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LARRY T. SMITH, APPELLANT, V. ROGER ERFTMIER AND THE COMMERCIAL NATIONAL BANK OF AINSWORTH, NEBRASKA, A NEBRASKA BANKING CORPORATION, APPELLEES.

315 N.W.2d 445

Filed January 29, 1982. No. 43707.

1. **Pleadings: Custom and Usage: Contracts.** It is ordinarily incumbent upon one who relies on a special custom as a basis of recovery or defense to allege the custom and to plead and prove the other party had knowledge of the custom and contracted with reference thereto.
2. **Trial: Judgments: Appeal and Error.** Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. **Contracts.** It is well recognized that, as a general rule, every contract for work or services includes an implied duty to perform the work or services skillfully, carefully, diligently, and in a workmanlike manner.
4. **Pleadings: Appeal and Error.** Where a certain theory has been adopted and relied upon by the parties during the trial, such theory will be adhered to on appeal regardless of whether it is correct.
5. **Contracts: Damages.** Where there has been a breach of a contract by one party resulting in a loss to the other, it is the duty of such other party to take all reasonable steps to reduce the amount of his damages.
6. **Motions for New Trial: Evidence.** Newly discovered evidence is not a ground for a new trial, where the exercise of due diligence before trial would have produced it.

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

Rodney J. Palmer for appellant.

David E. Pavel of Harris, Feldman, Stumpf & Pavel for appellees.

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

KRIVOSHA, C.J.

The instant appeal arises out of a contract entered into by and between the appellant, Larry T. Smith (Smith), a contractor, and the appellee Roger Erftmier (Erftmier) for the erection of a grain drying and storage complex to be located upon real estate owned

by Erftmier in a rural area of Keya Paha County, Nebraska. The appellee The Commercial National Bank of Ainsworth, Nebraska, is merely a stakeholder in this action, having received some $19,710 from Erftmier to hold pending the settlement of the dispute, and may, for purposes of this case, be disregarded. Smith filed suit against Erftmier for the balance allegedly due on the construction contract. Erftmier denied that he was indebted to Smith in any amount and filed a counterclaim seeking damages based upon Smith's alleged failure to construct the complex in a good and workmanlike manner and in accordance with the contract. Upon conclusion of a trial to the court, a jury having been waived, the trial court denied judgment to Smith on his petition. Further, the trial court entered judgment for Erftmier against Smith on Erftmier's counterclaim in the total amount of $33,544.01 and ordered that the $19,710 held in escrow by The Commercial National Bank of Ainsworth, Nebraska, be applied on the judgment. We believe that the trial court was in all respects correct, and affirm the judgment.

The contract between Smith and Erftmier was entered into on August 29, 1977, and was, in form, a standard AIA Document A101. By its terms Smith was to erect for Erftmier four grain bins, two of which were identified as Butler brand grain bins and two of which were identified as Eaton brand grain bins. The references are to the names of the manufacturers of the bins. In return for the work to be done by Smith, Erftmier agreed to pay to Smith the sum of $109,500, payments to be in accordance with the contract. Attached to the contract and made a part of it was AIA Document A201, "General Conditions of the Contract for Construction." By its terms Smith specifically warranted to Erftmier that "all Work will be of good quality, free from faults and defects and in conformance with the Contract Documents."

Three of the bins were completed by November 18,

1977, and the fourth one was completed in January of 1978. The evidence discloses that bin No. 1, the Butler drying bin, was 36 feet in diameter and had an eave height of 25 feet 8 inches. The second Butler bin had a diameter of 42 feet and an eave height of 33 feet. The remaining Eaton bins had a diameter of 48 feet and an eave height of 26 feet 10 inches.

The evidence discloses that during the construction period Erftmier continued to make payment to Smith even though he had several problems regarding the construction. By the time of trial all of these matters appeared to have been cleared up with the exception of the two now remaining. Those two items consisted of what Erftmier claimed was poor concrete work and inadequate footings and foundations beneath the bins. The evidence discloses that during the construction of the bins the contractor had in his possession a manual entitled "Grain Bin Erection Manual," published by the Eaton company. The manual provided in part: "An adequate foundation is essential to trouble-free service from your grain bin." It further provided that the foundation for the grain bin must be below the frostline. The evidence further disclosed that, rather than having foundations as indicated by the Eaton manual and as Erftmier's expert would have required, bin No. 1 had no footings at all and bin Nos. 2, 3, and 4 all had narrow, shallow footings with what was designated as a "rat ring" going down about 18 inches.

Smith assigns a number of errors, but basically argues three. First, he maintains that when Erftmier took possession of the bins and started using them, he accepted the bins and waived any alleged default; second, Smith maintains that the trial court erred in not finding that proven local custom, tradition, and usage did not require the installation of footings in connection with the construction of the bins; and, finally, that the wrong measure of damages was used.

We turn first to the question concerning custom and

usage. In the first place, Smith never pleaded the matter of custom and usage. Moreover, there is no evidence in the record that Erftmier had knowledge of the custom, if one existed, and contracted with reference to the alleged custom. The evidence, quite to the contrary, is that Erftmier did not reside in the area and had no knowledge of any alleged custom and usage with regard to the footings and the foundations. In *Fisher v. Stuckey*, 201 Neb. 439, 449, 267 N.W.2d 768, 774 (1978), we said: "'It is ordinarily incumbent upon one who relies on a special custom as a basis of recovery or defense to allege the custom and to plead and prove the other party had knowledge of the custom and contracted with reference thereto.' Timmerman v. Hertz, 195 Neb. 237, 238 N.W.2d 220 (1976). In the present case, Fisher did not allege the custom on which he relies, nor did he plead that the Stuckeys had knowledge of the custom and contracted with reference thereto. In view of this fact, we conclude that Fisher has failed to properly raise the issue of custom in this case, and reject his contention that a trial is necessary to resolve the custom issue." Similarly, in the instant case Smith neither alleged any custom nor did he allege or prove that Erftmier had knowledge of the custom and contracted with reference thereto.

But perhaps even more important in the instant case is the fact that the trial court permitted Smith to introduce all of his evidence with regard to custom and usage, though it was not admissible, and chose not to believe it. Smith called several witnesses, all of whom testified that local custom, usage, and tradition indicated that grain bins erected upon the sandy loam soil in north central Nebraska did not require footings below the frost level for either longevity of the project or economics of the project. Erftmier, on the other hand, called a witness who testified that he had been involved in the design of grain bins for both Butler and Eaton and had prepared and approved the ma-

terial regarding foundation design found in the Eaton manual. He testified that the foundations for grain bins of the size at issue should have a spread footing below the frostline, and down 50 to 60 inches below the ground.

At best, the question of whether footings and foundations were necessary was a question of fact. The trial court chose to believe Erftmier's witness and disregard Smith's witnesses. This was a matter solely within the discretion of the trial court sitting as a finder of fact, and a conclusion with which we have no authority to change. As we noted in *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 39, 302 N.W.2d 655, 661 (1981): "'The case below was tried to the court. Our rule is well-established. Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.'" Unless we are able to say that the testimony of Smith's witnesses must be believed as a matter of law, which we are not willing to do, then the trial court's decision to believe Erftmier's witness and disregard Smith's witnesses was not error. As we noted in *Erving v. Tri-Con Industries, ante* p. 339, 314 N.W.2d 253 (1982), the triers of fact are not required to take the opinions of experts as binding upon them. See, also, *Swartz v. Hess, Inc.*, 188 Neb. 542, 198 N.W.2d 64 (1972). The testimony of all the witnesses at best produced a conflict which the trier of fact had to resolve. *Smith v. Platte Valley Public Power and Irrigation District*, 151 Neb. 49, 36 N.W.2d 478 (1949). The requirement that the work should be done in a good and workmanlike manner cannot be questioned. Both the contract itself and the law generally required that the bins be built in a good and workmanlike manner. In *Tibbs v. Fisher*, 208 Neb. 306, 307, 303 N.W.2d 293, 295 (1981), we said: "It is well recognized that, as a general rule, every contract for work or services includes an implied duty to

perform the work or services skillfully, carefully, diligently, and in a workmanlike manner." The trial court found that, based upon competent evidence in the record, Smith failed to construct adequate and sufficient footings beneath the bins and his actions resulted in his failing to perform the contract work in a good and workmanlike manner. We cannot say that the trial court was wrong.

The second issue raised by Smith is that the trial court used the wrong measure of damages by allowing the cost of repair. The trial court found that the reasonable cost of repairing the defective work and constructing adequate footings and foundations was in the amount of $33,000. Smith argues that the cost of repair is a proper measure of damages only where the cost of repair is reasonable or where only a portion of an article is damaged and repairs are necessary before any of it can be used. He further claims that the rule is not applicable where the property cannot feasibly be restored to its original condition, and in such a case the difference in the value of the property "before and after" is the proper measure of damages. We can easily dispose of that claim. In the first instance, Smith offered no evidence to support his claim that the property could not be repaired. Nor did he offer any evidence as to the value of the property "before and after." The only evidence offered by Smith was the cost of repair. His witnesses all testified that whatever defects may exist, they were minor in nature and could be repaired. He tried the case on the theory that the cost of repair was the proper measure of damages. We have frequently held that where a certain theory has been adopted and relied upon by the parties during the trial, such theory will be adhered to on appeal regardless of whether it is correct. *Rieschick Drilling Co. v. American Cas. Co.*, 208 Neb. 142, 303 N.W.2d 264 (1981). In particular, we have followed that rule with regard to the theory of damages. See, *Jacobs v. Korst*, 175 Neb. 639, 122

N.W.2d 760 (1963); *Haarberg v. Schneider*, 174 Neb. 334, 117 N.W.2d 796 (1962); *Porterfield v. Buffalo County Public Power District*, 138 Neb. 720, 295 N.W. 379 (1940). But perhaps of even greater significance in this case is the fact that what little evidence there was concerning the value "before and after," offered by Erftmier, made it clear that the cost of repairs was less than what the damages would have been if the court had adhered to the theory of damages now contended for by Smith. There was evidence offered by Erftmier's expert, which the trial court could believe, to the effect that the failure to construct the footings properly would diminish the life and value of the bins by 50 percent. On that basis, the court could reasonably conclude that the bins were only worth half as much as the contract price. This obviously would have been excess of the damages awarded by the court sufficient to make the necessary repairs. Smith's claim of error in this regard must likewise be disregarded.

And, finally, Smith maintains that the trial court erred in not finding that Erftmier was precluded from claiming damages by accepting the bins and using them. This argument, of course, ignores the fact that at the time Erftmier accepted the bins he was not aware that the footings had not been properly constructed, nor was he aware that the bins would thereafter crack as, in fact, they did. The evidence discloses that the concrete work is irregular, and on bin Nos. 3 and 4 there are large gaps of up to 2 inches which would not have been remedied by sealing with tar. In addition, areas of spalling and cracking are present. These apparently have been caused by reason of the weight being placed upon the inadequate footings and foundations. While it is true that we have on occasion held that acceptance by one may preclude him from thereafter claiming a default, we have never applied the rule where the evidence discloses that the one accepting the product does not

have knowledge of the default at the time he accepts performance. *Randall v. Erdman*, 194 Neb. 390, 231 N.W.2d 689 (1975). The evidence in this case clearly establishes that Erftmier did not discover the footings problem until the summer of 1978, and after he started using the bins. Thus, for the first year that Erftmier used the bins he did not have knowledge of the default in the contract. Furthermore, the evidence clearly established that while there were defects in the bins which would ultimately seriously affect their use, the defects did not, at the time the bins were used by Erftmier, prevent their use. It is a well-established rule in this state that where there has been a breach of a contract by one party resulting in a loss to the other, it is the duty of such other party to take all reasonable steps to reduce the amount of his damages. It is the rule also that where one fails to perform such duty he may not recover damages which would have been avoided had such duty been performed. See, *Selig v. Wunderlich Contracting Co.*, 160 Neb. 215, 69 N.W.2d 861 (1955); *Chicago Roller Skate Mfg. Co., Inc. v. Sokol Manuf. Co.*, 185 Neb. 515, 177 N.W.2d 25 (1970). Had Erftmier not used the bins, he would have suffered even greater losses, either by having to rent other storage space or exposing the grain to the elements. There is no question but that Erftmier did Smith a favor by using the bins and mitigating the damages.

During the argument on the motion for new trial, Smith sought to offer in evidence a Butler manual which he claims would support a position that footings were unnecessary for the bins. The difficulty with Smith's position is that it ignores several basic legal principles. In the first instance, Smith never claimed he was entitled to omit the footings because of the Butler manual, but, rather, because of local custom. Additionally, there is no evidence that Smith followed the Butler manual in erecting the bins. The manual would not have established either local custom

or compliance with the contract, and therefore was irrelevant to that issue. Furthermore, Smith sought the introduction of the manual on the grounds of newly discovered evidence pursuant to Neb. Rev. Stat. § 25-1142(7) (Reissue 1979). The record, however, supports the trial court's position to the effect that the manual was in existence prior to trial and could have and should have been offered at that time. Smith has failed to meet any of the enumerated grounds entitling him to a new trial on the basis of newly discovered evidence. In *Jensen v. John Hancock Mutual Life Ins. Co.*, 145 Neb. 409, 412-13, 16 N.W.2d 847, 849 (1944), we said: "To make sufficient showing on the ground of newly discovered evidence, as contemplated by the seventh subdivision of section 20-1142, Comp. St. 1929, the proof must show that neither the litigant nor his counsel could have discovered the evidence by the exercise of due diligence. See *Wiegand v. Lincoln Traction Co.*, 123 Neb. 766, 244 N.W. 298.

"'Newly discovered evidence is not a ground for a new trial, where the exercise of due diligence before trial would have produced it.' *Hardt v. Orr*, 142 Neb. 460, 6 N.W.2d 589. See, also, *Gate City Co. v. Douglas County*, 135 Neb. 531, 282 N.W. 532; *Buzzello v. Sramek*, 110 Neb. 262, 193 N.W. 743.

. . . .

"Applications for a new trial are entertained with reluctance and granted with caution, because of the manifest injustice in allowing a party to allege that which may be the consequence of his own neglect in order to defeat an adverse verdict, and, further, to prevent fraud and imposition which defeated parties may be tempted to practice to escape the consequences of an adverse verdict."

Having concluded, therefore, that Smith's assignments of error are without merit, the judgment of the trial court is in all respects affirmed.

AFFIRMED.

JOSEPH F. KULHANEK, APPELLEE, V. EVELYN M. KULHANEK, APPELLANT.

315 N.W.2d 262

Filed January 29, 1982. No. 43752.

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

Sidner, Svoboda, Schilke, Wiseman & Thomsen for appellant.

Lawrence H. Yost of Yost, Schafersman, Yost, Lamme & Hillis for appellee.

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

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

MARY JO ELLIS, REGISTER OF DEEDS, APPELLEE, V. THE COUNTY OF SCOTTS BLUFF, NEBRASKA, ET AL., APPELLANTS.

315 N.W.2d 451

Filed January 29, 1982. No. 43786.

1. **Declaratory Judgments: Justiciable Issues.** The existence of a justiciable issue is a fundamental requirement to a court's exercise of its discretion to grant declaratory relief.
2. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
3. **Justiciable Issues: Supreme Court.** The Nebraska Supreme Court can only declare the law and its application to a given set of facts when a justiciable controversy is presented for determination. It is not empowered to render advisory opinions.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded with directions.

Wright & Simmons for appellants.

Raymond, Olsen & Coll, P.C., for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, and HASTINGS, JJ., and CAPORALE, District Judge.

CAPORALE, District Judge.

In this appeal from a declaratory judgment we find that no justiciable controversy exists. We thus reverse with directions to dismiss the action.

Mary Jo Ellis (Ellis), the plaintiff-appellee, is the duly elected register of deeds of Scotts Bluff County. The defendants-appellants are said County, its Board of Commissioners, and the Board's individual members. Hereafter, they shall be referred to collectively as Board.

On August 4, 1976, the then Board established a policy of "not approving claims for expenses for attendance at National Association of County Officials Conventions" and "allowance for expenses for attending out of State meetings by any County personnel must be approved prior to departure."

On July 13, 1979, Ellis submitted a proposed budget for the fiscal year beginning July 1, 1979, which included amounts for attendance at a National Association of County Officials (NACO) convention outside of Nebraska. On July 14, 1979, Ellis, without obtaining prior Board approval, departed for a NACO convention held at Kansas City, Missouri. Thereafter, on or about July 26, 1979, Ellis presented a claim in the amount of $412.80 as reimbursement for expenses incurred in attending the convention. On August 6, 1979, the Board rejected Ellis' claim and set an August 14, 1979, hearing on the County's budget for the 1979 fiscal year. On August 21, 1979, the Board reduced Ellis' proposed

budget by $412.80, but otherwise approved the budget. On August 27, 1979, the Board reversed its prior position, approved the Ellis claim, and paid it in full. The record is silent as to whether Ellis' budget for fiscal year 1979, as approved, was in excess of, less than, or equal to her office's expenditures.

Thereafter, Ellis sought a declaration that the Board's action reducing her budget by the amount of her claim was arbitrary, capricious, and an "undue interference" in the management of her department. She prayed for an order reinstating $412.80 to her 1979 fiscal year budget.

On September 17, 1980, the trial court declared the Board had acted in violation of its budget-making authority and ordered "restoration" of $412.80 to Ellis' budget for the 1980 fiscal year.

Our first inquiry must be whether this case, in its present posture, presents a justiciable issue, for the existence of such an issue is a fundamental requirement to a court's exercise of its discretion to grant declaratory relief.

The most recent of our statements in this regard is found in *Stahmer v. Marsh*, 202 Neb. 281, 275 N.W.2d 64 (1979), which held that inasmuch as plaintiffs could not show they would be benefited by a declaration that certain school laws were invalid, no justiciable issue existed as they had no legally protectible interest or right in the controversy and, thus, had no standing to sue. Likewise, in *Nebraska Seedsmen Assn. v. Department of Agriculture & Inspection*, 162 Neb. 781, 77 N.W.2d 464 (1956), we held that an organization which was not itself engaged in labeling had no interest entitling it to obtain an interpretation of a labeling law. The dispositions in both *Stahmer* and *Seedsmen* can be said to rest on the fact that plaintiffs lacked standing. Yet, the lack of a legally protectible interest or right bears as much on the absence of a justiciable issue as it does on the standing of the plaintiffs.

Cases in which we have found the existence of a

justiciable issue are more instructive. *Metropolitan Utilities Dist. v. City of Omaha*, 171 Neb. 609, 107 N.W.2d 397 (1961), declared the validity of an ordinance and contract adopted thereunder which provided that a utilities district could collect sewer usage fees and remit them to the city. In *Graham v. Beachamp*, 154 Neb. 889, 50 N.W.2d 104 (1951), we found a justiciable issue to exist and declared the rights of an incompetent to certain cattle where a dispute with respect thereto existed between the incompetent and her husband. A justiciable issue existed in *Noble v. City of Lincoln*, 153 Neb. 79, 43 N.W.2d 578 (1950), which concerned the disposition of public funds and property arising under a proposed election to amend a city charter so as to render for naught the outlay of prior expenditures in the purchase of a site on which to build a city auditorium. *Nebraska Mid-State Reclamation District v. Hall County*, 152 Neb. 410, 41 N.W.2d 397 (1950), adjudicated the validity of certain laws and taxes levied under them. *State ex rel. Smrha v. General American Life Ins. Co.*, 132 Neb. 520, 272 N.W. 555 (1937), declared that a successor insurance company was not liable for taxes which had not been paid by its predecessor and that the successor's certificate of authority should not be revoked if the taxes were not paid. In each of the above-cited cases there was a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.

The issues as framed in the case before us concern themselves only with the fiscal or budget year from July 1, 1979, through June 30, 1980. As noted earlier, the record does not reflect the status of Ellis' funds at the close of that fiscal year. Nor is there any judicially enforceable remedy which might be imposed at this time with respect to that fiscal year. Notwithstanding the stated policy of the Board with respect to NACO conventions and the need for prior approval of proposed expenditures for travel out of Nebraska, the fact of the

matter is, that policy was not applied to Ellis. The only claim she submitted for out-of-state travel to a NACO convention was paid in full. Under such circumstances, there is no present controversy susceptible to immediate resolution and capable of present judicial enforcement. Any pronouncement by us under the facts presented would merely give advice as to how and under what set of circumstances and facts the Board's policy should be applied, if at all, in the future. This court can only declare the law and its application to a given set of facts when a justiciable controversy is presented for determination. It is not empowered to render advisory opinions. *State ex rel. Nebraska Nurses Assn. v. State Board of Nursing*, 205 Neb. 792, 290 N.W.2d 453 (1980); *American Fed. of S., C. & M. Emp. v. State*, 200 Neb. 171, 263 N.W.2d 643 (1978).

The case at hand fails to present a justiciable controversy. Accordingly, the judgment of the trial court is reversed and the cause remanded with directions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM P. WINTER, JR., APPELLEE, V. BRUCE I. DOANE, APPELLANT.

315 N.W.2d 262

Filed January 29, 1982. No. 43824.

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

Norman E. Stephens and Donald R. Janousek for appellant.

John O. Sennett of Black & Sennett for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and FUHRMAN and CAPORALE, District Judges.

PER CURIAM.

The District Court's finding of the defendant Doane to be in contempt and its dismissal of his cross-petition as a sanction for failing to answer a deposition question ordered answered by the court was correct and is affirmed. See *Campbell v. Lutz*, 182 Neb. 27, 152 N.W.2d 101 (1967).

AFFIRMED.

IN RE INTEREST OF LESLIE ANN FARMER, A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. JUDY ANN FARMER, NATURAL MOTHER, APPELLANT.

315 N.W.2d 454

Filed January 29, 1982. No. 44335.

1. **Parental Rights: Appeal and Error.** An appeal from an order terminating parental rights requires a de novo review.
2. **Parental Rights.** Courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.
3. ——. An order of the juvenile court terminating parental rights must be based on clear and convincing evidence.
4. ——. Parental rights may be terminated when such action is found to be in the best interests of the child and it appears by the evidence that a parent is unable to discharge parental responsibilities because of mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged, indeterminate period.
5. ——. When a natural parent cannot be rehabilitated within a reasonable time, the best interests of the child require that a final disposition be made without delay.

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

Carl I. Klekers for appellant.

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

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, and HASTINGS, JJ., and CAPORALE, District Judge.

CAPORALE, District Judge.

Judy Ann Farmer appeals from an order entered by the separate juvenile court of Douglas County, Nebraska, dated March 26, 1981, terminating her parental rights to Leslie Ann Farmer, a minor, born January 28, 1970. We affirm.

An appeal from an order terminating parental rights requires a de novo review. *In re Interest of Bird Head*, 209 Neb. 575, 308 N.W.2d 837 (1981); *In re Interest of Stoppkotte*, *ante* p. 1, 312 N.W.2d 454 (1981). It is well established that courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right. *In re Interest of D.*, 209 Neb. 529, 308 N.W.2d 729 (1981). Furthermore, an order of the juvenile court terminating parental rights must be based on clear and convincing evidence. *In re Interest of J.L.L.*, 209 Neb. 76, 306 N.W.2d 175 (1981); *In re Interest of Hiatt*, 209 Neb. 195, 307 N.W.2d 108 (1981).

It is with these rules in mind that we consider appellant's assignments of error that (1) the order is not supported by the evidence, and (2) the order is not in the best interests of the child.

Neb. Rev. Stat. § 43-209 (Reissue 1978) sets out six independent conditions, any one of which existing alone will justify termination of parental rights. The applicable portion of the statute states in pertinent part: "The court may terminate all parental rights between the parents or the mother of a child born out of wedlock and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exist: . . . (5) The parents are unable to discharge parental responsibilities because of . . . mental de-

ficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period . . . ."

The evidence clearly and convincingly establishes that appellant has had a long history of psychiatric problems dating back to 1970 and suffers from a paranoid type of schizophrenia. Some of the more common characteristics of that condition are fragmentation of thought processes, delusions, and hallucinations. Appellant experienced hallucinatory voices instructing her to destroy herself. She refused to take medication, was apathetic in regard to meals and personal hygiene, her behavior was erratic and unpredictable, and on occasion she became violent. The psychologist who had interviewed appellant on May 27, 1980, was of the opinion that appellant's condition had deteriorated since her admission, on or about June 1, 1979, to the Norfolk Regional Center.

A psychiatric evaluation of the appellant was conducted on December 18, 1980. During that interview, according to the psychiatrist's report, the appellant "showed evidence of disturbance in thought content, simple persecution/delusions, inappropriate affect, disparity in thoughts, mood and affect." The psychiatrist recommended that the appellant continue to be hospitalized. In the psychiatrist's opinion, appellant is in no condition to take care of her daughter.

The record supports a finding that appellant is unable to discharge her parental responsibilities because of mental deficiency, and there are reasonable grounds to believe such condition, which has lasted for a decade, will continue for a prolonged, indeterminate period. Appellant's first assignment of error is without merit.

A report, dated March 3, 1981, of Douglas County Social Services was received in evidence which indicates that Leslie Ann has been a healthy child since she was placed in emergency foster care on January 10, 1979. Although Leslie Ann has seen very little of her mother, she becomes upset at the thought of severing

her relationship with the appellant and might need counseling if parental rights were to be terminated.

The child's concern is understandable, but cannot override the fact that appellant simply is in no position to discharge her parental responsibilities. The rule is well established that when a natural parent cannot rehabilitate herself within a reasonable time, the best interests of the child require that a final disposition be made without delay. *State v. Chant*, 202 Neb. 750, 277 N.W.2d 97 (1979); *In re Interest of McKee*, 208 Neb. 623, 304 N.W.2d 918 (1981). Leslie Ann has been in foster care for 3 years. Appellant's second assignment of error likewise fails.

The order of the separate juvenile court of Douglas County is affirmed.

AFFIRMED.

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

315 N.W.2d 456

Filed January 29, 1982. Nos. 44497, 44498.

Criminal Law: Judgments: Appeal and Error. Before a criminal matter may be appealed to this court, there must be a final judgment. No judgment will be regarded as final unless a sentence is pronounced.

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

Forrest F. Peetz for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson for appellee.

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

WHITE, J.

The defendant, Kenneth Kaba, was charged with issuing two bad checks on or about February 21, 1980, in violation of Neb. Rev. Stat. § 28-611(1) (Reissue 1979). In each case the defendant was charged with issuing the check, knowing he did not have sufficient funds and/or credit with the drawee bank for payment of the check. The checks were issued in payment for cattle purchased, and totaled $58,680.

Trial was had to the District Court for Holt County, Nebraska, sitting without a jury. The District Court found the defendant guilty of both charges. The District Court overruled defendant's motion for new trial and deferred sentencing pending an evaluation under Neb. Rev. Stat. § 83-1,105(3) (Reissue 1976). The court then deferred defendant's delivery to the penal complex for such evaluation until after the defendant appealed to this court.

We have previously said that before a criminal matter may be appealed to this court, there must be a final judgment. No judgment will be regarded as final unless a sentence is pronounced. *Kennedy v. State*, 170 Neb. 193, 101 N.W.2d 853 (1960); *State v. Shaw*, 202 Neb. 766, 277 N.W.2d 106 (1979).

The defendant in this case did not challenge the constitutionality of § 83-1,105(3). Since there is no final judgment, this court does not have jurisdiction over this appeal and we therefore dismiss.

APPEAL DISMISSED.

NEWT COPPLE, APPELLANT, V.
CITY OF LINCOLN ET AL., APPELLEES.

315 N.W.2d 628

Filed February 5, 1982. No. 43628.

1. **Municipal Corporations: Appeal and Error.** An appeal or error proceeding does not lie from a purely legislative act by a public body to which legislative authority has been delegated.

2. ____:____. Neb. Rev. Stat. § 15-1201 (Reissue 1977) applies only where the bodies mentioned therein act judicially or quasi-judicially and cannot be constitutionally construed to permit appeal from a legislative enactment.
3. **Constitutional Law: Legislative Power.** A delegation of legislative power to the courts is violative of article II, § 1, of the Constitution of Nebraska.
4. **Legislative Enactments: Collateral Attack: Actions.** A challenge to a legislative enactment must be by collateral attack in the form of an action for injunction or other suitable action.
5. **Zoning: Standing.** In order to have standing as an aggrieved person for the purpose of attacking a change of zone, the plaintiff must demonstrate that he suffers a special injury different in kind from that suffered by the general public.
6. ____: ____. An increase in business competition is not alone sufficient to confer standing to challenge a change of zone.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Noren & Burns for appellant.

William F. Austin, City Attorney, and William G. Blake for appellees.

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

CLINTON, J.

This action originates by a "petition on appeal" filed in the District Court for Lancaster County by the plaintiff Copple against the City of Lincoln, its mayor, the members of its city council, and Old Cheney Road, Inc. The plaintiff's petition alleges the action is an appeal under the provisions of Neb. Rev. Stat. § 15-1202 (Reissue 1977) from an amendment to a zoning ordinance of the City. It further alleges, among other things, that on May 9, 1977, the council approved ordinance No. 11976 which changed the zoning classification of a tract of land in the southwest quarter of Section 9, Township 9 North, Range 7 East, Lancaster County, from "G-Local Business District Zoning and A-1 Single Family Dwelling District Zoning to J-1 Planned Regional Com-

mercial District Zoning." The plaintiff alleges he is a citizen, resident, and taxpayer of Lincoln and Lancaster County, and he is owner of a tract of land described as the northeast quarter of Section 18, Township 9 North, Range 7 East of the 6th P.M., Lancaster County, Nebraska. He further alleges the zone change "will have a detrimental affect [sic] on plaintiff and his real property, in that plaintiff wishes to build a regional shopping center in close proximity to the area here involved, specifically at 40th Street and Old Cheney Road and currently has pending applications for said regional shopping center and a lawsuit to determine plaintiff's right to build said regional shopping center. The decision of the City Council herein would cause undue hardship on the plaintiff if in fact a shopping center is allowed to be built on the rezoned tract in said close proximity to plaintiff's proposed shopping center site."

The petition further alleges the city council of the City of Lincoln acted arbitrarily and capriciously in enacting the amendment to the zoning ordinance and sets forth various reasons for the conclusion.

The District Court, after a hearing on the merits of the plaintiff's petition, found that the plaintiff was not a person aggrieved within the meaning of Neb. Rev. Stat. § 15-1201 (Reissue 1977); that he did not have standing to sue; and that even if he had legal standing, he had failed to prove he suffered some special injury peculiar to himself as required by law to have standing to appeal the action of the council. It further found: "That if it should be determined that the plaintiff possesses legal standing to appeal this action, the plaintiff still has the burden of proving that the action of the defendant, City of Lincoln, was arbitrary, unreasonable, and without substantial relation to the public safety, health, morals, or the general welfare." The court then made findings indicating a lack of merit in each of the plaintiff's specific claims of invalidity of the ordinance. It ordered the plaintiff's appeal

dismissed.

We affirm on two alternative grounds. The first ground is that the enactment of a zoning ordinance by a municipal governing body is an exercise of legislative authority from which no direct appeal lies. An appeal or error proceeding does not lie from a purely legislative act by a public body to which legislative authority has been delegated. *Scottsbluff Improvement Assn. v. City of Scottsbluff*, 183 Neb. 722, 164 N.W.2d 215 (1969); *Williams v. County of Buffalo*, 181 Neb. 233, 147 N.W.2d 776 (1967). The only remedy in such cases is by collateral attack, that is, by injunction or other suitable actions. Insofar as the earlier case of *Kelley v. John*, 162 Neb. 319, 75 N.W.2d 713 (1956), holds that an amendment to a zoning ordinance is an administrative or executive act, it is overruled.

Section 15-1201 provides: "Any person or persons, jointly or severally aggrieved by any final administrative or judicial order or decision of the board of zoning appeals, the board of equalization, the city council, or any officer or department or board of a city of the primary class, shall, except as provided for claims in sections 15-840 to 15-842.01, appeal from such order or decision to the district court in the manner herein prescribed." The above statute applies only where the bodies mentioned act judicially or quasi-judicially. Any other construction would render the statute unconstitutional. The Legislature may not delegate legislative power to the courts. A delegation of legislative power to the courts is violative of article II, § 1, of the Constitution of Nebraska. *Williams v. County of Buffalo, supra.*

The alternative ground of our decision is that the plaintiff has not shown that he is an "aggrieved" person within the meaning of § 15-1201. In order to have standing as an aggrieved person for the purpose of attacking a change of zone, the plaintiff must demonstrate that he suffers a special injury different in kind from that suffered by the general public. *West Fort*

Residents Assn. v. Housing Auth. of City of Omaha, 205 Neb. 397, 288 N.W.2d 27 (1980); 8A McQuillin, Municipal Corporations § 25.292 (3d ed. 1976). The possibility that zone changes may afford competition for businesses which the plaintiff hopes will be established on his property if it is rezoned is not sufficient to give standing. An increase in business competition is not sufficient to confer standing to challenge a change of zone. *Swain v. County of Winnebago*, 111 Ill. App. 2d 458, 250 N.E.2d 439 (1969); *Waltham Motor Inn, Inc. v. LaCava*, 3 Mass. App. 210, 326 N.E.2d 348 (1975).

AFFIRMED.

WHITE, J., participating on briefs.

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

IN RE APPLICATION OF SCHROETLIN. SCHROETLIN TANK LINE, INC., APPELLANT, V. WYNNE TRANSPORT SERVICE, INC., ET AL., APPELLEES.

315 N.W.2d 630

Filed February 5, 1982. No. 43645.

1. **Motor Carriers: Proof.** The burden is on the applicant to show that the proposed service is required by public convenience and necessity.
2. **Motor Carriers.** In determining the issue of public convenience and necessity, controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers, contrary to the public interest.
3. **Public Service Commission: Judgments.** The issue of public convenience and necessity is ordinarily one of fact and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary.
4. ____: ____. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.

Appeal from the Nebraska Public Service Commission. Affirmed.

Scott T. Robertson of Peterson, Bowman & Johanns for appellant.

Ryan & Williams, P.C., for appellees.

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

PER CURIAM.

This is an appeal by Schroetlin Tank Line, Inc., from an order of the Public Service Commission denying an application to extend the applicant's existing limited authority as a common carrier of petroleum products to statewide authority.

Schroetlin Tank Line, Inc., is a Nebraska corporation which operates as a common carrier by motor vehicle over irregular routes, and holds both intrastate and interstate authorities. Its operations are conducted out of its headquarters in Sutton, Nebraska. Schroetlin holds intrastate authority to transport general commodities between points within a 20-mile radius of Sutton, Nebraska, on the one hand, and, on the other hand, all points in Nebraska. Schroetlin also holds statewide authority for various specific liquid commodities, including fertilizer and liquid feed. So far as is relevant here, Schroetlin also holds statewide alcohol authority and some limited petroleum oil authority to haul traffic originating at the Gulf Oil terminal in Blair, Nebraska.

