation of appellant's parole, appellant took no further action and was returned to the Nebraska Penal and Correctional Complex where he proceeded to again serve his sentence. When he had concluded serving that time which he computed was sufficient, taking into account all of the good time previously earned, he filed his application for a writ of habeas corpus.

Appellant does not maintain that he did not receive due process with regard to the hearing on whether his parole should be revoked or on the question of whether his misconduct was sufficiently serious to result in the revocation. His complaint, rather, is that he was never advised or made aware of the provisions of sections 83-1,107 and 83-1,107.01, R. R. S. 1943, and therefore he was denied his due process as required by the Supreme Court of the United States in the McDonnell decision.

We have carefully read the McDonnell case, as well as the following two decisions of the Supreme Court of the United States in the parole, probation, and good-time trilogy. Morrissey v. Brewer, 408 U. S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484; Gagnon v. Scarpelli, 411 U. S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656. A careful reading of those three decisions fails to disclose any legal support for appellant's position.

The McDonnell case was not a case involving the revocation of parole or probation. Rather, McDonnell was a class action brought by inmates of the Nebraska Penal and Correctional Complex maintaining their civil rights were being violated in that their good time was being taken away without them being afforded an opportunity for a hearing on whether *the misconduct* was sufficiently serious as to justify such disciplinary action. The reason for that result was due to the fact the State had previously promulgated rules concerning discipline within the Nebraska Penal and Correctional Complex. Not all misconduct by a prisoner resulted in the revocation

of good time. Only that misconduct which was determined to be serious misconduct might result in the revocation of good time.

In McDonnell the Supreme Court of the United States, speaking through Mr. Justice White, specifically found: "Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether *such behavior* has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed." (Emphasis supplied.)

It should be kept in mind and we note, however, that what the United States Supreme Court was addressing was a hearing to determine the *seriousness of the misconduct* and not the ultimate revocation of good time.

In the McDonnell case the inmates were arguing that the requirements of the Morrissey case were likewise required to be followed in the McDonnell situation. The United States Supreme Court, however, rejected that contention, saying: "We agree with neither petitioners nor the Court of Appeals: the Nebraska procedures are in some respects constitutionally deficient but the Morrissey-Scarpelli procedures need not in all respects be followed in disciplinary cases in state prisons."

The United States Supreme Court then concluded the McDonnell decision by decreeing that in disciplinary hearings within the Nebraska Penal and Correctional Complex the following due process must be afforded a prisoner: (1) Advance written notice of charges must be given to the disciplinary action inmate no less than 24 hours before his appearance before the adjustment committee; (2) there must be a "written statement" by the fact finders as to the evidence relied on and reasons for the disciplinary action; (3) the inmate should be allowed to call witnesses and present documentary evidence in his de-

fense if permitting him to do so will not jeopardize institutional safety or correctional goals; (4) the inmate has no constitutional right to confrontation and cross-examination in prison disciplinary proceedings, such procedures in the current environment, where prison disruption remains a serious concern, being discretionary with the prison officials; and (5) inmates have no right to retained or appointed counsel in such proceedings, although counsel substitutes should be provided in certain cases.

Nowhere in the McDonnell decision is there any indication that either a separate hearing or a combined hearing must be held as to the penalties to be imposed. The hearing which must be held under the McDonnell decision is with regard to the *seriousness of the misconduct.* The record in this case makes it quite clear that a full and adequate hearing with regard to the seriousness of the misconduct, to wit, pleading guilty to a charge of possession of stolen property while on parole, was in fact held, notice was given, and a written report made.

While both the Morrissey and Scarpelli decisions involve situations more closely akin to the case at bar, to wit, revocation of parole and revocation of probation, they likewise make no requirement for a specific notice or hearing with regard to the ultimate penalties to be imposed. Morrissey held that before one's liberty could be taken and his parole revoked, certain minimal due process requirements need be met. They were: (1) A written notice of the claimed parole violation; (2) disclosure to the parolee of evidence against him; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or

lawyers; and (6) a written statement by the fact-finders as to the evidence relied on and the reasons for revoking the parole. Again, there is no indication in the Morrissey case that a specific hearing on the penalty must be held. Once the seriousness of the misconduct has been disposed of and the individual has been afforded his minimal due process with regard to that determination, then the remaining statutory provisions may properly be imposed.

Numerous cases can be found wherein the courts of all jurisdictions have held that under the applicable good-time statutes, the grant or denial of an allowance of credits for good conduct is discretionary with the proper authorities and constitutes a matter of grace rather than a matter of right. For a detailed collection of these cases, see 95 A. L. R. 2d 1265. Nothing in either the Morrissey, Scarpelli, or McDonnell decisions has in any way affected those determinations.

Nowhere in this record has the appellant, who has the burden of proving he is being illegally or unlawfully detained, presented evidence to show such to be the case. Appellant has made no argument nor produced any evidence that the hearing with regard to the revocation of his parole was in any manner in violation of his due process rights or the requirements of Morrissey, Scarpelli, and McDonnell. His claim as noted originally is simply that no one told him he would lose his good time, if it were found that his misconduct was serious. We are unable to find, nor has any authority been cited to us, wherein such a requirement exists. The statutes of the State of Nebraska grant the Board of Parole absolute discretion with regard to forfeiting, withdrawing, or restoring good time when it is determined that misconduct has occurred. It appearing therefore that the appellant did, in fact, receive all of his required due process and he is not therefore being illegally or unlawfully detained, his application for a writ of ha-

beas corpus should have been denied. See Pruitt v. Parratt, 197 Neb. 854, 251 N. W. 2d 179. Accordingly, the judgment of the trial court is hereby reversed with directions to dismiss the application of the appellant.

REVERSED AND REMANDED WITH INSTRUCTIONS.

DALE REDDING, APPELLANT, V. AUDRA GIBBS ET AL., APPELLEES.

280 N. W. 2d 53

Filed June 19, 1979. No. 41908.

1. **Statutes: Parties.** Under section 25-301, R. R. S. 1943, every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 25-304, R. R. S. 1943.
2. **Judgments: Parties: Res Judicata.** In ascertaining whether the plaintiff is the real party in interest, the primary and fundamental test to be applied is whether the prosecution of the action will save the defendant from further harassment or vexation at the hands of other claimants to the same demand. If the defendant is not cut off from any just defense, offset, or counterclaim against the demand and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end.
3. **Mortgages: Assignments: Foreclosure: Parties.** Where the mortgagee has made an assignment of the mortgage, and the assignee has not reassigned or redelivered it to the mortgagee at the time a foreclosure action is commenced by the mortgagee, the mortgagee is not the real party in interest to bring the action.
4. **Mortgages: Equity: Default.** A court of equity has the power to relieve a mortgagor from the effect of an operative acceleration clause when the default of the mortgagor is the result of some unconscionable or inequitable conduct of the mortgagee.
5. **Mortgages: Equity: Default: Foreclosure.** Equity will grant relief to prevent an acceleration of a mortgage debt predicated on an inadvertent default where there are indications that the mortgagee had knowledge of the default and, subsequent to the expiration of the grace period, in personal dealings with the mortgagor failed to inquire about the delayed payment but immediately thereafter brought an action to foreclose.
6. _____: _____: _____: _____. When an advantage is unconscionable depends on the circumstances. The gravity of the fault

must be compared with the gravity of the hardship. "Unconscionable" conduct means conduct that is monstrously harsh, that is shocking to the conscience.

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

True R. Ferguson of Atkins, Ferguson, Hahn & Zimmerman, for appellant.

John F. Wright of Wright & Simmons, for appellees.

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

BRODKEY, J.

Plaintiff, Dale Redding, appeals from a decree entered by the District Court for Sioux County dismissing his petition to foreclose a certain mortgage upon a ranch which the defendant, Cameron Cattle Company, had purchased through mesne conveyances from the original owner, the plaintiff herein.

Plaintiff Redding was the owner of a ranch located in Sioux County which, on June 30, 1967, he sold to the original purchaser, Scottsbluff Angus Ranch, Inc., later renamed Shalco Land & Cattle Company, Inc. As part of that transaction, the purchaser gave Redding a purchase money mortgage and a note in the amount of $500,000 as partial payment therefor. The note and mortgage provided for quarterly payments on interest and/or principal to be made on March 31, June 30, September 30, and December 31 of each year thereafter. The note and mortgage contained an acceleration clause providing that in the event of default in the payment of any installment due for a period of 60 days from the date the same was due, the holder had the option to declare the entire balance of the debt due without notice. The note also contained a provision permitting both the maker and holder at any time to assign or trans-

fer all of their rights and obligations under the note and mortgage, provided any assignment or transfer by the holder would be of the holder's entire interest in both the note and the collateral.

On July 22, 1971, Redding, as the holder of the mortgage on the ranch, assigned all of his interest in the mortgage to Wichita Falls Production Credit Association, Wichita Falls, Texas, hereinafter referred to as Wichita Falls. The purpose of the assignment was to secure certain promissory notes executed by Redding and his son Paul in connection with a loan made to them by Wichita Falls. The assignment contained the condition that when those promissory notes were paid, the assignment would be void. The assignment was recorded in the office of the county clerk of Sioux County on August 27, 1971. Wichita Falls still retains possession of the assignment, and has never cancelled it or reassigned it to Redding. The ranch was sold several times thereafter; and was subsequently conveyed to the defendant, Cameron Cattle Company, hereinafter referred to as Cameron, who bought the ranch on April 3, 1973, subject to the mortgage and note originally given to Redding. Shortly after the purchase of the ranch by Cameron, Wichita Falls advised Cameron in writing that all quarterly payments on the mortgage were to be made directly to Redding unless and until Wichita Falls gave Cameron at least 30 days notice of a default by Redding. It was also stipulated between the parties that on May 1, 1973, Redding gave Cameron a statement of the principal balance due of $467,500, and that the next payment due on the mortgage was on June 30, 1973.

The record reveals that Cameron was anything but regular in making the payments on the mortgage. For example, it appears that the first payment from Cameron was due on June 30, 1973, but was not paid until August 6, 1973, 36 days late. The September 30, 1973, payment was not paid until November

12, 1973, which was 43 days late. The December 31, 1973, payment was made on February 6, 1974, 37 days late. The payment due March 31, 1974, was paid on May 10, 1974, which was 40 days late. It does not appear from the record that any complaint was ever made directly to Cameron about his late payments, although Redding testified he was dissatisfied with the way Cameron was making his payments. Cameron did not tender the payment due on June 30, 1974, until September 25, 1974, after Redding had commenced his foreclosure action. Darrell Cameron, who was the president of Cameron Cattle Company, testified that he was under the impression that the payment he had made in May 1974 was the payment which was due on June 30, 1974. As previously stated, both the note and the mortgage contained a 60-day grace period in which to make each quarterly payment after due; and it appears that Cameron frequently utilized the additional 60 days to make his payments.

It further appears that on or about June 25, 1974, Cameron sold the ranch to Audra Gibbs, who was the executive officer of the Gibbs Cattle Company, hereinafter referred to as Gibbs. In the contract between the parties, Gibbs was given the right to assume the existing mortgage to Redding, which, as previously stated, provided for a 6 percent interest rate. It appears from the record that the Scottsbluff National Bank was holding a prior security interest in the ranch as additional security for indebtedness owed to the Bank by Cameron. For the purpose of protecting its security interest, the Scottsbluff National Bank, hereinafter referred to as Bank, wrote to Redding, advising him the ranch had been sold by Cameron to Gibbs. In its letter of June 27, 1974, the Bank stated: "It is our understanding that the balance is now $457,500.00, and that the interest rate is 6% with payments of $2,500.00 plus interest payable quarterly on March 31st, June 30th, September 30th,

and December 31st of each year. *I would appreciate confirmation of the balance and payments due.*" (Emphasis supplied.) The plaintiff did not respond to the Bank's request for a confirmation of the balance and payments due, although the June 30, 1974, payment became due and delinquent.

The record reveals that on or about August 24, 1974, Redding visited the ranch and talked to Cameron. The conversation was primarily with reference to the condition of the grass and the cattle market. However, Cameron then informed Redding that he had sold the ranch to Gibbs, and that he (Cameron) would make the payment due on the mortgage on September 30, 1974, and that the Bank would make all subsequent payments. Cameron testified that he asked the plaintiff "if everything was alright." Cameron testified that Redding replied: "Yes, I just wanted to check on the condition of the ranch." There were no questions or conversation concerning the note and mortgage although the 60-day grace period for the June 30, 1974, payment had nearly expired. Redding testified he knew the June 30, 1974, payment had not been made at the time he visited with Cameron at the ranch on or about August 24, 1974. Redding also testified he was dissatisfied with Cameron's late payments. Plaintiff was asked at the trial: "Why didn't you discuss this matter with Cameron when you met him at the ranch?", to which Redding replied: "I had been talking to my attorney, Mr. Ferguson, and asking him all the time, what I could do and he said, 'There's not a thing you can do, because you gave sixty-days grace,' * * *."

Shortly thereafter, on September 19, 1974, Redding filed this foreclosure action. After the filing of the foreclosure action, the Bank sent Redding the delinquent payments which were due June 30, 1974, and September 30, 1974. Redding returned both payments to the Bank early in October of 1974. On Oc-

tober 15, 1974, Cameron directed the Bank to send the two checks for the delinquent payments to Wichita Falls, the assignee of the mortgage on the ranch. Wichita Falls accepted the tendered payments, and credited Redding's account for them, and then contacted Redding. Redding instructed Wichita Falls to return the payments to the Bank. Wichita Falls did so, referring to their previous statement that Cameron's payments were to be made directly to Redding unless notice to the contrary was given 30 days in advance. Cameron had never previously made the payments to Wichita Falls, but had always sent them directly to Redding.

After trial in the foreclosure action, the trial judge on December 20, 1977, sent a letter to the parties, which letter appears in the transcript, and reads, in part, as follows: "The plaintiff is not the real party in interest. If he is, he is barred under principles of equitable estoppel from foreclosing the mortgage. Given the letter from the Scottsbluff National Bank to which he did not reply and his conference with Mr. Cameron at the time the payment was delinquent, I think he had a duty to speak. It would be *unconscionable* to permit foreclosure under these circumstances." (Emphasis supplied.) The court entered his order to the same effect on December 20, 1977, and Redding then perfected his appeal to this court. For the reasons hereinafter set forth, we affirm the judgment and decree of the District Court.

In his brief on appeal, Redding makes two principal assignments of error. First, he contends the District Court erred in finding that the plaintiff was not the real party in interest; and second, the District Court erred in finding that even if the plaintiff was the real party in interest, he was equitably estopped, by unconscionable conduct, from foreclosing on the mortgage.

We first address Redding's contention that he was the real party in interest and should have been al-

lowed to maintain the foreclosure suit. Section 25-301, R. R. S. 1943, provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 25-304." Section 25-304, R. R. S. 1943, does not provide an exception applicable to the instant case. Redding argues that his assignment to Wichita Falls was a conditional assignment for security purposes only, and that he should be permitted to prosecute the action because Wichita Falls consented that he could do so. In support of his contention, counsel for Redding relies principally on two cases, Greco v. Oregon Mut. Fire Ins. Co., 191 Cal. App. 2d 674, 12 Cal. Rptr. 802 (1961); and Taylor v. Sanford, 203 Cal. App. 2d 330, 21 Cal. Rptr. 697 (1962). Counsel for Redding has cited the above authorities for the proposition that when an assignee gives his consent in some form to an action brought by the assignor on the chose in action, the assignor will be allowed to maintain the suit as the real party in interest. In the case of State, ex rel. Sorensen v. Nemaha County Bank, 124 Neb. 883, 248 N. W. 650 (1933), we stated: " 'In ascertaining whether the plaintiff is the real party in interest, the primary and fundamental test to be applied is whether the prosecution of the action will save the defendant from further harassment or vexation at the hands of other claimants to the same demand. If the defendant is not cut off from any just defense, offset, or counterclaim against the demand and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end.' 2 Bancroft, Code Practice and Remedies, 1094." See, also, Archer v. Musick, 147 Neb. 1018, 25 N. W. 2d 908 (1947).

Redding claims that Wichita Falls has in effect consented to this suit, and therefore Redding may maintain this suit as the real party in interest. As evidence of such consent by Wichita Falls, Redding points out the fact that he has always retained the

mortgage and note in his possession; and he cites authorites in which an assignor was allowed to maintain a suit as the real party in interest after the assignee reassigned or delivered the note to the assignor, thus evidencing the assignee's consent to the assignor's bringing the suit. He also argues that Wichita Falls has demonstrated its consent to the present suit when it authorized all payments on the note and mortgage to be made directly to him; and also that Wichita Falls returned the June 30, 1974, and September 30, 1974, payments it received from Cameron after Redding informed Wichita Falls that he was foreclosing on the mortgage.

A similar issue was presented to this court in Burns v. Hockett, 91 Neb. 546, 136 N. W. 348 (1912). The Burns case was also a foreclosure action which this court was rehearing on the basis of the mortgagors' allegation that the mortgagees had assigned their interest in the note and mortgage before the suit was instituted. In that case we stated: "At the time mortgagees decided to bring the suit, the note and mortgage were in possession of the Union State Bank. By formal assignment they were then held as collateral security for the payment of a debt owing by mortgagees to the bank, but a careful consideration of all of the evidence requires a finding that the bank had surrendered the note and mortgage to mortgagees without condition before the action was instituted, that they were the legal owners of the security when they filed their petition, and that the bank had full knowledge of their purpose to foreclose the mortgage and of their prosecution of the suit. This finding fully justifies the dismissal from which mortgagors have appealed.

"The surrender and the redelivery of the note and mortgage to the payees transferred to them the title thereto. They were the legal holders of the security when they sued mortgagors." In Burns, the bank surrendered and redelivered the note and mortgages

after first having taken possession of them; and this court found that as a result of the redelivery of the note and mortgage to the mortgagors, legal title was held by the mortgagors at the time their suit was commenced.

In the instant case, however, the mortgage was never reassigned to Redding by Wichita Falls, nor was there any document from Wichita Falls releasing the assignment of record or consenting to Redding's foreclosing of the mortgage. It is true that in this case Redding always retained possession of the note and mortgage. However, no affirmative action was ever taken by Wichita Falls indicating they were consenting to the present suit. The mortgage was never delivered to Wichita Falls, although its assignment was recorded. We conclude that Wichita Falls held legal title to the mortgage as a result of the assignment at the time the action was commenced, and was the proper party to bring the law suit. We also point out, however, that under section 25-304, R. R. S. 1943, Nebraska has not recognized "consent" as being an exception to the requirement under section 25-301, R. R. S. 1943, that actions be prosecuted by the real party in interest.

Redding also contends the District Court erred in finding that even if Redding could be considered the real party in interest, he is barred upon equitable principles from foreclosing the mortgage and that under the facts present in the instant case it would be inequitable to permit him to do so. The court stated: "Given the letter from Scottsbluff National Bank to which he [Redding] did not reply and his conference with Mr. Cameron at the time the payment was delinquent, I think he had a duty to speak. It would be *unconscionable* to permit foreclosure under these circumstances." (Emphasis supplied.) Redding contends, however, that under the existing law of Nebraska, the doctrine of equitable estoppel is not applicable. While it may be true that not all

the elements of the doctrine of equitable estoppel are present in this case, nevertheless we believe the facts of this case afford a proper situation where equity may afford relief from a technical acceleration of a mortgage under an acceleration clause because of the harsh, oppressive, and unconscionable conduct of the mortgagee. The law is well established, and the general rule is stated in an annotation in 70 A. L. R. 993 et seq. entitled "Grounds of relief from acceleration clause in mortgage." The general rule is there stated as follows: "It is held, apparently without dissent, that a court of equity has the power to relieve a mortgagor from the effect of an operative acceleration clause, when the default of the mortgagor was the result of some unconscionable or inequitable conduct of the mortgagee." Cases from at least 15 jurisdictions are cited to that effect in that annotation, including the case of Morling v. Bronson, 37 Neb. 608, 56 N. W. 205 (1893). Although not following the general rule above cited in that case, it is clear that, inferentially at least, Nebraska recognizes the general rule, as the court in that case stated: "Courts of equity will sometimes interfere to relieve a party who has been betrayed by the unconscionable or illegal or fraudulent conduct of another, * * *." See, also, 59 C. J. S., Mortgages, § 495 (6), p. 794 et seq.; Rosenthal, The Role of Courts of Equity In Preventing Acceleration Predicated Upon a Mortgagor's Inadvertent Default, 22 Syracuse Law Rev. 897 (1971). It appears some courts have granted relief to prevent acceleration predicated on an inadvertent default where there were indications the mortgagee had knowledge of the default and, subsequent to the expiration of the grace period, in *personal* dealings with the mortgagor had failed to inquire about the delayed payment but immediately thereafter brought an action to foreclose. Id. at p. 906.

A case of this nature, factually similar to the in-

stant case, is Arizona Coffee Shops, Inc. v. Phoenix Downtown Park. Ass'n, 95 Ariz. 98, 387 P. 2d 801 (1963). In that case the mortgagor missed the March 1st payment of principal and interest because of the inadvertent error of its bookkeeper who had been ill. (The bookkeeper was the wife of the mortgagor's president.) At the time of the default, the defendant had paid $173,500 of principal and interest. As a defense, the mortgagor alleged that after the March 1st payment became due its president bought a gift for his wife at the shop owned by the corporate mortgagee and, although the mortgagee was advised of the bookkeeper's illness, he made no mention of the fact that the payment had not been received. The court found nothing in the record to indicate the mortgagee was prejudiced, and that the default was entirely out of proportion to the harshness of the plaintiff's action in declaring the entire debt due. In that case the court stated: "Circumstances may exist where the withholding of the right to accelerate by a court of equity is appropriate. Were this not true, there would be no occasion for the enforcement of equitable doctrines." There the mortgagor immediately tendered the overdue payments upon learning of the default and commencement of the foreclosure action, as was done in this case. The mortgagor rejected the tendered payment. The Arizona Supreme Court stated: "It is universally held in equity that unconscionable conduct of the mortgagee constitutes a valid defense to a mortgage foreclosure." See, also, Lieberbaum v. Surfcomber Hotel Corp., 122 So. 2d 28 (Fla. App., 1960); Federal Home Loan Mortgage Corp. v. Taylor, 318 So. 2d 203 (Fla. App., 1975); Domus Realty Corp. v. 3440 Realty Co., Inc., 179 Misc. 749, 40 N. Y. S. 2d 69 (1943). In Domus the court defined the terms "oppressive" and "unconscionable" as follows: "Tested by ordinary definition and by common understanding, 'oppressive' means conduct that

is unjustly burdensome, harsh or merciless and 'unconscionable' means conduct that is monstrously harsh, that is shocking to the conscience."

The philosophy or rationale behind the rule allowing relief on equitable principles was well stated in a frequently quoted dissenting opinion by Justice Cardozo in a 1930 New York case, Graf v. Hope Building Corp., 254 N. Y. 1, 171 N. E. 884, as follows: "When an advantage is unconscionable depends upon the circumstances. It is not unconscionable generally to insist that payment shall be made according to the letter of the contract. It may be unconscionable to insist upon adherence to the letter where the default is limited to a trifling balance, where the failure to pay the balance is the product of mistake, and where the mortgagee indicates by his conduct that he appreciates the mistake and has attempted by silence and inaction to turn it to his own advantage. The holder of this mortgage must have understood that he could have his money for the asking. His silence, followed, as it was, by immediate suit at the first available opportunity, brings conviction to the mind that he was avoiding any act that would spur the mortgagor to payment. What he did was almost as suggestive of that purpose as if he had kept out of the way in order to avoid a tender. * * * Demand was, indeed, unnecessary to bring the debt to maturity at law. There is not a technical estoppel. * * * The consequence does not follow that, in conditions so peculiar, the omission to make demand is without significance in equity. Significant it may then be in helping the court to a determination whether the conduct of a suitor in taking advantage of a default, so easily averted and so plainly unintentional, is consistent with good conscience. * * * True, indeed, it is that accident and mistake will often be inadequate to supply a basis for the granting or withholding of equitable remedies where the consequences to be corrected might have been avoided if the victim of

the misfortune had ordered his affairs with reasonable diligence. * * * The restriction, however, is not obdurate, for always the gravity of the fault must be compared with the gravity of the hardship. * * * Let the hardship be strong enough, and equity will find a way, though many a formula of inaction may seem to bar the path. * * *."

In deciding whether or not equitable relief should be granted in situations such as this, it is clear the gravity of the fault must be weighed against the gravity of the hardship. In this case it is clear the hardship which would be caused to Cameron, and incidentally to the Bank, by allowing Redding to foreclose the mortgage, would be harsh, oppressive, and unconscionable. If Cameron were required to refinance after foreclosure of the mortgage, in view of his written guarantee to Gibbs that he could assume a 6 percent mortgage, the financial loss to him might very well be disastrous. An officer from the Bank testified as follows: "With the figures I had at hand, with any raise in the interest rate, I figured one per cent would be about $54,000 additional cost to Cameron, which would decrease our equity that amount, so if it were increased three per cent, it would be a hundred and fifty some thousand. Four per cent would be two hundred and some thousand, which would decrease our equity ---."

In this case it is clear Redding knew the property had been sold and all the parties were relying on the payments being current. He did not advise the Bank the payments were not current, even though he received a letter from the Bank requesting that information. Cameron relied upon Redding's statement made to him at the ranch that everything was all right, and the Bank relied upon the letter it sent to Redding regarding the payments. It is clear all of the defendants could and would have made the payment immediately if Redding had made demand upon them or informed them the payments were

late. Although perhaps not legally required to give that information to the mortgagor, Redding's failure to make such a demand is not without significance, especially in situations where it may appear the default was small and the mortgagee had not in the past insisted on prompt payment. It appears Cameron's failure to make the delinquent payments was due to inadvertence. He testified as follows: "Q. Did you have any idea at that time that you were delinquent or about to become delinquent in your June 30 payment? A. No, I was under the impression that the payment that I made in May was the June 30 payment. Q. Did you interpret Mr. Redding's response that everything was alright, that there was no problems with the payments? * * * A. There was nothing said about any payment or anything at all. I had no suspicions that anything was wrong with any payment. * * * Q. Were you prepared to make the June 30 payment at that date? A. Oh, yes, financially I was prepared." Redding commenced his foreclosure action almost immediately after the running of the 60-day grace period. He made no demand for payment before commencing suit, although it is clear payment would have been forthcoming immediately. Although, technically, he may not have been required to demand payment before instituting his foreclosure action, nevertheless his failure to do so in this situation was clearly harsh, oppressive, and unconscionable, and strongly suggests that he wished to take advantage of defendant Cameron's situation. The equities in this case preponderate in favor of the defendants and, in our opinion, justify the action of the trial court in dismissing plaintiff's petition.

For the reasons set forth above in this opinion, the judgment and decree of the lower court must be affirmed.

AFFIRMED.

ERNEST D. HARRIGFELD, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

280 N. W. 2d 61

Filed June 19, 1979. No. 41939.

1. **Administrative Law: Licenses and Permits: Intoxicating Liquors.** The Nebraska Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied and courts are without authority to interfere with that discretion unless it has been abused.
2. _____: _____: _____. Where the record of the proceedings before the Nebraska Liquor Control Commission contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary.
3. _____: _____: _____. The facts gathered and the evidence taken in this case are sufficient to establish that the order of the Nebraska Liquor Control Commission was not unreasonable or arbitrary.
4. **Appeal and Error.** Error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected and no judgment shall be reversed or affected by reason of such error or defect.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Affirmed.

Norris G. Leamer, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

COADY, District Judge.

Ernest Harrigfeld, petitioner-appellant herein, applied for a retail beer license from the Nebraska Liquor Control Commission, appellee herein and hereinafter referred to as the Commission. In accordance with statutory procedure, the application for this rural license was referred to the Dakota County board of commissioners. After a hearing with other protesting parties present, the county commission-

ers unanimously recommended that the license be issued.

Persons against the issuance of said license then filed written objections with the Commission setting forth, among other things: "3. That the road leading to applicant's premises is a long, winding and narrow country road with steep ditches along each side and several accidents have already occurred * * * that the narrow road in question is not sufficient to allow for heavy traffic." The plaintiff was further notified of the time and place of the statutory hearing to be had before the Commission due to the protest filed. At that hearing, evidence was taken and upon completion thereof, the Commission denied the application because "protests were filed" and "the proposed premises is in an area that would be difficult for law enforcement and that the access road is long and dangerous and hazardous."

Petitioner appealed the Commission's negative decision to the District Court for Dakota County and attempted there to introduce, for the first time, testimony by three witnesses. The District Court declined to hear those witnesses, the petitioner made a proper offer in regard to their evidence, and the case was tried upon the record made before the Commission. The District Court affirmed. The petitioner appeals to this court and we affirm the District Court.

This case involves questions raised concerning the issuance of a liquor license, as opposed to issues involved in the revocation or suspension of a license.

In 1959, the Legislature required that applications for liquor licenses be filed with the Commission rather than with local authorities. Appeals from such applications were taken in accordance with the ancestor of section 53-1,116 (8), R. S. Supp., 1978, which likewise provided that appeals from the Commission "shall be heard and tried de novo in the district court in the manner provided for the trial of

suits in equity. Additional testimony may be introduced at the hearing on appeal." Courts were denied authority to interfere unless there was an abuse of discretion by the Commission and the Commission's decisions were to be sustained unless its action is shown to be "unreasonable or arbitrary." Allen v. Nebraska Liquor Control Commission, 179 Neb. 767, 140 N. W. 2d 413 (1966); City of Lincoln v. Nebraska Liquor Control Commission, 181 Neb. 277, 147 N. W. 2d 803 (1967). The two cited cases so held on the facts set forth therein.

A subsequent case, The Flamingo, Inc. v. Nebraska Liquor Control Commission, 185 Neb. 22, 173 N. W. 2d 369 (1969), concerned a venue question. But its language and determination placed suspension appeals, as opposed to issuance and revocation appeals, under section 84-917, R. R. S. 1943. That case specifically said, "Since it is not a revocation, a suspension is not governed by section 53-1,116 R. R. S. 1943." This decision was followed by subsequent cases concerning Chapter 84 or suspension cases. See, The 20's, Inc. v. Nebraska Liquor Control Commission, 190 Neb. 761, 212 N. W. 2d 344 (1973); O'Connor v. Nebraska Liquor Control Commission, 191 Neb. 436, 215 N. W. 2d 635 (1974); Tri-City Beer Co. v. Nebraska Liquor Control Commission, 195 Neb. 278, 237 N. W. 2d 852 (1976).

The issuance or revocation cases continued to follow the Chapter 53 type of appeals. This court applied the "unreasonable or arbitrary" test in T & N P Co., Inc. v. Nebraska Liquor Control Commission, 189 Neb. 708, 204 N. W. 2d 809 (1973). Petitioner in that case wanted this court to hear the matter de novo, but it was said in reference to section 53-1,116, R. R. S. 1943, that "The statutory provision refers to the procedure on the trial of the appeal rather than the determination of the appeal." This line of cases continues in C & L Co. v. Nebraska Liquor Control Commission, 190 Neb. 91, 206 N. W. 2d 49 (1973), and

Eleven Eighteen Co. v. Nebraska Liquor Control Commission, 191 Neb. 572, 216 N. W. 2d 720 (1974).

At this point, it seems clear that in Chapter 53 cases, the District Courts could and did take additional evidence and then limited their findings to whether the Commission's decision was unreasonable or arbitrary. On the other hand, section 84-917, R. R. S. 1943, applies to license suspension cases and the District Court was limited to a review of the record.

The Commission would have us believe that three cases decided by this court have merged suspension and revocation appeals into one, i.e., Chapter 84. We would point out that in J K & J, Inc. v. Nebraska Liquor Control Commission, 194 Neb. 413, 231 N. W. 2d 694 (1975), it was said "The issue before us on appeal is whether, on the record, the action of the commission in denying the application was unreasonable and arbitrary." We would also point out that Winkelmann v. Nebraska Liquor Control Commission, 198 Neb. 481, 253 N. W. 2d 307 (1977), and 72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission, 199 Neb. 729, 261 N. W. 2d 614 (1978), on the facts therein, stand for the rule that it is not unreasonable or arbitrary for the Commission, when petitioned for a license, to rely on the mere recommendation of a city council. This black letter law was established long ago in Allen v. Nebraska Liquor Control Commission, *supra*. The most that the Commission can ask is that we merge two statutory procedures. This court, in division, declines to do so.

In this particular case, we will assume that the Commission has some rule or policy that a license should not be granted to a restaurant at the end of a dangerous access road. That seems to be rational and, in any case, the propriety of such a rule has not been made an issue here.

The Commission took evidence indicating that the

applicant's property is on the Missouri River. It consists of a boat dock and small restaurant where food, mostly fish, is consumed by the public. The restaurant is situated at the end of a county road about 6 miles from Jackson, Nebraska. There is evidence that the road is used by school children, is well maintained, is graveled, and the ditches are not steep. There is also conflicting evidence that the ditches are steep, that the road is very narrow, and that there are six 90-degree turns within 7 miles. Pictures were offered and received showing, among other things, that trees stand on the very edges of the traveled portion of the road.

The Nebraska Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied. Courts are without authority to interfere with that discretion unless it has been abused. T & N P Co., Inc. v. Nebraska Liquor Control Commission, *supra*. Where the record of the proceedings before the Nebraska Liquor Control Commission contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. J K & J, Inc. v. Nebraska Liquor Control Commission, *supra*. The facts gathered in evidence by the Commission in this case are sufficient to establish that their ruling was reasonable and, therefore, not arbitrary.

The petitioner asks us to reverse or remand this case because the District Court refused to take additional evidence. In the District Court, the petitioner offered to prove that the Dakota County highway superintendent would testify as follows: "That the road * * * is well known to him * * * [the] road is graveled and level * * * the last four and a half miles of said road is a deadend road with no through traffic. * * * [It] is a U. S. Mail Route * * * all * * * except the last one and a half miles is a school bus route. A federal aid secondary route No. 3935 and a rural other arterial road. That according to the Ne-

braska State functional classification of roads, rural other arterial is the highest class of road under county jurisdiction and that compared with the rest of the Dakota County roads system said road is above average." We decline, in this instance, to reverse or remand because the District Court could not find that the Commission's determination was unreasonable and arbitrary even if every word of the testimony offered was believed. Error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected and no judgment shall be reversed or affected by reason of such error or defect. §§ 25-853 and 27-103, R. R. S. 1943.

Finally, we do not find it necessary, in view of our holding, to consider whether there is sufficient evidence to enforce the commission's findings that licenses should be denied where the location is in an area difficult for law enforcement or where protests against a license have been had. All other exceptions taken to the proceedings below have been considered and found not to merit written discussion.

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, J., dissents.

BOSLAUGH, J., concurs in the result.

FOREMAN & CLARK OF NEBRASKA, INC., A MINNESOTA CORPORATION, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

280 N. W. 2d 892

Filed June 19, 1979. No. 41966.

1. **Condemnation: Damages.** The measure of damages in the taking or injury of a leasehold is the difference between the rental value of the remainder of the term and the rent reserved in the lease.
2. **Evidence: Appeal and Error.** A party may not claim error on the failure to introduce evidence which was incumbent upon the party

seeking the benefit of the evidence to introduce. A party cannot be heard to complain of error which he was instrumental in bringing about.

3. **Trial: Verdicts.** Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, 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 Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded with directions.

Herbert M. Fitle, Omaha City Attorney, and Charles K. Bunger, for appellant.

Christensen Law Offices, P.C. and Morseman, Fike, Davis & Polack, P.C., for appellee.

Heard before KRIVOSHA, C. J., MCCOWN, CLINTON, and HASTINGS, JJ., and KELLY, L. W., JR., District Judge.

PER CURIAM.

This is an appeal by the City of Omaha from the order of the District Court for Douglas County, Nebraska, granting plaintiff, Foreman & Clark of Nebraska, Inc., a new trial.

The action was originally commenced in the county court of Douglas County, Nebraska, as a condemnation action filed by the City of Omaha as condemner. The condemnee, Foreman & Clark, had a leasehold interest in a store located in a building known as the Karbach Building, located at 15th and Douglas Streets in Omaha, Nebraska. Foreman & Clark operated a retail men's clothing store on the second floor of the building which the City had earlier purchased by negotiation. It was only the leasehold interest of Foreman & Clark that was being condemned.

Following condemnation proceedings in the county court and an award by the board of appraisers, the

City of Omaha appealed to the District Court for Douglas County, Nebraska.

In its petition the City of Omaha alleged that on September 19, 1974, the fair market value of the leasehold interest in the real estate was $17,000. Nevertheless, the record reflects that the City permitted Foreman & Clark to remain in possession after the taking and until January 1, 1975.

The trial court in its instructions to the jury specifically stated that the condemnation proceedings were instituted by the City in September 1974, but possession did not occur until January 1, 1975, and the lease did not expire until February 28, 1978. The court further instructed the jury that the lease would therefore have been valid and existing for an additional 38 months from and after January 1, 1975. The measure of damages in the taking or injury of a leasehold is the difference between the rental value of the remainder of the term and the rent reserved in the lease. Ballantyne Co. v. City of Omaha, 173 Neb. 229, 113 N. W. 2d 486. See, also, Balog v. State, 177 Neb. 826, 131 N. W. 2d 402; State v. Dillon, 175 Neb. 350, 121 N. W. 2d 798.

During the course of the trial, the City introduced evidence as to the value of the leasehold, including testimony that the leasehold had no value because the difference between the rental still due under the remaining portion of the lease and the reasonable value of the leasehold was zero.

Foreman & Clark objected to the introduction of certain of the City's expert testimony on the basis that there was no foundation for such testimony. Foreman & Clark did not, however, at any time object to the introduction of such evidence on the basis that the City had admitted in its pleading the leasehold interest had a value of at least $17,000 on September 19, 1974. Moreover, the condemnee, Foreman & Clark, never sought to take advantage of the fact the City admitted that on September 19, 1974,

the property had a value of $17,000, nor did the condemnee request the court to either instruct the jury of that fact or take the matter into account.

At the conclusion of the jury's deliberation, it returned a verdict for no dollars. Foreman & Clark then filed a motion for new trial claiming it was entitled to an award of at least $17,000 on the basis of a judicial admission made by the City. This amount was chosen by Foreman & Clark alleging that the City judicially admitted in its petition that the leasehold interest had a value of at least $17,000.

The trial court concluded that Foreman & Clark was correct and granted a new trial. We believe the trial court was in error and should not have granted a new trial. We therefore reverse and remand.

While it is true the City admitted in its petition that the leasehold interest on September 19, 1974, had a value of $17,000, it did not make an admission as to the value of the leasehold interest on January 1, 1975, the date which the jury was instructed to use for determining Foreman & Clark's damage. It was certainly true that the admission by the City that on September 19, 1974, the leasehold interest was worth $17,000 was relevant evidence which Foreman & Clark would have been entitled to introduce in evidence. The jury could have taken that fact into account in attempting to determine the difference in value of the leasehold between September 19, 1974, and January 1, 1975. However, Foreman & Clark chose to waive that right by refusing to bring that value to the jury's attention.

A party may not claim error on the failure to introduce evidence which was incumbent upon the party seeking the benefit of the evidence to introduce. A party cannot be heard to complain of error which he was instrumental in bringing about. Regier v. Nebraska P. P. Dist., 189 Neb. 56, 199 N. W. 2d 742. Having failed to introduce the evidence as to value and having failed to request an instruc-

tion on that matter, Foreman & Clark is not now in a position to claim error.

Moreover, the allegation by the condemner, City of Omaha, as to the value of the leasehold interest on September 19, 1974, was not a judicial admission in that it was not the admission of a fact in issue in the lawsuit which the jury was to determine. In this case the date of September 19, 1974, was no longer relevant to the condemnation proceeding. The parties agreed to try the case on the theory that the relevant date for a determination of the value of the leasehold was January 1, 1975, and no assignment of error is made of that matter. The value of the leasehold on September 19, 1974, therefore, was merely evidence of the value of the leasehold some 3½ months earlier, but not a judicial admission as to the value of the leasehold on the important date. There was evidence, introduced without objection, that the leasehold interest had no value on January 1, 1975. The value on that date was a question of fact to be determined by the jury. Where the evidence is conflicting, this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. Ward v. Nebraska Electric G. and T. Coop., Inc., 195 Neb. 641, 240 N. W. 2d 18. The evidence presented as to value of the leasehold on January 1, 1975, was clearly in conflict.

" 'The district court has the power and is required to consider and determine motions for a new trial by the exercise of its judicial discretion . . . .

'Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.

* * *

'Whether the decision was to grant a new trial or deny one, the questions here are, do the alleged

error or errors appear in the record, were they called to the attention of the trial court by the motion, and do they constitute prejudicial error to the party complaining.' " Roush v. Nebraska P. P. Dist., 189 Neb. 785, 205 N. W. 2d 519.

We have examined the record and found there was an abuse of judicial discretion. The judgment of the trial court in granting the motion for a new trial on the basis of an admission as to value on a date irrelevant to the proceedings was in error and must be reversed. The verdict of the jury must therefore be reinstated.

Accordingly, we reverse the judgment of the District Court for Douglas County, Nebraska, in granting a new trial, and remand the cause back to the District Court for Douglas County, Nebraska, with instructions to reinstate the verdict of the jury.

REVERSED AND REMANDED WITH DIRECTIONS.

MCCOWN, J., dissenting.

The City of Omaha commenced this proceeding to take the property of the condemnee for public purposes. The appraisers in the proceeding in county court fixed just compensation at $70,000. The City appealed to the District Court and its petition alleged: "That the fair market value of such interest in real estate so condemned was, at the time of such condemnation, $17,000.00." One witness for the City testified that the value was $19,233. The City also presented another witness who testified, over objection, that the value of the property taken was nothing, and the jury found that the property had no value. The District Court recognized the injustice of such a verdict, and the errors which produced it, and granted a new trial. The City appealed that action to this court.

The majority opinion now holds that an award of nothing is just compensation for the taking of private property for public use; that a judicial admis-

sion by the condemning City that the property had substantial value did not mean anything because the property owner did not take advantage of it procedurally; and that the District Court, who recognized the errors of the trial and the obvious injustice of no compensation and granted a new trial, abused its discretion by doing so!

Such a holding exalts form over substance and places technical procedural rules above the constitutional guaranties of both federal and state Constitutions that private property shall not be taken for public use without just compensation. Under the facts in this case, no compensation cannot be just compensation.

The majority opinion treats the constitutional prohibition that "[t]he property of no person shall be taken or damaged for public use without just compensation therefor" to mean that the property of a person may be taken for public use without compensation if one witness says the property has no value, and the jury believes him and finds accordingly, even if the condemnor has judicially admitted the property has substantial value. Art. I, § 21, Constitution of Nebraska.

An actual "taking" of property by condemnation is not a "damaging." A condemnation award for a "taking" of property is not only for "damages" in the usual sense, it must also be compensation in the constitutional sense. "Compensation" under any meaning must be "something." It cannot be "nothing." If property has enough value to cause the government to bring a condemnation action to "take" it, that property has at least a nominal value, and "something" must be awarded as compensation. Procedural rules and trial tactics cannot be permitted to emasculate constitutional guaranties, nor should such obvious injustice be said to be beyond the reach of judicial discretion.

The action of the District Court in granting a new

trial under the circumstances here was eminently correct and should have been affirmed.

KELLY, L. W., Jr., District Judge, dissenting.

In addition to the facts recited in the majority opinion it should be noted that the appraisers appointed by the county court of Douglas County, Nebraska, appraised the value of the leasehold interest of the appellee in the sum of $70,000, which amount was the value of the leasehold over and above the amount due as rent upon the balance of the term of the lease. This award was made in September of 1974 and the actual taking of the premises did not occur until some 3½ months later on January 1, 1975. The majority opinion recognizes the fact that the City of Omaha filed a petition on appeal and in that petition admitted the value of the leasehold interest on September 19, 1974, was $17,000. The majority seems to hold that the fact the jury found zero value indicates the interest depreciated in 3½ months from $17,000 to zero dollars. There was neither evidence nor testimony of this fact introduced at the trial.

The City of Omaha had three expert witnesses testify in this matter. One valued the leasehold in the sum of $19,233 as of the date of the taking; the second was not allowed to give his opinion by the trial judge; the third witness testified that in his opinion the value of the leasehold interest in excess of the amount of rent due or to be paid by the condemnee was of no value. Objection was made to the testimony of this witness on the basis that no foundation had been laid; however, the court permitted the witness to so testify.

Our court held in the case of Kuhlman v. Farmers Union Co-Operative Assn., 152 Neb. 597, 42 N. W. 2d 182, as follows: "Where, in an action to recover a money judgment, the answer of the defendant admits the right of the plaintiff to judgment for any sum, the defendant cannot give evidence contradict-

ing the admission of his answer, nor can the plaintiff introduce the answer in evidence; * * *. Although the petition was filed by the City of Omaha the allegation in the petition that the value of the leasehold interest was $17,000 was in effect a judicial admission made the same as if it had been in an answer. It was error for the trial court to admit evidence on behalf of the condemner that the value of the leasehold interest of the condemnee was less than $17,000. It was, therefore, error for the trial court to admit the opinion of the third witness who testified for the condemner.

The majority opinion seems to hold that the admission by the City of Omaha was relevant evidence which the condemnee would have been entitled to introduce in evidence. The above cited case, however, states that: "* * * [N]or can the plaintiff introduce the answer in evidence; * * *." This would appear to be in direct conflict to the holding made by the majority in this case stating that the condemnee would have been entitled to introduce evidence of the admission of the value.

A further indication that the City of Omaha recognized a debt to the condemnee is found in the prayer of the petition filed by the City of Omaha when this matter was appealed to the District Court for Douglas County, Nebraska. The prayer is as follows: "WHEREFORE, Defendant prays that the Court determine and find the fair market value of the interest taken, and issue an order to the County Judge of Douglas County, Nebraska, to pay to the Plaintiff such amount out of the funds heretofore deposited by the Defendant and return the balance, if any, to the Defendant." The City of Omaha had paid the sum of $70,000 into the county court of Douglas County, Nebraska, so that it might take possession of the property. Further evidence that the City considered a debt was owed to the condemnee was the fact that the City entered into a stipulation permitting the

condemnee to withdraw 85 percent of this money so deposited with the county court of Douglas County, Nebraska.

The trial court recognized that prejudicial error towards the condemnee had occurred and ordered a new trial. This action should be sustained.

McCOWN, J., joins in this dissent.

PEGASUS OF OMAHA, INC., A NEBRASKA CORPORATION, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.

280 N. W. 2d 64

Filed June 19, 1979. No. 42135.

1. **Police Powers: Gambling.** A racetrack messenger service, whether or not it actually engages in gambling, is so intertwined with gambling that it falls within the State's plenary police power to regulate gaming activity.
2. **Legislature: Gambling: Statutes.** Prohibition by the Legislature of operation of racetrack messenger services bears a reasonable relationship to the legitimate State interest in the regulation of gambling. No constitutional provision renders such prohibition unlawful. § 2-1221, R. R. S. 1943.

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

Richard J. Bruckner, Mark Theisen, and Richard E. Shugrue, for appellant.

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

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

PER CURIAM.

The appellant, Pegasus of Omaha, Inc., plaintiff below, filed this action in the District Court for Douglas County, Nebraska, for a declaratory judgment holding that section 2-1221, R. R. S. 1943, is unconstitutional. After trial, petition of the plaintiff-appellant was denied. We affirm.

Section 2-1221, R. R. S. 1943, in the pertinent part, reads as follows: "Whoever for a fee, directly or indirectly, accepts anything of value to be wagered or to be transmitted or delivered for wager in any parimutuel or certificate system of wagering on horse races, or for a fee delivers anything of value which has been received outside of the enclosure of a race track holding a race meet licensed under Chapter 2, article 12, to be placed as wagers in the pari-mutuel pool or certificate system of wagering on horse racing within such enclosure shall be guilty of a misdemeanor * * *" and be punished as provided therein.

Article III, section 24, of the Constitution of Nebraska, generally prohibits games of chance and lotteries but further provides: "Nothing in this section shall be construed to prohibit the enactment of laws providing for the licensing and regulation of wagering on the results of horse races by the parimutuel or certificate method, when conducted by licensees within the race track enclosure at licensed horse race meetings, * * *."

Appellant concedes that the Legislature, in the exercise of its police power, may prohibit entirely games of chance or gambling and further implicitly admits that if the service offered by appellant could be determined to be gambling, the same would be absolutely prohibited as not falling within the exception of allowable gambling of Article III, section 24, of the Constitution of Nebraska. It is the appellant's contention then that the service offered is not gambling. At trial, the appellant offered evidence to show that Pegasus, a Nebraska corporation, engages in the messenger business. Its purpose is to transmit wagers for a fee for persons wishing to wager but unable or unwilling to attend a licensed horse race meeting. The appellant charges a flat 10 percent of the amount to be transmitted to the track. The terms and conditions of the contract appoint the appellant, Pegasus, as agent for persons using its

services and specifically states: "Money paid to Pegasus does not constitute a bet or wager. When tendered to Pegasus by a principal, Pegasus will provide an agent to be empowered by that principal to place such money in the parimutuel pool * * * of any enclosed race track which is licensed by the Nebraska Racing Commission to conduct race meetings." The Iowa Supreme Court in State ex rel. Turner v. Drake, 242 N. W. 2d 707 (Iowa, 1976), held a similar business did not constitute gambling. From this premise, Pegasus argues that it is conducting a beneficial and lawful business which, under Article I, section 3, of the Constitution of Nebraska, may not be taken away or destroyed under the guise of regulation. Article I, section 3, provides that no person shall be deprived of life, liberty, or property without due process of law. Pegasus contends that while the activity may be peculiarly subject to regulation, it is not within the power of the Legislature to absolutely prohibit an otherwise lawful occupation. It also argues that, in violation of the guarantee of equal protection, the classifications inherent in the statute bear no reasonable relationship to legitimate state policies. We shall deal with the appellant's assignments together.

It is not the position of the State that Pegasus' activities constitute gambling, but it is their position that in the exercise of its police power, a state may constitutionally prohibit an activity which the Legislature determines threatens the health, morals, or general welfare of the people of the state; that the business of Pegasus is, in fact, so intertwined with gambling that the Legislature may properly and has determined that the activity is one that constitutes a danger to the morals or general welfare of the people of this State and thus may be prohibited.

In determining that a statute nearly identical to Nebraska's was valid, the Illinois Supreme Court said: "Even if racetrack-messenger services were

operated without a hint of impropriety and even if we were to accept the doubtful proposition that these services do not constitute gambling itself, it is obvious that plaintiffs' business is completely intertwined with gambling and could not exist without it. As such, plaintiffs' business is within the State's plenary police power to regulate gaming activity. It is well within the authority of the State of Illinois to limit gambling on horse races to those who are at the track betting for themselves or betting for others only as a courtesy and not for a fee. In essence, this statute is part of the State's regulatory plan for limited gambling, and we find nothing in the Illinois or Federal constitutions which prevents its enactment or enforcement of such a statute." Finish Line Exp., Inc. v. City of Chicago, 72 Ill. 2d 131, 379 N. E. 2d 290.

The Illinois court considered the report of a special investigation by a legislative committee in its decision. A copy of the report was considered by a committee of the Nebraska Legislature which conducted hearings concerning the legislation outlawing messenger services. Appellant here contends that reception by the trial court of that report was error. They argue that it is irrelevant since Pegasus has not been shown to have engaged in any of the abuses cited therein. The objection misses the point. The report was relevant as part of the legislative history of the challenged statute. In its summary of the report, the Illinois court said: "Both houses of the General Assembly passed this amendment unanimously after the Illinois Legislative Investigating Commission reported a long list of serious and widespread problems with the messenger services, including booking of bets without buying the corresponding parimutuel tickets, failure to pay off winners, involvement of organized crime, and a reduction in track attendance and betting with a corresponding loss of local and State revenue. 'To be a

valid exercise of the police power, the enactment of the legislature must bear a reasonable relation to the public interest sought to be protected, and the means adopted must be a reasonable method to accomplish such objective. [Citations.]' (Sherman v. Reynolds, Inc. v. Mahin (1970), 47 Ill. 2d 323, 327, 265 N. E. 2d 640, 642.) In view of the reported problems, it cannot fairly be said that the legislature acted unreasonably in prohibiting the racetrack-messenger services from charging a fee rather than attempting to regulate those activities." Finish Line Exp., Inc. v. City of Chicago, *supra*.

The activity of Pegasus is so intertwined with gambling that, under its constitutional power to regulate, the Legislature may ban messenger services operated for a fee from accepting bets and conveying the bets to a licensed racetrack. The equal protection argument that persons who perform the service gratuitously are not also banned is frivolous. The evils which the Legislature had in mind are not likely to arise in the context of the friend who takes money to bet. The effect of all such activities would appear to be de minimis.