By this application Schroetlin seeks to extend its authority to transport petroleum products from all refineries or loading points in Nebraska to all points in the state over irregular routes. Protests were filed by several other carriers holding statewide petroleum authorities. The dual purpose of the expanded authority sought was to make Schroetlin's present petroleum transportation more efficient and to facilitate the shipment of gasohol and gasohol components. Gasohol is a mixture of nine parts of gasoline and one part of ethyl

alcohol. In some cases alcohol and gasoline are shipped separately to the retail stations where the two products are blended to form gasohol. Because it is more efficient and less costly, many retail stations prefer that the alcohol and gasoline be blended at the pipeline and the gasohol shipped in a premixed state.

Schroetlin has statewide authority to haul alcohol and also provides transportation service for petroleum products from one loading point within the 20-mile radius of Sutton, Nebraska, but does not have the flexible authority necessary to provide statewide service. Under a lease of equipment with Wynne Transport Service, Inc., Schroetlin is presently providing statewide petroleum service to some Nebraska shippers. Under the lease arrangement, Wynne receives 10 percent of the gross revenue and performs the billing, accounting, and other administrative functions. Schroetlin provides the equipment and drivers and arranges for the loads.

At the hearing before the commission there was some testimony by a witness for Schroetlin that some unidentified requests for service had been refused, but the witness conceded that the refused service could have been carried under the lease arrangement with Wynne. The witness also testified that existing equipment of Schroetlin was not being used to its full capacity.

Representatives of two large agricultural cooperatives testified that they projected significant increases in the volume of petroleum products shipped by them in the next 2 years, and testified that they could and would be able to utilize Schroetlin's transportation services if authority was granted and that they did not intend to divert any business from existing carriers. A witness for one of the two cooperatives testified that her company had no complaints about the services offered by the existing common carriers. A witness for the other cooperative generally agreed, but stated that during peak periods they had experienced some shortages of equipment.

The protestants' evidence was that there were sufficient carriers and sufficient available equipment in Nebraska to serve the shippers of petroleum products, that their equipment was not presently utilized to its fullest extent, and that there was no need for the services of an additional carrier. Some witnesses testified as to the volume of petroleum products transported by their companies for the cooperatives and expressed the belief that some business would be diverted from them to the applicant if the application were granted to Schroetlin.

Following the hearing the commission found that the applicant was fit, willing, and able to properly perform the proposed services; that the public convenience and necessity could be adequately met by existing carriers; and that the proposed service would, if permitted, lessen the ability of existing carriers to adequately meet present and future needs to the detriment of the public, and denied the application. Schroetlin has appealed.

The appellant contends that testimony by protestants expressing a general fear of potential diversion of traffic in the future does not constitute proof of harm to competitive carriers and that harm to competitive carriers is not alone sufficient to support denial of an application for a certificate of authority in the absence of evidence that the public will also be harmed. The argument is that injury to existing carriers through competition becomes relevant only when there is resulting injury to the public, and that the weight of the evidence does not support the denial of the application.

The burden is on the applicant to show that the proposed service is required by public convenience and necessity. In determining the issue of public convenience and necessity, controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the

applicant in a specified manner without endangering or impairing the operations of existing carriers, contrary to the public interest. *In re Application of Greyhound Lines, Inc.*, 209 Neb. 430, 308 N.W.2d 336 (1981).

In the present case the appellant contends that the commission has accepted evidence of possible economic harm to other carriers as being sufficient ground upon which to deny the certificate without any evidence of harm to the public interest. The dissenting commissioner in this case expressed the view that the weight of the evidence was against the majority decision. Whether we agree or disagree with the decision of the commission, however, is immaterial. It is not the province of this court to weigh or resolve conflicts in the evidence, or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it.

The issue of public convenience and necessity is ordinarily one of fact and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene. *Ace Gas, Inc. v. Peake, Inc.*, 184 Neb. 448, 168 N.W.2d 373 (1969). In the case at bar there is evidence in the record to support the finding of the commission.

The order of the commission denying the application is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

SHARON KAY SCHULZ, APPELLANT, V. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF FREMONT, APPELLEE.

315 N.W.2d 633

Filed February 5, 1982. No. 43722.

1. **Teacher Contracts: Tenure.** A tenured teacher may not be terminated absent just cause.
2. ____: ____. The critical issue in a teacher termination case is what conduct is sufficient to constitute just cause for the termination of the contract of a tenured teacher under current statutory requirements. There are few, if any, objective criteria for evaluating teacher performance or for determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must therefore be assessed on its own facts.
3. ____: ____. Incompetency or neglect of duty of a tenured teacher is not measured in a vacuum or against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties.

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

Mark D. McGuire of Crosby, Guenzel, Davis, Kessner & Kuester for appellant.

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

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

KRIVOSHA, C.J.

This is an error proceeding contesting the action of the appellee, Board of Education of the School District of Fremont, Nebraska (School Board), terminating the teaching contract of appellant, Sharon Kay Schulz (Mrs. Schulz). The District Court for Dodge County, Nebraska, affirmed the School Board's termination of Mrs. Schulz' teaching contract, and Mrs. Schulz has now appealed to this court. We find that the evidence

presented at the hearing before the School Board on May 8, 1980, was insufficient as a matter of law to support the determination of the School Board, and accordingly we reverse and remand.

Mrs. Schulz was employed by the School Board initially in 1960 and she taught for 1 year. Thereafter, in 1968 she was rehired by the School Board and continuously taught in the Fremont school district from 1968 until 1980, when her contract was terminated. From 1968 through 1979 she taught the fifth and sixth grades at Clarmar School. For the 1979-80 school year she taught the entire fourth grade and fifth grade mathematics at North Side Elementary School.

On April 15, 1980, Mrs. Schulz was notified in writing by the School Board that it had voted to consider terminating her contract effective at the end of the 1979-80 school year. This notice was required pursuant to Neb. Rev. Stat. § 79-1254 (Reissue 1976) because Mrs. Schulz was a tenured teacher.

The notice stated that "[t]he reason for this action is the alleged violation of the competency standards of the Nebraska Professional Practices Commission relating to instructional procedures, communication skills, management techniques, evaluation of learning and goal achievement, and human and interpersonal relationships." None of the above alleged violations, in themselves, are grounds for terminating the contract of a tenured teacher unless they constitute "just cause" within the meaning of § 79-1254. "Just cause" is specifically defined in the act to mean "incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, other conduct which interferes substantially with the continued performance of duties . . . ." It appears clear from the evidence produced by the School Board that it was relying exclusively on the alleged "incompetency" of Mrs. Schulz to constitute "just cause." We believe that the evidence presented does not support the School Board's finding that Mrs. Schulz was incompetent so as

to constitute just cause for terminating her teaching contract.

The evidence adduced at the hearing consisted of three employees of the School Board plus a number of parents, as well as certain documentary evidence. The first witness was Dr. Robert E. Melick, superintendent of the Fremont schools. Although Dr. Melick recommended that Mrs. Schulz' contract be terminated, he conceded that he had not made any personal evaluation of Mrs. Schulz. He knew who Mrs. Schulz was and had observed her in the classroom for about 10 minutes each year during the time he was superintendent, as he observed all the teachers working for the Fremont district. Dr. Melick testified that his conclusion regarding Mrs. Schulz' competency was based upon the fact that she had not satisfied the standards of competent professional performance adopted by the Professional Practices Commission pursuant to Neb. Rev. Stat. § 79-1282 (Reissue 1976). These standards are standards adopted by the Professional Practices Commission for carrying out its statutory function and not specially designed for use by a school district. In fact, the standards provide in part: "No finding of professional incompetency shall be made except where (a) a preponderance of evidence exists of such incompetency, and (b) at least two professional reviewers have reviewed the professional performance for a period of at least three days each." By its own standards, a professional reviewer is defined as one "appointed by the Commission by virtue of the successful completion of special training under the auspices of the Commission . . . ."

As a result of such an investigation, the State Board of Education may, after hearing, suspend or revoke a teacher's certificate. Neb. Rev. Stat. § 79-1283 (Reissue 1976).

It was clear that neither requirement of the professional standards noted above had been satisfied. Dr. Melick further testified that the standards had never

been adopted by the Fremont School Board but had simply become a set of rules which has been applied by the Fremont school system through the administration in 1978, long after Mrs. Schulz had obtained her tenure. Dr. Melick maintained that the standards were incorporated into the faculty handbook first published in 1978, although no such handbook was offered in evidence.

On direct examination Dr. Melick testified as to the various provisions of the standards of competent professional performance he believed that Mrs. Schulz violated, although his conclusions were based upon information provided principally by others and from letters he had received from parents. On cross-examination Dr. Melick testified that he had never had an occasion to evaluate Mrs. Schulz' performance and was basing his recommendation mainly on recommendations from Miss Marion Iversen, elementary supervisor. Dr. Melick further testified that, while he had stated that Mrs. Schulz had violated certain provisions of the standards of competent professional performance, he had not observed any specific violations of these procedures.

The second witness to testify was Miss Marion Iversen, the elementary supervisor. She too testified that in her opinion Mrs. Schulz' contract should be terminated. On cross-examination, however, she acknowledged that she had not read the latest report concerning Mrs. Schulz, prepared by her most recent principal, Mr. Charles Bechtel. She further testified that she could not make a classroom evaluation of Mrs. Schulz because she had not spent enough time in Mrs. Schulz' classroom.

Certain of Mrs. Schulz' performance evaluation records from at least 1974 through April of 1980 were also offered in evidence. In every instance they indicated average or above average or superior performance in almost every category. The reports do indicate, from time to time, that Mrs. Schulz was

apparently failing to receive complete approval from some of her students' parents. The complete record made before the School Board paints a picture of a teacher who is serious and devoted to her teaching, though, because of perhaps an introverted personality, she does not smile as much as she might. The various observation visitation forms and evaluation reports filled out by school officials for the period between 1968 and 1980 contain comments concerning Mrs. Schulz' personality. Typical of the comments may be the one noted in February 1969, which read: "Cold and distant manner with pupils and associates," or January 22, 1970, which read: "Too distant and hard to get acquainted with." Yet, during all of this time her administrative appraisal of teaching service forms were marked "outstanding" or "above average." The summary of appraisal form dated April 12, 1978, discloses 27 categories that are marked either above average or outstanding, and her appraisal dated April 11, 1980, while indicating 2 of the 27 categories "need improvement," still concluded: "On an overall basis, this teacher is rated as: Above Average."

The third witness was the principal of North Side Elementary School, Mr. Charles Bechtel. Mr. Bechtel was the principal of the school in which Mrs. Schulz had taught during the last year. He indicated that he had observed Mrs. Schulz and noted that her weaknesses were that she might tend to overexpect and that she was a quiet, serious, and strict type of teacher without a great deal of personal interaction. His evaluation, based on only the current year's performance, was that Mrs. Schulz was a satisfactory teacher, and he recommended that her contract be renewed.

The balance of the witnesses were parents, some of whom did not have children in Mrs. Schulz' class. While about half of the parents testifying objected to Mrs. Schulz' methods of teaching, an equal number appeared and praised her abilities.

One of the major complaints raised by the objecting

parents had to do with the amount of homework they perceived their children were required to do each evening. No evidence as to the actual amount of homework was made a part of the record. On further examination, however, it became clear that most of the allegedly excessive homework consisted of work assigned to certain students during the classroom day which the students failed to complete and which Mrs. Schulz insisted they take home and finish. Many of the students apparently completed their work during the class day and did not have a great deal of homework. The evidence further disclosed that the children of several of the objecting parents simply failed to return the homework to class after taking the work home and continued to have incomplete records, which affected their grades. Testimony was adduced that the fifth grade boys agreed to conduct a "mathematics strike" in which they all agreed not to turn in their mathematics homework. This likewise contributed to some of the incomplete work. In one instance, Mrs. Schulz sent home a note with one of the children of an objecting parent. The record reflects that the child forged the parent's signature to the note, as he did with a second note, and it was only when he misspelled his parent's name that Mrs. Schulz resorted to contacting the parent by phone.

Several parents testified that their children became ill or suffered from nerves. They believed that Mrs. Schulz was the cause. None of the claims were supported by any medical testimony and at best were unsupported conclusions of the testifying parents. A reading of the record leads the court to believe that certain of the parents determined that Mrs. Schulz had to be discharged and they would accept nothing else.

While it is not the function nor the desire of courts to second-guess school boards, nevertheless, it is clear that our Legislature has intended to grant to tenured teachers some protection from either disgruntled parents or angry school boards. Section 79-1254 spe-

cifically provides that a tenured teacher may not be terminated absent "just cause." Just cause is defined in the act as "incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, other conduct which interferes substantially with the continued performance of duties . . . ." The intention of the Legislature in this regard is clear. Prior to 1975 a teacher could be discharged for any reason. See *Schultz v. School Dist. of Dorchester*, 192 Neb. 492, 222 N.W.2d 578 (1974). As a result of our decision in the *Dorchester* case, § 79-1254 was amended to specifically require a finding of just cause as defined in the act before a tenured teacher could be discharged. Therefore, before a tenured teacher may now be terminated, the school board must meet its burden of establishing, as a matter of law, the existence of just cause which, as defined by the statute, is more than dissatisfaction by school board members or parents.

In *Sanders v. Board of Education*, 200 Neb. 282, 289-90, 263 N.W.2d 461, 465 (1978), we said: "The critical issue here is what conduct is sufficient to constitute just cause for the termination of the contract of a tenured teacher under current statutory requirements. There are few, if any, objective criteria for evaluating teacher performance or for determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must, therefore, be assessed on its own facts. . . .

. . . .

". . . Incompetency or neglect of duty are not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties."

After reviewing the facts in *Sanders*, we concluded that the terminating of Mrs. Sanders was not supported by the evidence and affirmed the trial court which had ordered her reinstated. In view of the fact that Mrs. Schulz continued to receive above average ratings

during the entire time she taught and the record is silent as to the performance of any other teachers in the Fremont school system, we are at a loss to see how Mrs. Schulz could be found to be incompetent.

To the same effect, we made similar observations in *Hollingsworth v. Board of Education*, 208 Neb. 350, 303 N.W.2d 506 (1981), where, again, we reversed the action of the school board and ordered the teacher reinstated.

The facts in both *Sanders* and *Hollingsworth* are not dissimilar to the facts in the instant case. There is little doubt that Mrs. Schulz might do herself a favor by being less rigid. As Mr. Bechtel testified, Mrs. Schulz is "an old-fashioned teacher." Perhaps such teachers do not win popularity contests, but neither can they be said to be incompetent. Teachers are not required to entertain their students, only to teach them.

The trial court, in affirming the action of the School Board, specifically found that evidence was presented that Mrs. Schulz had not met various minimum standards of competency, more particularly set out in the order. These appear to be a paraphrase of the standards promulgated by the Professional Practices Commission. We are unable to find any evidence in the record to support that conclusion. We must therefore reverse the action of the trial court and remand with directions that the School Board's action be vacated and Mrs. Schulz restored to her status as a tenured teacher with full compensation from the date of her termination.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissents.

HAROLD L. FREESE, APPELLEE, V. THE COUNTY OF DOUGLAS, A COUNTY IN THE STATE OF NEBRASKA, ET AL., APPELLEES, THE DOUGLAS COUNTY SHERIFF'S MERIT COMMISSION ET AL., APPELLANTS. STEVE JOHNSON AND GARY BJORK, APPELLEES, V. THE COUNTY OF DOUGLAS, A COUNTY IN THE STATE OF NEBRASKA, ET AL., APPELLEES, THE DOUGLAS COUNTY SHERIFF'S MERIT COMMISSION ET AL., APPELLANTS.

315 N.W.2d 638

Filed February 5, 1982. Nos. 43828, 43829.

1. **Administrative Agencies.** As an administrative body, the Douglas County Sheriff's Merit Commission is limited in its authority by the statutes granting to it its powers.
2. **Legislative Intent: Statutes.** Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes.
3. **Courts: Legislative Intent: Statutes.** The court, in considering the meaning of its statute, should, if possible, discover the legislative intent from the language of the act and give it effect.
4. **Legislative Intent: Statutes.** A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in light of the mischief to be remedied.
5. **Administrative Agencies.** The Douglas County Sheriff's Merit Commission has no authority when modifying an act of the sheriff to increase the punishment imposed by the sheriff, but may modify the sheriff's action by reducing the extent of the punishment.

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

William T. Ginsburg of Zuber & Ginsburg for appellants.

Jerome A. Merwald for appellees.

Heard before KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and FUHRMAN and CAPORALE, District Judges.

KRIVOSHA, C.J.

The several cases involved herein were consolidated for purposes of appeal before this court and will be considered as one. The appellants, The Douglas County Sheriff's Merit Commission for Douglas County and its individual members (the Commission), appeal from an order of the District Court for Douglas County, Nebraska, finding that the Commission exceeded its statutory authority when the Commission increased the penalties given by the sheriff of Douglas County against the various appellees. We believe that the trial court was correct in its interpretation, and affirm the judgment of the trial court.

The Douglas County Sheriff's Merit Commission is a body created pursuant to the provisions of Neb. Rev. Stat. § 23-1723 (Reissue 1977). Its purpose, as stated in the statute, is to carry out the provisions of Neb. Rev. Stat. §§ 23-1721 to 23-1737 (Reissue 1977), first adopted in 1969. The specific purpose for the act is set out in § 23-1721, which provides: "The purpose of sections 23-1721 to 23-1737 is to guarantee to all citizens a fair and equal opportunity for public service in the office of the county sheriff in counties having a population of forty thousand inhabitants or more, to establish conditions of service which will attract officers and employees of character and capacity, and to increase the efficiency of the county sheriff's office by the establishment of a merit system." It is clear from a reading of both the act itself and the legislative history prior to its enactment that the purpose of the bill was not to remove from the sheriff the right to discipline his personnel but, rather, to insulate deputy sheriffs in the designated counties from the hazards of politics which a career deputy sheriff might suffer each time a new sheriff was elected to office. The Commission is given specific powers and duties set out by statute (see § 23-1727), all of which are intended to provide a form of civil service to deputy sheriffs employed by the various counties.

The particular section of the statute raised by this appeal is § 23-1734, which reads as follows: "Any deputy sheriff may be removed, suspended, or reduced in either rank or grade or both rank and grade *by the sheriff*, after appointment or promotion is complete, by an order in writing, stating specifically the reasons therefor. Such order shall be filed with the commission and a copy thereof shall be furnished to the person so removed, suspended, or reduced. Any person so removed, suspended, or reduced in either rank or grade or both rank and grade may, within ten days after presentation to him of the order of removal, suspension, or reduction, appeal to the commission from such order. The commission shall, within two weeks from the filing of such appeal, hold a hearing thereon, and thereupon fully hear and determine the matter, and either *affirm, modify, or revoke* such order. The appellant shall be entitled to appear personally, produce evidence, and to have counsel and a public hearing. The finding and decision of the commission shall be certified to the sheriff, and shall forthwith be enforced and followed by him, but under no condition shall the employee who has appealed to the commission be permanently removed, suspended, or reduced in rank until such finding and decision of the commission shall be so certified to the sheriff." (Emphasis supplied.)

We think it of some significance and worth noting at this point that the section in question only becomes operative if a deputy sheriff is "removed, suspended, or reduced in either rank or grade or both rank and grade *by the sheriff*" and chooses to appeal. The act does not become operative until the sheriff acts. Furthermore, it does not apply if a promotion is granted, even though the employee might believe he should have received a greater promotion. Nor does it entitle any other deputy sheriff to appeal to the Commission if the deputy believes he has been aggrieved by reason of another deputy receiving a promotion which the former believes he should have received.

In the cases consolidated and now before us, each of

the appellees was employed as a deputy sheriff by the Douglas County sheriff's office on July 2, 1979, when an incident involving a female prisoner occurred. As a result of the incident, the sheriff, on July 9, 1979, suspended the appellee Harold L. Freese for a period of 15 calendar days and demoted him from the rank of captain to the rank of sergeant. Also, on the same date, the sheriff suspended the appellee Gary Bjork for a period of 5 calendar days and suspended the appellee Steve Johnson for a period of 15 calendar days, to thereafter be followed by termination. On the following day the sheriff rescinded his 15-day suspension and termination of Johnson and, instead, suspended him for a period of 5 calendar days. None of the suspended officers were directly involved with the female prisoner, but were reprimanded because they permitted the incident to occur.

Each of the appellees appealed the sheriff's disciplinary action to the Commission. Thereafter, hearings were held in accordance with statute, and on September 5, 1979, the Commission increased the sheriff's penalty imposed on Freese from a 15-day suspension and demotion to sergeant to a termination of employment. On the same day, the Commission increased the sheriff's suspension of Johnson from a 5-day suspension to a 20-day suspension and increased the suspension of Bjork from a 5-day suspension to a 10-day suspension. The three deputy sheriffs appealed the action of the Commission to the District Court for Douglas County, Nebraska, which found that a proper interpretation of the applicable laws did not grant the Commission the power to increase a penalty given by the sheriff to a deputy, but only to either affirm it, modify it by reducing it, or revoke it. The trial court therefore reversed the decision of the Commission and reinstated the prior orders of the sheriff with respect to all the deputy sheriffs.

The single issue presented to this court is whether the Commission's authority to modify the action of the

sheriff includes the power to increase as well as reduce the punishment imposed by the sheriff upon the various employees. While at first blush the answer may seem obvious and in the affirmative, further examination discloses that such is not the case. As an administrative body, the Commission is limited in its authority by the statutes granting to it its powers. *Slosburg v. City of Omaha*, 183 Neb. 839, 165 N.W.2d 90 (1969); *State, ex rel. Woolridge v. Morehead*, 100 Neb. 864, 161 N.W. 569 (1917). We must therefore attempt to determine from the statutes what the authority of the Commission is. That resolution in this case depends upon our interpretation of the word "modify" contained within § 23-1734.

Turning to a dictionary to find the meaning of the word "modify" proves, in this case, to be of little help. Black's Law Dictionary 905 (5th ed. 1979) defines modify as "To alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce." Relying, then, upon Black's definition, one would conclude that the word "modify" means either to increase or decrease. Webster's Third New International Dictionary, Unabridged (1968), however, defines modify as "to make more temperate and less extreme : lessen the severity of : MODERATE." Perhaps the best explanation of the problem is found in 58 C.J.S. *Modify* 840 (1948), where the author notes, "'Modify' is a transitive verb, having many meanings; it is a word general in use, with meanings that are not uncertain, but it must be interpreted in the light of the context in which it is used." We concur that in this case the word "modify" must be interpreted in light of the context in which it is used, to wit, § 23-1734.

Having reached the conclusion that the definition of the word "modify," as used in the questioned statute, is ambiguous, we are required to interpret its meaning. In doing so we are guided by certain statutory rules of construction which we have recently gathered and noted in *PPG Industries Canada Ltd. v. Kreuscher*, 204

Neb. 220, 227, 281 N.W.2d 762, 767 (1979), where we said: "Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes." We further said in *PPG Industries* at 227-28, 281 N.W.2d at 767-68: "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 lawmakers. . . . The court, in considering the meaning of its statute, should, if possible, discover the legislative intent from the language of the act and give it effect. [Citation omitted.] Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. . . . A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in light of the mischief to be remedied." With these guidelines in mind, then, we examine the act to attempt to determine the meaning of the word "modify" in light of the mischief sought to be remedied.

As we noted at the outset, an examination of the committee hearings and floor debate which resulted in the passage of the act for deputy sheriffs indicates that the act was intended to protect deputy sheriffs from arbitrary and capricious action of sheriffs and to protect career deputy sheriffs from the hazards they might otherwise experience when a new sheriff was elected. The act obviously was for the purpose of protecting deputy sheriffs and not for the purpose of removing from the sheriff the right to run his department or discipline his employees. We think it particularly significant that the act is only effective with regard to the removal, suspension, or reduction in rank or grade of a deputy sheriff, and may only be invoked by the affected employee. The legislative history and the language of § 23-1734 leads one to the conclusion that the act was intended to protect the employee and not to remove from the sheriff as employer the authority to

establish the maximum punishment for an employee by granting to an independent body separate and distinct disciplinary authority over deputy sheriffs. The authority granted to the Commission is to either "affirm, modify, or revoke such order." If revoking the order is the most that the Commission may do to aid an employee, contrary to the wishes of the sheriff, and affirm is the least it can do, it would appear to follow that the middle ground, "modify," must mean something between the most and the least. See, 2A Sutherland Statutory Construction § 47.16 (4th ed. 1973); *Lewis Realty v. Wisconsin R. E. Brokers' Board*, 6 Wis. 2d 99, 94 N.W.2d 238 (1959); *State v. Bauer*, 236 Iowa 1020, 20 N.W.2d 431 (1945). While it may have been possible for the Legislature to have granted to the Commission independent authority, it did not choose to do so. The Commission was intended to serve as aid to the deputy sheriff and not to place him in the difficult position of, on the one hand, giving him a right to appeal while, on the other hand, subjecting him to the possibility of even more severe punishment. We find nothing in the history of the act to indicate such intent on the part of the Legislature and believe that the trial court was correct in its interpretation. The Commission has no authority when modifying an act of the sheriff to increase the punishment imposed by the sheriff, but may modify the sheriff's action by reducing the extent of the punishment.

The statute, however, requires the Commission to either "affirm, modify, or revoke" the sheriff's order, and the order of the sheriff cannot be enforced *until* such finding and decision of the Commission is certified to the sheriff. We believe, therefore, that this matter should have been remanded to the Commission by the trial court with directions to affirm, modify, or revoke the sheriff's order, limited, however, by what we have now said with regard to the extent the Commission may modify the order. Accordingly, then, the judgment of the trial court is affirmed, except to the extent that

the trial court should order these matters returned to the Commission with instructions that it must affirm, modify, or revoke the sheriff's order and, upon doing so, certify the same to the sheriff.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF THOMAS F. ARNOLD, DECEASED.
EDWARD M. ARNOLD, APPELLANT, V.
FRANCES MULLEN ET AL., APPELLEES.

315 N.W.2d 642

Filed February 5, 1982. No. 43889.

Decedents' Estates: Appeal Bonds. Where a defective bond is filed in an appeal in a probate proceeding, the appellee may move to require that a proper bond be given. If the appellant fails to comply with an order requiring that a new or amended bond be furnished, the appeal may be dismissed.

Appeal from the District Court for Cherry County: HENRY F. REIMER, Judge. Reversed and remanded.

Murphy, Pederson, Piccolo & Anderson for appellant.

Dennis M. Connolly for appellee Ternus.

William Dill for appellee Mullen.

Heard before BOSLAUGH and WHITE, JJ., and BUCKLEY and CANIGLIA, District Judges, and RONIN, Retired District Judge.

BOSLAUGH, J.

Edward M. Arnold appeals from an order of the District Court dismissing his appeal from the final decree entered in proceedings to administer the estate of Thomas F. Arnold, deceased. The appellees contend that the bond filed by the appellant in the county court and approved by the county court was so defective that the District Court did not obtain jurisdiction of the appeal.

Neb. Rev. Stat. § 30-1603 (Reissue 1979) requires a party appealing in a probate matter to file a bond within 30 days "with two or more good and sufficient sureties, or with a corporate surety bond, to be approved by the court, conditioned that the appellant will prosecute such appeal to effect without unnecessary delay, and pay all debts, damages and costs that may be adjudged against him." The bond which was filed in this case was a "cash deposit in lieu of appeal undertaking." Although timely filed and approved by the county court, the bond did not have the sureties required by § 30-1603 and was defective in several other respects.

Where a defective bond is filed in an appeal in a probate proceeding, the appellee may move to require that a proper bond be given. If the appellant fails to comply with an order requiring that a new or amended bond be furnished, the appeal may be dismissed. *In re Estate of Kothe, on rehearing* 131 Neb. 780, 270 N.W. 117 (1936).

In the *Kothe* case we said at 785, 270 N.W. at 119: "[T]his jurisdiction is committed to the rule that, where a defective appeal bond in a probate proceeding is filed within the time prescribed by statute, the proper procedure for the appellee is to move to require a proper bond to be given within a time designated by the district court, and, upon failure to comply with the order, that the appeal may be dismissed." See, also, *State v. Kidder*, 169 Neb. 181, 98 N.W.2d 800 (1959); *In re Estate of McLean*, 138 Neb. 752, 295 N.W. 270 (1940); *Casey v. Peebles*, 13 Neb. 7, 12 N.W. 840 (1882); *Bazzo v. Wallace*, 16 Neb. 293, 20 N.W. 314 (1884); *Jacobs v. Morrow*, 21 Neb. 233, 31 N.W. 739 (1887); *In re Estate of Hoagland*, 128 Neb. 219, 258 N.W. 538 (1935).

The bond which was filed in this case was defective, but not void. The appellant should have been given an opportunity to amend or file a new bond before the appeal was dismissed.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

MICHAEL J. HOGAN AND MIKE HOGAN REALTY COMPANY, INC., APPELLEE, V. BILL N. PELTON, THIRD-PARTY PLAINTIFF, APPELLANT, V. SUN OIL COMPANY OF PENNSYLVANIA, THIRD-PARTY DEFENDANT, APPELLEE.

315 N.W.2d 644

Filed February 5, 1982. No. 44166.

1. **Forcible Entry and Detainer.** The action of forcible entry is merely possessory and the question of title to real estate cannot be either tried or determined in the case.
2. **Leases: Actions.** In the absence of a statute to the contrary, a tenancy cannot be terminated for breach of a covenant or condition by the lessee unless there is an express condition in the lease for a forfeiture or right of reentry on occurrence of the breach. The remedy for breach where there is no provision for forfeiture or reentry is an action for damages.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Reversed and remanded for a new trial.

John DiMari of Respeliers & DiMari and John A. Rickerson of Rickerson & Welch.

Warren S. Zweiback and Robert M. Soshnik of Zweiback, Kasher, Flaherty & DeWitt, P.C., for appellee Hogan.

No appearance for appellee Sun Oil Co.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

This is an action originating in the District Court for Sarpy County for a declaratory judgment to determine the rights of the parties under a "Station Site Lease." The plaintiff (hereinafter referred to as Hogan) is the owner of the fee title to the land on which the automobile service station is erected. The third-party defendant, Sun Oil Company of Pennsylvania, is the original lessee. The defendant Pelton is Sun's assignee. The issue in this case is whether a judgment in a forcible entry and detainer action in the county court of Sarpy County wherein Pelton was plaintiff and Hogan was defendant is, under the doctrine of res judicata, determinative of the issues in the declaratory judgment action.

Hogan, after issues were joined in the declaratory judgment action, filed a motion for summary judgment and in support thereof introduced the file, trial record, and judgment from the county court action. The District Court granted the motion for summary judgment and Pelton appeals to this court. We reverse and remand for trial.

A summary of the underlying facts, concerning which there is no great dispute, and the related proceedings is necessary for an understanding of the question presented.

Hogan, in October 1967, leased to Sunray DX Oil Company (Sun's predecessor in title) the real estate in question for a term of 15 years with an option to renew for three successive terms of 5 years each. Sun erected a station on the site. Pelton leased the premises from Sun and operated it for a period of years. In 1979 Sun assigned the site lease to Pelton, and there is an indication in the record that Sun sold the improvements thereon to Pelton. In September 1979 Pelton quit selling gasoline at the station because of difficulty in getting fuel allocations, but continued to pay the cash rent to Hogan. In January 1980 Hogan served on Pelton notice to quit, and Hogan thereafter took possession

of the premises, changed the locks on the station doors, and placed machinery on the premises. Pelton testified that the February 1980 rent was refused. Pelton then, on February 25, 1980, brought in the county court the forcible entry and detainer action to recover possession. The next day Hogan filed the action for a declaratory judgment in the District Court. At this point apparently both parties were proceeding unaware of what the other had done. Hogan's answer in the forcible entry and detainer action raised essentially the same issues raised in the declaratory judgment action, namely, whether the failure to keep the station open and the assignment of the lease to Pelton effected a termination of the lease. Hogan, in the declaratory judgment action, prayed for a construction of the lease, termination of the lease, damages, and restitution of the premises.

On March 13, 1980, in the forcible entry and detainer action, the defendant therein, Hogan, received judgment for possession of the premises. Because he was already in possession by means of self-help, no writ of assistance issued. Hogan's cross-claim for damages was also dismissed by the county court because Sun, not joined in the action, was a necessary party. Pelton attempted an appeal to the District Court, but failed to perfect the jurisdictional requirements, and the appeal was dismissed by the District Court.

Thereafter Hogan, plaintiff in the action for a declaratory judgment, moved for summary judgment on the ground there was no material issue of fact, and he was entitled to judgment as a matter of law. In support of the motion Hogan offered the evidence described in the second paragraph of this opinion, as well as the deposition of both parties. The trial court granted the motion for summary judgment. Pelton then filed this appeal.

In this court Hogan defends the order granting summary judgment on two grounds: (1) The judgment in the forcible entry and detainer action is res judicata of the action in the declaratory judgment proceeding. (2) He

argues that the evidence is undisputed that Pelton and Sun breached certain covenants of the lease, namely, failing to pay rent, assigning the lease to Pelton contrary to the provisions of the lease, failing to operate the premises for the purposes leased, and as such he was damaged by said breaches and is entitled to a judgment terminating the lease and awarding him possession.

For purposes of examining the claim of res judicata, we will assume, because neither of the parties has made any contention to the contrary, that the issue of res judicata may be raised on motion for summary judgment without the issue having been pleaded. In order for the defense of res judicata to prevail, it normally must be pleaded or appear upon the face of the petition. *Tedco Development Corp. v. Overland Hills, Inc.*, 205 Neb. 194, 287 N.W.2d 49 (1980). However, under the federal rule pertaining to summary judgment, which is identical to our statute, the issue may be properly raised by motion for summary judgment. See, for example, *Smith v. United States*, 369 F.2d 49 (8th Cir. 1966). However, in the federal case the issue of the necessity of pleading is, as might be expected, not raised or discussed.

Examining the history of the special action of forcible entry and detainer, our statutes and cases lead to the conclusion that such an action decides very little as far as the doctrine of res judicata is concerned. Neb. Rev. Stat. § 24-568 (Reissue 1979) gives the county and municipal courts jurisdiction "over complaints of unlawful and forcible entry into lands and tenements and the detention of the same, and of complaints against those who, having a lawful and peaceable entry into lands or tenements, unlawfully and by force hold the same." It further provides: "If the court finds that an unlawful and forcible entry has been made, and that the same lands or tenements are held by force, or that the same, after a lawful entry, are held unlawfully, the court shall cause the party complaining to have restitution thereof. The court, or the jury as the situa-

tion warrants, shall inquire into the matters between the two litigants such as the amount of rent owing the plaintiff and the amount of damage caused by the defendant to the premises while they were occupied by him, and render a judgment or verdict accordingly." Neb. Rev. Stat. § 24-569 (Reissue 1979) extends the action to tenants holding over their terms when they have neglected to pay rent and makes the action available as a means to possession following certain judicial proceedings.