A legislative classification will be upheld against constitutional attack if it bears some reasonable relationship to the legitimate purposes of the legislation. See State v. Kells, 199 Neb. 374, 259 N. W. 2d 19.

The prohibited activity bearing a reasonable relationship to the regulation of gambling and no constitutional objection under the state and federal Constitutions rendering such prohibition unlawful, the decision of the trial court must be affirmed.

AFFIRMED.

KRIVOSHA, C. J., dissenting.

I must respectfully dissent from the majority opinion in this case. In upholding the constitutionality of the act in question, I believe that this court has retreated from a position which we have hereto-

fore held and maintained with pride, to wit, that a citizen clearly has the right to engage in any lawful occupation not detrimental to the public health, safety, and welfare without interference by the State.

As early as Carolene Products Co. v. Banning, 131 Neb. 429, 268 N. W. 313, this court said, "Measures adopted by the legislature to protect the public health and secure the public safety and welfare must have some relation to those proposed ends. If it is apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety or welfare, it is unconstitutional as an invasion of the property rights of the individual."

The majority suggests that while the messenger service in this matter in and of itself is not gambling nor illegal, it is so intertwined with gambling that the Legislature may determine that it "*threatens*" the health, morals, or general welfare of the people. The rationale for that conclusion is apparently that the messenger service, being intertwined with gambling and gambling being illegal, may be prohibited by the Legislature. That rationale would wash were it not for the fact that the State has specifically authorized, licensed, permitted, and made lawful the ultimate act, to wit, placing wagers on horses at the track. Section 2-1216, R. R. S. 1943, specifically provides as follows: "The system of wagering on the results of horse races, as hereinbefore provided, when conducted within the race track enclosure at licensed horse-race meetings *shall not under any circumstances* be held or construed to be unlawful, *any other* statutes of the State of Nebraska to the contrary notwithstanding. * * *." (Emphasis supplied.) How, then, can it be said that the act of delivering wagers to a lawful licensed location can be illegal when the ultimate act, the placing of the bet, is legal. It is difficult, if not impossible, for me to understand how two separate acts,

both legal in themselves, can become illegal when combined together. Under such a theory, printing the wager tickets, raising oats for the horses, or operating a taxi service to racetracks might be prohibited.

" 'The legislature has no authority to pronounce the performance of an innocent act criminal when the public health, safety, comfort or welfare is not interfered with * * *, and may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations.' " Carolene Products Co. v. Banning, *supra*.

"A citizen has a constitutional right to own, acquire, and sell property, and if it becomes apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual." Gillette Dairy, Inc. v. Nebraska Dairy Products Board, 192 Neb. 89, 219 N. W. 2d 214.

This court has consistently held that the regulation of legitimate business may not be so unreasonable as to result in the confiscation of property and the rights incidental to its ownership. This court cannot give judicial approval to legislation that violates these fundamental principles on any theory that they are permissible under the Constitution of the State of Nebraska. See, Lincoln Dairy Co. v. Finigan, 170 Neb. 777, 104 N. W. 2d 227; Gillette Dairy, Inc. v. Nebraska Dairy Products Board, *supra*. A business or occupation which has no tendency to affect or endanger the public in connection with health, safety, morals, or general welfare is not within the police power. Skag-Way Department Stores, Inc. v. City of Grand Island, 176 Neb. 169, 125 N. W. 2d 529.

It is not the carrying of the money to the track, but

rather the conducting of horse races, which could affect the health, safety, and welfare of the community. Yet, in enacting section 2-1216, R. R. S. 1943, the Legislature has said such activity is not detrimental to the health, safety, or morals of the public. If an individual may lawfully carry the money himself to the track, and if a livery service may likewise lawfully carry the individual carrying his own money to the track, it is difficult, if not impossible, to see how omitting the person in the transportation process could result in an act which therefore becomes detrimental to the health, safety, or welfare of the public.

While it is elementary that courts do not determine economic policies of the legislation and the wisdom of such legislation is for the Legislature to determine, nevertheless, it is just as elementary that in order for such legislation to be valid under the police power of the State, it cannot be arbitrary or discriminatory but must have a real and substantial relation to the object sought to be attained. Courts are not powerless to determine the character of such legislation. The construction of statutes and the determination of their reasonableness is the ultimate province, responsibility, and duty of the courts, and must be exercised by them if state and federal constitutional guarantees of liberty and property rights are not to be made subservient to the pressure groups which seek and frequently secure the enactment of statutes advantageous to a particular industry and detrimental to another under the guise of police power regulations. The preservation of constitutional guarantees against such invasions of constitutional rights is one of the foremost duties imposed upon the courts. Lincoln Dairy Co. v. Finigan, *supra*.

The record is totally devoid of any evidence of how or in what manner prohibiting any messenger service has any real and substantial relation to the objects sought to be attained, to wit, the protection of

public health, safety, or welfare. The only group that will appear to have benefited by the action of the majority herein are existing bookmakers. I have difficulty understanding how protecting them is necessary or proper under the police power of the State.

The majority suggests that the Legislature had before it an Illinois study showing that messenger services in Illinois were guilty of multiple abuses. I find little comfort or persuasion by that fact. Relying on evidence of abuse in business in Illinois might very well result in prohibiting almost any type of business in Nebraska.

The Legislature could reasonably and rationally cure all of the potential ills it has concerned itself with herein by simply licensing messenger services, bonding messenger services, and requiring them to file periodic reports. Nevertheless, the right to regulate does not likewise give the right to prohibit, absent some compelling public reason. See, Nelsen v. Tilley, 137 Neb. 327, 289 N. W. 388; 16 Am. Jur., Constitutional Law, § 321, p. 623.

My fear is that by upholding such legislative action as that taken herein, we have approved a practice of prohibiting an otherwise lawful business because it is said to be intertwined with a business which is normally unlawful but which in this case has been made lawful, while leaving the normally unlawful business to continue and flourish. There appears to be no prescribed limits to which that practice could be carried. I find that of grave concern, not so much with this particular case as with future matters for which this case stands as precedent.

I am authorized to state that Judges McCown and White join with me in this dissent.

STATE OF NEBRASKA EX REL. VIRGIL JOHNSON ET AL., APPELLANTS, V. BOARD OF SUPERVISORS OF GAGE COUNTY, NEBRASKA, ET AL., APPELLEES.

280 N. W. 2d 636

Filed June 19, 1979. No. 42165.

Courts: Judgments. The District Court has the power to enter judgment of dismissal for lack of prosecution. Such action rests in the sound discretion of the court and in the absence of an abuse of discretion will not be interfered with.

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

Fredrick L. Swartz and David J. Powers, for appellants.

Everson, Noble, Wullschleger, Sutter & Sharp, for appellees.

Heard before BOSLAUGH, WHITE, and HASTINGS, JJ., and HENDRIX and BUCKLEY, District Judges.

HENDRIX, District Judge.

The relators appeal from an order of the District Court for Gage County, Nebraska, dismissing the action for want of prosecution.

The only issue is whether the trial court abused its discretion. We find no abuse of discretion and affirm.

This is an action brought on May 15, 1974, in the name of the State of Nebraska on the relation of 24 county residents against the Board of Supervisors of Gage County, Nebraska, and its individual members. The prayer of the petition was for a temporary and permanent injunction restraining the respondents from dismantling what was known as Johnson Bridge. A restraining order was issued pendente lite. Interrogatories were propounded by relators and answer filed on September 24, 1974. On September 17, 1974, an amended petition was filed praying in the alternative for either a writ of manda-

mus requiring restoration of the bridge or a permanent injunction restraining respondents from dismantling the bridge. The respondents were granted time to plead. The original counsel for respondents withdrew and new counsel entered the case in their behalf. A motion was filed by respondents asking that relators be required to elect remedies and on October 24, 1975, the motion was sustained. The relators were given 15 days to elect remedies and respondents were given 3 weeks thereafter to plead. On November 10, 1975, a second amended petition was filed and on February 3, 1976, a third amended petition was filed. The second amended petition and the third amended petition continued to pray for both injunction and mandamus. No election was made. On March 16, 1978, the respondents moved to dismiss the action of relators for lack of prosecution, and on March 21, 1978, a motion for hearing date, for respondents to show cause why an alternative writ of mandamus should not issue, was filed by relators. On April 28, 1978, after hearing, respondents' motion was sustained and the third amended petition was dismissed. A motion for new trial was overruled, and appeal was had to this court. Judge William F. Colwell presided during all proceedings except for a few routine orders, one granting additional time to plead, which order was entered by Judge William B. Rist in February 1975.

At the hearing held on the motion to dismiss, the affidavit of counsel for the relators was received in evidence. It set out that on or about October 26, 1977, counsel for relators and respondents agreed that a joint meeting for settlement negotiations would be scheduled after November 16, 1977. It further set out that the relators were cognizant of a case entitled " 'The State of Nebraska, ex rel., William Goossen, et al, vs. Board of Supervisors of Gage County, Nebraska, et al.' " The only other evidence was an affidavit of an attorney for Blakely

Township, designated as an intervenor, and it is not relevant to this appeal.

The law is clear that the District Court has discretionary power to dismiss a case for want of prosecution. The dismissal is, of course, without prejudice. Section 25-1149, R. R. S. 1943, states in part: "The court may in its discretion * * * provide for dismissing actions without prejudice for want of prosecution." Further, such dismissal is within the inherent power of the court. Brown v. Lincoln, 157 Neb. 840, 61 N. W. 2d 836.

This case had been pending for a long time. It was filed on May 15, 1974, and dismissed on April 28, 1978, almost 4 years later. There is nothing in the evidence to show that those involved in the action were waiting for a decision in the case of State ex rel. Goossen v. Board of Supervisors, 198 Neb. 9, 251 N. W. 2d 655, but even if such could be inferred, the Goossen case was decided by this court on March 16, 1977, just 1 year prior to the filing of the motion to dismiss in this case.

The relators claim the entry of the order of dismissal was an abuse of discretion for the reasons that delay was attributable to the failure of respondents to answer the petitions, that delay was attributable to settlement negotiations, and that delay was attributable to both parties since Judge Rist passed the case at docket call only 10 days prior to the filing of the motion to dismiss. As to an answer, the record reveals that relators never did elect remedies although ordered to do so within 15 days of October 24, 1975. No pleading was due by respondents until 3 weeks after the election was made. Further, if the action was in mandamus, no pleading was due until the writ issued. As to settlement negotiations, there is no evidence that any delay was caused by negotiations. It is true that counsel agreed a joint meeting would be set, but it never was. After 4 months of inactivity in this regard, the court had

every right to treat any settlement negotiations as abandoned. As to Judge Rist passing the case on the calling of the docket, this occurrence appears in the record only during arguments. In any event, Judge Colwell was the presiding judge in the case, not Judge Rist. We see no abuse of discretion.

AFFIRMED.

SHIRRALE KAY DUFF, APPELLANT, V. DOUGLAS J. DUFF, APPELLEE.

280 N. W. 2d 69

Filed June 19, 1979. No. 42185.

1. **Divorce: Custody: Minors.** A decree fixing custody of minor children will not be modified unless there has been a change of circumstances, indicating that the person having custody is unfit for that purpose, or that the best interests of the children require such action.
2. _____: _____: _____. In determining the question of who should have the care and custody of minor children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children.
3. _____: _____: _____. In any custody determination, the discretion of the trial court in such a situation is necessarily subjective and must be founded to a significant extent upon its observation of the parties and the review of all the minute details that affect the general welfare and the best interests of the children. It also must necessarily be prospective in nature.
4. **Equity: Evidence: Witnesses.** Equity cases are heard de novo in this court; however, in determining the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.
5. **Custody: Minors: Evidence.** A custody order of the trial court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

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

Pierson, Ackerman, Fitchett & Akin, for appellant.

Healey, Healey, Brown & Wieland, for appellee.

Heard before BOSLAUGH, CLINTON, BRODKEY, and HASTINGS, JJ., and BARTU, District Judge.

BARTU, District Judge.

Petitioner-appellant, Shirrale Kay Duff, appeals from an order modifying a decree of dissolution, changing custody of three minor children, Linda Rae Duff, age 12, James Allen Duff, age 11, and Douglas J. Duff, Jr., age 9, from her to respondent-appellee, Douglas J. Duff.

In the modification action, the trial court specifically found that both petitioner and respondent were fit and proper persons to have custody of the three minor children. A decree fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose *or* that the best interests of the children require such action. Ahlman v. Ahlman, 201 Neb. 273, 267 N. W. 2d 521 (1978).

The sole and only issue presented is whether the best interests of the children required the change of custody, considering the changes in circumstances of the parties and of the children subsequent to the dissolution.

In determining the question of who should have the care and custody of the children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children. Many factors may be considered in light of the particular circumstances of each individual case. The general considerations of respective environments offered by each parent, the emotional relationship between the children and their parents, their age, sex, and health, the effect on the children of continuing or disrupting an existing relationship, the attitude and the stability of character of each parent, and the capacity to furnish the physical care, education, and needs of the children are some of the many factors

for the court to consider. Moninger v. Moninger, 202 Neb. 494, 276 N. W. 2d 100 (1979); Christensen v. Christensen, 191 Neb. 355, 215 N. W. 2d 111 (1974).

The discretion of the trial court in such a situation is necessarily subjective and must be founded to a significant extent upon its observation of the parties and the review of all the minute details that affect the general welfare and the best interests of the children. It also must necessarily be prospective in nature. Gilman v. Riis, 190 Neb. 409, 209 N. W. 2d 173 (1973).

What are the standards for review? Equity cases are heard de novo in this court; however, in determining the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Bailey v. Mahr, 199 Neb. 29, 255 N. W. 2d 866 (1977); Swearingen v. Swearingen, 201 Neb. 255, 267 N. W. 2d 514 (1978).

The determination of the trial court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Allen v. Allen, 198 Neb. 544, 253 N. W. 2d 853 (1977).

Was the order changing custody a clear abuse of discretion or clearly against the weight of the evidence? We examine the record de novo. Subsequent to the dissolution on October 24, 1975, petitioner moved with her children from Lincoln, Nebraska, on July 31, 1977, to the home of Sterling Legate near Elgin, Nebraska, with the intention of later marrying Mr. Legate, which she did on November 5, 1977. The children remained with petitioner in the home of Mr. Legate until August 16, 1977, when they were delivered for visitation with the respondent to respondent's present wife, whom he married on August 19, 1977. Although respondent's wife indicated that the children would be returned in 1 week, respondent refused to return the

children, and made application for and received temporary custody of them on August 26, 1977, pending home-study investigations.

An investigation into the homes of the respective parties was made by the juvenile probation officer, and a report was filed with the trial court on November 2, 1977. On November 18, 1977, the trial court placed temporary custody of the children with the respondent for the remainder of the first semester of school, pending further investigation. Petitioner was granted visitation on alternate weekends.

On March 1, 1978, respondent moved for permanent custody of the children, and on March 29, 1978, and April 18, 1978, trial was held, at which the juvenile probation officer, the parties, and their spouses testified. On April 28, 1978, the children were interviewed by the court.

Respondent, at the time of trial, was 36 years old, and had not graduated from high school. He owns and drives a truck, which is leased to Crete Carrier Corporation, and is paid by the load. Respondent tries to work for 10 straight days and then take 4 days off, so his job requires him to spend considerable time away from the children.

Respondent owns and lives in a house with the children in Bennet, Nebraska, directly across the street from the home of petitioner's parents. The house is an older, two-story, four-bedroom structure being remodeled, and is situated upon a large lot upon which respondent and his wife raise a garden and provide much of the family's food supplies through canning and freezing the produce. There are also rabbit hutches and geese on the property, and the children willingly participate in the gardening, canning, and raising of the animals.

Respondent's present wife is 26 years old and a graduate of Doane College, where she majored in sociology and psychology. She is active in various community projects, and the juvenile probation of-

ficer indicated that she had a calming influence upon the children. There was, however, testimony regarding a conflict between respondent's present wife and Linda, which the juvenile probation officer attributed to emotional difficulties Linda had experienced as a result of a number of things, including the divorce and custody proceedings, but also indicated the problem had been resolved through counseling.

Petitioner had lived in Bennet, Nebraska, for most of her life, where she attended and was graduated from the Bennet High School. Subsequent to graduation, she worked as a clerk-typist at the University of Nebraska. Subsequent to the divorce, petitioner held several jobs, including work as a cook in a truckstop near Elgin, Nebraska. At the time of trial, she was unemployed. Petitioner's present husband is 42 years old and employed full time at Roker Industries, earning $3.75 an hour. During the winter months, he works weekends as a bartender in a steak house. He also owns a 320-acre farm, which grossed $25,000 in 1977.

The Legate home is a ranch-style frame house with four bedrooms, and is located on his farm between Elgin and Neligh, Nebraska.

Petitioner's present husband has been married twice before, and has five children from the first marriage and one child from the second marriage. The child from the second marriage, who is four years old, is in the custody of Mr. Legate, and gets along well with petitioner's children.

The juvenile probation officer testified that in her opinion both parties were adequate parents. The juvenile probation officer's report, filed with the trial court, indicated that all three children expressed a preference to live with their father and, in a personal interview with the trial court, Linda Duff indicated it did not make any difference to her where she lived, but she believed it would be better

if all of the children lived together. James Duff and Douglas Duff advised the court that they preferred to live with their father.

The record establishes that there have been material changes in the circumstances of the parties and of the children. The petitioner has removed herself from the community in which the children were raised, in which their father and maternal grandparents reside, and, obviously, where the only friends that they know reside. The children's expressions of wanting to live with their father and wanting to live together, while not controlling upon the court, were obviously given great weight by the trial court, and correctly so, in determining their best interests.

The change of custody order was certainly not an abuse of discretion and is supported by the evidence. Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

BERT ARMBRUSTER AND IRENE ARMBRUSTER, HUSBAND AND WIFE, APPELLEES, V. STANTON-PILGER DRAINAGE DISTRICT, APPELLANT.

280 N. W. 2d 72

Filed June 19, 1979. No. 42318.

1. **Pleadings: Waiver.** A defect of parties not raised by demurrer or answer is waived.
2. _____: _____. An admission in a pleading upon which the case is tried waives all controversy concerning the fact admitted.

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

Grady, Caskey & Thor, for appellant.

Vince Kirby, for appellees.

Heard before BOSLAUGH, MCCOWN, and BRODKEY, JJ., and RIST and WOLF, District Judges.

BOSLAUGH, J.

The plaintiffs own the north half of Section 24, Township 23 North, Range 2 East of the 6th P.M., in Stanton County, Nebraska. Cedar Creek enters the property from the south at a point near the southeast corner of the land, flows in a northwesterly direction across the northeast quarter of the section, and leaves the property of the plaintiffs at a point near the center of the north line of the section.

Prior to 1950 the Elkhorn River followed a meandering course through the section north of the plaintiffs' property. Cedar Creek flowed into the Elkhorn River at a point approximately 2,200 feet north of the plaintiffs' property. In 1950 the defendant, Stanton-Pilger Drainage District, straightened the Elkhorn River channel north of the plaintiffs' property. As a part of the project the district constructed a pilot channel which intersected Cedar Creek at a point approximately 990 feet north of the plaintiffs' property. The bed of the pilot channel was approximately 6 feet below the bed of Cedar Creek at the point of intersection, which had the effect of creating a waterfall at the point where Cedar Creek flowed into the Elkhorn River. As a result of the difference in elevation between the bed of the river and the creek, there was substantial erosion which progressed upstream on Cedar Creek and into the property of the plaintiffs.

In 1960 the plaintiffs recovered a judgment against the defendant, pursuant to the mandate of this court, for damages in the amount of $12,240 and a mandatory injunction was granted which required the defendant to "construct in Cedar Creek a structure, or other constructions, or to take such other actions as may be necessary to prevent further erosion in Cedar Creek upon plaintiffs' land and further dam-

ages thereto and to prevent future deepening of the bed of said stream upon plaintiffs' land, caused by the acts of the defendant district in intersecting the bed and banks of Cedar Creek by and with its pilot ditch as set forth and found in the opinion of the Supreme Court." The facts are set out in detail in the opinion referred to which is reported in 169 Neb. 594, 100 N. W. 2d 781. See, also, Armbruster v. Stanton-Pilger Drainage Dist., 165 Neb. 459, 86 N. W. 2d 56.

Pursuant to the mandatory injunction, the defendant erected a structure in Cedar Creek near the north line of the plaintiffs' land in 1960 and 1961. The structure amounts to a dam which raises the flow line of Cedar Creek to an elevation approximately that of the bed of the creek in 1956 or about 10 feet above the bed of the creek as it existed at that point in 1960.

This action was commenced sometime prior to February 5, 1975, to recover damages for erosion to the plaintiffs' land caused by the defendant's failure to comply with the mandatory injunction.

The defendant's answer admitted the plaintiffs were the owners of the land involved in this action and alleged that the structure erected in 1960 and 1961 stopped the erosion in Cedar Creek. The answer further alleged waiver, res judicata, and estoppel.

The trial court found that the structure erected in Cedar Creek by the defendant was constructed in good faith but did not stabilize Cedar Creek or prevent further erosion on the plaintiffs' land; the "water fall and rapids area" continues to move upstream through the plaintiffs' land widening and deepening the channel of the creek as it moves; and the plaintiffs had been damaged in the amount of $11,550 since December 23, 1958, the effective date of the 1960 judgment recovered by the plaintiffs.

The defendant has appealed and contends that the plaintiffs are not the real parties in interest and the

judgment is not supported by the evidence. Since this is a proceeding in equity we review the record de novo.

The defendant's contention that the plaintiffs are not the real parties in interest is based upon testimony by Bert Armbruster that he had sold the land to his son on contract some time after this action had been commenced. The contract was not produced and there is no evidence in the record to show exactly what the interests of the parties were. The inference from the record is that the plaintiffs retained the legal title and a substantial beneficial interest. At most, there may have been a defect of parties plaintiff which was waived if not timely raised. See Cromwell v. Ward, 192 Neb. 178, 219 N. W. 2d 446.

The defendant did not seek to be relieved from its admission in its answer that the plaintiffs owned the land. This was a judicial admission which was a waiver of all controversy concerning the matter. See Krueger v. Krueger, 169 Neb. 82, 98 N. W. 2d 360. In view of the state of the record, the trial court did not err in overruling the defendant's motion to dismiss.

Although there is some conflict in the evidence, the record as a whole establishes that the structure erected by the defendant in Cedar Creek in 1960 and 1961 did not stabilize the channel of Cedar Creek and prevent further erosion upon the plaintiffs' land. The evidence shows that the channel of Cedar Creek upon the plaintiffs' property has steadily deepened and widened as the waterfall and rapids area has continued to move upstream. The channel which formerly was 32 to 35 feet wide and 8 to 10 feet deep is now 80 to 100 feet wide in some places and more than 20 feet deep.

In 1961 the defendant, at its expense, straightened a part of the channel of the creek on the plaintiffs' land to prevent the erosion from progressing into the

plaintiffs' farmyard and destroying the buildings and other improvements. Although this work appears to have saved the plaintiffs' buildings and improvements from destruction, erosion has continued. The creek has moved to within 16 feet of an irrigation well. A flume that the plaintiffs used to convey irrigation water to the land north and east of the creek collapsed as a result of the erosion and a new pipe supported by poles and cable had to be erected. At the point where the private bridge had been located, the creek is now about 100 feet wide. Cattle can no longer cross the creek at any place on the plaintiffs' property. The plaintiffs no longer have direct access to their land north and east of the creek from the land which is south and west of the creek.

The damage to the plaintiffs' land, caused by the defendant's failure to stabilize the channel of Cedar Creek upon the plaintiffs' land, was of a continuing nature, and the record fully sustains the findings and award of damages made by the trial court, which we adopt. The defendant's claim of waiver, res judicata, or estoppel is not sustained by the record.

The judgment is affirmed.

AFFIRMED.

IN RE WATER APPROPRIATION. ROBERT HOSTETLER ET AL., APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF WATER RESOURCES, APPELLEE.

280 N. W. 2d 75

Filed June 19, 1979. No. 42333.

1. **Waters: Statutes.** All appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose the right ceases. § 46-229, R. R. S. 1943.
2. **Waters: Statutes: Abandonment: Time.** If it shall appear that

any water appropriation has not been used for some beneficial or useful purpose, or having been so used at one time has ceased to be used for such purpose for more than 3 years, the Department of Water Resources shall appoint a place and time of hearing, and shall serve notice upon the owners of such water appropriation or such ditch, canal, or other diverting works to show cause, by such time and at such place, why the water appropriation owned by such person should not be declared forfeited and annulled because such water appropriation had not been used for more than 3 years prior to receiving such notice, and shall also serve such notice upon the landowners under such water appropriation, ditch, or canal. § 46-229.02, R. R. S. 1943.

3. **Waters: Abandonment: Time.** Where irrigation water has not been applied to the lands described in the adjudicated appropriation for the statutory period of 3 years, such nonuse, unless excused for some valid reason, will result in the loss of the right and the Department of Water Resources may cancel the appropriation in whole or in part.
4. **Waters.** Beneficial use requires, in the case of an appropriation for irrigation purposes, actual application of the water to the land for the purpose of irrigation. To constitute a beneficial use within the meaning of the appropriation statute, the use must be one described in the appropriation.
5. ____. An unexcused nonuse of water appropriation rights by a predecessor in title binds the successor in title.

Appeal from the Department of Water Resources. Affirmed.

Healey, Healey, Brown & Wieland, for appellants.

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

Heard before KRIVOSHA, C. J., CLINTON, WHITE, and HASTINGS, JJ., and MURPHY, District Judge.

CLINTON, J.

This is an appeal from an order of the Department of Water Resources, made under the provisions of section 46-229.02 et seq., R. R. S. 1943, canceling and annulling a water appropriation identified as docket No. 305 with priority date of June 1, 1879, granting the right to divert not to exceed 1.43 cubic feet of water per second of time, from Lodgepole Creek at a

point on the north bank of that stream for the irrigation of certain described land containing about 100 acres in Sections 1 and 12, Township 14 North, Range 52 West of the 6th P.M., in Cheyenne County, Nebraska. The landowner, Carolyn Hostetler, has appealed to this court under the provisions of section 46-229.05, R. R. S. 1943. The sole error assigned is that the department erred in determining that the appropriation had not been put to beneficial use for more than 3 years prior to the notice of hearing. We affirm.

Section 46-229.02, R. R. S. 1943, provides: "If it shall appear that any water appropriation has not been used for some beneficial or useful purpose, or having been so used at one time has ceased to be used for such purpose for more than three years, the department shall appoint a place and time of hearing, and shall serve notice upon the owners of such water appropriation or such ditch, canal or other diverting works to show cause by such time and at such place why the water appropriation owned by such person should not be declared forfeited and annulled because such water appropriation had not been used for more than three years prior to receiving such notice, and shall also serve such notice upon the landowners under such water appropriation, ditch or canal." Section 46-229.04, R. R. S. 1943, provides in part as follows: "At such hearing the verified report of the water commissioner or engineers of the department shall be prima facie evidence for the forfeiture and annulment of such water appropriation."

The landowner appeared at the hearing held on April 5, 1978, and she, her husband who operated the farm of which the 100 acres was a part, and an engineer from the Department of Water Resources testified. Certain documentary evidence was also introduced.

Mrs. Hostetler testified she was the sole owner of

the land in question and had recently acquired the property by inheritance from Myrtle Gunderson. She and her husband had been in possession of the land only a relatively short time, having moved onto it at some unspecified time prior to November of 1977. She testified she had been told by Myrtle Gunderson, during that person's lifetime, that the water rights had been lost "several years before," and that Mrs. Gunderson had attempted to get them back but had been unsuccessful. Mrs. Hostetler stated she did not know when the canal had last been used to irrigate the meadow. She testified the creek itself had been used for watering livestock.

On November 3, 1977, an engineer from the Department of Water Resources visited the farm and he, together with Mr. Hostetler, inspected the site where the diversion dam had been. At that time only remnants of the dam remained, a post or two. Hostetler stated he had been told by "people" that the canal had not been used for 12 years. He had been farming the land himself for about a year and a half.

Mr. Langhofer, the department engineer who inspected the site with Hostetler on November 3, 1977, stated that Hostetler expressed an interest in using the water right for irrigation. The implication of the testimony is that the engineer must have informed Hostetler that there had been, up to that time, no actual cancellation of the appropriation. Langhofer testified that during the 6 years preceding November 3, 1977, he had visited the Gunderson canal about 10 times a year. At no time was there any water in the canal, although there was sufficient flow in the Lodgepole Creek so that diversion could have taken place had there been a diversion dam.

After the engineer's inspection on November 3, 1977, Hostetler, on or about November 15, 1977, constructed a temporary diversion dam. He stated he did this as a test to see if the water would flow into

the canal and "to get the right flow." On that occasion the water flowed into the canal for a distance of about 100 feet. The documentary evidence indicates the canal is a little more than ¾ mile in length. Hostetler did not, in November, put any water on the irrigable land. He did nothing afer that because of a snowstorm.

Mrs. Hostetler argues that the diversion of water into the canal on November 15, 1977, about 3 months before the notice of hearing was served, constituted a beneficial use within the meaning of section 46-229.02, R. R. S. 1943. She also argues that the watering of cattle from the creek constituted a beneficial use for purposes of the appropriation. Her other contention is that good cause was shown for not canceling the appropriation because there was no evidence to show the failure to use was the consequence of her neglect. As she was unaware until the engineer's visit that there had been no cancellation and since she had reasonably assumed there was no existing right, the nonuse was not the result of voluntary neglect on her part.

It is plain the evidence justifies the conclusion that no use had been made of the appropriation for at least 6 years and probably much longer. Did the erection of the temporary diversion dam and the diversion of a small amount of water into the canal about November 15, 1977, constitute a beneficial use within the meaning of the statute? If it was such a beneficial use, does that use defeat the effect of more than 3 years of previous nonuse?

Section 46-229, R. R. S. 1943, provides: "All appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose the right ceases." Where irrigation water has not been applied to the lands described in the adjudicated appropriation for the statutory period of 3 years, such nonuse, unless excused for some valid

reason, will result in the loss of the right and the State may cancel the appropriation in whole or in part. State v. Birdwood Irrigation District, 154 Neb. 52, 46 N. W. 2d 884.

The parties to this litigation have not called to our attention any authorities from this jurisdiction which have precisely defined beneficial use. However, the clear implication of our holdings in State v. Birdwood Irrigation District, *supra*, and Kersenbrock v. Boyes, 95 Neb. 407, 145 N. W. 837, is that beneficial use requires, in the case of an appropriation for irrigation purposes, actual application of the water to the land for the purpose of irrigation. The courts of most jurisdictions seem to have defined beneficial use as including actual application of water to the land or other beneficial use within the ambit of the appropriation, e.g., power. Arizona v. California, 283 U. S. 423, 51 S. Ct. 522, 75 L. Ed. 1154; Carlsbad Irr. Dist. v. Ford, 46 N. M. 335, 128 P. 2d 1047; McCall v. Porter, 42 Ore. 49, 70 P. 820; Woods v. Sargent, 43 Colo. 268, 95 P. 932; 93 C. J. S., Waters, § 178, p. 928. We hold, therefore, that the diversion of some amount of water into the ditch on or about November 15, 1977, did not constitute a beneficial use within the meaning of sections 46-229 and 46-229.02, R. R. S. 1943.

There is no substance to the contention that the use of the Lodgepole Creek to water cattle was a use within the meaning of the appropriation. It was clearly a beneficial use, but it was a riparian use, not a use pursuant to the appropriation which, by its terms, was for irrigation. We hold that to constitute a beneficial use within the meaning of the appropriation statute, the use must be one described in the appropriation. Kersenbrock v. Boyes, *supra*.

Was beneficial use excused for any reason? Reasons which might excuse beneficial use would appear to include the following: Unavailability of or insufficient water in the stream, State v. Delaware-

Hickman Ditch Co., 114 Neb. 806, 210 N. W. 279; and adequate moisture from natural precipitation so that diversion was unnecessary and would result in waste or violate principles of good husbandry, State v. Delaware-Hickman Ditch Co., *supra*; State v. Birdwood Irrigation District, *supra*; North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., 162 Neb. 22, 74 N. W. 2d 863. The record shows no reason which excused the failure to make beneficial use of the appropriation. Mrs. Hostetler had no right of appropriation independent of that of her predecessor in title. An unexcused nonuse by the appellant's predecessor in title binds the appellant. State v. Nielsen, 163 Neb. 372, 79 N. W. 2d 721.

AFFIRMED.

KEITH W. WHITE, APPELLANT, V. FERN M. WHITE, APPELLEE.

280 N. W. 2d 78

Filed June 19, 1979. No. 42373.

1. **Divorce: Appeal and Error: Time.** A decree of dissolution of marriage settling and dividing the property of the parties is not subject to appellate review respecting such division and assignment of property unless appeal is taken therefrom within the time provided by statute. When final it is res judicata as to the parties on the award and assignment of property therein provided.
2. **Motions, Rules, and Orders: Appeal and Error.** An appeal from an order nunc pro tunc is limited to whether that order was properly made and does not afford appellant the right to appeal from the decree to which the order is directed.
3. **Motions, Rules, and Orders: Judgments.** The proper function of an order nunc pro tunc is to correct the record which has been made so it will truly reflect the action really had. The order must conform to and be no broader in its terms than the judgment or decree actually rendered.

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

Vince Kirby, for appellant.

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

Heard before BOSLAUGH, MCCOWN, and BRODKEY, JJ., and RIST and WOLF, District Judges.

RIST, District Judge.

This is an appeal from an order nunc pro tunc entered in an action for dissolution of marriage wherein the decree of dissolution was corrected to show legal descriptions of real estate and to provide that the decree and order act as a conveyance thereof to the parties to whom the real estate was awarded and assigned.

On February 18, 1978, after trial, a decree was entered dissolving the marriage of the parties, the court taking under advisement the issue of property settlement, alimony, debts, and costs. On May 9, 1978, the court entered a further decree assigning various tracts of real estate to each of the parties and assigning to respondent wife "[t]he entire partnership interest of the petitioner [husband] in the White Grain Co. partnership." The decree subjected the latter assignment to the condition that the remaining partners shall, on or before May 31, 1978, each file his consent with the court to the substitution of the respondent as a partner in place of petitioner and waive his right to intervene in the dissolution action with reference to the partnership property. The decree further provided that if such consents and waivers were not so filed, then the partnership interest shall be assigned to petitioner and he shall be ordered to pay additional alimony in installments to the respondent, the total thereof being the value placed on the partnership interest by the court.

On May 30, 1978, the remaining partners filed their consent to the substitution of respondent as a partner and waived their right to intervene in this action

with respect to partnership property, reserving the right to withdraw the consent and waiver if the decree was modified or overruled.

Both parties filed motions for new trial in mid-May 1978, petitioner alleging in part that the trial court had erred in assigning his partnership interest to respondent. Both motions were overruled on June 5, 1978, and no appeal was taken therefrom.

On September 21, 1978, respondent filed a motion for an order nunc pro tunc to supply legal descriptions for the real estate referred to in the decree of May 9, 1978, and to provide that the decree and order nunc pro tunc act as a conveyance and transfer of the land to the parties as provided in the decree, including a description and transfer of the land included in the partnership interest in White Grain Co. The motion was heard on September 27, 1978, and order nunc pro tunc entered as prayed for.

On October 6, 1978, petitioner filed a motion for new trial alleging that the trial court had erred in sustaining the motion for order nunc pro tunc insofar as the same included the description and assignment of the real estate included in the partnership interest and that the decree and order should act as a conveyance thereof. The motion also asserted the order was contrary to the law and the evidence. This motion was overruled on October 6, 1978, and petitioner has appealed therefrom.

The record in this case consists of the transcript and a bill of exceptions setting forth the statements of counsel and the court when petitioner's motion for new trial was heard and overruled following the entry of the order nunc pro tunc. There is no record of the evidence when the action was heard on its merits or of any other hearing. The only statements of consequence in the bill of exceptions are those in which the court announced it had in fact considered all the real estate at the time of decree, which is now legally described in the order nunc pro tunc, and had con-

sidered the original decree as conveying the property as the same was assigned to the parties, but included language of conveyance in the order as a specific statement on that matter.

On appeal petitioner argues that the trial court erred in substituting the respondent as a partner in White Grain Co. and transferring the partnership interest to her, claiming that the court had no authority to do so. Respondent replies in substance that petitioner is out of time to raise this issue since the same was decided in the original decree and not appealed from, and that petitioner can now only challenge the order nunc pro tunc, not the original decree.

We find respondent's position to be correct. It is basic law requiring no citation that the original decree, not having been appealed from, governs the disposition of property therein provided for and, when final, is res judicata between the parties on the award and assignment of property contained therein. Petitioner may not now challenge it on appeal from an order nunc pro tunc. Whatever complaints or arguments petitioner wished to raise with respect to the award of the partnership interest had to be raised in an appeal from the decree itself. This was not done and petitioner is foreclosed and estopped from raising them now.

The order nunc pro tunc in this case does not enlarge the judgment and decree as originally rendered or change any rights as established in that decree. It only supplies omissions of legal descriptions of real estate which were in fact considered at the time of decree. That portion of the order relating to the decree acting as a conveyance of such interest adds nothing to the legal effect of the decree. The order, therefore, on this record was proper. See Andrews v. Nebraska State Railway Commission, 178 Neb. 799, 135 N. W. 2d 712.

Accordingly, the action of the trial court is af-

firmed. Respondent is awarded an attorney's fee of $500 with respect to this appeal, which is taxed to petitioner.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JESSE E. SAMPSON, APPELLANT.

280 N. W. 2d 81

Filed June 19, 1979. No. 42406.

1. **Criminal Law: Intent.** Because the intent with which an act is done exists only in the mind of the actor, its proof must be inferred from the act itself and from the facts surrounding the act.
2. **Criminal Law: Intent: Juries.** Criminal intent is to be determined from the evidence and surrounding circumstances, and is therefore for the jury.
3. **Criminal Law: Verdicts: Juries.** The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
4. **Criminal Law: Probation and Parole.** A sentencing court in prescribing probation may impose any conditions of probation that are authorized by statute to be imposed.
5. ___: ___. This court will disturb an order of probation only where it appears from the record that in executing such order the sentencing court imposed a condition or conditions of probation which it was not authorized by statute to impose.

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

Jacobsen, Orr & Nelson, for appellant.

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

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

KRIVOSHA, C. J.

Appellant appeals from a conviction finding him guilty of assault with intent to inflict great bodily harm in violation of section 28-413, R. R. S. 1943. As

a result of the conviction, appellant was placed on probation for a term of 3 years. In addition, the trial court sentence directed appellant to serve 30 days in the county jail of Buffalo County, Nebraska, and, after discharge from the county jail, to be placed on an alcohol treatment program which would include 30 days or more of inpatient counseling and treatment followed by additional counseling and treatment as required by the probation officer.

The trial court further ordered that in view of the fact there was a pending civil action by the victim, a Mr. Richard Bohaty, seeking to recover damages against appellant, the trial court would not at that time determine the amount of restitution which should be ordered paid by appellant to Bohaty as damages, but rather would, as a condition of probation, establish a fund for the payment of the damages to the victim when determined. The court therefore ordered appellant to pay into a restitution fund, to be held by the clerk of the District Court and to be available for payment to Bohaty, the sum of $200 per month. While the order did not specifically make it clear because it was a term and condition of probation, the payment of $200 per month would continue for the 3 years that appellant was on probation, unless discontinued by further order of the court. In addition, as a condition of probation, appellant was fined the sum of $2,000 and the costs of the action.

Appellant has appealed to this court assigning as errors: (1) That the State failed to prove the necesary specific intent essential to the crime of assault with intent to inflict great bodily injury; and (2) that the terms of the probation are excessive and constitute an abuse of the trial court's discretion. We have examined the record in detail and disagree with the contentions of the appellant. Accordingly, the judgment of the trial court is affirmed.

The evidence is without dispute that in the early morning hours of October 29, 1977, appellant fired a

gun while standing near a parked Volkswagen automobile then occupied by Bohaty. In addition, appellant drove his vehicle into the rear of Bohaty's Volkswagen pushing it to a fence some 40 feet away.

Upon further examination, a bullet hole was found in Bohaty's Volkswagen which passed from the driver's side of the car through the driver's door and into the passenger's door. Further examination revealed two bullet fragments which were recovered from the passenger's door of the Volkswagen.

Following his arrest, appellant admitted he had fired the weapon, but maintained he had fired it in the air and for the purpose of scaring Bohaty. Likewise, appellant admitted he had run into the back of the Volkswagen. Appellant maintains that while he did perform the acts described, he did not by doing so intend to inflict great bodily injury to Bohaty.

The jury apparently chose to believe the State and reject the appellant's claim. The criminal intent is to be determined from the evidence and surrounding circumstances, and was therefore for the jury to decide. State v. Johnsen, 197 Neb. 216, 247 N. W. 2d 638. 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. Coleman, 196 Neb. 721, 246 N. W. 2d 61; State v. Johnsen, *supra;* State v. Lang, 197 Neb. 47, 246 N. W. 2d 608. Because the intent with which an act is done exists only in the mind of the actor, its proof must be inferred from the act itself and from the facts surrounding the act. State v. Judd, 200 Neb. 344, 263 N. W. 2d 487. It is difficult, if not impossible, to imagine one indiscriminately firing a gun into a car knowing it is occupied and still maintaining that the necessary intent to inflict great bodily harm is absent. The jury was justified in its conclusion, and we find no reason or basis to disagree.

Appellant next contends that the conditions of probation were excessive. All of the conditions of the

probation, including the fine of $2,000 and the order to pay money into a fund for restitution, were within the court's statutory authority. A sentencing court in prescribing probation may impose any conditions of probation that are authorized by statute to be imposed. State v. Nuss, 190 Neb. 755, 212 N. W. 2d 565. As a consequence, this court will disturb an order of probation only where it appears from the record that in executing such order the sentencing court imposed a condition or conditions of probation which it was not authorized by statute to impose. State v. Muggins, 192 Neb. 415, 222 N. W. 2d 289. In this case, the court was authorized to impose all of the conditions, and therefore we should not disturb it.

To the extent that the order of the court may be in doubt, it should be clear that the payment of $200 per month to the fund for restitution should continue only during the term of probation or until further order of the trial court, and in no event should payment be in excess of that amount for which appellant is ultimately determined to be liable.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS A. WANT, APPELLANT.

280 N. W. 2d 83

Filed June 19, 1979. No. 42623.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed as modified.

William H. Grant, for appellant.

Paul L. Douglas, Attorney General, and C. C. Sheldon, for appellee.

PER CURIAM.

The defendant pleaded guilty to a charge of deliv-

ering and distributing marijuana and was sentenced to imprisonment for not less than 2 years and not more than 5 years. The applicable statutory penalty was not less than 1 year nor more than 5 years imprisonment.

On appeal the defendant contends, and the State concedes, that where an indeterminate sentence is pronounced, section 83-1,105 (1), R. R. S. 1943, requires that "the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term * * *."

The minimum limit imposed by the trial court was more than one-third of the maximum term. The conviction of the defendant is affirmed. The sentence is modified to provide that the defendant shall be confined in the Nebraska Penal and Correctional Complex for a term of not less than 1 year 8 months and not more than 5 years.

AFFIRMED AS MODIFIED.

PATRICIA ELLIOTT, THROUGH AND BY HER MOTHER AND NEXT FRIEND, ET AL., APPELLANTS, V. ELDIN J. EHRLICH, DIRECTOR OF THE DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

280 N. W. 2d 637

Filed June 26, 1979. No. 41975.

1. **Welfare and Assistance.** Welfare benefits are not a fundamental right and neither the state nor the federal government is under a constitutional obligation to guarantee minimum levels of support.
2. **Constitutional Law: Statutes.** If a statutory classification has some reasonable basis it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. A statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it.
3. **Welfare and Assistance: Constitutional Law.** A state eligibility

standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.

4. **Welfare and Assistance.** In this state there is no legal obligation upon grandparents to support grandchildren.
5. **Welfare and Assistance: Statutes.** Welfare benefits are a matter of statutory entitlement for persons qualified to receive them and refusal or termination involves state action that adjudicates important rights.
6. **Welfare and Assistance: Administrative Law: Constitutional Law.** To the extent that regulation IX-4731 of the Nebraska State Department of Welfare creates an irrebuttable presumption that the income of maternal grandparents is contributed to the needs of an unborn grandchild, it denies equal protection and due process of law and is unconstitutional under the United States and Nebraska Constitutions.

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

David G. Challed of Dubuque Area Legal Services and David J. Clegg of Western Nebraska Legal Services, Inc., for appellants.

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellees.

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

MCCOWN, J.

This is an appeal by plaintiffs from a judgment of the District Court affirming a final administrative decision of the State Department of Public Welfare denying applications of the plaintiffs for aid to dependent children benefits on behalf of the unborn child of each of the plaintiffs.

The plaintiffs, Patricia Elliott and Ruth L. Elliott, were 17 and 16 years old respectively at the times relevant here. They were living in the home of their mother, Grace Mart, in Scottsbluff, Nebraska, at the time the applications here were made, and both girls were unmarried and pregnant. In addition to the

plaintiffs, Grace Mart's son was also a member of the household, although he was away at college.

On November 3, 1976, the county department of public welfare notified plaintiffs that their applications for aid to dependent children and medical expense benefits had been rejected because plaintiffs were not deprived of parental support or care.

Plaintiffs appealed to the Director of the State Department of Public Welfare and a hearing was held on December 3, 1976. The evidence at the hearing established that because of the plaintiffs' pregnancies they required more fruits, vegetables, and milk, and needed vitamin supplements. They needed new clothes because their old ones no longer fit, and they were unable to walk for exercise because of inadequate clothing for winter. Plaintiffs were unable to afford such needed items because they had no money. The mother of the plaintiffs, with whom they were living, had monthly take-home pay of $480, plus $100 in child support. She testified that she could not afford to pay the pregnancy expenses of her daughters.

The hearing examiner found that there were six persons in the family unit, Grace Mart, her three children, and the two unborn children of the plaintiffs, and that the income of Grace Mart was substantially in excess of the $429 per month need standard for a family unit of six, and found that the applications of the plaintiffs for benefits should be rejected. The Director of the State Department of Public Welfare consequently affirmed the previous action of the county division of public welfare and rejected the plaintiffs' applications.

The plaintiffs filed a petition for review of the action of the Director of the State Welfare Department in the District Court for Scotts Bluff County. The petition of the plaintiffs alleged that the basis of the rejection of plaintiffs' applications was regulation IX-4731 of the Nebraska Department of Public Wel-

fare which provides, among other things: "Responsibility of parents for a pregnant minor includes responsibility for the unborn child." The petition alleged that the regulation was unconstitutional because it was a usurpation of the legislative power; because the regulation arbitrarily created classifications of pregnant minors which had no rational basis and constituted a denial of equal protection; and because classification of unborn children of pregnant minors living at home rested on the irrebuttable presumption that the income of a grandparent would be available for the benefit of an unborn grandchild, and the presumption was arbitrary and in violation of due process.

The matter was tried in the District Court in October 1977 on the transcript from the county welfare department hearing and other evidence. The record establishes that plaintiff, Ruth L. Elliott, gave birth to a son on March 9, 1977, and plaintiff, Patricia Elliott, gave birth to a son on March 21, 1977. The plaintiffs prayed for a retroactive award of aid to dependent children benefits for the months of November 1976, December 1976, January 1977, and February 1977, totaling $640 for the unborn child of each plaintiff, and retroactive medical assistance benefits for the same period. On December 12, 1977, the District Court affirmed the order of the State Director of Public Welfare denying benefits, and this appeal followed.

Some background information is necessary. The basic grant in aid program for aid to dependent children was established by the federal government through the Social Security Act codified as 42 U. S. C. A., section 601 et seq. The act provides specific guidelines as to how state plans are to be set up and provides that "all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall * * * be furnished

with reasonable promptness *to all eligible individuals* * * *." 42 U. S. C. A. § 602 (a) (10). (Emphasis supplied.)

The federal act defines dependent child and does not specifically include an unborn child within that definition but is silent on the question. However, the Department of Health, Education and Welfare has promulgated a regulation which provides that federal fund participation is available in payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis. The practice of the department has been to make payments for unborn children an optional matter with the states. The United States Supreme Court has held that states are not required to include unborn children within the meaning of dependent child but may receive federal funds for unborn children at their option. Burns v. Alcala, 420 U. S. 575, 95 S. Ct. 1180, 43 L. Ed. 2d 469. Nebraska has a statutory plan for receiving and dispensing aid to dependent children benefits including those for unborn children. See § 43-501 et seq., R. R. S. 1943, as amended.

Section 43-504 (2), R. S. Supp., 1978, defines dependent child substantially in conformity with the federal statute but also provides: "Only for the purpose of awarding aid to dependent children payments, the term *dependent child* shall include unborn children. As soon as it is medically determined that pregnancy exists, application may be made for initial eligibility or an increase in an existing unit budget." (Emphasis supplied.) This subsection became effective May 13, 1975.

The State Welfare Department has adopted regulation IX-4731, which provides: "Unborn Children: In the ADC budget an unborn child shall be budgeted in the same manner as any other child. The unborn child shall be included in the household and in the unit when using the standard table (IX-4641). Responsibility of parents for a pregnant minor includes

responsibility for the unborn child."

Obviously regulation IX-4731 applies only to unborn children and consequently does not apply once the child is born. Unmarried pregnant minors not living with their parents and unmarried pregnant adults, whether living with their parents or not, are treated as a separate "unit." Once the child is born, mother and child are treated as a separate unit, whether the mother is an adult or a minor, and whether she lives in the home of her parents or not. Regulation IX-4731 is, therefore, applied only during pregnancy and only in the case of an unmarried pregnant minor who is living with her parent or parents.

The thrust of the plaintiffs' contentions here is that regulation IX-4731 creates an irrebuttable presumption that when an unmarried pregnant minor is living in the home of her parent or parents, the prospective grandparents provide support for the unborn child, whether or not any support is actually provided, thus denying plaintiffs equal protection and due process of law.

The plaintiffs contend that the regulation has established different classifications of needs for unborn children. Under the challenged regulation an unborn child has no needs which are separate and distinct from those of its mother and maternal grandparents if the prospective mother is an unmarried minor and lives in the home of her own parents. If the prospective mother is an unmarried minor and does not live in the home of her parents, or is 19 years old or older, whether she lives in the home of her parents or elsewhere, her unborn child does have needs which are separate and distinct from those of its mother and maternal grandparents.

The irrebuttable presumption created by the regulations of the welfare department includes the total amount of income of the maternal grandparents of an unborn child as income available for its needs if

the minor mother lives with her parents regardless of whether any income is actually contributed. That irrebuttable presumption does not apply to any other classification of unborn children, nor any other classification of unmarried pregnant women. Neither does it apply in any case after the child is born. Instead a new "unit" is created consisting of the mother and child.

Welfare benefits are not a fundamental right and neither the state nor the federal government is under any sort of constitutional obligation to guarantee minimum levels of support. Lavine v. Milne, 424 U. S. 577, 96 S. Ct. 1010, 47 L. Ed. 2d 249.

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' * * * 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' " Dandridge v. Williams, 397 U. S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491.

Under federal ADC regulations only the net income that is actually contributed by a person who is not a "parent" may be considered in determining need. See 45 C. F. R. § 233.90 (a).

In Townsend v. Swank, 404 U. S. 282, 92 S. Ct. 502, 30 L. Ed. 2d 448, the Supreme Court held that a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.

In King v. Smith, 392 U. S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118, the Supreme Court of the United States determined that AFDC regulations properly excluded from consideration resources which are merely

assumed to be available to the needy individual and said: "We believe Congress intended the term 'parent' in § 406 (a) of the Act, 42 U. S. C. § 606 (a), to include only those persons with a legal duty of support." Since the repeal of section 68-101, R. R. S. 1943, in 1969, in Nebraska there has been no legal obligation upon grandparents to support grandchildren. Neither do grandparents as such stand in loco parentis to their grandchildren. See 59 Am. Jur. 2d, Parent and Child, § 89, at p. 185.

In Boines v. Lavine, 44 A. D. 2d 765, 354 N. Y. S. 2d 252, the court held: "An unborn child has needs separate and distinct from its mother for which its grandparents (applicant's parents) are not legally responsible. * * * Absent an obligation of support owing by the grandparents for the needs of a minor child or an unborn infant, their resources and income are irrelevant and should not be the subject of a hearing under subdivision c of section 349 of the Social Services Law. We agree with the conclusion reached by Special Term, however, that this applicant was entitled to an aid for dependent children grant to meet the needs of her unborn infant although she was not a recipient of public assistance. The legislative and departmental regulations recognize that unborn children have needs separate and independent from those of its mother; that they are, therefore, eligible for public assistance and included among those benefited. * * * The State's statutes and regulations may not be construed inconsistently with the Federal statute which controls the disbursement of these funds * * *."