The scope is, however, limited as is indicated by Neb. Rev. Stat. § 24-570 (Reissue 1979), which says: "Judgments obtained in county court under sections 24-568 to 24-584 shall not be a bar to any future action brought by either party." Old cases shed light upon the meaning of this section. As a general rule, forcible entry and detainer does not try the question of title, but only the immediate right of possession. It is res judicata only as to the immediate right. This is illustrated by the case of *Dale v. Doddridge*, 9 Neb. 138, 1 N.W. 999 (1879). In that case this court construed § 24-570 (then Gen. Stat. § 1021 (1873)) and held that an action of forcible entry and detainer is res judicata so as to prevent repetitive actions for possession but does not try title. An action for forcible entry and detainer is merely possessory, and the question of title to real estate cannot be either tried or determined in the case. *Jones v. Schmidt*, 163 Neb. 508, 80 N.W.2d 289 (1957). An equitable title to real estate and possession thereof may be shown as a defense in an action for forcible entry and detainer. A county court has no jurisdiction to try such title. *Jones v. Schmidt, supra.*

In this case the evidence in the county court indicated Hogan was the record fee title owner, and Pelton, before the self-help action by Hogan, was in possession of the premises and improvements made upon the real estate by virtue of an assignment of the site lease by the original lessee, Sun. The lease was for a term of 15 years with an option to renew for three successive 5-year

terms. The lease also contained an option to purchase the real estate during the term of the lease or any extension thereof upon the same terms "as any bona fide offer for said premises received by lessor." An interest such as is above described is an interest in real estate. Neb. Rev. Stat. § 76-201 (Reissue 1976) provides: "The term real estate, as used in sections 76-201 to 76-281, shall be construed as coextensive in meaning with lands, tenements and hereditaments, and as embracing all chattels real, except leases for a term not exceeding one year." The evidence in the county court showed the rent called for by the lease had been paid through the month of January 1980 and was tendered by Pelton to Hogan for the month of February 1980 but had been refused by the latter.

The county court refused to restore the premises to Pelton, reasoning that he could not recover under "a purported" assignment of the lease. No further specification was stated in the order. The assignment from Sun to Pelton occurred on December 21, 1979.

The county court had no jurisdiction to determine the interests of the parties to the real estate in question. Judgment in the forcible entry and detainer action was not res judicata of the issues raised in the declaratory judgment action by Hogan.

Hogan asserts that irrespective of the res judicata issue he was entitled to judgment as a matter of law. This contention rests upon the position that he was entitled to termination of the lease because of claimed violations of certain provisions of the lease. We have mentioned the issue of failure to pay rent. The evidence indicates the rent was paid through January 1980 and tendered for February 1980 but refused by Hogan. The inference arises that Hogan refused the rent because, as he claims, the lease and all rights thereunder were forfeited by breach of the covenants of the lease. Whether a tender of rent for March should have been made is a factual question. The law does not require a useless formality. A formal tender is not necessary

where a party has shown by act or word that it would not be accepted if made. *Canaday v. Krueger*, 156 Neb. 287, 56 N.W.2d 123 (1952).

Hogan contends the lease was forfeited because Pelton breached the terms of the agreement when he did not keep the station open after September 1979 and because the assignment by Sun also breached the terms of the lease. He further contends the operation of the station was a term or condition of the lease required for the benefit of Hogan's other operations on the adjacent premises, to wit, operation of a shopping center, and as such this alleged failure to remain operational forfeited the lease.

"[I]n the absence of a statute to the contrary a tenancy cannot be terminated for the breach of a covenant, condition, or collateral agreement by the lessee unless there is an express and distinct provision in the lease for a forfeiture or right of reentry on the occurrence of the breach. Forfeitures of estates under leases are not favored in law and the right to forfeit must be clearly stipulated. If a forfeiture has not been stipulated for, a covenant or condition which is merely implied, or an express one not clearly within the forfeiture clause, will not sustain a claim of forfeiture for breach." *Olson v. Pedersen*, 194 Neb. 159, 165, 231 N.W.2d 310, 314 (1975). In the event of the breach of a covenant of a lease which does not expressly provide for termination, the lessor's remedy is ordinarily for damages only. *Olson v. Pedersen, supra.*

An examination of the lease indicates it contains nothing providing for termination upon any breach of the lease except for the failure to pay rent. Furthermore, while the lease recites its purposes, it contains no express covenant requiring the lessee to operate the service station; it permits the conduct of any other lawful business; and it expressly permits the right to sublease as well as underletting. It contains no provision against assignment. It expressly provides: "This lease and any renewal or extension thereof shall be binding

upon and shall inure to the benefit of the parties hereto and to their respective heirs, successors or assigns."

There are disputed questions of both fact and law not determined by the trial court. Summary judgment should not have been granted. The judgment is reversed and the cause remanded to the District Court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

TESORO PETROLEUM CORPORATION, A CORPORATION, APPELLANT, V. ALVIN W. SCHMIDT AND DEAN'S SERVICE CO., A CORPORATION, APPELLEES.

316 N.W.2d 290

Filed February 5, 1982. No. 44438.

1. **Promissory Notes: Intent: Notice.** Evidence of the mere subjective intent of the maker of a promissory note not to be personally bound is insufficient to rebut the presumption of personal obligation under Neb. U.C.C. § 3-403 (Reissue 1980) when that intent is not shown to have been communicated in some manner to the other party to the note.
2. **Promissory Notes: Acceleration Clauses.** In order to take advantage of an optional acceleration provision in a promissory note, the holder of the security must take some affirmative action evidencing his election to do so.
3. ____:____. The filing of a petition alleging such election is a clear and unequivocal manner of declaring the holder's intention to take advantage of the optional acceleration provision and declare the entire debt due.

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

Jim Zimmerman of Atkins, Ferguson, Hahn, Zimmerman & Carney for appellant.

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

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

PER CURIAM.

This was an action to recover judgment on a promissory note brought by the plaintiff, Tesoro Petroleum Corporation, against the defendants, Alvin W. Schmidt and Dean's Service Co., a corporation. Trial to the court alone resulted in judgment in favor of the plaintiff and against Dean's Service Co. in the amount of $19,035.55, but in favor of Schmidt as to whom the action was dismissed. It is from this last action of the District Court that Tesoro has appealed, assigning as error the admission of parol evidence surrounding Schmidt's execution of the note and the sufficiency of the evidence to support a judgment of dismissal in favor of Schmidt.

Dean's Service Company was incorporated by Schmidt's wife, Maxine, who was the president and sole stockholder. Schmidt was the vice president and secretary, as well as manager of the gasoline service station operated by the corporation in Scottsbluff.

The service station was owned by Tesoro and was the subject of a lease between Tesoro and Dean's which was executed for the latter by Schmidt in his representative capacity as vice president. He was the one principally involved with Tesoro in the regular business dealings, and the invoices for goods received from Tesoro were marked with the names "Dean's Service Co." and "A. W. Schmidt." Schmidt paid all the bills from the corporate checking account.

For reasons not apparent on the record, Dean's Service Co., Inc., executed a promissory note on July 1, 1976, payable to Tesoro Petroleum Corporation in the amount of $13,779.09. That note is reproduced in full as follows:

PROMISSORY NOTE

$ 13,779.09 San Antonio, Texas, July 1st 1976

For value received, I, We, or either of us, as principals/jointly and severally promise to pay to the order of Tesoro Petroleum Corporation, Post Office Box 17536, 8700 Tesoro Drive in the City of San Antonio, Bexar County, Texas, the sum of Thirteen thousand seven hundred seventy nine and 09/100 ********** Dollars ($ 13,779.09), in legal and lawful money of the United States of America, with interest thereon from date hereof until maturity at the rate of eight per cent (8 %) per annum; the interest payable ; matured unpaid principal and interest shall bear interest at the rate of ten per cent (10%) per annum from date of maturity until paid.

This note is due and payable as follows, to-wit:

The first payment of $3,779.09 due on ~~September~~ October 1, 1976 with the remaining $10,000.00 being retired by thirty-six (36) equal monthly payments of principal and interest in the amount of $ 313.36 each beginning ~~October~~ November 1, 1976, and each successive payment becoming due and payable on the first day of each succeeding month.

It is expressly provided that upon default in the punctual payment of this note or any part thereof, principal or interest, as the same shall become due and payable, the entire indebtedness evidenced hereby shall be matured, at the option of the holder. In the event this Note, or any part hereof, is collected through Probate, Bankruptcy or other judicial proceedings by an attorney or is placed in the hands of an attorney for collection after maturity, then the undersigned agree and promise to pay a reasonable attorney's fee for collection, which in no event shall be less than ten per cent (10%) of the principal and interest then owing.

Each maker, surety and endorser of this Note expressly waives all notices, demands for payment, presentations for payment, notices of intention to accelerate the maturity, protest and notice of protest, as to this note and as to each, every and all installments hereof, and each consents that the payee or other holder of this Note may at any time, and from time to time, upon request of or by agreement with any of us, extend the date of maturity hereof or change the time or method of payments without notice to any of the other makers, sureties or endorsers, who shall remain bound for the payment hereof.

Address Scottsbluff, Nebraska 69361

Alvin W. Schmidt Mgr

By: Deans Service Co. Inc. Mgr Alvin W. Schmidt

Dean's Service Co., Inc. Alvin W. Schmidt

Date: 9/1/76

Other than the state of the signatures, we would only call attention to the words "jointly and severally" which were apparently added with a typewriter to a printed form near the top of the note.

Tesoro's petition alleged that no payments have been made on the note, that demand had been made upon both parties for payment of the same on December 21, 1976, and prayed for judgment for the face amount of the note plus interest, according to its terms. Schmidt's answer contained a general denial, and he also raised the defense that his signatures on the note were made in a representative capacity and did not give rise to a personal obligation on his part.

At trial Schmidt admitted the authenticity of the signatures and the validity of the debt at the time of execution of the note. He made no claim that any payments had been made. He was permitted, over the

objection of Tesoro, to testify that at the time he signed the note he had not intended to become personally obligated on the same. No other testimony was offered to the court. The note, however, was received in evidence.

The note in question comes within the form of a negotiable instrument as it is described in Neb. U.C.C. § 3-104 (Reissue 1980). Therefore, the resolution of the issue regarding Schmidt's personal obligation on the note is governed by Neb. U.C.C. §§ 3-401 et seq. (Reissue 1980) in general, and § 3-403 in particular. These sections also govern in part the admissibility of parol evidence to prove or disprove personal liability on a note, which is the primary issue before the court at this time.

Section 3-403 governs the liability of one who signs an instrument as an authorized representative of another. The record sufficiently establishes that Schmidt was an authorized representative of Dean's Service Co. at the time he signed the note in question. The fact that the note identifies the "person represented," namely Dean's Service Co., Inc., removes subsection (2)(a) from consideration, allowing the focus to be shifted to subsections (2)(b) and (3) only. These sections provide: "(2) An authorized representative who signs his own name to an instrument (a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity; (b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity. (3) Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a

representative capacity."

In this case, Schmidt's signature appears on the note twice. The signature, which appears in the following form,

"/s/ Alvin W. Schmidt, Mgr.
By /s/ Dean's Service Co., Inc.
Dean's Service Co., Inc."

fits well within the provisions of § 3-403(3). The name of an organization, Dean's Service Co., Inc., is preceded by the name and office of an authorized individual, Alvin W. Schmidt, Mgr. Therefore, this signature was clearly "made in a representative capacity" as a matter of law and need be considered no further.

However, with regard to the second signature, shown below, Schmidt contends it is ambiguous and justifies the admission of parol evidence, a contention with which the trial court agreed.

"/s/ Alvin W. Schmidt, Mgr.
/s/ Mgr.
By /s/ Dean's Service Co., Inc. /s/ Alvin W. Schmidt
Dean's Service Co., Inc. Alvin W. Schmidt"

Schmidt argues that a reasonable construction of the signature appearing above the typed name of Alvin W. Schmidt, when read in conjunction with the remaining signatures, meets the requirements of § 3-403(2)(b), a section which, he alleges, allows the admission of parol evidence to show that the signature was in fact made in a representative capacity.

The other side of the argument, of course, is that the second signature was entirely superfluous to the obvious representative execution of the note and that the note was drafted with the intent that both Dean's Service Co., Inc., and Alvin W. Schmidt be bound to the note, as is apparent from the typewritten addition to the note of the words "jointly and severally." As such, the signatures and the note are not ambiguous and do not permit the admission of parol evidence.

However, we do not find it necessary to resolve this

question regarding the admissibility of parol evidence. As will be apparent from the discussion to follow, we do not believe that the evidence offered by Schmidt was sufficient to overcome his burden to prove that the note was not signed in his personal capacity.

In *Seale v. Nichols*, 505 S.W.2d 251 (Tex. 1974), a similar problem was presented to the court. A note was signed with the name of an organization appearing in typewritten form, followed by the typewritten and then handwritten name of the defendant. It was Nichols' contention that the organization listed on the note was the name in which a corporation of which he was the president did business, and that he signed in a representative capacity. The holder of the note, the plaintiff, responded that the signature on the note was not ambiguous and, in any event, the note did not disclose that Nichols signed it in a representative capacity.

Certain portions of the Texas Business and Commerce Code appear to be identical to our § 3-403. The Texas court stated at 253-55: "We find it unnecessary to decide these problems because we have concluded that the summary judgment affidavit of Nichols is insufficient to raise a fact issue upon the affirmative defense of representation on which Nichols relies. . . . As we interpret the code, a person signing a promissory note is presumed to be personally obligated to the holder thereof unless he, as the maker, interposes a defense sufficient to relieve himself of the obligation. . . .

. . . .

"Section 3.403 [the same as Neb. U.C.C. § 3-403], above set out, provides the circumstances under which personal liability may be avoided. It follows that this section would also provide the circumstances in which parol evidence will be admissible to show the fact of the execution of the note in a representative capacity. The code, however, does not spell out the type of parol evidence necessary to raise this defense. . . .

. . . .

"Again viewing Nichols' affidavit broadly, it states that he signed the note as president of the corporation, thus clearly indicating his subjective intent to sign as an agent. However, nowhere does Nichols say that he disclosed his intent to Seale. Nor does his statement that '. . . I signed the promissory note . . . in the capacity of officer of such corporation and in behalf of such corporation and not in my personal capacity,' intimate that this intended capacity was communicated to Seale. This is his burden in the context of the summary judgment proceedings. Consequently, Nichols has not effectively raised a fact issue upon his alleged affirmative defense of representation and Seale's motion for summary judgment must be granted."

We are well aware of the rule that the judgment of a district court in an action at law where a jury has been waived will not be set aside on appeal unless clearly wrong. *Weber v. Swenson*, 207 Neb. 35, 295 N.W.2d 688 (1980). However, in this instance we find that mere subjective intent of the maker of a promissory note not to be personally bound is insufficient to rebut the presumption of personal obligation under § 3-403 when that intent is not shown to have been communicated in some manner to the other party to the note. The trial court was clearly wrong in determining that the evidence, even if admissible, was sufficient to support a dismissal of the action against Schmidt.

Tesoro contends that it should have been entitled to judgment in the amount of $19,035.55 against Schmidt, the total amount which the District Court found was due and owing on the note from Dean's Service Co. Schmidt does not dispute that amount. However, he does insist that where acceleration of the maturity of a debt on default is made optional with the payee, some affirmative action must be taken by him evidencing his election to take advantage of the provision. Of

course this is true. *State Security Savings Co. v. Pelster*, 207 Neb. 158, 296 N.W.2d 702 (1980). The petition filed by Tesoro alleges that a demand for payment was made upon Dean's Service and Schmidt on December 21, 1976, giving them until January 10, 1977, to pay the amounts due and owing on the note, but that payment was refused and that, on and after that date, "said note became due and payable on [sic] the entire indebtedness thereby became matured." Schmidt argues in his brief that "there was no evidence introduced of any demand other than the commencement of the suit."

Schmidt has answered his own argument. "The institution of a suit for the whole debt is, of course, the most solemn form in which the holder can exercise his option. This is well recognized and it is, hence, generally held that the institution of a suit on the bills or notes is notice of the most unequivocal character that the holder wishes to avail himself of his option for acceleration." Annot., 5 A.L.R.2d 968, § 5 at 975 (1949). Cited in the annotation as supporting the general rule is *Morling v. Bronson*, a commissioner's opinion found at 37 Neb. 608, 56 N.W. 205 (1893). A portion of the court's syllabus is as follows: "*Held*, . . . Third, that the holder was under no legal obligation to notify the maker that by reason of the default he had elected to declare the whole note due . . . ." That part of the opinion pertinent to this ruling states at 609-11, 56 N.W. at 206: "The plaintiff in error, in his petition . . . set[s] out the fact that Brown had made default in the payment of seven of the installments, and that he, the plaintiff in error, for that reason, elected to declare the whole debt due. . . .

. . . .

". . . The promise of Brown to pay this note in installments was absolute, and a failure on his part left it wholly optional with the holder to declare the entire debt due, and Brown was not entitled to *notice in advance* that, if he failed to pay any installment, the

holder would insist upon his right to the whole debt." (Emphasis supplied.)

We agree that in order to take advantage of an optional acceleration provision on a promissory note, the holder of the security must take some affirmative action evidencing his election to do so. At this time we hold that the filing of a petition alleging such election is a clear and unequivocal manner of declaring the holder's intention to take advantage of the optional acceleration provision and declare the entire debt due. This is in no manner inconsistent with the rule laid down in *State Security Savings Co. v. Pelster, supra.* The plaintiff Tesoro is entitled to a judgment against Schmidt in the full principal amount of the note, together with the accrued interest.

The judgment of the District Court in favor of Schmidt is reversed and the cause is remanded with directions to enter judgment for Tesoro in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. KENNETH LEE MICHAELIS, RESPONDENT.

316 N.W.2d 46

Filed February 12, 1982. No. 42820.

1. **Attorneys at Law: Disciplinary Proceedings: Proof.** In disciplinary proceedings of members of the bar, the relator must establish the allegations in the formal charges by a clear preponderance of the evidence so the court is satisfied to a reasonable certainty that the charges are true.
2. ____: ____: ____. In disciplinary proceedings the findings must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal case.
3. ____:____:____. In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence.

4. **Attorneys at Law: Disciplinary Proceedings: Appeal and Error.** To determine whether and to what extent discipline should be imposed in a disbarment proceeding, it is necessary for this court to review the evidence de novo, considering the nature of the offense, the need for deterrence of others, maintenance of the reputation of the bar as a whole, protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law.
5. **Attorneys at Law: Disciplinary Proceedings.** An attorney at law may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients.
6. ____: ____. An attorney may be disciplined for criticism in the heat of a political contest if such criticism is carried beyond the limits of truth and fairness.

Original action. Judgment of disbarment.

Paul L. Douglas, Attorney General, and Mel Kammerlohr for relator.

Kenneth Lee Michaelis, pro se.

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

PER CURIAM.

This is an original disciplinary proceeding brought against the respondent, Kenneth L. Michaelis, an attorney admitted to practice in this state by the State of Nebraska ex rel. Nebraska State Bar Association, the relator herein.

Following hearings held before the Committee on Inquiry of the Ninth Judicial District and The Advisory Committee, formal charges were filed against the respondent on November 29, 1978, arising out of his conduct during a 1978 campaign for the office of Cuming County attorney. The formal charges consist of four counts alleging that the respondent had violated the following Canons of Ethics and Disciplinary Rules of the Code of Professional Responsibility: Canon 1, DR 1-102(A) (1), (4), (5), and (6); DR 1-103(A); and Canon 2, DR 2-101(A). Additionally, upon the motion of the relator, four more charges were filed against the respondent relating to statements he made and his conduct during the pendency of this disciplinary pro-

ceeding. The additional charges allege that the respondent violated Canon 1, DR 1-102(A) (1), (5), and (6), and Canon 8, DR 8-102(B). In each instance it is alleged that the respondent engaged in conduct prejudicial to the administration of justice or in conduct tending to bring reproach, discredit, and disrespect upon himself, the courts, and the legal profession.

The referee appointed by this court held a hearing on the formal charges on June 30, 1980, and a hearing was held on the additional charges filed against respondent on February 24, 1981. The referee filed his report with this court on April 7, 1981, in which report he found that the respondent had violated the aforementioned disciplinary rules as set out in the charges. In his report filed in this matter with this court on April 7, 1981, the referee concludes by stating: "This Referee has been waiting for some evidence of sorrow or regret on the part of the Respondent that would give some assurance that the conduct herein disclosed will not be repeated. There have been no such expressions of regret nor has there been any retraction by the Respondent of any of the charges he has made. His conduct before this Referee in several hearings has been exemplary and it has been difficult to associate the Respondent before us as the author of the documents received in evidence. This is some basis for hope of reformation. I have in my mind touched upon the thought of recommending outright disbarment but having regard to the short time this Respondent has been engaged in practice, his youth, having regard to the economic stake he has in his period of training and education for a legal career extended over his possible lifetime, and the well being of members of his family, and remembering also that it is not the purpose by this proceeding to punish but rather to reform, I recommend that the Respondent be suspended from practice in this State for a period of one year." Respondent has filed exceptions to the report of the referee and the matter has now been argued before this court.

Before discussing the merits of the allegations con-

tained in the charges against the respondent, it will be helpful to set out established standards which govern the review by this court in disciplinary proceedings. We have held that the relator must establish the allegations in the formal charges by a clear preponderance of the evidence, so the court is satisfied to a reasonable certainty that the charges are true. *State ex rel. Nebraska State Bar Assn. v. Hollstein*, 202 Neb. 40, 274 N.W.2d 508 (1979); *State ex rel. Nebraska State Bar Assn. v. Rhodes*, 177 Neb. 650, 131 N.W.2d 118 (1964). The findings must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal case. *State ex rel. Nebraska State Bar Assn. v. Hollstein, supra; State ex rel. Nebraska State Bar Assn. v. Richards*, 165 Neb. 80, 84 N.W.2d 136 (1957). In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence. *State ex rel. Nebraska State Bar Assn. v. Hollstein, supra; State ex rel. Nebraska State Bar Assn. v. Pinkett*, 157 Neb. 509, 60 N.W.2d 641 (1953). To determine whether and to what extent discipline should be imposed in a disbarment proceeding, it is necessary for this court to review the evidence de novo, considering the nature of the offense, the need for deterrence of others, maintenance of the reputation of the bar as a whole, protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. *State ex rel. Nebraska State Bar Assn. v. Erickson*, 204 Neb. 692, 285 N.W.2d 105 (1979); *State ex rel. Nebraska State Bar Assn. v. Cook*, 194 Neb. 364, 232 N.W.2d 120 (1975).

Turning to the formal charges originally filed against the respondent in this matter, the first such charge concerns a political advertisement placed by Michaelis in the Wisner News-Chronicle, a newspaper of general circulation in Cuming County. It appears from the evidence that Michaelis had been seeking nomination for the position of Cuming County attorney in an effort to

unseat the incumbent county attorney. According to respondent, he placed the advertisement of April 13, 1978, with the newspaper for the purpose of announcing his withdrawal from candidacy for the county attorney position. The advertisement consists of four columns of the paper, one continuing onto a second page. Only one sentence in the first column and the last paragraph of the advertisement relate to Michaelis' withdrawal from the county attorney election. The bulk of the advertisement contains allegations of illegal and unethical conduct on the part of the incumbent county attorney and several other named attorneys in the Cuming County area. The article also contains several self-laudatory statements in reference to respondent.

The second formal charge is based upon a one-page document the respondent caused to be released on or about April 11, 1978, and is captioned as a statement to the press. This paper also contains allegations of illegal and unethical conduct on the part of several local attorneys. The statements contained therein cast aspersions by innuendo on the incumbent county attorney and the city attorney of West Point, Nebraska.

The third formal charge relates to a three-page document dated April 25, 1978, and circulated by the respondent. These pages repeat many of the allegations of impropriety alleged by respondent in his other publications.

The fourth formal charge is in regard to a one-page document captioned "Acceptance of Republican Nomination for Cuming County Attorney," and is dated June 5, 1978. This document alleges conspiracy on the part of three Cuming County officials in removing respondent's name from the April primary election ballot.

During the pendency of the investigation of the formal charges, respondent made several additional statements and caused to be filed with the Cuming County Court certain documents which gave rise to the relator's motion of October 31, 1980, to incorporate additional charges against respondent. The first of these additional charges relates to a statement made by

Michaelis to a newspaper reporter on or about October 7, 1980, which subsequently appeared on the front page of the West Point News on October 9, 1980. In the article Michaelis described the disciplinary proceedings brought against him, in part, as follows: "'The Nebraska Supreme Court is scared of this, because they know they have a dirty house, and if you have a dirty house, you don't open the windows . . . . And two attorneys have already committed perjury in this matter.'"

The second additional charge concerns a notice of disallowance of claim which the respondent caused to be filed in the county court of Cuming County, Nebraska, on September 8, 1980. The document appears to disallow all but $5.78 of a claim filed by a local law firm against the estate of one Herman A. Melcher. The document contains a typed statement prepared by the respondent, which he caused to be signed by the personal representative of the estate. The statement reads in part: "The Melcher family fear that theft by some Cuming County lawyers was imminent if it did not already occur. The family states its full confidence in the first attorney retained by [name omitted], Mr. Ken L. Michaelis, and they refuse to allow further theft from this estate by attorneys and their lust and greed."

The third additional charge pertains to a document entitled "Praecipe — Requisition for Transcript," and filed in the county court of Cuming County, Nebraska, on October 23, 1980. This document also contains derogatory claims made against area attorneys on the validity of their claims against the Melcher estate and, generally, upon the integrity of the courts and the judicial system.

The fourth, and last, additional charge filed in this case concerns a statement respondent issued on October 2, 1980, to radio station WJAG/KEXL of Norfolk, Nebraska. The statement, which concerns the disciplinary proceedings filed against respondent, was recorded and broadcast to the public, and was as follows: "Never have I said anyone was guilty of bribery. Never have I done this. This is a blatant and apparent, this is a blatant

lie. And apparently is perpetrated by the Nebraska Bar Association using and misusing the press and media. It is a typical smear campaign by what is probably in many people's mind the dirtiest profession in all of America today. Not just today, it was that way yesterday, and the day before that.

"At least prostitutes, and prostitution has a sense of fairness and some decency. The Nebraska State Bar Association apparently has none.

"Not one of the many false allegations by this very ignorant committee of puppets and professional stooges of the Nebraska Bar Association is true. No one wants to look into the factual truth, for they fear opening a can of worms that finds the West Point City Attorney guilty of gross negligence, reckless and wanten [sic] malice, greed, and gross conflicts of interest for his own personal gain and selfish glory over the past 20-years. His name is [omitted]. Some of the same is true about [name omitted], our former Cuming County Attorney . . . ."

It is clear that the foregoing statements would clearly have a profound effect upon the minds of the reading and listening public, and could only serve to shake the confidence of the public in the legal profession. While the record in this case is voluminous and obviously cannot be quoted in full in this opinion, we have read the entire record and believe that all that is necessary to be discussed at this point is the testimony of the respondent, given under oath, in his original hearing held before the Committee on Inquiry, Ninth Judicial District, on November 14, 1978. We quote pertinent parts of respondent's testimony at that hearing. During his direct testimony, the respondent was asked: "Q Mr. Michaelis, in these various exhibits, you make some general statements indicating that you have knowledge of unethical conduct on the part of attorneys in Cuming County, and also you make some allegations of what would amount to criminal conduct. Did you have any or do you now have any evidence of any such conduct on the part of any attorneys in Cuming County? A I don't think

it could be construed that we made allegations against particular attorneys. . . . Q So all of your statements of that nature were based simply on what other people had said to you, is that right? A What other people had said to me. . . ." He was also asked: "Q Then, for purposes of clarification, you know of no specific acts on the part of [name omitted] that would be in violation of the Code of Professional Responsibility — A No, no clear ones. No. Q — or the Nebraska statutes? A Or the Nebraska statutes. None that readily come to my mind. Q Another individual who has been mentioned specifically, [name omitted] — do you know of any specific conduct on his part that would be a violation of the Code or of any Nebraska Statutes? A Not clearly; not that I would clearly believe to be in violation. . . . Q Again, you know of no such conduct on the part of [name omitted]? A I'm not very knowledgeable of his affairs. Q You've made several allegations in regard to [name omitted], specific allegations. In connection with the salary increase, you stated, in Exhibit 1, 'smacks as a species of blackmail and bribery'. Do you know of any 'blackmail' or 'bribery' that [name omitted] was involved in? A No."

The respondent also responded to questions put to him at that hearing as follows: "Q Have you, or anyone on your behalf, made any complaints to this committee about unethical conduct of a lawyer in Cuming County or any other county in this district? A No, I have not. Q Did you ever complain to the Counsel for Discipline or any representative of the Bar Association? A No, I have not. Q Didn't you, in some of your correspondence, indicate that your letters to the pastors, with regard to making a donation to their church, was a mistake? A Was a mistake? Q Yeah. A On my part? Q Yes. A I don't believe. I don't remember. I don't recall."

Finally, the respondent was asked: "Q Mr. Gushard [Counsel for Discipline] has asked you about various attorneys. Do you have any evidence of dishonesty or unethical acts on the part of [name omitted]? A Just other than hearsay that mainly [name omitted] had

made reference about. Q Other than the attorneys that have been mentioned, do you have any evidence of dishonesty or unethical conduct on the part of any other attorneys in Cuming County or in this district? A Other than the ones that — Certainly, I have heard of the ones that have been disbarred, as far as that is concerned."

Respondent was also asked with reference to a letter written to St. Joseph's Catholic Church in Wisner, in which letter he stated that if he should become county attorney he planned to divide a portion of the salary to the various parishes. He was asked: "Q . . . Do you see an ethical problem with such an offer as that? A Well, now that it has been brought on up, I do see; but at the time, that's the way one honestly felt, you know. Now, it could be construed as a ethical problem. Q At this time, do you see that it is an ethical problem? A Certainly."

In his report the referee found that the respondent had prepared the above-mentioned materials and that he had placed many of them in the region's newspapers or for broadcast by radio. The referee determined that Michaelis knew that many of the statements were false, deceptive or misleading, or that with ordinary care he should have known them to be false. The referee also found that Michaelis never brought the alleged acts of impropriety to the attention of the proper authorities, but that he consistently used the news media to make public denunciations of certain local attorneys and build up his own image by contrast. The lack of specifics in respondent's allegations, as well as the lack of any reasonable proof of his claims, suggests a malicious motive on the part of respondent, rather than a good faith attempt at fair and candid criticism.

Neb. Rev. Stat. § 7-105 (Reissue 1977) provides that upon admission to the bar of this state, attorneys assume certain duties as officers of the court. Among the duties imposed upon attorneys is the duty to maintain the respect due to the courts of justice and to other judicial officers. This court has recognized and adopted the principles embodied in the American Bar Association's Code of Professional Responsibility as a general state-

ment of the standards of professional conduct required of a member of the Nebraska State Bar Association. Canon 1 of the code pertains to maintaining the integrity and competence of the legal profession. DR 1-102, promulgated thereunder, prohibits, among other things, engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; engaging in conduct prejudicial to the administration of justice; or any other conduct adversely reflecting on the fitness of a lawyer to practice law. DR 1-103 further provides that any lawyer possessing unprivileged information of a violation of the code shall report such knowledge to the proper tribunal or other authority empowered to investigate or act upon the conduct of lawyers and judges.

DR 2-101 also provides that a lawyer shall not prepare, or cause to be prepared, any form of public communication which contains professionally self-laudatory statements. Also pertinent to this matter is Canon 8, which states that a lawyer should assist in improving the legal system. DR 8-102(B) provides that a lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer. The rationale for this disciplinary rule appears in Ethical Consideration 8-6, which provides in pertinent part: "Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. *While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms,* for unrestrained and intemperate statements tend to lessen public confidence in our legal system. *Criticisms motivated by reasons other than a desire to improve the legal system are not justified.*" (Emphasis supplied.)

As a defense to the charges listed above, the respondent makes the following contentions: (1) That the statements attributed to him during the 1978 county attorney election were campaign rhetoric made during the heat and stress of a political campaign; (2) That to bring disciplinary proceedings against him for his ex-

pressions is an unconstitutional restraint upon his first amendment right to free speech; (3) That he acted in his capacity as a citizen and not as an attorney of record for a pending trial at the time the statements were made; and (4) That his comments and criticisms in this regard were made in good faith with the purpose of improving the legal system.

The respondent's assertion that he cannot be disciplined for his comments because they were protected expressions under the first amendment is an issue raised for the first time before this court. This issue requires a delicate balancing of the interests in upholding the integrity of our judicial system and in protecting the right of an attorney to free expression. In determining this balance, we will rely primarily upon the case law as formulated by other jurisdictions which have addressed this issue.

The U.S. Supreme Court addressed this issue generally in the case of *In Re Sawyer*, 360 U.S. 622, 79 S. Ct. 1376, 3 L. Ed. 2d 1473 (1959). In a five to four decision the Court held that the conduct of Sawyer, an attorney practicing in Hawaii, during a public speech did not impugn upon the integrity of a judge during a current Smith Act trial. The Court found that the lawyer's comments about the "shocking and horrible things that go on at the trial in a Smith Act case" were proper criticism of the law itself and the government's prosecutorial policy, and not personal criticism aimed toward the trial judge. In reviewing the case the Court began its discussion "with the proposition that lawyers are free to criticize the state of the law." *Id.* at 631. The Court went on to state: "To say that 'the law is a ass, a idiot' is not to impugn the character of those who must administer it. To say that prosecutors are corrupt is not to impugn the character of judges who might be unaware of it . . . ." *Id.* at 634. The Court also stated that a lawyer can properly criticize a judge's view of the law, as follows: "If [the judge] was said to be wrong on his law, it is no matter; appellate courts and law reviews say that of judges daily, and it impugns no dis-

grace. Dissenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed. *Petitioner did not say [the judge] was corrupt or venal or stupid or incompetent.* The public attribution of honest error to the judiciary is no cause for professional discipline in this country." (Emphasis supplied.) *Id.* at 635.

The Court also noted that "surely permissible criticism may as well be made to a lay audience as to a professional . . . ." *Id.* at 632. Finally, the Court noted: "A lawyer does not acquire any license to do these things by not being presently engaged in a case. *They are equally serious whether he currently is engaged in litigation before the judge or not.* We can conceive no ground whereby the pendency of litigation might be thought to make an attorney's out-of-court remarks more censurable, other than that they might tend to obstruct the administration of justice." (Emphasis supplied.) *Id.* at 636.

It is implicit in the statements of the Court as to the boundary of permissible criticism of the law and judiciary that instances can exist where an attorney's criticism or conduct would be impermissible and the subject of professional discipline. We note, as did the Supreme Court of Kentucky in *Kentucky Bar Ass'n v. Heleringer*, 602 S.W.2d 165 (Ky. 1980), and the Iowa Supreme Court in *Matter of Frerichs*, 238 N.W.2d 764 (Iowa 1976), that Justice Stewart was speaking for five members of the court when he stated in his concurring opinion: "If, as suggested by my Brother Frankfurter, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.

"Obedience to ethical precepts may require abstention from what in other circumstances might be constitu-

tionally protected speech." (Emphasis supplied.) 360 U.S. at 646-47.

Generally, the majority of the state courts which have addressed this issue concur that a person does not surrender his freedom of expression upon becoming an attorney. However, most jurisdictions have recognized that upon admission to the bar an attorney incurs the obligation to temper his criticism of the bench and bar in the manner allowed by the canons of professional ethics. As stated by the Kentucky Supreme Court in *Kentucky Bar Ass'n v. Heleringer*, *supra* at 168: "We are not alone in our opinion that by coming to the bar an attorney incurs the ethical obligation not to bring the bench and bar into disrepute by unfounded public criticism. 'Our system of justice rests upon the mutual regard of the bench and bar.' *Matter of Frerichs*, supra at 766. '[I]n the case of a lawyer an abuse of the right of free speech may be some index of his character or fitness to be a lawyer.' *In Re Lacey*, S.D., 283 N.W.2d 250, 252 (1979), *quoting In Re Gorsuch*, 76 S.D. 191, 75 N.W.2d 644, 57 A.L.R.2d 1355 (1956). 'Nor does free speech give a lawyer the right to openly denigrate the court in the eyes of the public.' *In Re Raggio*, 87 Nev. 369, 371, 487 P.2d 499, 500 (1971). *See also, In Re Glenn*, 256 Iowa 1233, 130 N.W.2d 672, 12 A.L.R.3d 1398 (1964); ABA Code of Professional Responsibility, EC 8-6; Annot., 12 A.L.R.3d 1408; Annot., 56 L. Ed. 2d 841, 855-69. *But see, Justices of the Appellate Division v. Erdmann*, 33 N.Y.2d 559, 347 N.Y.S.2d 441, 301 N.E.2d 426 (1973); *State Bar v. Semaan*, Tex. Civ. App., 508 S.W.2d 429 (1974); *Polk v. State Bar of Texas*, N.D. Tex., 374 F. Supp. 784 (1974)."

In the case of *Matter of Frerichs*, *supra* at 769, the Iowa Supreme Court stated: "A lawyer, acting in a professional capacity, may have some fewer rights of free speech than would a private citizen. As was well explained in *In re Woodward*, 300 S.W.2d 385, 393-394 (Mo. 1957):

'* * * Neither the right of free speech nor the right to

engage in "political" activities can be so construed or extended as to permit any such liberties to a member of the bar; respondent's action was in express and exact contradiction of his duties as a lawyer. A layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. *A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics;* and if he wishes to remain a member of the bar he will conduct himself in accordance therewith. * * *'" (Emphasis supplied.)

In the recent case of *State v. Russell*, 227 Kan. 897, 610 P.2d 1122 (1980), the Kansas Supreme Court determined that an attorney could be disciplined for intentionally publishing known falsehoods while engaged in a campaign for public office. In addressing the first amendment free expression issue, the court stated at 901-02, 610 P.2d at 1127: "Respondent notes that little authority can be found on the issue of professional discipline for political rhetoric directly implicating dishonesty under DR 1-102(A) (4). However, extensive treatment is afforded the issues of discipline of attorneys for publications made in the course of political campaigns for the election of judges. See annotations in 57 A.L.R.2d 1362 and 12 A.L.R.3d 1408. *An attorney may be disciplined for criticism in the heat of a political contest if such criticism is carried beyond the limits of truth and fairness. In re Charles A. Thatcher*, 80 Ohio St. 492, 89 N.E. 39 (1909). Within that context the expression of opinion is protected if true or in good faith believed to be true, but when derogatory factual allegations are false and with ordinary care should have been known to be false, discipline may be imposed. *State Board of Exam. v. Spriggs*, 61 Wyo. 70, 155 P.2d 285 (1945).

"In *State v. Nelson*, 210 Kan. 637, 640, 504 P.2d 211 (1972), this court stated: 'Concerning respondent's argument that DR 1-102(A) (5) creates an impermissible

and chilling effect on "First Amendment freedoms," an examination of decisions on the point (12 A.L.R.3d, Anno., p. 1408) reveals the consensus to be that an attorney's right to free speech is tempered by his obligation to both the courts and the bar . . . .'

"In the case of *In re Baker*, 218 Kan. 209, 542 P.2d 701 (1975), a disciplinary proceeding arising out of a political campaign against an incumbent judge, this court held that *a challenger in a partisan election for judicial office is free to criticize an incumbent's record so long as the criticism is accurate.* However, a violation of ethics was found and the challenger was censured for publishing untrue statements concerning eligibility for a disability pension, which statements the challenger knew or could have known were false by reading an applicable state statute.

"Although a lawyer may speak out and state his opinions on current campaign issues without fear of jeopardizing his license to practice law, his First Amendment rights are not absolute. The guarantee of freedom of speech will not protect him from disciplinary action as a lawyer if he is guilty of known falsehood intentionally used and published for the purpose of misleading the voters and gaining personal advantage for himself or his candidate." (Emphasis supplied.)

We determine, as did the referee, that respondent's public attribution of unethical and illegal conduct on the part of the then incumbent Cuming County attorney and other named regional attorneys, charges respondent knew or should have known to be unwarranted, was unethical and unprofessional conduct tending to bring the bench and bar of this state into disrepute and tending to undermine the public confidence in the integrity of the judicial process. If respondent had reason to believe, in good faith, that the named individuals engaged in proscribed conduct, then he had the responsibility and obligation of notifying the office of the Counsel for Discipline of the Nebraska State Bar Association as provided in rule 8(A) of the

rules of this court.

Respondent has suggested that because he was not acting in his capacity as an attorney of record for a pending trial, the Code of Professional Responsibility should not apply to his conduct. We do not agree. This court has stated on several prior occasions that an attorney may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients. *State ex rel. Nebraska State Bar Assn. v. Ledwith*, 197 Neb. 572, 250 N.W.2d 230 (1977); *State ex rel. Nebraska State Bar Assn. v. Bremers*, 200 Neb. 481, 264 N.W.2d 194 (1978); *State ex rel. Nebraska State Bar Association v. Walsh*, 206 Neb. 737, 294 N.W.2d 873 (1980). In this regard, we also note that Formal Opinion 336, Committee on Ethics and Professional Responsibility of the American Bar Association, dated June 3, 1974, holds that a lawyer is bound by the Code of Professional Responsibility in every capacity in which the lawyer acts, whether he is acting as an attorney or not. See, also, *Wright v. State ex rel. State Real Estate Comm.*, 208 Neb. 467, 304 N.W.2d 39 (1981).

We conclude that in the political advertisement dated April 13, 1978, as well as in the subsequent documents dated April 11, 1978, April 25, 1978, and June 5, 1978, the respondent listed several factual charges of misconduct, illegal acts, and other violations of law by the then incumbent Cuming County attorney, various Cuming County officials, the city attorney of West Point, Nebraska, and several named attorneys practicing in the region which he knew or should have known with ordinary care to be false. Such conduct on the part of respondent was unprofessional and in violation of DR 1-102(A) (1), (4), (5), and (6). The respondent's statements also included several contrasting self-laudatory statements in which he criticized not only particular attorneys but the profession as a whole, and then built up his own image for truth and veracity. These statements, which may have been made for the purpose of attracting voters to his campaign, or,

potentially, clients to his legal practice, were in violation of DR 2-101(A). We would distinguish respondent's statements, however, from the general political rhetoric of election campaigns in that they were not made fairly or accurately upon the facts, and contained false representations. Other statements made by the respondent, while not in good taste, appear to be rhetoric so general in nature and apparently aimed at protesting the state of the law that they cannot be the basis for discipline under the holding of *In Re Sawyer*, 360 U.S. 622, 79 S. Ct. 1376, 3 L. Ed. 2d 1473 (1959).

We now consider the proper discipline to be imposed upon respondent in this case. Although it is true that the referee in his report recommended that the respondent be suspended from the practice of law in this state for a period of 1 year, he also noted that respondent had not displayed any evidence of remorse or sorrow with regard to his conduct, or any assurances that it would not be repeated in the future. It should be noted that the original proceedings in this matter were commenced in 1978, and this matter is now being adjudicated in 1982, or approximately 4 years later. Apparently the respondent has failed or refused to profit from past experience and still is convinced that his past conduct was perfectly proper and ethical, and that he should not be penalized for his actions. We note with dismay that on January 14, 1982, after the submission of the case to this court for decision, he filed in the office of the Clerk of the Supreme Court two documents in which he continues to vilify certain attorneys, the bar generally, and the Nebraska Supreme Court. The first document, dated November 8, 1981, is entitled "RE: Attorney General's Office LIES to Nebraska Supreme Court." The document in question is too long to be included in full in this opinion, but we quote from certain pertinent excerpts thereof. In one paragraph he attacks the Attorney General and the assistant attorney general in this case, stating: "[Name omitted] and [name omitted] intentionally, and with criminal

intent as in Watergate, engaged in a most blatant, easily perceivable, and massive coverup that puts Watergate, Richard Nixon, Abscam, and other government scandals to shame.

"In 1978, 1979, 1980, and 1981, Attorney Michaelis informed these corrupt State lawyers of each of the following." Thereafter, respondent repeats many of the same allegations and charges against various attorneys that were previously the basis of the action. He also alleges that the Nebraska Supreme Court refused to accept copies of his reply brief which we note was tendered in violation of the court rules with reference to its preparation. He also states in his memorandum as follows: "Why worry about organized crime in gambling, slot machines, horse racing, etc. when we have organized crime in the law itself? In the legal profession under the guise of the Nebraska Bar Association!!!"

The second document filed in this court on January 14, 1982, is dated December 15, 1981, and is entitled "NOTICE — CUMING COUNTIANS." After referring to the Nebraska Supreme Court, respondent states: "Knowing the past and the politics by a few evil, greedy, corrupt and conniving local and regional lawyers, we do not have faith in that Court's ability to be fully honest, intelligent, unbiased, truthful, and competent. The people own that Court — they can dissolve that court!"

While respondent's acts subsequent to submission should not, perhaps, be considered in determining whether he has violated the Canons of Professional Responsibility, particularly DR 8-102(B), we believe it is perfectly proper to consider these subsequent events in determining what sanctions should be applied against him in this matter. Respondent has exhibited no remorse, change in attitude, or desire to cease his scurrilous attacks upon the bar and bench of this state. We are therefore of the opinion that the original recommendation of the referee of suspension is far too lenient and, if applied, would depreciate the seriousness

of his actions. His conduct clearly demonstrates that he is not fit to engage in the practice of law in this state and should be disbarred.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

VIRGIE J. HERMAN, APPELLANT, V. LOIS J. LEE ET AL., APPELLEES.

316 N.W.2d 56

Filed February 12, 1982. No. 43435.

1. **Legislative Power: Highways: Municipal Corporations.** The state has inherent power to establish, maintain, and control the highways of the state, including those within corporate limits of municipalities. While the Legislature may properly delegate certain powers over streets, alleys, and highways to a municipality, it retains the power to legislate with reference thereto when a matter of statewide policy and concern are involved.
2. **Municipal Corporations: Highways.** Any power a municipality derives over its streets is strictly statutory and is not exclusive.
3. **Statutes: Municipal Ordinances.** Where there is a direct conflict between a city ordinance and a state statute, the statute is the superior law.
4. ____:____ A city ordinance is inconsistent with a statute that is contradictory in a sense that the two legislative provisions cannot coexist.
5. **Municipal Ordinances: Municipal Corporations: Statutes.** The Omaha city ordinance regulating funeral processions was a reasonable and valid exercise of the city's police power under Neb. Rev. Stat. § 39-697(1)(c) (Reissue 1978), and does not conflict with Nebraska's right-of-way statutes.
6. **Motor Vehicles: Right-of-Way.** Intersection right-of-way is a qualified, not absolute, right to proceed through an intersection, exercising due care, in a lawful manner in preference to another vehicle.
7. **Motor Vehicles: Expert Witnesses.** An opinion of vehicular speed is proper, provided a sufficient foundation is laid to show the expertise of the witness, as well as specific knowledge of the underlying facts to deal with the question in issue.
8. **Expert Witnesses: Appeal and Error.** No exact standard is possible for fixing the qualifications of an expert or skilled witness, and the ruling

of a trial judge receiving or excluding an opinion will be reversed on appeal only when a clear abuse of discretion is shown.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Eric W. Kruger and J. Patrick Green for appellant.

Hansen & Engles for appellees.

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

PER CURIAM.

This is an action for personal injuries sustained as the result of a collision between the automobiles of appellant, Virgie J. Herman, and appellee Lois J. Lee at the intersection of 20th and Martha Streets in Omaha, Nebraska, on February 26, 1979. From a jury verdict in favor of the appellee and the subsequent order overruling the motion for new trial, appellant appeals. We affirm.

The Herman car was traveling south on 20th Street and entered the intersection of 20th and Martha Streets on a green traffic signal. The Lee car was traveling west on Martha Street and was the 10th to 13th car in a funeral procession consisting of approximately 30 cars. The Lee vehicle had its lights on and also displayed a plastic hood ornament designating it as a vehicle in a funeral procession. The procession was being escorted by an off-duty police officer driving an escort vehicle containing red flashing lights. At the time of the collision, the escort vehicle was 2 to 4 blocks beyond the 20th and Martha Streets intersection.

The speed of both vehicles, which vehicle entered the intersection first, and the distance between the Lee vehicle and the preceding vehicle in the procession were all matters in dispute and properly for the jury's determination.

Lee testified that she was the 10th to 13th car in the funeral procession and was following the im-

mediately preceding car by one car length, or approximately 20 feet. She also testified that she was first in the intersection, observed the Herman vehicle approaching from nearly one-half block away, and that she had virtually stopped when the Herman vehicle entered the intersection at approximately 50 miles per hour, striking the front portion of her vehicle. Lee stated that she was traveling approximately 3 miles per hour at the time of the collision.

Herman's testimony contradicted these claims. Herman testified that she was driving 30 to 35 miles per hour in a 30-mile-per-hour speed zone and entered the intersection first and was struck by the Lee vehicle. Herman attempted to offer opinion testimony by the police officer who investigated the accident. An offer of proof indicated that the officer would have testified that the Herman vehicle was traveling 20 to 25 miles per hour at the time of the collision.

It is uncontradicted that the Lee vehicle was part of a funeral procession that was passing through the 20th and Martha Streets intersection where the accident occurred, and that the Lee vehicle was positioned midway in the procession.

Herman assigns three errors. First, she claims the trial court erred in refusing opinion testimony of an investigating officer relative to the speed of her vehicle; second, the trial court erred in admitting in evidence the Omaha municipal code relating to funeral processions; and third, the trial court erred in embodying the ordinance into a jury instruction.

The crucial question presented on this appeal is whether the city ordinance is in conflict with the general laws of this state, and therefore we will discuss it first.

Appellant contends that the Omaha municipal code, § 35.12.030, is in conflict with Neb. Rev. Stat. §§ 39-609 and 39-614 (Reissue 1978).

The appellee, on the other hand, contends that the ordinance and the statutes do not conflict. The appellee

further contends that even if the ordinance and the statutes are conflicting, the city of Omaha was expressly authorized to enact the ordinance under Neb. Rev. Stat. § 39-697 (Reissue 1978).

The state has inherent power to establish, maintain, and control the highways of the state, including those within corporate limits of municipalities. While the Legislature may properly delegate certain powers over streets, alleys, and highways to a municipality, it retains the power to legislate with reference thereto, even in home rule cities, such as Omaha, when a matter of statewide policy and concern is involved. *Omaha Parking Authority v. City of Omaha*, 163 Neb. 97, 77 N.W.2d 862 (1956).

It has been said before that the city streets are part of the highway system of the state. The concentration of traffic in metropolitan cities is a matter of general rather than strictly local concern. The state is primarily concerned when through traffic passing through a municipality becomes congested. When a traffic problem occurs which is of statewide concern, the state Legislature is the body which has authority to alleviate the problem. The choosing of the means and the methods of accomplishing such purpose is a legislative function. Its justification stems directly from the exercise of the police power. The primary object of the Nebraska Rules of the Road, as set out in Chapter 39 of the Nebraska Revised Statutes, is to facilitate and make safe the use of the highways. Any power a municipality derives over its streets is strictly statutory and is not exclusive. The power of a municipality over its streets is subject to the superior control of the state except where the Constitution prevents its doing so.

Although a home rule charter must be consistent with and subject to the Constitution and laws of this state, it has been held that a provision of a home rule charter takes precedence over a conflicting state statute in instances of local municipal concern, but when the Legislature enacts a law affecting municipal affairs

which are of statewide concern, the state law takes precedence over any municipal action taken under the home rule charter. See *Omaha Parking Authority v. City of Omaha, supra.*

This view is consistent with *Arrow Club, Inc. v. Nebraska Liquor Control Commission*, 177 Neb. 686, 693-94, 131 N.W.2d 134, 139 (1964), wherein this court said: "Where there is a direct conflict between a city ordinance and a state statute, the statute is the superior law. . . . A city ordinance is inconsistent with a statute if it is contradictory in a sense that the two legislative provisions cannot coexist. . . . Generally, an ordinance cannot prohibit what the Legislature has expressly licensed, authorized, or permitted."

We believe the Omaha city ordinance and the statutes cited by the appellant are not contradictory and can coexist. Section 35.12.030 of the ordinance provides: "It shall be unlawful for the driver of any vehicle to drive between vehicles comprising a funeral or other authorized procession, while they are in motion, and when such vehicles are conspicuously designated. Funerals shall be designated by the use of funeral flags or lighted headlamps. This provision shall not apply at intersections where traffic is controlled by a police officer."

Section 39-609(1) provides: "The driver of any vehicle shall obey the instructions of any traffic-control device applicable thereto placed in accordance with the provisions of sections 39-601 to 39-6,122, unless otherwise directed by a law enforcement officer, subject to the exceptions granted the driver of an authorized emergency vehicle in sections 39-601 to 39-6,122."

The other statute claimed to be inconsistent with the city ordinance is § 39-614(1)(a), which provides: "Vehicular traffic facing a circular green signal may proceed straight through or turn right or left unless a sign at such place prohibits either such turn, but vehicular traffic, including vehicles turning right or left, shall yield the right-of-way to other vehicles and

to pedestrians lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited . . . ." Appellant contends that the city ordinance cannot modify the right-of-way provided by these two statutes.

The Legislature has stated in Neb. Rev. Stat. § 39-603(3) (Reissue 1978): "The provisions of sections 39-601 to 39-6,122 shall be applicable and uniform throughout this state and in all political subdivisions and municipalities of this state and no local authority shall enact or enforce any ordinance directly contrary to the provisions of sections 39-601 to 39-6,122 unless expressly authorized by the Legislature."

The appellee contends that the Legislature, in § 39-697(1)(c), expressly authorized the city of Omaha and all municipalities to enact ordinances regarding the regulation of processions and assemblages. Section 39-697(1)(c) provides: "Any local authority with respect to highways under its jurisdiction and within the reasonable exercise of the police power may: . . . Regulate or prohibit processions or assemblages on the highways . . . ."

We are of the opinion that the ordinance regulating funeral processions was a reasonable and valid exercise of the city's police power under § 39-697(1)(c).

The ordinance was enacted for the benefit of the traveling public and is a legitimate traffic measure. Slow-moving funeral processions impede traffic and cause congestion, and it is in the interest of other motorists that their movement through the streets and to their destination be expedited. We think that this is the purpose of the ordinance and that it serves the public welfare and safety.

The ordinance as enacted does not directly conflict with our present right-of-way statutes. It has been held that intersection right-of-way is a qualified, not absolute, right to proceed through an intersection, exercising due care, in a lawful manner in preference to another vehicle. *Reese v. Mayer*, 198 Neb. 499, 253

N.W.2d 317 (1977).

Section 39-614(1)(a) already provides that traffic facing a green light may proceed unless there is another vehicle lawfully within the intersection. We believe that if the appellee's car was, in fact, part of a funeral procession and was in its proper place, it had the right to enter the intersection lawfully on the red light by virtue of the ordinance. The intersection was initially controlled by the funeral escort car and was thereafter controlled by each vehicle in the funeral procession. As long as the funeral procession was not broken, under our present right-of-way statutes no vehicle facing a green signal would have the right-of-way to proceed through the intersection. The green light facing the appellant did not authorize her to enter the intersection and drive through the funeral procession if she knew or should have known that a funeral procession was passing through the intersection. The evidence indicates that one exercising due care in keeping a careful lookout should have known that a funeral procession was passing through the 20th and Martha Streets intersection.

We are not holding that the ordinance gives a vehicle in a funeral procession an absolute right to proceed through a red light. The driver of a vehicle in a funeral procession, just as any other vehicle, has a duty to exercise ordinary care for the safety of other persons and those persons in his or her own car. When a driver has a preferred right-of-way, such as an emergency vehicle or a vehicle in a funeral procession, he or she must be especially alert and cautious if he or she intends to run a red traffic signal and must take such care commensurate with the serious consequences that may follow. If a party becomes detached from a funeral procession or lags too far behind, the preferred right-of-way granted by the ordinance is lost and the party must stop for the red traffic signal. If another vehicle slips between cars in a funeral procession and is already in the intersection, subsequent vehicles in the

procession must yield the right-of-way to the car already in the intersection. *Reese, supra.*

The ordinance does not conflict with the statutes and the giving of an instruction based thereon was not error.

Appellant also claims that the trial court erred in refusing opinion testimony of an investigating officer relative to the speed of the appellant's vehicle. The officer's opinion on the speed of the Herman vehicle was based on his investigation, training, experience, road conditions, and damage to the Herman vehicle. His training and experience encompass both classroom and practical application. Officer Dennis Moran served as an accident investigator for the Omaha Police Department for 3 years. The objection made by the appellee's counsel was based on no proper and sufficient foundation in that the opinion invaded the province of the court and the jury. An offer of proof was made indicating that if the officer had been permitted to testify, his opinion of the speed of the Herman vehicle would have been approximately 20 to 25 miles per hour. The latter ground of the objection was probably added by defense counsel from force of habit since Rule 704 of the Rules of Evidence, Neb. Rev. Stat. § 27-704 (Reissue 1979), specifically provides that an opinion is not objectionable because it embraces an ultimate issue for the trier of fact. Therefore, the ruling excluding the opinion must have necessarily been on foundational grounds.

Neb. Rev. Stat. § 27-702 (Reissue 1979) provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Since the adoption of the Rules of Evidence, opinions as to vehicular rates of speed have been elicited in two other cases before us. In *Nickal v. Phinney,* 207 Neb.

281, 298 N.W.2d 360 (1980), a licensed professional engineer with a degree in mechanical engineering and experience in accident reconstruction was permitted to testify as to the speed of plaintiff's motorcycle. His personal knowledge of underlying data included measurements, skid marks, degree of rotation of defendant's pickup, weight of vehicles, road surface conditions, coefficient of friction between the tires and the pavement, change of grade, and other facts. In *Belitz v. Suhr*, 208 Neb. 280, 303 N.W.2d 284 (1981), we held it was error to allow an investigating officer that arrived on the scene an hour after an accident to testify as a lay witness that plaintiff's speed exceeded what was safe for road conditions. The rule to be gleaned from these two cases is that an opinion of vehicular speed is proper, provided a sufficient foundation is laid to show the expertise of the witness, as well as specific knowledge of the underlying facts to deal with the question in issue.

No exact standard is possible for fixing the qualifications of an expert or skilled witness, and the ruling of a trial judge receiving or excluding an opinion will be reversed on appeal only when a clear abuse of discretion is shown. *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 275 N.W.2d 77 (1979); *Danielsen v. Richards Mfg. Co., Inc.*, 206 Neb. 676, 294 N.W.2d 858 (1980); *State v. Loveless*, 209 Neb. 583, 308 N.W.2d 842 (1981).

No abuse of discretion has been demonstrated. The exclusion of the opinion evidence was not error.

The judgment of the trial court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

CLINTON, J., dissenting.

I dissent. The majority opinion, in the paragraph beginning with the words "Section 39-614(1)(a) already provides," reconciles the statute pertaining

to traffic lights and the right-of-way given thereby and the right-of-way arising from the Omaha ordinance by reason of the Lee car being part of a funeral procession. That paragraph now tells a trial judge the type of instruction which is appropriate in such cases.

However, no such reconciling instruction was given in this case and the appellant's complaint with reference to the instruction given is not dealt with in the opinion at all.

In effect the instructions told the jury that the green light which Herman had would give her the right-of-way. Other instructions and the one of which Herman complains told the jury the Lee car could have the right-of-way by reason of the ordinance. It did not tell the jury how to apply these conflicting instructions.

We summarize by quoting, with the modifications indicated, the last paragraph of the appellant's brief: "If the ordinance can be harmonized in some other way with the state statute, that harmony was not embodied in the trial court's instructions. The trial court in instruction three charged on the ordinance. In instruction 11 it defined right of way. In instruction 12 it charged that the car with the green light had the right of way. Thus, under the court's instructions, both cars had the right of way. The car in the funeral procession under the ordinance and the car with the green light under the statute. The court charged that drivers had the right to assume that others would obey the law until they had notice to the contrary. Thus under the court's instructions, each car either had the right to proceed into the intersection until it knew the other car was proceeding, or each car had to wait until the other car had proceeded. Thus, the court instructed the jury that the law either created a situation in which an accident was inevitable, or required each car to wait until the other had [proceeded] . . . . If the trial court believed that the ordinance and the statute could be harmonized, the

method of reconciliation should have been included in the instruction. It was not."

I believe the judgment should be reversed and the cause remanded for new trial with proper instructions.

COUNTY OF DOUGLAS, NEBRASKA, APPELLEE, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, A CORPORATION, APPELLANT.

316 N.W.2d 62

Filed February 12, 1982. No. 43670.

1. **Statutes.** A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. 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.
2. **Political Subdivisions: Claims.** When governmental officials, with full knowledge of all the facts pertaining to a claim, allow and pay it, the action is at least presumptively correct and is frequently termed conclusive.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and dismissed.

David R. Buntain of Cline, Williams, Wright, Johnson & Oldfather for appellant.

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

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

MCCOWN, J.

This is an action by Douglas County to recover money allegedly erroneously paid to the Board of Regents of the University of Nebraska for patient care rendered

at the Nebraska Psychiatric Institute to indigent mentally ill patients who were residents of Douglas County. The District Court entered judgment against the Board of Regents for $100,199.93, together with interest from the date of payment. The Board of Regents has appealed.

The facts in this case are stipulated. The Nebraska Psychiatric Institute (NPI) was created in 1952 as a state hospital for the mentally ill and was under the control of the Department of Public Institutions (DPI), which delegated control of the teaching function at NPI to the Board of Regents of the University of Nebraska. NPI provides care to residents of several counties and approximately 85 percent of its patients are residents of Douglas County.

Prior to July 1, 1969, the cost of patient care at NPI was borne by the patient himself and, in the event he could not pay, by the State of Nebraska through its general appropriations to the DPI. On July 1, 1969, the DPI and the state became entitled to reimbursement for a portion of the unpaid costs of such care from the county in which the patient resided and from patients' relatives by reason of 1969 Neb. Laws, Ch. 812, § 14, p. 3055 (except for minor changes not relevant here, now Neb. Rev. Stat. § 83-376 (Reissue 1976)). That statute provides: "When the full cost determined to be necessary for the care, support, maintenance, and treatment of any patient is not paid by the patient or his relatives within thirty days of receipt of such care, (1) the county in which the patient resides shall pay (a) the first fifteen dollars per day of the unpaid cost for each of the first thirty days at the Hastings Regional Center, the Lincoln Regional Center, the Norfolk Regional Center, or the Nebraska Psychiatric Institute, (b) the first ten dollars per day of the unpaid cost for each of the first thirty days at the Beatrice State Developmental Center, and (c) the first three dollars per day of the unpaid costs for each day after the first thirty days at any such institution, (2) the balance of the un-

paid cost shall be borne by the state, and (3) the county in which the patient resides shall be credited by the Director of Public Institutions for amounts collected from such patient or his relative in excess of the portion of such costs borne by the state."

From July 1, 1969, through June 30, 1975, the DPI periodically submitted itemized billings to Douglas County for its portion of the unpaid costs of patient care as defined in § 83-376, and these billings were routinely paid by Douglas County.

On July 1, 1975, general control of the Nebraska Psychiatric Institute was transferred from the Department of Public Institutions to the Board of Regents of the University of Nebraska under the provisions of 1975 Neb. Laws, L.B. 466. Section 3 of that act is now Neb. Rev. Stat. § 83-305.01 (Reissue 1976), which provides: "Control of all functions of the Nebraska Psychiatric Institute is hereby transferred from the Department of Public Institutions to the Board of Regents of the University of Nebraska. The titular head of the Nebraska Psychiatric Institute shall be known as the director and he shall have the same powers, authority, and duties as prescribed for the superintendents of the other state hospitals described in section 83-305 and, for the purpose of carrying out the functions of the titular head of the Nebraska Psychiatric Institute, director and superintendent shall mean one and the same person. The director shall be under the jurisdiction of the Chancellor of the Medical Center, shall report to the Board of Regents through the President of the University, and shall be responsible for the administration and the preparation of its budget."

NPI continued to admit patients from Douglas and other counties as before, and to look to the county to reimburse the Board of Regents for a portion of the costs of treating indigent residents of the county. Administrators of the university were uncertain about the effect of 1975 Neb. Laws, L.B. 466, on NPI's right to collect reimbursement from the counties under § 83-376.

Based upon its budgets for previous years, NPI's budget for the 1975-76 fiscal year was set up so that 71 percent of the budget of NPI was supported by the State of Nebraska and 29 percent of the support came from revenues generated from services to patients. After July 1, 1975, NPI therefore billed the counties 29 percent of its full charges per patient, after adjustments were made for third-party coverage and the patient's own ability to pay.

In December 1975 NPI's hospital administrator wrote to the director of public welfare and the clerk of the District Court of Douglas County explaining NPI's revised billing procedure and enclosing billings from July 1, 1975, through September 30, 1975. On March 4, 1976, NPI sent billings to the chief deputy county clerk of Douglas County enclosing copies of NPI's billings for services rendered to residents of Douglas County for the months of July through December 1975. The aggregate amount of the billings was $100,199.93.

On June 1, 1976, Douglas County issued a warrant to NPI for $100,199.93 in satisfaction of the billings. The warrant was paid and credited to the account of NPI on June 16, 1976.

On September 22, 1977, Douglas County made demand upon the Board of Regents for a refund of the $100,199.93. The demand was denied.

NPI has continued to render patient care to indigent residents of Douglas County and has continued to submit billings based upon the same formula used in compiling the 1975 billings. Subsequent billings have been denied by Douglas County and an action is presently pending in the District Court for Lancaster County by the Board of Regents against Douglas County for billings during the period of January 1, 1976, through February 28, 1978.

On July 9, 1980, following trial and the submission of briefs in the present case, the District Court found in favor of Douglas County and entered judgment against the Board of Regents in the sum of $100,199.93,

plus interest from June 16, 1976. This appeal followed.

Douglas County takes the position that although § 83-376 specifically requires the county of a patient's residence to pay specified portions of the costs of patient care in certain designated institutions, the inclusion of the Nebraska Psychiatric Institute in that statute was impliedly repealed on July 1, 1975. The argument is that the transfer of control of the Nebraska Psychiatric Institute from the Department of Public Institutions and the deletion of NPI from the list of state institutions and state hospitals under the control of the Department of Public Institutions impliedly repealed the specific designation of the Nebraska Psychiatric Institute in § 83-376. In essence, the argument is that the Legislature simply forgot to amend § 83-376 but really intended to remove any county liability for patients treated at the Nebraska Psychiatric Institute.

Section 83-376 is clear and unambiguous. It mandates payment by the counties of a specified portion of the cost of care given indigent patients at the Nebraska Psychiatric Institute and other named institutions. The section is essentially complete in itself and it does not directly conflict with any other section of the act. This court has consistently held that where the words of a statute are clear and unambiguous, the statute is not open to construction.

In *Bachus v. Swanson*, 179 Neb. 1, 3-4, 136 N.W.2d 189, 192 (1965), we said: "The position seems to be that any statute passed by the Legislature should be open to construction as a matter of course, and that we should not only judicially construe it, but judicially rewrite it. A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not

warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute." See, also, *City of Scottsbluff v. Tiemann*, 185 Neb. 256, 175 N.W.2d 74 (1970).

The basic foundation for the argument of the county assumes that the Legislature did not intend to impose a portion of indigent patient costs in mental hospitals upon counties except where treatment was in state hospitals or public institutions under the control of the Department of Public Institutions. That assumption is unfounded. Other portions of the relevant statutory provisions effectively demonstrate a contrary intent.

Neb. Rev. Stat. § 83-306(3) (Reissue 1976) provides that the mental health board may commit mentally ill dangerous persons to the Douglas County Hospital or *"other public or private"* hospitals with acute psychiatric care facilities under specified conditions. The section then provides: "The county and state shall contribute toward the payment of the costs of such commitment, as defined in section 83-376, in an amount which would have been paid if such mentally ill dangerous person had become a patient and received care and treatment at a state hospital described in section 83-305; *Provided*, that the state's cost of care for such mentally ill dangerous person shall not exceed the individual cost as defined in section 83-365." The explicit language of this statute clearly demonstrates an intent to extend the liability of counties for treatment of mentally ill patients in many more institutions than those specified in § 83-376.

Under the facts and circumstances of the present case, Douglas County was liable for the treatment of indigent mentally ill patients at the Nebraska Psychiatric Institute from July 1 to December 31, 1975, in accordance with the terms of § 83-376. The NPI billed Douglas County for such services in the sum of $100,199.93 and that amount was voluntarily paid by Douglas County. The record establishes that the amount

of the bill was not computed in accordance with the specific provisions of the statute. The record does not establish what the charges would have been if computed in accordance with the statutory requirements, nor does it show whether the amount paid was more or less than the amount due under § 83-376.

Douglas County made no claim that costs were not accurately or reasonably determined, nor that the share of costs allocated to the counties was excessive, but brought this action for reimbursement on the theory that the entire amount paid was an overpayment because there was no legal liability. In view of our holding that § 83-376 applied to the charges made and paid, it is apparent that the county's right to recover rests on proving that the amount paid was in excess of the amount actually due. By voluntarily paying the bill submitted by NPI, Douglas County at least raised a presumption that the bill was valid and the amount correct. The authorities generally agree that when governmental officials, with full knowledge of all the facts pertaining to a claim, allow and pay it, the action is held to be at least presumptively correct and is frequently termed conclusive. See 17 McQuillin, Municipal Corporations § 48.11 (3d ed. 1968).

Courts have generally held that parties suing to recover an alleged overpayment on a contract have the burden of proving the amount of the overpayment. See *Hersch Buildings, Inc. v. Steinbrecher*, 198 Neb. 486, 253 N.W.2d 310 (1977). Under the circumstances of this case Douglas County had the burden of proving an overpayment and the amount of reimbursement to which it was entitled because of the alleged overpayment. This it did not do.

The judgment of the District Court is reversed and plaintiff's cause of action is dismissed.

REVERSED AND DISMISSED.

WHITE, J., participating on briefs.

BRODKEY, J., concurs in the result.

IN RE APPLICATION OF THE MICKOW CORP.
THE MICKOW CORP., APPELLANT, V. PIERCE TELEPHONE COMPANY, INC., APPELLEE.