Regulation IX-4731 creates an irrebuttable presumption that a maternal grandparent, who has no legal duty to support an unborn grandchild, actually contributes all income required for the needs of the unborn child. Statutes creating a permanent irrebuttable presumption have long been disfavored under the Due Process Clauses of the Fifth and Four-

teenth Amendments. See Vlandis v. Kline, 412 U. S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63.

Welfare benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. Goldberg v. Kelly, 397 U. S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287.

It may be reasonable to assume that the parents of an unmarried pregnant minor will support the needs of the unborn child but that assumption is not always true. It is not difficult to imagine many situations in which prospective grandparents might refuse to support the needs of an unborn child. It is arbitrary and unreasonable to create such an irrebuttable presumption during the time the unmarried pregnant minor lives with her parents but transform it into a rebuttable presumption the moment she leaves her parents' residence or the moment her child is born. The state's interest in administrative ease and certainty cannot save the conclusive presumption of the regulation from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts of actual contribution. If those facts can be ascertained, as they are now being ascertained in other cases involving unmarried pregnant minors not living at home, and all unmarried minor mothers, whether living at home or not, there is no valid reason they cannot be ascertained with respect to an unmarried pregnant minor living at home.

Regulation IX-4731, to the extent that it creates an irrebuttable presumption that the income of maternal grandparents is contributed to the needs of an unborn grandchild, denies the plaintiffs equal protection of the law and due process of law and is invalid and unconstitutional under the United States and Nebraska Constitutions. The evidence in the record fails to establish the amounts that the grandmother of the unborn children here actually contrib-

uted to their needs, and because of the regulation no evidence was presented on that issue.

The judgment of the District Court is therefore reversed and the cause remanded to the District Court for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

GREAT PLAINS INSURANCE COMPANY, INC., A NEBRASKA CORPORATION, APPELLANT, V. DONALD J. KALHORN ET AL., APPELLEES.

280 N. W. 2d 642

Filed June 26, 1979. No. 42164.

1. **Insurance: Contracts.** Ambiguities in an insurance policy should be construed against the insurer and if a policy is fairly susceptible of two constructions and one affords coverage and the other does not, then the construction which affords coverage should be adopted. Complexity is not the same as ambiguity.
2. ____: ____. An insurance policy is a contract between the insurance company and the insured. As such, the insurance company has the right to limit its liability by including those limitations in the policy definitions. If those definitions are clearly stated and unambiguous, the insurance company is entitled to have those terms enforced.

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

Jeffrey A. Silver, for appellant.

Michael J. Lehan, for appellee Jensen. James R. Coe of Carpenter, Fitzgerald & Coe, P. C., for appellee Kalhorn. David L. Herzog, for appellees Owens.

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

BRODKEY, J.

Plaintiff-appellant, Great Plains Insurance Com-

pany, Inc., hereinafter referred to as Great Plains or plaintiff, has filed a declaratory judgment action against the defendants-appellees, Donald J. Kalhorn, Earl W. Owens, Linda Owens, and Glen G. Jensen, to obtain an interpretation and determination of the rights of the parties under a certain automobile liability insurance policy issued by Great Plains to the Owens' insuring a certain 1974 Chevrolet pickup truck for use in both pleasure and business. During the pendency of the action, Great Plains filed a motion for summary judgment which, after a hearing thereon, the court overruled, making findings of both facts and law relative to the issues in the case. The matter was thereafter assigned for trial to another judge, and was tried to the court pursuant to stipulated facts, which are not in dispute in this appeal.

It appears that on the date of the accident involved herein, August 9, 1976, the truck was being driven by defendant Kalhorn, with the permission of Owens, and was pulling a tandem trailer in a northerly direction on Interstate Highway No. 680 in Omaha, Nebraska, when a spare tire attached to the trailer worked loose and rolled down the interstate, colliding with an automobile being driven by defendant Jensen, and causing damage to the vehicle driven by Jensen. Jensen subsequently filed an action to recover damages, resulting from that accident, from Kalhorn and the Owens'. It was stipulated by all the parties that the truck and the trailer were being used for business purposes at the time of the accident. It is the contention of Great Plains that its policy does not provide coverage under the facts of this case, and it has appealed to this court from the judgment of the District Court for Douglas County finding that coverage did exist under the policy, and requiring Great Plains to defend and indemnify defendant Kalhorn in the lawsuit brought by defendant Jensen.

The resolution of this issue necessitates the examination of the policy in question, and particularly the definitions contained therein pertinent to the question presented to us. To begin with, the policy provides: "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage, arising out of the ownership, maintenance or use of an owned automobile or a non-owned automobile, and the company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient. * * *." In the definition section of the policy, it is provided: " 'automobile' " means a four wheel land motor vehicle designed for use principally upon public roads, and, * * *, includes a utility trailer, while used therewith, * * *." The parties concede that the truck involved herein was "designed for use principally upon public roads." The term "owned automobile" is defined in the policy as meaning: "(a) a private passenger or utility automobile described in this policy, * * *." "Private passenger automobile" is defined as meaning: "a private passenger or station wagon type automobile; * * *." "Utility automobile" is defined as meaning: "an automobile of the truck type with a load capacity of fifteen hundred pounds or less not used for business or commercial purposes other than farming; * * *." The policy defines "utility trailer" to mean: "(1) a trailer designed for use with a private passenger automobile, if not being used for business or commercial purposes with other than a private passenger or utility automobile, * * *." Counsel for Great Plains concedes that the trailer in question was designed for use with a private passenger automobile,

but points out the additional requirements that in order to be considered a "utility trailer" the trailer may not be used for business or commercial purposes with other than a private passenger or utility automobile. He points out that the truck in question was not a private passenger automobile under the definition of that term in the policy, and also that the truck was not a "utility automobile" under the definition because it was used for business or commercial purposes other than farming. He therefore argues that there is no coverage provided under the policy for any damage that resulted from the accident in question, because both the truck and the trailer were being used for business purposes at the time of the accident, notwithstanding the policy itself covers both business and pleasure use.

Counsel for defendants argues, however, that the policy provisions are ambiguous, that the endorsement page of the policy shows that the insured vehicle was the 1974 pickup truck, and that in the policy the term "automobile" specifically includes a utility trailer when used therewith. He points out, however, that the definition of "utility automobile" excludes its use in business, and the definition for "utility trailer" excludes its use in business unless used with a private passenger or utility automobile. He argues that the clearer meaning is that the policy transforms a pickup truck used for business with a utility trailer to a utility automobile, and refers to the findings of Judge Murphy who, after hearing the motion for summary judgment, stated: "Plaintiff, having insured the specific Chevrolet for use in pleasure and business, cannot now successfully argue that, because it was used for business, it became uninsured. Having thus transformed a truck into a utility automobile, plaintiff is now powerless to undo what it did, or to eradicate the underlined portion of its own definition." The underlined portion referred to by Judge Murphy, as contained in his order, is in

the definition of "utility trailer" which he defines as "a trailer not being used for commercial or business purposes with other *than a private passenger or utility automobile.*"

In reply to the arguments advanced by counsel for the defendants, Great Plains points out there is no question that in the declaration page of their policy they insure the 1974 Chevrolet pickup truck for business and pleasure and that they do not seek by definitions to take away that coverage. They contend the only reason the definition of "utility automobile" is in the policy is to determine whether or not the trailer is or is not a "utility trailer." They concede that if it is a "utility trailer" then they owe the coverage, but if it is not a "utility trailer," then they do not owe the coverage. They contend that if the truck is used for business, then it is not a utility automobile, and that if you have a trailer being pulled by the truck that is being used in business, there is no coverage. They argue that the reason for the definitions in the policy is to differentiate between the vehicle that is insured, and something else the vehicle may be pulling.

In Hartford Acc. & Ind. Co. v. Olson Bros., Inc., 187 Neb. 179, 188 N. W. 2d 699 (1971), we stated: "We are not unmindful of the principles that ambiguities must be construed against the insurer and if a policy is fairly susceptible of two constructions and one affords coverage and the other does not then the construction which affords coverage must be adopted. There is no ambiguity in the policy. *Complexity is not the same as ambiguity.*" (Emphasis supplied.) In the instant case we conclude that while there is, undoubtedly, complexity involved in the policy provisions, there is no ambiguity. An insurance policy is a contract between the insurance company and the insured. As such, the insurance company has the right to limit its liability by including those limitations in the policy definitions. If those definitions

are clearly stated and unambiguous, the insurance company is entitled to have those terms enforced. We conclude that since, in this case, both the truck and the trailer were being used for business purposes at the time of the accident in question, the trailer, by definition, was not a "utility trailer" and, therefore, the policy issued by Great Plains afforded no coverage to the defendants. For the reasons stated above, the judgment of the District Court must be reversed and the cause remanded to the District Court with directions to enter judgment for plaintiff as prayed for in its amended petition.

REVERSED AND REMANDED WITH DIRECTIONS.

EDWIN A. DAVIDSON ET AL., APPELLANTS, V. TERRY SIMMONS, A MINOR CHILD, ET AL., APPELLEES.

280 N. W. 2d 645

Filed June 26, 1979. No. 42231.

1. **Motions, Rules, and Orders: Judgments: Evidence.** A motion for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. 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.
2. **Conspiracy: Proof.** A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purpose to be accomplished.
3. **Conspiracy: Damages.** A conspiracy between the parties having been once established, whatever was done in pursuance of it by one of the conspirators is to be considered as the act of all, and all are liable irrespective of the fact that they did not actively participate in the particular act and irrespective of the extent to which they benefited by it.

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

Knapp, State, Yeagley, Mues & Sidwell, for appellants.

Jacobsen, Orr & Nelson, for appellees Farquhar.

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

MCCOWN, J.

In this action the plaintiff, a police officer, seeks damages for personal injuries sustained when he was struck on the head with a hammer while investigating a burglary. The action was brought against the three minor defendants on allegations that they were engaged in a civil conspiracy to commit the burglary. The parents of the minor defendants were joined under statutory authorization for imposition of limited liability upon parents for willful and intentional infliction of personal injuries by their minor children. The jury found for the plaintiff and against each of the minor defendants, jointly and severally, and assessed total damages at $35,000. That total amount included judgment against the parents of the minor defendants in the total amount of $1,819.22, but not exceeding $1,000 as to each couple, under section 43-801, R. R. S. 1943. The District Court entered judgment against the respective defendants in accordance with the verdict. The parental defendants filed motions for judgment notwithstanding the verdict, as did the minor defendant, Robert Farquhar. The District Court overruled all motions for judgment notwithstanding the verdict except the motions on behalf of the minor defendant, Robert Farquhar, and his parents, which motions were sustained. Plaintiff has appealed from the order sustaining the Farquhar motions for judgment notwithstanding the verdict.

On the evening of December 29, 1975, the three minor defendants, Robert Farquhar, age 16, Gregory Evans, age 18, and Terry Simmons, age 16, were rid-

ing around in Kearney, Nebraska, in a pickup belonging to Evans' father. After drinking beer and riding around town for approximately an hour, Robert Farquhar suggested that the trio break into a business in order to get some money. He suggested a bookstore because he knew how to get into it. At approximately 1:30 a.m., on December 30, 1975, the trio made an unsuccessful attempt to break into the bookstore. During this attempted break-in Simmons stayed in the pickup and Farquhar and Evans broke into the building housing the bookstore. After some period of time Farquhar and Evans gave up the attempt to get into the bookstore and returned to the pickup at approximately 2 a.m.

The trio then rode around town for approximately half an hour and discussed breaking into some other building. During that time they stopped the pickup in the alley behind a building at 1970 Central Avenue which housed a slot-track racing establishment known as "The Track." Simmons got out of the pickup and broke a window near the back door. Simmons returned to the pickup and the three defendants drove around the vicinity for approximately 15 minutes to make sure there were no people on the street in the area. They then returned to the alley in the rear of "The Track." This time Simmons and Evans broke into the building and Farquhar waited in the pickup.

Shortly before 3 a.m., the Kearney police department was notified that a burglary was in progress at "The Track" and five policemen proceeded to the scene, including the plaintiff, Captain Edwin A. Davidson. Two police officers arrived first and drove into the alley to the rear of the building where they observed a pickup truck directly across the alley from the rear of the building. The engine was running and a person was observed inside the pickup. One of the officers circled around to approach the pickup, but when he reached it the person who had

been seen inside the pickup was gone. That individual was later identified as the defendant, Robert Farquhar.

Two more officers arrived at the scene and covered the front of the building. The plaintiff arrived at the rear of the building where he instructed one officer to stand guard while the plaintiff and another officer entered the building through a rear door, which was ajar. As the two officers moved through the building with flashlights, they heard a noise and saw a figure move. As the plaintiff cautiously worked around a doorway he was struck on the head and knocked to his knees. The assailant was subdued after a struggle and was later identified as the defendant, Terry Simmons. Evans was arrested at the front of the building when he broke through a large window. Farquhar was identified and arrested at his home later.

The plaintiff sustained a skull fracture and cerebral contusions. He remained in the hospital for a week and spent nearly a month thereafter convalescing at home. He returned to light work thereafter and to full duty in March 1976. His hospital and medical expenses were $1,819.22.

The Farquhars contend that the evidence of a conspiracy is insufficient to submit to the jury because it does not establish the existence of a conspiracy to strike and injure the plaintiff, and that act was outside the scope of the burglary conspiracy and cannot result in liability on the part of the Farquhars. The plaintiff asserts that if a conspiracy is conceived and executed and injury results from an act of one conspirator in the course of the conspiracy, the person injured has a right of action against all the conspirators, and the evidence of Farquhar's active participation in the conspiracy to burglarize was sufficient for submission to the jury.

Where the facts adduced to sustain an issue are such that reasonable minds can draw but one con-

clusion therefrom, it is the duty of the court to decide the question, as a matter of law, rather than submit it to a jury for determination. Mimick v. Beatrice Foods Co., 167 Neb. 470, 93 N. W. 2d 627.

A motion for a directed verdict or for a judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. 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. The burden of establishing a cause of action by circumstantial evidence requires that such evidence, to be sufficient to sustain a verdict or require submission of a case to a jury, shall be of such character and the circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved. Hosford v. Doherty, 198 Neb. 211, 252 N. W. 2d 154.

This court has recognized a cause of action for damages resulting from a civil conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy rather than by the conspiracy itself, and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. Workman v. Workman, 174 Neb. 471, 118 N. W. 2d 764.

A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purpose to be accomplished. If it be proved that defendants, by their acts, pursued the same object, although by different means, one performing one part and another another part, with a view to the

attainment of the same object, the conclusion is justified that they were engaged in a conspiracy to effect that object. Stillinger & Napier v. Central States Grain Co., Inc., 164 Neb. 458, 82 N. W. 2d 637.

A case very similar on its facts supports the application of the Napier rule in the present case. In Tabb v. Norred, 277 So. 2d 223 (La. App., 1973), two boys burglarized a school. They were discovered in the act. One of the boys attempted to escape but was caught. The other boy fired shots at the officers, wounding one, escaped, and was later caught. Both boys were sued in a civil case by the wounded officer. The one who had not fired the shots asserted that he was not liable because he did not assist in the shooting, nor encourage the other boy to shoot the plaintiff. The court found both defendants liable. The court determined that by entering into a conspiracy to commit burglary and then joining in the execution of that conspiracy, the defendant who had not fired the shots nonetheless actively assisted and encouraged the commission of any acts which were incidental to the execution of the conspiracy. The shooting was an act which could reasonably have been anticipated when the conspiracy to commit burglary was executed.

In the Stillinger & Napier v. Central States Grain Co., Inc., case, *supra,* this court said: " 'There is no question but that the conspiracy between the parties having been once established, whatever was done in pursuance of it by one of the conspirators is to be considered as the act of all, and all are liable irrespective of the fact they did not actively participate therein or the extent to which they benefited thereby. It is sufficient if the proof shows such a concert of action in the commission of the unlawful act or such other facts and circumstances from which the natural inference arises that the unlawful overt act was in furtherance of a common design, in-

tention and purpose of the alleged conspirators to commit the same.' "

In the present case the evidence of Farquhar's participation in the conspiracy was more than sufficient to go to the jury. It cannot be said that reasonable minds could not differ, nor that Farquhar was not a part of any conspiracy to commit burglary, as a matter of law. The jury determined the issue by its verdict, and the plaintiff 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.

The order of the District Court entering judgment notwithstanding the verdict was erroneous. That order is reversed and set aside and the verdict and judgment for the plaintiff against Robert Farquhar, Robert M. Farquhar, and Betty C. Farquhar is reinstated.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD L. MUNN, APPELLANT.

280 N. W. 2d 649

Filed June 26, 1979. No. 42289.

1. **Criminal Law: Instructions: Lesser-Included Offenses.** It is not error to refuse a jury instruction on a lesser-included offense unless, under a different but reasonable view, the evidence is sufficient to establish guilt of the lesser offense and also leave a reasonable doubt as to some particular element included in the greater offense but not the lesser.
2. **Criminal Law.** The criminal code which became effective January 1, 1979, is not applicable to offenses committed prior to its effective date.

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

Thomas M. Kenney, Douglas County Public De-

fender, Bennett G. Hornstein, Stanley A. Krieger, and Daniel K. Powers, for appellant.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter, for appellee.

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

BRODKEY, J.

Defendant, Edward L. Munn, appeals to this court from his conviction by a jury in the Douglas County District Court on the charge of robbery, and his subsequent sentence to a minimum statutory term of 3 years imprisonment in the Nebraska Penal and Correctional Complex.

The victim of the robbery, Edward Rybin, returned to Omaha on June 7, 1978, by Greyhound bus, following a visit to his son in Cedar Rapids, Iowa. He arrived at the bus depot at approximately 11 p.m. After claiming his bags, he was in the process of hailing a cab when he was accosted by a black male who, according to the testimony of the victim, told him: "Give me your billfold and we won't have no trouble." The victim testified that he struggled with the assailant, but was knocked to the ground. Rybin further testified that he protected his face, and the assailant unbuttoned his pants pocket, removed his billfold, and ran with it. Rybin further testified that he was yelling "robbery, robbery" during the incident. A bus driver testified that he observed the incident and saw Rybin being held on the ground by an individual who was holding Rybin down with one hand and going over him with the other. The bus driver alerted an off-duty police officer who was acting as a security guard at the bus depot. He pursued and apprehended the defendant with Rybin's wallet in his possession. The defendant was later identified as the individual in question. Defendant's version of what transpired was that ear-

lier in the evening he had bought a man a cup of coffee in the bus depot coffeeshop, and when he saw Rybin waiting for a cab, he thought Rybin was the other individual and had approached him to get back his quarter that he had paid for the coffee earlier in the evening. He testified that he asked Rybin: "Do you have that now?", and placed his hand on the man's shoulders. He admitted that Rybin then started yelling "robbery." Defendant denied pushing Rybin and stated that he put his hand on the shoulder of Rybin to try to hold him up, and he felt Rybin fall backwards. At the trial defendant testified: "I would like to say to the panel that I am not arguing the fact that I did not take the wallet; I did take the wallet, which I did, but what I would like to say in this incident it is not a case of robbery because I didn't have any weapon. * * * It's just more or less larceny from the person, that's all I want out of it — it is not robbery. I didn't use no force; I didn't use no weapon. * * *." On cross-examination he further testified as follows: "Q. So it is your testimony that you did steal Mr. Rybin's wallet, is that correct? A. I did. I did take it from him. Q. You did so with an intent to steal it from him, isn't that right? A. Yes."

In his brief on appeal, defendant makes two assignments of error: (1) The District Court committed reversible error in refusing the defense request for a jury instruction on the lesser-included offense of larceny from the person; (2) the defendant is entitled to have his minimum statutory sentence of 3 years imprisonment for robbery under section 28-414, R. R. S. 1943, vacated and this cause remanded to the District Court for resentencing in view of the reduced statutory minimum sentence of 1 year imprisonment for the same offense under sections 28-324 and 28-105 (1), R. S. Supp., 1978, which became law on January 1, 1979. We affirm the judgment and sentence of the District Court.

We deem defendant's contention that he was entitled to a jury instruction on the lesser-included offense of larceny from the person to be without merit, notwithstanding defendant's contention that he placed his hand on Rybin's body only for the purpose of holding him up to prevent him from falling; and further, that he had no weapon. The facts are undisputed, however, that defendant did make an unlawful, forceful touching of Rybin's body, and Rybin was put in fear as evidenced by the undisputed testimony of plaintiff's witnesses and admissions of the defendant that Rybin was yelling "robbery, robbery" at all times. Defendant's own testimony and admissions are more than sufficient, in themselves, to sustain his conviction for the offense of robbery, as defined in section 28-414, R. R. S. 1943, which was in effect on the date of the commission of the offense involved herein.

In State v. Tamburano, 201 Neb. 703, 271 N. W. 2d 472 (1978), we held that it is not error to refuse a jury instruction on a lesser-included offense unless, under a different but *reasonable* view, the evidence is sufficient to establish guilt of the lesser offense and also leave a reasonable doubt as to some particular element included in the greater offense but not the lesser. In that case we quoted from an opinion of the Supreme Court of Minnesota in State v. McDonald, 251 N. W. 2d 705, as follows: " 'The test which must be applied in determining whether or not to submit a lesser-included offense is whether there is evidence which produces a *rational* basis for a verdict acquitting defendant of the offense charged and convicting him of the lesser offense.' " (Emphasis supplied.) In Tamburano, we also quoted from a Wisconsin case, State v. Bergenthal, 47 Wis. 2d 668, 178 N. W. 2d 16: " 'Only if, "under a different but reasonable view," the evidence is sufficient to establish guilt of the lower degree and also leave a reasonable doubt as to some particular element included in the higher

degree but not the lower, should the lesser crime also be submitted to the jury.' " In Tamburano, we also stated: "Evidence which requires the submission of a lesser-included offense is necessarily left to a case-by-case basis." Under the above cited rules, it cannot be doubted that the trial court was correct in the instant case in refusing to instruct the jury on the charge of "larceny from the person," as requested by the defendant, as the evidence clearly established defendant's guilt of the crime of "robbery," and defendant's explanation of his actions was neither "reasonable" nor "rational" nor sufficient to justify the giving of the requested instruction.

Defendant's second assignment of error is likewise without merit and is governed by our opinion in State v. Weinacht, *ante* p. 124, 277 N. W. 2d 567 (1979).

No errors appearing, the judgment and sentence of the District Court must be affirmed.

AFFIRMED.

WILLIAM E. QUINLAN ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPELLANTS.

280 N. W. 2d 652

Filed June 26, 1979. No. 42312.

1. **Appeal and Error: Evidence: Proof: New Trial.** An actual offer of evidence upon an issue is not necessary in order to preserve the question for review if the trial court has theretofore ruled that no proof upon that issue would be received in any event, and the alleged error in doing so has been appropriately preserved by motion for new trial or otherwise.
2. **Courts: New Trial.** During the same term of court a trial court has inherent power, over its judgments and orders, to correct errors and mistakes appearing of record, even to the extent of granting a new trial.
3. ____: ____. A confusing situation prejudicial to a party's rights which has been created by the trial court is sufficient ground to support its granting of a new trial.

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

Herbert M. Fitle, Kent N. Whinnery, and Patrick W. Kennison, for appellants.

Charles F. Gotch of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

Heard before KRIVOSHA, C. J., MCCOWN, BRODKEY, and HASTINGS, JJ., and STUART, District Judge.

HASTINGS, J.

This is an appeal by the defendants, the City of Omaha and members of the city council, from an order of the trial court granting plaintiffs a new trial in a proceeding in which the trial court had originally denied plaintiffs' motion to tax attorney's fees against the City.

This action was originally commenced in 1974 wherein plaintiffs asked that a writ of mandamus be issued requiring the City to fund prior service credit of the Police and Fireman's Retirement System. After what might be called protracted pretrial proceedings, a settlement agreement was entered into between the parties and approved by the trial court, all on September 1, 1977. Without going into detail not necessary to a decision in this case, the settlement provided for the payment of several million dollars by the City over a period of years. The agreement also provided that "the parties likewise reserve the right to contest the reasonableness of the amount of fees, if any, allowed to counsel for the plaintiffs, but not the appropriateness of the allowance of such fees against the City of Omaha * * *."

On October 27, 1977, plaintiffs filed a "Motion for Attorneys fees" asking that the court allow their counsel a reasonable fee as a "charge against the fund with the fund to be reimbursed by the City, or as a direct charge to the City." Hearing was or-

dered by the court for March 23, 1978, and briefs were submitted in advance.

A letter dated March 16, 1978, written by the trial court and mailed to all attorneys of record, read as follows: "The Court has considered your briefs in the above-entitled cause. It is our feeling that the hearing set for the 23rd of March should be restricted to arguments in support of your respective positions, regarding the City's obligation, if any, to pay fees. Accordingly, *there will be no evidence received on March 23rd,* and a later date will be set to determine the amount of fees, if any." (Emphasis supplied.)

The hearing was had as scheduled before a three-judge panel, and on May 5, 1978, an order was entered denying the motion insofar as it requested a fee to be taxed against the City. Among the findings made by the court was one that the provisions of the settlement agreement as to incontestability of the assessment of fees against the City was "ambiguous and readily subject to the interpretation urged by the City." The plaintiffs had made no attempt at the March 23rd hearing to offer any evidence. A motion for a new trial was filed by plaintiffs within 10 days alleging generally error on the part of the trial court in its final decision and specifically in interpreting the agreement of September 1, 1977, without an evidentiary hearing. At a hearing on that motion, evidence was adduced suggesting the possibility of the existence of a legitimate factual dispute on the contract interpretation. The court thereafter granted plaintiffs a new trial without assigning any reason in the formal order. However, in a letter dated July 31, 1978, forwarded to all counsel of record, the court did say: "I am today sustaining plaintiffs' motion for a new trial in the matter of awarding attorney fees. The principle [sic] basis for this ruling is plaintiffs' argument that he was not granted an evidentiary hearing and was prevented

from so doing by a communication from this Court, received and marked into evidence as Exhibit 1. While the letter was intended only to avoid hearing evidence on the amount and reasonableness of the fees, yet by its wording, it did appear that plaintiffs would not be allowed to introduce any evidence on any subject for any reason, and for this cause plaintiffs are being granted a new trial."

The City's assignments of error are that plaintiffs did not request an evidentiary hearing nor did they call any witnesses at the hearing nor make an offer of proof, but, rather, presented the issue for the first time in their motion for a new trial. The answer to this is very simple: "The general controlling rule in that regard is that an actual offer of evidence upon an issue is not necessary in order to preserve the question for review if the trial court has theretofore ruled, as it did in this case, that no proof upon that issue would be received in any event, and the alleged error in doing so has been appropriately preserved by motion for new trial or otherwise." Dixon v. Coffey, 161 Neb. 487, 73 N. W. 2d 660 (1955).

There, of course, is another very obvious reason why the action of the trial court must be sustained. During the same term of court a trial court has inherent power, over its judgments and orders, to correct errors and mistakes appearing of record, even to the extent of granting a new trial. Harman v. Swanson, 169 Neb. 452, 100 N. W. 2d 33 (1959). Counsel for the City admitted during oral arguments that such action was taken during the same term of court and nothing in the record appears to the contrary. At worst, the trial court denied plaintiffs the right to offer evidence, which was to their prejudice. At best, a confusing situation was created, to the prejudice of plaintiffs, which the trial court admitted was of its doing.

Clearly, the trial court had tenable grounds to grant a new trial and to have done otherwise would

undoubtedly have been prejudicial error. The action of the District Court is affirmed.

AFFIRMED.

NORMAN COCHRAN, APPELLEE, V. THE COUNTY OF LINCOLN, NEBRASKA, APPELLANT.

280 N. W. 2d 897

Filed June 26, 1979. No. 42320.

1. **Witnesses: Statutes: Fees.** Section 33-139, R. S. Supp., 1978, does not authorize the payment of $20 per day to a material witness during the time that he is confined while he is unable to post bond.
2. ___: ___: ___. A general statute providing for witness fees cannot be construed to include or to authorize payment of such fees to any person detained by court order while waiting for the trial to take place.
3. **Statutes.** Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
4. **Witnesses: Statutes: Fees: Constitutional Law.** The right of a witness to compensation is purely statutory since at common law no witness fees were paid. A statute not providing for payment of fees to witnesses in criminal and other cases does not on that account infringe the constitutional provision against taking property for public use, against taking property without due process of law, or against demanding a man's particular services without just compensation.
5. **Witnesses: Fees.** It is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual for the welfare of the public.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Reversed and remanded.

Milton R. Larson, Lincoln County Attorney, and Marvin L. Holscher, for appellant.

James E. Schneider and James R. Nisley, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY, and HASTINGS, JJ., and COADY and NORTON, District Judges.

KRIVOSHA, C. J.

The instant appeal presents to this court a case of first impression requiring an examination of section 33-139, R. S. Supp., 1978, to determine whether a material witness, being confined pursuant to section 29-507, R. R. S. 1943, is entitled to witness fees for the time spent in custody prior to trial.

The facts involved herein are without dispute and have been stipulated. Appellee was a resident of the State of Texas. On June 24, 1977, Louis B. Brigman was shot and killed. Appellee's brother, William Glenn Cochran, was taken into custody and charged with first degree murder. Appellee appeared before the county court of Lincoln County, Nebraska, on June 27, 1977. The county court, pursuant to the provisions of section 29-507, R. R. S. 1943, determined that the appellee would not appear to testify at trial and therefore ordered him to post a bond in the amount of $25,000 with a right to post 10 percent thereof according to law. On June 28, 1977, bond was reduced to $15,000 by court order with the right to post 10 percent thereof according to law. Appellee did not post bond and was held in custody pursuant to section 29-507, R. R. S. 1943.

On August 13, 1977, appellee was released from custody upon the order of the United States District Court for the District of Nebraska, having been confined for 52 days. On September 6, 1977, jury trial commenced against William Cochran. Appellee attended the trial for 6 days as a witness for the State, pursuant to subpoena. William Cochran was found

not guilty. On September 12, 1977, the clerk of the District Court for Lincoln County, Nebraska, paid appellee the sum of $121.92, which represented $20 per day for 6 days attendance, plus mileage in the amount of $1.92.

On September 22, 1977, appellee filed a document entitled "Application for Payment of Witness Fees," praying for witness fees of $1,040. That figure represented $20 per day for the 52 days he was confined while unable to post bond pursuant to the provisions of sections 29-507 and 29-508, R. R. S. 1943. On October 27, 1977, the District Court for Lincoln County allowed the application and entered an order in favor of appellee in the amount of $1,040. After the county board of Lincoln County, Nebraska, denied the claim, appeal was taken to the District Court for Lincoln County, Nebraska, which again sustained the application and ordered payment to the appellee in the amount of $1,040. Appeal was perfected by the County of Lincoln, Nebraska, to this court.

In reviewing the matter, we now find that section 33-139, R. S. Supp., 1978, does not authorize the payment of $20 per day to a material witness during the time he is confined while he is unable to post bond. Accordingly, we reverse the order of the District Court for Lincoln County, Nebraska.

Section 33-139, R. S. Supp., 1978, provides: "Witnesses before the district court * * * shall receive twenty dollars * * * for each day actually employed in attendance on the court * * *." The sole question involved herein is whether a material witness, confined because of his inability to post bond, is "actually employed in attendance on the court" during the period of incarceration prior to trial. While this court has not had the opportunity heretofore to decide this question, other courts have ruled on this issue. The majority of those courts have held that such individuals are not in actual attendance on the court and therefore are not entitled to the statutory

witness fee. The weight of authority is to the effect that a general statute providing for witness fees cannot be construed to include or to authorize payment of such fees to any person detained by court order while waiting for the trial to take place. See, Barber v. Moss, 3 Utah 2d 268, 282 P. 2d 838; and the cases annotated and collected at 50 A. L. R. 2d 1436.

Appellee urges us to reject the majority view and to find, as the District Court held, that section 33-139, R. S. Supp., 1978, authorizes the payment of witness fees for the period of confinement prior to trial when a material witness is financially unable to post bond to secure his release. In order for us to reach that conclusion, we must read into section 33-139, R. S. Supp., 1978, language which is not now there. We should be reluctant to so legislate, no matter how painful the result may be. "Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. * * * It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. *Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.*" City of Scottsbluff v. Tiemann, 185 Neb. 256, 175 N. W. 2d 74.

By its plain language, section 33-139, R. S. Supp., 1978, authorizes payment of witness fees to only those persons actually attending the court. In the absence of legislative authorization, witness fees would not otherwise be allowed. "The right of a witness to compensation is purely statutory, since at common law no witness fees were paid. A statute not providing for payment of fees to witnesses in criminal and other cases does not on that account infringe the constitutional provision against taking private property for public use, against taking property without due process of law, or against demanding a man's particular services without just compensation." 81 Am. Jur. 2d, Witnesses, § 23, p. 47. To the

same effect, see United Development Corp. v. State Highway Dept., 133 N. W. 2d 439 (N. D., 1965).

"[I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." Blair v. United States, 250 U. S. 273, 39 S. Ct. 468, 63 L. Ed. 979.

While the result of this position may work a hardship on a material witness who is unable to post bond, the solution to that problem is for the Legislature to reexamine the provisions of sections 29-507 and 29-508, R. R. S. 1943, and to make provision for some form of payment for the time spent incarcerated prior to trial. In the final analysis there is probably no payment adequate to compensate a material witness who must remain in custody solely due to his financial inability to post bond and secure his release.

The provisions of the material witness statutes, sections 29-507 and 29-508, R. R. S. 1943, do not *require* that all material witnesses be confined to secure appearance at trial, or post bond to secure the same. Rather, such result occurs only when the magistrate is satisfied that the witness will not appear to testify at trial. However, these matters are factors totally outside of and beyond the clear meaning of section 33-139, R. S. Supp., 1978. To hold as urged by appellee would require us both to stretch the meaning of the statute and to read into the words "actually employed in attendance on the court" facts and circumstances which are not present. How can it be said that one is in attendance on the court when neither the court, itself, is in session nor

are the parties to the action present? Such a construction has been rejected by other courts ruling in this area. " 'To consider a witness who has been committed to jail because he cannot give security to attend a future court, to be actually *attending the court* from the time of his commitment, and this for five months before there is any court in existence, would seem to me to be a rather forced and unnatural construction.' " Hurtado v. United States, 410 U. S. 578, 93 S. Ct. 1157, 35 L. Ed. 2d 508.

While the result sought by the appellee in this case may have merit and while the action of the District Court was equitable, in light of the clear meaning of the statute we are without authority to take such action and feel compelled to follow the majority view in this matter. Accordingly, we hold that one who is retained in custody as a material witness pursuant to the provisions of section 29-507, R. R. S. 1943, is not actually employed in attendance on the court during all the time that the individual is in custody. We further find that a material witness held in custody is only actually employed in attendance on the court during that period of time in which trial of the matter for which the individual is being incarcerated is conducted. To that extent, therefore, the order of the District Court for Lincoln County, Nebraska, must be reversed.

REVERSED AND REMANDED.

JAMES RUSSELL COCHRAN, APPELLEE, V. THE COUNTY OF LINCOLN, NEBRASKA, APPELLANT.

280 N. W. 2d 900

Filed June 26, 1979. No. 42319.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Reversed and remanded.

Milton R. Larson, Lincoln County Attorney, and Marvin L. Holscher, for appellant.

Ruff & Murphy, for appellee.

Heard before KRIVOSHA, C. J., BRODKEY, and HASTINGS, JJ., and COADY and NORTON, District Judges.

KRIVOSHA, C. J.

This case is a companion case to Cochran v. County of Lincoln, decided this day and reported *ante* p. 818, 280 N. W. 2d 897. The facts in this case are almost identical to the facts in the Norman Cochran case, and were stipulated to by the parties. It appears that the appellee, James Cochran, was a witness to the shooting and killing of Louis B. Brigman on June 24, 1977, and was ordered held as a material witness subject to the posting of a bond in the amount of $25,000 with the right to post 10 percent thereof according to law, pursuant to the provisions of section 29-507, R. R. S. 1943. The amount of the bond was later reduced to $15,000 with the right to post 10 percent thereof according to law. Cochran was not able at first to post bond.

On August 2, 1977, appellee was released from custody upon posting of bond, having been incarcerated for 40 days. On September 12, 1977, the clerk of the court paid the sum of $121.92 to appellee which represented $20 per day for 6 days attendance, plus mileage in the amount of $1.92. Appellee filed a motion for witness fees in the amount of $800, representing $20 per day for 40 days held in custody as a material witness. On October 27, 1977, the court allowed the application and ordered payment to appellee in the amount of $800. When the claim was presented to the county board of Lincoln County, Nebraska, on April 10, 1978, the claim was denied and appeal was taken to the District Court for Lincoln County, Nebraska, which once again entered an order directing payment in the amount of $800 to ap-

pellee. Appeal was taken to this court. In view of our holding in the case of Cochran v. County of Lincoln, *supra,* we likewise reverse the decision of the District Court in this case.

REVERSED AND REMANDED.

ROBERT D. LYTLE, APPELLANT, V. JOSEPH C. VITEK, DIRECTOR OF CORRECTIONS, ET AL., APPELLEES.

280 N. W. 2d 654

Filed June 26, 1979. No. 42326.

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

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

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellees.

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

MCCOWN, J.

This is a declaratory judgment action brought by an inmate of the Nebraska Penal and Correctional Complex to determine whether the applicable statutes as to parole and discharge from custody had been properly interpreted and applied in depriving him of meritorious good-time credits earned prior to a discretionary parole, and in computing his release date for discharge from custody. The District Court found the statutes had been properly applied and dismissed the petition.

On March 22, 1974, after conviction on a charge of robbery, petitioner, Robert D. Lytle, was sentenced to 5 years imprisonment in the Nebraska Penal and Correctional Complex. On June 23, 1976, he was granted a discretionary parole. At the time of pa-

role, petitioner had accumulated 3 months 27 days meritorious good-time credit. Thereafter petitioner violated his parole and was found guilty of parole violation after notice and hearing. On August 5, 1976, his parole was revoked.

On January 31, 1978, the petitioner filed this action for declaratory judgment alleging that he had requested his exact date of release from custody and had been informed that it was April 6, 1979. Petitioner concedes that certain adjustments resulting from his conduct after August 5, 1976, were proper but contends that the release date of April 6, 1979, constituted a full 5-year sentence without reduction for the 3 months 27 days of meritorious good-time credits he had earned prior to his discretionary parole.

Petitioner relies on the provisions of section 83-1,107 (2), R. S. Supp., 1974. That section dealt with reduction of sentences for both ordinary and meritorious good time. Subsection (2) provided: "Reductions of such terms may be forfeited, withheld and restored by the chief executive officer of the facility after the offender has been consulted regarding the charges of misconduct. *No reduction of an offender's term for especially meritorious behavior or exceptional performance of his duties shall be forfeited or withheld after an offender is released on parole.*" (Emphasis supplied.) The Legislature amended many of the applicable statutes in 1975 and the emphasized language quoted above was completely omitted.

It should be noted here that section 83-1,107, R. S. Supp., 1974, made the granting of ordinary good time mandatory by the use of the word "shall," while meritorious good time was discretionary and was to be granted for not to exceed 5 days for any month of imprisonment. Both types of good-time reductions under the 1974 statute were applicable only to release on parole. See Von Bokelman v. Sigler, 186

Neb. 378, 183 N. W. 2d 267. The only good-time credits we are concerned with in this case are meritorious good-time credits.

The petitioner takes the position that meritorious good time was mandatory in the same sense as ordinary good time. He contends that it was a part of the sentence and, therefore, could not be changed to his detriment. It is obvious that statutory authorization for the discretionary granting of meritorious good time by the Board of Parole at a future date was not part of any sentence, and that provisions with respect to it could be changed, at least prospectively, at any time. Here the petitioner was not paroled until approximately a year after the statute had been changed and at the time of his parole the language he relies on was no longer a part of the statutes. There can be no doubt that petitioner's reliance on statutory language which was repealed is unfounded.

Some statutory history is necessary here. Until 1969 good-time credits were applied to reduce the maximum term of a sentence and the statutes required discharge from custody rather than release on parole when time limits had been met. From 1969 until 1975 the statutes continued to provide for discretionary parole but provided for mandatory release on parole rather than the mandatory discharge from custody required by prior and subsequent statutes. In 1975 the statutes basically returned to the pre-1969 system and the statutes now have no provision for mandatory parole but instead require discharge from custody when the time served in custody and on parole equals the maximum term, less all good-time reductions granted.

Although the petitioner relies primarily on a portion of the 1974 statute since repealed, he also testified that he had never been consulted as to forfeiture of any good-time credits which had accrued prior to his release on parole. His position is that there was

no way in which his meritorious good time could be forfeited in the absence of consulting with him as provided by statute. That position completely ignores the provisions of section 83-1,123, R. R. S. 1943, which governs and controls this case.

Section 83-1,123, R. R. S. 1943, was in effect at all times relevant here. It provides: "(1) A parolee whose parole is revoked shall (a) Be recommitted for the remainder of his maximum prison term, deducting the period served on parole prior to the violation; and (b) be treated as an escaped prisoner until apprehended and returned to the Department of Correctional Services.

"(2) The time from the date of his declared delinquency until the date of his arrest for the custody of the Board of Parole shall not be counted as any portion of the time served.

"(3) A parolee whose parole has been revoked shall be considered by the Board of Parole for reparole at any time in the same manner as any other committed offender eligible for parole. * * *"

That statute specifically deals with a parolee whose parole is revoked. It requires that such a prisoner be recommitted for the remainder of his maximum prison term, deducting only the period served on parole prior to the violation. The statute by its terms establishes a new prison term, wiping out any previous credits except for discretionary reparole. It certainly does not require that a prisoner be consulted again with regard to charges of parole violation or be specifically advised that previously earned good-time credits have been forfeited. It is ludicrous to contend that a prisoner who has had his parole revoked after hearing must be further consulted about the statutory effect of the parole revocation and its effect on the date of his ultimate release from custody before any meritorious good time can be forfeited.

Under current statutes the petitioner was still enti-

tled to all his good-time credits for purposes of a discretionary reparole. He was not entitled to a discharge from custody until the remainder of his maximum prison term had been served. The District Court was correct in determining that once the petitioner's parole was revoked the statutes required that he be recommitted for the remainder of his maximum prison term for purposes of a release and discharge from custody.

The judgment of the District Court is affirmed.

AFFIRMED.

HASTINGS, J., not participating.

RETAIL AND PROFESSIONAL EMPLOYEES UNION, LOCAL 1015, AFL-CIO, APPELLEE, V. BOARD OF TRUSTEES, NEBRASKA STATE COLLEGES, A DIVISION OF THE STATE OF NEBRASKA, APPELLANT.

280 N. W. 2d 656

Filed June 26, 1979. No. 42414.

Appeal from the Court of Industrial Relations. Affirmed.

George C. Rozmarin of Swarr, May, Smith & Andersen, for appellant.

William Stillmock, for appellee.

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

WHITE, J.

A single issue is presented in this case — whether Article VII, section 13, of the Nebraska Constitution, and our decision in Board of Regents v. Exon, 199 Neb. 146, 256 N. W. 2d 330, deprive the Court of Industrial Relations of jurisdiction over industrial disputes involving the Board of Trustees of the Nebraska State Colleges and its employees. Even if the

principles announced in Board of Regents v. Exon, *supra,* were applicable to the Board of Trustees of the Nebraska State Colleges, the question has been answered. This case is controlled by University Police Officers Union v. University of Nebraska, *ante* p. 4, 277 N. W. 2d 529. The Court of Industrial Relations has jurisdiction over labor disputes involving the Board of Trustees of the Nebraska State Colleges and its employees.

The decision appealed from is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FERRIS GRIGGS, APPELLANT.

280 N. W. 2d 657

Filed June 26, 1979. No. 42427.

Criminal Law. The criminal code which became effective January 1, 1979, is not applicable to offenses committed prior to its effective date.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Robert B. Creager of Berry, Anderson & Creager, for appellant.

Paul L. Douglas, Attorney General, and Sharon M. Brueggemann, for appellee.

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

BOSLAUGH, J.

Upon a plea of nolo contendere to robbery the defendant was sentenced to imprisonment for 5 to 10 years. He has appealed and contends the sentence was contrary to law and was excessive.

The defendant was originally charged with rob-

bery and use of a firearm to commit a felony. Thereafter an amended information was filed alleging that the defendant was an habitual criminal. On the day set for trial, pursuant to a plea bargain, the information was amended by striking the allegation that the defendant was an habitual criminal and count II of the information was dismissed. The defendant then entered a plea of nolo contendere to the charge of robbery.

The defendant contends that he should have been sentenced under the provisions of the Nebraska Criminal Code which became effective January 1, 1979. The offense here was committed on February 6, 1978, before the new criminal code became effective. In State v. Weinacht, *ante* p. 124, 277 N. W. 2d 567, we held that offenses committed before January 1, 1979, are to be punished according to the law in effect at the date of the offense. See § 28-103 (1), R. S. Supp., 1978. See, also, State v. Fuller, *ante* p. 233, 278 N. W. 2d 756.

The robbery involved in this case occurred when the defendant, carrying a gun, took approximately $300 from the cashier at Cinema X in Lincoln, Nebraska.

The defendant is nearly 45 years of age and has a lengthy criminal record including convictions for burglary, receiving stolen property, and armed robbery. In view of the defendant's past record and the serious nature of the offense committed in this case, the sentence imposed was not excessive.

The judgment is affirmed.

AFFIRMED.

METROPOLITAN TECHNICAL COMMUNITY COLLEGE EDUCATION ASSOCIATION, APPELLEE, V. METROPOLITAN TECHNICAL COMMUNITY COLLEGE AREA, A POLITICAL SUBDIVISION, APPELLANT.

281 N. W. 2d 201

Filed July 3, 1979. No. 42009.

1. **Court of Industrial Relations: Evidence: Appeal and Error.** In our review of orders and decisions of the Court of Industrial Relations, we are restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.
2. **Labor and Labor Relations: Collective Bargaining.** Matters which are predominately matters of educational policy and management prerogative are not subject to mandatory negotiation, whereas conditions of employment are.
3. _____: _____. A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative.
4. _____: _____. Those matters which involve foundational value judgments, which strike at the very heart of the educational philosophy of the particular institution, are management prerogatives and are not a proper subject for negotiation even though such decisions may have some impact on working conditions.

Appeal from the Nebraska Court of Industrial Relations. Reversed and dismissed.

Joseph J. Barmettler and Robert T. Cannella of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellant.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

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

HASTINGS, J.

The plaintiff Association filed its petition in the Court of Industrial Relations (CIR) seeking to require the defendant College to enter into mandatory

bargaining concerning the matter of "workload" as it applied to faculty, counselors, vocational evaluators, and librarians of the College. The CIR held that workload, or perhaps more accurately, "contact hours," was a bargainable issue and directed the parties to proceed to negotiate their differences. The College has appealed.

The College is a technical community college under the provisions of section 79-2636 et seq., R. R. S. 1943, and as such its board of governors is charged with the general supervision, control, and operation of this particular college located in Omaha. The board is responsible to develop programs of vocational and technical education, employ staff, prescribe courses of study, promulgate rules and regulations necessary or appropriate to the administration of the institution, and control the various fiscal operations. § 79-2644, R. R. S. 1943. The Association is the exclusive collective bargaining representative of the College's full-time instructors, counselors, vocational evaluators, and campus librarians under the provisions of section 48-801, R. R. S. 1943. As such representative, it is authorized to negotiate with the College as to wages, hours, and conditions of employment. § 48-838 (4), R. R. S. 1943. The CIR is empowered to order employers and employees who have refused to bargain in good faith, regarding wages, hours, or conditions of employment, to proceed to negotiate. § 48-816, R. R. S. 1943.

"Contact hours" are 50 minutes in length and generally, as to instructors, refer to those times when the instructor must be available in the classroom, laboratory, or clinic for teaching purposes, and as to counselors and evaluators, those scheduled hours during which they will be available to students for counseling, testing, and evaluation. Concerning librarians, the term refers to those hours when they are "on duty" in the library. Presently the "teaching load" for faculty has been fixed by the College at

24 hours per 40-hour week and is set forth in the "Notice of Appointment" signed by both the employee and president of the College. A similar document for all other employees with which we are here concerned simply refers to a minimum 40-hour workweek and makes no provision for "workload," "contact hours," or "duty hours."

During negotiations of wages and other terms and conditions of employment for the 1977-1978 contract year, the Association proposed that faculty "contact hours" be set at a maximum of 14 hours per week and "contact or duty hours" for counselors, evaluators, and campus librarians be established at 28 hours per week. The College refused to negotiate, alleging that "workload" was "predominately a matter of educational policy, management prerogative, and/or constitutes a demand for bargaining over the statutory duties of the Board of Governors of the Metropolitan Technical Community College Area." This litigation then followed.

The CIR in its opinion rejected consideration of the College's evidence as to its educational philosophy and its effect on whether "contact hours" are conditions of employment or educational policy. Rather, it concluded that the only question for the court to decide was whether it should adhere to its prior precedent or overrule it. After referring to cases involving the Seward Educational Association, Norfolk Educational Association, and Fremont Educational Association, wherein the CIR had held that school calendar, hours at school, and planning time were mandatory subjects of bargaining, its opinion goes on to say: "After the *Fremont* case was decided, the Supreme Court decided the *Seward* appeal, 188 Neb. 772, 784 (1972). In dicta, the Supreme Court listed the right to schedule work as a management prerogative, possibly but not necessarily contrary to our holdings. If we were to decide the question initially today, we might well decide it differ-

ently. However, it seems more important to us that items once decided and relied on for over six years remain decided."

In School Dist. of Seward Education Assn. v. School Dist. of Seward, 188 Neb. 772, 199 N. W. 2d 752 (1972), which the CIR referred to as the "*Seward* appeal," this court said: "The next question raised involved an interpretation of the language 'conditions of employment.' While the issue may be moot because the parties did reach agreement on all points referred except wages we do feel some observations are pertinent. Generally, teacher organizations have given the term 'conditions of employment' an extremely broad meaning, while boards of education have tried to restrict that term to preserve their management prerogatives and policy-making powers. While there are many nebulous areas that may overlap working conditions, boards should not be required to enter negotiations on matters which are predominately matters of educational policy, management prerogatives, or statutory duties of the board of education. Kansas, by statute, has defined conditions of employment to include hours of work, vacation allowances, sick and injury leave, number of holidays, and wearing apparel. K. S. A. 1971 Supp., § 75-4322 (s). Without trying to lay down any specific rule, we would hold that conditions of employment can be interpreted to include only those matters directly affecting the teacher's welfare. Without attempting in any way to be specific, or to limit the foregoing, we would consider the following to be exclusively within the management prerogative: The right to hire; to maintain order and efficiency; *to schedule work*; to control transfers and assignments; to determine what extracurricular activities may be supported or sponsored; and to determine the curriculum, class size, and types of specialists to be employed." (Emphasis supplied.)

The only witness for the Association was Melvin Solotorovsky, who was employed by the College as an air-conditioning and heating inspector. He is also chairman of the welfare committee of the Association and head of its negotiation team, and, by inference at least, it can be assumed that he is a member of the College's faculty. After outlining the nature of the dispute and the Association's demands as stated above, he went on to explain the need for "non-contact time." He said that such time was necessary in which to prepare lesson plans; to do research, i.e., in order to keep up with new trends and technological changes in an instructor's particular field; to grade tests; to serve on committees; and other similar duties. However, he made no case at all for employees other than instructors. He also conceded that the amount of time which a teacher spends in direct contact with the student is "very critical" in its effect on the education attained.

The College presented three witnesses: The dean of administrative services, the director of finance and business, and the president, Dr. Marm Harris. These witnesses pointed out that a reduction in "contact hours," with no other changes, would force elimination of six programs which are not courses, but an entire listing of courses in a particular career field. On the other hand, if the solution was to be a reduction in the number of students, the College would face a financial squeeze because the amount of state aid has a direct relationship to enrollment.

Particular emphasis was placed on the philosophy of education as espoused by Dr. Harris. This was what he called the "individualized self-paced" method of instruction. Without going into great detail, this method recognizes that each student has different aptitudes, ability, and experience, and by using the traditional "lecture method," where each student is brought along with the entire class, the brighter ones become bored and drop out of the pro-

gram. The individualized method, according to the witness, places some of the responsibility for learning on the student. After a preliminary introduction to a particular phase of the program, each student progresses at his or her own speed and the instruction must be available in the classroom to give individualized help to each student as the need arises. In other words, the instructor is dealing with several levels of instruction and learning going on during the same period and, rather than being just a lecturer, the instructor is a "facilitator or a classroom manager that is available at the critical times that the student needs him." This method, according to the witness, requires more "student contact hours" than the traditional method of teaching, but is the educational philosophy dictated by the board of governors at his request.

Dr. Harris also pointed out that there is no requirement for independent research or publication on the part of the faculty as a prerequisite to retention or promotion. At a technical school such as the College, according to the witness, "It is not our job to increase or expand knowledge. It is our job to take the basic information and teach that to students, keeping in mind that we are talking about freshman-sophomore level students. We are a two-year school. We are not talking about juniors and seniors or graduate students." He goes on to point out that 96.5 percent of all the credit hours generated at the College during the previous year came from vocational technical students and 3.5 percent from academic students.

The parties agree, and their position is supported by both case law and statutes, that matters which are predominantly matters of educational policy and management prerogative are not subject to mandatory negotiation, whereas conditions of employment are. School Dist. of Seward Education Assn. v. School Dist. of Seward, 188 Neb. 772, 199 N. W. 2d 752

(1972); § 48-816, R. R. S. 1943. It is also obvious the number of "contact hours" or "duty hours" which must be spent out of the 40-hour workweek has some effect on whether it is an easy job or a difficult job and these hours are therefore, to that extent, "conditions of employment." By the same token, if the number of "contact hours" requires a change in the philosophy of education, the number of teachers needed, the scope of the program offered, the number of students, or the amount of financial aid, as was demonstrated by the record, it affects educational policy and management prerogatives.

The College recognized this dichotomy, or perhaps more accurately this overlapping, in its formal response to the Association's demand for negotiation. In that document the College said: "The allocation of the time and energies of its faculty are consequences of the College's basic educational policy. This is an area of management prerogative and policy-making powers, reserved to the Board of Governors of the College. Accordingly, we decline to bargain concerning the number of hours within the work week that are to be allocated to classroom time, laboratory time or other time in contact with students. However, *this is not to say that we decline to bargain, at the appropriate time, concerning the affects* [sic] *of the Board's allocation of faculty's time on the wages of bargaining unit employees.*" (Emphasis supplied.)

In our review of orders and decisions of the CIR, we are restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. American Assn. of University Professors v. Board of Regents, 198 Neb. 243, 253 N. W. 2d 1 (1977). We have reviewed the evidence in some detail and have set forth the general statutory authority of the CIR.

The problem is to determine whether "workload" is a condition of employment or a prerogative of management.

A reference to the decisions of other jurisdictions, although not necessarily determinative of the issue, is nevertheless helpful. All seem to agree generally that a balancing test is needed. In Dunellen Bd. of Ed. v. Dunellen Ed. Assn., 64 N. J. 17, 311 A. 2d 737 (1973), the court said: "* * * it would appear evident that the consolidation of chairmanships represents a matter *predominantly* of educational policy within management's exclusive prerogatives * * *" (emphasis supplied), citing School Dist. of Seward Education Assn. v. School Dist. of Seward, *supra*.

In Burlington Cty. Col. Fac. Assoc. v. Bd. of Trustees, 64 N. J. 10, 311 A. 2d 733 (1973), the New Jersey court said: "It negotiated on the matters *directly and intimately* affecting the faculty's working terms and conditions, such as compensation, hours, work loads, * * *." (Emphasis supplied.)

The final case in the New Jersey trilogy, Bd. of Ed. Englewood v. Englewood Teachers, 64 N. J. 1, 311 A. 2d 729 (1973), provided that: "* * * major educational policies which indirectly affect the working conditions of the teachers remain exclusively with the Board and are not negotiable whereas items which are not predominantly educational policies and directly affect the financial and personal welfare of the teachers do not remain exclusively with the Board and are negotiable."

The Alaska Supreme Court has indicated the amount of paid time available to a teacher for preparation of lesson plans affects the teacher directly and is negotiable; a demand that such time be available during the academic portion of the day presents a policy question. Kenai Peninsula Borough v. Kenai Peninsula Ed., 572 P. 2d 416 (Alaska, 1977). That court recognized "If teachers' unions are permitted to bargain on matters of edu-

cational policy, it is conceivable that through successive contracts the autonomy of the school boards could be severely eroded, and the effective control of educational policy shifted from the school boards to the teachers' unions." It quoted the following language from National Ed. Ass'n. of Shawnee Mission, Inc. v. Board of Ed., 212 Kan. 741, 512 P. 2d 426 (1973): " 'The key, as we see it, is how direct the impact of an issue is on the well-being of the individual teacher, as opposed to its effect on the operation of the school system as a whole.' " The court went on to say, "* * * a matter is more susceptible to bargaining the more it deals with the economic interests of employees and the less it concerns professional goals and methods." Put another way, the court explained that those items which are "so closely connected with the economic well-being of the individual teacher" must be held negotiable.

A provision that secondary teachers not be required to teach more than 25 periods per week, after having been held nonbargainable as a matter of inherent managerial policy by an intermediate court of Pennsylvania, was referred back to the appropriate administrative agency for reassessment in Pennsylvania Lab. Rel. Bd. v. State Col. A. Sch. Dist., 461 Pa. 494, 337 A. 2d 262 (1975). Citing the same language from Shawnee Mission as was set out in Kenai Peninsula, the court went on to say: "Thus we hold that where an item of dispute is a matter of fundamental concern to the employees' interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining under section 701 simply because it may touch upon basic policy."

Although holding that teacher load was a mandatory subject of negotiations, the court in West Hartford Education Assn., Inc. v. DeCourcy, 162 Conn. 566, 295 A. 2d 526 (1972), went on to say: "Suffice it to say that, at the very least, matters of educational

policy are those which are fundamental to the existence, direction and operation of the enterprise."

The majority opinion in City of Biddeford v. Biddeford Teachers Ass'n., 304 A. 2d 387 (Me., 1973), held that the Legislature's attempt to delegate to arbitrators binding determination of labor disputes involving " 'Length of a Teacher's Working Day' " was void for lack of adequate standards. However, the concurring opinion of Wernick, J., is somewhat enlightening. "Similarly, the length of the school day in terms of the number of hours the teacher will be required to teach or be in attendance at school, is a matter concerning which the 'working conditions' interests of teachers are fundamentally inseparable from a plurality of non-teacher considerations involving important 'managerial' and 'policy' areas.

"While it is clear that the number of hours which any individual teacher shall be required to work in a given day need not coincide with the number of hours the students are obliged to be in attendance at school, this fact by itself fails to establish that the length of the teacher's school day may be isolated as a proper subject of mandatory collective bargaining. * * * negotiations aimed at shortening the work-day of teachers would necessarily become directed toward seeking alternatives to the hiring of additional personnel. * * *

"Thus, the length of the teacher's working day is closely and heavily interwoven with judgments bearing upon the welfare of the students, — as reflected in the ultimate quality of their education and the extent to which it may be improved or weakened by use of various types of substitutes, technological or otherwise, for the living presence and active participation of teachers. Such foundational educational value judgments cannot reasonably be subordinated to the overlay of teacher 'working conditions,' and for this reason, the length of the teacher's working day must be held, fundamentally, that kind

of 'educational policies' subject-matter which was legislatively intended to remain outside the scope of mandatory collective bargaining and, therefore, of binding arbitration."

Only subject matters that are *primarily* related to wages, hours, or conditions of employment are mandatorily bargainable in Wisconsin. In Beloit Education Asso. v. WERC, 73 Wis. 2d 43, 242 N. W. 2d 231 (1976), the court said: "Some [courts] limit required bargaining to matters 'directly' related to 'wages, hours and conditions of employment.' Some make the test whether the subject matter is 'significantly' related to 'wages, hours and conditions of employment.' Some make the test whether the subject 'materially' affects the working conditions. Commen[t]ators appear to agree that drawing the line or making the distinction is not easy." In opting for the test "*primarily* related to wages or hours or conditions of employment" as being mandatorily bargainable, the court went on to say: "The dictionary defines 'primarily' as meaning 'fundamentally.' It is in this sense of the word that 'primarily' is here used. What is fundamentally or basically or essentially a matter involving 'wages, hours and conditions of employment' is, under the statute, a matter that is required to be bargained. The commission construed the statute to require mandatory bargaining as to (1) matters which are *primarily* related to 'wages, hours and conditions of employment,' and (2) the impact of the 'establishment of educational policy' affecting the 'wages, hours and conditions of employment.' "

A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative. However, those matters which involve foundational value

judgments, which strike at the very heart of the educational philosophy of the particular institution, are management prerogatives and are not a proper subject for negotiation even though such decisions may have some impact on working conditions. However, the impact of whatever decision management may make in this or any other case on the economic welfare of employees is a proper subject of mandatory bargaining.

At the outset it should be said that all of the cases cited from other jurisdictions together with those from the CIR involve purely academic and mostly elementary educational units rather than a technical vocational school as involved here. There is an obvious difference in the requirements made of both management and faculty. It appears the CIR failed to recognize that distinction because, by its own opinion, it failed to consider the evidence of the College and relied wholly on its past decisions in cases involving elementary and secondary academic institutions.

We find the evidence supports the College's position that the number of instructor contact hours involves a foundational value judgment which is essential to its basic educational and learning philosophy and is therefore a prerogative of management and is not bargainable. The evidence completely fails to support any justification for reducing contact hours of counselors or evaluators or duty hours of librarians below the basic workweek and is not negotiable.

Inasmuch as there is no substantial evidence supporting the order made by the CIR, its action must be held to be arbitrary, capricious, and unreasonable. Therefore, the judgment is reversed and the Association's cause of action is ordered dismissed.

REVERSED AND DISMISSED.

VSC, INC., APPELLEE AND CROSS-APPELLANT, V. RICHARD L. LILJA, APPELLANT AND CROSS-APPELLEE, IMPLEADED WITH MYRTLE B. LILJA, APPELLEE.

280 N. W. 2d 901

Filed July 3, 1979. No. 42148.

1. **Frauds, Statute of.** Where the principal object of a party promising to pay the debt of another is to promote his own interests, and not to become guarantor, and the promise is made on sufficient consideration, it will be valid though not in writing.
2. _____. A consideration to support a promise, not in writing, to pay the debt of another must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt.
3. **Judgments: Appeal and Error.** This court in determining if findings of the District Court are sustained by evidence must consider the proof and permissible inferences therefrom most favorably to the successful party.
4. _____: _____. The findings of the trial court in an action at law have the effect of a verdict of a jury and will not be disturbed on appeal unless they are clearly wrong.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Affirmed.

Norris G. Leamer, for appellant.

Smith, Smith & Boyd, for appellee VSC, Inc.

Heard before BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KNAPP, District Judge.

KNAPP, District Judge.

VSC, Inc. sued Richard L. Lilja and Myrtle B. Lilja, husband and wife, on open account, claiming $15,596.55 due and unpaid for merchandise, goods, and wares furnished. Defendants answered alleging the account was actually that of Lilja's Department Store, Inc., a corporation, and that defendants had not signed any agreement, note, or memorandum wherein they promised to answer for such debt.

The issues actually tried were: (1) Whether the $15,596.55 admittedly due was a debt of Lilja's De-

partment Store, Inc., or a personal debt of the defendants; (2) if found to be a debt of the corporation, whether defendants had orally promised to answer therefor; and (3) if defendants had so promised, whether the promise was within the statute of frauds, section 36-202 (2), R. R. S. 1943, and hence unenforceable.

The trial court, sitting without a jury, found the debt to be originally that of the corporation; found that no promises had been made by Myrtle B. Lilja and dismissed the action as to her; found that Richard L. Lilja had orally promised to answer for the debt; found that the circumstances surrounding the promise were such that the promise was not within the statute of frauds; and entered judgment against Richard L. Lilja for the amount of the prayer.

Motion for new trial was overruled and Richard L. Lilja appeals assigning as error, essentially, that the court's findings are contrary to law and are not supported by the evidence. We affirm.

This appeal is governed by the following principles. "Where the leading object of a party promising to pay the debt of another is to promote his own interests, and not to become guarantor, and the promise is made on sufficient consideration, it will be valid although not in writing. In such case the promissor assumes the payment of the debt." Fitzgerald v. Morrissey, 14 Neb. 198, 15 N. W. 233.

"A consideration to support a promise, not in writing, to pay the debt of another must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promissee independent of the original debt, which obligation is to be discharged by the payment of that debt." King v. Schmall, 156 Neb. 635, 57 N. W. 2d 287.

"This court in determining if findings of the district court are sustained by evidence must consider the proof and permissible inferences therefrom most favorably to the successful party." Otto Gas, Inc.

v. Stewart, 160 Neb. 200, 69 N. W. 2d 545.

"The findings of a trial court in an action at law have the effect of a verdict of a jury and will not be disturbed on appeal unless they are clearly wrong." Otto Gas, Inc. v. Stewart, *supra*.

Appellee, VSC, Inc., is a wholesale supplier to small retail dry goods stores in the midwest. Lilja's Department Store, Inc. (hereinafter the Store), is a closely held family corporation formed in 1965 by appellant, his wife, and his father; its stated nature of business was to establish and conduct a general department store in South Sioux City, Nebraska. Appellee furnished merchandise for sale by the Store throughout the period of the Store's existence. The Store, in 1974, experienced financial difficulties culminating in a liquidation or "going out of business" sale commencing in early 1975 and continuing until the Store closed permanently in June 1975. Appellee contributed substantially to what success the liquidation sale had by consigning promotional merchandise to encourage traffic through the Store during the sale and by furnishing an employee to assist appellant during part of the sale. All secured creditors of the Store were in fact paid in full from the sale proceeds. Appellant was paid his regular salary throughout the sale and it is clear that the only substantial creditor not receiving payment in full was appellee.

Considering the proof and the permissible inferences therefrom most favorably to appellee, as we must, it appears that appellant was desirous of relocating and continuing in the department store business. To that end, during the closing months of the liquidation sale, he repeatedly solicited appellee's aid in obtaining a new location and, in conjunction with such requests for assistance, repeatedly promised to assume and pay the Store's debt to appellee.

Appellee thereupon, and in reliance upon appellant's promise to assume the debt, proceeded to ac-

tively and effectively seek out new locations for appellant and eventually prepared, at considerable expenditure of its officers' and employees' time and its costs necessarily attendant thereto, a comprehensive and detailed market survey of the Spirit Lake, Iowa, area. The market survey concluded that an operation there, such as appellant contemplated, would have an excellent chance for success. Appellee's efforts, activities, and expenditures in this regard clearly operated to the benefit of appellant and gave rise to an obligation independent of the original debt. The completed market survey was delivered to appellant but, for reasons not disclosed by the record, appellant failed to relocate.

The proof and the permissible inferences therefrom are such that the trial court's conclusions that appellant orally promised to answer for the debt of his family corporation, that appellant's principal object in so promising was not to become a guarantor but was to promote his own interests in connection with relocating and continuing in business, that the promise was made on sufficient new consideration, and that the promise was therefore not within the statute of frauds, cannot be said to be clearly wrong.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILFRED W. NIELSEN, APPELLANT.

280 N. W. 2d 904

Filed July 3, 1979. No. 42190.

1. **Criminal Law: Indictments and Informations: Time.** A trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after the trial has begun where there is no showing of prejudice to the rights of the defendant.
2. **Criminal Law: Indictments and Informations: Appeal and Error.** The endorsement of additional names upon the information after

trial has begun cannot be availed of as error where defendant makes no showing of prejudice or does not ask for postponement or continuance of the trial.

3. **Criminal Law: Evidence.** 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.
4. _____: _____. Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible.
5. **Criminal Law: Evidence: Proof.** It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Affirmed.

S. J. Albracht of Lathrop, Albracht & Swenson, for appellant.

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

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

MCCOWN, J.

Defendant was found guilty by a jury of the first degree murder of Edward Grabbe and sentenced to life imprisonment.

The defendant was a 40-year-old professional duck hunter who lived in Blair, Nebraska. He owned a commercial hunting facility for members only located near Mondamin, Iowa. Early on the morning of November 19, 1977, defendant drove from his home in Nebraska to his hunting operation in Iowa and hunted with club members until approximately 11 a.m. The defendant then drove to a bar in Logan, Iowa, where he commenced drinking. After drink-

ing beer for about an hour he drove to a tavern in Blair, Nebraska, where he continued to drink. About 3 p.m. the defendant drove home. He continued drinking and got into an argument with his wife. A short time later he left and drove to a liquor store to purchase more whiskey. When he returned home his wife had taken their child and left. Defendant went to Tekamah, Nebraska, to the home of his wife's sister, looking for his wife, but his wife was not there. He then drove to the farm home of his wife's parents near Spiker, Nebraska.

The defendant arrived at the farm about 4 p.m. Edward Grabbe, his wife, Opal, and their son, 21-year-old Rick, were in the house. Defendant took a gun and walked into the kitchen. Edward Grabbe and the defendant had a short conversation. Rick Grabbe went to the kitchen doorway and saw the defendant point his rifle at the floor and fire it. At that point Mrs. Grabbe entered the kitchen. There was some additional heated conversation in which defendant swore at Edward Grabbe. The defendant fired once more, striking a vase on the wall. Mrs. Grabbe became hysterical. The defendant then said to Edward Grabbe: "Let's go outside." As the two men started to leave the room, Rick Grabbe ran upstairs to his bedroom to get his pistol. The magazine of his pistol came apart and the cartridges fell on the floor. At that point he heard a shot and his mother called to him that the defendant had shot his father. Rick went out the bedroom window onto the porch roof and as he did so he heard another shot. He jumped off the roof and hid under the porch until he heard the defendant drive away. He then came out and found his mother and father lying on the ground outside the house, apparently dead. He ran across the road to his uncle's farm and the sheriff and an ambulance were called. Rick and his uncle returned to the Edward Grabbe house and found Edward and Opal Grabbe both dead.

The defendant's testimony was that he and Edward Grabbe had a conversation in the kitchen and during the conversation defendant's gun went off twice. The defendant and Grabbe agreed to go outside. Defendant's testimony was that Edward Grabbe shoved him outside on the steps and as defendant turned around his gun fired and shot Grabbe. The defendant testified that he did not intend to shoot Grabbe and that he did not remember pulling the trigger when his gun fired. The defendant also testified that he did not remember shooting anyone except Edward Grabbe and did not remember seeing Opal Grabbe outside the Grabbe house. The next thing he remembered he was in his truck somewhere in Iowa and realized that he had shot Edward Grabbe. He threw his gun into the Missouri River from a highway bridge and returned home, where he was arrested later that evening.

In this appeal the defendant first contends that the District Court erred in permitting the prosecution to endorse the names of John Blatter, Mona Stout, and Rick Stout on the information just prior to trial. The witnesses testified some 2 or 3 days later. The defendant did not ask for a continuance or a postponement when the trial court approved the State's motion to endorse the names of the witnesses.

The witness Blatter testified to a conversation which he had with the defendant in jail in which the defendant told him of shooting Edward Grabbe and of the other events of November 19, 1977, which defendant could remember. He did not testify to anything that the defendant did not himself testify to or that a psychiatrist had not described. Defendant was not prejudiced by the late endorsement of Blatter.

The Stout testimony was to the effect that there were hard feelings between the defendant and Edward Grabbe, and that the defendant might have possible reasons to kill him. The defendant himself

admitted that there had been some hard feelings between him and Edward Grabbe caused by the defendant's drinking.

A trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice to the rights of the defendant. State v. Woods, 182 Neb. 668, 156 N. W. 2d 786.

The trial court, in its discretion, may permit the names of additional witnesses to be endorsed upon the information after trial has begun, and such action cannot be availed of as error where defendant makes no showing of prejudice or does not ask for postponement or continuance of the trial. McCartney v. State, 129 Neb. 716, 262 N. W. 679. The record here does not reflect prejudice and there was no motion for continuance.

Defendant also contends that the court erred in permitting the State to introduce any evidence of the killing of Opal Grabbe on the ground that evidence of other crimes is not admissible except to prove motive, intent, malice, deliberation, and premeditation.

The evidence in this case showed that Opal Grabbe was killed within a matter of minutes after Edward Grabbe and that the two killings were parts of one continuous transaction. One of the defenses was that the killing of Edward Grabbe was accidental. The rule is well established in this state that 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. § 27-404 (2), R. R. S. 1943; State v. Metzger, 199 Neb. 186, 256 N. W. 2d 691.

Evidence of other criminal acts which involve or

explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. See, Wigmore on Evidence (3rd Ed.), § 218, p. 719; Buatte v. United States, 350 F. 2d 389 (9th Cir., 1965), cert. den. 385 U. S. 856, 87 S. Ct. 104, 17 L. Ed. 2d 83; Caldwell v. Commonwealth, 503 S. W. 2d 485 (Ky. App., 1972).

This court has also held that it is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Riley, 182 Neb. 300, 154 N. W. 2d 741.

It should be noted that the trial court in this case specifically instructed the jury that any evidence as to the killing of Opal Grabbe was received solely and for the limited purpose of showing intent or motive as to the particular acts charged, and that the jury must not consider that evidence for any other purpose. The trial court did not err in permitting such evidence to be introduced in this case.

The judgment is affirmed.

AFFIRMED.

GERALD D. KNIESCHE, APPELLANT, V. LUDWIG THOS, APPELLEE.

280 N. W. 2d 907

Filed July 3, 1979. No. 42317.

1. **Motions, Rules, and Orders: Appeal and Error: Evidence.** A motion for mistrial is inappropriate when it relates to rulings of the court on the admissibility of evidence and only the underlying assignment of error relating to the challenged admission of evidence will be considered on appeal by this court.
2. **Verdicts: Evidence: Juries.** A jury verdict may not be set aside unless it is clearly wrong and it is sufficient if there is any compe-

tent evidence presented to the jury upon which it could find for the successful party and all conflicts in the evidence, expert or lay, and the credibility of the witnesses is for the jury and not for the court.

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

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

Brogan & Stafford, P.C., for appellee.

Heard before BOSLAUGH, MCCOWN, and BRODKEY, JJ., and RIST and WOLF, District Judges.

WOLF, District Judge.

This is an appeal by the plaintiff from a jury verdict and judgment in favor of the defendant upon plaintiff's action for breach of oral contract by the defendant in the construction of a hog confinement barn. The defendant, Ludwig Thos, was principally a masonry contractor. Defendant was a personal friend of the plaintiff and together they had, over a period of several months, made inquiries and inspections for the purpose of planning and building a hog confinement barn for the plaintiff. Plans were prepared by the defendant and an estimate of cost was made by the defendant and submitted to the plaintiff. The parties, however, instead of making a fixed amount contract, made an oral agreement that the defendant would build the hog confinement barn for the plaintiff at defendant's actual cost plus 15 percent. Other than the plans, the only agreement between the parties as to the quality of construction was that the defendant would build a "good one" for the plaintiff. Although the dates of construction are not shown, it appears to have been completed late in 1975 and the plaintiff entered into use and occupancy of the building during the first week of January 1976.

On April 16, 1976, there were strong winds in the area. The east one-third of the roof of the building blew off that morning. The damage was not con-

fined to the roof. The side walls and portions of the masonry construction were also damaged.

The plaintiff's first cause of action alleges the defendant warranted by implication the building would be constructed in a workmanlike manner and in accordance with the accepted methods of the building trade, and that the defendant breached those implied warranties.

Plaintiff's second cause of action was actually a second theory of recovery for the same cause of action based upon negligence and improper construction.

The defendant's answer denied the allegations of the plaintiff's first cause of action and further alleged an affirmative defense that such damage to the building was caused by the high velocity winds which were an act of God and not due to any acts or omissions of the defendant. The defendant denied the allegations of the plaintiff's second cause of action.

The court instructed the jury on the plaintiff's first cause of action submitting the implied agreement that the contractor would adhere to construction standards which were generally accepted in the area and perform in a workmanlike manner. The court did not instruct on the plaintiff's theory of negligence and the plaintiff makes no assignment of error in that regard. The court instructed the jury as to the defendant's affirmative defense of an act of God, to which the plaintiff objected at the instruction conference, in his motion for new trial, and in his argument and the briefs submitted in this court. A review of the evidence shows that the defendant did submit substantial evidence of the intensity and breadth of the storm, sufficient to raise a factual question for the jury as to whether such storm was "a manifestation of nature so unusual and extraordinary that it could not under normal conditions have been anticipated or expected or guarded against

or resisted, and no ordinary and reasonable amount of care would have prevented the damage." The court also properly instructed the jury that the burden was upon the defendant to prove by a preponderance of the evidence that the act of God alleged was the sole proximate cause of the occurrence and the resulting damages to the plaintiff. We conclude, therefore, that the defendant's evidence was sufficient to raise the factual question for the jury and the jury was properly instructed.

At trial, the court permitted the defendant to introduce: (1) Evidence of wind damage to a building in Wayne, Nebraska, which occurred sometime during the day of April 16, 1976; (2) the weather bureau report for the entire day of April 16, 1976; (3) evidence of damage to another hog barn on that date, although the other hog barn was located "quite a bit north" of the plaintiff's farm; and (4) cross-examination testimony given by the plaintiff, over objection of plaintiff's attorney as to damage to other buildings in the Wayne vicinity. The plaintiff claims such evidence was without foundation, was too remote in time and distance, and was inadmissible. The record shows the farm of the plaintiff is less than 10 miles from Wayne, Nebraska, and the weather station was approximately 30 miles from the plaintiff's farmstead. Under the circumstances, the time and distance do not seem too remote to be objectionable nor is it objectionable that the weather reports and wind damage encompass parts of the afternoon on April 16 as well as the morning of April 16. Each of these items of evidence can be taken into consideration by the jury in determining whether the defense of an act of God, as defined in the instructions, has been established. The difference in time and distance would relate only to the weight of the evidence and not to its admissibility.

The plaintiff further assigns as error the failure of the court to grant plaintiff's motion for a mistrial

because the defendant was permitted to cross-examine the plaintiff as to his knowledge of other buildings which were damaged by wind on the date in question. The motion for mistrial is inappropriate when it relates to rulings of the court on the admissibility of the evidence. Only the underlying assignment of error relating to the challenged admission of evidence will be considered by this court. Plaintiff's objection to the cross-examination of plaintiff as to other damage caused by the storm has as its basis the plaintiff's claim that the evidence was too remote and thus the defendant was not entitled to raise the affirmative defense of an act of God. Both of the objections have previously been discussed.

The remaining assignment of error by the plaintiff was the failure of the court to sustain the plaintiff's motion for a directed verdict and/or judgment notwithstanding the verdict. A jury verdict may not be set aside unless it is clearly wrong and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party and all conflicts in the evidence, expert or lay, and the credibility of the witnesses is for the jury and not for the court. Hawkins Constr. Co. v. Matthews Co., Inc., 190 Neb. 546, 209 N. W. 2d 643. Reviewing the evidence with all conflicts resolved in favor of the defendant, it would appear that the hog confinement barn was constructed substantially as set forth in the plans submitted to the plaintiff, both the plaintiff and the defendant participated in determining the method and style of construction, and the hog confinement barn was built similar in style and design to other hog confinement barns either built in the vicinity or recommended by the University of Nebraska Cooperative Extension Service. Other evidence presented would indicate that the windstorm caused wide damage within the area and was of an unusual

and extraordinary velocity, perhaps exceeding 80 miles per hour.

Plaintiff's expert witness, an engineer, testified as to some deficiencies in the manner of construction and to what, in his opinion, was a minimum standard of load bearing for the industry. Although the plaintiff's expert witness was the only academically expert witness, the jury is not bound to accept his version and opinion over all other evidence. The jury was properly instructed that it may adopt or reject the conclusions of the experts, according to its own best judgment.

The verdict of the jury was a general verdict rather than a special finding and the verdict does not disclose whether the verdict for the defendant was based upon the failure of the plaintiff to prove his case or whether it was based upon the affirmative defense of the defendant. For the purpose of this appeal it makes no real difference, as this court finds that the evidence is sufficient to support a verdict in favor of the defendant on either basis.

Judgment for the defendant is affirmed.

AFFIRMED.

INDEX

Abandonment.

1. If it shall appear that any water appropriation has not been used for some beneficial or useful purpose, or having been so used at one time has ceased to be used for such purpose for more than 3 years, the Department of Water Resources shall appoint a place and time of hearing, and shall serve notice upon the owners of such water appropriation or such ditch, canal, or other diverting works to show cause, by such time and at such place, why the water appropriation owned by such person should not be declared forfeited and annulled because such water appropriation had not been used for more than 3 years prior to receiving such notice, and shall also serve such notice upon the landowners under such water appropriation, ditch, or canal. § 46-229.02, R. R. S. 1943. Hostetler v. State 776
2. Where irrigation water has not been applied to the lands described in the adjudicated appropriation for the statutory period of 3 years, such nonuse, unless excused for some valid reason, will result in the loss of the right and the Department of Water Resources may cancel the appropriation in whole or in part. Hostetler v. State 776

Accord and Satisfaction.

1. An oral agreement to suspend a right to enforce a judgment for child support may constitute an accord and satisfaction entitling a party to a release and satisfaction of a judgment for child support. Weber v. Weber 528
2. The principal questions in determining whether a discharge by accord and satisfaction has taken place are: (1) Did the parties in fact agree that the performance rendered should operate as a final discharge and satisfaction; and (2) does that performance constitute a sufficient consideration for a return promise or for a discharge? Kurkowski v. Bailey 582
3. The question of whether a payment rendered by the obligor, and later asserted to be in satisfaction, was so tendered to the claimant that he knew or should have known that it was tendered as full satisfaction is a question of fact. Kurkowski v. Bailey 582

Administrative Law.

1. In an error proceeding conflicting evidence will not be

weighed, and the order of an administrative tribunal must be affirmed if the tribunal has acted within its jurisdiction and there is sufficient competent evidence, as a matter of law, to sustain its findings and order. Davis v. Board of Education 1

2. In the grant of power to an administrative agency to legislate such power must be limited to the express purpose and administered in accordance with standards prescribed in the legislative act. 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. That authority which is necessary to accomplish the purpose of the act must be narrowly construed. It is fundamental that in the legislative grant of power to an administrative agency, such power must be limited to the express legislative purpose and administered in accordance with standards described in the legislative act. The limitations of the power granted and the standards by which the granted powers are to be administered must be clearly and definitely stated. They may not rest upon indefinite, obscure, or vague generalities or upon extrinsic evidence not readily available. University Police Officers Union v. University of Nebraska 4

3. The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. Its discretion is to be exercised reasonably and not whimsically nor capriciously. Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission 176
Ortman v. Nebraska Liquor Control Commission 244

4. Where the record of the proceedings before the Nebraska Liquor Control Commission contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission 176

5. In a proceeding to obtain a liquor license, a resolution of the governing body of a municipality recommending approval of the application, which fails to receive the required number of votes to pass, is ineffective to constitute any official action of that governing body, amounts to no recommendation at all, and does not furnish competent evidence upon which to base a denial of a liquor license application by the Nebraska Liquor Control Commission. Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission 176

6. Upon appeal to the District Court from an order of the

Nebraska Equal Opportunity Commission the review is by trial de novo upon the record. Farmer v. Richman Gordman Stores, Inc. 222

7. The power to equalize property valuations between counties is vested in the State Board of Equalization and Assessment. The sole method of review in this court is by appeal. DeCamp v. State Board of Equalization and Assessment 366

8. The right of an individual to appeal an order of the State Board of Equalization and Assessment is restricted to one who has demonstrated to the State Board that he is a "person affected" by the order. Only a taxpayer is a "person affected." § 77-510, R. R. S. 1943. DeCamp v. State Board of Equalization and Assessment 366

9. Where appeal is the sole method of review, failure to allege essential elements of standing to the State Board of Equalization and Assessment may not be corrected by affidavit in this court. DeCamp v. State Board of Equalization and Assessment 366

10. Public hearings, and notice thereof, are a prerequisite to an order changing valuations by the State Board of Equalization and Assessment. While an appearance might properly be made in some manner other than personal appearance, it must be made within the time limits legally set by the State Board. DeCamp v. State Board of Equalization and Assessment 366

11. The Nebraska Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied and courts are without authority to interfere with that discretion unless it has been abused. Harrigfeld v. Nebraska Liquor Control Commission 741

12. Where the record of the proceedings before the Nebraska Liquor Control Commission contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. Harrigfeld v. Nebraska Liquor Control Commission 741

13. The facts gathered and the evidence taken in this case are sufficient to establish that the order of the Nebraska Liquor Control Commission was not unreasonable or arbitrary. Harrigfeld v. Nebraska Liquor Control Commission 741

14. To the extent that regulation IX-4731 of the Nebraska State Department of Welfare creates an irrebuttable presumption that the income of maternal grandparents is contributed to the needs of an unborn grandchild, it denies equal protection and due process of law and is

unconstitutional under the United States and Nebraska Constitutions. Elliott v. Ehrlich 790

Admissions Against Interest.

1. The requirement imposed by section 27-613 (2), R. R. S. 1943, that a witness be afforded an opportunity to explain or deny a prior inconsistent statement does not apply to admissions or statements offered against a party to the action, if the admissions or statements were made by that party. Hyde v. Cleveland 420
2. The admissions and declarations of a party to an action against his own interest, upon a material matter, are admissible against him as original evidence and may be used as rebuttal evidence, and, where he is examined as a witness in his own behalf, it is unnecessary to lay foundation for the admission of such evidence by cross-examination. Hyde v. Cleveland 420

Adverse Possession.

1. One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. Rentschler v. Walnofer 84
2. To permit tacking of successive adverse possession of grantees of an area not within the calls of a deed, but contiguous thereto, among the ultimate facts to be established is the intended and actual transfer and delivery of such area to the grantee as successor in ownership, possession, and claim. Rentschler v. Walnofer 84
3. Title may not be granted or quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted for the statutory period of 10 years. Rentschler v. Walnofer 84
4. Acts of dominion over the land must, to be effective as against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. Rentschler v. Walnofer 84
5. A person claiming title by adverse possession must occupy and possess the land adversely to the record owners with the requisite intent and purpose to assert ownership. Rentschler v. Walnofer 84

Affidavits.

1. The provisions of section 52-103, R. S. Supp., 1978, as to the making of an affidavit of the giving of notice of me-

chanic's lien to the landowner, are directory and not mandatory; irregularities in such affidavit will not render the lien void and unenforceable. Sherwood v. Tucker 56

2. Although an affidavit may be used to prove service of process, such affidavit cannot be considered on an appeal of a cause to this court, unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318

Agents.

The term "attorney," used in section 52-103, R. S. Supp., 1978, means any agent or substitute acting for and in behalf of a lien claimant; it may include an attorney at law but is not limited to that meaning. Sherwood v. Tucker 56

Agreements.

Where the leading object or main purpose of a party promising to pay the debt of another is to promote his own interests, and not to become a guarantor, and the promise is made on sufficient consideration, the statute of frauds is not applicable and the promise will be valid although not in writing. Branham v. McGinnis 664

Alcoholic Liquors.

1. The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. Its discretion is to be exercised reasonably and not whimsically nor capriciously. Ortman v. Nebraska Liquor Control Commission 244

2. Absence of need alone is not a sufficient reason to deny an otherwise proper application for a liquor license. Ortman v. Nebraska Liquor Control Commission 244

Alimony.

1. The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts in each case and the courts will consider all pertinent facts in reaching an award that is just and equitable. Pfeiffer v. Pfeiffer 137
Slama v. Slama 644

2. The fixing of alimony or distribution 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. Pfeiffer v. Pfeiffer 137
Mahan v. Mahan 316
3. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Brus v. Brus 161
4. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. Mahan v. Mahan 316
5. The rule for determination of alimony or division of property in dissolution actions provides no mathematical formula by which such an award can be determined and, generally speaking, awards vary from one-third to one-half the property involved depending on the facts and circumstances in each particular case. Patton v. Patton 638
6. A judgment of the trial court making a distribution of property and fixing the amount of alimony will not be disturbed on appeal unless it is patently unfair on the record. Patton v. Patton 638
7. When a 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. The ultimate test of alimony provisions is one of reasonableness. Slama v. Slama 644
8. An award of alimony or distribution of property may be altered on appeal where the record reflects good cause. Slama v. Slama 644

Appeal and Error.

1. The standard of review in an error proceeding from an order terminating the contract of a tenured teacher is whether there has been sufficient evidence adduced at the proceeding before the inferior tribunal, as a matter of law, to support the determination reached. Davis v. Board of Education 1
2. In an appeal in an equity action, it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion without reference to the findings of the District Court. Monarch Chemical Works, Inc. v. City of Omaha 33
3. Where, by stipulation of the parties and order of the

court, two lawsuits, having a common issue determinative of both, are consolidated for trial and only one judgment is entered affecting two adverse parties on the common issue, the parties have, in effect, made one lawsuit out of two and the appealing party need file only one notice of appeal to this court. Southwest Bank of Omaha v. Moritz 45

4. A motion to declare a mistrial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion. Reicheneker v. Seward 68
5. A notice of appeal filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective to confer jurisdiction on this court if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the notice of appeal relates. Dale Electronics, Inc. v. Federal Ins. Co. 133
6. The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong. Fabricators, Inc. v. Farmers Elevator, Inc. 150
7. Error may not be predicated upon a ruling excluding evidence without making an offer of proof as to what the excluded evidence may have been. Schwartz v. Selvage 158
8. Upon appeal to the District Court from an order of the Nebraska Equal Opportunity Commission the review is by trial de novo upon the record. Farmer v. Richman Gordman Stores, Inc. 222
9. Where the evidence supporting the District Court's findings of fact is substantial, the findings will not be disturbed. Farmer v. Richman Gordman Stores, Inc. 222
10. Appellate review in civil cases is not a fundamental right guaranteed by either the due process or privileges and immunities clauses of the Fourteenth Amendment to the Constitution of the United States. Nebraska State Bank v. Dudley 226
11. Where the right to appellate review is granted by law, it must be afforded in a nondiscriminating manner. Nebraska State Bank v. Dudley 226
12. Article I, section 24, of the Nebraska Constitution, does not bar either the Legislature or this court from making reasonable rules and regulations governing review

on appeal. Nebraska State Bank v. Dudley 226
13. The trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion. State v. Fuller 233
14. An issue which has been fully litigated by direct appeal cannot be relitigated in an action for post conviction relief or by mere presentation of different arguments related to the same issue if the alleged facts are known to the defendant at the time of direct appeal. State v. Davis 284
15. Although an affidavit may be used to prove service of process, such affidavit cannot be considered on an appeal of a cause to this court, unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318
16. The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318
17. Except where jurisdiction is involved, this court will consider on appeal only questions which have been presented to and passed upon by the trial court. State v. Lehman 341
18. Once the state court is notified of an order of remand by the federal court, it resumes jurisdiction and may proceed even in the face of an appeal of the remand order, unless the defendant obtains a stay of proceedings. State v. Lehman 341
19. On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the Commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356
20. Where appeal is the sole method of review, failure to allege essential elements of standing to the State Board of Equalization and Assessment may not be corrected by affidavit in this court. DeCamp v. State Board of Equalization and Assessment 366
21. A motion to vacate or modify which is filed within the time limitation contemplated by section 30-2437, R. R. S. 1943, is similar in nature to a motion for a new trial in District Court, and the overruling of such motion is a final order itself which extends the 30-day appeal time

from the entry of the original order complained of to the date upon which the motion to vacate or modify is overruled. DeVries v. Rix 392
22. For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court or it will be deemed waived. State Fire Marshal v. Schaneman 413
23. Questions not presented to or passed upon by the trial court will not be considered on appeal. State Fire Marshal v. Schaneman 413
24. If the trial court views the premises, it is required to consider any competent and relevant facts revealed thereby; and, similarly, a duty is imposed on this court, on review of the findings made by the trial court, to give consideration to the fact that the trial court did view the premises. State Fire Marshal v. Schaneman 413
25. A judgment of the District Court will not be set aside by this court on appeal unless it is clearly wrong and not supported by the evidence. Hyde v. Cleveland 420
26. Petition in error proceedings are not available to appeal from ministerial acts. Singleton v. Kimball County Board of Commissioners 429
27. While a collection of individual errors, each of which standing alone is insufficient to constitute prejudicial error, may under certain circumstances be sufficient to warrant a granting of a new trial, the mere collection of errors in itself does not necessarily mandate this result, the test being whether under the totality of the circumstances prejudice has resulted. Palma v. Barta .. 459
28. In a jury-waived action the judgment of the trial court on the facts has the same force as a jury verdict and will not be set aside on appeal if there is sufficient competent evidence to support it. Scott-Hourigan Co. v. Deprez 493
29. Consideration of the cause in this court is generally limited to errors assigned and discussed. Grand Island School Dist. #2 v. Celotex Corp. 559
30. Where during the trial of a case, both parties treat an affirmative defense as denied, it will be so considered in this court, although plaintiff did not file a reply. Kurkowski v. Bailey 582
31. Mental commitment proceedings are judicial in nature and the District Court must review the determination of the mental health board de novo on the record. Hill v. County Board of Mental Health 610
32. This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless this court can say as a matter

of law that it is not supported by clear and convincing proof. Hill v. County Board of Mental Health 610
33. An order of the Court of Industrial Relations that is supported by substantial evidence and is not arbitrary or capricious will not be disturbed on appeal. American Assn. of University Professors v. Board of Regents 628
34. This court may take cognizance of prejudicial error in instructions indicative of probable miscarriage of justice. Nat. Bank of Commerce Trust & Savings Assn. v. Mitchell 634
35. In an appeal of an action for dissolution of a marriage, the Supreme Court is required to try the case de novo and reach independent conclusions on the issues presented by the appeal without referring to the conclusions or judgment reached in the District Court. While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of facts rather than the opposite. Patton v. Patton 638
36. In an appeal from a decree of dissolution of marriage, 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. Slama v. Slama 644
Mueller v. Mueller 653
37. An award of alimony or distribution of property may be altered on appeal where the record reflects good cause. Slama v. Slama 644
38. An error in ruling on the admissibility of evidence will not constitute ground for reversal unless the evidence is prejudicial. State v. Williams 649
39. The credibility of witnesses is for the trier of fact to determine and not for the Supreme Court on appeal. State v. Williams 649
40. It is not the province of this court to weigh or resolve conflicts in the evidence, the credibility of witnesses, or the weight to be given their testimony. Commodity Traders, Inc. v. Palmer 667
41. It is a general rule in this jurisdiction that mandamus will not issue to review the action of an inferior court where there is an adequate remedy at law, and the writ may not be used to usurp or take the place of a writ of error or an appeal. However, when the remedy, though available, is inadequate, mandamus will lie. State ex rel. Simpson v. Vondrasek 693
42. Validity of special assessment for street improvement

was properly challenged by petition in error timely filed after appearance before city council sitting as board of equalization. Turner v. City of North Platte 706

43. In a post conviction proceeding where the evidence establishes a denial or infringement of the right to counsel which occurred only at the appeal stage of the former criminal proceedings, the District Court has jurisdiction and power to grant a new direct appeal without granting a new trial or setting aside the original conviction and sentence. State v. Chipps 715

44. Error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected and no judgment shall be reversed or affected by reason of such error or defect. Harrigfeld v. Nebraska Liquor Control Commission 741

45. A party may not claim error on the failure to introduce evidence which was incumbent upon the party seeking the benefit of the evidence to introduce. A party cannot be heard to complain of error which he was instrumental in bringing about. Foreman & Clark of Nebraska, Inc. v. City of Omaha 746

46. A decree of dissolution of marriage settling and dividing the property of the parties is not subject to appellate review respecting such division and assignment of property unless appeal is taken therefrom within the time provided by statute. When final it is res judicata as to the parties on the award and assignment of property therein provided. White v. White 782

47. An appeal from an order nunc pro tunc is limited to whether that order was properly made and does not afford appellant the right to appeal from the decree to which the order is directed. White v. White 782

48. An actual offer of evidence upon an issue is not necessary in order to preserve the question for review if the trial court has theretofore ruled that no proof upon that issue would be received in any event, and the alleged error in doing so has been appropriately preserved by motion for new trial or otherwise. Quinlan v. City of Omaha 814

49. In our review of orders and decisions of the Court of Industrial Relations, we are restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Metro. Tech. Com. Col. Ed. Assn. v. Metro. Tech. Com. Col. Area 832

50. This court in determining if findings of the District

Court are sustained by evidence must consider the proof and permissible inferences therefrom most favorably to the successful party. VSC, Inc. v. Lilja 844
51. The findings of the trial court in an action at law have the effect of a verdict of a jury and will not be disturbed on appeal unless they are clearly wrong. VSC, Inc. v. Lilja 844
52. The endorsement of additional names upon the information after trial has begun cannot be availed of as error where defendant makes no showing of prejudice or does not ask for postponement or continuance of the trial. State v. Nielsen 847
53. A motion for mistrial is inappropriate when it relates to rulings of the court on the admissibility of evidence and only the underlying assignment of error relating to the challenged admission of evidence will be considered on appeal by this court. Kniesche v. Thos 852

Arraignments.

1. A claim that a defendant was not accorded a preliminary hearing, nor waived it, is determinable by a plea in abatement. State v. Forbes 349
2. District Courts are without jurisdiction to try on information one accused of committing a felony within the state unless the defendant is first accorded the privilege of a preliminary examination or waives the same. State v. Forbes 349
3. If a defendant is accorded a preliminary hearing and thereafter an amended information is filed charging a crime that includes some of the elements of the original crime charged without the addition of any element irrelevant to that original charge, no new preliminary hearing is required. State v. Forbes 349
4. Without a certified copy of the transcript of the evidence introduced at the preliminary hearing, and in the absence of a stipulation, no determination can be made in District Court that probable cause is established by an amended information, which on its face does not appear to be a lesser-included offense. State v. Forbes 349

Assault and Battery.

1. Section 25.11.010 of the Omaha municipal code, establishing the misdemeanor offense of "Assault; Battery" is a proper and valid exercise of the power granted to the city under its home rule charter to establish ordinances for the safety and security of the city and the citizens thereof. State v. Belitz 375
2. Where an 18-year-old man intentionally hits another

person in the face with his fist, with force enough to knock the person unconscious, an intent to cause bodily injury can be inferred as a matter of law, and the subjective intent of the actor is immaterial. Jones v. Norval 549

Assessments.

The constitutional requirement is that there be notice to the property owners of a special assessment and an opportunity to contest its validity and amount before the assessment becomes a charge on the property. First Assembly of God Church v. City of Scottsbluff 452

Assignments.

1. Though there may be no assignment *in haec verba* of a mortgage and note, the facts may establish an equitable assignment of such interest. Equity disregards mere form, and no particular words or particular form of instrument is necesssary to effect an equitable assignment. Any language, however informal, may amount to an equitable assignment if it shows the intention of the owner of a chose in action to transfer it, so that it will become the property of the transferee. Tilden v. Beckmann 293
2. The intention of the assignor must be to transfer a present interest in the debt or fund or subject matter; if this is clearly expressed, the transaction is an assignment; otherwise not. Tilden v. Beckmann 293
3. An assignment is not binding if obtained by misrepresentation, or if not supported by consideration. Abraham v. Abraham 384
4. Where, in the process of liquidating and terminating the business of an installment loan licensee, a legal and valid installment loan obligation is assigned to a creditor of the licensee in satisfaction of an indebtedness of the licensee, the assignee acquires all the right, title, and interest of the licensee and may sue for, collect, and receive any lawful rate of interest provided for in the installment loan agreement although the assignee does not have a license to engage in the installment loan business. Bateman v. Liggett 472
5. Where the mortgagee has made an assignment of the mortgage, and the assignee has not reassigned or redelivered it to the mortgagee at the time a foreclosure action is commenced by the mortgagee, the mortgagee is not the real party in interest to bring the action. Redding v. Gibbs 727

Attorney and Client.

1. Acquiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of the constitutional guarantees of effective assistance of counsel. State v. Kerns 278
2. As a general rule a defendant is entitled to retain counsel of his own choice and may not be denied the right to change retained counsel unless the result is to interfere with the orderly procedure in the courts without a showing of good cause for the desired change. State v. Kincaid 495
3. If a defendant in a criminal case acquiesces in representation by an attorney whom he had previously rejected, he cannot afterwards complain that he was not represented by counsel. State v. Kincaid 495

Attorneys at Law.

1. The test for determining whether or not counsel for a defendant in a criminal prosecution has provided adequate representation is that trial 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. Kerns 278
2. To meet the test of effectiveness, trial counsel should perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and he should conscientiously protect the interests of his client. State v. Mays 487
3. Lawyers who are granted licenses to practice their profession in this state thereby voluntarily assume certain obligations and duties as officers of the courts, and in the performance thereof they must conform to certain standards in relation to clients, to the courts, to the profession, and to the public. State ex rel. Nebraska State Bar Assn. v. Dunker 589
4. In determining the sanction to be applied for violations of the Code of Professional Responsibility of the Nebraska State Bar Association, this court may properly consider the respondent's history and record in this regard. State ex rel. Nebraska State Bar Assn. v. Dunker 589

Attorney's Fees.

1. Reasonable attorney's fees may properly be awarded in actions upon insurance policies under section 44-359, R. R. S. 1943. The amount to be allowed rests in the sound discretion of the court, considering the elements

of the amount involved, the responsibility assumed, the questions of law raised, the time and labor necessarily required in the performance of duties, the professional diligence and skill required, and the result of the services performed. Herrera v. American Standard Ins. Co. 477

2. An action seeking modification of custody or possession rights over minor children is a proceeding ancillary to the original divorce, and the District Court retains authority to exercise discretion in the granting of attorney's fees. Nimmer v. Nimmer 503

Bail.

1. It is within the discretion of the trial court to remit a part or all of the penalty of a bail bond. State v. Ernest 290
2. An order forfeiting a part of a bail bond and remitting the balance will not be disturbed in the absence of an abuse of discretion. State v. Ernest 290
3. Courts have the inherent power to consider the propriety of bail under special circumstances in the light of modern concepts of fundamental fairness, even though there is no statute specifically authorizing bail. State ex rel. Partin v. Jensen 441

Bailment.

1. The term "bailment" is comprehensively defined as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be. Peck v. Masonic Manor Apartment Hotel 308
2. It is of the very essence of a contract of bailment that it shall contemplate the return of the property bailed. Peck v. Masonic Manor Apartment Hotel 308
3. An information which charges theft from the person in the actual possession of personal property, as bailee, is sufficient. State v. Mays 487
4. For purposes of determining the value of the property alleged to have been stolen, the State may aggregate the value of property entrusted to the victim, as bailee, by another person and of property in which the victim has complete ownership. State v. Mays 487

Bankruptcy.

1. A trustee in bankruptcy, receiver, custodian in possession under a bankruptcy arrangement, etc., of a car-

rier, has the rights in the certificate of convenience and necessity of the carrier which are provided by section 75-322, R. R. S. 1943, and these rights must be respected by the Nebraska Public Service Commission. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356

2. The question of what property belongs to the bankrupt as of the date of the filing of the petition in bankruptcy is determined by state law. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356
3. The mere filing of a petition in bankruptcy does not deprive a state court or agency such as the Nebraska Public Service Commission of jurisdiction in a pending action against the bankrupt. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356
4. A reclamation of cattle sold to a cash purchaser is not a voidable preference in bankruptcy. Peck v. Augustin Bros. Co. 574

Bill of Exceptions.

Although an affidavit may be used to prove service of process, such affidavit cannot be considered on an appeal of a cause to this court, unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318

Board of Regents.

The Board of Regents of the University of Nebraska has primary authority for establishing its own schedules of wages, terms and conditions of employment, and hours of labor, but when an industrial dispute, as defined by section 48-801 (7), R. R. S. 1943, arises, the Court of Industrial Relations may acquire jurisdiction for the limited purpose of resolving such dispute. Likewise, the Court of Industrial Relations may acquire jurisdiction for resolving an industrial dispute concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment or refusal to discuss terms or conditions of employment. University Police Officers Union v. University of Nebraska 4

Bonds.

1. The county court has exclusive jurisdiction to determine the state of accounts between the guardian and ward, and no action can be maintained upon a guardian's bond until the amount to be due from the guar-

dian is first ascertained on the settlement of the guardian's final account by the county court. Feltz v. Universal Surety Co. 42
2. The order and decree of the county court as to the amount due from the guardian to his ward upon the final accounting and settlement of the guardian is final and conclusive upon the sureties on the guardian's bond, both as to the bond entered into upon his appointment or for any bond he may have been required to give under a license to sell his ward's real estate. Feltz v. Universal Surety Co. 42
3. It is within the discretion of the trial court to remit a part or all of the penalty of a bail bond. State v. Ernest 290
4. An order forfeiting a part of a bail bond and remitting the balance will not be disturbed in the absence of an abuse of discretion. State v. Ernest 290

Burden of Proof.

1. The State has the burden of establishing the legal sufficiency of a consent to a search and seizure. State v. French 435
2. Whether a person whose consent is sought was in the custody of the police at the time the consent was given is an important consideration in determining voluntariness, duress, or coercion, and custody makes the prosecution's burden heavier. State v. French 435
3. The petitioners for the transfer of land from one school district to another school district have the burden of proving by a preponderance of the evidence each of the statutory requirements for such transfer provided in section 79-403 (1), R. R. S. 1943. Roelfs v. Specht 448

Canons.