316 N.W.2d 66

Filed February 19, 1982. No. 43657.

Public Service Commission: Judgments. An order of the Public Service Commission will be affirmed if it acted within the scope of its authority, if its order is reasonable and not arbitrary, and if there is evidence to support its findings.

Appeal from the Public Service Commission. Affirmed.

Lavern R. Holdeman and Peterson, Bowman & Johanns for appellant.

Paul M. Schudel and Woods, Aitken, Smith, Greer, Overcash & Spangler 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 Nebraska Public Service Commission (hereinafter Commission) denying the application of The Mickow Corp., made under the provisions of Neb. Rev. Stat. §§ 75-612 and 75-613 (Reissue 1976), to receive telephone service from the Norfolk exchange of the Northwestern Bell Telephone Company, rather than from the Hoskins exchange of the Pierce Telephone Company.

The above-mentioned statutes provide that any entity desiring to receive telephone service in a service area adjacent to the one in which the entity resides or operates may file an application with the Commission requesting such service. The Commission may grant the application if the evidence establishes all of the following: "(1) That such applicant or applicants are not receiving, and will not within a reasonable time receive, reasonably adequate exchange telephone service from

the company furnishing such service in the exchange service area in which the applicant or applicants reside or operate;

"(2) The revision of the exchange service area or areas required to grant the application will not create a duplication of facilities, is economically sound and will not impair the capability of the telephone company or companies affected to serve the remaining subscribers in any affected exchanges;

"(3) The community of interest in the general territory is such that the public offering of each telephone company in its own exchange service area involved should include all the territory in its service area as revised by the commission's order; and

"(4) The applicant or applicants are willing and will be required to pay such construction and other costs and rates as are fair and equitable and will reimburse the affected company for any necessary loss of investment in existing property as determined by the Public Service Commission." § 75-613.

After a hearing at which the applicant and Pierce presented evidence, the Commission found that the evidence failed to satisfy the requirements of § 75-613(2) and denied the application. We affirm.

The standard by which this court reviews orders of the Commission is: "An order of the Public Service Commission will be affirmed if it acted within the scope of its authority, if its order is reasonable and not arbitrary, and if there is evidence to support its findings." *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 249 N.W.2d 468 (1977) (syllabus of the court).

The Commission, in its order, made specific factual findings as follows: "13. Pierce clearly has in place facilities to serve the Applicant from the Hoskins exchange, and if this application were granted, such facilities would be rendered useless. However, this Commission believes that the significant provision of §75-613(2) is whether the requested boundary revision 'is economically sound and will not impair the capabili-

ty of the telephone company . . . affected to serve the remaining subscribers in any affected exchanges.'

"14. Evidence accepted at the hearing supports a finding that eight of Pierce's Hoskins exchange subscribers have expressed an interest in receiving service from Northwestern Bell's Norfolk exchange. This would indicate possible future erosion of subscriber base in an area of the Hoskins exchange which the exchange map show[s] to have an above average subscriber concentration.

"15. Financial data contained in Exhibit 28 shows that Pierce realized an 8.45% return on equity from telephone operations in 1979. This, according to Mr. Robert Eddy's testimony is substantially below the 12-17% return on equity currently considered to be acceptable in the telephone industry.

"16. The evidence indicates average monthly toll and local billings of $24.92 per customer for Pierce, while Applicant's local service billing alone from Pierce is $48.06 per month and total average monthly billings for Applicant approximate $940.00.

"17. Based on the number of subscribers at Hoskins at the end of 1979 (327) and the total subscribers of the company (1564), the revenue received from the applicant represents 10% of Hoskins revenue and 2% of total revenue. While the applicant was a customer of Pierce for only the last month of 1979, revenue derived from the applicant is a significant portion of Pierce's total revenue and loss of that revenue would have a significant impact on the company.

"18. The evidence of other subscriber interest in transfer and interests in Norfolk exchange service similar to Applicant indicate a possibility of gradual erosion of subscriber base."

A review of the record indicates that it contains evidence to support the above factual findings and the conclusion of the Commission. The order of the Commission must, therefore, be affirmed.

AFFIRMED.

IN RE FREEHOLDERS PETITION.
NEIL W. SCHILKE AND BONNIE SCHILKE, APPELLEES, V. WALTER WALKENHORST ET AL., APPELLANTS.

316 N.W.2d 294

Filed February 19, 1982. No. 43720.

1. **Schools and School Districts: Words and Phrases.** While the term adjoin, as used in Neb. Rev. Stat. § 79-403 (Reissue 1976), ordinarily means touching or having a common boundary, it may also include a situation where the boundaries, although not touching, are separated only by a streambed which is not part of any school district.
2. **Summary Judgments.** Where one party moves for a partial summary judgment on certain issues only, the other party should not be expected at the hearing on the motion for summary judgment to present evidence on issues as to which the motion does not apply.

Appeal from the District Court for Saunders County: BRYCE BARTU, Judge. Affirmed in part, reversed in part, and remanded for further proceedings.

James B. Gessford of Perry, Perry, Witthoff & Guthery for appellants.

Sidner, Svoboda, Schilke, Wiseman & Thomsen for appellees.

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

CLINTON, J.

The petitioners-appellees Schilke, by appropriate petition, requested under the provisions of Neb. Rev. Stat. § 79-403(1) (Reissue 1976) the transfer to school district No. 1 of Dodge County from school district No. 107 of Saunders County certain real estate owned by the petitioners. District No. 107 is a Class II school district. District No. 1 is a Class III school district. The freeholders board did not act on the request. Schilke then, under the provisions of the statute, appealed to the District Court for Saunders County which, after hearing on motions for summary judgment made by both parties, rendered a summary judgment granting the

transfer. The appellants are taxpayers and electors of district No. 107 who objected to the transfer.

The appellants make and argue the following assignments of error: (1) The court erred in granting the Schilke motion for summary judgment because there existed a disputed issue of material fact as to whether the transfer would serve the best educative interests of the Schilkes' daughter. (2) The Schilke motion for summary judgment asked only for a partial summary judgment and acknowledged that there was a material issue of fact as to whether the transfer would serve the best educative interests of their child, and, accordingly, full summary judgment should not have been entered. (3) The court erred in granting the summary judgment because the records show that district Nos. 1 and 107 do not adjoin and the requirements of § 79-403 have not been satisfied in that respect.

We reverse in part and remand to the District Court for further proceedings in accord with this opinion.

Accompanying the Schilke petition to the freeholders board and offered in support of the motion for summary judgment was the affidavit of Schilke which, in addition to other necessary factual allegations, stated: "9. Petitioners have paid tuition for the attendance of their daughter Lisa at school district 1, Dodge County, Nebraska for two consecutive years.

. . . .

"13. This application for transfer is made for the following reasons and each of them:

"a. It is for the best interest of the daughter of petitioners that she continue to attend school in Fremont, School District 1. The petitioner's daughter has continuously attended schools in School District 1, Fremont, from kindergarten to present.

"b. Petitioners' daughter has been enrolled in a Talented and Gifted Program in the Fremont school district. She was enrolled in this program when the program was first commenced and while in grade school. The program was established on a long term

projected basis and intended to continue throughout the child's school years. School District 107 does not have a comparable program and attendance in school there would disrupt the planned education program to this extent to the adverse interest of petitioner's daughter.

"c. Petitioners' daughter has a genuine interest and some ability in tennis. She has played tournament tennis for several years and has looked forward to playing interscholastic tennis in high school. Fremont, School District No. 1, has an interscholastic tennis program for girls. School District No. 107 has no such program. Fremont, School District No. 1, has a coaching staff and facilities for tennis and school district No. 107 does not have such coaching staff or facilities for tennis.

"d. All of petitioners' contacts are with Fremont. Petitioner Neil W. Schilke is legal counsel for the Fremont school district No. 1. Petitioner Bonnie Schilke previously taught in Fremont, School District No. 1. The social friends and acquaintances of petitioners and relatives of petitioners live within Fremont school district No. 1 and their children attend Fremont school district No. 1. As a result, petitioners' daughter attends school with many friends with whom she engages in non-school activities which tends to further her interest in school and its activities. This situation would not exist in school district No. 107.

"e. It is not necessary for petitioners' daughter to ride a school bus to attend school in Fremont School District 1, for the reason that petitioner Neil W. Schilke drives to his office every morning of the week at 7:30 a.m. which coincides with the schedule for his daughter so that she rides with him to school. This results in petitioners' daughter not being required to ride a bus and having additional time for conversation with petitioner on the trip to school.

"f. Petitioners' daughter is also involved in catechetical classes which require continued Wednesday

evening attendance at Salem Lutheran Church in Fremont, Nebraska. If petitioners' daughter attended school at District 107 it would be difficult for petitioners' daughter to return home from school and then go into Fremont for Catechetical classes.

"g. Petitioners' daughter participates in an organization known as 'all American kids'. This is a singing group which entertains for various organizations, principally in Fremont. This organization practices each Monday night after school. If petitioners' daughter were required to attend school in District 107 it would be impossible for her to be a member of this organization and it is the belief of petitioners that membership in this organization does contribute to her best interest."

The Schilke motion for summary judgment recited: "There is no genuine issue of material fact herein and Appellants are entitled to judgment as a matter of law herein on all issues except as to one, and as to this issue Appellants do not make this motion for summary judgment. The portion of the case as to which there is a genuine issue of material fact is as to whether the best educative interests of Appellants' daughter is for her to attend school in School District No. 1, Dodge County, Nebraska, or in School District No. 107, Saunders County, Nebraska."

The appellants, in support of their motion for summary judgment, offered and there was received affidavits which show that the southern boundary of school district No. 1 is along the north bank of the Platte River; that the northern boundary of school district No. 107 is along the south boundary of the Platte River opposite the south boundary of school district No. 1. The affidavits indicate the property which is within the banks of the Platte River is not assessed or taxed, and it does not lie within the boundaries of any school district. No affidavit or other evidence was offered by the appellants contradicting the quoted allegations of the Schilke affidavit on the issue of best educative

interests. Neither did they offer any evidence of facts from which it might be concluded that the best educative interests of the Schilke daughter can be met by her attendance at the school in district No. 107.

We will first discuss the boundary question. The appellants argue that the statutory provision which requires that the districts adjoin means that the boundaries must touch, and since the uncontradicted evidence indicates that the boundaries are separated by a river, the petitioners' property is not eligible for transfer. The Schilke property is located in district No. 107 on the south bank of the Platte River.

The primary meaning of the word adjoin is to touch or have a common boundary. See the words adjoin and adjoining, Webster's Third New International Dictionary, Unabridged (1968). A synonym for adjoin is adjacent. The secondary meaning of both adjoin and its synonym is "to be close" and "near in space." *Id.* An example of the use of the words in their secondary meaning would be: "Adjoining or adjacent islands." Under the word adjacent we find the secondary meaning explained as "relatively near and having nothing of the same kind intervening." *Id.*

Nothing in the record shows the ownership of the portion of the Platte River which lies between the two districts. It is possible, of course, that title to the riverbed has not followed the ownership of the riparian property. Meander lines of a river as established by original government survey are not boundary lines unless made so by the instrument of conveyance. Instead, the waters themselves constitute the real boundary. *Summerville v. Scotts Bluff County,* 182 Neb. 311, 154 N.W.2d 517 (1967).

This factual situation is no doubt uncommon, as the Legislature, pursuant to its constitutional mandate to provide free education in the common schools for all between the ages of 5 and 21 years, has enacted legislation which contemplates that all property shall be included in some organized school district. Neb. Rev.

Stat. § 79-402.10 (Reissue 1976); Neb. Const. art. VII, § 1.

We hold that while the term adjoin, as used in § 79-403, ordinarily means touching or having a common boundary, it may also include a situation where the boundaries, although not touching, are separated only by a streambed which is not part of any school district. *Bullock v. Cooley*, 225 N.Y. 566, 122 N.E. 630 (1919). Under the facts of this particular case, district Nos. 107 and 1 do adjoin within the meaning of § 79-403.

With reference to the issue of whether a summary judgment may be granted to the nonmoving party, appellants rely upon the provisions of our statute, Neb. Rev. Stat. § 25-1332 (Reissue 1979), and upon the principle that a motion for summary judgment may not be granted where there exists a material issue of disputed fact. *Hiram Scott College v. Insurance Co. of North America*, 187 Neb. 290, 188 N.W.2d 688 (1971); § 25-1332.

Schilke counters by pointing out, as we have previously mentioned, that the appellants have not filed counteraffidavits or presented other evidence disputing the allegations of paragraph 13 of the Schilke affidavit. Citing 6 Moore's Federal Practice ¶ 56.12 (1981), Schilke further urges that where one party has moved for summary judgment and is not entitled thereto, the court may grant summary judgment to the nonmoving party if he is so entitled.

Under federal rule 56, which is virtually if not exactly identical to our statute, the prevailing view is that summary judgment may be granted to the nonmoving party. The state courts appear to be split on the issue. However, even the federal cases do not depart from the requirement that there be no disputed question of fact and that the nonmoving party may be entitled to judgment as a matter of law. *Morrissey v. Curran*, 423 F.2d 393 (2d Cir. 1970).

We need not, for the reasons which follow, decide

in this case whether a summary judgment should be granted to the nonmoving party. Although the contents of the Schilke affidavit pertaining to best educative interest would appear to satisfy the factual requirements on that point (see *Klecan v. Schmal*, 196 Neb. 100, 241 N.W.2d 529 (1976)) and the appellants have offered no counteraffidavits or other proper evidence on the issue, the Schilke motion expressly states it does not move for summary judgment on that issue and acknowledges there is a question of material fact. There is in the record no other evidence with reference to the matter. Under these circumstances the appellants could not reasonably be expected at the hearing on the motion for summary judgment to meet that issue.

We find the interests of justice will be served by permitting the Schilkes to modify their motion to ask for full summary judgment and the appellants be given the opportunity to counter the factual allegations of paragraph 13 of the Schilke affidavit by appropriate counteraffidavit or other evidence in proper form. An affidavit opposing the rendition of a summary judgment, to be effective, must be made on personal knowledge, must set forth such facts as would be admissible in evidence in detail and with precision, and must show affirmatively that the affiant is competent to testify to the matters stated therein. *Eden v. Klaas*, 165 Neb. 323, 85 N.W.2d 643 (1957).

We affirm the judgment of the District Court insofar as it grants partial summary judgment on all issues except that of best educative interest and remand for further proceedings on the excepted issue.

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

WILLIAM W. GRIFFIN, APPELLEE, V. LEWIS L. VANDERSNICK, APPELLANT.

316 N.W.2d 299

Filed February 19, 1982. No. 43721.

1. **Attorney Fees.** As a general rule, an award of attorney fees made in favor of a litigant belongs to the litigant and not to the attorney who performed the service.
2. **Judgments: Collateral Attack.** A judgment entered without jurisdiction of the subject matter or in excess of the court's power is void and may be collaterally attacked.
3. **Divorce: Attorney Fees.** There is no authority for a court in a dissolution action to fix the amount of attorney fees which the parties are to pay their respective attorneys.

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

James Widtfeldt for appellant.

William W. Griffin, pro se.

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

HASTINGS, J.

The defendant, Lewis L. Vandersnick, has appealed from an order of the District Court which sustained plaintiff William W. Griffin's motion for summary judgment and entered judgment in the amount of $6,000. Vandersnick has alleged 16 assignments of error. We consider as germane to this appeal only the one which disputed the absence of any material factual question. We reverse.

This was an action brought by Griffin, an attorney, seeking to recover a fee of $6,000 from his former client, Vandersnick, for services rendered in a marriage dissolution proceeding. The petition alleges that in the dissolution action a written settlement agreement was executed by both Vandersnick and his spouse, and also signed by the lawyers, which, among other things, set forth that the fair and reasonable value of the legal

services rendered by each attorney, including Griffin, to the respective parties was $6,000 each, which should be paid from a marital joint bank account. The petition goes on to allege that the District Court entered a decree which found that $6,000 was a fair and reasonable fee in each instance, and ordered that said fees be paid from the joint bank account, and a further order which found that the fees had not been paid, and directed the parties to do so.

Vandersnick's answer and cross-petition, consisting of 8 pages and 41 paragraphs, was eventually filed. The only real defense which can be gleaned from the pleadings is that Vandersnick, although admitting the signing of the agreement, claims to have done so as a result of undue influence brought to bear upon him by Griffin, and therefore his agreement to pay that amount was not voluntarily made.

At the hearing on Griffin's motion for summary judgment, the complete file in both the dissolution action and this action was introduced in evidence and made a part of the bill of exceptions. The only portions of the dissolution file relevant to Griffin's theory of recovery would be the settlement agreement and the two judicial orders from the dissolution proceeding. The pleadings from the present action were a part of the transcript and duplicate copies were not necessary to be offered in evidence.

Vandersnick, through counsel, attempted to resist the motion for summary judgment by making several offers of proof. These offers involved claims that he had been overreached by his counsel in that at the time of signing the fee agreement he was subjected to unreasoned decisions and that therefore there was no meeting of the minds as to the amount of the fees. Upon objection by Griffin, the District Court sustained the objections on the basis that this was a collateral attack on a judgment in the dissolution action which had become final.

It appears to have been the theory of the trial court

that its decree approving the property settlement and the reasonableness of the fees, and its later order directing that the parties pay such fees, constituted a final judgment in favor of Griffin, not a party to the action; hence the court's ruling that the offer of evidence was an attempt to collaterally attack a final judgment.

Was this a final judgment in favor of Griffin? We believe not. As a general rule, an award of attorney fees made in favor of a litigant belongs to the litigant and not to the attorney who performed the services. *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980).

However, it seems apparent to us that no "award" of fees was made in this case in any event. The trial court merely ordered that court costs, including attorney fees, be paid out of a joint bank account and found that $6,000 was a fair and reasonable attorney fee in each instance. The court did, by subsequent order, direct that the fees be paid. If the District Court had the authority to enter such an order, it was correct in refusing to allow the introduction of evidence to support a collateral attack on that order. However, a judgment entered without jurisdiction of the subject matter or in excess of the court's power is void and may be collaterally attacked. *State v. Simants*, 194 Neb. 783, 236 N.W.2d 794 (1975).

In *O'Neill v. O'Neill*, 164 Neb. 674, 83 N.W.2d 92 (1957), fees were fixed for the attorneys for both parties to be paid out of a savings account which represented an accumulation of the savings of both parties, but which stood in the name of the plaintiff's wife. In reversing that judgment, we considered three points. First, we declared that there was neither statutory nor decisional authority to allow an attorney fee in favor of a husband. Secondly, we said that to direct that the fees be paid out of a fund standing in the wife's name alone "would in actuality be to transfer to the defendant [wife] the obligation imposed by the court upon the plaintiff [husband] pursuant to the provisions of section 42-308, R.R.S. 1943, to pay fees for the attorneys for the

defendant. No provision of statute and no decision has been cited or found permitting this to be done." *Id.* at 678, 83 N.W.2d at 94. Finally, we said: "If it be assumed that it was the intention of the court to fix the fees of the defendant's own attorneys and to render judgment in their favor against her in this action for divorce and to order satisfaction out of her property the action of the court in so doing must be regarded as being without authority of law. . . . No legislation has been enacted by the Legislature of this state granting the power involved in this assumption. In *Nickerson v. Nickerson*, 152 Neb. 799, 42 N.W.2d 861, it was said: 'There is no authority for a court, in a divorce action, to fix the amount of the attorney fees each party is to pay their respective attorneys.'" *Id.* at 678-79, 83 N.W.2d at 94-95.

Since *O'Neill*, the Legislature has enacted the so-called no fault divorce law, which became effective on July 6, 1972. Neb. Rev. Stat. § 42-351 (Reissue 1978) provides in part that "In proceedings under sections 42-347 to 42-379, the court shall have jurisdiction to inquire into such matters . . . and render such judgments and make such orders . . . as are appropriate concerning . . . the settlement of the property rights of the parties, and the *award* of costs and attorneys' fees." (Emphasis supplied.) We believe that such legislation removed the prohibition against awarding fees in favor of the husband and against the wife, but we cannot read into that same legislation authority for a court to fix the amount of attorney fees which the parties are to pay their respective attorneys.

Accordingly, we believe that the court's orders, insofar as they purported to "award" an attorney fee in favor of Griffin and against Vandersnick, were without authority and were subject to collateral attack. Therefore, the court's rulings on Vandersnick's offers of proof were erroneous.

Although the settlement agreement constituted competent evidence that a fee agreement had been

reached, Vandersnick's claim that such agreement was not voluntary on his part left open a material question of fact. Summary judgment should not have been granted.

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

REVERSED AND REMANDED.

STATE OF NEBRASKA EX REL.
CHARLES E. SCHULER, APPELLANT, V.
BOARD OF COUNTY COMMISSIONERS
OF LOUP COUNTY, NEBRASKA, ET AL., APPELLEES.

316 N.W.2d 302

Filed February 19, 1982. Nos. 43734, 43735.

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

George Rhodes for appellant.

Joseph M. Casson for appellees.

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

WHITE, J.

Relator, a resident and taxpayer of Loup County, Nebraska, brought an action in the District Court for Loup County under the authority of Neb. Rev. Stat. §§ 23-336 and 23-337 (Reissue 1977) to recover from the respondents, the three elected commissioners of Loup County, certain amounts of money spent for gravel for road purposes for the 1979-80 budget year. The trial court found that the respondents had not violated the competitive bid statutes by splitting purchases into amounts less than the amount for which competitive bids are required, and dismissed the relator's petition. Relator appeals. We affirm.

The evidence indicates that Loup County has no road overseer. Instead, the responsibility for the maintenance of the roads is assumed by each of the three commissioners in his own district. Each commissioner, on being informed by the road maintenance operator or by a member of the public, orders from a gravel supplier nearest the road for which the gravel is needed. In no case did an individual order exceed $5,000, although the total county expenditure exceeded $15,000 in each of the budget years. Claims for the orders were often combined and submitted together and audited and paid together.

Neb. Rev. Stat. § 39-1406 (Reissue 1978) provides in part: "Before the county board of any county shall make any contract to purchase any materials or supplies for county road purposes, the cost of which shall exceed the sum of five thousand dollars, except in cases of an emergency nature, such boards shall advertise for bids and award such contract at a public letting."

It is the respondents' contention that the purchases of gravel are not governed by the preceding section but by the $10,000 limitation in Neb. Rev. Stat. § 39-810 (Reissue 1978).

In the view we take of the case, it is not necessary to decide that question.

The determination by the trial court that the individual orders for gravel constituted separate contracts not exceeding the statutory limit is supported by the evidence and, as such, is binding on us in this law action. See *Capital Bridge Co. v. County of Saunders*, 164 Neb. 304, 83 N.W.2d 18 (1957).

Relator's suggestion that the procedure followed by the commissioners violated the spirit of the bid law, if not its letter, is better addressed to the Legislature rather than the courts, as are his allegations that the commissioners exercised preferences in the purchase of county supplies.

AFFIRMED.

SALLY HANSEN, APPELLANT, V. GERALD MAGNUS HANSEN, APPELLEE.

316 N.W.2d 68

Filed February 19, 1982. No. 43758.

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

Wilbur C. Smith of Smith & Hansen for appellant.

John F. Irwin of Galvin & Irwin for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and BROWER and EMPSON, District Judges.

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record de novo as it is required to do, finds that the decree of the trial court should be affirmed except that appellant should not be required to pay interest on the appellee's equity in the family home prior to the sale as contemplated by the decree. Appellant's counsel is awarded the sum of $200 as an attorney fee for appeal in this court.

AFFIRMED AS MODIFIED.

PATRICIA DYKEMAN, APPELLANT, V. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF COLERIDGE, CEDAR COUNTY, NEBRASKA, APPELLEE.

316 N.W.2d 69

Filed February 19, 1982. No. 43760.

1. **Schools and School Districts: Termination of Employment.** The selection of a teacher to be eliminated from the staff through a reduction in force is an executive or administrative function as distinguished from quasi-judicial action.
2. ____:____. In the absence of statutory or contractual restrictions,

the decision of a school board in such a matter is generally subject to but a limited review.

3. ____:____. In making a selection of the teacher to be dismissed pursuant to a reduction in force, the school board may exercise its discretion and consider noneducational factors as well as educational ones.

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

Mark D. McGuire of Crosby, Guenzel, Davis, Kessner & Kuester for appellant.

Max G. Dreier of Jewell, Otte, Gatz, Collins & Domina for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding in error to review an order of the Board of Education of the School District of Coleridge, Cedar County, Nebraska, terminating the contract of the plaintiff pursuant to a reduction in force. The District Court found that the action of the Board was not arbitrary or capricious and dismissed the petition in error. The plaintiff has appealed.

The plaintiff had been employed by the district for 6 years as a business education teacher. In 1980 the Board determined that it was necessary to reduce its staff for the next school year and that a teacher in the business education department of the high school should be dropped from the staff. There were two teachers employed to teach business education, both of whom were tenured, and whose teaching certificates contained identical endorsements.

In deciding which teacher should be dropped from the staff, the Board considered the contribution that each made to the activities program. The plaintiff was cosponsor of the annual staff and sponsor of the sophomore class. For her duties in connection with the activities program, the plaintiff was paid an additional

$228, amounting to 2.5 percent of her annual base salary. The other teacher, who had been employed for 3 years and was retained, was the assistant volleyball coach, head girls' basketball coach, and cosponsor of the "C" Club. For these duties he was paid an additional $1,592.50, which amounted to 17.5 percent of his annual base salary.

The reduction in force policy which the Board had adopted pursuant to Neb. Rev. Stat. § 79-1254.05 (Cum. Supp. 1980) provided in part: "Within the separate category of tenured teachers, the process of selecting personnel for termination will involve consideration of (listed in order of priority):

"1. Certification and area(s) of endorsement.

"2. Program to be offered.

"3. Contribution to the activity program.

"4. Length of uninterrupted service.

"5. Special qualifications that may require specific training and/or experience. Part-time employees shall have lowest priority for retention."

The plaintiff contends that a school board may not consider the contribution teachers make to an activities program in making a reduction in force. The plaintiff relies on *Neal v. School Dist. of York*, 205 Neb. 558, 288 N.W.2d 725 (1980).

The *Neal* case held that the provisions of the tenure law did not apply to coaching duties. We noted that nothing in the statutory language or legislative history indicated the Legislature intended the position of coach to be entitled to the protection of the statute, and that such a construction would interfere with the right of school authorities to make reasonable assignments and reassignments of a teacher's extracurricular duties. We find nothing in the decision in the *Neal* case which prevents a board of education from considering the contribution made by a teacher to the activities program in making a reduction in force.

Although § 79-1254.05 does not specifically authorize consideration of a teacher's contribution to an activities

program as a criterion to be used in making a reduction in force, neither does it prohibit its use as a criterion. Certainly, extracurricular activities such as athletics are generally considered to be important parts of any educational program. It has been held that a school board may impose extracurricular activity duties upon a teacher as a condition to continued employment in the system. See *Enstad v. N. Cent. of Barnes Pub. Sch., etc.*, 268 N.W.2d 126 (N.D. 1978).

It is generally held that the selection of a teacher to be eliminated from the staff through a reduction in force is an executive or administrative function as distinguished from quasi-judicial action. *State ex rel. Ging v. Board of Education*, 213 Minn. 550, 7 N.W.2d 544 (1942), *overruled on other grounds* in *Foesch v. Independent School Dist. No. 646*, 300 Minn. 478, 223 N.W.2d 371 (1974); *State ex rel. Marolt v. Independent Sch. Dist. No. 695*, 299 Minn. 134, 217 N.W.2d 212 (1974); *Jordahl v. Independent School Dist. No. 129*, 302 Minn. 286, 225 N.W.2d 224 (1974).

In the absence of statutory or contractual restrictions, the decision of a school board in such a matter is generally subject to but a limited review. School boards should have broad discretionary powers in such matters free from judicial interference in the absence of a finding that their actions were arbitrary and capricious. *Jordahl v. Independent School Dist. No. 129, supra.*

In making a selection of the teacher to be dismissed pursuant to a reduction in force, the school board may exercise its discretion and consider noneducational factors as well as educational ones. Annot., 100 A.L.R.2d 1141 (1965); 68 Am. Jur. 2d *Schools* § 169 (1973).

The board of education is given the general authority to manage and direct the schools within the district. This includes the power to conduct nonteaching and extracurricular duties as a part of the educational program. It follows that the board may consider a

teacher's contribution to the activities program when deciding upon a reduction in force.

The judgment of the District Court is affirmed.

AFFIRMED.

MILDRED SIMON, APPELLANT, V.
ROBERT G. CHRISTIE, APPELLEE.

316 N.W.2d 303

Filed February 19, 1982. No. 43781.

Jury Instructions. It is error to submit to the jury an issue which is not pleaded in the case.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded for a new trial.

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

J. Thomas Rowen of Miller & Rowen, P.C., for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and BROWER and EMPSON, District Judges.

EMPSON, District Judge.

This is an action for damages resulting from a two-car collision which occurred January 12, 1977. The case was tried to a jury which returned a verdict for the defendant Christie. The plaintiff Simon appeals from the giving of a sudden emergency instruction. We reverse and remand.

On January 12, 1977, at about 10:30 p.m., Simon and Christie approached each other on Highway 31, approximately 2 miles north of Elkhorn, Nebraska. Simon was operating her automobile southbound and Christie was operating his automobile northbound. The

highway was wet and slick and the automobiles collided nearly head on. Simon claimed Christie was negligent in operating his vehicle on the wrong side of the road and in failing to have his vehicle under reasonable control. Christie denied negligence on his part and claimed Simon was contributorily negligent in failing to have her vehicle under reasonable control.

In charging the jury, the trial court gave verbatim the sudden emergency instruction, NJI 3.09.

Christie did not attempt to plead any facts raising "sudden emergency," did not request any such instruction, and does not contend that the pleadings support any emergency as an issue in the case.

Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. Ordinarily, it is error to submit to the jury an issue which is not pleaded in the case. *Newkirk v. Kovanda*, 184 Neb. 127, 165 N.W.2d 576 (1969); *Barney v. Adcock*, 162 Neb. 179, 75 N.W.2d 683 (1956).

The giving of the sudden emergency instruction in this case permitted the jury to relieve Christie from the standard of conduct ordinarily required of the operator of a motor vehicle upon the public highways, and to decide the case upon an issue not pleaded by any party.

The judgment of the District Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

PATRICIA RAE TUCH, APPELLEE, V.
JOHN FRANK TUCH, APPELLANT.

316 N.W.2d 304

Filed February 19, 1982. No. 43904.

1. **Witnesses.** Except as specifically provided otherwise by the rules of evidence, every person is competent to be a witness about those things of

which he has personal knowledge.

2. **Findings of Fact: Pleadings.** Findings of fact must conform to and be supported by the allegations of the pleadings on which they are based.

Appeal from the District Court for Boyd County: HENRY F. REIMER, Judge. Reversed.

John M. Peebles of Thomas & Peebles for appellant.

Thomas P. Herzog for appellee.

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

CAPORALE, J.

The appellant, John Frank Tuch, appeals from a finding and order, made during the course of a show cause hearing, that he is delinquent in his child support obligation. We find the trial court erred and we reverse.

The marriage of the parties was dissolved on April 5, 1977. The court's journal entry concerning that event incorporates a stipulation of the parties which provides, in pertinent part, "The Respondent shall also be entitled to have the children for a six-week period each year, said six-week period to begin at 8:00 A.M. on July 1st, and the children to be returned to the Petitioner at 8:00 P.M. at the end of said six-week period. It is further agreed by the parties that during the time the Respondent actually has the children during said six-week period he shall not be responsible for the support payments hereinbefore ordered."

On August 18, 1980, the court ordered respondent to appear and show cause why he should not be found in contempt of court for failing to make child support payments as ordered.

At a subsequent hearing the trial court determined that respondent had paid $715 less in child support payments than he should have, and ordered him to pay that amount together with a $250 attorney fee and $11.10 in costs.

Respondent testified that he had actual possession of

the two children of the parties for at least 6 weeks during each of the 4 years from 1977 through 1980. The court, although there was no objection from petitioner to such evidence, received it on condition that respondent verify it by an affidavit or letter from petitioner. Such verification has not been provided by respondent. Petitioner offered no evidence on that issue.

Respondent asserts the trial court erred in conditioning the receipt of respondent's evidence on the issue of whether the children were with him and in refusing to apply the language of the stipulation of the parties as adopted by the court.

We know of no legal authority, nor have we been cited any, which authorizes a trial court to condition the receipt of respondent's evidence with respect to when the children were with him. Except as specifically provided otherwise by the rules of evidence, every person is competent to be a witness about those things of which he has personal knowledge. Neb. Rev. Stat. §§ 27-601 and 27-602 (Reissue 1979). In the absence of contradicting evidence, there is simply no basis upon which the trial court could find that the children were not with respondent during the periods he testified they were.

The language of the stipulation of the parties, which was adopted by the trial court in its journal entry dated April 5, 1977, clearly and unambiguously provides that during the 6-week period the children are actually with respondent, he has no obligation to pay child support. The refusal of the trial court to apply that provision was erroneous. The trial court had no power to modify, during the course of contempt proceedings, the terms of its earlier support order. See, *Lipp v. Horbach*, 12 Neb. 371, 11 N.W. 431 (1882), and *Domann v. Domann*, 114 Neb. 563, 208 N.W. 669 (1926), holding that findings of fact must conform to and be supported by the allegations of the pleadings on which they are based.

For the reasons hereinabove stated, the findings of the trial court are set aside and vacated, and the order is reversed.

REVERSED.

THE OMAHA NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, APPELLANT, V. GODDARD REALTY, INC., ET AL., APPELLEES.

316 N.W.2d 306

Filed February 19, 1982. No. 43918.

1. **Contracts: Consideration.** In order for there to be consideration for an agreement there must be a benefit to one of the parties or a detriment to the other.
2. ____:____. A valuable consideration to support a contract need not be one translatable into dollars and cents; it is sufficient if it consists of the performance or promise thereof which the promisor treats and considers a value to him.
3. ____: ____. There is a sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, whether or not there is any actual loss or detriment to him or actual benefit to the promisor.
4. **Contracts.** Courts will not permit a party to avoid a contract into which he has entered on the grounds that he did not attend to its terms, that he did not read the document which he signed and supposed it was different from its terms, or that it was a mere form.

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

Milton A. Katskee and Harry R. Henatsch of Katskee & Henatsch for appellant.

Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler for appellee Waldinger Corp.

Kutak Rock & Huie for appellees Bailey Plumbing & Micklin Home Improvement.

Wall, Wintroub & Weiner for appellee Brase Electric.

Abrahams, Kaslow & Cassman for appellee Creative Kitchens.

John J. Fitzgerald, Esq., for appellee Wemhoff.

Jon Lance Jabenis, Esq., for appellee Micklin Lumber.

Walsh, Walentine & Miles for appellees Hill Constr. Co. and Chips Supply Co.

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

KRIVOSHA, C.J.