In determining the sanction to be applied for violations of the Code of Professional Responsibility of the Nebraska State Bar Association, this court may properly consider the respondent's history and record in this regard. State ex rel. Nebraska State Bar Assn. v. Dunker 589

Case Overruled.

1. Matzke v. City of Seward, 193 Neb. 211, 226 N. W. 2d 340, overruled in part. First Assembly of God Church v. City of Scottsbluff 452
2. The common law doctrine of interspousal tort immunity pronounced in Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N. W. 297 (1927), is abrogated. Imig v. March 537

Child Support.

1. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Brus v. Brus 161
2. In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account, and a decision in this regard rests in the sound discretion of the trial court which will not be disturbed on appeal unless it appears that the court abused its discretion. Brus v. Brus 161
3. An oral agreement to suspend a right to enforce a judgment for child support may constitute an accord and satisfaction entitling a party to a release and satisfaction of a judgment for child support. Weber v. Weber 528

Claims.

A contingent claim against a decedent's estate is one upon which the liability depends upon some future event which may or may not happen and which makes it uncertain whether it will ever be a liability. Until that future event happens a right of action upon the contingent claim does not arise. Hooker and Heft v. Estate of Weinberger 674

Collective Bargaining.

1. Matters which are predominately matters of educational policy and management prerogative are not subject to mandatory negotiation, whereas conditions of employment are. Metro. Tech. Com. Col. Ed. Assn. v. Metro. Tech. Com. Col. Area 832
2. A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative. Metro. Tech. Com. Col. Ed. Assn. v. Metro. Tech. Com. Col. Area 832
3. Those matters which involve foundational value judgments, which strike at the very heart of the educational philosophy of the particular institution, are management prerogatives and are not a proper subject for negotiation even though such decisions may have some impact on working conditions. Metro. Tech. Com. Col. Ed. Assn. v. Metro. Tech. Com. Col. Area 832

Colleges and Universities.

1. The Board of Regents of the University of Nebraska has primary authority for establishing its own schedules of wages, terms and conditions of employment, and hours of labor, but when an industrial dispute, as defined by section 48-801 (7), R. R. S. 1943, arises, the Court of Industrial Relations may acquire jurisdiction for the limited purpose of resolving such dispute. Likewise, the Court of Industrial Relations may acquire jurisdiction for resolving an industrial dispute concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment or refusal to discuss terms or conditions of employment. University Police Officers Union v. University of Nebraska 4
2. The Court of Industrial Relations may acquire jurisdiction of an industrial dispute between the Board of Regents of the University of Nebraska and its employees for the purpose of resolving the dispute. American Assn. of University Professors v. Board of Regents 628
3. Under the facts in this case a bargaining unit consisting of employees holding academic rank and administratively assigned to the University of Nebraska-Omaha was appropriate. American Assn. of University Professors v. Board of Regents 628
4. Department chairmen are properly included in bargaining units of faculty employees where their powers are effectively diffused among the department faculty pursuant to the principle of collegiality. American Assn. of University Professors v. Board of Regents 628

Conciliation.

It is only when there exists a reasonable possibility of reconciliation that the statutes require efforts to effect reconciliation to be made. Mueller v. Mueller 653

Condemnation.

The measure of damages in the taking or injury of a leasehold is the difference between the rental value of the remainder of the term and the rent reserved in the lease. Foreman & Clark of Nebraska, Inc. v. City of Omaha 746

Confessions.

1. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exer-

tion of any improper influence. State v. Smith 64
2. The right to counsel attaches when the proceeding ceases to be investigatory and becomes accusatory. Statements obtained during the investigation of a crime are not inadmissible because counsel was not present. State v. Fuller 233

Conspiracy.
1. A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purpose to be accomplished. Davidson v. Simmons ... 804
2. A conspiracy between the parties having been once established, whatever was done in pursuance of it by one of the conspirators is to be considered as the act of all, and all are liable irrespective of the fact that they did not actively participate in the particular act and irrespective of the extent to which they benefited by it. Davidson v. Simmons 804

Constitutional Law.
1. Each and every clause in the Constitution has been inserted for some useful purpose. Constitutional provisions should receive even broader and more liberal construction than statutes, and constitutions are not subject to rules of strict construction. University Police Officers Union v. University of Nebraska 4
2. The sovereign nature of the power of eminent domain is such that the function of the courts is limited to a determination of whether constitutional provisions have been violated, and if they have not, the right of the Legislature to exercise it in any manner it sees fit must be sustained. If the property be taken irregularly, or if the taking is not for a public purpose, the owner can proceed against the taker the same as any other trespasser by injunction, ejectment, or any other available remedy. Monarch Chemical Works, Inc. v. City of Omaha 33
3. If an indigent defendant was deprived of his constitutional right to counsel by not being furnished an attorney to present his appeal to the appellate court, he was not afforded an effective appeal and the decision thereon must be deemed a nullity. State v. Moore 94
4. The due process clause of the Fourteenth Amendment to the Constitution of the United States guarantees the assistance of counsel unless that right is intelligently and understandingly waived by the accused. Courts

must indulge every reasonable presumption against a waiver of fundamental constitutional rights, and do not presume acquiescence in their loss. State v. Moore ... 94

5. Appellate review in civil cases is not a fundamental right guaranteed by either the due process or privileges and immunities clauses of the Fourteenth Amendment to the Constitution of the United States. Nebraska State Bank v. Dudley 226
6. Article I, section 24, of the Nebraska Constitution, does not bar either the Legislature or this court from making reasonable rules and regulations governing review on appeal. Nebraska State Bank v. Dudley 226
7. Acquiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of the constitutional guarantees of effective assistance of counsel. State v. Kerns 278
8. A preliminary investigation conducted by the prosecuting attorney and upon which he files a sworn complaint or information against the party accused, is a sufficient compliance with the requirement of the Fourth Amendment of the United States Constitution that no warrant shall issue but upon probable cause, supported by oath or affirmation. State v. Lehman 341
9. The provision of the Constitution of the State of Nebraska permitting prosecutions for felonies by information, rather than by grand jury indictment, does not conflict with the Fifth and Fourteenth Amendments of the United States Constitution. State v. Lehman 341
10. For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court or it will be deemed waived. State Fire Marshal v. Schaneman 413
11. When the defendant is not in custody and the State attempts to justify a search on the basis of defendant's consent, the Fourth and Fourteenth Amendments to the Constitution of the United States require that the State demonstrate that the consent was in fact voluntarily given and not the result of duress or coercion, express or implied. State v. French 435
12. There is no constitutional requirement that property owners be given notice of the creation of an improvement district although creation of the district may foreclose any opportunity of the property owners to protest the making of the improvement. First Assembly of God Church v. City of Scottsbluff 452
13. The constitutional requirement is that there be notice to the property owners of a special assessment and an opportunity to contest its validity and amount before

the assessment becomes a charge on the property. First Assembly of God Church v. City of Scottsbluff ... 452

14. Sections 43-202 and 43-209, R. S. Supp., 1978, which, respectively, define parental responsibilities and prescribe the conditions under which parental rights may be terminated, are sufficiently definite and are not void for vagueness. The constitutional requirement that statutory language must be reasonably certain or be held void for vagueness is satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding; the due process clause requires that the law give sufficient warning of conduct which is forbidden but it does not require a precise checklist of parental responsibilities and prohibited behavior. State v. Metteer 515

15. Except where there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for a violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment to the Constitution of the United States. State v. Kretchmar 663

16. It is constitutionally required that there be notice to the property owners of a special assessment and an opportunity to contest the amount and validity of the assessment before it becomes a charge on the property. Turner v. City of North Platte 706

17. If a statutory classification has some reasonable basis it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. A statutory discrimination will not be set aside if any set of facts reasonable may be conceived to justify it. Elliott v. Ehrlich 790

18. A state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. Elliott v. Ehrlich 790

19. To the extent that regulation IX-4731 of the Nebraska State Department of Welfare creates an irrebuttable presumption that the income of maternal grandparents is contributed to the needs of an unborn grandchild, it denies equal protection and due process of law and is unconstitutional under the United States and Nebraska Constitutions. Elliott v. Ehrlich 790

20. The right of a witness to compensation is purely statu-

tory since at common law no witness fees were paid. A statute not providing for payment of fees to witnesses in criminal and other cases does not on that account infringe the constitutional provision against taking property for public use, against taking property without due process of law, or against demanding a man's particular services without just compensation. Cochran v. County of Lincoln 818

Contempt.

It may be the duty of the personal representative to prosecute a suit for the collection of assets. In a proper case the court may punish an administrator for contempt on his refusal to sue, or it may revoke his letters and appoint an administrator who will prosecute the action. The duty of an executor or administrator to bring an action on a debt due the estate may depend on whether the claim is reasonably good or one of doubtful character. He may decline to sue on a doubtful or controverted claim notwithstanding the fact that the heirs think it is well-founded, unless they are willing to give him indemnity for costs. Brown v. Sherwood 209

Contracts.

1. The standard of review in an error proceeding from an order terminating the contract of a tenured teacher is whether there has been sufficient evidence adduced at the proceeding before the inferior tribunal, as a matter of law, to support the determination reached. Davis v. Board of Education 1
2. Where a trespass is committed by an independent contractor, the other party to the contract is not liable for the trespass unless such other party controls the work or authorizes the specific act. Crnkovich v. Scaletta 22
3. Under the provisions of the Uniform Commercial Code, a "sale" consists of the passing of title from the seller to the buyer for a price. Unless otherwise explicitly agreed, where delivery is to be made without moving the goods, if the goods at the time of contracting are already identified and no documents are to be delivered, the title passes at the time and place of contracting. Southwest Bank of Omaha v. Moritz 45
4. Unless the lease stipulates that a lessor shall inspect the premises to ascertain the need of repair, a contract to keep the interior in safe condition subjects the lessor to liability if, but only if, reasonable care is not exercised after the lessee has given notice of the need for repair. Reicheneker v. Seward 68

5. An insurance policy is a contract, and where there is no uncertainty as to its meaning and the same is legal and not opposed to public policy, it will be enforced as it is made. Stark v. Grange Mut. Ins. Co. 154
6. A provision in an insurance policy reciting that failure to pay the premium due on a specified date will suspend the policy and relieve the company of liability for losses occurring during the period of suspension is a valid and enforceable provision. Stark v. Grange Mut. Ins. Co. 154
7. Where one intentionally does damage to the property of another in the mistaken belief that the property belongs to him, the property damage is not, within the meaning of an insurance policy, an "accident" neither expected nor intended from the standpoint of the insured. Foxley & Co. v. United States Fidelity & Guaranty Co. 165
8. A policy of insurance undertaking to pay damages because of injury to or destruction of property caused by accident does not cover damages caused by the trespass of the policyholder upon the land of another when the damage is the natural result of the intentional act of the policyholder. Foxley & Co. v. United States Fidelity & Guaranty Co. 165
9. Where contractual promises are mutual and dependent, the failure of one party to perform authorizes the other to rescind the contract. Gallner v. Sweep Left, Inc. ... 169
10. The failure to perform a promise, the performance of which is a condition, entitles the other party to the contract to a rescission thereof. Gallner v. Sweep Left, Inc. 169
11. Where a contract for the sale of real estate includes both homestead and nonhomestead property, but is not duly executed and acknowledged, specific performance may be obtained of the nonhomestead land only if the contract is clearly severable as to the homestead and nonhomestead property. Struempler v. Peterson 173
12. The terms reservation and exception may be used as synonyms in conveyances and contracts, the description of what is being excepted or reserved normally making clear what is being accomplished and thus no ambiguity results. Schaffert v. Hartman 271
13. The term "bailment" is comprehensively defined as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be. Peck v. Masonic Manor

Apartment Hotel 308
14. It is of the very essence of a contract of bailment that it shall contemplate the return of the property bailed. Peck v. Masonic Manor Apartment Hotel 308
15. The statute of limitations begins to run against a cause of action to recover the purchase price or value of goods sold and delivered at the time of their delivery unless there is some agreement as to the time and manner of payment different from that which the law implies, which is, payment shall be made in cash on delivery. If a term of credit is given to the buyer, the statute begins to run when, and only when, the period of credit has expired. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318
16. The latest item of a continuous account removes prior items from the operation of the statute of limitations. Transactions may be independent because of special contracts, long intervals, or other circumstances. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318
17. An action based on breach of an implied contract must be commenced within 4 years of accrual of the cause of action. § 25-206, R. R. S. 1943. Grand Island School Dist. #2 v. Celotex Corp. 559
18. An action based on breach of a written contract must be commenced within 5 years of accrual of the cause of action. § 25-205, R. R. S. 1943. Grand Island School Dist. #2 v. Celotex Corp. 559
19. An option to purchase real estate is a unilateral contract by which the optionor agrees with the optionee that the optionee has the right to buy certain property, according to the terms and conditions of the option. Commuter Developments and Investments, Inc. v. Gramlich 569
20. An option does not constitute an estate or interest in land but it is a mere right of election to accept or reject a present offer within the time and upon the terms designated. Commuter Developments and Investments, Inc. v. Gramlich 569
21. A consideration for an agreement requires that there be a benefit on one side or a detriment suffered or a service done on the other. Commuter Developments and Investments, Inc. v. Gramlich 569
22. An agreement to devise and bequeath property is, where supported by consideration, valid and enforceable. In such a case, equity will impress a trust upon the property, which trust will follow it into the hands of the personal representatives of the promisor or into the hands of a grantee who has not given consideration for

the conveyance. Allen v. Mayo 602
23. A promise to convey or devise property made in consideration of marriage is valid and enforceable. Allen v. Mayo 602
24. Generally in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens. Commodity Traders, Inc. v. Palmer 667
25. A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury occasioned him, but not until then. Hooker and Heft v. Estate of Weinberger 674
26. A cause of action on a covenant of warranty or for quiet enjoyment does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title. Hooker and Heft v. Estate of Weinberger 674
27. An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or actions evincing an intention to refuse performance in the future. Hooker and Heft v. Estate of Weinberger 674
28. Where a party bound by an executory contract repudiates his obligation before the time for performance, the promisee has an option to treat the contract as ended so far as further performance is concerned and to maintain an action at once for damages occasioned by such anticipatory breach. Hooker and Heft v. Estate of Weinberger 674
29. Ambiguities in an insurance policy should be construed against the insurer and if a policy is fairly susceptible of two constructions and one affords coverage and the other does not, then the construction which affords coverage should be adopted. Complexity is not the same as ambiguity. Great Plains Ins. Co., Inc. v. Kalhorn .. 799
30. An insurance policy is a contract between the insurance company and the insured. As such, the insurance company has the right to limit its liability by including those limitations in the policy definitions. If those definitions are clearly stated and unambiguous, the insurance company is entitled to have those terms enforced. Great Plains Ins. Co., Inc. v. Kalhorn 799

Conveyances.

1. As used in the law of conveyancing, an exception is a withdrawal from the operation of the grant of some part of the thing granted; thus, where real estate is granted, a portion thereof may be excepted from the

terms of the conveyance and the thing excepted remains in the grantor the same as if no grant had been made. An exception in a deed is nothing more than a qualification by which some part of the estate is not conveyed, but which would have passed to the grantee but for the exception. Schaffert v. Hartman 271

2. As used in the law of conveyancing, a reservation gives rise to some new thing issuing out of that which is granted. A reservation, while not affecting the title to the thing granted, may reserve to the grantor a right to the use or enjoyment of a portion thereof, as, for example, an easement. Schaffert v. Hartman 271
3. The terms reservation and exception may be used as synonyms in conveyances and contracts, the description of what is being excepted or reserved normally making clear what is being accomplished and thus no ambiguity results. Schaffert v. Hartman 271
4. Where a deed is plain and unambiguous, its meaning is to be determined without reference to extrinsic facts. Schaffert v. Hartman 271
5. In determining the intent of the parties to a deed, the language of the instrument, together with the surrounding circumstances, are to be considered. Schaffert v. Hartman 271
6. The intention of the assignor must be to transfer a present interest in the debt or fund or subject matter; if this is clearly expressed, the transaction is an assignment; otherwise not. Tilden v. Beckmann 293
7. An agreement to devise and bequeath property is, where supported by consideration, valid and enforceable. In such a case, equity will impress a trust upon the property, which trust will follow it into the hands of the personal representatives of the promisor or into the hands of a grantee who has not given consideration for the conveyance. Allen v. Mayo 602

Corporations.

1. The equitable principle that the corporate entity may be disregarded to prevent fraud and injustice is intended to prevent corporate owners from using the corporate entity to cloak fraud or justify wrongdoing, and it may not be applied to prefer a creditor of the corporate owner who fails to perfect a security interest to the other creditors of the corporation of whom a trustee in bankruptcy is the representative. Southwest Bank of Omaha v. Moritz 45
2. The general rule is that a corporation will be looked on as a legal entity until sufficient reason to the contrary

appears; that is, when the notion of legal entity is used to justify wrong and protect fraud. Branham v. McGinnis 664

3. Where various corporations, substantially owned by one individual, are but instrumentalities through which such individual transacts his business, and, where such corporations are used as a cloak or shield to perpetrate a fraud, a court of law will examine the whole transaction, looking through corporate forms to the substance of things to protect the rights of innocent parties and to circumvent fraud. Branham v. McGinnis 664

Counties.

1. The county board is vested with general supervision and control of the public roads located in its county as provided in section 39-1402, R. R. S. 1943. Art-Kraft Signs, Inc. v. County of Hall 523
2. The statutory definition of public roads makes no distinction between county roads and township roads for the general purposes prescribed in section 39-1402, R. R. S. 1943. Art-Kraft Signs, Inc. v. County of Hall 523
3. In counties operating under the township organization, the township board possesses the limited power of general supervision of road and culvert work. Art-Kraft Signs, Inc. v. County of Hall 523
4. The granting of any type of interest in a county road or a township road is vested in the county board in which such public road is situated. Art-Kraft Signs, Inc. v. County of Hall 523

Court of Industrial Relations.

1. The Board of Regents of the University of Nebraska has primary authority for establishing its own schedules of wages, terms and conditions of employment, and hours of labor, but when an industrial dispute, as defined by section 48-801 (7), R. R. S. 1943, arises, the Court of Industrial Relations may acquire jurisdiction for the limited purpose of resolving such dispute. Likewise, the Court of Industrial Relations may acquire jurisdiction for resolving an industrial dispute concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment or refusal to discuss terms or conditions of employment. University Police Officers Union v. University of Nebraska 4
2. Decisions under the National Labor Relations Act are helpful but not controlling upon either the Court of Industrial Relations or the Supreme Court. Likewise, de-

cisions under the National Labor Relations Act are of no help or benefit in attempting to determine actions absent similar provisions under the Nebraska statutes, nor can common practices under other statutes in other jurisdictions enlarge the statutory power granted the Court of Industrial Relations by the Nebraska Legislature. University Police Officers Union v. University of Nebraska 4

3. In the grant of power to an administrative agency to legislate such power must be limited to the express purpose and administered in accordance with standards prescribed in the legislative act. 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. That authority which is necessary to accomplish the purpose of the act must be narrowly construed. It is fundamental that in the legislative grant of power to an administrative agency, such power must be limited to the express legislative purpose and administered in accordance with standards described in the legislative act. The limitations of the power granted and the standards by which the granted powers are to be administered must be clearly and definitely stated. They may not rest upon indefinite, obscure, or vague generalities or upon extrinsic evidence not readily available. University Police Officers Union v. University of Nebraska 4

4. In the absence of specific statutory authority the Court of Industrial Relations is without jurisdiction to generally find and declare unfair labor practices. University Police Officers Union v. University of Nebraska 4

5. The adoption of sections 48-801 to 48-838, R. R. S. 1943, was not intended to in any way remove the lawful responsibility nor the proper prerogative of public employers in the exercise of their recognized management rights or in the exercise of their lawful duties, except as may otherwise have been specifically entrusted to the Court of Industrial Relations in resolving industrial disputes as prescribed by the statutes. University Police Officers Union v. University of Nebraska 4

6. The authority of the Court of Industrial Relations is carefully circumscribed. Its procedures are prescribed by statute. Its jurisdiction is clearly defined and is limited to what are clearly legislative concerns. University Police Officers Union v. University of Nebraska 4

7. The Court of Industrial Relations has power and au-

thority upon its own initiative to make temporary findings and orders as may be necessary to preserve and protect the status of the parties' property and public interest involved pending final determination. That authority does not authorize the Court of Industrial Relations to make findings with regard to unfair labor practices or direct a public employer to take any more action than is necessary to preserve and protect the status of the parties' property and public interest involved pending final determination of the issues. University Police Officers Union v. University of Nebraska 4

8. The Court of Industrial Relations may acquire jurisdiction of an industrial dispute between the Board of Regents of the University of Nebraska and its employees for the purpose of resolving the dispute. American Assn. of University Professors v. Board of Regents 628
9. Under the facts in this case a bargaining unit consisting of employees holding academic rank and administratively assigned to the University of Nebraska-Omaha was appropriate. American Assn. of University Professors v. Board of Regents 628
10. Department chairmen are properly included in bargaining units of faculty employees where their powers are effectively diffused among the department faculty pursuant to the principle of collegiality. American Assn. of University Professors v. Board of Regents 628
11. An order of the Court of Industrial Relations that is supported by substantial evidence and is not arbitrary or capricious will not be disturbed on appeal. American Assn. of University Professors v. Board of Regents 628
12. An intervenor in a proceeding before the Court of Industrial Relations may be required to make a reasonable showing of interest in support of the intervention. American Assn. of University Professors v. Board of Regents 628
13. In our review of orders and decisions of the Court of Industrial Relations, we are restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Metro. Tech. Com. Col. Ed. Assn. v. Metro. Tech. Com. Col. Area 832

Courts.

1. In post conviction proceedings under section 29-3001 et seq., R. R. S. 1943, the District Court is the trier of disputed questions of fact and it is not ordinarily for the

Supreme Court to determine questions of credibility. State v. Davis 284
2. Once the state court is notified of an order of remand by the federal court, it resumes jurisdiction and may proceed even in the face of an appeal of the remand order, unless the defendant obtains a stay of proceedings. State v. Lehman 341
3. A trial court has always had inherent power over its judgments to correct errors and mistakes therein, even to the extent of granting a new trial whether requested or not, as long as such action is taken within the same term of court at which the judgment was entered. DeVries v. Rix 392
4. It is the policy of the law to give a litigant full opportunity to present his contention in court and for this purpose to give full relief against slight and technical omissions. On the other hand, it is the duty of the courts to prevent an abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice. DeVries v. Rix 392
5. In a trial de novo on the record, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county court, with the caveat that where the evidence is in irreconcilable conflict, the District Court should consider the lower court's opportunity to observe the witnesses and their manner of testifying. Hyde v. Cleveland 420
6. It is not the province of this court to weigh or resolve conflicts in the evidence, the credibility of witnesses, or the weight to be given their testimony. Commodity Traders, Inc. v. Palmer 667
7. A suit brought in small claims court and transferred to the regular docket of the municipal court prior to the time set for hearing in the small claims court shall be subject to all of the provisions of law and rules of court applicable to proceedings in municipal court. State ex rel. Simpson v. Vondrasek 693
8. A municipal court rule which provides that a party desiring a jury trial in a civil case must demand the same in writing on or before the answer day refers to the answer date as established in the municipal court after the transfer of the case from the small claims court and not to the "appearance" date specified in the notice to the defendant in the small claims court. State ex rel. Simpson v. Vondrasek 693
9. Mandamus will lie to compel an inferior court to hear and determine a cause, if within its jurisdiction and when properly brought into the court. Mandamus will

not lie to coerce judicial discretion of an inferior court, nor to predetermine the character of the judgment that the court shall enter. State ex rel. Simpson v. Vondrasek 693
10. If a demand for a jury trial in municipal court is timely filed, a jury trial is mandated and no discretion upon the part of the court is involved. State ex rel. Simpson v. Vondrasek 693
11. The District Court has the power to enter judgment of dismissal for lack of prosecution. Such action rests in the sound discretion of the court and in the absence of an abuse of discretion will not be interfered with. State ex rel. Johnson v. Board of Supervisors of Gage County 764
12. During the same term of court a trial court has inherent power, over its judgments and orders, to correct errors and mistakes appearing of record, even to the extent of granting a new trial. Quinlan v. City of Omaha 814
13. A confusing situation prejudicial to a party's rights which has been created by the trial court is sufficient ground to support its granting of a new trial. Quinlan v. City of Omaha 814

Criminal Law.

1. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. State v. Smith 64
2. An accused person is entitled to counsel at every critical stage of a criminal proceeding. State v. Moore 94
3. If an indigent defendant was deprived of his constitutional right to counsel by not being furnished an attorney to present his appeal to the appellate court, he was not afforded an effective appeal and the decision thereon must be deemed a nullity. State v. Moore 94
4. Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial. State v. Moore 94
5. The due process clause of the Fourteenth Amendment to the Constitution of the United States guarantees the assistance of counsel unless that right is intelligently and understandingly waived by the accused. Courts must indulge every reasonable presumption against a waiver of fundamental constitutional rights, and do not presume acquiescence in their loss. State v. Moore ... 94
6. No defendant can be completely denied the assistance

of counsel absent a determination of his ability to retain counsel or his desire to have counsel appointed. State v. Moore 94

7. The general rule applicable to custodial interrogations by the police is that if the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. State v. Weinacht 124
8. "Interrogation" occurs when the subject is placed under a compulsion to speak. State v. Weinacht 124
9. Where during a custodial interrogation the individual being questioned indicates he does not wish to talk without the presence of an attorney, and the officer, seeking only clarification of the individual's intention not to talk, asks an additional question for that purpose, and the individual then answers the questioning officer by agreeing to talk, his answer constitutes an explicit, clear, and unequivocal waiver of his prior request for assistance of counsel. State v. Weinacht 124
10. It is the general rule that where a criminal statute is amended by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise. State v. Weinacht 124
11. Under the new Nebraska Criminal Code, sections 28-101 to 28-1335, R. S. Supp., 1978, effective January 1, 1979, offenses committed before that date shall be construed and punished according to the provisions of law existing at the time of the commission thereof, in the same manner as if the new criminal code had not been enacted. State v. Weinacht 124
12. Whether successive presentence investigations are necessary before the revocation of an order of probation is entered rests in the sound discretion of the sentencing judge. State v. Herzog 195
13. A person charged with a crime may be convicted on circumstantial evidence only. State v. Meadows 197
14. A court will not interfere on appeal with the 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. Meadows 197
15. The right to counsel attaches when the proceeding ceases to be investigatory and becomes accusatory. Statements obtained during the investigation of a crime

are not inadmissible because counsel was not present. State v. Fuller 233
16. The criminal code which became effective January 1, 1979, is not applicable to offenses committed prior to its effective date. State v. Fuller 233
State v. Munn 810
State v. Griggs 830
17. The jury should only be instructed on those degrees of homicide that are supported by the evidence. State v. Fuller 233
18. The test for determining whether or not counsel for a defendant in a criminal prosecution has provided adequate representation is that trial 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. Kerns 278
19. Where the likelihood of conviction was great, where a favorable plea bargain was arranged, and where the rights of the defendant were patiently explained prior to acceptance of a guilty plea, defendant's request for post conviction relief due to alleged ineffectiveness of counsel was properly denied. State v. Kerns 278
20. An order to the prosecuting attorney under the provisions of section 29-1912, R. R. S. 1943, is not an appropriate way for a defendant in a criminal case to procure handwriting exemplars of third parties unless it be alleged that such exemplars are in the possession of the prosecutor and are relevant evidence in the prosecution. State v. Davis 284
21. A preliminary investigation conducted by the prosecuting attorney and upon which he files a sworn complaint or information against the party accused, is a sufficient compliance with the requirement of the Fourth Amendment of the United States Constitution that no warrant shall issue but upon probable cause, supported by oath or affirmation. State v. Lehman 341
22. The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceedings in the District Court, and after trial and conviction any error in the ruling of the District Court on the 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. Lehman 341
23. The provision of the Constitution of the State of Nebraska permitting prosecutions for felonies by information, rather than by grand jury indictment, does not conflict with the Fifth and Fourteenth Amendments of

the United States Constitution. State v. Lehman 341
24. In order to suspend jurisdiction of a state court in a criminal proceeding it is necessary to file a petition for removal in the appropriate United States District Court, to give notice to the adverse parties, and to file a copy of such petition with the clerk of the state court, all as provided by 28 U. S. C. A., § 1446. Once this is accomplished the state court shall proceed no further unless and until the case is remanded. State v. Lehman 341
25. A claim that a defendant was not accorded a preliminary hearing, nor waived it, is determinable by a plea in abatement. State v. Forbes 349
26. District Courts are without jurisdiction to try on information one accused of committing a felony within the state unless the defendant is first accorded the privilege of a preliminary examination or waives the same. State v. Forbes 349
27. If a defendant is accorded a preliminary hearing and thereafter an amended information is filed charging a crime that includes some of the elements of the original crime charged without the addition of any element irrelevant to that original charge, no new preliminary hearing is required. State v. Forbes 349
28. A complaint that accused willfully attempted to evade an income tax or the payment thereof without specifying the means employed to attempt such evasion, does not include on its face the crime of filing a false return. State v. Forbes 349
29. Without a certified copy of the transcript of the evidence introduced at the preliminary hearing, and in the absence of a stipulation, no determination can be made in District Court that probable cause is established by an amended information, which on its face does not appear to be a lesser-included offense. State v. Forbes .. 349
30. It is the responsibility of the prosecutor to examine the evidence, the statutes, and the cases to make a proper determination of what charge to file. It is not always desirable that a prosecutor prosecute all crimes at the highest degree available; and in exercising his discretion in this regard, he does not neglect his public duty nor discriminate among offenders. State v. Belitz 375
31. When the defendant is not in custody and the State attempts to justify a search on the basis of defendant's consent, the Fourth and Fourteenth Amendments to the Constitution of the United States require that the State demonstrate that the consent was in fact voluntarily given and not the result of duress or coercion, express or implied. State v. French 435

32. Whether or not consent to search was freely and intelligently given is a question of fact to be determined from the totality of all the circumstances surrounding it. State v. French 435
33. The State has the burden of establishing the legal sufficiency of a consent to a search and seizure. State v. French 435
34. Whether a person whose consent is sought was in the custody of the police at the time the consent was given is an important consideration in determining voluntariness, duress, or coercion, and custody makes the prosecution's burden heavier. State v. French 435
35. While a consent to search is not terminated merely by a worsening of the consenting party's position, a consent may be withdrawn or limited at any time prior to the completion of the search. State v. French 435
36. In an extradition proceeding where the Governor of the asylum state has granted extradition, a court of the asylum state can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. State ex rel. Partin v. Jensen 441
37. Courts have the inherent power to consider the propriety of bail under special circumstances in the light of modern concepts of fundamental fairness, even though there is no statute specifically authorizing bail. State ex rel. Partin v. Jensen 441
38. In a habeas corpus proceeding challenging extradition, in the absence of specific statutory authorization, the trial court of the District Court has power, in its discretion, to grant bail during the pendency of the proceedings, including an appeal to this court, in the same cases and under the same terms and conditions authorized by statute in preliminary extradition proceedings, or in other habeas corpus proceedings. State ex rel. Partin v. Jensen 441
39. No information shall be deemed invalid for any defect or imperfection which does not prejudice the substantial rights of the defendant upon the merits. State v. Mays 487
40. An information which charges theft from the person in the actual possession of personal property, as bailee, is sufficient. State v. Mays 487
41. For purposes of determining the value of the property alleged to have been stolen, the value of money or prop-

erty stolen by a series of acts from the same person may be aggregated. § 28-506, R. R. S. 1943. State v. Mays 487
42. For purposes of determining the value of the property alleged to have been stolen, the State may aggregate the value of property entrusted to the victim, as bailee, by another person and of property in which the victim has complete ownership. State v. Mays 487
43. To meet the test of effectiveness, trial counsel should perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and he should conscientiously protect the interests of his client. State v. Mays 487
44. The right of counsel accorded defendants in criminal trials cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. State v. Kincaid 495
45. An accused may voluntarily, knowingly, and understandingly plead guilty to a crime even though his plea contains a protestation of innocence, when he intelligently concludes that his interests require a guilty plea and the record strongly evidences guilt. State v. Kincaid 495
46. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Kincaid 495
47. In a criminal action, this court will not interfere with a verdict of guilty unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Costanzo 586
48. 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. Costanzo 586
49. 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 the punishment to be imposed and the judge may consider probation reports, police reports, affidavits, and other information, including his own personal observations. State v. Kramer 658
50. Disparity in sentences of codefendants does not of itself indicate denial of due process. State v. Kramer 658
51. Failure of the trial court to disclose prior to sentencing that it does not accept defendant's statement that he

was not the mastermind of crime involving several defendants does not preclude the court from considering that fact in sentencing. State v. Kramer 658
52. Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed. Riker v. Vitek 719
53. Before a parolee's liberty can be taken and his parole revoked, certain minimal due process requirements need be met. They are: (1) A written notice of the claimed parole violation; (2) disclosure to the parolee of evidence against him; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (6) a written statement by the fact finders as to the evidence relied on and the reasons for revoking the parole. Riker v. Vitek ... 719
54. Once the seriousness of the misconduct of a parolee has been disposed of and the individual has been afforded his minimal due process with regard to that determination, then the remaining statutory provisions may properly be imposed. Riker v. Vitek 719
55. Because the intent with which an act is done exists only in the mind of the actor, its proof must be inferred from the act itself and from the facts surrounding the act. State v. Sampson 786
56. Criminal intent is to be determined from the evidence and surrounding circumstances, and is therefore for the jury. State v. Sampson 786
57. 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. Sampson 786
58. A sentencing court in prescribing probation may impose any conditions of probation that are authorized by statute to be imposed. State v. Sampson 786
59. This court will disturb an order of probation only where it appears from the record that in executing such order the sentencing court imposed a condition or conditions of probation which it was not authorized by statute to impose. State v. Sampson 786
60. It is not error to refuse a jury instruction on a lesser-included offense unless, under a different but reason-

able view, the evidence is sufficient to establish guilt of the lesser offense and also leave a reasonable doubt as to some particular element included in the greater offense but not the lesser. State v. Munn 810

61. A trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after the trial has begun where there is no showing of prejudice to the rights of the defendant. State v. Nielsen 847

62. The endorsement of additional names upon the information after trial has begun cannot be availed of as error where defendant makes no showing of prejudice or does not ask for postponement or continuance of the trial. State v. Nielsen 847

63. 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. Nielsen 847

64. Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. State v. Nielsen 847

65. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Nielsen 847

Custody.

1. Generally, visitation relates to continuing and fostering the normal parental relationship of the noncustodial parent with the minor child or children of the marriage. Heyne v. Kucirek 59

2. In determining reasonable visitation rights, the best interests and welfare of the child are the primary consideration, considering age, health, welfare, educational and social needs, the need for a stable home environment free of unsettling influences, the fitness of the noncustodial parent for such visitation, and the relationship of the child to that parent. Heyne v. Kucirek 59

3. The writ of habeas corpus is not a corrective remedy and is not a substitute for appeal of proceedings in error. Thus, where the question of a child's custody has been determined by a court of competent jurisdic-

tion, that disposition will control and cannot be disregarded in subsequent habeas corpus proceedings involving the same parties. Schleuter v. McCuiston 101

4. The writ of habeas corpus is a proper remedy where a person entitled to custody of a child has been deprived of that custody by reason of a void judgment. Schleuter v. McCuiston 101

5. Section 43-201, R. S. Supp., 1976, which states that nothing in the Juvenile Court Act shall operate to deprive the District Courts of their chancery jurisdiction, does not limit the county court's jurisdiction to determine the custody of a minor child whose custody was subject to a preexisting District Court order where the county court's jurisdiction was invoked by the county attorney acting to protect the child pursuant to section 43-205, R. S. Supp., 1978. Schleuter v. McCuiston 101

6. Whether a person whose consent is sought was in the custody of the police at the time the consent was given is an important consideration in determining voluntariness, duress, or coercion, and custody makes the prosecution's burden heavier. State v. French 435

7. An action seeking modification of custody or possession rights over minor children is a proceeding ancillary to the original divorce, and the District Court retains authority to exercise discretion in the granting of attorney's fees. Nimmer v. Nimmer 503

8. A decree fixing custody of minor children will not be modified unless there has been a change of circumstances, indicating that the person having custody is unfit for that purpose, or that the best interests of the children require such action. Duff v. Duff 767

9. In determining the question of who should have the care and custody of minor children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children. Duff v. Duff 767

10. In any custody determination, the discretion of the trial court in such a situation is necessarily subjective and must be founded to a significant extent upon its observation of the parties and the review of all the minute details that affect the general welfare and the best interests of the children. It also must necessarily be prospective in nature. Duff v. Duff 767

11. A custody order of the trial court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Duff v. Duff 767

Damages.

1. An excavating owner is liable, irrespective of negligence, for damages caused by depriving adjoining land, in its natural state, of lateral support even if an independent contractor performed the work, if the damage was a necessary consequence of the excavation. Crnkovich v. Scaletta 22
2. Injunction is a proper form of remedy in which to present the question of unlawful or improper exercise of the power of eminent domain and proof of the attempt to so deprive a private citizen of an estate in his property makes the resulting damage irreparable and the legal remedy inadequate. Monarch Chemical Works, Inc. v. City of Omaha 33
3. Where one intentionally does damage to the property of another in the mistaken belief that the property belongs to him, the property damage is not, within the meaning of an insurance policy, an "accident" neither expected nor intended from the standpoint of the insured. Foxley & Co. v. United States Fidelity & Guaranty Co. 165
4. A policy of insurance undertaking to pay damages because of injury to or destruction of property caused by accident does not cover damages caused by the trespass of the policyholder upon the land of another when the damage is the natural result of the intentional act of the policyholder. Foxley & Co. v. United States Fidelity & Guaranty Co. 165
5. A motorist who sees anything upon a highway at night which is abnormal and in itself a warning and takes no precaution by way of reducing speed, or otherwise, is guilty, as a matter of law, of more than slight negligence which will bar his recovery for damage contributed to by his lack of care. Hyde v. Cleveland 420
6. Where a general verdict is returned by a jury not delineating the type and amount of damages included within the verdict, the court has no means of ascertaining what elements were considered by the jury, nor the basis on which the jury determined the amount of damages awarded. Where that information could have been obtained by requesting a special verdict, the information in question may not later be obtained by extended or subsequent litigation. Herrera v. American Standard Ins. Co. 477
7. An injury is "expected or intended" from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury or if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law. Jones v. Norval 549

8. A prayer for affirmative relief, such as damages, is a general appearance and waives any objection to jurisdiction over the person. Peck v. Augustin Bros. Co. 574
9. Where a party bound by an executory contract repudiates his obligation before the time for performance, the promisee has an option to treat the contract as ended so far as further performance is concerned and to maintain an action at once for damages occasioned by such anticipatory breach. Hooker and Heft v. Estate of Weinberger 674
10. The measure of damages in the taking or injury of a leasehold is the difference between the rental value of the remainder of the term and the rent reserved in the lease. Foreman & Clark of Nebraska, Inc. v. City of Omaha 746
11. A conspiracy between the parties having been once established, whatever was done in pursuance of it by one of the conspirators is to be considered as the act of all, and all are liable irrespective of the fact that they did not actively participate in the particular act and irrespective of the extent to which they benefited by it. Davidson v. Simmons 804

Declaratory Judgments.

1. Under the facts of this case the insurance company issuing an automobile policy containing "uninsured motorist" coverage is held not entitled to relitigate, in a subsequent declaratory judgment action filed against it by its insured, whether the general verdict for damages returned by the jury, in a prior action brought by the insured against an uninsured motorist, contained any amounts for property damage, where counsel did not request a special verdict itemizing the type of damages included therein. Herrera v. American Standard Ins. Co. 477
2. The use of a declaratory judgment remedy is proper in this state to determine the rights and obligations of the insured and the insurance company under an uninsured motorist clause following the rendition of a final judgment against the uninsured motorist. Herrera v. American Standard Ins. Co. 477

Decrees.

1. After the time for appeal has expired, the provisions of a decree are res judicata and binding upon all the parties to the action. Omaha Nat. Bank v. Continental Western Corp. 264
2. In a contested proceeding for dissolution of marriage,

upon proper and timely request being made for determination of value of property being awarded to the parties, the trial court shall state in writing the conclusions of fact found separately from the conclusions of law. Slama v. Slama 644

Deeds.

1. As used in the law of conveyancing, an exception is a withdrawal from the operation of the grant of some part of the thing granted; thus, where real estate is granted, a portion thereof may be excepted from the terms of the conveyance and the thing excepted remains in the grantor the same as if no grant had been made. An exception in a deed is nothing more than a qualification by which some part of the estate is not conveyed, but which would have passed to the grantee but for the exception. Schaffert v. Hartman 271
2. As used in the law of conveyancing, a reservation gives rise to some new thing issuing out of that which is granted. A reservation, while not affecting the title to the thing granted, may reserve to the grantor a right to the use or enjoyment of a portion thereof, as, for example, an easement. Schaffert v. Hartman 271
3. The terms reservation and exception may be used as synonyms in conveyances and contracts, the description of what is being excepted or reserved normally making clear what is being accomplished and thus no ambiguity results. Schaffert v. Hartman 271
4. Where a deed is plain and unambiguous, its meaning is to be determined without reference to extrinsic facts. Schaffert v. Hartman 271
5. In determining the intent of the parties to a deed, the language of the instrument, together with the surrounding circumstances, are to be considered. Schaffert v. Hartman 271

Default.

1. A court of equity has the power to relieve a mortgagor from the effect of an operative acceleration clause when the default of the mortgagor is the result of some unconscionable or inequitable conduct of the mortgagee. Redding v. Gibbs 727
2. Equity will grant relief to prevent an acceleration of a mortgage debt predicated on an inadvertent default where there are indications that the morgagee had knowledge of the default and, subsequent to the expiration of the grace period, in personal dealings with the mortgagor failed to inquire about the delayed payment

but immediately thereafter brought an action to foreclose. Redding v. Gibbs 727
3. When an advantage is unconscionable depends on the circumstances. The gravity of the fault must be compared with the gravity of the hardship. "Unconscionable" conduct means conduct that is monstrously harsh, that is shocking to the conscience. Redding v. Gibbs 727

Disciplinary Proceedings.

In determining the sanction to be applied for violations of the Code of Professional Responsibility of the Nebraska State Bar Association, this court may properly consider the respondent's history and record in this regard. State ex rel. Nebraska State Bar Assn. v. Dunker 589

Discovery.

The trial court is vested with broad discretion in considering discovery requests of defense counsel and error can be predicated only upon an abuse of such discretion. State v. Fuller 233

Divorce.

1. The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts in each case and the courts will consider all pertinent facts in reaching an award that is just and equitable. Pfeiffer v. Pfeiffer 137
Slama v. Slama 644
2. The fixing of alimony or distribution 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. Pfeiffer v. Pfeiffer 137
Mahan v. Mahan 316
3. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Brus v. Brus 161
4. In an appeal from a decree of dissolution of marriage, 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. Brus v. Brus 161
Slama v. Slama 644
Mueller v. Mueller 653
5. The rules for determining a division of property in an

action for dissolution of marriage provide no mathematical formula by which such awards can be determined. Brus v. Brus 161
Mueller v. Mueller 653
6. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Brus v. Brus 161
7. In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account, and a decision in this regard rests in the sound discretion of the trial court which will not be disturbed on appeal unless it appears that the court abused its discretion. Brus v. Brus 161
8. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. Mahan v. Mahan 316
9. An action seeking modification of custody or possession rights over minor children is a proceeding ancillary to the original divorce, and the District Court retains authority to exercise discretion in the granting of attorney's fees. Nimmer v. Nimmer 503
10. An oral agreement to suspend a right to enforce a judgment for child support may constitute an accord and satisfaction entitling a party to a release and satisfaction of a judgment for child support. Weber v. Weber 528
11. In an appeal of an action for dissolution of a marriage, the Supreme Court is required to try the case de novo and reach independent conclusions on the issues presented by the appeal without referring to the conclusions or judgment reached in the District Court. While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of facts rather than the opposite. Patton v. Patton 638
12. The rule for determination of alimony or division of property in dissolution actions provides no mathematical formula by which such an award can be determined and, generally speaking, awards vary from one-third to one-half the property involved depending on the facts and circumstances in each particular case. Patton v.

Patton 638
13. A judgment of the trial court making a distribution of property and fixing the amount of alimony will not be disturbed on appeal unless it is patently unfair on the record. Patton v. Patton 638
14. In a contested proceeding for dissolution of marriage, upon proper and timely request being made for determination of value of property being awarded to the parties, the trial court shall state in writing the conclusions of fact found separately from the conclusions of law. Slama v. Slama 644
15. Where one of the parties to a marriage places property beyond the reach of the other party, and thus forestalls a division of the property, that action does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets. Slama v. Slama 644
16. When a 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. The ultimate test of alimony provisions is one of reasonableness. Slama v. Slama 644
17. An award of alimony or distribution of property may be altered on appeal where the record reflects good cause. Slama v. Slama 644
18. It is only when there exists a reasonable possibility of reconciliation that the statutes require efforts to effect reconciliation to be made. Mueller v. Mueller 653
19. This court on appeal is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Mueller v. Mueller 653
20. The distribution 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. Mueller v. Mueller 653
21. A decree fixing custody of minor children will not be modified unless there has been a change of circumstances, indicating that the person having custody is unfit for that purpose, or that the best interests of the children require such action. Duff v. Duff 767
22. In determining the question of who should have the care and custody of minor children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children. Duff v. Duff 767
23. In any custody determination, the discretion of the trial court in such a situation is necessarily subjective and

must be founded to a significant extent upon its observation of the parties and the review of all the minute details that affect the general welfare and the best interests of the children. It also must necessarily be prospective in nature. Duff v. Duff 767

24. A decree of dissolution of marriage settling and dividing the property of the parties is not subject to appellate review respecting such division and assignment of property unless appeal is taken therefrom within the time provided by statute. When final it is res judicata as to the parties on the award and assignment of property therein provided. White v. White 782

Due Process.

1. Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed. Riker v. Vitek 719
2. Before a parolee's liberty can be taken and his parole revoked, certain minimal due process requirements need be met. They are: (1) A written notice of the claimed parole violation; (2) disclosure to the parolee of evidence against him; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (6) a written statement by the fact finders as to the evidence relied on and the reasons for revoking the parole. Riker v. Vitek ... 719
3. Once the seriousness of the misconduct of a parolee has been disposed of and the individual has been afforded his minimal due process with regard to that determination, then the remaining statutory provisions may properly be imposed. Riker v. Vitek 719

Easements.

As used in the law of conveyancing, a reservation gives rise to some new thing issuing out of that which is granted. A reservation, while not affecting the title to the thing granted, may reserve to the grantor a right to the use or enjoyment of a portion thereof, as, for example, an easement. Schaffert v. Hartman 271

Eminent Domain.

1. Injunction is a proper form of remedy in which to present the question of unlawful or improper exercise of the power of eminent domain and proof of the attempt to so deprive a private citizen of an estate in his property makes the resulting damage irreparable and the legal remedy inadequate. Monarch Chemical Works, Inc. v. City of Omaha 33
2. The sovereign nature of the power of eminent domain is such that the function of the courts is limited to a determination of whether constitutional provisions have been violated, and if they have not, the right of the Legislature to exercise it in any manner it sees fit must be sustained. If the property be taken irregularly, or if the taking is not for a public purpose, the owner can proceed against the taker the same as any other trespasser by injunction, ejectment, or any other available remedy. Monarch Chemical Works, Inc. v. City of Omaha 33
3. The acquisition of property whether by voluntary methods or by eminent domain to carry out a redevelopment plan must be provided for in and be in accordance with such plan. Monarch Chemical Works, Inc. v. City of Omaha 33

Equity.

1. In an appeal in an equity action, it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion without reference to the findings of the District Court. Monarch Chemical Works, Inc. v. City of Omaha 33
2. The equitable principle that the corporate entity may be disregarded to prevent fraud and injustice is intended to prevent corporate owners from using the corporate entity to cloak fraud or justify wrongdoing, and it may not be applied to prefer a creditor of the corporate owner who fails to perfect a security interest to the other creditors of the corporation of whom a trustee in bankruptcy is the representative. Southwest Bank of Omaha v. Moritz 45
3. It is the duty of the Supreme Court to try the issues of fact de novo on the record without reference to the findings of the District Court. Such independent conclusions of fact must be determined by the Supreme Court in accordance with the ordinary rules governing the burden of proof and the competency and materiality of the evidence. Rentschler v. Walnofer 84
4. Courts of equity will decree a strict foreclosure only un-

der special circumstances where it would be inequitable and unjust to refuse them. Whether or not such a decree will be granted is dependent upon the facts of the particular case being considered and is necessarily addressed to the sound judicial discretion of the court. Where such a decree is entered, the defaulting party is entitled to a reasonable time to avoid its consequences by performing the contract. Morgan v. Zoucha 119

5. When marshaling of assets is sought by a junior lien holder, equities are determined as of the time when such request is made. Omaha Nat. Bank v. Continental Western Corp. 264

6. A real estate foreclosure action is an action in equity, and upon appeal to this court is triable de novo, subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. The above rule is applicable even though all the witnesses testifying were called by only one of the parties. Tilden v. Beckmann 293

7. Though there may be no assignment *in haec verba* of a mortgage and note, the facts may establish an equitable assignment of such interest. Equity disregards mere form, and no particular words or particular form of instrument is necessary to effect an equitable assignment. Any language, however informal, may amount to an equitable assignment if it shows the intention of the owner of a chose in action to transfer it, so that it will become the property of the transferee. Tilden v. Beckmann 293

8. An agreement to devise and bequeath property is, where supported by consideration, valid and enforceable. In such a case, equity will impress a trust upon the property, which trust will follow it into the hands of the personal representatives of the promisor or into the hands of a grantee who has not given consideration for the conveyance. Allen v. Mayo 602

9. On appeals in equity, the Supreme Court will, in determining the weight of the testimony of the witnesses, consider that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Allen v. Mayo 602

10. A court of equity has the power to relieve a mortgagor from the effect of an operative acceleration clause when the default of the mortgagor is the result of some

unconscionable or inequitable conduct of the mortgagee. Redding v. Gibbs 727
11. Equity will grant relief to prevent an acceleration of a mortgage debt predicated on an inadvertent default where there are indications that the mortgagee had knowledge of the default and, subsequent to the expiration of the grace period, in personal dealings with the mortgagor failed to inquire about the delayed payment but immediately thereafter brought an action to foreclose. Redding v. Gibbs 727
12. When an advantage is unconscionable depends on the circumstances. The gravity of the fault must be compared with the gravity of the hardship. "Unconscionable" conduct means conduct that is monstrously harsh, that is shocking to the conscience. Redding v. Gibbs 727
13. Equity cases are heard de novo in this court; however, in determining the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Duff v. Duff 767

Evidence.

1. In an error proceeding conflicting evidence will not be weighed, and the order of an administrative tribunal must be affirmed if the tribunal has acted within its jurisdiction and there is sufficient competent evidence, as a matter of law, to sustain its findings and order. Davis v. Board of Education 1
2. When the evidence is conflicting regarding a motion for the suppression of evidence the decision upon the motion is for the court and will not be reversed on appeal in the absence of an abuse of discretion. State v. Weinacht 124
3. When the evidence viewed most favorably for plaintiff fails to disclose the existence of gross negligence, the trial court is obligated to sustain a motion to direct a verdict for the defendant. Wagner v. Mines 143
4. In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Fabricators, Inc. v. Farmers Elevator, Inc. 150
5. Negligence is never presumed but must be proved by a preponderance of the evidence. The fact that an in-

vitee falls upon the steps leading from the exit of a building to the sidewalk below does not raise any presumption of negligence on the part of its owner. Schwartz v. Selvage 158
6. A motion for a directed verdict is 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. Schwartz v. Selvage 158
7. Directing a verdict is proper only when there is a complete absence of probative facts to support a judgment or verdict in favor of the party against whom the verdict is directed. Schwartz v. Selvage 158
8. Error may not be predicated upon a ruling excluding evidence without making an offer of proof as to what the excluded evidence may have been. Schwartz v. Selvage 158
9. Where the record of the proceedings before the Nebraska Liquor Control Commission contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission 176
10. In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in her favor and the benefit of every reasonable inference that may be deducted from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for the jury. Swiler v. Baker's Super Market, Inc. 183
11. Negligence is a question of fact and may be proven by circumstantial evidence and physical facts. However, the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with a reasonable certainty the negligent act charged. Swiler v. Baker's Super Market, Inc. 183
12. A litigant is entitled to have the jury instructed only on those theories of the case which are presented by the pleadings and which are supported by competent evidence. Swiler v. Baker's Super Market, Inc. 183
13. Upon the issue of negligence or contributory negligence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance under similar circumstances of acts like those which are alleged to have been done negligently is generally competent evidence. Swiler v. Baker's Super Market,

Inc. 183
14. A person charged with a crime may be convicted on circumstantial evidence only. State v. Meadows 197
15. A court will not interfere on appeal with the 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. Meadows 197
16. Where the evidence supporting the District Court's findings of fact is substantial, the findings will not be disturbed. Farmer v. Richman Gordman Stores, Inc. 222
17. For the purpose of evaluating a motion for a directed verdict or a dismissal of a cause of action, all doubt must be resolved in favor of the party against whom the verdict or dismissal is urged. The truth of all evidence he has submitted must be assumed and he must be given the benefit of all inferences therefrom. The question must be whether, in view of these assumptions, the jury could properly bring in a verdict in his favor. Jones v. Foutch 246
18. A guest to recover damages from his host for injury received by the guest while riding in a motor vehicle operated by the host must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon by the guest and that it was the proximate cause of the accident and injury. Jones v. Foutch 246
19. Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. In case of doubt or where reasonable minds might differ the evidence must be resolved in favor of the existence of gross negligence, in which case it is a question for the jury. Jones v. Foutch 246
20. Although any one of several acts of negligence proximately causing an accident might not, standing alone, constitute gross negligence, no one act should be separated from the whole of the acts and held to be the independent cause of the accident. The several acts are to be considered as a whole to determine whether or not gross negligence has been established. Jones v. Foutch 246
21. An order to the prosecuting attorney under the provisions of section 29-1912, R. R. S. 1943, is not an appropriate way for a defendant in a criminal case to procure handwriting exemplars of third parties unless it be alleged that such exemplars are in the possession of the prosecutor and are relevant evidence in the prosecution. State v. Davis 284

22. A real estate foreclosure action is an action in equity, and upon appeal to this court is triable de novo, subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. The above rule is applicable even though all the witnesses testifying were called by only one of the parties. Tilden v. Beckmann 293
23. The owner of personal property is qualified to express an opinion of the value thereof solely because of his status as owner of it. Peck v. Masonic Manor Apartment Hotel 308
24. In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it. A jury verdict based on conflicting evidence should not be set aside on appeal unless clearly wrong. Lockhart v. Continental Cheese, Inc. 331
25. A review of the relevant books of an employer by a wage claimant, together with his own arithmetic and testimony of his conclusion of the amount due, is sufficient evidence to support a judgment for a salary bonus figured as an agreed percentage of gross profit. Lockhart v. Continental Cheese, Inc. 331
26. The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceedings in the District Court, and after trial and conviction any error in the ruling of the District Court on the 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. Lehman 341
27. Without a certified copy of the transcript of the evidence introduced at the preliminary hearing, and in the absence of a stipulation, no determination can be made in District Court that probable cause is established by an amended information, which on its face does not appear to be a lesser-included offense. State v. Forbes 349
28. It is the responsibility of the prosecutor to examine the evidence, the statutes, and the cases to make a proper determination of what charge to file. It is not always desirable that a prosecutor prosecute all crimes at the highest degree available; and in exercising his discretion in this regard, he does not neglect his public duty

nor discriminate among offenders. State v. Belitz 375
29. In a trial de novo on the record, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county court, with the caveat that where the evidence is in irreconcilable conflict, the District Court should consider the lower court's opportunity to observe the witnesses and their manner of testifying. Hyde v. Cleveland 420
30. A judgment of the District Court will not be set aside by this court on appeal unless it is clearly wrong and not supported by the evidence. Hyde v. Cleveland 420
31. The admissions and declarations of a party to an action against his own interest, upon a material matter, are admissible against him as original evidence and may be used as rebuttal evidence, and, where he is examined as a witness in his own behalf, it is unnecessary to lay foundation for the admission of such evidence by cross-examination. Hyde v. Cleveland 420
32. Ordinarily the order of proof is a matter in the discretion of the trial court and error cannot be successfully asserted on account of any irregularity therein; prejudice in such case should first appear. Hyde v. Cleveland 420
33. Where evidence improperly received during a trial is afterwards stricken by the judge and expressly withdrawn from the consideration of the jury, the error involved in its reception is ordinarily cured. Palma v. Barta 459
34. A verdict will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law. Palma v. Barta 459
35. In a jury-waived action the judgment of the trial court on the facts has the same force as a jury verdict and will not be set aside on appeal if there is sufficient competent evidence to support it. Scott-Hourigan Co. v. Deprez 493
36. Generally a photograph is admissible if it is relevant and is shown to be a true and correct representation of the place or subject it purports to represent at a time pertinent to the inquiry. Thomas v. Burlington Northern R.R., Inc. 507
37. A duplicate of a writing is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original or in the circum-

stances it would be unfair to admit the duplicate in lieu of the original. Commuter Developments and Investments, Inc. v. Gramlich 569
38. In a criminal action, this court will not interfere with a verdict of guilty unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Costanzo 586
39. 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. Costanzo 586
40. On appeals in equity, the Supreme Court will, in determining the weight of the testimony of the witnesses, consider that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Allen v. Mayo 602
41. An order of the Court of Industrial Relations that is supported by substantial evidence and is not arbitrary or capricious will not be disturbed on appeal. American Assn. of University Professors v. Board of Regents 628
42. Hearsay evidence is not admissible except as otherwise provided by the statutes of this state. State v. Williams 649
43. An error in ruling on the admissibility of evidence will not constitute ground for reversal unless the evidence is prejudicial. State v. Williams 649
44. A party may not claim error on the failure to introduce evidence which was incumbent upon the party seeking the benefit of the evidence to introduce. A party cannot be heard to complain of error which he was instrumental in bringing about. Foreman & Clark of Nebraska, Inc. v. City of Omaha 746
45. Equity cases are heard de novo in this court; however, in determining the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Duff v. Duff 767
46. A custody order of the trial court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Duff v. Duff 767
47. A motion for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. 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. Davidson v. Simmons 804

48. An actual offer of evidence upon an issue is not necessary in order to preserve the question for review if the trial court has theretofore ruled that no proof upon that issue would be received in any event, and the alleged error in doing so has been appropriately preserved by motion for new trial or otherwise. Quinlan v. City of Omaha 814

49. In our review of orders and decisions of the Court of Industrial Relations, we are restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Metro. Tech. Com. Col. Ed. Assn. v. Metro Tech. Com. Col. Area 832

50 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. Nielsen 847

51. Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. State v. Nielsen 847

52. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Nielsen .. 847

53. A motion for mistrial is inappropriate when it relates to rulings of the court on the admissibility of evidence and only the underlying assignment of error relating to the challenged admission of evidence will be considered on appeal by this court. Kniesche v. Thos 852

54. A jury verdict may not be set aside unless it is clearly wrong and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party and all conflicts in the evidence, expert or lay, and the credibility of the witnesses is for the jury and not for the court. Kniesche v. Thos 852

Executors, Administrators, and Personal Representatives.

1. The general rule is that an executor in discharging his trust duties must exercise the care, prudence, and judgment that a man of fair, average capacity and ability exercises in the transaction of his own business. Brown v. Sherwood 209
2. Ordinarily, a personal representative of an estate, acting reasonably for the benefit of interested persons, may properly effect a fair and reasonable compromise with any debtor or obligor. Brown v. Sherwood 209
3. It may the the duty of the personal representative to prosecute a suit for the collection of assets. In a proper case the court may punish an administrator for contempt on his refusal to sue, or it may revoke his letters and appoint an administrator who will prosecute the action. The duty of an executor or administrator to bring an action on a debt due the estate may depend on whether the claim is reasonably good or one of doubtful character. He may decline to sue on a doubtful or controverted claim notwithstanding the fact that the heirs think it is well-founded, unless they are willing to give him indemnity for costs. Brown v. Sherwood 209

Extradition.

1. In an extradition proceeding where the Governor of the asylum state has granted extradition, a court of the asylum state can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. State ex rel. Partin v. Jensen 441
2. In a habeas corpus proceeding challenging extradition, in the absence of specific statutory authorization, the trial court or the District Court has power, in its discretion, to grant bail during the pendency of the proceedings, including an appeal to this court, in the same cases and under the same terms and conditions authorized by statute in preliminary extradition proceedings, or in other habeas corpus proceedings. State ex rel. Partin v. Jensen 441

Fees.

1. Section 33-139, R. S. Supp., 1978, does not authorize the payment of $20 per day to a material witness during the time that he is confined while he is unable to post bond. Cochran v. County of Lincoln 818

2. A general statute providing for witness fees cannot be construed to include or to authorize payment of such fees to any person detained by court order while waiting for the trial to take place. Cochran v. County of Lincoln 818
3. The right of a witness to compensation is purely statutory since at common law no witness fees were paid. A statute not providing for payment of fees to witnesses in criminal and other cases does not on that account infringe the constitutional provision against taking property for public use, against taking property without due process of law, or against demanding a man's particular services without just compensation. Cochran v. County of Lincoln 818
4. It is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual for the welfare of the public. Cochran v. County of Lincoln 818

Firemen.

1. The fireman's rule negates liability to firemen by one whose negligence causes or contributes to a fire which in turn causes injury or death of a fireman. Buchanan v. Prickett & Son, Inc. 684
2. The underlying basis of the fireman's rule is that the ordinary risks which a fireman encounters in the performance of his duty in fighting fires and protecting life and property are those which he has assumed a duty to perform and to which he has assumed the risk in a "primary" sense; that is, the risk is one which the fireman has engaged to encounter by virtue of his employment and one which it is his duty to perform and thus the person who negligently caused the fire has not breached a duty owed the fireman. In the absence of any statute or ordinance prescribing a duty on the part of the owner or possessor of the property to members of a public fire department, the owner is not liable for such injuries to firemen except those proximately resulting from willful or wanton negligence or a designed injury, except in certain cases where there may be the duty to warn of hidden danger or peril known to the owner or occupant but unknown to or unobservable by

the fireman in the exercise of ordinary care. Buchanan v. Prickett & Son, Inc. 684

Foreclosure.

1. Courts of equity will decree a strict foreclosure only under special circumstances where it would be inequitable and unjust to refuse them. Whether or not such a decree will be granted is dependent upon the facts of the particular case being considered and is necessarily addressed to the sound judicial discretion of the court. Where such a decree is entered, the defaulting party is entitled to a reasonable time to avoid its consequences by performing the contract. Morgan v. Zoucha 119
2. A court has jurisdiction and power to include, within a decree of foreclosure of a real estate mortgage, provisions for the disposition of the proceeds of the sale of the property. Omaha Nat. Bank v. Continental Western Corp. 264
3. When marshaling of assets is sought by a junior lien holder, equities are determined as of the time when such request is made. Omaha Nat. Bank v. Continental Western Corp. 264
4. When the holder of a first real estate mortgage upon property subsequently encumbered in separate parcels to junior lien holders seeks foreclosure, such first lien will be enforced against the entire security; junior lien holders will bear the burden of such first lien in proportion to the value of the parcels upon which they have claims; any surplus remaining after the satisfaction of the first lien should be apportioned among junior lien holders in proportion to the value of the parcels in which they have an interest. Omaha Nat. Bank v. Continental Western Corp. 264
5. A real estate foreclosure action is an action in equity, and upon appeal to this court is triable de novo, subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. The above rule is applicable even though all the witnesses testifying were called by only one of the parties. Tilden v. Beckmann 293
6. Where the mortgagee has made an assignment of the mortgage, and the assignee has not reassigned or redelivered it to the mortgagee at the time a foreclosure action is commenced by the mortgagee, the mortgagee is

not the real party in interest to bring the action. Redding v. Gibbs 727
7. Equity will grant relief to prevent an acceleration of a mortgage debt predicated on an inadvertent default where there are indications that the mortgagee had knowledge of the default and, subsequent to the expiration of the grace period, in personal dealings with the mortgagor failed to inquire about the delayed payment but immediately thereafter brought an action to foreclose. Redding v. Gibbs 727
8. When an advantage is unconscionable depends on the circumstances. The gravity of the fault must be compared with the gravity of the hardship. "Unconscionable" conduct means conduct that is monstrously harsh, that is shocking to the conscience. Redding v. Gibbs 727

Franchises.

1. The Motor Vehicle Industry Licensing Act regulates and restricts the termination of dealer franchises and creates rights in franchisees which would not exist independent of the statute. S & T Motors v. General Motors Corp. 188
2. Under section 60-1429(2), R. R. S. 1943, change of ownership of a franchisee's dealership is not good cause for termination of the franchise unless the franchisor proves that the change of ownership will be substantially detrimental to the distribution of franchisor's motor vehicle in the community. S & T Motors v. General Motors Corp. 188
3. Under section 60-1430, R. R. S. 1943, in the event of the sale or transfer of ownership of the franchisee's dealership by sale or transfer of the business, the franchisor shall give effect to such change in the franchise unless the transfer of the franchisee's license under the act is denied or the new owner is unable to obtain a license. S & T Motors v. General Motors Corp. 188
4. The essential concept involved in the term dealership, as sued in the Motor Vehicle Industry Licensing Act, is the "business" of the dealer. S & T Motors v. General Motors Corp. 188
5. The real estate on which the business is operated is not necessarily an integral part of a dealership. S & T Motors v. General Motors Corp. 188
6. The term "motor vehicle" as used in section 60-1429(2), R. R. S. 1943, refers to the motor vehicles covered by the franchise and does not refer to all of the motor vehicles which a franchisor may distribute through

various divisions and separate franchises. S & T Motors v. General Motors Corp. 188

Fraud.

1. The equitable principle that the corporate entity may be disregarded to prevent fraud and injustice is intended to prevent corporate owners from using the corporate entity to cloak fraud or justify wrongdoing, and it may not be applied to prefer a creditor of the corporate owner who fails to perfect a security interest to the other creditors of the corporation of whom a trustee in bankruptcy is the representative. Southwest Bank of Omaha v. Moritz 45
2. In order to avail himself of the rule that the statute of limitations for an action based on fraud does not begin to run until discovery of the facts constituting the fraud, plaintiff must allege in his petition the failure to discover. Grand Island School Dist. #2 v. Celotex Corp. 559
3. The general rule is that a corporation will be looked on as a legal entity until sufficient reason to the contrary appears; that is, when the notion of legal entity is used to justify wrong and protect fraud. Branham v. McGinnis 664
4. Where various corporations, substantially owned by one individual are but instrumentalities through which such individual transacts his business, and, where such corporations are used as a cloak or shield to perpetrate a fraud, a court of law will examine the whole transaction, looking through corporate forms to the substance of things to protect the rights of innocent parties and to circumvent fraud. Branham v. McGinnis 664
5. Generally in the absence of fraud, one who does not choose to read a contract before signing it cannot later relieve himself of its burdens. Commodity Traders, Inc. v. Palmer 667

Frauds, Statute of.

1. Where the leading object or main purpose of a party promising to pay the debt of another is to promote his own interests, and not to become a guarantor, and the promise is made on sufficient consideration, the statute of frauds is not applicable and the promise will be valid although not in writing. Branham v. McGinnis 664
2. Where the principal object of a party promising to pay the debt of another is to promote his own interests, and not to become guarantor, and the promise is made on sufficient consideration, it will be valid though not in

writing. VSC, Inc. v. Lilja 844
3. A consideration to support a promise, not in writing, to pay the debt of another must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt. VSC, Inc. v. Lilja 844

Gambling.

1. A racetrack messenger service, whether or not it actually engages in gambling, is so intertwined with gambling that it falls within the State's plenary police power to regulate gaming activity. Pegasus of Omaha, Inc. v. State 755
2. Prohibition by the Legislature of operation of racetrack messenger services bears a reasonable relationship to the legitimate State interest in the regulation of gambling. No constitutional provision renders such prohibition unlawful. § 2-1221, R. R. S. 1943. Pegasus of Omaha, Inc. v. State 755

Governmental Subdivisions.

It shall be presumed, in the case of governmental subdivisions, such as municipalities, counties, power districts, or utility districts with no previous history of collective bargaining, that units of employees of less than departmental size shall not be appropriate. University Police Officers Union v. University of Nebraska 4

Grantor-Grantee.

1. As used in the law of conveyancing, an exception is a withdrawal from the operation of the grant of some part of the thing granted; thus, where real estate is granted, a portion thereof may be excepted from the terms of the conveyance and the thing excepted remains in the grantor the same as if no grant had been made. An exception in a deed is nothing more than a qualification by which some part of the estate is not conveyed, but which would have passed to the grantee but for the exception. Schaffert v. Hartman 271
2. As used in the law of conveyancing, a reservation gives rise to some new thing issuing out of that which is granted. A reservation, while not affecting the title to the thing granted, may reserve to the grantor a right to the use or enjoyment of a portion thereof, as, for example, an easement. Schaffert v. Hartman 271

Guardian and Ward.

1. The county court has exclusive jurisdiction to determine the state of accounts between the guardian and ward, and no action can be maintained upon a guardian's bond until the amount to be due from the guardian is first ascertained on the settlement of the guardian's final account by the county court. Feltz v. Universal Surety Co. 42
2. The order and decree of the county court as to the amount due from the guardian to his ward upon the final accounting and settlement of the guardian is final and conclusive upon the sureties on the guardian's bond, both as to the bond entered into upon his appointment or for any bond he may have been required to give under a license to sell his ward's real estate. Feltz v. Universal Surety Co. 42

Guest Statute.

1. The owner of a motor vehicle who entrusts it to an underage minor is liable to an injured guest only if the operator of the motor vehicle is guilty of gross negligence. Wagner v. Mines 143
2. Gross negligence within the meaning of the Nebraska guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Wagner v. Mines 143
3. A guest to recover damages from his host for injury received by the guest while riding in a motor vehicle operated by the host must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon by the guest and that it was the proximate cause of the accident and injury. Jones v. Foutch 246

Habeas Corpus.

1. The writ of habeas corpus is not a corrective remedy and is not a substitute for appeal or proceedings in error. Thus, where the question of a child's custody has been determined by a court of competent jurisdiction, that disposition will control and cannot be disregarded in subsequent habeas corpus proceedings involving the same parties. Schleuter v. McCuiston 101
2. The writ of habeas corpus is a proper remedy where a person entitled to custody of a child has been deprived of that custody by reason of a void judgment. Schleuter v. McCuiston 101

3. In a habeas corpus proceeding challenging extradition, in the absence of specific statutory authorization, the trial court or the District Court has power, in its discretion, to grant bail during the pendency of the proceedings, including an appeal to this court, in the same cases and under the same terms and conditions authorized by statute in preliminary extradition proceedings, or in other habeas corpus proceedings. State ex rel. Partin v. Jensen 441

Hearings.

1. In an error proceeding conflicting evidence will not be weighed, and the order of an administrative tribunal must be affirmed if the tribunal has acted within its jurisdiction and there is sufficient competent evidence, as a matter of law, to sustain its findings and order. Davis v. Board of Education 1
2. The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceedings in the District Court, and after trial and conviction any error in the ruling of the District Court on the 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. Lehman 341

Hearsay.

Hearsay evidence is not admissible except as otherwise provided by the statutes of this state. State v. Williams 649

Highways.

1. The duty of the board of county commissioners under section 39-1716, R. R. S. 1943, to lay out a public road, upon a showing that the statutory conditions of section 39-1713, R. R. S. 1943, exist, is ministerial. Singleton v. Kimball County Board of Commissioners 429
2. The county board is vested with general supervision and control of the public roads located in its county as provided in section 39-1402, R. R. S. 1943. Art-Kraft Signs, Inc. v. County of Hall 523
3. The statutory definition of public roads makes no distinction between county roads and township roads for the general purposes prescribed in section 39-1402, R. R. S. 1943. Art-Kraft Signs, Inc. v. County of Hall 523
4. In counties operating under the township organization, the township board possesses the limited power of general supervision of road and culvert work. Art-Kraft Signs, Inc. v. County of Hall 523
5. The granting of any type of interest in a county road or

a township road is vested in the county board in which such public road is situated. Art-Kraft Signs, Inc. v. County of Hall 523

Homesteads.

Where a contract for the sale of real estate includes both homestead and nonhomestead property, but is not duly executed and acknowledged, specific performance may be obtained of the nonhomestead land only if the contract is clearly severable as to the homestead and nonhomestead property. Struempler v. Peterson 173

Homicide.

The jury should only be instructed on those degrees of homicide that are supported by the evidence. State v. Fuller 233

Husband and Wife.

1. The common law doctrine of interspousal tort immunity pronounced in Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N. W. 297 (1927), is abrogated. Imig v. March 537
2. The personal representative of a decedent may maintain a wrongful death action based on the alleged negligence of decedent's spouse. Imig v. March 537

Indictments and Informations.

1. A preliminary investigation conducted by the prosecuting attorney and upon which he files a sworn complaint or information against the party accused, is a sufficient compliance with the requirement of the Fourth Amendment of the United States Constitution that no warrant shall issue but upon probable cause, supported by oath or affirmation. State v. Lehman 341
2. A trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice. State v. Lehman 341
3. The provision of the Constitution of the State of Nebraska permitting prosecutions for felonies by information, rather than by grand jury indictment, does not conflict with the Fifth and Fourteenth Amendments of the United States Constitution. State v. Lehman 341
4. District Courts are without jurisdiction to try on information one accused of committing a felony within the state unless the defendant is first accorded the privilege of a preliminary examination or waives the same. State v. Forbes 349

5. If a defendant is accorded a preliminary hearing and thereafter an amended information is filed charging a crime that includes some of the elements of the original crime charged without the addition of any element irrelevant to that original charge, no new preliminary hearing is required. State v. Forbes 349
6. A complaint that accused willfully attempted to evade an income tax or the payment thereof without specifying the means employed to attempt such evasion, does not include on its face the crime of filing a false return. State v. Forbes 349
7. Without a certified copy of the transcript of the evidence introduced at the preliminary hearing, and in the absence of a stipulation, no determination can be made in District Court that probable cause is established by an amended information, which on its face does not appear to be a lesser-included offense. State v. Forbes 349
8. No information shall be deemed invalid for any defect or imperfection which does not prejudice the substantial rights of the defendant upon the merits. State v. Mays 487
9. An information which charges theft from the person in the actual possession of personal property, as bailee, is sufficient. State v. Mays 487
10. A trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after the trial has begun where there is no showing of prejudice to the rights of the defendant. State v. Nielsen 847
11. The endorsement of additional names upon the information after trial has begun cannot be availed of as error where defendant makes no showing of prejudice or does not ask for postponement or continuance of the trial. State v. Nielsen 847

Injunction.

1. Injunction is a proper form of remedy in which to present the question of unlawful or improper exercise of the power of eminent domain and proof of the attempt to so deprive a private citizen of an estate in his property makes the resulting damage irreparable and the legal remedy inadequate. Monarch Chemical Works, Inc. v. City of Omaha 33
2. The sovereign nature of the power of eminent domain is such that the function of the courts is limited to a determination of whether constitutional provisions have been violated, and if they have not, the right of the Legislature to exercise it in any manner it sees fit must be

sustained. If the property be taken irregularly, or if the taking is not for a public purpose, the owner can proceed against the taker the same as any other trespasser by injunction, ejectment, or any other available remedy. Monarch Chemical Works, Inc. v. City of Omaha 33

Instructions.

1. Instructions should be considered together so that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside. Reicheneker v. Seward 68
2. A litigant is entitled to have the jury instructed only on those theories of the case which are presented by the pleadings and which are supported by competent evidence. Swiler v. Baker's Super Market, Inc. 183
3. This court may take cognizance of prejudicial error in instructions indicative of probable miscarriage of justice. Nat. Bank of Commerce Trust & Savings Assn. v. Mitchell 634
4. It is not error to refuse a jury instruction on a lesser-included offense unless, under a different but reasonable view, the evidence is sufficient to establish guilt of the lesser offense and also leave a reasonable doubt as to some particular element included in the greater offense but not the lesser. State v. Munn 810

Insurance.

1. An insurance policy is a contract, and where there is no uncertainty as to its meaning and the same is legal and not opposed to public policy, it will be enforced as it is made. Stark v. Grange Mut. Ins. Co. 154
2. A provision in an insurance policy reciting that failure to pay the premium due on a specified date will suspend the policy and relieve the company of liability for losses occurring during the period of suspension is a valid and enforceable provision. Stark v. Grange Mut. Ins. Co. 154
3. Where one intentionally does damage to the property of another in the mistaken belief that the property belongs to him, the property damage is not, within the meaning of an insurance policy, an "accident" neither expected nor intended from the standpoint of the insured. Foxley & Co. v. United States Fidelity & Guaranty Co. 165
4. A policy of insurance undertaking to pay damages because of injury to or destruction of property caused by accident does not cover damages caused by the trespass of the policyholder upon the land of another

when the damage is the natural result of the intentional act of the policyholder. Foxley & Co. v. United States Fidelity & Guaranty Co. 165

5. Under the facts of this case the insurance company issuing an automobile policy containing "uninsured motorist" coverage is held not entitled to relitigate, in a subsequent declaratory judgment action filed against it by its insured, whether the general verdict for damages returned by the jury, in a prior action brought by the insured against an uninsured motorist, contained any amounts for property damage, where counsel did not request a special verdict itemizing the type of damages included therein. Herrera v. American Standard Ins. Co. 477

6. The use of a declaratory judgment remedy is proper in this state to determine the rights and obligations of the insured and the insurance company under an uninsured motorist clause following the rendition of a final judgment against the uninsured motorist. Herrera v. American Standard Ins. Co. 477

7. Reasonable attorney's fees may properly be awarded in actions upon insurance policies under section 44-359, R. R. S. 1943. The amount to be allowed rests in the sound discretion of the court, considering the elements of the amount involved, the responsibility assumed, the questions of law raised, the time and labor necessarily required in the performance of duties, the professional diligence and skill required, and the result of the services performed. Herrera v. American Standard Ins. Co. 477

8. An injury is "expected or intended" from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury or if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law. Jones v. Norval 549

9. Where an 18-year-old man intentionally hits another person in the face with his fist, with force enough to knock the person unconscious, an intent to cause bodily injury can be inferred as a matter of law, and the subjective intent of the actor is immaterial. Jones v. Norval 549

10. Ambiguities in an insurance policy should be construed against the insurer and if a policy is fairly susceptible of two constructions and one affords coverage and the other does not, then the construction which affords coverage should be adopted. Complexity is not the same as ambiguity. Great Plains Ins. Co., Inc. v. Kalhorn 799

11. An insurance policy is a contract between the insur-

ance company and the insured. As such, the insurance company has the right to limit its liability by including those limitations in the policy definitions. If those definitions are clearly stated and unambiguous, the insurance company is entitled to have those terms enforced. Great Plains Ins. Co., Inc. v. Kalhorn 799

Intent.

1. A person claiming title by adverse possession must occupy and possess the land adversely to the record owners with the requisite intent and purpose to assert ownership. Rentschler v. Walnofer 84
2. Where the language used in the statute is ambiguous, recourse should be had to the legislative purposes. School District of Murray v. Lancaster 109
3. Where because a statute is ambiguous it is necessary to construe it, the principal objective is to determine legislative intention. School District of Murray v. Lancaster 109
4. Legislative intent is the cardinal rule in the construction of statutes. School District of Murray v. Lancaster 109
5. A fundamental principle of statutory construction is to ascertain the legislative intent and to give it effect. School District of Murray v. Lancaster 109
6. The reasons for the enactment of a statute and the purposes and objects of an act may be guides in an attempt to give effect to the main intent of the lawmakers. School District of Murray v. Lancaster 109
7. When the literal wording of a statute leads to an absurdity or to an illogical or unjust conclusion, the intention of the Legislature, as gathered from the entire act, will prevail. School District of Murray v. Lancaster 109
8. In determining the intent of the parties to a deed, the language of the instrument, together with the surrounding circumstances, are to be considered. Schaffert v. Hartman 271
9. Though there may be no assignment *in haec verba* of a mortgage and note, the facts may establish an equitable assignment of such interest. Equity disregards mere form, and no particular words or particular form of instrument is necessary to effect an equitable assignment. Any language, however informal, may amount to an equitable assignment if it shows the intention of the owner of a chose in action to transfer it, so that it will become the property of the transferee. Tilden v. Beckmann 293
10. The intention of the assignor must be to transfer a pres-

ent interest in the debt or fund or subject matter; if this is clearly expressed, the transaction is an assignment; otherwise not. Tilden v. Beckmann 293

11. A complaint that accused willfully attempted to evade an income tax or the payment thereof without specifying the means employed to attempt such evasion, does not include on its face the crime of filing a false return. State v. Forbes 349
12. The Nebraska Probate Code should be liberally construed to discover and make effective the intent of a decedent in distribution of his property. DeVries v. Rix 392
13. An injury is "expected or intended" from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury or if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law. Jones v. Norval 549
14. Where an 18-year-old man intentionally hits another person in the face with his fist, with force enough to knock the person unconscious, an intent to cause bodily injury can be inferred as a matter of law, and the subjective intent of the actor is immaterial. Jones v. Norval 549
15. The principal questions in determining whether a discharge by accord and satisfaction has taken place are: (1) Did the parties in fact agree that the performance rendered should operate as a final discharge and satisfaction; and (2) does that performance constitute a sufficient consideration for a return promise or for a discharge? Kurkowski v. Bailey 582
16. An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or actions evincing an intention to refuse performance in the future. Hooker and Heft v. Estate of Weinberger 674
17. Because the intent with which an act is done exists only in the mind of the actor, its proof must be inferred from the act itself and from the facts surrounding the act. State v. Sampson 786
18. Criminal intent is to be determined from the evidence and surrounding circumstances, and is therefore for the jury. State v. Sampson 786

Interest.

Where, in the process of liquidating and terminating the business of an installment loan licensee, a legal and valid installment loan obligation is assigned to a creditor of the licensee in satisfaction of an indebtedness of the licensee, the assignee acquires all the right, title,

and interest of the licensee and may sue for, collect, and receive any lawful rate of interest provided for in the installment loan agreement although the assignee does not have a license to engage in the installment loan business. Bateman v. Liggett 472

Intervention.

An intervenor in a proceeding before the Court of Industrial Relations may be required to make a reasonable showing of interest in support of the intervention. American Assn. of University Professors v. Board of Regents 628

Intoxicating Liquors.

1. The Nebraska Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied and courts are without authority to interfere with that discretion unless it has been abused. Harrigfeld v. Nebraska Liquor Control Commission 741
2. Where the record of the proceedings before the Nebraska Liquor Control Commission contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. Harrigfeld v. Nebraska Liquor Control Commission 741
3. The facts gathered and the evidence taken in this case are sufficient to establish that the order of the Nebraska Liquor Control Commission was not unreasonable or arbitrary. Harrigfeld v. Nebraska Liquor Control Commission 741

Invitor-Invitee.

1. Negligence is never presumed but must be proved by a preponderance of the evidence. The fact that an invitee falls upon the steps leading from the exit of a building to the sidewalk below does not raise any presumption of negligence on the part of its owner. Schwartz v. Selvage 158
2. There is no liability on the part of an invitor-owner to protect a business invitee against hazards which are known to the business invitee and are so apparent that he may reasonably be expected to discover them and be able to protect himself. Schwartz v. Selvage 158
3. If the invitee has knowledge of the conditions and circumstances in advance, or should have knowledge comparable to that of the invitor, then it may not be said that the invitor is guilty of actionable negligence. Schwartz v. Selvage 158

4. A mail carrier is treated as a business visitor or invitee, to whom the premises owner owes a duty of exercising reasonable care to keep the premises reasonably safe for their contemplated use or to give adequate warning of dangers of which the owner knew or should have known, and which were not reasonably apparent to the invitee. Schwartz v. Selvage 158

Judges.

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 the punishment to be imposed and the judge may consider probation reports, police reports, affidavits, and other information, including his own personal observations. State v. Kramer 658

Judgments.

1. In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Fabricators, Inc. v. Farmers Elevator, Inc. 150
2. The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong. Fabricators, Inc. v. Farmers Elevator, Inc. 150
3. The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318
4. A motion for a directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict. Lockhart v. Continental Cheese, Inc. 331
5. A review of the relevant books of an employer by a wage claimant, together with his own arithmetic and testimony of his conclusion of the amount due, is sufficient evidence to support a judgment for a salary bonus figured as an agreed percentage of gross profit. Lockhart v. Continental Cheese, Inc. 331
6. Under the provisions of section 24-537, R. S. Supp., 1976, a motion to vacate a default judgment in the county court must be made within 30 days after such judgment is entered and in the manner therein provided. Credit

Bureau of Hastings, Inc. v. George 338
7. A trial court has always had inherent power over its judgments to correct errors and mistakes therein, even to the extent of granting a new trial whether requested or not, as long as such action is taken within the same term of court at which the judgment was entered. DeVries v. Rix 392
8. A judgment of the District Court will not be set aside by this court on appeal unless it is clearly wrong and not supported by the evidence. Hyde v. Cleveland 420
9. In a jury-waived action the judgment of the trial court on the facts has the same force as a jury verdict and will not be set aside on appeal if there is sufficient competent evidence to support it. Scott-Hourigan Co. v. Deprez 493
10. In ascertaining whether the plaintiff is the real party in interest, the primary and fundamental test to be applied is whether the prosecution of the action will save the defendant from further harassment or vexation at the hands of other claimants to the same demand. If the defendant is not cut off from any just defense, offset, or counterclaim against the demand and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end. Redding v. Gibbs 727
11. The District Court has the power to enter judgment of dismissal for lack of prosecution. Such action rests in the sound discretion of the court and in the absence of an abuse of discretion will not be interfered with. State ex rel. Johnson v. Board of Supervisors of Gage County 764
12. The proper function of an order nunc pro tunc is to correct the record which has been made so it will truly reflect the action really had. The order must conform to and be no broader in its terms than the judgment or decree actually rendered. White v. White 782
13. A motion for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. 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. Davidson v. Simmons 804
14. This court in determining if findings of the District Court are sustained by evidence must consider the proof and permissible inferences therefrom most favorably to the successful party. VSC, Inc. v. Lilja 844
15. The findings of the trial court in an action at law have

the effect of a verdict of a jury and will not be disturbed on appeal unless they are clearly wrong. VSC, Inc. v. Lilja 844

Judicial Notice.

A court must take judicial notice of its own records in the case under consideration. State v. Norwood 201

Juries.

1. The verdict of a jury will not be disturbed unless it is clearly wrong. Reicheneker v. Seward 68
2. Instructions should be considered together so that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside. Reicheneker v. Seward 68
3. A litigant is entitled to have the jury instructed only on those theories of the case which are presented by the pleadings and which are supported by competent evidence. Swiler v. Baker's Super Market, Inc. 183
4. The jury should only be instructed on those degrees of homicide that are supported by the evidence. State v. Fuller 233
5. Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. In case of doubt or where reasonable minds might differ the evidence must be resolved in favor of the existence of gross negligence, in which case it is a question for the jury. Jones v. Foutch 246
6. The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceedings in the District Court, and after trial and conviction any error in the ruling of the District Court on the 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. Lehman 341
7. There was no reversible error where a juror on voir dire examination inadvertently failed to answer a question put to him as to whether any claim for personal injuries had ever been made against him, where the juror voluntarily called attention to his omission to the trial judge and informed him that notwithstanding the omission he could render a fair and impartial judgment in the action. Palma v. Barta 459
8. Where evidence improperly received during a trial is afterwards stricken by the judge and expressly withdrawn from the consideration of the jury, the error involved in its reception is ordinarily cured. Palma v.

Barta 459
9. Where a general verdict is returned by a jury not delineating the type and amount of damages included within the verdict, the court has no means of ascertaining what elements were considered by the jury, nor the basis on which the jury determined the amount of damages awarded. Where that information could have been obtained by requesting a special verdict, the information in question may not later be obtained by extended or subsequent litigation. Herrera v. American Standard Ins. Co. 477
10. As a general rule, the right to a jury trial is part of our fundamental law. State ex rel. Simpson v. Vondrasek 693
11. If a demand for a jury trial in municipal court is timely filed, a jury trial is mandated and no discretion upon the part of the court is involved. State ex rel. Simpson v. Vondrasek 693
12. Criminal intent is to be determined from the evidence and surrounding circumstances, and is therefore for the jury. State v. Sampson 786
13. 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. Sampson 786
14. A jury verdict may not be set aside unless it is clearly wrong and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party and all conflicts in the evidence, expert or lay, and the credibility of the witnesses is for the jury and not for the court. Kniesche v. Thos 852

Jurisdiction.

1. In the absence of specific statutory authority the Court of Industrial Relations is without jurisdiction to generally find and declare unfair labor practices. University Police Officers Union v. University of Nebraska 4
2. The authority of the Court of Industrial Relations is carefully circumscribed. Its procedures are prescribed by statute. Its jurisdiction is clearly defined and is limited to what are clearly legislative concerns. University Police Officers Union v. University of Nebraska 4
3. The county court has exclusive jurisdiction to determine the state of accounts between the guardian and ward, and no action can be maintained upon a guardian's bond until the amount to be due from the guardian is first ascertained on the settlement of the guardian's final account by the county court. Feltz v. Universal Surety Co. 42

4. An appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of the defendant, whether the defendant intended such waiver or not. Schleuter v. McCuiston ... 101
5. Section 43-201, R. S. Supp., 1976, which states that nothing in the Juvenile Court Act shall operate to deprive the District Courts of their chancery jurisdiction, does not limit the county court's jurisdiction to determine the custody of a minor child whose custody was subject to a preexisting District Court order where the county court's jurisdiction was invoked by the county attorney acting to protect the child pursuant to section 43-205, R. S. Supp., 1978. Schleuter v. McCuiston 101
6. In order to suspend jurisdiction of a state court in a criminal proceeding it is necessary to file a petition for removal in the appropriate United States District Court, to give notice to the adverse parties, and to file a copy of such petition with the clerk of the state court, all as provided by 28 U. S. C. A., § 1446. Once this is accomplished the state court shall proceed no further unless and until the case is remanded. State v. Lehman 341
7. Once the state court is notified of an order of remand by the federal court, it resumes jurisdiction and may proceed even in the face of an appeal of the remand order, unless the defendant obtains a stay of proceedings. State v. Lehman 341
8. The mere filing of a petition in bankruptcy does not deprive a state court or agency such as the Nebraska Public Service Commission of jurisdiction in a pending action against the bankrupt. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356
9. A prayer for affirmative relief, such as damages, is a general appearance and waives any objection to jurisdiction over the person. Peck v. Augustin Bros. Co. ... 574
10. Where one of the parties to a marriage places property beyond the reach of the other party, and thus forestalls a division of the property, that action does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets. Slama v. Slama 644

Labor and Labor Relations.

1. The Board of Regents of the University of Nebraska has primary authority for establishing its own schedules of wages, terms and conditions of employment, and hours of labor, but when an industrial dispute, as

defined by section 48-801 (7), R. R. S. 1943, arises, the Court of Industrial Relations may acquire jurisdiction for the limited purpose of resolving such dispute. Likewise, the Court of Industrial Relations may acquire jurisdiction for resolving an industrial dispute concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment or refusal to discuss terms or conditions of employment. University Police Officers Union v. University of Nebraska 4

2. In the absence of specific statutory authority the Court of Industrial Relations is without jurisdiction to generally find and declare unfair labor practices. University Police Officers Union v. University of Nebraska 4

3. The adoption of sections 48-801 to 48-838, R. R. S. 1943, was not intended to in any way remove the lawful responsibility nor the proper prerogative of public employers in the exercise of their recognized management rights or in the exercise of their lawful duties, except as may otherwise have been specifically entrusted to the Court of Industrial Relations in resolving industrial disputes as prescribed by the statutes. University Police Officers Union v. University of Nebraska 4

4. Public employees are generally not entitled to collective bargaining in the sense that private industrial employees are. University Police Officers Union v. University of Nebraska 4

5. The Court of Industrial Relations has power and authority upon its own initiative to make temporary findings and orders as may be necessary to preserve and protect the status of the parties' property and public interest involved pending final determination. That authority does not authorize the Court of Industrial Relations to make findings with regard to unfair labor practices or direct a public employer to take any more action than is necessary to preserve and protect the status of the parties' property and public interest involved pending final determination of the issues. University Police Officers Union v. University of Nebraska 4

6. It shall be presumed, in the case of governmental subdivisions, such as municipalities, counties, power districts, or utility districts with no previous history of collective bargaining, that units of employees of less than departmental size shall not be appropriate. University Police Officers Union v. University of Nebraska 4

7. The Court of Industrial Relations may acquire jurisdiction of an industrial dispute between the Board of Regents of the University of Nebraska and its employees

for the purpose of resolving the dispute. American Assn. of University Professors v. Board of Regents 628
8. Under the facts in this case a bargaining unit consisting of employees holding academic rank and administratively assigned to the University of Nebraska-Omaha was appropriate. American Assn. of University Professors v. Board of Regents 628
9. Department chairmen are properly included in bargaining units of faculty employees where their powers are effectively diffused among the department faculty pursuant to the principle of collegiality. American Assn. of University Professors v. Board of Regents 628
10. Matters which are predominately matters of educational policy and management prerogative are not subject to mandatory negotiation, whereas conditions of employment are. Metro. Tech. Com. Col. Ed. Assn. v. Metro. Tech. Com. Col. Area 832
11. A matter which is of fundamental, basic, or essential concern to an employee's financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative. Metro. Tech. Com. Col. Ed. Assn. v. Metro. Tech. Com. Col. Area 832
12. Those matters which involve foundational value judgments, which strike at the very heart of the educational philosophy of the particular institution, are management prerogatives and are not a proper subject for negotiation even though such decisions may have some impact on working conditions. Metro. Tech. Com. Col. Ed. Assn. v. Metro. Tech. Com. Col. Area 832

Larceny.

1. For purposes of determining the value of the property alleged to have been stolen, the value of money or property stolen by a series of acts from the same person may be aggregated. § 28-506, R. R. S. 1943. State v. Mays 487
2. For purposes of determining the value of the property alleged to have been stolen, the State may aggregate the value of property entrusted to the victim, as bailee, by another person and of property in which the victim has complete ownership. State v. Mays 487

Leases.

Unless the lease stipulates that a lessor shall inspect the premises to ascertain the need of repair, a contract to keep the interior in safe condition subjects the lessor to

liability if, but only if, reasonable care is not exercised after the lessee has given notice of the need for repair. Reicheneker v. Seward 68

Legislature.

1. When the literal wording of a statute leads to an absurdity or to an illogical or unjust conclusion, the intention of the Legislature, as gathered from the entire act, will prevail. School District of Murray v. Lancaster 109
2. Article I, section 24, of the Nebraska Constitution, does not bar either the Legislature or this court from making reasonable rules and regulations governing review on appeal. Nebraska State Bank v. Dudley 226
3. The Legislature has complete power over the organization, function, and finances of school districts. State ex rel. Halloran v. Hawes 405
4. The Legislature may make reasonable classifications of the objects of legislation for the purpose of legislating with reference thereto. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification. State ex rel. Halloran v. Hawes 405
5. It is competent for the Legislature to change statutes subject to the limitation that an action already barred may not be revived and that an action may not be unreasonably cut off. The applicable statute of limitations is the one in force at the time the suit is brought. Grand Island School Dist. #2 v. Celotex Corp. 559
6. Prohibition by the Legislature of operation of racetrack messenger services bears a reasonable relationship to the legitimate State interest in the regulation of gambling. No constitutional provision renders such prohibition unlawful. § 2-1221, R. R. S. 1943. Pegasus of Omaha, Inc. v. State 755

Lesser-Included Offenses.

1. If a defendant is accorded a preliminary hearing and thereafter an amended information is filed charging a crime that includes some of the elements of the original crime charged without the addition of any element irrelevant to that original charge, no new preliminary hearing is required. State v. Forbes 349
2. Without a certified copy of the transcript of the evidence introduced at the preliminary hearing, and in the absence of a stipulation, no determination can be made in District Court that probable cause is established by an amended information, which on its face does not ap-

pear to be a lesser-included offense. State v. Forbes 349
3. It is not error to refuse a jury instruction on a lesser-included offense unless, under a different but reasonable view, the evidence is sufficient to establish guilt of the lesser offense and also leave a reasonable doubt as to some particular element included in the greater offense but not the lesser. State v. Munn 810

Licenses and Permits.

1. The order and decree of the county court as to the amount due from the guardian to his ward upon the final accounting and settlement of the guardian is final and conclusive upon the sureties on the guardian's bond, both as to the bond entered into upon his appointment or for any bond he may have been required to give under a license to sell his ward's real estate. Feltz v. Universal Surety Co. 42
2. The Nebraska Liquor Control Commission is vested with discretion in the granting or denial of retail liquor licenses, but it may not act arbitrarily or unreasonably. Its discretion is to be exercised reasonably and not whimsically nor capriciously. Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission 176
Ortman v. Nebraska Liquor Control Commission 244
3. In a proceeding to obtain a liquor license, a resolution of the governing body of a municipality recommending approval of the application, which fails to receive the required number of votes to pass, is ineffective to constitute any official action of that governing body, amounts to no recommendation at all, and does not furnish competent evidence upon which to base a denial of a liquor license application by the Nebraska Liquor Control Commission. Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission 176
4. Absence of need alone is not a sufficient reason to deny an otherwise proper application for a liquor license. Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission 176
Ortman v. Nebraska Liquor Control Commission 244
5. Under section 60-1430, R. R. S. 1943, in the event of the sale or transfer of ownership of the franchisee's dealership by sale or transfer of the business, the franchisor shall give effect to such change in the franchise unless the transfer of the franchisee's license under the act is denied or the new owner is unable to obtain a license. S & T Motors v. General Motors Corp. 188
6. Where, in the process of liquidating and terminating the business of an installment loan licensee, a legal and

valid installment loan obligation is assigned to a creditor of the licensee in satisfaction of an indebtedness of the licensee, the assignee acquires all the right, title, and interest of the licensee and may sue for, collect, and receive any lawful rate of interest provided for in the installment loan agreement although the assignee does not have a license to engage in the installment loan business. Bateman v. Liggett 472

7. Lawyers who are granted licenses to practice their profession in this state thereby voluntarily assume certain obligations and duties as officers of the courts, and in the performance thereof they must conform to certain standards in relation to clients, to the courts, to the profession, and to the public. State ex rel. Nebraska State Bar Assn. v. Dunker 589
8. The Nebraska Liquor Control Commission has broad discretion in determining whether applications for licenses should be granted or denied and courts are without authority to interfere with that discretion unless it has been abused. Harrigfeld v. Nebraska Liquor Control Commission 741
9. Where the record of the proceedings before the Nebraska Liquor Control Commission contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary. Harrigfeld v. Nebraska Liquor Control Commission 741
10. The facts gathered and the evidence taken in this case are sufficient to establish that the order of the Nebraska Liquor Control Commission was not unreasonable or arbitrary. Harrigfeld v. Nebraska Liquor Control Commission 741

Liens.

1. When marshaling of assets is sought by a junior lien holder, equities are determined as of the time when such request is made. Omaha Nat. Bank v. Continental Western Corp. 264
2. When the holder of a first real estate mortgage upon property subsequently encumbered in separate parcels to junior lien holders seeks foreclosure, such first lien will be enforced against the entire security; junior lien holders will bear the burden of such first lien in proportion to the value of the parcels upon which they have claims; any surplus remaining after the satisfaction of the first lien should be apportioned among junior lien holders in proportion to the value of the parcels in which they have an interest. Omaha Nat. Bank v. Continental Western Corp. 264

3. Where judgment is recovered against one who has agreed to sell land but made no deed nor received the whole of the purchase money, it is a lien on the vendor's interest in the land. Monroe v. Lincoln City Employees Credit Union 702

Livestock.

1. A cash seller of cattle may reclaim the cattle from the buyer where the buyer dishonors the draft drawn on the buyer by the seller pursuant to the understanding of the parties. Peck v. Augustin Bros. Co. 574
2. A reclamation of cattle sold to a cash purchaser is not a voidable preference in bankruptcy. Peck v. Augustin Bros. Co. 574

Mandamus.

1. To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear. State ex rel. Halloran v. Hawes 405
2. Mandamus is available to enforce the performance of ministerial duties of a board of county commissioners but is not available if the duties are quasi-judicial or discretionary. Singleton v. Kimball County Board of Commissioners 429
3. To warrant the issuance of a writ of mandamus to compel official action: (1) The duty must be imposed upon the official by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear. Singleton v. Kimball County Board of Commissioners 429
4. In a mandamus action, findings of fact by the trial court upon conflicting evidence will not be disturbed on appeal unless clearly wrong. Singleton v. Kimball County Board of Commissioners 429
5. Madamus will lie to compel an inferior court to hear and determine a cause, if within its jurisdiction and when properly brought into the court. Mandamus will not lie to coerce judicial discretion of an inferior court, nor to predetermine the character of the judgment that the court shall enter. State ex rel. Simpson v. Vondrasek 693
6. It is a general rule in this jurisdiction that mandamus will not issue to review the action of an inferior court where there is an adequate remedy at law, and the writ may not be used to usurp or take the place of a writ of error or an appeal. However, when the remedy,

though available, is inadequate, mandamus will lie. State ex rel. Simpson v. Vondrasek 693
7. Where a specific duty is provided for by statute, mandamus may be invoked to enforce it, if denied; and the party entitled to such relief will not be forced to pursue his remedy by circuitous and dilatory action. State ex rel. Simpson v. Vondrasek 693

Mechanic's Liens.

The provisions of section 52-103, R. S. Supp., 1978, as to the making of an affidavit of the giving of notice of mechanic's lien to the landowner, are directory and not mandatory; irregularities in such affidavit will not render the lien void and unenforceable. Sherwood v. Tucker 56

Mental Health.

1. Under the provisions of section 43-209(5), R. R. S. 1943, parental rights may be terminated where parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such conditions will exist for a prolonged, indeterminate period. State v. Norwood 201
2. Mental commitment proceedings are judicial in nature and the District Court must review the determination of the mental health board de novo on the record. Hill v. County Board of Mental Health 610
3. This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless this court can say as a matter of law that it is not supported by clear and convincing proof. Hill v. County Board of Mental Health 610
4. An act within the meaning of the Nebraska Mental Health Commitment Act is "recent" if the time interval between it and the hearing of the mental health board is not greater than that which would indicate processing of the complaint was carried on with reasonable diligence under the circumstances existing, having due regard for the rights and welfare of the alleged mentally ill dangerous person and the protection of society in general. Hill v. County Board of Mental Health 610
5. The existence of mental illness and the presence of a threat of violence cannot be examined in isolated vacuums of semantics under the Nebraska Mental Health Commitment Act. Although either standing alone may be insufficient to support a commitment, the

two considered together, under all the circumstances, may compel a finding that there is clear and convincing proof that one is a mentally ill dangerous person. Jones v. County Board of Mental Health 618
6. As a general rule, spendthriftiness and improvidence, with nothing more, do not establish inability to provide for basic human needs, including food, clothing, shelter, essential medical care, or personal safety, within the meaning of the Nebraska Mental Health Commitment Act. Petersen v. County Board of Mental Health 622
7. A final order of the District Court in a mental health commitment proceeding which is not supported by clear and convincing proof must be set aside on appeal. Petersen v. County Board of Mental Health 622

Minors.

1. The writ of habeas corpus is not a corrective remedy and is not a substitute for appeal or proceedings in error. Thus, where the question of a child's custody has been determined by a court of competent jurisdiction, that disposition will control and cannot be disregarded in subsequent habeas corpus proceedings involving the same parties. Schleuter v. McCuiston 101
2. The writ of habeas corpus is a proper remedy where a person entitled to custody of a child has been deprived of that custody by reason of a void judgment. Schleuter v. McCuiston 101
3. Section 43-201, R. S. Supp., 1976, which states that nothing in the Juvenile Court Act shall operate to deprive the District Courts of their chancery jurisdiction, does not limit the county court's jurisdiction to determine the custody of a minor child whose custody was subject to a preexisting District Court order where the county court's jurisdiction was invoked by the county attorney acting to protect the child pursuant to section 43-205, R. S. Supp., 1978. Schleuter v. McCuiston 101
4. The owner of a motor vehicle who entrusts it to an underage minor is liable to an injured guest only if the operator of the motor vehicle is guilty of gross negligence. Wagner v. Mines 143
5. An action seeking modification of custody or possession rights over minor children is a proceeding ancillary to the original divorce, and the District Court retains authority to exercise discretion in the granting of attorney's fees. Nimmer v. Nimmer 503
6. Sections 43-202 and 43-209, R. S. Supp., 1978, which, respectively, defined parental responsibilities and prescribe the conditions under which parental rights may

be terminated, are sufficiently definite and are not void for vagueness. The constitutional requirement that statutory language must be reasonably certain or be held void for vagueness is satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding; the due process clause requires that the law give sufficient warning of conduct which is forbidden but it does not require a precise checklist of parental responsibilities and prohibited behavior. State v. Metteer 515

7. Section 43-209, R. S. Supp., 1978, is not void because it allows the judge to consider the circumstances of individual cases in determining whether to terminate parental rights. State v. Metteer 515
8. The State has a compelling interest in protecting minor children from abuse and neglect, and that interest may be implemented by statutes such as sections 43-202 and 43-209, R. S. Supp., 1978. State v. Metteer 515
9. A decree fixing custody of minor children will not be modified unless there has been a change of circumstances, indicating that the person having custody is unfit for that purpose, or that the best interests of the children require such action. Duff v. Duff 767
10. In determining the question of who should have the care and custody of minor children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children. Duff v. Duff 767
11. In any custody determination, the discretion of the trial court in such a situation is necessarily subjective and must be founded to a significant extent upon its observation of the parties and the review of all the minute details that affect the general welfare and the best interests of the children. It also must necessarily be prospective in nature. Duff v. Duff 767
12. A custody order of the trial court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Duff v. Duff 767

Miranda Rights.