The appellant, The Omaha National Bank (ONB), appeals from a judgment entered by the District Court for Douglas County, Nebraska, finding that certain subordination agreements executed by Hill Construction, Inc.; Don Hill, doing business as Chips Supply Co.; Brase Electric Co., Inc.; Bailey Plumbing Co., Inc.; Waldinger Corporation; Francis A. Wemhoff, doing business as Wemhoff Tile Co.; Micklin Home Improvement Co.; Creative Kitchen Interiors, Inc.; and Micklin Lumber Co. (Subcontractors) were invalid and unenforceable due to the fact that they were executed without valid consideration. We believe that the trial court was in error and that there was valid consideration for the subordination agreements. Accordingly, we reverse and remand with directions.

Goddard Realty, Inc., (Goddard) had, sometime before it obtained a construction loan from ONB, undertaken the renovation of a building on certain real estate involved in this action. It was Goddard's plan to renovate an older building and construct apartments and a health club center, as well as racquetball courts, a restaurant, and a lounge. For reasons which are not entirely clear in the record, but obviously were due to Goddard's failure to pay materialmen for work done prior to obtaining the construction loan from ONB, the project was temporarily suspended. At that time there were a number of unpaid materialmen on the project, some of whom had removed themselves from the job. Several of the materialmen who are appellees in this action had money owing to them for the previous

work and were paid for that work by reason of ONB's subsequent construction loan to Goddard.

Most of the evidence presented at the trial was by way of a trial stipulation and is without dispute. The stipulation provided that on July 27, 1979, Goddard, for value received, executed and delivered to ONB a certain deed of trust note in the principal amount of $700,000, representing the proceeds of a construction loan by ONB to Goddard. To secure the deed of trust note and the performance by Goddard of all the terms and conditions of a certain building loan agreement, Goddard executed and delivered to ONB a deed of trust, assignment of rents and security agreement covering certain real estate described in the stipulation as Lots 1, 2, 3, 4, 14, 15, 16, and the north 45 feet of Lot 13 in Block 5, John I. Redick's Subdivision, an addition to the City of Omaha, as surveyed, platted, and recorded in Douglas County, Nebraska, together with vacated alley between 29th Street and Park Avenue, from Dewey Avenue to a point 239 feet south of Dewey Avenue, abutting Lots 1, 2, 3, 14, 15, 16, and parts of Lots 4 and 13 (secured property). The parties further stipulated that the deed of trust, assignment of rents and security agreement, dated July 27, 1979, executed by Goddard, was filed for record in the office of the register of deeds of Douglas County, Nebraska, on August 1, 1979. The parties further stipulated that on July 27, 1979, Goddard further executed and delivered to ONB its demand promissory note in the sum of $147,000 which it secured by a second deed of trust covering the same real estate as described in the first deed of trust. As in the case of the first deed of trust, the second deed of trust was likewise filed for record in the office of the register of deeds of Douglas County, Nebraska, on August 1, 1979. The parties further stipulated that on November 5, 1979, ONB made demand upon Goddard pursuant to paragraph 8 of the building loan agreement for an additional cash deposit in the sum of $341,247.85 for the reason that as of said date it then appeared to ONB

that the cost of the project would exceed the cost estimates as set forth in the building loan agreement.

Paragraph 8 of the building loan agreement provided as follows: "(8) The Borrower agrees that at any time it appears that costs for the project will exceed the above estimate in Lender's opinion, Lender may make demand for additional cash deposit to cover such anticipated cost over-runs and Borrower will immediately deposit the required additional cash with the Lender for that purpose. No further advances shall be made from loan proceeds until such requirement has been complied with. Failure to make the required cash deposit within 20 days of such demand shall be considered a default under this Agreement."

The parties further stipulated that Goddard failed to make the cash deposit and therefore was in default. By reason of the default, ONB declared the deed of trust notes and deeds of trust held by it due and payable and sought to foreclose pursuant to Neb. Rev. Stat. § 76-1005 (Reissue 1976).

When the Subcontractors were not paid following Goddard's default to ONB, they each filed mechanics' liens which they maintain are superior to the claim of ONB under its deeds of trust.

Each of the Subcontractors who now claim that their liens are superior to that of ONB executed a document presented by ONB to each Subcontractor as each payment was made. The document is the form required by paragraph 4 of the building loan agreement and reads in part as follows: "This order will not be honored by the Bank until the following receipt has been signed by the payee.

"RECEIVED of The Omaha National Bank the sum of _____ Dollars $_____ in payment of the above order. In consideration of the said payment the undersigned hereby acknowledges that the mortgage in favor of The Omaha National Bank on the above property constitutes a prior lien, superior to any lien which the undersigned may

now have or hereafter acquire by virtue of furnishing labor or materials for the improvement of said property. Nothing herein contained shall prevent the undersigned from filing a mechanic's lien against the above property but such mechanic's lien shall be junior and subordinate to the lien of The Omaha National Bank." The signatures of the Subcontractors appear on each receipt. Paragraph 4 of the agreement provides in part as follows: "(4) Applications for advances under this agreement are to be made by the Borrower to the Lender in triplicate on form attached, on or about the first day of each month after the commencement of work hereunder, for work done during the preceding month or part thereof or upon payment of and presentation of receipts to the Lender for the items enumerated in Article Seven (7) hereafter."

According to the testimony of one of the officers of ONB, as each voucher was submitted by Goddard on behalf of a Subcontractor, an officer of ONB reviewed the documentation. After verification of the documentation, a cashier's check and cover letter for the payment of each item were prepared. The cashier's check and the cover letter, together with the receipt containing the subordination agreement, were sent to the Subcontractor with directions that he was to sign the receipt and the subordination agreement in return for cashing the check. Signed subordination agreements were received by ONB from every mechanic's lien claimant involved in this appeal.

The Subcontractors now maintain that the basis for their position is premised upon a legal conclusion that there was no valid consideration for executing the receipt subordinating their lien, and therefore their agreement to subordinate is not enforceable, notwithstanding the clear language of the receipt which each saw before signing.

Following a trial to the court, the court determined that ONB was entitled to foreclose the subject real estate but that its right to foreclosure was subject and inferior to the mechanics' liens filed by the

Subcontractors.

As we noted at the outset, there appears to be but one issue necessary for determination by this court. That issue is whether there was consideration for the agreement by the laborers and materialmen to subordinate their liens for the lien of ONB.

There appears to be no precise statement as to what constitutes consideration for an agreement other than the general declaration that in order for there to be consideration for an agreement there must be a benefit to one of the parties or a detriment to the other. See, *Commuter Developments & Investments, Inc. v. Gramlich*, 203 Neb. 569, 279 N.W.2d 394 (1979); *Dorland v. Dorland*, 175 Neb. 233, 121 N.W.2d 28 (1963). What that benefit/detriment must be or how valuable it must be varies from case to case. It is clear, however, that even "a peppercorn" may be sufficient. In *Asmus v. Longenecker*, 131 Neb. 608, 269 N.W. 117 (1936), we said: "'A valuable consideration to support a contract need not be one translatable into dollars and cents; it is sufficient if it consists of the performance, or promise thereof, which the promisor treats and considers a value to him.' . . . 'A valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.'" *Id.* at 611, 269 N.W. at 119. To a similar effect see *Crawford State Bank v. McEwen*, 132 Neb. 399, 272 N.W. 226 (1937).

"'There is a sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, *whether or not there is any actual loss or detriment to him or actual benefit to the promisor.*'" (Emphasis supplied.) *Phelps v. Blome*, 150 Neb. 547, 555, 35

N.W.2d 93, 97 (1948). See, also, *In re Estate of Griswold*, 113 Neb. 256, 202 N.W. 609 (1925).

The Subcontractors argue that ONB did nothing more than it was legally obligated to do when it made payment directly to the various Subcontractors by certified check. This, of course, is not the case. As we have already noted, under the provisions of the building loan agreement, paragraph 4, applications for advances under the agreement were to be made by the borrower, Goddard, to ONB. There appears to be no right in the Subcontractors to make application for payment, nor any obligation on the part of ONB to deal directly with each individual Subcontractor. The advances, under the terms of the agreement, were to be made directly to Goddard. Likewise, ONB was not required to provide each Subcontractor with its guaranteed funds in the form of a certified check, but, rather, could have delivered all the loan proceeds to Goddard who might or might not have made prompt payment to the Subcontractors. The fact that each Subcontractor received direct bank proceeds which were available for use immediately was certainly more than the agreement required and must, for purposes of law, be determined to be "consideration." To hold otherwise would be to attempt to impose upon the definition of consideration requirements which do not exist in the law. The question of consideration in this state has never been dependent upon whether the promisor considered the benefit received sufficient, but only whether, as a matter of law, the promisee suffered a detriment or did anything which he was not otherwise required to do, no matter how significant in fact was the detriment or promise. We are unable to say that, as a matter of law, an agreement knowingly entered into by and between two sophisticated parties should now be set aside because the consideration given for the agreement was not what one of the parties considers of particular value.

The Subcontractors further argue that the direct

payment by ONB to the various Subcontractors does not constitute consideration because it was not bargained for or intended by the parties. This argument ignores both the building loan agreement and the language of the receipt signed by each of them. Paragraph 4 of the agreement specifically imposes upon Goddard the requirement of obtaining the execution of these receipt/subordination agreements as one of the conditions for obtaining payment. The Subcontractors argue that in order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them, citing *Leach v. Treber*, 164 Neb. 419, 82 N.W.2d 544 (1957). It is difficult for the court to conceive how the Subcontractors can argue that the consideration was not within the express or implied contemplation of the parties when the document itself clearly and unequivocally recited the fact. The receipt says: "In consideration of the said payment the undersigned hereby acknowledges that the mortgage in favor of The Omaha National Bank on the above property constitutes a prior lien, superior to any lien which the undersigned may now have or hereafter acquire by virtue of furnishing labor or materials for the improvement of said property. . . ." While it may be true that the Subcontractors, not being a party to the building loan agreement, were not required to execute the receipt in order to obtain payment from Goddard, it is true that they did have to execute the receipt if they wanted to receive payment from Goddard with ONB funds or wanted to receive payment directly from ONB. The receipt declares in bold type that payment will not be made unless the document with its agreement to subordinate is executed by the Subcontractor. By signing the receipt before accepting the proceeds from ONB, they obviously bargained for and intended to be bound by the agreement. It is generally held that courts will not permit a party to avoid a contract into which he

has entered on the grounds that he did not attend to its terms, that he did not read the document which he signed and supposed it was different from its terms, or that it was a mere form. *Garsick v. Dehner*, 145 Neb. 73, 15 N.W.2d 235 (1944); *Lincoln Joint Stock Land Bank v. Bexten*, 129 Neb. 422, 261 N.W. 845 (1935); *Von Knuth v. Ryan*, 107 Neb. 351, 186 N.W. 81 (1921). The Subcontractors are simply in no position to now contend that the consideration was not either expressly or impliedly within the contemplation of the parties when the document itself expressly makes it clear that the agreement to subordinate is the very consideration referred to in the receipt and was required as a condition of obtaining payment from ONB.

For these reasons we believe that there was sufficient consideration to create a binding agreement by and between the Subcontractors and ONB which the Subcontractors cannot now avoid on the grounds that the agreement was not binding. The judgment of the trial court is reversed and remanded with directions to reestablish the priorities of the various lienholders in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

DONALD J. DAWSON AND MINA PFEIFLEY DAWSON, HUSBAND AND WIFE, APPELLEES, V. PAPIO NATURAL RESOURCES DISTRICT, APPELLANT.

316 N.W.2d 311

Filed February 19, 1982. No. 44057.

SUPPLEMENTAL OPINION

Appeal from the District Court for Sarpy County, Nebraska. On motion for rehearing. See *ante* p. 100, 313 N.W.2d 242 (1981), for original opinion. Motion for rehearing overruled.

Paul F. Peters for appellant.

J. Thomas Rowen of Miller & Rowen, P.C., for appellees.

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

PER CURIAM.

Our opinion directing the District Court to grant condemner's motion to dismiss its appeal to the District Court had the effect of reinstating the award of the appraisers in the county court of Sarpy County, Nebraska. The death of one of the condemnees without revivor during the pendency of an appeal in the District Court does not change the date, nor alter the validity of the original award of the appraisers, nor destroy the jurisdiction of the District Court to impose reasonable conditions on the dismissal of the appeal.

The judgment for attorney fees and costs is ordered to be entered as of December 11, 1980, the date the motion to dismiss was originally made and overruled.

STATE OF NEBRASKA, APPELLEE, V. JOHN PEREA, APPELLANT.

316 N.W.2d 312

Filed February 19, 1982. No. 44169.

1. **Constitutional Law: Self-Incrimination.** The fifth amendment right to be free from self-incrimination is a personal right and may not be vicariously asserted.
2. ____:____. The defendant lacks standing to challenge the testimony of a coparticipant who implicated defendant in the crime on the grounds that the coparticipant's right against self-incrimination was violated.

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

Anthony S. Troia and James E. Riha for appellant.

Paul L. Douglas, Attorney General, and Mel Kam-

merlohr for appellee.

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

BRODKEY, J.

John Perea, defendant and appellant herein, appeals to this court from his conviction by a jury in the District Court of Douglas County, Nebraska, of first degree sexual assault in violation of Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1979). On March 2, 1981, Perea was sentenced by the trial court to a term of from 10 to 15 years' imprisonment in the Nebraska Penal and Correctional Complex. We affirm.

The evidence discloses that on August 14, 1980, the defendant and three other individuals, Robert Hilario, Donald Thompson, and Joseph Castaneda, devised a plan to have sexual intercourse with Hilario's former girl friend, the victim of the sexual assault. The victim, born June 29, 1962, was a schoolmate of one of the named individuals and had become acquainted with the defendant through Hilario. At approximately 11 p.m. on August 14, 1980, Castaneda telephoned the victim at her home and asked if she would like to go out and talk. She was subsequently picked up at her home by Castaneda at 11:30 p.m. and driven to Spring Lake Park, located in south Omaha. It appears that the four named individuals had designated Spring Lake Park as the place the victim was to be taken. Shortly upon their arrival at the park, three individuals approached the parked vehicle and pulled the victim from the car. The individuals assaulting the victim kept her eyes covered with their hands. She was carried to a nearby ravine in the woods and raped by at least three of the individuals. The exhibits admitted at trial also clearly indicate that the victim was seriously beaten by her attackers.

Castaneda was subsequently arrested for the crime, along with Perea, Hilario, and Thompson. Castaneda was tried on December 1, 1980, and found guilty of

first degree sexual assault. Thereafter, at defendant's trial on January 12, 1981, Castaneda was subpoenaed by the Douglas County attorney prosecuting the case to testify at defendant's trial. In this regard, the record discloses the following questioning of Castaneda: "Q- (By Mr. Schatz). You have been convicted of this first-degree sexual assault and you are awaiting sentencing at this time? A- Yes. Q- What is your intention if asked to testify against Mr. Perea regarding your knowledge of the events that took place at the ball field at 20th and F Street on the evening of August 14, 1980, and the early morning hours of August 15, 1980? A- I refuse to testify. Q- And for the reason that what you say may tend to incriminate you? A- Yes. Q- Have you discussed this with your attorney? A- Yes. Q- And it is your decision to invoke your Fifth Amendment rights, those being your right not to testify for the reason that your testimony may tend to incriminate you? A- Yes."

Thereafter, the trial judge ordered Castaneda to testify, pursuant to Neb. Rev. Stat. § 29-2011.01 (Reissue 1979). Castaneda then testified and implicated the defendant as being present and participating in the assault on the night in question.

On appeal to this court the defendant's sole assignment of error is that the trial court erred in overruling a motion for a mistrial and a motion to dismiss the information at the close of the State's evidence. The only issue which we need to address in this case is whether the trial court erred in ordering Castaneda to testify as to the events on August 14, 1980, despite his desire to remain silent.

We note that as a general rule the only grounds on which a witness may invoke his privilege against self-incrimination and refuse to answer a question is that the answer may subject him to a penalty, forfeiture, or punishment for a crime. "A witness cannot claim the privilege not to incriminate himself unless at the time he is liable to prosecution and punishment for the offense which would be disclosed. . . .

"Similarly, a witness cannot refuse to answer where he has been tried for the offense and acquitted or convicted, particularly where he has already served his sentence." 98 C.J.S. *Witnesses* § 437 at 253-54 (1957). See, also, Annot., 9 A.L.R.3d 990 (1966).

It should be noted, however, that in the instant case the witness Castaneda was convicted of his participation in the offense, not by a plea of guilty to the charge of first degree sexual assault but following a trial to a jury. He subsequently appeared at the trial of the defendant, John Perea, at which time and place he invoked his fifth amendment rights. The court then ordered him to testify, under the provisions of § 29-2011.01, on the theory that he was no longer subject to prosecution for the crime for which his testimony was being elicited against Perea. The questions presented, therefore, are whether the mere conviction of Castaneda, who had not as yet been sentenced at the time of Perea's trial, was sufficient to result in the loss of his privilege against self-incrimination and, also, what the effect of a pending right to appeal the conviction to a higher court would be. This latter question, however, is not before us in this appeal, for the reason that the record clearly shows that Castaneda's right to appeal to this court for his conviction for the crime in question has long since expired.

On the question of whether Castaneda's conviction, in and of itself, was sufficient to result in the loss of his privilege against self-incrimination, it appears that the authorities in jurisdictions are divided. Many of the cases hold that the privilege is lost upon a conviction of guilt; however, authority can be found which indicates that the privilege against self-incrimination is lost only when there has been a conviction and sentence. These cases are collected in an annotation found at 9 A.L.R.3d 990 at 996 et seq. See, especially, *Reina v. United States*, 364 U.S. 507, 81 S. Ct. 260, 5 L. Ed. 2d 249 (1960); *United States v. Romero*,

249 F.2d 371 (2d Cir. 1957); 8 Wigmore on Evidence § 2279 (1961); *Brown v. Walker*, 161 U.S. 591, 16 S. Ct. 644, 40 L. Ed. 819 (1896).

We have concluded, however, that it is unnecessary for us to reach or decide the above issues, for the reason that the defendant Perea is not entitled to raise them in his appeal to this court. He complains of an alleged violation of the constitutional rights of Castaneda, and not of his own constitutional rights. He lacks standing to challenge the testimony of his coparticipant, which implicated him. The law is well established that the fifth amendment right to be free from self-incrimination is a personal right of the witness. See *United States v. Bruton*, 416 F.2d 310 (8th Cir. 1969), and cases therein cited. The same rule has been applied not only to the fifth amendment but also to the fourth and sixth amendments. An excellent summary of the authorities, both federal and state, is contained in the recent case of *State v. Graham*, 291 N.W.2d 345, 347-48 (Iowa 1980), and we quote from the opinion in that case.

"Defendant's motion to suppress was based on the derivation of evidence from Fitzgerald's allegedly illegal arrest and interrogation without the benefit of counsel. He argues the evidence must be excluded as 'fruit of the poisonous tree.' *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441, 455 (1963). The trial court ruled that Fitzgerald was arrested but felt there was no need to determine the legality of the arrest because the fourth and fifth amendment rights implicated by these police actions are 'personal rights' and that the 'exclusionary rule should not be extended to others [than] that person' whose rights are violated. We concur in the trial court's ruling.

"In analyzing a 'poisonous tree' argument in the context of this case, one thing is clear: Not everybody is entitled to complain about the quality of its fruit. This defendant contends Fitzgerald's fourth and fifth

amendment rights were abridged by the arrest and interrogation which followed. We need not reach that issue, because he may not raise them, even if they were established.

"The Supreme Court has consistently ruled that exclusion of evidence garnered in violation of the fourth amendment may be obtained only by those people who have had an interest protected by that amendment violated. *E.g.*, *Rakas v. Illinois* 439 U.S. 128, 140, 99 S. Ct. 421, 425, 58 L. Ed. 2d 387, 399 (1978); *Alderman v. United States*, 394 U.S. 165, 174, 89 S. Ct. 961, 967, 22 L. Ed. 2d 176, 187 (1969). The rationale of the rule against vicarious assertion of the constitutional right is the personal nature of that right. *Rakas v. Illinois*, 439 U.S. at 140, 99 S. Ct. at 425, 58 L. Ed. 2d at 399; *Alderman v. United States*, 394 U.S. at 174, 89 S. Ct. at 966, 22 L. Ed. 2d at 187.

"Assertions of *fifth* amendment rights have similarly been held to be personal. *Couch v. United States*, 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973), involved an Internal Revenue Service summons on the defendant's accountant. The Court quoted Mr. Justice Holmes: 'A party is privileged from producing the evidence but not from its production.' *Id.* at 328, 93 S. Ct. at 616, 34 L. Ed. 2d at 554 (quoting *Johnson v. United States*, 228 U.S. 457, 458, 33 S. Ct. 572, 572, 57 L. Ed. 919, 920 (1913)). The Court then went on to say:

"'The Constitution explicitly prohibits compelling an accused to bear witness "against himself": it necessarily does not proscribe incriminating statements elicited from another. . . . *It is extortion of information from the accused himself that offends our sense of justice.*' *Id.* (emphasis added). Other Supreme Court cases have also emphasized the personal nature of fifth amendment rights. *See, e.g.*, *United States v. Nobles*, 422 U.S. 225, 233, 95 S. Ct. 2160, 2167, 45 L. Ed. 2d 141, 150 (1975) (discovery of defense investigator's written report); *Bellis v. United States*, 417 U.S. 85, 91, 94 S. Ct. 2179, 2184, 40 L. Ed. 2d 678, 685 (1974)

(subpoena to partner of small law firm to produce partnership's financial records).

"Federal courts of appeals considering the question have declined to draw a distinction between fourth and fifth amendment rights, ruling that fifth amendment rights may not be asserted vicariously. *United States v. Shaffner*, 524 F.2d 1021, 1022 (7th Cir. 1975), *cert. denied*, 424 U.S. 920, 96 S. Ct. 1126, 47 L. Ed. 2d 327 (1976); *United States v. Skoleck*, 474 F.2d 582, 584 (10th Cir. 1973); *Byrd v. Comstock*, 430 F.2d 937, 938 (9th Cir. 1970); *Bryson v. United States*, 419 F.2d 695, 699 (D.C. Cir. 1969); *United States v. Bruton*, 416 F.2d 310, 312 (8th Cir. 1969)." See, also, *Hill v. State*, 500 P.2d 1080 (Okla. Crim. 1972).

We conclude that Perea has no standing in this appeal to raise the issue of a violation of Castaneda's constitutional right against self-incrimination and defendant Perea's conviction and sentence were proper and must be affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

WALKER MANUFACTURING COMPANY, APPELLEE, V. JANICE A. POGREBA, APPELLEE, JOHN R. HANLON, STATE OF NEBRASKA, COMMISSIONER OF LABOR, APPELLANT.

316 N.W.2d 315

Filed February 19, 1982. No. 44280.

1. **Employer and Employee: Appeal and Error.** Appeals in unemployment compensation benefit cases are reviewed de novo on the record.
2. **Employer and Employee: Termination of Employment.** An employee who accepted a job which she knew in advance to be temporary did not "voluntarily" leave her employment when the job ceased to exist, and she was not disqualified from benefits on the basis she had voluntarily left her work without good cause.
3. ____: ____. An agreement of a temporary employee to quit when the job

no longer existed was one for the voluntary termination of employment and did not constitute a waiver of that employee's right to unemployment compensation benefits.

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

Pamela A. Mattson for appellant.

Robert L. Bals of Nelson & Harding for appellee Walker Mfg. Co.

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

WHITE, J.

Appellant, Commissioner of Labor, appeals from the order of the District Court finding that Janice A. Pogreba was ineligible for unemployment benefits for a 7-week period. The District Court reversed the Nebraska Appeal Tribunal's determination of eligibility.

We review the denial for granting of unemployment benefits de novo on the record. *Powers v. Chizek*, 204 Neb. 759, 285 N.W.2d 501 (1979).

The facts are not substantially in dispute. On March 6, 1979, Janice made application for employment with Walker Manufacturing Company. Janice had previously worked for Walker as a temporary worker in the summer of 1978. She completed applications for both temporary and permanent employment. On June 1, 1979, she signed a TEMPORARY EMPLOYMENT AGREEMENT. She was requested in the agreement to state when she expected to leave the employ of Walker, and she did so. Paragraphs 5 and 6 of the agreement provide as follows: "5. That my rate of pay will be $5.07 an hour and that my period of employment will end on or about Aug. 10, 1979.

"6. That the exact date of my leaving will be determined later, through discussions between myself and Walker Manufacturing Company, and, will be marked

by written notice of resignation. Such notice will be signed and submitted by me two weeks prior to the last day that I intend to work."

One week prior to August 10, 1979, a representative of Walker spoke with Janice and confirmed that she would leave on August 10, 1979. Although permanent employment positions were available at the time of her leaving, Walker did not inform Janice of the existence of those positions, nor did Janice inquire about any permanent positions which might be available.

The District Court found "that Janice A. Pogreba began and terminated her employment with Walker Manufacturing Company by written agreement. By reason thereof she terminated her employment on or about August 20, 1979, voluntarily and without good cause."

The commissioner argues that the separation from work pursuant to an agreement for employment for a fixed term does not operate to deny a claimant benefits. *In Re Interrogatories*, 30 Colo. App. 599, 496 P.2d 1064 (1972); *Intermt'n Jewish News v. Indust. Comm'n*, 39 Colo. App. 258, 564 P.2d 132 (1977); *Kentucky Unemp. Ins. Com'n v. American Nat. B. & T. Co.*, 367 S.W.2d 260 (Ky. 1963).

Walker, however, asserts that where work of a permanent nature is available, the employee who does not accept such work has voluntarily left employment and is, therefore, disqualified for the statutory period. The argument is not well taken. Janice was not asked to stay on or even informed that work of a permanent character was available. We do not here pass on the situation where a temporary employee, hired for a time certain, is afforded an opportunity to continue employment on a permanent basis but declines it. In this case we are inclined to the view of the Kentucky court that "it is our opinion that a correct interpretation of the statute is that an employee who accepts a job which he knows in advance to be temporary does not voluntarily leave when the job ceases to exist. There is language

in a New Jersey case, *Campbell Soup Company v. Board of Review, etc.*, 13 N.J. 431, 100 A.2d 287, which sustains that view. That Court said that employees frequently take jobs which employers tell them at the time will engage their services for only a stipulated period. But, even so, the voluntary acceptance of such work does not constitute a voluntary leaving at the end of the agreed time." *Kentucky Unemp. Ins. Com'n v. American Nat. B. & T. Co., supra* at 262.

The decision of the District Court is reversed and the cause remanded with directions to enter judgment for the claimant in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON and HASTINGS, JJ., concur in the result.

STATE OF NEBRASKA, APPELLEE, V. TIM THADEN, APPELLANT.

316 N.W.2d 317

Filed February 19, 1982. No. 44418.

1. **Criminal Law: Witnesses: Constitutional Law.** The right of an accused under the sixth amendment to the Constitution of the United States to confront the witnesses against him is a fundamental right made obligatory upon the states by the fourteenth amendment.
2. ____: ____: ____. The right of cross-examination is an essential and fundamental requirement of a fair trial which is the constitutional goal of this country.
3. ____: ____: ____. The right of a defendant to engage in a searching and wide-ranging cross-examination is an essential requirement for a fair trial.
4. **Witnesses.** Cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of a witness.
5. **Witnesses: Evidence.** Anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination.
6. **Witnesses: Appeal and Error.** The scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will

be upheld on appeal unless there is an abuse of discretion.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos for appellant.

Paul L. Douglas, Attorney General, and Frank J. Hutfless for appellee.

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

HASTINGS, J.

According to a jury verdict filed on December 5, 1980, the defendant, Tim Thaden, was found guilty by the District Court for Lancaster County of the May 20, 1980, first degree forcible sexual assault of a 17-year-old Lincoln woman. He was sentenced to a term of imprisonment in an institution under the jurisdiction of the Department of Correctional Services for a term of not less than 2 nor more than 5 years. He has appealed from that conviction and sentence, contending specifically that the trial court unduly and prejudicially limited his right of cross-examination of the prosecutrix, and generally that the evidence was insufficient upon which a jury could have found him guilty. We reverse and remand for a new trial.

We consider first the claimed insufficiency of the evidence. There is no question but that the defendant had sexual intercourse with the prosecutrix. This occurred at his residence in Lincoln where he had taken the prosecutrix after having picked her up in his automobile as a hitchhiker. The only question for the jury to determine was whether the activity was consensual on the part of the prosecutrix or as the result of force practiced by the defendant. Assuming that no relevant evidence was withheld improperly from the jury, that which was adduced was sufficient to support the jury's

verdict. It was simply a question of fact as to whether to believe the prosecutrix or the defendant. The defendant practically concedes this point in his brief. In a criminal case, this court will not interfere on appeal with a jury's verdict of guilty based upon evidence unless it is so lacking in probative force that it can be said that as a matter of law the evidence is insufficient to support a verdict of guilty beyond a reasonable doubt. *State v. Eynon*, 197 Neb. 734, 250 N.W.2d 658 (1977). There is no merit to this claimed error.

Defendant's other argument presents a more difficult problem. As earlier stated, the only issue in this case involved the credibility of the two principals. Therefore, evidence which might cast some doubt upon the believability of the prosecutrix' testimony was of critical importance to the defense.

A pretrial hearing was held on the State's motion in limine, seeking to prevent inquiry by the defense into the prior sexual activity of the prosecutrix. At that hearing the defense learned from the prosecutrix that from approximately April of 1979, when she was living at the Youth Service System Group Home, to the time of the hearing on December 1, 1980, she had lived at approximately seven different addresses. The prosecutrix also testified that the day following the alleged assault, or on the 21st day of May 1980, she moved out of the residence in which she was then living, and then moved three more times up until the time of the hearing.

At the conclusion of the hearing, the court ruled to permit certain testimony as to the prior sexual activities of the prosecutrix. Then, as to evidence of her various residences, the trial court at first stated: "First of all, she talks about the various places she's lived. I'm going to permit you to spend just a little time on that, because I think its [sic] foundational for her relationships, but don't spend a lot of time on it." The prosecuting attorney then challenged the relevance of that testimony, after which the trial judge reversed himself. "I'm going to exclude it. I think it's pretty insignificant."

The defense attorney then stated: "Your honor, I think it goes to her credibility. We all sat here and listened to her testify that she can't even remember all the addresses she's lived at, or dates or anything else." To which the judge answered: "You have my ruling." The prosecuting attorney then moved in limine to exclude any evidence that the prosecutrix had ever lived at the Youth Service System Group Home. When questioned by the court, the defense attorney replied: "Well, I guess in light of the order preventing me from going into any other addresses, maybe it's already covered by that order." The court replied: "I'll grant the motion. There should be no reference to that, and I think it's already covered . . . ."

At the actual trial of the case, during the direct examination of the prosecutrix, the following questions and answers appear in the record: "Q. Do you remember what day of the week May 20th, 1980, was? A. It was a Tuesday. Q. Do you recall what you did the next day, on Wednesday? A. Yes, I immediately moved from Ginny and Mike's. Q. Had you planned on moving from their house on that day? A. No. Q. Why did you move then on Wednesday the 21st? A. Because Tim Thaden had told me that he was going to return on Wednesday, the 21st, to see me at 5:00, and I was moved out by 4:30, so I wouldn't be there for when he did return." No objection was made to these questions and answers by the defense.

However, at a recess during the course of cross-examination of the prosecutrix, the defense attorney made the following statement at a hearing in camera: "The first offer of proof I would like to make is as to the various residences of [the prosecutrix]. I would submit that if she were allowed to testify as to her various residences, that she would, if asked the questions that were asked at the in camera hearing this morning, testify as she did in the in camera hearing this morning concerning her residences." The court then asked: "What is the purpose? What are you trying to show by

that?" To which defense counsel replied: "Your Honor, what I'm trying to show by that is that the impression that could be left with the jury that she moved from the premises where she lived on May 20, 1980, because of fear of the defendant, ought to be weighed against the general instability of her residences between May 20th and the present." The objections of the prosecution were that the testimony of prosecutrix at trial was direct evidence that she moved out of fear, and that the jury should not be permitted to draw an inference to the contrary based on her various moves. The court responded by saying, "Well, the ruling will stand. The offer and objection are noted, and the ruling stands as the Court ruled this morning." The defense counsel, during the balance of cross-examination, made no attempt to ask the prohibited questions.

During the opening portion of the State's closing argument the prosecuting attorney stated: "Now, when the defendant had left [the prosecutrix] out at 1801 South 27th, he stated that he wouldn't come in at this time, but they discussed the possibility of him coming back the next day. . . . So what does [the prosecutrix] do the next day? . . . She moved. She got out of 1801 South 27th Street, unplanned. She was planning to stay until the end of the month. She packed up her things and left . . . ."

During the closing portion of the prosecution's statement, the county attorney stated again: "The fact that [the prosecutrix] moved the next day is corroboration for her side of the story. The defendant's been able to offer no explanation as to why she would suddenly move unexpectedly away like this. She moved because she had been raped, and she was afraid of him. . . . And I'm telling you things that there's no controversy on. These are items in evidence that there's just basically no dispute as to, and they corroborate [the prosecutrix'] version of the facts."

The defendant contends he was denied his constitutional right of confrontation by the trial court's

ruling prohibiting the defense from adducing, on cross-examination, evidence pertaining to the many moves of the prosecutrix, while permitting the State to comment on the "uncontroverted" fact that she moved the day following the alleged rape out of fear. We agree. As stated in *Dutton v. Evans*, 400 U.S. 74, 79, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970): "[T]his Court has squarely held that 'the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right . . . made obligatory on the States by the Fourteenth Amendment.'"

Furthermore, we note that "[t]he right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' . . . It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.'" *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1972).

Finally, we recognize that "[t]he right of a defendant to engage in a searching and wide-ranging cross-examination is an essential requirement for a fair trial." *United States v. Jones*, 557 F.2d 1237, 1238 (8th Cir. 1977).

With regard to a party's right of cross-examination, we have noted in the past that "cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of the witness" and "anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination." *Scofield v. Haskell*, 180 Neb. 324, 328, 142 N.W.2d 597, 601 (1966).

The court is well aware that "'[t]he rule is well established in this jurisdiction that the scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion.'" *State v. Reinert*, 197 Neb. 379, 380, 248 N.W.2d 782, 783 (1977). How-

ever, in view of the final argument made by the prosecuting attorney, we believe that the restriction upon the defendant in his cross-examination of the prosecutrix was unreasonable, an abuse of discretion, and constituted prejudicial error.

The judgment of the trial court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

KNOELL CONSTRUCTION COMPANY, INC., APPELLANT, V. JAMES A. HANSON ET AL., APPELLEES.

316 N.W.2d 321

Filed February 19, 1982. No. 44423.

Pleadings: Limitations of Actions. A cause of action pleaded by amendment ordinarily relates back to the original pleading for limitation purposes, provided that claimant seeks recovery on the same general set of facts.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Reversed and remanded for further proceedings.

Steven O. Stumpff of Stumpff & Washburn for appellant.

Carlos E. Schaper and John O. Sennett for appellees.

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

MCCOWN, J.

This is an action for foreclosure of a mechanic's lien. On the first appearance of this case in this court we reversed a judgment for the plaintiff and remanded the case to the District Court for a new trial. Following remand the District Court denied plaintiff's motion to amend the petition to seek recovery on the same basic facts but on the basis of quantum meruit rather than

an express contract. The court then granted the defendants' motion for summary judgment, and the plaintiff has appealed.

In *Knoell Constr. Co., Inc. v. Hanson*, 205 Neb. 311, 287 N.W.2d 439 (1980), this court reversed a judgment for $11,267.50 in favor of the plaintiff and remanded the cause to the District Court for a new trial. The action was to foreclose a mechanic's lien based on land leveling work done on defendants' property. Plaintiff alleged an express contract as the basis for recovery. At the conclusion of plaintiff's evidence, over objection by the defendants, plaintiff requested and was granted leave to amend the petition to allege quantum meruit as the basis for recovery. The court entered judgment for the plaintiff, and the defendants appealed. This court, on appeal, held that at that stage of the proceedings, over objection by the defendants, permission to amend the petition was erroneous and prejudicial. We therefore reversed the judgment and remanded the case for a new trial.

Ordinarily the reversal of a judgment and remand for new trial places the case in the same posture that it was in prior to the trial, except as otherwise directed in the opinion. The amendment was permissible prior to trial and upon remand it was again permissible. The trial court determined that, for purposes of the statute of limitations, recovery on quantum meruit and recovery on an express contract constitute two separate causes of action, even though they are based on the same general facts, and denied the motion to amend.

Alternative theories of recovery on the same general set of facts are not ordinarily separate causes of action for the purposes of the running of a statute of limitations. A cause of action pleaded by amendment ordinarily relates back to the original pleading for limitation purposes, provided that claimant seeks recovery on the same general set of facts. *Abbott v. Abbott*, 185 Neb. 177, 174 N.W.2d 335 (1970); *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971).

The defendants' reliance on *Vantage Enterprises, Inc. v. Caldwell*, 196 Neb. 671, 244 N.W.2d 678 (1976), is misplaced. In that case the plaintiff sought to recover on the theory of an express contract and the jury returned a verdict for the defendant. The plaintiff then filed another action to recover on the same set of facts on the theory of quantum meruit. The court sustained a summary judgment for the defendant in the second action based on principles of res judicata. The distinction between that case and the present one is clear cut. In the case at bar the plaintiff obtained a judgment against the defendants which was reversed for errors at trial. Rather than being res judicata in favor of the plaintiff as to the cause of action, the reversal wiped out any res judicata effect and placed the parties in the same position they were in before the trial. It is also obvious that the material facts are still in dispute and summary judgment is unavailable.

The District Court erred in denying plaintiff the right to amend its petition and in granting summary judgment for the defendants.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LOIS M. RYAN, EXECUTRIX OF THE ESTATE OF EUGENE RYAN, DECEASED, APPELLANT, V. GERALD L. TICKLE, APPELLEE.

316 N.W.2d 580

Filed February 26, 1982. No. 43575.

1. **Insurable Interest.** An insurable interest, in the matter of life and health insurance, exists when the beneficiary because of relationship, either pecuniary or from ties of blood or marriage, has reason to expect some benefit from the continuance of the life of the insured. Neb. Rev. Stat. § 44-103(13) (Reissue 1978).
2. ——. The question of the lack of insurable interest in a life insurance policy may be raised only by the insurance company, and where the com-

pany recognizes the validity of the policy, as by paying the amount thereof to the person named therein or into court, adverse claimants to the fund may not raise the objection of lack of insurable interest.

3. **Insurable Interest: Standing.** Only an insurer has standing to complain of a lack of an insurable interest and the heirs of the insured may not proceed on such cause of action against the designated beneficiary.

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

Schneider & Nisley, P.C., for appellant.

Murphy, Pederson, Piccolo & Anderson for appellee.

Heard before BOSLAUGH, CLINTON, BRODKEY, and WHITE, JJ., and HOWARD, District Judge.

BRODKEY, J., Retired.

Lois M. Ryan, the plaintiff and appellant herein, is the widow of Eugene Ryan and the executrix of his estate. She commenced this action to recover the proceeds of a life insurance policy which were paid to the decedent's former business partner, appellee Gerald L. Tickle. After a trial in the District Court of Lincoln County, Nebraska, the appellee demurred to the evidence presented by the appellant and moved to dismiss appellant's petition. In its judgment entered on June 4, 1980, the trial court sustained the appellee's motions and dismissed the appellant's petition with prejudice. We affirm.

The facts as revealed in the record disclose that the decedent, Eugene Ryan, was a licensed mortician doing business in North Platte as the manager and president of Ryan Funeral Home, Inc. Tickle was licensed as a mortician doing business in Arnold, Nebraska, as owner of the Quig-Tickle Funeral Home. It appears that the two men had known each other since 1964, and in October 1971 they went into business together. The Ryan Funeral Home, Inc., had 477 outstanding shares of stock distributed among 12 shareholders. Ryan owned 50 shares of the company and Tickle purchased 25 shares. The two men also obtained an option to pur-

chase the remaining outstanding stock in the Ryan Funeral Home from the other shareholders. The 5-year option was to expire on September 2, 1976, and granted Ryan and Tickle, or the survivor of them, the right to exercise the option.

In March 1972 Ryan and Tickle were offered an opportunity to purchase the Mullen Funeral Home located in nearby Mullen, Nebraska. They purchased the funeral home together for $20,000, as equal partners. They borrowed $7,000 for the downpayment and arranged to finance the balance over a period of 5 to 6 years.

Shortly after the purchase of the Mullen Funeral Home, Ryan and Tickle decided to purchase life insurance policies on each other's lives, their ultimate business goal being to acquire ownership of the Ryan and Mullen funeral homes and to provide a fund by which the survivor could purchase the homes upon the death of one of the partners. It was their estimate that if one died, the survivor would need $20,000 to $25,000 to purchase the other's interest in the Mullen Funeral Home and an additional $75,000 to purchase the outstanding stock of the Ryan Funeral Home from the owners thereof under the option agreement.

Ryan and Tickle thereupon purchased decreasing term life insurance policies on their joint lives in the total amount of $100,000. Tickle was designated the owner of one policy which had a face value of $50,000, and Ryan was designated the owner of a second policy, also valued at $50,000. Both policies insured the joint lives of Ryan and Tickle so that the entire proceeds were payable to the survivor of them. The premiums for the insurance were paid by an automatic bank withdrawal arrangement through a partnership bank account maintained for the Mullen Funeral Home.

In early 1973 it was discovered that Ryan had cancer from which he subsequently died on October 25, 1975. Following Ryan's death, Tickle collected a total of $88,000 as the beneficiary of the two life insurance

policies. On September 22, 1976, Tickle and the appellant entered into a settlement agreement in which Tickle purchased the decedent's interest in the Mullen Funeral Home for the sum of $15,000. In addition, Tickle agreed to pay an additional $3,000 to the appellant in full and complete distribution of any sum of money claimed to be distributable to the decedent as undistributed earnings from the Mullen partnership. Tickle also agreed to assume and pay the unpaid balance due on the Mullen Funeral Home in the amount of $9,000. He also purchased all the assets of the Ryan Funeral Home from the board of directors and shareholders of the corporation for the sum of $147,000.

On November 7, 1977, the appellant, as executrix of the estate of Eugene Ryan, instituted this action alleging that the estate was entitled to all insurance proceeds paid upon the death of the decedent. In her brief on appeal to this court, appellant makes two principal arguments, to wit: That Tickle did not have an insurable interest in the life of the deceased, Eugene Ryan, and hence was not entitled to receive the proceeds of the insurance policies as the surviving partner of the deceased; and that the proceeds paid under the insurance agreement on decedent's life exceeded by $73,000 the amount of decedent's insurable interest in the Mullen Funeral Home, thus creating a wagering contract which is void as against public policy.

We note at the outset that the evidence in the record clearly indicates that the agreement between the partners had a dual purpose: not only to acquire for the survivor the Mullen Funeral Home but also to acquire the outstanding shares of stock in Ryan Funeral Home, Inc. The trial court found, and we conclude that the record sustains such finding, that the parties made a good faith estimate that the amount of money necessary to accomplish both such purposes would be approximately $100,000. That being so, appellee argues that the insurance contract was not a "wagering" contract but, rather, was a valid and enforceable contract of in-

surance. Also, with regard to appellant's contention that appellee did not have an insurable interest in the life of the decedent, appellee points out that the term "insurable interest" is defined in Neb. Rev. Stat. § 44-103(13) (Reissue 1978) as follows: "Insurable interest, in the matter of life and health insurance, exists when the beneficiary because of relationship, either pecuniary or from ties of blood or marriage, has reason to expect some benefit from the continuance of the life of the insured." In view of their avowed purpose in obtaining the insurance in question, in addition to the fact that evidence in the record discloses income tax returns showing increased profits from the operation of the funeral homes since the association of the parties as partners, appellee argues that there was clearly an expectation of benefit from the continuance of the life of the insured, and that therefore Tickle had an "insurable interest" in the life of the decedent Ryan.

We conclude, however, that we need not, and indeed may not, decide these issues, for the reason that the appellant herein has no standing or right to bring this lawsuit.

The law is well established throughout the country that only the insurer can raise the objection of want of an insurable interest. "The question of the lack of insurable interest in a life insurance policy may be raised only by the insurance company, and, where the company recognizes the validity of the policy, as by paying the amount thereof to the person named therein or into court, ordinarily adverse claimants to the fund may not raise the objection of lack of insurable interest." 44 C.J.S. *Insurance* § 212 at 915 (1945). See, also, *Poland v. Fisher' Estate*, 329 S.W.2d 768 (Mo. 1959); *Ryan v. Andrewski*, 206 Okla. 199, 242 P.2d 448 (1952); *Edgington v. Equitable L. Assur. Soc.*, 236 Iowa 903, 20 N.W.2d 411 (1945). "The heirs of the insured have no cause of action against the insurer upon a policy the proceeds of which have been paid by the insurer to a third person who was the beneficiary designated in the policy,

on the ground that the insurer could have refused to make the payment for want of an insurable interest on the part of the beneficiary." 3 Couch on Insurance 2d, Insurable Interest § 24:6 at 76 (1960).

The above-cited authorities make it clear that only an insurer has standing to complain of a lack of insurable interest and that the heirs of the insured may not proceed on such cause of action against the designated beneficiary. This position was recently discussed in an excellent opinion by the Michigan Court of Appeals in *Secor v. Pioneer Foundry*, 20 Mich. App. 30, 173 N.W.2d 780 (1969). In that case Pioneer Foundry obtained a $50,000 life insurance policy on Secor, who was a 9-year employee of the company. Three years later Secor terminated his employment; however, the company paid the 1964 policy premium 8 months after Secor had terminated his employment. Secor died a month later, and the company collected the proceeds of the insurance. Secor's widow filed suit, alleging that Pioneer Foundry had no insurable interest in Secor's life and sought a constructive trust to be imposed in favor of Secor's estate. The trial court dismissed Mrs. Secor's suit.

On appeal, the Michigan court, citing *Hicks v. Cary*, 332 Mich. 606, 52 N.W.2d 351 (1952), held: "'We hold to the rule that lack in the beneficiary of an insurable interest equal to the full amount of the insurance policy, to the extent that it thereby renders the policy a wagering contract, constitutes a barrier to the beneficiary's right to receive and retain the full amount of the insurance proceeds, but that *it is one which may be raised by and for the benefit of the insurer alone.*'" *Id.* at 33, 173 N.W.2d at 781. The court concluded that it was the insurer alone who had standing to complain of a lack of insurable interest and noted that the insurance company had paid the proceeds of the policy to Pioneer Foundry without raising the issue. The court affirmed the dismissal of the plaintiff's action, based on a lack of standing to complain.

In *Secor* the court at 33, 173 N.W.2d at 782, stated: "The rule that only the insurer can raise the question of lack of insurable interest appears to be well supported in other jurisdictions," and cites in support thereof, 3 Couch on Insurance, *supra;* 2 Appleman, Insurance Law & Practice § 765 (1966); Vance on Insurance § 31 at 199 (3d ed. 1951). In the opinion, the court at 34, 173 N.W.2d at 782, states: "In recognition of these considerations the almost universal rule of law in this country is that if the insurable interest requirement is satisfied at the time the policy is issued, the proceeds of the policy must be paid upon the death of the life insured without regard to whether the beneficiary has an insurable interest at the time of death." The court in *Secor* also recognized that there are cases that hold that a creditor who acquires insurance on his debtor's life may not recover more than the amount of the debt and the premiums he paid. In this connection, however, the court at 37, 173 N.W.2d at 784, stated: "This analysis has been rejected in the better-reasoned cases; it is contrary to the principle that the termination of an insurable interest does not affect the rights of an owner-beneficiary in a life policy." The court also noted at 35, 173 N.W.2d at 783: "Life insurance is not meant to assuage grief; its primary function is monetary. It serves fundamentally the same purpose whether the beneficiary is a widow or a business; it seeks to replace with a sum of money the earning capacity of the life insured." The court concluded at 36, 173 N.W.2d at 783: "We also decline to limit Pioneer Foundry's recovery to the amount of its investment in the policy and its financial loss (probably nil) upon Secor's death. Pioneer Foundry's investment in the policy was large both quantitatively and relatively."

The holding and reasoning of the Michigan Court of Appeals is persuasive in the instant case, and we conclude that appellant is without standing to object that no insurable interest existed between the decedent and the appellee, or that the parties had entered into an

illegal wagering agreement. The judgment of the District Court dismissing appellant's cause of action must be, and hereby is, affirmed.

AFFIRMED.

STEWART W. KLEEB, APPELLEE, V.
ALLENE D. KLEEB ET AL., APPELLEES,
WILMA E. ASKEY AND ARDEN L. ASKEY, APPELLANTS.

316 N.W.2d 583

Filed February 26, 1982. No. 43581.

1. **Equity: Appeal and Error.** In an action in equity this court must retry the issues of fact and, on a trial de novo, reach independent conclusions without regard to the conclusions reached by the District Court.
2. **Partition: Judicial Sales.** The confirmation of judicial sales is left to the discretion of the trial court; such discretion should be sound and equitable in view of all the circumstances, and the court must act in the interest of fairness and prudence and with a just regard to the rights of all concerned and the stability of judicial sales.
3. **Partition: Judicial Sales: Words and Phrases: Notice.** The phrase "on the courthouse door," as found in Neb. Rev. Stat. § 25-1529 (Reissue 1979), is to be given a practical and reasonable interpretation, rather than a literal or technical construction, and a notice of public sale posted on a bulletin board near the courthouse door satisfies the statute's requirements.
4. **Partition: Judicial Sales.** An upset bid following a judicial sale and before a final confirmation should be considered only when it affords convincing proof that the property was not sold at an adequate price and a just regard for the rights of all concerned and the stability of judicial sales permits its acceptance.
5. **Records: Evidence: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before this court, and evidence which does not appear in the record cannot be considered by this court on appeal.

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

James E. Case of Case & Reinsch, P.C., for appellants.

Ronald D. Svoboda and David V. Chebatoris of Clements, Svoboda & Chebatoris for appellee Stewart W. Kleeb.

Jim R. Titus of Peterson, Bowman & Johanns for appellee Lauritzen.

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

BRODKEY, J., Retired.

Wilma E. Askey and Arden L. Askey, wife and husband, defendants and appellants herein, appeal to this court from an order entered by the District Court of Cass County, Nebraska, confirming the sale of certain real property, pursuant to an order of the court entered in a partition action, over objections to such confirmation filed by the appellant Wilma E. Askey. We affirm.

On September 18, 1979, Stewart W. Kleeb, the plaintiff-appellee herein, filed a petition in the District Court seeking to quiet title to a 162-acre tract in Cass County, praying that the court determine the interests owned in the property by the heirs of Elsie A. Kleeb and to partition the property, with the proceeds to be divided among the heirs in accordance with their shares as determined by the court. On January 25, 1980, the court entered an order quieting title to the property and confirming the shares owned in said property as follows: Stewart W. Kleeb, an undivided one-sixth interest; Allene D. Kleeb, an undivided one-sixth interest; Wilma E. Askey, an undivided one-third interest; and Velma M. Jezbera, an undivided one-third interest. The court also appointed a referee to partition the real estate.

On February 26, 1980, the referee filed a report with the court in which he determined that the property could not be partitioned and divided between the owners in kind, as it would result in tracts of land too small to farm adequately. The referee found that there were limestone deposits under the property and recommended that the real estate be sold and the proceeds divided among the owners. The court subsequently ordered the premises to be sold at a public sale

and authorized the referee to drill several core samples of the mineral deposits. On March 4, 1980, the referee filed his bond, and notice of the sale was published. The property was sold on April 17, 1980, to Kenneth P. Lauritzen, an appellee herein, who purchased the premises for the sum of $181,440.

On April 24, 1980, Wilma Askey filed objections to the confirmation of the referee's sale of the property to the high bidder at the sale, Kenneth Lauritzen. A hearing was held on the motion for confirmation of the sale and the objections thereto filed by appellant Wilma E. Askey, following which the court confirmed the sale to Lauritzen. In their brief on appeal to this court, the appellants make the following three assignments of error: "1. The District Court erred in determining that the requirements of Section 25-520.01 R.R.S. Neb., 1943 were satisfied. 2. The District Court erred in confirming the sale in determining that the highest bid at the sale was adequate and in determining that a resale would not bring a substantially greater price. 3. The District Court erred in determining that the evidence of posting of notice within the Courthouse was sufficient to satisfy the requirement of posting at the front door of the courthouse."

In its memorandum opinion filed on June 3, 1980, the court found that the sale had been "thoroughly advertised" and that the posting of the notices within the courthouse was sufficient to satisfy the requirements of posting at the front door. The court also found that the sale was fairly conducted and that there was no adequate evidence presented to support a belief that a resale would bring a substantially greater price. The court further found: "The oral testimony is to the effect that some unknown party had offered an increase of $50.00 per acre or a total of $8,100.00 in excess of the accepted bid at the sale. The purported increase bid is by a party unknown and it is affirmatively stated that the bid is open only for one day. There are no pleadings or deposit of any nature which might support the bid or

any evidence which would permit a new sale to start at the point of the highest offer. . . . The amount of increase is approximately 4.40 percent which in view of the amount involved is not a substantial amount." The court thereupon ordered the confirmation of the sale and ordered the referee to convey the premises to appellee Lauritzen.

We begin our discussion of this case by noting that the standard of review by this court in partition actions is well established. On appeal from a decree in an action in equity the Supreme Court must retry the issues of fact and, on a trial de novo, reach independent conclusions without regard to the conclusions reached by the District Court. *Frankenberger v. Holm*, 154 Neb. 80, 46 N.W.2d 901 (1951); Neb. Rev. Stat. § 25-1925 (Reissue 1979). However, on appeal in equity cases, 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. *Cofer v. Perkins*, 199 Neb. 327, 258 N.W.2d 807 (1977). It is also well established that the confirmation of judicial sales is left to the judicial discretion of the trial court. "The discretion to be exercised is not arbitrary, however, but should be one which is sound and equitable in view of all the circumstances. The court must act in the interest of fairness and prudence, and with a just regard to the rights of all concerned and the stability of judicial sales." *Hull v. Hull*, 183 Neb. 773, 776, 164 N.W.2d 455, 458 (1969). See, also, *Michelson v. Wagner*, 170 Neb. 28, 101 N.W.2d 498 (1960). We also note that in regard to appellee Lauritzen, a successful bidder at a judicial sale becomes a party to the proceedings and may appear and urge or object to confirmation. *Michelson v. Wagner*, *supra*.

The appellants contend that the District Court erred in determining that the posting of notice within the Cass County Courthouse was sufficient to satisfy the requirements of Neb. Rev. Stat. § 25-1529 (Reissue 1979) that the posting of notice must be at the front

door of the courthouse. In this regard, § 25-1529 provides in pertinent part: "Lands and tenements taken in execution shall not be sold until the officer causes public notice of the time and place of sale to be given. The notice shall be given . . . by posting a notice on the courthouse door . . . ."

The evidence in the record reveals that a notice of the public sale, setting forth the mineral and farm nature of the premises, as well as information as to the time, place, and terms of the sale, was posted at the Cass County Courthouse on a bulletin board located beside the south courthouse door. A second notice was also posted on a bulletin board in the office of the Cass County treasurer. It appears that the notices were posted on the bulletin boards at the specific direction of the Cass County clerk. The appellants, however, urge this court to apply a literal interpretation to the statute's requirement that the notice be posted on the door of the courthouse. This we decline to do.

Our review of the case law has revealed that several other jurisdictions have been presented with this same issue, and have generally concluded that the posting of a notice of sale on a public bulletin board in close proximity to the courthouse door will satisfy the requirement that the notice be posted on the door. In *Hoskins v. Iowa Land Co.*, 121 Iowa 299, 300-01, 96 N.W. 977, 978 (1903), the Iowa Supreme Court stated: "While the statutory directions as to tax sales are to be strictly construed, it would, we think, border upon the absurd to hold that the requirement for posting upon the 'courthouse door' is not fairly and fully complied with by posting upon a bulletin board at the door. The evident design of the law is to have the notice in a public place, easy of access, and of such notorious location that no one need be misled or mistaken as to the place where it can be seen. 'On the door' does not necessarily mean on the swinging panel which fills the opening or entrance to the building. A conspicuous posting upon the building, at the side of the

opening, or upon a separate board or panel or bulletin kept there for that purpose, is sufficient, to all reasonable intents and purposes."

The Texas Supreme Court reached the same conclusion in *Howard v. Fulton*, 79 Tex. 231, 236, 14 S.W. 1061, 1062 (1891), which stated: "Reasons readily suggest themselves why the doors of a costly public building should be neither defaced by posting notices upon them nor incumbered by bulletin boards, and none is seen why a notice posted near the door and in immediate view of it does not fully meet the purpose of the law in regard to legal notices . . . ." See, also, *Matson v. Federal Farm Mortgage Corporation*, 151 S.W.2d 636 (Tex. Civ. App. 1941); *Sims v. Crabtree*, 166 Tenn. 508, 63 S.W.2d 662 (1933); 47 Am. Jur. 2d *Judicial Sales* § 85 (1969).

The purpose of § 25-1529 is to inform the public as to the time, place, and date of the public sale, in addition to a description of the property and the terms of sale. The evidence in the record clearly indicates that the notices posted on the public bulletin boards provided in the Cass County Courthouse effectuated the statute's purposes. In this regard, we have previously held that the requirements of § 25-1529 may be satisfied by substantial compliance. *Hollstein v. Adams*, 187 Neb. 781, 194 N.W.2d 216 (1972). We therefore determine that the phrase "on the courthouse door" is to be given a practical and reasonable interpretation, rather than a literal or technical construction as urged by the appellants.

We turn next to appellants' allegation that the trial court erred in determining that the requirements of Neb. Rev. Stat. § 25-520.01 (Reissue 1979) had been satisfied. Section 25-520.01 provides, in part, that where a notice of publication is given as authorized by law, the party maintaining the action "shall within five days after the first publication of notice send by United States mail a copy of such published notice to each and every party appearing to have a direct legal interest in

such action or proceeding whose name and post-office address are known to him. Proof by affidavit of the mailing of such notice shall be made by the party or his attorney and shall be filed . . . within ten days after mailing of such notice." The appellants contend that the sale must be set aside because the notice was not mailed within the prescribed time period and that it was not received until after the sale.

A review of the record convinces us, however, that there was compliance with the requirements of § 25-520.01, notwithstanding the fact that the notice in question was mailed on Monday, March 17, 1980, rather than on Saturday, March 15, 1980, the latter date being normally the fifth day after the first publication of notice. It is clear that the trial court apparently felt that the mailing of the notice upon the following Monday, rather than on Saturday, was not a violation § 25-520.01, as Saturday and Sunday were nonjudicial days and the filing of the notice on the following Monday was appropriate. We agree. See, Neb. Rev. Stat. § 25-2221 (Reissue 1979); *Ruan Transport Corp. v. Peake, Inc.*, 163 Neb. 319, 79 N.W.2d 575 (1956).

We now discuss appellants' contention and assignment that the District Court erred in determining that the highest bid at the sale was adequate and in determining that a resale would not bring a substantially greater price. This involves two alleged "upset" bids, one made on the morning the hearing on the motion for confirmation was heard; the second allegedly made after the confirmation by the trial court and pending the present appeal of the matter to this court. With reference to the first alleged upset bid, attorney Lynn McHugh, the referee appointed by the court, after testifying that he held the sale in the matter on April 17th at 2 p.m., that the sale was regularly held under the terms and conditions of the published notice, and that he felt the sale was fairly conducted and that the property was sold for a reasonable and adequate price, to wit, $181,440 to the purchaser Kenneth Lauritzen,

was asked about the upset bid as follows: "Q— Have you been informed this morning that an offer in writing has been made to the owners of the property for a sum $8,100.00 higher in gross for the purchase of this real estate? . . . A— Yes." Attorney Ronald Svoboda also testified at the hearing on confirmation, and his testimony was as follows: "Q— Mr. Case asked you a few questions about whether or not you knew of an offer of purchase for this property that was submitted by a third party this morning and you indicated that you did know of this. Did you know anything of the terms of this bid, if you want to call it a bid? A— As I recall, the bid was for $50.00 per acre more than the high bid of $1,120.00 which Kenney Lauritzen has at 162 acres, that would be $8,100.00, I believe. Q— Do you know any other terms? A— There was a hundred dollar check deposited with Mr. Case, I believe, this morning with the balance to be paid upon confirmation. And his offer was to be good only for June 2nd of 1980." No other details of the upset were testified to, including the name of the bidder. As previously stated, the trial judge in his opinion noted that there were no pleadings or deposits to support the bid, nor was there any evidence that a new sale could start at the point of such upset bid, which was only open for that one day. Also, the court found that the increase was not a substantial amount. It is the general rule that confirmation of judicial sales rests largely within the discretion of the trial court, and will not be reviewed except for manifest abuse of such discretion. Inadequacy of price is not of itself sufficient to warrant a resale unless it appears that resale would probably produce a higher price. *Michelson v. Wagner*, 170 Neb. 28, 101 N.W.2d 498 (1960). An upset bid following a judicial sale and before a final confirmation should be considered only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all concerned and the stability of judicial sales permits its acceptance. *Glaser v. Weinberger*, 188 Neb.

205, 196 N.W.2d 113 (1972); *Hull v. Hull*, 183 Neb. 773, 164 N.W.2d 455 (1969). The trial court was well within its discretion in refusing to set aside the alleged upset bid made by an unknown party, and especially in the absence of any convincing evidence that a resale would result in a larger price. While it is true that the District Court strives to obtain the best price possible for the property it sells at public sale, it must also give consideration to the rights of the purchaser and the stability of judicial sales, particularly where the sale was free of fraud and an adequate price has been realized. This court's attitude toward upset bids is well expressed in the case of *Michelson v. Wagner, supra*, where we stated at 34, 101 N.W.2d at 502: "'If upset bids were permitted and accepted under any and all circumstances, the holding of judicial sales would become only a means of bidding on the property instead of an opportunity to purchase it. Bidders would naturally pass up the judicial sale and place their bids with the court immediately prior to the hearing on confirmation and thereby eliminate the risk of loss by depreciation in the value of the property pending confirmation. Such procedure seeks to deprive a purchaser at a judicial sale of the property if the bidder making the upset bid thinks the purchase an advantageous one and leaves it to the buyer if he thinks the purchase unwise. The effect of such a procedure would be to chill the bidding at judicial sales and would largely eliminate the purpose for which they are held.'"

The record reveals the sale was widely advertised, both by newspaper ads and the posting of sales bills, and there is evidence in the record that the sale was fairly conducted and the property sold for a reasonable and adequate price. The primary concern of the appellants appears to be that proper consideration was not given to the value of minerals in the land. However, the record clearly indicates that all the local quarry companies were given copies of the analysis of the core samples taken from the property in question and had

access to the core samples for inspection. Two of the mining companies in the area have mines that border the real estate, with the mine of American Cyanamid going right up to the property line. These local quarry companies had representatives at the sale, and the mineral values of the land were emphasized in the promotion and advertisement of the sale. At no time did Mrs. Askey ever make a bid or upset bid on the property. No evidence other than the upset bid referred to above, and the additional one subsequently discussed herein, together with speculation about possible gross revenue that mining might produce, was submitted to show inadequacy of price, or more particularly that a resale would produce a higher price.

Subsequent to the confirmation of the sale by the trial court and during the pendency of the appeal to this court, the appellants Askey and the appellee Stewart W. Kleeb filed a joint motion in this court for an order remanding the matter to the District Court of Cass County, Nebraska, with an order for a new public sale with the opening bid to be $217,728, alleging that an "upset" bid had been made in a total amount of $217,728 by NEBCO, Inc., in an amount 20 percent greater than the original bid made by appellee Lauritzen in the amount of $181,440. They also allege an earnest money deposit of 15 percent has been made by the bidder to the referee. They allege that the upset bid was made on November 10, 1980, and their joint motion was filed in this court on November 20, 1980. Their contention is that this latest upset bid is being made prior to confirmation of the sale, because of the fact that the matter is still on appeal to this court and there is the possibility of reversal by this court. We note that the alleged upset bid referred to is not made a part of the bill of exceptions, nor could it have been, since such alleged upset bid was not in existence until over 5 months after the District Court tried and decided the matter of the confirmation of the sale. This being an action in partition, it is clearly a suit in equity and triable de novo on the record

in this court. *Cofer v. Perkins*, 199 Neb. 327, 258 N.W.2d 807 (1977). Under § 25-1925 a bill of exceptions is the only vehicle for bringing evidence before this court, and evidence which does not appear in such record cannot be considered by this court on appeal. See, also, *Moninger v. Moninger*, 202 Neb. 494, 276 N.W.2d 100 (1979); *Hanson v. Hanson*, 198 Neb. 675, 254 N.W.2d 699 (1977). To hold otherwise would permit evidence to be submitted for consideration without the witness for such evidence being cross-examined as to its truth, completeness, and foundation, and without the introduction of clarifying or opposing evidence. Upset bids to set aside public sales of property in this situation must end somewhere, and we decline to further protract this litigation by remanding the matter to the District Court for further action by way of a new public sale, and we overrule the joint motion of the parties for that purpose.

The order of the District Court confirming the sale to appellee Lauritzen and ordering the referee to convey the premises to him must be, and hereby is, affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

CITY OF LINCOLN, APPELLEE, V. BUD MOORE, INC., APPELLANT.

316 N.W.2d 590

Filed February 26, 1982. No. 43663.

1. **Rules of Evidence: Witnesses: Billings.** The supervisor of all billing records is an appropriate witness with regard to such billing records, assuming such witness complies with the requirements of Neb. Rev. Stat. § 27-803(5) (Reissue 1979).
2. **Sales: Billings: Proof.** In order for the party submitting an erroneous bill for material delivered to recover on the basis of a corrected billing, the party must show that reasonable care to avoid the mistake was exercised and that the billed party was not damaged by the mistake.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Floyd A. Sterns and W. Travis Burney for appellant.

Fredda J. Bisman of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon for appellee.

Heard before MCCOWN and HASTINGS, JJ., and KORTUM and GRANT, District Judges, and RONIN, Retired District Judge.

GRANT, District Judge.

Defendant occupied certain premises in Lincoln, Nebraska, beginning in January 1977. Defendant remodeled those premises, changing the use of the premises from the furnishing of "petroleum and service" to "gasoline and convenience sales." Refrigeration units using electricity were installed. No such units had been used on the premises before. The remodeling was completed about March 15, 1977.

The existing meter on the premises was a four-digit meter, capable of recording consumption of electricity up to 9,999 kilowatt hours (KWH). Billings began on January 13, at which time the meter read "1796." On February 11, the meter read "9080." Simple mathematics produce a usage of 7284 KWH (9080 - 1796) in that period. The bill for such usage was approximately $256.

On March 14 the reading was "6258." Again using simple mathematics, and using the knowledge that the meter "turned over" after registering 9,999 KWH, the usage calculated was 7178 KWH (10,000 - 9080 = 920; 920 + 6258 = 7178), and the bill was about $252.

On April 13, after the remodeling was completed and the new electrical refrigeration had been in use for about 1 month, the meter reading was 6740 KWH. Plaintiff's computer then calculated a usage of 482 KWH (6740 - 6258), resulting in a bill of about $25. Similar calculations were made by the computer for

the next 8 months, resulting in billings ranging from $25 to $137.18.

An employee of plaintiff had gone to defendant's premises each month from February to November and had recorded the reading of the meter. Monthly bills were rendered to defendant, on the basis set out above, and promptly paid by defendant.

In November of 1977 plaintiff's meter reader notified his supervisor that there could be a problem with the billings at defendant's premises, because there was a "reasonably good-sized business" there and the electrical consumption was only 600 to 800 KWH per month.

Plaintiff's employees then checked the meter and found it to be functioning properly and that it had not been tampered with in any way. Further check was made by "accessing the billing system in the computer," and the discrepancy between the February and March bills of about $250 each and the April billing of $25 was noted. A five-digit meter was installed, and the usage in the next succeeding month from December 14, 1977, to January 13, 1978, was indicated as being 12,430 KWH.

Plaintiff's employees then made the deduction that defendant had been underbilled by 10,000 KWH during each month from February through December. A corrected billing, based on this assumption and the simple mathematics flowing from it, was prepared and defendant was billed for an additional $3,053.07. Defendant refused to pay the additional amount, and this extended litigation (99 pages of transcript) followed.

After trial in the municipal court of Lincoln, the following order was made: "On consideration of the pleadings, the evidence adduced at trial, the briefs of counsel, the Court finds: 1) That the foundation for the admission of plaintiff's exhibits was proper, said exhibits being business records prepared in the course of a regularly conducted business under the witness's

supervision. 2) Plaintiff proved a prima facie case of mistake made bona fide for services delivered to and used by defendant, and the reasonableness of the charges based on rates in effect at the time. No evidence was adduced by defendant. The burden of evidence shifted to the adverse party and was not forthcoming. Evidence as to calculations of the usage, testified to by witness of plaintiff, was based on computations, records and machine use which were reasonable and persuasive. 3) Nebraska law clearly permits recovery for furnishing goods and services delivered where a mistake is inadvertent and unilateral. See Valvoline Oil Company v. Duda-Meyers Company, 130 Neb. 190 (1936). See also Baldridge v. Flothow, 123 Neb. 218 (1932). Judgment for plaintiff against defendant in the amount of $3,053.07 plus costs. Thomas J. McManus, Judge."

The District Court, hearing the appeal de novo on the record, reached the same conclusion and affirmed the judgment of the municipal court.

On its appeal to this court, defendant alleges that the plaintiff's exhibits were based on hearsay and were not admissible as exceptions to the hearsay rule set out in Neb. Rev. Stat. § 27-803(5) (Reissue 1979); that the opinion of plaintiff's witness is inadmissible unless the underlying data is reliable (Neb. Rev. Stat. § 27-701 (Reissue 1979)); and that, in any event, where plaintiff has made a unilateral mistake, plaintiff must prove that the mistake occurred notwithstanding the exercise of reasonable care by plaintiff. Each of these contentions was expressly determined in favor of plaintiff by the municipal court and the District Court, each court citing the authority cited herein. We find no fault in the clear order of the municipal court and in the order of the District Court affirming that judgment. We affirm.