1. The general rule applicable to custodial interrogations by the police is that if the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. State v. Weinacht 124
2. "Interrogation" occurs when the subject is placed un-

der a compulsion to speak. State v. Weinacht 124
3. Where during a custodial interrogation the individual being questioned indicates he does not wish to talk without the presence of an attorney, and the officer, seeking only clarification of the individual's intention not to talk, asks an additional question for that purpose, and the individual then answers the questioning officer by agreeing to talk, his answer constitutes an explicit, clear, and unequivocal waiver of his prior request for assistance of counsel. State v. Weinacht 124

Mistrial.

A motion to declare a mistrial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion. Reicheneker v. Seward 68

Mortgages.

1. A court has jurisdiction and power to include, within a decree of foreclosure of a real estate mortgage, provisions for the disposition of the proceeds of the sale of the property. Omaha Nat. Bank v. Continental Western Corp. 264
2. When the holder of a first real estate mortgage upon property subsequently encumbered in separate parcels to junior lien holders seeks foreclosure, such first lien will be enforced against the entire security; junior lien holders will bear the burden of such first lien in proportion to the value of the parcels upon which they have claims; any surplus remaining after the satisfaction of the first lien should be apportioned among junior lien holders in proportion to the value of the parcels in which they have an interest. Omaha Nat. Bank v. Continental Western Corp. 264
3. Where the mortgagee has made an assignment of the mortgage, and the assignee has not reassigned or redelivered it to the mortgagee at the time a foreclosure action is commenced by the mortgagee, the mortgagee is not the real party in interest to bring the action. Redding v. Gibbs 727
4. A court of equity has the power to relieve a mortgagor from the effect of an operative acceleration clause when the default of the mortgagor is the result of some unconscionable or inequitable conduct of the mortgagee. Redding v. Gibbs 727
5. Equity will grant relief to prevent an acceleration of a mortgage debt predicated on an inadvertent default where there are indications that the mortgagee had

knowledge of the default and, subsequent to the expiration of the grace period, in personal dealings with the mortgagor failed to inquire about the delayed payment but immediately thereafter brought an action to foreclose. Redding v. Gibbs 727

6. When an advantage is unconscionable depends on the circumstances. The gravity of the fault must be compared with the gravity of the hardship. "Unconscionable" conduct means conduct that is monstrously harsh, that is shocking to the conscience. Redding v. Gibbs 727

Motions, Rules, and Orders.

1. A motion for leave to file an amended answer, particularly after the matter is submitted, is addressed to the sound discretion of the trial court. Miller v. Westwood Homes, Inc. 29
2. When the evidence is conflicting regarding a motion for the suppression of evidence the decision upon the motion is for the court and will not be reversed on appeal in the absence of an abuse of discretion. State v. Weinacht 124
3. A motion for new trial filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective and does not constitute a nullity if the record shows that the motion for new trial relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the motion for new trial relates. Pfeiffer v. Pfeiffer 137
4. When the evidence viewed most favorably for plaintiff fails to disclose the existence of gross negligence, the trial court is obligated to sustain a motion to direct a verdict for the defendant. Wagner v. Mines 143
5. A motion for a directed verdict is 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. Schwartz v. Selvage 158
6. For the purpose of evaluating a motion for a directed verdict or a dismissal of a cause of action, all doubt must be resolved in favor of the party against whom the verdict or dismissal is urged. The truth of all evidence he has submitted must be assumed and he must be given the benefit of all inferences therefrom. The question must be whether, in view of these assumptions, the jury could properly bring in a verdict in his favor. Jones v. Foutch 246

7. A motion for a directed verdict is an absolute prerequisite to a motion for judgment notwithstanding the verdict. Lockhart v. Continental Cheese, Inc. 331
8. A party aggrieved by a verdict may move for a new trial upon the grounds that the verdict is "not sustained by sufficient evidence, or is contrary to law" as provided in section 25-1142, R. R. S. 1943, and the trial court has the power and authority to grant a new trial where such legal cause or reason therefor appears in the record and timely appropriate motions for a new trial have been filed, notwithstanding the fact that no preliminary motion for a directed verdict has been made. Lockhart v. Continental Cheese, Inc. 331
9. A motion to vacate or modify which is filed within the time limitation contemplated by section 30-2437, R. R. S. 1943, is similar in nature to a motion for a new trial in District Court, and the overruling of such motion is a final order itself which extends the 30-day appeal time from the entry of the original order complained of to the date upon which the motion to vacate or modify is overruled. DeVries v. Rix 392
10. An appeal from an order nunc pro tunc is limited to whether that order was properly made and does not afford appellant the right to appeal from the decree to which the order is directed. White v. White 782
11. The proper function of an order nunc pro tunc is to correct the record which has been made so it will truly reflect the action really had. The order must conform to and be no broader in its terms than the judgment or decree actually rendered. White v. White 782
12. A motion for judgment notwithstanding the verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. 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. Davidson v. Simmons 804
13. A motion for mistrial is inappropriate when it relates to rulings of the court on the admissibility of evidence and only the underlying assignment of error relating to the challenged admission of evidence will be considered on appeal by this court. Kniesche v. Thos 852

Motor Carriers.

1. Under the provisions of section 75-315, R. R. S. 1943, the Nebraska Public Service Commission may, upon complaint or on the Commission's own initiative after no-

tice and hearing, suspend, revoke, or change a certificate of a common carrier for willful failure to comply with any of the provisions of sections 75-101 to 75-801, R. R. S. 1943. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356

2. The term "willful failure," as used in the statute giving the Nebraska Public Service Commission jurisdiction and authority to suspend, change, or revoke a certificate of public convenience and necessity for failure to comply with the provisions of the Motor Carrier Act, is such behavior through acts of commission or omission which justifies a belief that there was an intent entered into and characterizing the failure complained of. A failure through oversight to file the annual report required by section 75-116, R. R. S. 1943, would not justify the revocation of an authority. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356

3. An act or failure to act within the provisions of section 75-315, R. R. S. 1943, may be willful within the meaning of the statute even though a decision to cease operations under the certificate may be the consequence of circumstances over which the carrier may have no absolute control such as financial failure. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356

4. A trustee in bankruptcy, receiver, custodian in possession under a bankruptcy arrangement, etc., of a carrier, has the rights in the certificate of convenience and necessity of the carrier which are provided by section 75-322, R. R. S. 1943, and these rights must be respected by the Nebraska Public Service Commission. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356

Motor Vehicles.

1. The owner of a motor vehicle who entrusts it to an underage minor is liable to an injured guest only if the operator of the motor vehicle is guilty of gross negligence. Wagner v. Mines 143

2. Gross negligence within the meaning of the Nebraska guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Wagner v. Mines 143

3. The Motor Vehicle Industry Licensing Act regulates and restricts the termination of dealer franchises and

creates rights in franchisees which would not exist independent of the statute. S & T Motors v. General Motors Corp. 188
4. Under section 60-1429(2), R. R. S. 1943, change of ownership of a franchisee's dealership is not good cause for termination of the franchise unless the franchisor proves that the change of ownership will be substantially detrimental to the distribution of franchisor's motor vehicle in the community. S & T Motors v. General Motors Corp. 188
5. Under section 60-1430, R. R. S. 1943, in the event of the sale or transfer of ownership of the franchisee's dealership by sale or transfer of the business, the franchisor shall give effect to such change in the franchise unless the transfer of the franchisee's license under the act is denied or the new owner is unable to obtain a license. S & T Motors v. General Motors Corp. 188
6. The essential concept involved in the term dealership, as used in the Motor Vehicle Industry Licensing Act, is the "business" of the dealer. S & T Motors v. General Motors Corp. 188
7. The real estate on which the business is operated is not necessarily an integral part of a dealership. S & T Motors v. General Motors Corp. 188
8. The term "motor vehicle" as used in section 60-1429(2), R. R. S. 1943, refers to the motor vehicles covered by the franchise and does not refer to all of the motor vehicles which a franchisor may distribute through various divisions and separate franchises. S & T Motors v. General Motors Corp. 188
9. A guest to recover damages from his host for injury received by the guest while riding in a motor vehicle operated by the host must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon by the guest and that it was the proximate cause of the accident and injury. Jones v. Foutch 246
10. Significant in the determination of gross negligence is the presence or imminence of danger that is visible to, known by, or made known to a driver, together with persistence in negligence, heedless of the consequences. Jones v. Foutch 246
11. Excessive speed of a vehicle does not necessarily establish gross negligence, although it is a factor to be considered. Jones v. Foutch 246
12. A motorist who sees anything upon a highway at night which is abnormal and in itself a warning and takes no precaution by way of reducing speed, or otherwise, is guilty, as a matter of law, of more than slight negli-

gence which will bar his recovery for damage contributed to by his lack of care. Hyde v. Cleveland 420

13. As a general rule, it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision within the area lighted by his headlights. Hyde v. Cleveland 420

14. A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages resulting from a collision with a passing train. Thomas v. Burlington Northern R.R., Inc. 507

15. All persons using a railroad crossing are required to exercise a degree of caution that is commensurate with the danger. Thomas v. Burlington Northern R.R., Inc. 507

16. The classification of a vehicle as a truck-tractor under section 39-602, R. S. Supp., 1978, is not changed by the addition of a box to the vehicle if the design and primary use of the vehicle is to draw other vehicles, and any load carried by the truck-tractor, other than a part of the weight of the vehicle and the load so drawn, is merely incidental to its primary use. State v. Speicher and Herrick 535

17. Except where there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for a violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment to the Constitution of the United States. State v. Kretchmar 663

18. A state may develop acceptable methods for spot checking the validity of motor vehicle registrations and operators' licenses that involve little intrusion or do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one acceptable alternative. State v. Kretchmar 663

Municipal Corporations.

1. The taking of substandard or blighted areas by a city for redevelopment and resale in accordance with an approved redevelopment plan which is in conformity with

a general plan for the municipality as a whole, all as provided for in the Nebraska Community Development Law, section 18-2101 et seq., R. R. S. 1943, is a proper public use for a municipality. Monarch Chemical Works, Inc. v. City of Omaha 33

2. The acquisition of property whether by voluntary methods or by eminent domain to carry out a redevelopment plan must be provided for in and be in accordance with such plan. Monarch Chemical Works, Inc. v. City of Omaha 33

3. In a proceeding to obtain a liquor license, a resolution of the governing body of a municipality recommending approval of the application, which fails to receive the required number of votes to pass, is ineffective to constitute any official action of that governing body, amounts to no recommendation at all, and does not furnish competent evidence upon which to base a denial of a liquor license application by the Nebraska Liquor Control Commission. Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission 176

4. Under sections 14-101, 14-102, and 14-102.01, R. R. S. 1943, the city of Omaha is given power by the State of Nebraska to enact ordinances relating to the safety and security of its citizens, and to impose fines, forfeitures, penalties, and imprisonment for the violation thereof. State v. Belitz 375

5. Section 25.11.010 of the Omaha municipal code, establishing the misdemeanor offense of "Assault; Battery" is a proper and valid exercise of the power granted to the city under its home rule charter to establish ordinances for the safety and security of the city and the citizens thereof. State v. Belitz 375

6. Section 25.11.010, of the Omaha municipal code, and sections 28-408.01 to 28-408.05, R. R. S. 1943, the sexual assault felony statutes, define and constitute separate and distinct offenses under the law, notwithstanding they may encompass elements in common. State v. Belitz 375

7. Section 29-615, R. R. S. 1943, does not mandate that a municipal judge, engaged in the trial of an offense charged under section 25.11.010 of the Omaha municipal code, must immediately stop further proceedings and act as an examining magistrate to determine if the defendant must be charged under the sexual assault statutes of the state. State v. Belitz 375

8. There is no constitutional requirement that property owners be given notice of the creation of an improvement district although creation of the district may fore-

close any opportunity of the property owners to protest the making of the improvement. First Assembly of God Church v. City of Scottsbluff 452

9. The constitutional requirement is that there be notice to the property owners of a special assessment and an opportunity to contest its validity and amount before the assessment becomes a charge on the property. First Assembly of God Church v. City of Scottsbluff ... 452
10. Section 16-667, R. R. S. 1943, as it existed in 1975, authorized a city of the first class to create a water district to extend water service within the city limits without giving notice of the creation of the district to property owners affected. First Assembly of God Church v. City of Scottsbluff 452
11. Validity of special assessment for street improvement was properly challenged by petition in error timely filed after appearance before city council sitting as board of equalization. Turner v. City of North Platte 706
12. The authorization for special assessment for street improvements found at sections 18-2001 to 18-2003, R. R. S. 1943, does not extend to a street section already paved. Turner v. City of North Platte 706
13. The legislative power and authority delegated to a city to construct local improvements and levy assessments for payments thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer. Turner v. City of North Platte 706
14. Where special assessments against property to pay the costs of paving are void, knowledge of the proceedings and of the construction of the improvement will not estop the owner from avoiding liability therefor, and they cannot be enforced solely on the ground of the benefits of the improvements to the owners of abutting lots or lands. Turner v. City of North Platte 706

Negligence.

1. An excavating owner is liable, irrespective of negligence, for damages caused by depriving adjoining land, in its natural state, of lateral support even if an independent contractor performed the work, if the damage was a necessary consequence of the excavation. Crnkovich v. Scaletta 22
2. Where a trespass is committed by an independent contractor, the other party to the contract is not liable for the trespass unless such other party controls the work or authorizes the specific act. Crnkovich v. Scaletta .. 22

3. Unless the lease stipulates that a lessor shall inspect the premises to ascertain the need of repair, a contract to keep the interior in safe condition subjects the lessor to liability if, but only if, reasonable care is not exercised after the lessee has given notice of the need for repair. Reicheneker v. Seward 68
4. The owner of a motor vehicle who entrusts it to an underage minor is liable to an injured guest only if the operator of the motor vehicle is guilty of gross negligence. Wagner v. Mines 143
5. Gross negligence within the meaning of the Nebraska guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Wagner v. Mines 143
6. When the evidence viewed most favorably for plaintiff fails to disclose the existence of gross negligence, the trial court is obligated to sustain a motion to direct a verdict for the defendant. Wagner v. Mines 143
7. Negligence is never presumed but must be proved by a preponderance of the evidence. The fact that an invitee falls upon the steps leading from the exit of a building to the sidewalk below does not raise any presumption of negligence on the part of its owner. Schwartz v. Selvage 158
8. There is no liability on the part of an invitor-owner to protect a business invitee against hazards which are known to the business invitee and are so apparent that he may reasonably be expected to discover them and be able to protect himself. Schwartz v. Selvage 158
9. If the invitee has knowledge of the conditions and circumstances in advance, or should have knowledge comparable to that of the invitor, then it may not be said that the invitor is guilty of actionable negligence. Schwartz v. Selvage 158
10. A person who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. Schwartz v. Selvage 158
11. A mail carrier is treated as a business visitor or invitee, to whom the premises owner owes a duty of exercising reasonable care to keep the premises reasonably safe for their contemplated use or to give adequate warning of dangers of which the owner knew or should have known, and which were not reasonably apparent

to the invitee. Schwartz v. Selvage 158
12. In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in her favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for the jury. Swiler v. Baker's Super Market, Inc. 183
13. Negligence is a question of fact and may be proven by circumstantial evidence and physical facts. However, the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with a reasonable certainty the negligent act charged. Swiler v. Baker's Super Market, Inc. 183
14. Upon the issue of negligence or contributory negligence, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance under similar circumstances of acts like those which are alleged to have been done negligently is generally competent evidence. Swiler v. Baker's Super Market, Inc. 183
15. A guest to recover damages from his host for injury received by the guest while riding in a motor vehicle operated by the host must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon by the guest and that it was the proximate cause of the accident and injury. Jones v. Foutch 246
16. Gross negligence means great and excessive negligence; that is, negligence in a very high degree. It indicates the absence of slight care in the performance of a duty. Jones v. Foutch 246
17. Significant in the determination of gross negligence is the presence or imminence of danger that is visible to, known by, or made known to a driver, together with persistence in negligence, heedless of the consequences. Jones v. Foutch 246
18. Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule. In case of doubt or where reasonable minds might differ the evidence must be resolved in favor of the existence of gross negligence, in which case it is a question for the jury. Jones v. Foutch 246
19. Excessive speed of a vehicle does not necessarily establish gross negligence, although it is a factor to be

considered. Jones v. Foutch 246
20. Although any one of several acts of negligence proximately causing an accident might not, standing alone, constitute gross negligence, no one act should be separated from the whole of the acts and held to be the independent cause of the accident. The several acts are to be considered as a whole to determine whether or not gross negligence has been established. Jones v. Foutch 246
21. A motorist who sees anything upon a highway at night which is abnormal and in itself a warning and takes no precaution by way of reducing speed, or otherwise, is guilty, as a matter of law, of more than slight negligence which will bar his recovery for damage contributed to by his lack of care. Hyde v. Cleveland 420
22. As a general rule, it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision within the area lighted by his headlights. Hyde v. Cleveland 420
23. A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages resulting from a collision with a passing train. Thomas v. Burlington Northern R.R., Inc. 507
24. All persons using a railroad crossing are required to exercise a degree of caution that is commensurate with the danger. Thomas v. Burlington Northern R.R., Inc. 507
25. The common law doctrine of interspousal tort immunity pronounced in Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N. W. 297 (1927), is abrogated. Imig v. March 537
26. The personal representative of a decedent may maintain a wrongful death action based on the alleged negligence of decedent's spouse. Imig v. March 537
27. An injury is "expected or intended" from the standpoint of the insured if a reason for an insured's act is to inflict bodily injury or if the character of the act is such that an intention to inflict an injury can be inferred as a matter of law. Jones v. Norval 549
28. An action grounded in tort must be commenced within 4 years of accrual of the cause of action. § 25-207 (3), R. R. S. 1943. Grand Island School Dist. #2 v. Celotex

Corp. 559

29. The fireman's rule negates liability to firemen by one whose negligence causes or contributes to a fire which in turn causes injury or death of a fireman. Buchanan v. Prickett & Son, Inc. 684

30. The rescue doctrine contemplates a voluntary act by one who, in an emergency and prompted by spontaneous human motives to save human life, attempts a rescue which he had no duty to attempt by virtue of the legal obligation or duty fastened on him by his employment. It is not contributory negligence for a volunteer to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value of the advantage to be realized from meeting the danger and attempting to remove or eliminate the hazard, i.e., the less the danger to the third party, the less risk the volunteer is justified in taking. Buchanan v. Prickett & Son, Inc. 684

31. The underlying basis of the fireman's rule is that the ordinary risks which a fireman encounters in the performance of his duty in fighting fires and protecting life and property are those which he has assumed a duty to perform and to which he has assumed the risk in a "primary" sense; that is, the risk is one which the fireman has engaged to encounter by virtue of his employment and one which it is his duty to perform and thus the person who negligently caused the fire has not breached a duty owed the fireman. In the absence of any statute or ordinance prescribing a duty on the part of the owner or possessor of the property to members of a public fire department, the owner is not liable for such injuries to firemen except those proximately resulting from willful or wanton negligence or a designed injury, except in certain cases where there may be the duty to warn of hidden danger or peril known to the owner or occupant but unknown to or unobservable by the fireman in the exercise of ordinary care. Buchanan v. Prickett & Son, Inc. 684

New Trial.

1. A motion for new trial filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective and does not constitute a nullity if the record shows that the motion for new trial relates to the decision which has been announced

by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the motion for new trial relates. Pfeiffer v. Pfeiffer 137

2. A party aggrieved by a verdict may move for a new trial upon the grounds that the verdict is "not sustained by sufficient evidence, or is contrary to law" as provided in section 25-1142, R. R. S. 1943, and the trial court has the power and authority to grant a new trial where such legal cause or reason therefor appears in the record and timely appropriate motions for a new trial have been filed, notwithstanding the fact that no preliminary motion for a directed verdict has been made. Lockhart v. Continental Cheese, Inc. 331
3. A trial court has always had inherent power over its judgments to correct errors and mistakes therein, even to the extent of granting a new trial whether requested or not, as long as such action is taken within the same term of court at which the judgment was entered. DeVries v. Rix 392
4. In a post conviction proceeding where the evidence establishes a denial or infringement of the right to counsel which occurred only at the appeal stage of the former criminal proceedings, the District Court has jurisdiction and power to grant a new direct appeal without granting a new trial or setting aside the original conviction and sentence. State v. Chipps 715
5. An actual offer of evidence upon an issue is not necessary in order to preserve the question for review if the trial court has theretofore ruled that no proof upon that issue would be received in any event, and the alleged error in doing so has been appropriately preserved by motion for new trial or otherwise. Quinlan v. City of Omaha 814
6. During the same term of court a trial court has inherent power, over its judgments and orders, to correct errors and mistakes appearing of record, even to the extent of granting a new trial. Quinlan v. City of Omaha 814
7. A confusing situation prejudicial to a party's rights which has been created by the trial court is sufficient ground to support its granting of a new trial. Quinlan v. City of Omaha 814

Notice.

1. Under the Uniform Commercial Code rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer sea-

sonably notifies the seller. Fabricators, Inc. v. Farmers Elevator, Inc. 150
2. Under the provisions of section 75-315, R. R. S. 1943, the Nebraska Public Service Commission may, upon complaint or on the Commission's own initiative after notice and hearing, suspend, revoke, or change a certificate of a common carrier for willful failure to comply with any of the provisions of section 75-101 to 75-801, R. R. S. 1943. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356
3. Public hearings, and notice thereof, are a prerequisite to an order changing valuations by the State Board of Equalization and Assessment. While an appearance might properly be made in some manner other than personal appearance, it must be made within the time limits legally set by the State Board. DeCamp v. State Board of Equalization and Assessment 366
4. There is no constitutional requirement that property owners be given notice of the creation of an improvement district although creation of the district may foreclose any opportunity of the property owners to protest the making of the improvement. First Assembly of God Church v. City of Scottsbluff 452
5. The constitutional requirement is that there be notice to the property owners of a special assessment and an opportunity to contest its validity and amount before the assessment becomes a charge on the property. First Assembly of God Church v. City of Scottsbluff ... 452
6. Section 16-667, R. R. S. 1943, as it existed in 1975, authorized a city of the first class to create a water district to extend water service within the city limits without giving notice of the creation of the district to property owners affected. First Assembly of God Church v. City of Scottsbluff 452

Options.

1. An option to purchase real estate is a unilateral contract by which the optionor agrees with the optionee that the optionee has the right to buy certain property, according to the terms and conditions of the option. Commuter Developments and Investments, Inc. v. Gramlich 569
2. An option does not constitute an estate or interest in land but it is a mere right of election to accept or reject a present offer within the time and upon the terms designated. Commuter Developments and Investments, Inc. v. Gramlich 569
3. A consideration for an agreement requires that there

be a benefit on one side or a detriment suffered or a service done on the other. Commuter Developments and Investments, Inc. v. Gramlich 569

Ordinances.

1. Under sections 14-101, 14-102, and 14-102.01, R. R. S. 1943, the city of Omaha is given power by the State of Nebraska to enact ordinances relating to the safety and security of its citizens, and to impose fines, forfeitures, penalties, and imprisonment for the violation thereof. State v. Belitz 375
2. Section 25.11.010 of the Omaha municipal code, establishing the misdemeanor offense of "Assault; Battery" is a proper and valid exercise of the power granted to the city under its home rule charter to establish ordinances for the safety and security of the city and the citizens thereof. State v. Belitz 375
3. Section 25.11.010, of the Omaha municipal code, and sections 28-408.01 to 28-408.05, R. R. S. 1943, the sexual assault felony statutes, define and constitute separate and distinct offenses under the law, notwithstanding they may encompass elements in common. State v. Belitz 375
4. Section 29-615, R. R. S. 1943, does not mandate that a municipal judge, engaged in the trial of an offense charged under section 25.11.010 of the Omaha municipal code, must immediately stop further proceedings and act as an examining magistrate to determine if the defendant must be charged under the sexual assault statutes of the state. State v. Belitz 375

Parent and Child.

1. Generally, visitation relates to continuing and fostering the normal parental relationship of the noncustodial parent with the minor child or children of the marriage. Heyne v. Kucirek 59
2. In determining reasonable visitation rights, the best interests and welfare of the child are the primary consideration, considering age, health, welfare, educational and social needs, the need for a stable home environment free of unsettling influences, the fitness of the noncustodial parent for such visitation, and the relationship of the child to that parent. Heyne v. Kucirek 59
3. Under the provisions of section 43-209(5), R. R. S. 1943, parental rights may be terminated where parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such conditions will ex-

ist for a prolonged, indeterminate period. State v. Norwood 201

4. Sections 43-202 and 43-209, R. S. Supp., 1978, which, respectively, define parental responsibilities and prescribe the conditions under which parental rights may be terminated, are sufficiently definite and are not void for vagueness. The constitutional requirement that statutory language must be reasonably certain or be held void for vagueness is satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding; the due process clause requires that the law give sufficient warning of conduct which is forbidden but it does not require a precise checklist of parental responsibilities and prohibited behavior. State v. Metteer 515
5. Section 43-209, R. S. Supp., 1978, is not void because it allows the judge to consider the circumstances of individual cases in determining whether to terminate parental rights. State v. Metteer 515
6. The State has a compelling interest in protecting minor children from abuse and neglect, and that interest may be implemented by statutes such as sections 43-202 and 43-209, R. S. Supp., 1978. State v. Metteer 515

Parties.

1. Under section 25-301, R. R. S. 1943, every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 25-304, R. R. S. 1943. Redding v. Gibbs 727
2. In ascertaining whether the plaintiff is the real party in interest, the primary and fundamental test to be applied is whether the prosecution of the action will save the defendant from further harassment or vexation at the hands of other claimants to the same demand. If the defendant is not cut off from any just defense, offset, or counterclaim against the demand and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end. Redding v. Gibbs 727
3. Where the mortgagee has made an assignment of the mortgage, and the assignee has not reassigned or redelivered it to the mortgagee at the time a foreclosure action is commenced by the mortgagee, the mortgagee is not the real party in interest to bring the action. Redding v. Gibbs 727

Personal Representative.

While it is not mandatory that the county court appoint as

personal representative of the estate the person or persons nominated in a will, it is required that the court adhere to all of the applicable provisions of section 30-2412, R. R. S. 1943, in making an appointment. Schissler v. Foote 598

Plea Bargains.

Where the likelihood of conviction was great, where a favorable plea bargain was arranged, and where the rights of the defendant were patiently explained prior to acceptance of a guilty plea, defendant's request for post conviction relief due to alleged ineffectiveness of counsel was properly denied. State v. Kerns 278

Pleadings.

1. A motion for leave to file an amended answer, particularly after the matter is submitted, is addressed to the sound discretion of the trial court. Miller v. Westwood Homes, Inc. 29
2. An appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of the defendant, whether the defendant intended such waiver or not. Schleuter v. McCuiston ... 101
3. A litigant is entitled to have the jury instructed only on those theories of the case which are presented by the pleadings and which are supported by competent evidence. Swiler v. Baker's Super Market, Inc. 183
4. Even after the issues have been made up, it is within the sound judicial discretion of the trial judge to permit amendments to the pleadings in the furtherance of justice. Tilden v. Beckmann 293
5. In order to avail himself of the rule that the statute of limitations for an action based on fraud does not begin to run until discovery of the facts constituting the fraud, plaintiff must allege in his petition the failure to discover. Grand Island School Dist. #2 v. Celotex Corp. 559
6. A prayer for affirmative relief, such as damages, is a general appearance and waives any objection to jurisdiction over the person. Peck v. Augustin Bros. Co. ... 574
7. A defect of parties not raised by demurrer or answer is waived. Armbruster v. Stanton-Pilger Drainage Dist. 772
8. An admission in a pleading upon which the case is tried waives all controversy concerning the fact admitted. Armbruster v. Stanton-Pilger Drainage Dist. 772

Pleas.

1. The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceedings in the District Court, and after trial and conviction any error in the ruling of the District Court on the 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. Lehman 341
2. A claim that a defendant was not accorded a preliminary hearing, nor waived it, is determinable by a plea in abatement. State v. Forbes 349
3. An accused may voluntarily, knowingly, and understandingly plead guilty to a crime even though his plea contains a protestation of innocence, when he intelligently concludes that his interests require a guilty plea and the record strongly evidences guilt. State v. Kincaid 495

Police Powers.

1. The requirement of section 81-513, R. R. S. 1943, that a certificate of a building contractor, licensed architect, or licensed engineer be procured by the State Fire Marshal before ordering the demolition of a building applies only where the reason for destruction is other than fire protection. State Fire Marshal v. Schaneman 413
2. Actions instituted by the State Fire Marshal under section 81-517, R. R. S. 1943, are tried in the District Court and reviewed in this court as in equity. State Fire Marshal v. Schaneman 413
3. Where the evidence does not affirmatively show that a building is beyond reasonable repair, the order of the State Fire Marshal should be in the alternative, to wit, to make needed specified repairs within a fixed period of time, or, upon failure to so do, to direct the demolition of the building. State Fire Marshal v. Schaneman 413
4. A racetrack messenger service, whether or not it actually engages in gambling, is so intertwined with gambling that it falls within the State's plenary police power to regulate gaming activity. Pegasus of Omaha, Inc. v. State 755

Post Conviction.

1. Where the likelihood of conviction was great, where a favorable plea bargain was arranged, and where the rights of the defendant were patiently explained prior to acceptance of a guilty plea, defendant's request for post conviction relief due to alleged ineffectiveness of counsel was properly denied. State v. Kerns 278

2. An issue which has been fully litigated by direct appeal cannot be relitigated in an action for post conviction relief or by mere presentation of different arguments related to the same issue if the alleged facts are known to the defendant at the time of direct appeal. State v. Davis 284
3. In post conviction proceedings under section 29-3001 et seq., R. R. S. 1943, the District Court is the trier of disputed questions of fact and it is not ordinarily for the Supreme Court to determine questions of credibility. State v. Davis 284
4. In a post conviction proceeding where the evidence establishes a denial or infringement of the right to counsel which occurred only at the appeal stage of the former criminal proceedings, the District Court has jurisdiction and power to grant a new direct appeal without granting a new trial or setting aside the original conviction and sentence. State v. Chipps 715

Presentence Reports.

Whether successive presentence investigations are necessary before the revocation of an order of probation is entered rests in the sound discretion of the sentencing judge. State v. Herzog 195

Prisoners.

Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed. Riker v. Vitek 719

Privity.

Ordinarily a party in privity with a party to an action, in the sense that he will be bound by the judgment, is one who acquired his interest after commencement of the action or rendition of the judgment. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356

Probate and Administration.

1. The Nebraska Probate Code should be liberally construed to discover and make effective the intent of a decedent in distribution of his property. DeVries v. Rix 382
2. A contingent claim against a decedent's estate is one upon which the liability depends upon some future event which may or may not happen and which makes it uncertain whether it will ever be a liability. Until

that future event happens a right of action upon the contingent claim does not arise. Hooker and Heft v. Estate of Weinberger 674

Probation and Parole.

1. Whether successive presentence investigations are necessary before the revocation of an order of probation is entered rests in the sound discretion of the sentencing judge. State v. Herzog 195
2. Before a parolee's liberty can be taken and his parole revoked, certain minimal due process requirements need be met. They are: (1) A written notice of the claimed parole violation; (2) disclosure to the parolee of evidence against him; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (6) a written statement by the fact finders as to the evidence relied on and the reasons for revoking the parole. Riker v. Vitek 719
3. Once the seriousness of the misconduct of a parolee has been disposed of and the individual has been afforded his minimal due process with regard to that determination, then the remaining statutory provisions may properly be imposed. Riker v. Vitek 719
4. A sentencing court in prescribing probation may impose any conditions of probation that are authorized by statute to be imposed. State v. Sampson 786
5. This court will disturb an order of probation only where it appears from the record that in executing such order the sentencing court imposed a condition or conditions of probation which it was not authorized by statute to impose. State v. Sampson 786

Proof.

1. A conspiracy need not be established by direct evidence of the acts charged, but may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purpose to be accomplished. Davidson v. Simmons ... 804
2. An actual offer of evidence upon an issue is not necessary in order to preserve the question for review if the trial court has theretofore ruled that no proof upon that issue would be received in any event, and the alleged error in doing so has been appropriately preserved by

motion for new trial or otherwise. Quinlan v. City of Omaha 814

3. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Nielsen 847

Property.

1. An excavating owner is liable, irrespective of negligence, for damages caused by depriving adjoining land, in its natural state, of lateral support even if an independent contractor performed the work, if the damage was a necessary consequence of the excavation. Crnkovich v. Scaletta 22
2. Where a trespass is committed by an independent contractor, the other party to the contract is not liable for the trespass unless such other party controls the work or authorizes the specific act. Crnkovich v. Scaletta 22
3. The sovereign nature of the power of eminent domain is such that the function of the courts is limited to a determination of whether constitutional provisions have been violated, and if they have not, the right of the Legislature to exercise it in any manner it sees fit must be sustained. If the property be taken irregularly, or if the taking is not for a public purpose, the owner can proceed against the taker the same as any other trespasser by injunction, ejectment, or any other available remedy. Monarch Chemical Works, Inc. v. City of Omaha 33
4. The taking of substandard or blighted areas by a city for redevelopment and resale in accordance with an approved redevelopment plan which is in conformity with a general plan for the municipality as a whole, all as provided for in the Nebraska Community Development Law, section 18-2101 et seq., R. R. S. 1943, is a proper public use for a municipality. Monarch Chemical Works, Inc. v. City of Omaha 33
5. The acquisition of property whether by voluntary methods or by eminent domain to carry out a redevelopment plan must be provided for in and be in accordance with such plan. Monarch Chemical Works, Inc. v. City of Omaha 33
6. Where the primary function of tangible personal property is to aid in the production of goods which are

manufactured for ultimate retail sale, the property will not be exempt from the use tax as defined by section 77-2702(20), R. R. S. 1943, merely because some undetermined fraction of the property is absorbed into the retail product during its manufacture. American Stores Packing Co. v. Peters 76

7. The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts in each case and the courts will consider all pertinent facts in reaching an award that is just and equitable. Pfeiffer v. Pfeiffer 137
Slama v. Slama 644

8. The fixing of alimony or distribution 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. Pfeiffer v. Pfeiffer 137
Mahan v. Mahan 316

9. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion. Brus v. Brus 161

10. The rules for determining a division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be determined. Brus v. Brus 161
Mueller v. Mueller 653

11. This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Brus v. Brus 161

12. Where a contract for the sale of real estate includes both homestead and nonhomestead property, but is not duly executed and acknowledged, specific performance may be obtained of the nonhomestead land only if the contract is clearly severable as to the homestead and nonhomestead property. Struempler v. Peterson 173

13. A court has jurisdiction and power to include, within a decree of foreclosure of a real estate mortgage, provisions for the disposition of the proceeds of the sale of the property. Omaha Nat. Bank v. Continental Western Corp. 264

14. Though there may be no assignment *in haec verba* of a mortgage and note, the facts may establish an equitable assignment of such interest. Equity disregards mere form, and no particular words or particular form of instrument is necessary to effect an equitable assignment. Any language, however informal, may amount to an equitable assignment if it shows the intention of

the owner of a chose in action to transfer it, so that it will become the property of the transferee. Tilden v. Beckmann 293

15. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. Mahan v. Mahan 316
16. The question of what property belongs to the bankrupt as of the date of the filing of the petition in bankruptcy is determined by state law. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356
17. The power to equalize property valuations between counties is vested in the State Board of Equalization and Assessment. The sole method of review in this court is by appeal. DeCamp v. State Board of Equalization and Assessment 366
18. The Nebraska Probate Code should be liberally construed to discover and make effective the intent of a decedent in distribution of his property. DeVries v. Rix 392
19. The rule for determination of alimony or division of property in dissolution actions provides no mathematical formula by which such an award can be determined and, generally speaking, awards vary from one-third to one-half the property involved depending on the facts and circumstances in each particular case. Patton v. Patton 638
20. A judgment of the trial court making a distribution of property and fixing the amount of alimony will not be disturbed on appeal unless it is patently unfair on the record. Patton v. Patton 638
21. In a contested proceeding for dissolution of marriage, upon proper and timely request being made for determination of value of property being awarded to the parties, the trial court shall state in writing the conclusions of fact found separately from the conclusions of law. Slama v. Slama 644
22. Where one of the parties to a marriage places property beyond the reach of the other party, and thus forestalls a division of the property, that action does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets. Slama v. Slama 644
23. An award of alimony or distribution of property may be altered on appeal where the record reflects good

cause. Slama v. Slama 644
24. This court on appeal is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. Mueller v. Mueller 653
25. The distribution 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. Mueller v. Mueller 653
26. Where judgment is recovered against one who has agreed to sell land but made no deed nor received the whole of the purchase money, it is a lien on the vendor's interest in the land. Monroe v. Lincoln City Employees Credit Union 702
27. It is constitutionally required that there be notice to the property owners of a special assessment and an opportunity to contest the amount and validity of the assessment before it becomes a charge on the property. Turner v. City of North Platte 706
28. Where special assessments against property to pay the costs of paving are void, knowledge of the proceedings and of the construction of the improvement will not estop the owner from avoiding liability therefor, and they cannot be enforced solely on the ground of the benefits of the improvements to the owners of abutting lots or lands. Turner v. City of North Platte 706

Prosecuting Attorneys.

1. An order to the prosecuting attorney under the provisions of section 29-1912, R. R. S. 1943, is not an appropriate way for a defendant in a criminal case to procure handwriting exemplars of third parties unless it be alleged that such exemplars are in the possession of the prosecutor and are relevant evidence in the prosecution. State v. Davis 284
2. It is the responsibility of the prosecutor to examine the evidence, the statutes, and the cases to make a proper determination of what charge to file. It is not always desirable that a prosecutor prosecute all crimes at the highest degree available; and in exercising his discretion in this regard, he does not neglect his public duty nor discriminate among offenders. State v. Belitz 375

Proximate Cause.

A guest to recover damages from his host for injury received by the guest while riding in a motor vehicle operated by the host must prove by the greater weight of the evidence in the case the gross negligence of the host relied upon by the guest and that it was the proxi-

mate cause of the accident and injury. Jones v. Foutch 246

Public Officers and Employees.

1. Public employees are generally not entitled to collective bargaining in the sense that private industrial employees are. University Police Officers Union v. University of Nebraska 4
2. To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear. State ex rel. Halloran v. Hawes 405
3. The requirement of section 81-513, R. R. S. 1943, that a certificate of a building contractor, licensed architect, or licensed engineer be procured by the State Fire Marshal before ordering the demolition of a building applies only where the reason for destruction is other than fire protection. State Fire Marshal v. Schaneman 413
4. Actions instituted by the State Fire Marshal under section 81-517, R. R. S. 1943, are tried in the District Court and reviewed in this court as in equity. State Fire Marshal v. Schaneman 413
5. Where the evidence does not affirmatively show that a building is beyond reasonable repair, the order of the State Fire Marshal should be in the alternative, to wit, to make needed specified repairs within a fixed period of time, or, upon failure to so do, to direct the demolition of the building. State Fire Marshal v. Schaneman 413
6. Mandamus is available to enforce the performance of ministerial duties of a board of county commissioners but is not available if the duties are quasi-judicial or discretionary. Singleton v. Kimball County Board of Commissioners 429
7. An act is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. Singleton v. Kimball County Board of Commissioners 429
8. When the law, in words or by implication, commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi-judicial; however, an act may be held to be ministerial even though the person performing it may have to satisfy himself that a certain state of facts exists under which it is his duty to perform the act. Singleton v. Kimball County Board of Commissioners 429

9. The duty of the board of county commissioners under section 39-1716, R. R. S. 1943, to lay out a public road, upon a showing that the statutory conditions of section 39-1713, R. R. S. 1943, exist, is ministerial. Singleton v. Kimball County Board of Commissioners 429

Public Policy.

1. An insurance policy is a contract, and where there is no uncertainty as to its meaning and the same is legal and not opposed to public policy, it will be enforced as it is made. Stark v. Grange Mut. Ins. Co. 154
2. A provision in an insurance policy reciting that failure to pay the premium due on a specified date will suspend the policy and relieve the company of liability for losses occurring during the period of suspension is a valid and enforceable provision. Stark v. Grange Mut. Ins. Co. 154
3. It is the policy of the law to give a litigant full opportunity to present his contention in court and for this purpose to give full relief against slight and technical omissions. On the other hand, it is the duty of the courts to prevent an abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice. DeVries v. Rix 392

Public Service Commission.

1. Under the provisions of section 75-315, R. R. S. 1943, the Nebraska Public Service Commission may, upon complaint or on the Commission's own initiative after notice and hearing, suspend, revoke, or change a certificate of a common carrier for willful failure to comply with any of the provisions of sections 75-101 to 75-801, R. R. S. 1943. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356
2. The term "willful failure," as used in the statute giving the Nebraska Public Service Commission jurisdiction and authority to suspend, change, or revoke a certificate of public convenience and necessity for failure to comply with the provisions of the Motor Carrier Act, is such behavior through acts of commission or omission which justifies a belief that there was an intent entered into and characterizing the failure complained of. A failure through oversight to file the annual report required by section 75-116, R. R. S. 1943, would not justify the revocation of an authority. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356
3. An act or failure to act within the provisions of section 75-315, R. R. S. 1943, may be willful within the meaning

of the statute even though a decision to cease operations under the certificate may be the consequence of circumstances over which the carrier may have no absolute control such as financial failure. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356

4. On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the Commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356
5. A trustee in bankruptcy, receiver, custodian in possession under a bankruptcy arrangement, etc., of a carrier, has the rights in the certificate of convenience and necessity of the carrier which are provided by section 75-322, R. R. S. 1943, and these rights must be respected by the Nebraska Public Service Commission. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356
6. The mere filing of a petition in bankruptcy does not deprive a state court or agency such as the Nebraska Public Service Commission of jurisdiction in a pending action against the bankrupt. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356

Railroads.

1. A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages resulting from a collision with a passing train. Thomas v. Burlington Northern R. R., Inc. 507
2. A railroad has no obligation to install signal devices or maintain flagmen under all conditions even at arterial crossings. Thomas v. Burlington Northern R. R., Inc. 507
3. All persons using a railroad crossing are required to exercise a degree of caution that is commensurate with the danger. Thomas v. Burlington Northern R. R., Inc. 507

Ratification.

The mere entry of a credit by creditor without the consent of his debtor is without effect upon the statute of limitations and the fact that the debtor knows of an unauthorized entry of credit and makes no objection thereto is not alone sufficient to constitute a ratification of the credit so as to toll the statute of limitations. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318

Records.

Although an affidavit may be used to prove service of process, such affidavit cannot be considered on an appeal of a cause to this court, unless it is offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318

Releases.

A release which is confined to certain claims or demands arising from a particular matter operates to release the particular claim or demand specified but does not necessarily release other claims or demands arising from the same matter, particularly those expressly excepted from its operation. Crnkovich v. Scaletta ... 22

Replevin.

1. The 1972 decision of the United States Supreme Court in Fuentes v. Shevin, 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, will not be applied retroactively to a replevin action commenced in 1967. Peck v. Augustin Bros. Co. 574
2. A reclamation of cattle sold to a cash purchaser is not a voidable preference in bankruptcy. Peck v. Augustin Bros. Co. 574

Res Judicata.

1. After the time for appeal has expired, the provisions of a decree are res judicata and binding upon all the parties to the action. Omaha Nat. Bank v. Continental Western Corp. 264
2. In ascertaining whether the plaintiff is the real party in interest, the primary and fundamental test to be applied is whether the prosecution of the action will save the defendant from further harassment or vexation at the hands of other claimants to the same demand. If the defendant is not cut off from any just defense, offset, or counterclaim against the demand and a judgment in behalf of the party suing will fully pro-

tect him when discharged, then is his concern at an end. Redding v. Gibbs 727

Rescission.

1. Where contractual promises are mutual and dependent, the failure of one party to perform authorizes the other to rescind the contract. Gallner v. Sweep Left, Inc. 169
2. The failure to perform a promise, the performance of which is a condition, entitles the other party to the contract to a rescission thereof. Gallner v. Sweep Left, Inc. 169

Rescue Doctrine.

The rescue doctrine contemplates a voluntary act by one who, in an emergency and prompted by spontaneous human motives to save human life, attempts a rescue which he had no duty to attempt by virtue of the legal obligation or duty fastened on him by his employment. It is not contributory negligence for a volunteer to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value of the advantage to be realized from meeting the danger and attempting to remove or eliminate the hazard, i.e., the less the danger to the third party, the less risk the volunteer is justified in taking. Buchanan v. Prickett & Son, Inc. 684

Right to Counsel.

1. An accused person is entitled to counsel at every critical stage of a criminal proceeding. State v. Moore 94
2. If an indigent defendant was deprived of his constitutional right to counsel by not being furnished an attorney to present his appeal to the appellate court, he was not afforded an effective appeal and the decision thereon must be deemed a nullity. State v. Moore 94
3. Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial. State v. Moore 94
4. The due process clause of the Fourteenth Amendment to the Constitution of the United States guarantees the assistance of counsel unless that right is intelligently and understandingly waived by the accused. Courts must indulge every reasonable presumption against a

waiver of fundamental constitutional rights, and do not presume acquiescence in their loss. State v. Moore ... 94
5. No defendant can be completely denied the assistance of counsel absent a determination of his ability to retain counsel or his desire to have counsel appointed. State v. Moore ... 94
6. The right to counsel attaches when the proceeding ceases to be investigatory and becomes accusatory. Statements obtained during the investigation of a crime are not inadmissible because counsel was not present. State v. Fuller ... 233
7. A statement which is obtained after the proceeding has become accusatory and there has been no voluntary and intelligent waiver of the right to counsel is not admissible. State v. Fuller ... 233
8. The test for determining whether or not counsel for a defendant in a criminal prosecution has provided adequate representation is that trial 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. Kerns ... 278
9. Where the likelihood of conviction was great, where a favorable plea bargain was arranged, and where the rights of the defendant were patiently explained prior to acceptance of a guilty plea, defendant's request for post conviction relief due to alleged ineffectiveness of counsel was properly denied. State v. Kerns ... 278
10. Acquiring or permitting a single attorney to represent codefendants, often referred to as joint representation, is not per se violative of the constitutional guarantees of effective assistance of counsel. State v. Kerns ... 278
11. As a general rule a defendant is entitled to retain counsel of his own choice and may not be denied the right to change retained counsel unless the result is to interfere with the orderly procedure in the courts without a showing of good cause for the desired change. State v. Kincaid ... 495
12. The right of counsel accorded defendants in criminal trials cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. State v. Kincaid ... 495
13. If a defendant in a criminal case acquiesces in representation by an attorney whom he had previously rejected, he cannot afterwards complain that he was not represented by counsel. State v. Kincaid ... 495
14. In a post conviction proceeding where the evidence

establishes a denial or infringement of the right to counsel which occurred only at the appeal stage of the former criminal proceedings, the District Court has jurisdiction and power to grant a new direct appeal without granting a new trial or setting aside the original conviction and sentence. State v. Chipps 715

Rules of Court.

1. A suit brought in small claims court and transferred to the regular docket of the municipal court prior to the time set for hearing in the small claims court shall be subject to all of the provisions of law and rules of court applicable to proceedings in municipal court. State ex rel. Simpson v. Vondrasek 693
2. A municipal court rule which provides that a party desiring a jury trial in a civil case must demand the same in writing on or before the answer day refers to the answer date as established in the municipal court after the transfer of the case from the small claims court and not to the "appearance" date specified in the notice to the defendant in the small claims court. State ex rel. Simpson v. Vondrasek 693

Sales.

1. Under the provisions of the Uniform Commercial Code, a "sale" consists of the passing of title from the seller to the buyer for a price. Unless otherwise explicitly agreed, where delivery is to be made without moving the goods, if the goods at the time of contracting are already identified and no documents are to be delivered, the title passes at the time and place of contracting. Southwest Bank of Omaha v. Moritz 45
2. The statute of limitations begins to run against a cause of action to recover the purchase price or value of goods sold and delivered at the time of their delivery unless there is some agreement as to the time and manner of payment different from that which the law implies, which is, payment shall be made in cash on delivery. If a term of credit is given to the buyer, the statute begins to run when, and only when, the period of credit has expired. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318
3. Openness of an account may be indicated when further dealings between the parties are contemplated and when some term or terms of the sale or sales is left open and undetermined. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318
4. A cash seller of cattle may reclaim the cattle from the

buyer where the buyer dishonors the draft drawn on the buyer by the seller pursuant to the understanding of the parties. Peck v. Augustin Bros. Co. 574
5. A reclamation of cattle sold to a cash purchaser is not a voidable preference in bankruptcy. Peck v. Augustin Bros. Co. 574

Schools and School Districts.

1. The standard of review in an error proceeding from an order terminating the contract of a tenured teacher is whether there has been sufficient evidence adduced at the proceeding before the inferior tribunal, as a matter of law, to support the determination reached. Davis v. Board of Education 1
2. Under the provisions of section 79-4,104, R. R. S. 1943, a territory's proportionate share of any balance remaining in the nonresident tuition fund is computed by determining the total amount paid into the fund by the territory and subtracting the amounts paid out of the fund on behalf of the territory. The balance, if any, constitutes the territory's proportionate share in the fund which the territory is entitled to receive. School District of Murray v. Lancaster 109
3. The Legislature has complete power over the organization, function, and finances of school districts. State ex rel. Halloran v. Hawes 405
4. The petitioners for the transfer of land from one school district to another school district have the burden of proving by a preponderance of the evidence each of the statutory requirements for such transfer provided in section 79-403 (1), R. R. S. 1943. Roelfs v. Specht 448
5. Where petitioner's residence is closer to the schoolhouse in their own school district than that of an adjoining district, and both districts maintain a bus route, the distance to the school bus route of the district to which transfer is sought must be ½ mile closer to petitioner's residence for their land to be transferred. Roelfs v. Specht 448

Searches and Seizures.

1. When the defendant is not in custody and the State attempts to justify a search on the basis of defendant's consent, the Fourth and Fourteenth Amendments to the Constitution of the United States require that the State demonstrate that the consent was in fact voluntarily given and not the result of duress or coercion, express or implied. State v. French 435
2. Whether or not consent to search was freely and intelli-

gently given is a question of fact to be determined from the totality of all the circumstances surrounding it. State v. French 435
3. The State has the burden of establishing the legal sufficiency of a consent to a search and seizure. State v. French 435
4. While a consent to search is not terminated merely by a worsening of the consenting party's position, a consent may be withdrawn or limited at any time prior to the completion of the search. State v. French 435
5. Except where there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for a violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment to the Constitution of the United States. State v. Kretchmar 663
6. A state may develop acceptable methods for spot checking the validity of motor vehicle registrations and operators' licenses that involve little intrusion or do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one acceptable alternative. State v. Kretchmar 663

Security Interest.

1. Under the provisions of section 9-105(1)(d), U. C. C., the owner of the collateral subject to a security interest is a debtor, and the filing of a financing statement not signed by the owner of the collateral described in the financing statement is not sufficient to perfect the security interest. Southwest Bank of Omaha v. Moritz 45
2. The equitable principle that the corporate entity may be disregarded to prevent fraud and injustice is intended to prevent corporate owners from using the corporate entity to cloak fraud or justify wrongdoing, and it may not be applied to prefer a creditor of the corporate owner who fails to perfect a security interest to the other creditors of the corporation of whom a trustee in bankruptcy is the representative. Southwest Bank of Omaha v. Moritz 45

Sentences.

1. It is the general rule that where a criminal statute is amended by mitigating the punishment after the com-

mission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise. State v. Weinacht 124
2. Under the new Nebraska Criminal Code, sections 28-101 to 28-1335, R. S. Supp., 1978, effective January 1, 1979, offenses committed before that date shall be construed and punished according to the provisions of law existing at the time of the commission thereof, in the same manner as if the new criminal code had not been enacted. State v. Weinacht 124
3. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. State v. Kincaid 495
4. 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 the punishment to be imposed and the judge may consider probation reports, police reports, affidavits, and other information, including his own personal observations. State v. Kramer 658
5. Disparity in sentences of codefendants does not of itself indicate denial of due process. State v. Kramer 658
6. Failure of the trial court to disclose prior to sentencing that it does not accept defendant's statement that he was not the mastermind of crime involving several defendants does not preclude the court from considering that fact in sentencing. State v. Kramer 658

Severance.

Where a contract for the sale of real estate includes both homestead and nonhomestead property, but is not duly executed and acknowledged, specific performance may be obtained of the nonhomestead land only if the contract is clearly severable as to the homestead and nonhomestead property. Struempler v. Peterson 173

Sexual Assault.

1. Section 25.11.010 of the Omaha municipal code, and sections 28-408.01 to 28-408.05, R. R. S. 1943, the sexual assault felony statutes, define and constitute separate and distinct offenses under the law, notwithstanding they may encompass elements in common. State v. Belitz 375
2. Section 29-615, R. R. S. 1943, does not mandate that a municipal judge, engaged in the trial of an offense charged under section 25.11.010 of the Omaha municipal code, must immediately stop further proceedings and

act as an examining magistrate to determine if the defendant must be charged under the sexual assault statutes of the state. State v. Belitz 375

Specific Performance.

Where a contract for the sale of real estate includes both homestead and nonhomestead property, but is not duly executed and acknowledged, specific performance may be obtained of the nonhomestead land only if the contract is clearly severable as to the homestead and nonhomestead property. Struempler v. Peterson 173

States.

1. In an extradition proceeding where the Governor of the asylum state has granted extradition, a court of the asylum state can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. State ex rel. Partin v. Jensen 441
2. In a habeas corpus proceeding challenging extradition, in the absence of specific statutory authorization, the trial court or the District Court has power, in its discretion, to grant bail during the pendency of the proceedings, including an appeal to this court, in the same cases and under the same terms and conditions authorized by statute in preliminary extradition proceedings, or in other habeas corpus proceedings. State ex rel. Partin v. Jensen 441

Statute of Limitations.

1. A cause of action accrues and the statute of limitations begins to run when an aggrieved party has a right to start and maintain a suit. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318
2. The statute of limitations begins to run against a cause of action to recover the purchase price or value of goods sold and delivered at the time of their delivery unless there is some agreement as to the time and manner of payment different from that which the law implies, which is, payment shall be made in cash on delivery. If a term of credit is given to the buyer, the statute begins to run when, and only when, the period of credit has expired. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318
3. The mere entry of a credit by creditor without the

consent of his debtor is without effect upon the statute of limitations and the fact that the debtor knows of an unauthorized entry of credit and makes no objection thereto is not alone sufficient to constitute a ratification of the credit so as to toll the statute of limitations. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318

4. The latest item of a continuous account removes prior items from the operation of the statute of limitations. Transactions may be independent because of special contracts, long intervals, or other circumstances. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318

5. Ordinarily, a statute of limitations begins to run as soon as the plaintiff has a right to bring suit. This is true even though the plaintiff may be ignorant of the existence of the cause of action. Grand Island School Dist. #2 v. Celotex Corp. 559

6. The statute of limitations for an action based on alleged deficiencies in improvements to real property does not run during the time when the plaintiff reasonably could not discover the existence of the cause of action. § 25-223, R. S. Supp., 1978. Grand Island School Dist. #2 v. Celotex Corp. 559

7. It is competent for the Legislature to change statutes subject to the limitation that an action already barred may not be revived and that an action may not be unreasonably cut off. The applicable statute of limitations is the one in force at the time the suit is brought. Grand Island School Dist. #2 v. Celotex Corp. 559

8. Where pleadings and evidence presented conclusively indicate that the statute of limitations has run, summary judgment is appropriate. Grand Island School Dist. #2 v. Celotex Corp. 559

9. In order to avail himself of the rule that the statute of limitations for an action based on fraud does not begin to run until discovery of the facts constituting the fraud, plaintiff must allege in his petition the failure to discover. Grand Island School Dist. #2 v. Celotex Corp. 559

10. An action for breach of warranty in the sale of goods must be commenced within 4 years of tender of delivery. Failure to discover the breach prevents the running of the statute only when the warranty explicitly extends to future performance. § 2-725, U. C. C. Grand Island School Dist. #2 v. Celotex Corp. 559

11. An action grounded in tort must be commenced within 4 years of accrual of the cause of action. § 25-207 (3),

R. R. S. 1943. Grand Island School Dist. #2 v. Celotex Corp. 559
12. An action based on breach of an implied contract must be commenced within 4 years of accrual of the cause of action. § 25-206, R. R. S. 1943. Grand Island School Dist. #2 v. Celotex Corp. 559
13. An action based on breach of a written contract must be commenced within 5 years of accrual of the cause of action. § 25-205, R. R. S. 1943. Grand Island School Dist. #2 v. Celotex Corp. 559

Statutes.

1. The Board of Regents of the University of Nebraska has primary authority for establishing its own schedules of wages, terms and conditions of employment, and hours of labor, but when an industrial dispute, as defined by section 48-801 (7), R. R. S. 1943, arises, the Court of Industrial Relations may acquire jurisdiction for the limited purpose of resolving such dispute. Likewise, the Court of Industrial Relations may acquire jurisdiction for resolving an industrial dispute concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment or refusal to discuss terms or conditions of employment. University Police Officers Union v. University of Nebraska 4
2. The adoption of sections 48-801 to 48-838, R. R. S. 1943, was not intended to in any way remove the lawful responsibility nor the proper prerogative of public employers in the exercise of their recognized management rights or in the exercise of their lawful duties, except as may otherwise have been specifically entrusted to the Court of Industrial Relations in resolving industrial disputes as prescribed by the statutes. University Police Officers Union v. University of Nebraska 4
3. The taking of substandard or blighted areas by a city for redevelopment and resale in accordance with an approved redevelopment plan which is in conformity with a general plan for the municipality as a whole, all as provided for in the Nebraska Community Development Law, section 18-2101 et seq., R. R. S. 1943, is a proper public use for a municipality. Monarch Chemical Works, Inc. v. City of Omaha 33
4. The term "attorney," used in section 52-103, R. S. Supp., 1978, means any agent or substitute acting for and in behalf of a lien claimant; it may include an attorney

at law but is not limited to that meaning. Sherwood v. Tucker 56
5. The provisions of section 52-103, R. S. Supp., 1978, as to the making of an affidavit of the giving of notice of mechanic's lien to the landowner, are directory and not mandatory; irregularities in such affidavit will not render the lien void and unenforceable. Sherwood v. Tucker 56
6. Where the primary function of tangible personal property is to aid in the production of goods which are manufactured for ultimate retail sale, the property will not be exempt from the use tax as defined by section 77-2702(20), R. R. S. 1943, merely because some undetermined fraction of the property is absorbed into the retail product during its manufacture. American Stores Packing Co. v. Peters 76
7. Section 43-201, R. S. Supp., 1976, which states that nothing in the Juvenile Court Act shall operate to deprive the District Courts of their chancery jurisdiction, does not limit the county court's jurisdiction to determine the custody of a minor child whose custody was subject to a preexisting District Court order where the county court's jurisdiction was invoked by the county attorney acting to protect the child pursuant to section 43-205, R. S. Supp., 1978. Schleuter v. McCuiston 101
8. Where the language used in the statute is ambiguous, recourse should be had to the legislative purposes. School District of Murray v. Lancaster 109
9. Where because a statute is ambiguous it is necessary to construe it, the principal objective is to determine legislative intention. School District of Murray v. Lancaster 109
10. Legislative intent is the cardinal rule in the construction of statutes. School District of Murray v. Lancaster 109
11. A fundamental principle of statutory construction is to ascertain the legislative intent and to give it effect. School District of Murray v. Lancaster 109
12. The reasons for the enactment of a statute and the purposes and objects of an act may be guides in an attempt to give effect to the main intent of the lawmakers. School District of Murray v. Lancaster 109
13. When the literal wording of a statute leads to an absurdity or to an illogical or unjust conclusion, the intention of the Legislature, as gathered from the entire act, will prevail. School District of Murray v. Lancaster 109
14. In construing a statute, the court must look to the ob-

ject to be accomplished, the evils and mischiefs sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. School District of Murray v. Lancaster 109

15. Under the provisions of section 79-4,104, R. R. S. 1943, a territory's proportionate share of any balance remaining in the nonresident tuition fund is computed by determining the total amount paid into the fund by the territory and subtracting the amounts paid out of the fund on behalf of the territory. The balance, if any, constitutes the territory's proportionate share in the fund which the territory is entitled to receive. School District of Murray v. Lancaster 109

16. It is the general rule that where a criminal statute is amended by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise. State v. Weinacht 124

17. Under the new Nebraska Criminal Code, sections 28-101 to 28-1335, R. S. Supp., 1978, effective January 1, 1979, offenses committed before that date shall be construed and punished according to the provisions of law existing at the time of the commission thereof, in the same manner as if the new criminal code had not been enacted. State v. Weinacht 124

18. Under section 60-1429(2), R. R. S. 1943, change of ownership of a franchisee's dealership is not good cause for termination of the franchise unless the franchisor proves that the change of ownership will be substantially detrimental to the distribution of franchisor's motor vehicle in the community. S & T Motors v. General Motors Corp. 188

19. Under section 60-1430, R. R. S. 1943, in the event of the sale or transfer of ownership of the franchisee's dealership by sale or transfer of the business, the franchisor shall give effect to such change in the franchise unless the transfer of the franchisee's license under the act is denied or the new owner is unable to obtain a license. S & T Motors v. General Motors Corp. 188

20. The term "motor vehicle" as used in section 60-1429(2), R. R. S. 1943, refers to the motor vehicles covered by the franchise and does not refer to all of the motor vehicles which a franchisor may distribute through various divisions and separate franchises. S & T Motors v. General Motors Corp. 188

21. Under the provisions of section 43-209(5), R. R. S. 1943,

parental rights may be terminated where parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such conditions will exist for a prolonged, indeterminate period. State v. Norwood 201

22. An order to the prosecuting attorney under the provisions of section 29-1912, R. R. S. 1943, is not an appropriate way for a defendant in a criminal case to procure handwriting exemplars of third parties unless it be alleged that such exemplars are in the possession of the prosecutor and are relevant evidence in the prosecution. State v. Davis 284

23. In post conviction proceedings under section 29-3001 et seq., R. R. S. 1943, the District Court is the trier of disputed questions of fact and it is not ordinarily for the Supreme Court to determine questions of credibility. State v. Davis 284

24. A party aggrieved by a verdict may move for a new trial upon the grounds that the verdict is "not sustained by sufficient evidence, or is contrary to law" as provided in section 25-1142, R. R. S. 1943, and the trial court has the power and authority to grant a new trial where such legal cause or reason therefor appears in the record and timely appropriate motions for a new trial have been filed, notwithstanding the fact that no preliminary motion for a directed verdict has been made. Lockhart v. Continental Cheese, Inc. 331

25. Under the provisions of section 24-537, R. S. Supp., 1976, a motion to vacate a default judgment in the county court must be made within 30 days after such judgment is entered and in the manner therein provided. Credit Bureau of Hastings, Inc. v. George 338

26. In order to suspend jurisdiction of a state court in a criminal proceeding it is necessary to file a petition for removal in the appropriate United States District Court, to give notice to the adverse parties, and to file a copy of such petition with the clerk of the state court, all as provided by 28 U. S. C. A., § 1446. Once this is accomplished the state court shall proceed no further unless and until the case is remanded. State v. Lehman . 341

27. Under the provisions of section 75-315, R. R. S. 1943, the Nebraska Public Service Commission may, upon complaint or on the Commission's own initiative after notice and hearing, suspend, revoke, or change a certificate of a common carrier for willful failure to comply with any of the provisions of sections 75-101 to 75-801, R. R. S. 1943. Neb. Public Service Commission v.

Grand Island Mov. & Stor. Co., Inc. 356
28. The term "willful failure," as used in the statute giving the Nebraska Public Service Commission jurisdiction and authority to suspend, change, or revoke a certificate of public convenience and necessity for failure to comply with the provisions of the Motor Carrier Act, is such behavior through acts of commission or omission which justifies a belief that there was an intent entered into and characterizing the failure complained of. A failure through oversight to file the annual report required by section 75-116, R. R. S. 1943, would not justify the revocation of an authority. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356
29. An act or failure to act within the provisions of section 75-315, R. R. S. 1943, may be willful within the meaning of the statute even though a decision to cease operations under the certificate may be the consequence of circumstances over which the carrier may have no absolute control such as financial failure. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356
30. A trustee in bankruptcy, receiver, custodian in possession under a bankruptcy arrangement, etc., of a carrier, has the rights in the certificate of convenience and necessity of the carrier which are provided by section 75-322, R. R. S. 1943, and these rights must be respected by the Nebraska Public Service Commission. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356
31. The right of an individual to appeal an order of the State Board of Equalization and Assessment is restricted to one who has demonstrated to the State Board that he is a "person affected" by the order. Only a taxpayer is a "person affected." § 77-510, R. R. S. 1943. DeCamp v. State Board of Equalization and Assessment 366
32. Under sections 14-101, 14-102, and 14-102.01, R. R. S. 1943, the city of Omaha is given power by the State of Nebraska to enact ordinances relating to the safety and security of its citizens, and to impose fines, forfeitures, penalties, and imprisonment for the violation thereof. State v. Belitz 375
33. Section 25.11.010, of the Omaha municipal code, and sections 28-408.01 to 28-408.05, R. R. S. 1943, the sexual assault felony statutes, define and constitute separate and distinct offenses under the law, notwithstanding they may encompass elements in common. State v.

Belitz 375
34. Section 29-615, R. R. S. 1943, does not mandate that a municipal judge, engaged in the trial of an offense charged under section 25.11.010 of the Omaha municipal code, must immediately stop further proceedings and act as an examining magistrate to determine if the defendant must be charged under the sexual assault statutes of the state. State v. Belitz 375
35. "Good cause shown" as used in section 30-2437, R. R. S. 1943, means to demonstrate a logical reason or legal ground, based on fact or law, why an otherwise final order of the county court should be vacated or modified. DeVries v. Rix 392
36. A motion to vacate or modify which is filed within the time limitation contemplated by section 30-2437, R. R. S. 1943, is similar in nature to a motion for a new trial in District Court, and the overruling of such motion is a final order itself which extends the 30-day appeal time from the entry of the original order complained of to the date upon which the motion to vacate or modify is overruled. DeVries v. Rix 392
37. A statute is open to construction only where the language used requires interpretation or may reasonably be considered ambiguous. State ex rel. Halloran v. Hawes 405
38. A proviso which operates to limit the application of the provisions of a statute general in terms should be strictly construed and held to include no case not clearly within the purpose, letter, or express terms of the proviso. State ex rel. Halloran v. Hawes 405
39. The Legislature may make reasonable classifications of the objects of legislation for the purpose of legislating with reference thereto. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification. State ex rel. Halloran v. Hawes 405
40. The requirement of section 81-513, R. R. S. 1943, that a certificate of a building contractor, licensed architect, or licensed engineer be procured by the State Fire Marshal before ordering the demolition of a building applies only where the reason for destruction is other than fire protection. State Fire Marshal v. Schaneman 413
41. Actions instituted by the State Fire Marshal under section 81-517, R. R. S. 1943, are tried in the District Court and reviewed in this court as in equity. State Fire Marshal v. Schaneman 413

42. The requirement imposed by section 27-613 (2), R. R. S. 1943, that a witness be afforded an opportunity to explain or deny a prior inconsistent statement does not apply to admissions or statements offered against a party to the action, if the admissions or statements were made by that party. Hyde v. Cleveland 420
43. The duty of the board of county commissioners under section 39-1716, R. R. S. 1943, to lay out a public road, upon a showing that the statutory conditions of section 39-1713, R. R. S. 1943, exist, is ministerial. Singleton v. Kimball County Board of Commissioners 429
44. The petitioners for the transfer of land from one school district to another school district have the burden of proving by a preponderance of the evidence each of the statutory requirements for such transfer provided in section 79-403 (1), R. R. S. 1943. Roelfs v. Specht 448
45. Section 16-667, R. R. S. 1943, as it existed in 1975, authorized a city of the first class to create a water district to extend water service within the city limits without giving notice of the creation of the district to property owners affected. First Assembly of God Church v. City of Scottsbluff 452
46. Reasonable attorney's fees may properly be awarded in actions upon insurance policies under section 44-359, R. R. S. 1943. The amount to be allowed rests in the sound discretion of the court, considering the elements of the amount involved, the responsibility assumed, the questions of law raised, the time and labor necessarily required in the performance of duties, the professional diligence and skill required, and the result of the services performed. Herrera v. American Standard Ins. Co. 477
47. For purposes of determining the value of the property alleged to have been stolen, the value of money or property stolen by a series of acts from the same person may be aggregated. § 28-506, R. R. S. 1943. State v. Mays 487
48. Sections 43-202 and 43-209, R. S. Supp., 1978, which, respectively, define parental responsibilities and prescribe the conditions under which parental rights may be terminated, are sufficiently definite and are not void for vagueness. The constitutional requirement that statutory language must be reasonably certain or be held void for vagueness is satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding; the due process clause requires that the law give sufficient warning of conduct which is forbidden but it does not require a

precise checklist of parental responsibilities and prohibited behavior. State v. Metteer 515
49. Section 43-209, R. S. Supp., 1978, is not void because it allows the judge to consider the circumstances of individual cases in determining whether to terminate parental rights. State v. Metteer 515
50. The State has a compelling interest in protecting minor children from abuse and neglect, and that interest may be implemented by statutes such as sections 43-202 and 43-209, R. S. Supp., 1978. State v. Metteer 515
51. The county board is vested with general supervision and control of the public roads located in its county as provided in section 39-1402, R. R. S. 1943. Art-Kraft Signs, Inc. v. County of Hall 523
52. The statutory definition of public roads makes no distinction between county roads and township roads for the general purposes prescribed in section 39-1402, R. R. S. 1943. Art-Kraft Signs, Inc. v. County of Hall 523
53. The classification of a vehicle as a truck-tractor under section 39-602, R. S. Supp., 1978, is not changed by the addition of a box to the vehicle if the design and primary use of the vehicle is to draw other vehicles, and any load carried by the truck-tractor, other than a part of the weight of the vehicle and the load so drawn, is merely incidental to its primary use. State v. Speicher and Herrick 535
54. The statute of limitations for an action based on alleged deficiencies in improvements to real property does not run during the time when the plaintiff reasonably could not discover the existence of the cause of action. § 25-223, R. S. Supp., 1978. Grand Island School Dist. #2 v. Celotex Corp. 559
55. An action grounded in tort must be commenced within 4 years of accrual of the cause of action. § 25-207 (3), R. R. S. 1943. Grand Island School Dist. #2 v. Celotex Corp. 559
56. An action based on breach of an implied contract must be commenced within 4 years of accrual of the cause of action. § 25-206, R. R. S. 1943. Grand Island School Dist. #2 v. Celotex Corp. 559
57. An action based on breach of a written contract must be commenced within 5 years of accrual of the cause of action. § 25-205, R. R. S. 1943. Grand Island School Dist. #2 v. Celotex Corp. 559
58. While it is not mandatory that the county court appoint as personal representative of the estate the person or persons nominated in a will, it is required that the court adhere to all of the applicable provisions of sec-

tion 30-2412, R. R. S. 1943, in making an appointment. Schissler v. Foote 598
59. The authorization for special assessment for street improvements found at sections 18-2001 to 18-2003, R. R. S. 1943, does not extend to a street section already paved. Turner v. City of North Platte 706
60. Under section 25-301, R. R. S. 1943, every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 25-304, R. R. S. 1943. Redding v. Gibbs 727
61. Prohibition by the Legislature of operation of racetrack messenger services bears a reasonable relationship to the legitimate State interest in the regulation of gambling. No constitutional provision renders such prohibition unlawful. § 2-1221, R. R. S. 1943. Pegasus of Omaha, Inc. v. State 755
62. All appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose the right ceases. § 46-229, R. R. S. 1943. Hostetler v. State 776
63. If it shall appear that any water appropriation has not been used for some beneficial or useful purpose, or having been so used at one time has ceased to be used for such purpose for more than 3 years, the Department of Water Resources shall appoint a place and time of hearing, and shall serve notice upon the owners of such water appropriation or such ditch, canal, or other diverting works to show cause, by such time and at such place, why the water appropriation owned by such person should not be declared forfeited and annulled because such water appropriation had not been used for more than 3 years prior to receiving such notice, and shall also serve such notice upon the landowners under such water appropriation, ditch, or canal. § 46-229.02, R. R. S. 1943. Hostetler v. State 776
64. If a statutory classification has some reasonable basis it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. A statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it. Elliott v. Ehrlich 790
65. Welfare benefits are a matter of statutory entitlement for persons qualified to receive them and refusal or termination involves state action that adjudicates important rights. Elliott v. Ehrlich 790
66. Section 33-139, R. S. Supp., 1978, does not authorize the

payment of $20 per day to a material witness during the time that he is confined while he is unable to post bond. Cochran v. County of Lincoln 818

67. A general statute providing for witness fees cannot be construed to include or to authorize payment of such fees to any person detained by court order while waiting for the trial to take place. Cochran v. County of Lincoln 818

68. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. Cochran v. County of Lincoln 818

69. The right of a witness to compensation is purely statutory since at common law no witness fees were paid. A statute not providing for payment of fees to witnesses in criminal and other cases does not on that account infringe the constitutional provision against taking property for public use, against taking property without due process of law, or against demanding a man's particular services without just compensation. Cochran v. County of Lincoln 818

Stop and Check.

1. Except where there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for a violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment to the Constitution of the United States. State v. Kretchmar 663

2. A state may develop acceptable methods for spot checking the validity of motor vehicle registrations and operators' licenses that involve little intrusion or do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one acceptable alternative. State v. Kretchmar 663

Streets and Alleys.

1. Validity of special assessment for street improvement was properly challenged by petition in error timely filed after appearance before city council sitting as board of equalization. Turner v. City of North Platte 706

2. The authorization for special assessment for street improvements found at sections 18-2001 to 18-2003, R. R. S. 1943, does not extend to a street section already paved. Turner v. City of North Platte 706
3. The legislative power and authority delegated to a city to construct local improvements and levy assessments for payments thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer. Turner v. City of North Platte 706
4. Where special assessments against property to pay the costs of paving are void, knowledge of the proceedings and of the construction of the improvement will not estop the owner from avoiding liability therefor, and they cannot be enforced solely on the ground of the benefits of the improvements to the owners of abutting lots or lands. Turner v. City of North Platte 706

Summary Judgments.

1. The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where under the facts he is entitled to judgment as a matter of law. 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. 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. Crnkovich v. Scaletta 22
2. Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment. Miller v. Westwood Homes, Inc. 29
3. Where pleadings and evidence presented conclusively indicate that the statute of limitations has run, summary judgment is appropriate. Grand Island School Dist. #2 v. Celotex Corp. 559

Supreme Court.

1. Except where jurisdiction is involved, this court will consider on appeal only questions which have been presented to and passed upon by the trial court. State v. Lehman 341
2. Consideration of the cause in this court is generally limited to errors assigned and discussed. Grand Island School Dist. #2 v. Celotex Corp. 559

3. The 1972 decision of the United States Supreme Court in Fuentes v. Shevin, 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, will not be applied retroactively to a replevin action commenced in 1967. Peck v. Augustin Bros. Co. 574

Sureties.

The order and decree of the county court as to the amount due from the guardian to his ward upon the final accounting and settlement of the guardian is final and conclusive upon the sureties on the guardian's bond, both as to the bond entered into upon his appointment or for any bond he may have been required to give under a license to sell his ward's real estate. Feltz v. Universal Surety Co. 42

Taxation.

1. Where the primary function of tangible personal property is to aid in the production of goods which are manufactured for ultimate retail sale, the property will not be exempt from the use tax as defined by section 77-2702(20), R. R. S. 1943, merely because some undetermined fraction of the property is absorbed into the retail product during its manufacture. American Stores Packing Co. v. Peters 76
2. The power to equalize property valuations between counties is vested in the State Board of Equalization and Assessment. The sole method of review in this court is by appeal. DeCamp v. State Board of Equalization and Assessment 366
3. The right of an individual to appeal an order of the State Board of Equalization and Assessment is restricted to one who has demonstrated to the State Board that he is a "person affected" by the order. Only a taxpayer is a "person affected." § 77-510, R. R. S. 1943. DeCamp v. State Board of Equalization and Assessment 366
4. Where appeal is the sole method of review, failure to allege essential elements of standing to the State Board of Equalization and Assessment may not be corrected by affidavit in this court. DeCamp v. State Board of Equalization and Assessment 366
5. Public hearings, and notice thereof, are a prerequisite to an order changing valuations by the State Board of Equalization and Assessment. While an appearance might properly be made in some manner other than personal appearance, it must be made within the time limits legally set by the State Board. DeCamp v.

State Board of Equalization and Assessment 366
6. In the execution of the power to tax, the taxing officers must be able to show legislative authority for every levy of taxes. Turner v. City of North Platte 706
7. It is constitutionally required that there be notice to the property owners of a special assessment and an opportunity to contest the amount and validity of the assessment before it becomes a charge on the property. Turner v. City of North Platte 706
8. Validity of special assessment for street improvement was properly challenged by petition in error timely filed after appearance before city council sitting as board of equalization. Turner v. City of North Platte .. 706
9. The authorization for special assessment for street improvements found at sections 18-2001 to 18-2003, R. R. S. 1943, does not extend to a street section already paved. Turner v. City of North Platte 706
10. The legislative power and authority delegated to a city to construct local improvements and levy assessments for payments thereof is to be strictly construed and every reasonable doubt as to the extent or limitation of such power and authority is resolved against the city and in favor of the taxpayer. Turner v. City of North Platte 706
11. Where special assessments against property to pay the costs of paving are void, knowledge of the proceedings and of the construction of the improvement will not estop the owner from avoiding liability therefor, and they cannot be enforced solely on the ground of the benefits of the improvements to the owners of abutting lots or lands. Turner v. City of North Platte 706

Tax Evasion.

A complaint that accused willfully attempted to evade an income tax or the payment thereof without specifying the means employed to attempt such evasion, does not include on its face the crime of filing a false return. State v. Forbes 349

Time.

1. One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. Rentschler v. Walnofer 84
2. Title may not be granted or quieted on the theory of adverse possession in the absence of proof of exclusive possession for a purpose to which the land is adapted

for the statutory period of 10 years. Rentschler v. Walnofer 84

3. A notice of appeal filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective to confer jurisdiction on this court if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the notice of appeal relates. Dale Electronics, Inc. v. Federal Ins. Co. 133
4. A motion for new trial filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective and does not constitute a nullity if the record shows that the motion for new trial relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the motion for new trial relates. Pfeiffer v. Pfeiffer 137
5. Under the Uniform Commercial Code rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller. Fabricators, Inc. v. Farmers Elevator, Inc. 150
6. Under the Uniform Commercial Code acceptance of goods occurs when the buyer fails to make an effective rejection if the buyer has had a reasonable opportunity to inspect the goods. Fabricators, Inc. v. Farmers Elevator, Inc. 150
7. A cause of action accrues and the statute of limitations begins to run when an aggrieved party has a right to start and maintain a suit. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318
8. The statute of limitations begins to run against a cause of action to recover the purchase price or value of goods sold and delivered at the time of their delivery unless there is some agreement as to the time and manner of payment different from that which the law implies, which is, payment shall be made in cash on delivery. If a term of credit is given to the buyer, the statute begins to run when, and only when, the period of credit has expired. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318
9. The latest item of a continuous account removes prior items from the operation of the statute of limitations.

Transactions may be independent because of special contracts, long intervals, or other circumstances. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318

10. Under the provisions of section 24-537, R. S. Supp., 1976, a motion to vacate a default judgment in the county court must be made within 30 days after such judgment is entered and in the manner therein provided. Credit Bureau of Hastings, Inc. v. George 338
11. A trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after the trial has begun when there is no showing of prejudice. State v. Lehman 341
12. Ordinarily a party in privity with a party to an action, in the sense that he will be bound by the judgment, is one who acquired his interest after commencement of the action or rendition of the judgment. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356
13. Public hearings, and notice thereof, are a prerequisite to an order changing valuations by the State Board of Equalization and Assessment. While an appearance might properly be made in some manner other than personal appearance, it must be made within the time limits legally set by the State Board. DeCamp v. State Board of Equalization and Assessment 366
14. A motion to vacate or modify which is filed within the time limitation contemplated by section 30-2437, R. R. S. 1943, is similar in nature to a motion for a new trial in District Court, and the overruling of such motion is a final order itself which extends the 30-day appeal time from the entry of the original order complained of to the date upon which the motion to vacate or modify is overruled. DeVries v. Rix 392
15. Where the evidence does not affirmatively show that a building is beyond reasonable repair, the order of the State Fire Marshal should be in the alternative, to wit, to make needed specified repairs within a fixed period of time, or, upon failure to so do, to direct the demolition of the building. State Fire Marshal v. Schaneman 413
16. Ordinarily, a statute of limitations begins to run as soon as the plaintiff has a right to bring suit. This is true even though the plaintiff may be ignorant of the existence of the cause of action. Grand Island School Dist. #2 v. Celotex Corp. 559
17. The statute of limitations for an action based on alleged deficiencies in improvements to real property does not run during the time when the plaintiff rea-

sonably could not discover the existence of the cause of action. § 25-223, R. S. Supp., 1978. Grand Island School Dist. #2 v. Celotex Corp. 559

18. It is competent for the Legislature to change statutes subject to the limitation that an action already barred may not be revived and that an action may not be unreasonably cut off. The applicable statute of limitations is the one in force at the time the suit is brought. Grand Island School Dist. #2 v. Celotex Corp. 559

19. An action for breach of warranty in the sale of goods must be commenced within 4 years of tender of delivery. Failure to discover the breach prevents the running of the statute only when the warranty explicitly extends to future performance. § 2-725, U. C. C. Grand Island School Dist. #2 v. Celotex Corp. 559

20. An action grounded in tort must be commenced within 4 years of accrual of the cause of action. § 25-207 (3), R. R. S. 1943. Grand Island School Dist. #2 v. Celotex Corp. 559

21. An action based on breach of an implied contract must be commenced within 4 years of accrual of the cause of action. § 25-206, R. R. S. 1943. Grand Island School Dist. #2 v. Celotex Corp. 559

22. An action based on breach of a written contract must be commenced within 5 years of accrual of the cause of action. § 25-205, R. R. S. 1943. Grand Island School Dist. #2 v. Celotex Corp. 559

23. An option does not constitute an estate or interest in land but it is a mere right of election to accept or reject a present offer within the time and upon the terms designated. Commuter Developments and Investments, Inc. v. Gramlich 569

24. An act within the meaning of the Nebraska Mental Health Commitment Act is "recent" if the time interval between it and the hearing of the mental health board is not greater than that which would indicate processing of the complaint was carried on with reasonable diligence under the circumstances existing, having due regard for the rights and welfare of the alleged mentally ill dangerous person and the protection of society in general. Hill v. County Board of Mental Health 610

25. A cause of action in contract accrues at the time of the breach or failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury occasioned him, but not until then. Hooker and Heft v. Estate of Weinberger 674

26. An anticipatory breach of contract is one committed

before the time has come when there is a present duty of performance and is the outcome of words or actions evincing an intention to refuse performance in the future. Hooker and Heft v. Estate of Weinberger 674

27. Where a party bound by an executory contract repudiates his obligation before the time for performance, the promisee has an option to treat the contract as ended so far as further performance is concerned and to maintain an action at once for damages occasioned by such anticipatory breach. Hooker and Heft v. Estate of Weinberger 674

28. A suit brought in small claims court and transferred to the regular docket of the municipal court prior to the time set for hearing in the small claims court shall be subject to all of the provisions of law and rules of court applicable to proceedings in municipal court. State ex rel. Simpson v. Vondrasek 693

29. A municipal court rule which provides that a party desiring a jury trial in a civil case must demand the same in writing on or before the answer day refers to the answer date as established in the municipal court after the transfer of the case from the small claims court and not to the "appearance" date specified in the notice to the defendant in the small claims court. State ex rel. Simpson v. Vondrasek 693

30. If it shall appear that any water appropriation has not been used for some beneficial or useful purpose, or having been so used at one time has ceased to be used for such purpose for more than 3 years, the Department of Water Resources shall appoint a place and time of hearing, and shall serve notice upon the owners of such water appropriation or such ditch, canal, or other diverting works to show cause, by such time and at such place, why the water appropriation owned by such person should not be declared forfeited and annulled because such water appropriation had not been used for more than 3 years prior to receiving such notice, and shall also serve such notice upon the landowners under such water appropriation, ditch, or canal. § 46-229.02, R. R. S. 1943. Hostetler v. State 776

31. Where irrigation water has not been applied to the lands described in the adjudicated appropriation for the statutory period of 3 years, such nonuse, unless excused for some valid reason, will result in the loss of the right and the Department of Water Resources may cancel the appropriation in whole or in part. Hostetler v. State 776

32. A decree of dissolution of marriage settling and divid-

ing the property of the parties is not subject to appellate review respecting such division and assignment of property unless appeal is taken therefrom within the time provided by statute. When final it is res judicata as to the parties on the award and assignment of property therein provided. White v. White 782

33. A trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after the trial has begun where there is no showing of prejudice to the rights of the defendant. State v. Nielsen 847

Torts.

1. The common law doctrine of interspousal tort immunity pronounced in Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N. W. 297 (1927), is abrogated. Imig v. March 537
2. The personal representative of a decedent may maintain a wrongful death action based on the alleged negligence of decedent's spouse. Imig v. March 537

Trespass.

1. Where a trespass is committed by an independent contractor, the other party to the contract is not liable for the trespass unless such other party controls the work or authorizes the specific act. Crnkovich v. Scaletta .. 22
2. A policy of insurance undertaking to pay damages because of injury to or destruction of property caused by accident does not cover damages caused by the trespass of the policyholder upon the land of another when the damage is the natural result of the intentional act of the policyholder. Foxley & Co. v. United States Fidelity & Guaranty Co. 165

Trial.

1. A motion for leave to file an amended answer, particularly after the matter is submitted, is addressed to the sound discretion of the trial court. Miller v. Westwood Homes, Inc. 29
2. In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Fabricators, Inc. v. Farmers Elevator, Inc. 150
3. The judgment of the trial court in an action at law

where a jury has been waived has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong. Fabricators, Inc. v. Farmers Elevator, Inc. 150

4. Error may not be predicated upon a ruling excluding evidence without making an offer of proof as to what the excluded evidence may have been. Schwartz v. Selvage 158

5. In an appeal from a decree of dissolution of marriage, 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. Brus v. Brus 161

6. In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in her favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for the jury. Swiler v. Baker's Super Market, Inc. 183

7. Negligence is a question of fact and may be proven by circumstantial evidence and physical facts. However, the law requires that the facts and circumstances proved, together with the inferences that may properly be drawn therefrom, indicate with a reasonable certainty the negligent act charged. Swiler v. Baker's Super Market, Inc. 183

8. A court will not interfere on appeal with the 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. Meadows 197

9. Even after the issues have been made up, it is within the sound judicial discretion of the trial judge to permit amendments to the pleadings in the furtherance of justice. Tilden v. Beckmann 293

10. For a question of constitutionality of a statute to be considered in this court, it must be properly raised in the trial court or it will be deemed waived. State Fire Marshal v. Schaneman 413

11. Questions not presented to or passed upon by the trial court will not be considered on appeal. State Fire Marshal v. Schaneman 413

12. If the trial court views the premises, it is required to

consider any competent and relevant facts revealed thereby; and, similarly, a duty is imposed on this court, on review of the findings made by the trial court, to give consideration to the fact that the trial court did view the premises. State Fire Marshal v. Schaneman 413

13. In a trial de novo on the record, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county court, with the caveat that where the evidence is in irreconcilable conflict, the District Court should consider the lower court's opportunity to observe the witnesses and their manner of testifying. Hyde v. Cleveland 420

14. Ordinarily the order of proof is a matter in the discretion of the trial court and error cannot be successfully asserted on account of any irregularity therein; prejudice in such case should first appear. Hyde v. Cleveland 420

15. In a mandamus action, findings of fact by the trial court upon conflicting evidence will not be disturbed on appeal unless clearly wrong. Singleton v. Kimball County Board of Commissioners 429

16. Where during the trial of a case, both parties treat an affirmative defense as denied, it will be so considered in this court, although plaintiff did not file a reply. Kurkowski v. Bailey 582

17. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Foreman & Clark of Nebraska, Inc. v. City of Omaha 746

Trusts.

An agreement to devise and bequeath property is, where supported by consideration, valid and enforceable. In such a case, equity will impress a trust upon the property, which trust will follow it into the hands of the personal representatives of the promisor or into the hands of a grantee who has not given consideration for the conveyance. Allen v. Mayo 602

Undue Influence.

A person asserting the exercise of undue influence on a decedent must prove that the decedent was subject to such influence; that there existed an opportunity to exercise such influence; that there was a disposition to exercise such influence; and, that the result appears to be the effect of such influence. Tilden v. Beckmann 293

Uniform Commercial Code.

1. Under the provisions of section 9-105(1)(d), U. C. C., the owner of the collateral subject to a security interest is a debtor, and the filing of a financing statement not signed by the owner of the collateral described in the financing statement is not sufficient to perfect the security interest. Southwest Bank of Omaha v. Moritz .. 45
2. Under the provisions of the Uniform Commercial Code, a "sale" consists of the passing of title from the seller to the buyer for a price. Unless otherwise explicitly agreed, where delivery is to be made without moving the goods, if the goods at the time of contracting are already identified and no documents are to be delivered, the title passes at the time and place of contracting. Southwest Bank of Omaha v. Moritz 45
3. Under the Uniform Commercial Code rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller. Fabricators, Inc. v. Farmers Elevator, Inc. 150
4. Under the Uniform Commercial Code acceptance of goods occurs when the buyer fails to make an effective rejection if the buyer has had a reasonable opportunity to inspect the goods. Fabricators, Inc. v. Farmers Elevator, Inc. 150
5. An action for breach of warranty in the sale of goods must be commenced within 4 years of tender of delivery. Failure to discover the breach prevents the running of the statute only when the warranty explicitly extends to future performance. § 2-725, U. C. C. Grand Island School Dist. #2 v. Celotex Corp. 559
6. An implied warranty cannot "explicitly" extend to future performance. § 2-725, U. C. C. Grand Island School Dist. #2 v. Celotex Corp. 559
7. A cash seller of cattle may reclaim the cattle from the buyer where the buyer dishonors the draft drawn on the buyer by the seller pursuant to the understanding of the parties. Peck v. Augustin Bros. Co. 574

Usury.

Where, in the process of liquidating and terminating the business of an installment loan licensee, a legal and valid installment loan obligation is assigned to a creditor of the licensee in satisfaction of an indebtedness of the licensee, the assignee acquires all the right, title, and interest of the licensee and may sue for, collect, and receive any lawful rate of interest provided for in the installment loan agreement although the assignee

does not have a license to engage in the installment loan business. Bateman v. Liggett 472

Vendor and Purchaser.

Where judgment is recovered against one who has agreed to sell land but made no deed nor received the whole of the purchase money, it is a lien on the vendor's interest in the land. Monroe v. Lincoln City Employees Credit Union 702

Verdicts.

1. The verdict of a jury will not be disturbed unless it is clearly wrong. Reicheneker v. Seward 68
2. Instructions should be considered together so that they may be properly understood, and when, as an entire charge, they properly submit the issues to the jury, the verdict will not be set aside. Reicheneker v. Seward 68
3. When the evidence viewed most favorably for plaintiff fails to disclose the existence of gross negligence, the trial court is obligated to sustain a motion to direct a verdict for the defendant. Wagner v. Mines 143
4. A motion for a directed verdict is 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. Schwartz v. Selvage 158
5. Directing a verdict is proper only when there is a complete absence of probative facts to support a judgment or verdict in favor of the party against whom the verdict is directed. Schwartz v. Selvage 158
6. A court will not interfere on appeal with the 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. Meadows 197
7. For the purpose of evaluating a motion for a directed verdict or a dismissal of a cause of action, all doubt must be resolved in favor of the party against whom the verdict or dismissal is urged. The truth of all evidence he has submitted must be assumed and he must be given the benefit of all inferences therefrom. The question must be whether, in view of these assumptions, the jury could properly bring in a verdict in his favor. Jones v. Foutch 246
8. The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. T. S. McShane Co., Inc. v. Dominion Constr. Co. 318
9. A motion for a directed verdict is an absolute pre-

requisite to a motion for judgment notwithstanding the verdict. Lockhart v. Continental Cheese, Inc. 331

10. A party aggrieved by a verdict may move for a new trial upon the grounds that the verdict is "not sustained by sufficient evidence, or is contrary to law" as provided in section 25-1142, R. R. S. 1943, and the trial court has the power and authority to grant a new trial where such legal cause or reason therefor appears in the record and timely appropriate motions for a new trial have been filed, notwithstanding the fact that no preliminary motion for a directed verdict has been made. Lockhart v. Continental Cheese, Inc. 331

11. In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it. A jury verdict based on conflicting evidence should not be set aside on appeal unless clearly wrong. Lockhart v. Continental Cheese, Inc. 331

12. A verdict will not be set aside as inadequate unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law. Palma v. Barta 459

13. Under the facts of this case the insurance company issuing an automobile policy containing "uninsured motorist" coverage is held not entitled to relitigate, in a subsequent declaratory judgment action filed against it by its insured, whether the general verdict for damages returned by the jury, in a prior action brought by the insured against an uninsured motorist, contained any amounts for property damage, where counsel did not request a special verdict itemizing the type of damages included therein. Herrera v. American Standard Ins. Co. 477

14. Where a general verdict is returned by a jury not delineating the type and amount of damages included within the verdict, the court has no means of ascertaining what elements were considered by the jury, nor the basis on which the jury determined the amount of damages awarded. Where that information could have been obtained by requesting a special verdict, the information in question may not later be obtained by extended or subsequent litigation. Herrera v. American Standard Ins. Co. 477

15. In a criminal action, this court will not interfere with a verdict of guilty unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support a finding of guilt beyond a reasonable doubt. State v. Costanzo 586
16. Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Foreman & Clark of Nebraska, Inc. v. City of Omaha 746
17. 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. Sampson 786
18. A jury verdict may not be set aside unless it is clearly wrong and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party and all conflicts in the evidence, expert or lay, and the credibility of the witnesses is for the jury and not for the court. Kniesche v. Thos 852

Voir Dire.

There was no reversible error where a juror on voir dire examination inadvertently failed to answer a question put to him as to whether any claim for personal injuries had ever been made against him, where the juror voluntarily called attention to his omission to the trial judge and informed him that notwithstanding the omission he could render a fair and impartial judgment in the action. Palma v. Barta 459

Waiver.

1. Absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial. State v. Moore 94
2. The due process clause of the Fourteenth Amendment to the Constitution of the United States guarantees the assistance of counsel unless that right is intelligently and understandingly waived by the accused. Courts must indulge every reasonable presumption against a waiver of fundamental constitutional rights, and do not presume acquiescence in their loss. State v. Moore ... 94
3. An appearance for the purpose of objecting to the jurisdiction of the court of the subject matter of the action, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of the defendant, whether the defendant in-

tended such waiver or not. Schleuter v. McCuiston ... 101
4. Where during a custodial interrogation the individual being questioned indicates he does not wish to talk without the presence of an attorney, and the officer, seeking only clarification of the individual's intention not to talk, asks an additional question for that purpose, and the individual then answers the questioning officer by agreeing to talk, his answer constitutes an explicit, clear, and unequivocal waiver of his prior request for assistance of counsel. State v. Weinacht 124
5. A statement which is obtained after the proceeding has become accusatory and there has been no voluntary and intelligent waiver of the right to counsel is not admissible. State v. Fuller 233
6. A defect of parties not raised by demurrer or answer is waived. Armbruster v. Stanton-Pilger Drainage Dist. 772
7. An admission in a pleading upon which the case is tried waives all controversy concerning the fact admitted. Armbruster v. Stanton-Pilger Drainage Dist. 772

Warranty.

1. An implied warranty cannot "explicitly" extend to future performance. § 2-725, U. C. C. Grand Island School Dist. #2 v. Celotex Corp. 559
2. An action for breach of warranty in the sale of goods must be commenced within 4 years of tender of delivery. Failure to discover the breach prevents the running of the statute only when the warranty explicitly extends to future performance. § 2-725, U. C. C. Grand Island School Dist. #2 v. Celotex Corp. 559
3. A cause of action on a covenant of warranty or for quiet enjoyment does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title. Hooker and Heft v. Estate of Weinberger 674

Waters.

1. Section 16-667, R. R. S. 1943, as it existed in 1975, authorized a city of the first class to create a water district to extend water service within the city limits without giving notice of the creation of the district to property owners affected. First Assembly of God Church v. City of Scottsbluff 452
2. All appropriations for water must be for some beneficial or useful purpose, and when the appropriator of his successor in interest ceases to use it for such purpose the right ceases. § 46-229, R. R. S. 1943. Hostetler v. State 776
3. If it shall appear that any water appropriation has not

been used for some beneficial or useful purpose, or having been so used at one time has ceased to be used for such purpose for more than 3 years, the Department of Water Resources shall appoint a place and time of hearing, and shall serve notice upon the owners of such water appropriation or such ditch, canal, or other diverting works to show cause, by such time and at such place, why the water appropriation owned by such person should not be declared forfeited and annulled because such water appropriation had not been used for more than 3 years prior to receiving such notice, and shall also serve such notice upon the landowners under such water appropriation, ditch, or canal. § 46-229.02, R. R. S. 1943. Hostetler v. State 776

4. Where irrigation water has not been applied to the lands described in the adjudicated appropriation for the statutory period of 3 years, such nonuse, unless excused for some valid reason, will result in the loss of the right and the Department of Water Resources may cancel the appropriation in whole or in part. Hostetler v. State 776
5. Beneficial use requires, in the case of an appropriation for irrigation purposes, actual application of the water to the land for the purpose of irrigation. To constitute a beneficial use within the meaning of the appropriation statute, the use must be one described in the appropriation. Hostetler v. State 776
6. An unexcused nonuse of water appropriation rights by a predecessor in title binds the successor in title. Hostetler v. State 776

Welfare and Assistance.

1. Welfare benefits are not a fundamental right and neither the state nor the federal government is under a constitutional obligation to guarantee minimum levels of support. Elliott v. Ehrlich 790
2. A state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. Elliott v. Ehrlich 790
3. In this state there is no legal obligation upon grandparents to support grandchildren. Elliott v. Ehrlich 790
4. Welfare benefits are a matter of statutory entitlement for persons qualified to receive them and refusal or termination involves state action that adjudicates important rights. Elliott v. Ehrlich 790
5. To the extent that regulation IX-4731 of the Nebraska State Department of Welfare creates an irrebuttable

presumption that the income of maternal grandparents is contributed to the needs of an unborn grandchild, it denies equal protection and due process of law and is unconstitutional under the United States and Nebraska Constitutions. Elliott v. Ehrlich 790

Wills.

While it is not mandatory that the county court appoint as personal representative of the estate the person or persons nominated in a will, it is required that the court adhere to all of the applicable provisions of section 30-2412, R. R. S. 1943, in making an appointment. Schissler v. Foote 598

Witnesses.

1. In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Fabricators, Inc. v. Farmers Elevator, Inc. 150
2. In an appeal from a decree of dissolution of marriage, 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. Brus v. Brus 161
   Slama v. Slama 644
   Mueller v. Mueller 653
3. A real estate foreclosure action is an action in equity, and upon appeal to this court is triable de novo, subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. The above rule is applicable even though all the witnesses testifying were called by only one of the parties. Tilden v. Beckmann 293
4. The owner of personal property is qualified to express an opinion of the value thereof solely because of his status as owner of it. Peck v. Masonic Manor Apartment Hotel 308
5. A trial court may, in the exercise of its discretion, permit the names of witnesses to be endorsed upon an information before or after the trial has begun when

there is no showing of prejudice. State v. Lehman 341
6. In a trial de novo on the record, it is the obligation of the District Court to reach an independent conclusion without reference to the decision of the county court, with the caveat that where the evidence is in irreconcilable conflict, the District Court should consider the lower court's opportunity to observe the witnesses and their manner of testifying. Hyde v. Cleveland 420
7. The requirement imposed by section 27-613 (2), R. R. S. 1943, that a witness be afforded an opportunity to explain or deny a prior inconsistent statement does not apply to admissions or statements offered against a party to the action, if the admissions or statements were made by that party. Hyde v. Cleveland 420
8. The admissions and declarations of a party to an action against his own interest, upon a material matter, are admissible against him as original evidence and may be used as rebuttal evidence, and, where he is examined as a witness in his own behalf, it is unnecessary to lay foundation for the admission of such evidence by cross-examination. Hyde v. Cleveland 420
9. On appeals in equity, the Supreme Court will, in determining the weight of the testimony of the witnesses, consider that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Allen v. Mayo 602
10. In an appeal of an action for dissolution of a marriage, the Supreme Court is required to try the case de novo and reach independent conclusions on the issues presented by the appeal without referring to the conclusions or judgment reached in the District Court. While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of facts rather than the opposite. Patton v. Patton 638
11. The credibility of witnesses is for the trier of fact to determine and not for the Supreme Court on appeal. State v. Williams 649
12. Failure of the trial court to disclose prior to sentencing that it does not accept defendant's statement that he was not the mastermind of crime involving several defendants does not preclude the court from considering that fact in sentencing. State v. Kramer 658
13. Equity cases are heard de novo in this court; however, in determining the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Duff v.

Duff 767
14. Section 33-139, R. S. Supp., 1978, does not authorize the payment of $20 per day to a material witness during the time that he is confined while he is unable to post bond. Cochran v. County of Lincoln 818
15. A general statute providing for witness fees cannot be construed to include or to authorize payment of such fees to any person detained by court order while waiting for the trial to take place. Cochran v. County of Lincoln 818
16. The right of a witness to compensation is purely statutory since at common law no witness fees were paid. A statute not providing for payment of fees to witnesses in criminal and other cases does not on that account infringe the constitutional provision against taking property for public use, against taking property without due process of law, or against demanding a man's particular services without just compensation. Cochran v. County of Lincoln 818
17. It is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual for the welfare of the public. Cochran v. County of Lincoln 818

Words and Phrases.

1. The term "attorney," used in section 52-103, R. S. Supp., 1978, means any agent or substitute acting for and in behalf of a lien claimant; it may include an attorney at law but is not limited to that meaning. Sherwood v. Tucker 56
2. Gross negligence within the meaning of the Nebraska guest statute means gross and excessive negligence or negligence in a very high degree; the absence of slight care in the performance of duty; an entire failure to exercise care; or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. Wagner v. Mines 143
3. Where one intentionally does damage to the property of another in the mistaken belief that the property belongs to him, the property damage is not, within the meaning of an insurance policy, an "accident" neither expected nor intended from the standpoint of the insured. Fox-

ley & Co. v. United States Fidelity & Guaranty Co. 165

4. The essential concept involved in the term dealership, as used in the Motor Vehicle Industry Licensing Act, is the "business" of the dealer. S & T Motors v. General Motors Corp. 188

5. The term "willful failure," as used in the statute giving the Nebraska Public Service Commission jurisdiction and authority to suspend, change, or revoke a certificate of public convenience and necessity for failure to comply with the provisions of the Motor Carrier Act, is such behavior through acts of commission or omission which justifies a belief that there was an intent entered into and characterizing the failure complained of. A failure through oversight to file the annual report required by section 75-116, R. R. S. 1943, would not justify the revocation of an authority. Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc. 356

6. "Good cause shown" as used in section 30-2437, R. R. S. 1943, means to demonstrate a logical reason or legal ground, based on fact or law, why an otherwise final order of the county court should be vacated or modified. DeVries v. Rix 392

7. The use of a declaratory judgment remedy is proper in this state to determine the rights and obligations of the insured and the insurance company under an uninsured motorist clause following the rendition of a final judgment against the uninsured motorist. Herrera v. American Standard Ins. Co. 477

8. An act within the meaning of the Nebraska Mental Health Commitment Act is "recent" if the time interval between it and the hearing of the mental health board is not greater than that which would indicate processing of the complaint was carried on with reasonable diligence under the circumstances existing, having due regard for the rights and welfare of the alleged mentally ill dangerous person and the protection of society in general. Hill v. County Board of Mental Health 610