First of all, plaintiff has clearly adduced testimony within the purview of § 27-803(5). Plaintiff's witness was the supervisor of all billing for consumer account-

ing. As such supervisor, he is the custodian or a qualified witness with regard to billing records. He had access to such billings on the business records of plaintiff; prepared a data compilation near in time to the events and conditions of the billings; and prepared such data in the course of his regularly conducted activities as an employee of plaintiff. The resulting opinion of such qualified witness, assuming he is determined to be a lay witness, is clearly admissible within the ambit of § 27-701, because his conclusion is "rationally based on the perception of the witness" and is "helpful to a clear understanding of his testimony" and to a "determination of a fact in issue." Plaintiff's witness, the supervisor, clearly explained the mathematical conclusions as to the underbillings and clearly explained the factual basis of his opinion as to the fact of the underbillings.

Once that fact was presented to the trier of fact, the defendant had the opportunity to rebut it. Defendant chose not to do so, relying on its conclusion that the evidence was inadmissible. The evidence was admissible and, if believed by the trier of fact, clearly supports the judgment appealed from.

Defendant's remaining assignment of error is that: "In a case where a party claims a mistake in electrical billing arising from a faulty meter, the party claiming under the mistake must show that it exercised reasonable care to avoid such mistake and where such party's employees visited and viewed, indeed, read the faulty meter once a month for an entire year, such conduct as a matter of law is not the exercise of reasonable care."

Defendant misses the point in this case. The meter was not faulty; it recorded accurately within its limits, but the calculations made by plaintiff's computer were faulty in that those calculations did not consider that the meter had turned over and thus the calculations missed a usage of 10,000 KWH each month. Plaintiff clearly established this fact, albeit by circumstantial evidence, and defendant chose not to attempt in any

manner to rebut such fact.

As stated in both the municipal court and the District Court, the instant case is controlled by the holding in *Valvoline Oil Co. v. Duda-Myers Co.*, 130 Neb. 190, 264 N.W. 464 (1936). Plaintiff clearly established a prima facie case that it furnished a precise amount of electricity to defendant; that it made a mistake in calculating the dollar amount due from defendant for such electricity; that such mistake was made innocently and inadvertently; and that the mistake caused plaintiff financial injury and resulted in profit to defendant. Defendant offered no evidence to rebut that prima facie case. The factual determination is inescapable that defendant received the use of a great deal of electricity for which it did not pay.

The judgment in favor of plaintiff and against defendant is correct and is affirmed.

AFFIRMED.

DAVIS-MOORE INDUSTRIAL PARK, APPELLEE, CITY OF OMAHA, INTERVENOR-APPELLEE, V. MISSOURI PACIFIC RAILROAD COMPANY, APPELLANT.

316 N.W.2d 593

Filed February 26, 1982. No. 43679.

1. **Public Service Commission: Railroads: Jurisdiction.** The Nebraska Public Service Commission has jurisdiction over all crossings of highways outside of incorporated villages, towns, and cities, both public and private, across, over, or under all railroads in Nebraska. It has no jurisdiction over crossings of railroads within incorporated villages, towns, and cities, except to provide regulations for the safety and convenience of the public.
2. **Public Service Commission: Railroads.** The Nebraska Public Service Commission has no authority to order a railroad company to construct a crossing over its railroad at a point within the limits of a city or village where no street has been opened.
3. **Public Service Commission.** The judicial powers lodged in the Nebraska Public Service Commission are only such as are remedial of its regulatory powers.

4. **Public Service Commission: Real Estate: Easements: Jurisdiction.** Title to real estate, including the determination of the existence of easements and the condemnation of lands for easement purposes, and questions of law arising out of contract are judicial matters within the jurisdiction of the courts of this state and not within the jurisdiction of the Nebraska Public Service Commission.

Appeal from the Nebraska Public Service Commission. Reversed and dismissed.

R. A. Skochdopole and Robert F. Craig of Kennedy, Holland, DeLacy & Svoboda for appellant.

Victor J. Lich, Jr., Gerald P. Herold, and Emmett D. Childers of Lich, Herold & Mackiewicz for appellee Davis-Moore.

Herbert M. Fitle, Omaha City Attorney, and Robert J. Hamer for appellee City.

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

MCCOWN, J.

Davis-Moore Industrial Park filed a complaint with the Nebraska Public Service Commission requesting that the defendant, Missouri Pacific Railroad Company, be directed to construct a temporary and permanent crossing at a specific location on the defendant's railroad track within the City of Omaha. The City of Omaha intervened in support of the complaint. The commission sustained the complaint and ordered the railroad to construct a vehicular crossing and furnish and install grade crossing protection. The railroad has appealed.

The complainant is the owner and developer of an industrial park subdivision which is located east of the railroad right-of-way and south of L Street near its intersection with 67th Street in the City of Omaha. L Street runs east and west and 67th Street runs north and south but does not extend south of L Street. There is a frontage road south of and parallel to L Street which extends west from the railroad right-of-way.

The railroad right-of-way is 100 feet wide and the railroad track in the center of the right-of-way runs generally in a northeast-southwest direction and crosses L Street at an angle near the east edge of the 67th and L Streets intersection.

On August 21, 1962, the railroad granted the State of Nebraska an easement to permit the construction of a frontage road extending west from the railroad and connecting to L Street on the west portion of the railroad right-of-way. The easement area was located almost entirely on the west half of the railroad right-of-way, but a small triangular strip approximately 15 feet wide at the base was located immediately east of the railroad track.

The easement area and the road to the west was completed and paved in 1964 or 1965. In accordance with the 1962 easement contract with the State of Nebraska, the railroad installed a crossing at the location in September 1964. Since the frontage road to the west of the track was completed, it has been used by the public. The railroad removed the crossing about 1970, apparently without the consent of the State of Nebraska or the City of Omaha.

In 1979 the complainant paved a street along the northerly edge of its property to the east of the railroad right-of-way paralleling L Street, and extended and paved the road across the easterly portion of the railroad right-of-way to meet the road previously built by the State of Nebraska to the west of the railroad. The complainant built the road without permission of the railroad but obtained approval of the plans and building permits for the road from the City of Omaha and the State of Nebraska.

There is no evidence that any railroad right-of-way east of the 1962 easement was ever dedicated as a public street or acquired by eminent domain proceedings. Neither is there any evidence that the railroad granted any easement over that portion of its right-of-way.

The complainant and defendant attempted to reach an agreement for the railroad to construct a crossing at the location but were unable to agree, and complainant filed its complaint with the commission on February 1, 1980.

On April 23, 1980, following hearing, the Public Service Commission found that it had jurisdiction and that the defendant had a duty to construct and maintain the crossing. The commission therefore ordered the railroad to construct a temporary or permanent crossing as soon as possible and to furnish and install specified grade crossing protection. The railroad has appealed.

The railroad contends that the Public Service Commission had no jurisdiction to enter its order in this case. The argument is that the commission had no jurisdiction to order railroad crossings to be established within the limits of an incorporated city, has no jurisdiction to order a crossing unless the railroad right-of-way is crossed by a public road legally established and acquired, and that the commission has no jurisdiction to determine questions pertaining to real estate or questions of law arising out of contract.

The complainant asserts that under the Constitution and statutes of this state the commission has general jurisdiction and control over the service, facilities, and equipment of all railroad carriers, and has jurisdiction over crossings under two specific statutes.

Neb. Rev. Stat. § 75-410 (Reissue 1976) provides: "The commission shall have jurisdiction over all crossings outside of incorporated villages, towns, and cities, both public and private, across, over or under all railroads in the state, except as provided in sections 75-416 to 75-418, and shall make such rules and regulations for the construction, repair, and maintenance thereof as the commission shall deem adequate and sufficient for the protection and necessity of the public, except as to automatic grade crossing protection devices. The provisions of sections 75-410 to 75-418

should not be construed as a limitation on the powers of the commission which have been heretofore granted, but as supplemental and additional thereto. The powers herein granted shall not be construed as extending to the projection of a new public highway crossing or to the abandonment of any existing public crossing."

Neb. Rev. Stat. § 75-414 (Reissue 1976) provides: "Whenever complaint is filed in writing with the commission by the duly authorized officers of any incorporated village or city, relative to any crossing or crossings within such village or city, praying for relief from the matters complained of, the commission shall hold a hearing in the manner provided by section 75-132 and shall make such order as the facts warrant. The findings of the commission, subject to the right of appeal, shall be binding on the parties to the suit."

It is the complainant's position that a public road is deemed to cross a railroad right-of-way when the dedicated roadway intersects or meets both sides of the railroad right-of-way. Complainant also contends that the public may take possession and use the right-of-way of a railroad for road purposes without an easement and without exercising the power of eminent domain. We disagree.

The case of *Village of Louisville v. Chicago, B. & Q. R.R. Co.*, 177 Neb. 491, 129 N.W.2d 454 (1964), is dispositive of the issues involved here. In that case the commission had ordered the railroad to reopen a crossing in the village of Louisville upon a complaint by the village that it had obtained a prescriptive right to a crossing which the railroad was required to keep open. It should be noted here that there has been no material change in the two statutes dealing with crossings which are involved here, except for the numbering. In the *Louisville* case this court held that under Neb. Rev. Stat. § 75-219 (Cum. Supp. 1961) (now Neb. Rev. Stat. § 75-410 (Reissue 1976)) the

Nebraska State Railway Commission (now Public Service Commission) has jurisdiction over all crossings of highways outside of incorporated villages, towns, and cities, both public and private, across, over, or under all railroads in Nebraska. It has no jurisdiction over crossings of railroads within incorporated villages, towns, and cities, except to provide regulations for the safety and convenience of the public.

In reaching its decision in the *Louisville* case this court cited with approval previous cases holding that the commission had no authority to order a railway company to construct a crossing over its railway at a point within the limits of a village where no street has been opened. See, *Chicago, R. I. & P. R. Co. v. Nebraska State Railway Commission*, 88 Neb. 239, 129 N.W. 439 (1911); *State ex rel. Jensen v. Omaha & S. I. R. Co.*, 103 Neb. 40, 170 N.W. 496 (1918).

In the *Louisville* case this court specifically held that the judicial powers lodged in the commission are only such as are remedial of its regulatory powers, and that the hearing and determination as to whether or not an easement by prescription exists across the right-of-way of a railroad company is not regulatory and not within the jurisdiction of the Nebraska Public Service Commission. This court said: "Title to real estate, including the determination of the existence of easements, and the condemnation of land for easement purposes are judicial matters within the jurisdiction of the courts of this state. We find no authority in the statutes for the commission to hear and determine such questions." *Id.* at 494, 129 N.W.2d at 456.

In the case at bar the complainant asserts that the public has a purported easement right to use any or all of the railroad right-of-way for road purposes without constitutionally required just compensation, and also rests its claim on a contract between the railroad and the State of Nebraska. The determination of both issues is clearly a judicial matter within the jurisdiction of the courts and not the commission.

We paraphrase the language of this court in *Louisville.* The mere fact that a purported, but disputed, easement crosses the right-of-way and tracks of the railroad company does not have the effect of lodging jurisdiction in the Nebraska Public Service Commission. The rights of the complainant or of the intervening City in having such issues determined are no different than those of any other person or entity. We find no reason to depart from the holdings announced in *Louisville.*

The order of the commission is reversed and the complaint is dismissed for want of jurisdiction in the commission.

REVERSED AND DISMISSED.

WHITE, J., concurs in the result.

HOLLY BERQUIST ET AL., APPELLEES, V.
DR. ANNE CAMPBELL, COMMISSIONER, ET AL., APPELLEES,
SHIRLEY BRUCKNER ET AL., INTERVENORS-APPELLANTS.

316 N.W.2d 596

Filed February 26, 1982. No. 43744.

1. **Administrative Law: Statutes: Appeal and Error.** The right of appeal in this state is clearly statutory and unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist.
2. **Administrative Law: Schools and School Districts: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 79-1283 (Reissue 1976), there exists no right of appeal to the State Board of Education from an order of the Nebraska Professional Practices Commission dismissing a complaint against a member of the teaching profession for violation of the professional practices criteria promulgated under the provisions of Neb. Rev. Stat. § 79-1282 (Reissue 1976).

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Richard J. Bruckner for appellants.

Mark D. McGuire of Crosby, Guenzel, Davis, Kessner & Kuester for appellee Berquist.

Clayton H. Shrout for appellee Christiansen.

Verne Moore, Jr., of McGill, Koley, Parsonage & Lamphier for appellee Mussman.

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

CLINTON, J.

This is an appeal by the intervenors, Bruckner et al. (Bruckner), from a declaratory judgment entered by the District Court for Lancaster County. The judgment determined Bruckner had no right under the provisions of Neb. Rev. Stat. § 79-1283 (Reissue 1976) of appeal to the State Board of Education (board) from an order of the Nebraska Professional Practices Commission (commission) dismissing complaints against the plaintiffs for violation of the ethical professional practices criteria promulgated by the commission under the provisions of Neb. Rev. Stat. § 79-1282 (Reissue 1976).

Neb. Rev. Stat. §§ 79-1281 and 79-1281.01 (Reissue 1976) provide for the creation of the commission. Section 79-1282 provides that the board, with the counsel of the commission, "shall develop, through the teaching profession, criteria of professional practices in areas including but not limited to: (1) Ethical and professional performance, (2) competency, (3) continuance in professional service, and (4) contractual obligations."

Section 79-1283 is as follows: "The State Board of Education shall request the commission or a special committee of members thereof to make investigations, hold hearings and make recommendations to the State Board of Education concerning alleged violations of standards of professional ethics and practices. The commission recommendations shall be made a part of the record of the State Board of Education in all cases of certificate revocation or suspension and reinstate-

ment of a revoked or suspended certificate. The commission may privately admonish, warn and reprimand members of the teaching profession for violation of the standards established pursuant to section 79-1282."

The intervenors Bruckner, whose status is not otherwise described in the record, made complaints to the board against the plaintiffs, Berquist, Christiansen, and Mussman, who are, respectively, a teacher, school principal, and superintendent of schools of district No. 46, Sarpy County, for violation of the ethical criteria. The board, pursuant to the provisions of § 79-1283, requested the commission to make an investigation and hold hearings on the complaints. At the conclusion of the hearing the commission ordered the complaints dismissed for the reason the evidence did not make a prima facie case. Bruckner then filed a notice of appeal and a request for hearing with the board, seeking a review or new hearing before that body.

The plaintiffs then filed this declaratory judgment action against Dr. Anne Campbell, the Commissioner of Education of the State of Nebraska, and the State Board of Education, requesting that the court determine the board had no jurisdiction to hear appeals from an order of dismissal by the commission. The plaintiffs further asked that the board be enjoined from hearing the matter upon the appeal or rehearing the matter as requested by Bruckner. Pursuant to stipulation, a temporary restraining order was entered in this action enjoining the board from acting on Bruckner's "appeal." Thereafter, trial was held, and the court determined Bruckner had no right of appeal to the board. In addition, however, the District Court went on to conclude that Bruckner would have had a right of review under Neb. Rev. Stat. § 84-917 (Reissue 1976) before the appropriate District Court, had timely action been taken. No injunctive relief was granted because the plaintiffs waived that form of relief. Bruckner then filed this appeal. We affirm.

Bruckner makes various assignments of error. However, the only question we need decide is whether, under the provisions of § 79-1283, there may be an appeal from an order of the commission dismissing a complaint.

Neb. Rev. Stat. § 79-1284 (Reissue 1976) authorizes the commission to "adopt rules and regulations for the performance of its functions." The commission has adopted the following rule: "1-(8)(c) THE DECISION "(i) The Commission shall render a decision on the basis of a majority vote of its members, same being seven members thereof, and said decision shall constitute the official position of the Nebraska Professional Practices Commission.

"(ii) The ruling of the Commission may be one of the following:

"1. That no action against the Respondent is warranted.

"2. The Respondent should be privately warned and reprimanded by the Commission.

"3. That a recommendation be made to the State Board of Education that the certificate of the Respondent be suspended or revoked.

"4. Any other ruling within the Commission's statutory authority."

Section 79-1283 has never been construed by this court, and neither Bruckner nor the plaintiffs have cited any authority from any other jurisdiction construing a similar statute. We must, therefore, determine the question by examining the statute in the light of the following principle: "The right of appeal in this state is clearly statutory and unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist." *Gretna Public School v. State Board of Education*, 201 Neb. 769, 772, 272 N.W.2d 268, 269 (1978).

Section 79-1283, after providing the board may request the commission to make investigations, hold hearings, and make recommendations in response to

alleged violations of the standards of professional ethics and practices, then makes a special provision with reference to recommendations. In effect, it provides that recommendations become part of the record of the board only in case of revocation or suspension of a certificate, or reinstatement of a revoked or suspended certificate. (Only the board, not the commission, may revoke certificates. Neb. Rev. Stat. § 79-1234 (Reissue 1976).) Section 79-1283 then authorizes the commission to privately admonish, warn, and reprimand the teaching profession for violation of the standards. The statute makes no provision for any appeal from an order of reprimand or admonition to any court. Under rule 1-(8)(c), earlier quoted, the commission has four alternatives, one being a recommendation to the board that the certificate be suspended or revoked. Another alternative is a finding that no action is warranted, and another: "Any other ruling within the Commission's statutory authority."

The statutes do not seem to contemplate that the board act in any case other than license revocation or suspension. In such cases the issue does not reach the board by way of appeal from the commission but, rather, upon its recommendation after the matter has been referred to the commission.

Bruckner argues that the commission had no right to dismiss the complaint because no such power is given by statute. It must be admitted that the statute is somewhat vague, but it clearly seems to contemplate that when the commission reprimands or admonishes, the complaint is at an end as far as the board is concerned. The record indicates the board has interpreted and applied the statute in this manner. However, we note in this case the board notified Bruckner after he filed the notice of appeal and request for hearing before the board that it would hear the complaint, and did set a date for such hearing.

Because the statute gives the commission power to admonish and reprimand without action before the

board, we hold that under the provisions of § 79-1283 it also has the power to take the lesser action of dismissal of the complaint. We further hold that there is no authority for any person to appeal to the board from such order of dismissal.

We affirm the holding of the District Court in the foregoing respects.

We have noted that the District Court found Bruckner had a right of review of the commission dismissal in the appropriate District Court. This finding went beyond any issue made by the pleadings. It is dicta. We do not approve or affirm that portion of the court's judgment. That specific issue would be determined in an appropriate proceeding not before us here. We have grave doubt that Bruckner is an aggrieved party within the meaning of § 84-917. Nothing in the record or in Bruckner's pleadings shows or alleges specifically any legal right, duty, or privilege of Bruckner's which was "required by law or constitutional right to be determined after an agency hearing." Neb. Rev. Stat. § 84-901 (Reissue 1976).

AFFIRMED.

KRIVOSHA, C.J., MCCOWN, and WHITE, JJ., concur in the result.

JACK DEAN BOND, J.B. ENTERPRISES, DOING BUSINESS AS SHORT STOP, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

316 N.W.2d 600

Filed February 26, 1982. No. 43784.

1. **Administrative Agencies: Liquor Licenses.** 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.
2. **Liquor Licenses.** Absence of need alone is not a sufficient reason to deny an otherwise proper application for a liquor license.

Appeal from the District Court for Lincoln County:

HUGH STUART, Judge. Reversed and remanded with directions.

Kelley, Wallace, Scritsmier, Moore, Romatzke & Byrne, P.C., for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

KRIVOSHA, C.J.

This is an appeal from a judgment entered by the District Court for Lincoln County, Nebraska, affirming an order entered by the Nebraska Liquor Control Commission (Commission) which had denied the appellant, Jack Dean Bond (Bond), a permit to sell beer at retail off-sale at Bond's convenience store in North Platte, and known as the Short Stop. We believe that the record will not support the action of either the Commission or the District Court, and accordingly we reverse and remand with directions.

This case does not present any new or unique issues of law, and our decisions in both *Hadlock v. Nebraska Liquor Control Commission*, 193 Neb. 721, 228 N.W.2d 887 (1975), and *Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission*, 203 Neb. 176, 277 N.W.2d 693 (1979), effectively dispose of the issues raised.

Bond has owned and operated the Short Stop, a convenience store in North Platte, Nebraska, since March 1, 1979. His store carries a limited line of groceries, drugs, and beauty care aids. In addition, he sells oil, gasoline, and some automotive accessories from 7 a.m. until 11 p.m., 7 days a week.

On or about October 16, 1979, Bond applied to the Nebraska Liquor Control Commission for a retail, off-sale only, beer license. Notice was given the city of North Platte, as required by Neb. Rev. Stat. § 53-131 (Reissue 1978), and a hearing was held before the city

council on November 6, 1979. The purpose of the hearing was to permit the council to make recommendation to the Commission, pursuant to the provisions of Neb. Rev. Stat. § 53-134 (Reissue 1978). At the time of the hearing on November 6, 1979, the North Platte city council consisted of eight elected members. Only five of the eight members, however, were present at the meeting. The significance of this will be discussed later. One member of the council moved that the council approve the license in question. That motion died for lack of a second. It was then moved that the council deny approval of the application. That motion passed on a vote of four in favor and one against. The recommendation of the city council denying the license was forwarded to the Commission, as required by statute.

On February 27, 1980, a hearing was held before the Commission, at which time the parties stipulated that Bond had met all of the qualifications required for the granting of the retail license except for the fact that (1) the local governing body recommended denial; (2) the applicant had not shown a need within the community for the license pursuant to rule 2 of the rules of the Nebraska Liquor Control Commission; and (3) if Bond intended to dispense gasoline on the premises, he would be in violation of rule 13 of the rules of the Nebraska Liquor Control Commission which prohibited the sale of beer on premises selling gasoline except where the applicant could show "exceptional need beyond general convenience or service to the public" for the license. Following the hearing the Commission denied the application for the license and gave the following reasons: (1) That the local governing board recommended denial of the application; (2) That the applicant dispenses gasoline at this location; (3) That the applicant has failed to demonstrate an extraordinary need sufficient to satisfy the requirements of rule 13; and (4) That for each of the reasons set forth above, separately and collectively, the application should be denied.

On appeal to the District Court, the action of the Commission was affirmed.

We will address each of the issues in the order in which they were addressed by the Commission.

We begin our analysis by first setting out the standard of review in this court with regard to the actions of the Commission. "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. As in the case of other administrative bodies, the Nebraska Liquor Control Commission, after an administrative hearing, must base its findings and orders on a factual foundation in the record of the proceedings, and the record must show some valid basis on which a finding and order may be premised. Where the record of the proceedings contains no evidence to justify an order, the action must be held to be unreasonable and arbitrary." *Hadlock v. Nebraska Liquor Control Commission*, 193 Neb. 721, 727, 228 N.W.2d 887, 891 (1975). See, also, *Brannen v. Nebraska Liquor Control Commission*, 206 Neb. 662, 294 N.W.2d 376 (1980); *Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission*, 203 Neb. 176, 277 N.W.2d 693 (1979); *J K & J, Inc. v. Nebraska Liquor Control Commission*, 194 Neb. 413, 231 N.W.2d 694 (1975).

Turning then to the issue regarding the recommendation of denial by the city council, we find that the record clearly establishes that the action of the North Platte city council in recommending denial was, for all purposes, a legal nullity and therefore not a denial. Ordinance No. 1-402 of the city council of North Platte requires the attendance of two-thirds of all elected council members to constitute a quorum for the transaction of business. Because the council consists of eight, a quorum is not present unless there are at least six members of the council. As we have already noted, in this case there were only five members present and

therefore a quorum was not present when the council sought to act. A similar situation was presented to us in the *Hadlock* case where the city council of the city of Kearney was involved. There the council was made up of five members. The ordinance then in effect required that a majority of all members elected vote in favor of a matter in order for it to pass. On a rollcall vote, two council members voted yes, one voted no, one did not vote, and one was absent. We found that the action of the council was ineffective, saying in *Hadlock, supra* at 728, 228 N.W.2d at 891-92: "Here the Nebraska Liquor Control Commission found that the local governing body had recommended denial of the application, and it based its own decision on that assumed fact. If true, that fact would have constituted valid grounds for denial of the application. However, there is no evidence to support that finding, nor is there any other evidence in the record which could have constituted valid grounds for denial. To the contrary, the evidence established that the purported recommendation of denial of the city counsel [sic] was wholly ineffective to constitute official action by the city. At best it could only be treated as a failure to act. Under such circumstances, the order of denial was arbitrary and unreasonable." Because a quorum was not present, the action of the city council of North Platte was ineffective and should have been disregarded by the Commission. The Commission's finding regarding the action of the city council is not supported by the record.

Turning now to the Commission's finding that Bond had not demonstrated need as required by rule 2, we need only look at our holding in *Joe and Al's IGA, Inc., supra,* where a similar argument was made and a similar finding made by the Commission. In rejecting the Commission's claim that need was a valid criteria, we said at 182-83, 277 N.W.2d at 697: "Nowhere in the statutes relating to the liquor laws is there any such requirement. . . . Absence of need alone is not a sufficient reason to deny an otherwise proper application

for a liquor license." The Commission's second finding must therefore be disregarded.

This then brings us to the final basis upon which the license was denied. Rule 13 provides that if gasoline and liquor are to be sold on the same premises, a showing of "exceptional need beyond general convenience or service to the public" must be made. It seems to follow, as the day follows the night, that if rule 2 is not valid because nowhere in the statutes is there any requirement to show ordinary need, then likewise nowhere in the statutes is there any requirement to show "exceptional need." An administrative agency is limited in its rule-making authority to the powers granted to the agency by the statutes which they are to administer. See *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960).

When the bases upon which the Commission acted in denying the application are examined and rejected, as the law requires them to be, we are left only with the stipulation of the parties that the applicant has met all of the requirements for obtaining a license. On that basis, then, there can be no other conclusion but that the action of the Commission in refusing the license was arbitrary and capricious and must be reversed.

The action of the Nebraska Liquor Control Commission in denying the license and the action of the District Court affirming its denial are reversed and remanded with directions to issue the license in accordance with applicable laws.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD STUDLEY, APPELLANT, V. SCHOOL DISTRICT NO. 38 OF HALL COUNTY, NEBRASKA, AND SCHOOL DISTRICT NO. 82 OF HALL COUNTY, NEBRASKA, POLITICAL SUBDIVISIONS OF THE STATE OF NEBRASKA, APPELLEES.

316 N.W.2d 603

Filed February 26, 1982. No. 43807.

1. **Political Subdivisions: Torts: Appeal and Error.** Under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 23-2406 (Reissue 1977), the findings of the District Court under the act will not be disturbed on appeal unless they are clearly wrong.
2. **Judgments: Evidence.** In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Ralph A. Bradley for appellant.

John R. Brownell of Lauritsen, Baker & Brownell for appellee School Dist. No. 38.

Luebs, Dowding, Beltzer, Leininger & Smith for appellee School Dist. No. 82.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and BROWER and EMPSON, District Judges.

BROWER, District Judge.

This is an action for damages brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977).

On March 12, 1978, while refereeing a basketball game in the School District No. 82 Hall County gymnasium, the plaintiff, Richard Studley, sustained personal injury. School District No. 38, Hall County, had arranged the contest and requested the plaintiff to officiate the game. The plaintiff alleges that he slipped and fell in an area within the gym where moisture had

accumulated on the floor surface from a leak in the ceiling and that the condition of the gym floor surface was the proximate cause of his injury. He further alleges the defendants had knowledge of the wet condition of the floor but failed to notify or apprise the plaintiff of such fact. The defendants denied plaintiff's claim and alleged that the plaintiff was guilty of contributory negligence and had assumed the risk, all of which was denied by the plaintiff.

The record reflects that at the conclusion of the plaintiff's case and at the close of all the testimony, defendants moved the court to dismiss the plaintiff's amended petition. Both motions were overruled by the trial court and judgment was subsequently entered. From the order overruling the motion for new trial, plaintiff brings this appeal. We affirm.

The appellant's contention is that the court erred in dismissing his amended petition and in finding that the appellant had failed to meet his burden of proof as to the issue of liability, and further erred in finding that neither of the appellees was negligent in any manner which would be the proximate cause of the injury and accident sustained by the appellant.

Actions brought under the Political Subdivisions Tort Claims Act are by statute tried to the court. § 23-2406. The findings of the District Court under the Political Subdivisions Tort Claims Act will not be disturbed on appeal unless clearly wrong. *Craig v. Gage County*, 190 Neb. 320, 208 N.W.2d 82 (1973); *Daniels v. Andersen*, 195 Neb. 95, 237 N.W.2d 397 (1975).

In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Daniels v. Andersen, supra; Rieschick Drilling Co. v. American Cas. Co.*, 208 Neb. 142, 303 N.W.2d 264 (1981).

It is apparent from the record in this case that the

appellant has confused the final decision of the trial court with an order ruling on a motion to dismiss. Once the motion to dismiss was overruled and the court took said matter under advisement, its final decision was equivalent to a jury verdict.

The rulings of the court on motions for directed verdict or motions to dismiss at the end of the evidence should not be confused with the decision of the court after the review of the evidence. In the former, the court directs or dismisses as a matter of law. In the latter, the findings are equivalent to a verdict of the jury and, unless clearly wrong, will not be overturned by the appellate court.

A review of the evidence raises factual questions and, when considered in the light most favorable to the appellees, would support the decision of the trial court, and the decision of the trial court is not clearly wrong.

The judgment of the District Court is affirmed.

AFFIRMED.

KENNETH ZNAMENACEK, SPECIAL ADMINISTRATOR OF THE ESTATE OF MARIE CLOUSE LONG, DECEASED, APPELLEE, V.
CLARA MENKE ET AL., APPELLANTS,
FRANCIS R. MENKE ET AL., INTERVENORS-APPELLEES.

316 N.W.2d 605

Filed February 26, 1982. No. 43814.

1. **Estates: Wills: Intent.** In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law. Neb. Rev. Stat. § 76-205 (Reissue 1976).
2. **Estates: Wills.** A future interest is vested when there is no condition precedent to its taking effect in possession other than the termination of prior estates.

3. ____: ____. The law favors the early vesting of estates, and in construing a will containing a devise of a life estate and a devise of the remainder, the inference of a vested remainder is stronger than the inference of a contingent remainder if the meaning is obscure in this respect.
4. ____: ____. Whenever it is possible, a future interest will be construed as vested, and hence alienable and devisable by the remainderman.
5. ____: ____. A remainder is vested if the remainderman, being alive, will take at once if the life tenant were to die. It is not the certainty of possession or enjoyment which distinguishes a vested remainder, but the certainty of the right of future possession or enjoyment if the remainderman who is ascertained lives until the determination of the preceding estate.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Bernard J. Ach for appellant Heers.

Jack L. Craven for appellant Clara Menke.

Hroch, Conner & Schelstraete for appellee Znamenacek.

Soucheck & Kimble for appellees Francis Menke et al.

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

WHITE, J.

This is an action filed in the District Court for Saline County, Nebraska, by the special administrator of the estate of Marie Clouse Long, deceased, for construction of the will of one Martin J. Clouse and for partition of real estate. The defendants-appellants are two devisees and legatees under the will of Martin J. Clouse and the intervenors-appellees are the heirs at law and the devisees and legatees under the will of four deceased aunts, Sena Menke, Sophia Byers, Lena Kahle, and Minnie Menke, who were named in the will of Martin J. Clouse. A recitation of the facts is necessary.

Martin J. Clouse died November 11, 1957, and left the bulk of his estate in trust to one Thomas J. Aron as trustee for the benefit of Marie Clouse Long for life. The

will of Martin J. Clouse contains the following provision: "F. Upon the death of my sister, Marie Clouse Long, this trust shall terminate and the real estate and personal property devised and bequeathed under this my Last Will and Testament, the Second paragraph thereof, to said Trustee, or the remainder thereof, and any unexpended income on hand at the time of the death of my sister, Marie Clouse Long, or the remainder of any real property or personal property, I give, bequeath and devise to my aunts, Sena Menke, Sophia Byers, Lena Kahle, Charlotte Heers, Clara Menke and Minnie Menke, share and share alike, to be theirs absolutely."

At the death of Martin J. Clouse, all six of the aunts named in paragraph F were alive. Marie Clouse Long, the life beneficiary of the trust, died on April 29, 1979, with Sena Menke, Sophia Byers, Lena Kahle, and Minnie Menke having predeceased her. The trial court found that the remainder described in paragraph F of the last will and testament was a vested remainder and that the shares of the four devisees and legatees named in paragraph F who had predeceased the life tenant did not lapse but descended to their devisees and legatees or their heirs at law. The appellants, Clara Menke and Charlotte Heers, the only devisees and legatees of Martin J. Clouse who were living at the date of the life tenant's death, appeal. We affirm.

"In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." Neb. Rev. Stat. § 76-205 (Reissue 1976).

In their assignments of error, appellants contend that the plaintiff special administrator was not a real party in interest since the interest of the life tenant, Marie Clouse Long, ceased as of the date of her death. We shall dispose of that assignment first before pro-

ceeding on to consider the meaning of paragraph F.

If the life estate was the only interest that Marie Clouse Long had, the special administrator would not be the appropriate party to bring this action. However, the record reflects that Marie Clouse Long acquired an interest in this real estate during her lifetime as devisee of two of the predeceased aunts, Sena Menke and Sophia Byers. We further note that Neb. Rev. Stat. § 30-2209(33) (Reissue 1979) provides that a personal representative in an estate proceeding includes a special administrator. Neb. Rev. Stat. § 30-2459 (Reissue 1979) provides that a special administrator has the power of a personal representative under the probate code, including the right to partition assets in estates being administered. Appellants' first assignment of error is without merit. The special administrator is a real party in interest and authorized by law to bring this action.

Paragraph F in the will does not contain any statement that the devise was conditioned on the survival of the remaindermen beyond the death of the life tenant. In general, a future interest is vested when there is no condition precedent to its taking effect in possession other than the termination of prior estates. Simes, Law of Future Interests, Ch. 17, § 90 (2d Ed. 1966). "The authorities and our cases agree that the intent of the testator is controlling." *Rudy v. Wagner*, 188 Neb. 508, 511, 198 N.W.2d 75, 77 (1972). "The law favors the early vesting of estates, and in construing a will containing a devise of a life estate and a devise of the remainder, the inference of a vested remainder is stronger than the inference of a contingent remainder if the meaning is obscure in this respect." *Rudy v. Wagner*, *supra* at 511, 198 N.W.2d at 77, citing *Davis v. Davis*, 107 Neb. 70, 185 N.W. 442 (1921).

"'Whenever it is possible the future interest will be construed as vested, and hence alienable and devisable by the remainderman. * * * A remainder is vested if the remainderman, being alive, will take at once if the

life tenant were to die.' . . . ' * * * the law does not favor the abeyance of estates but estates by way of remainder vest at the earliest period possible, unless the will shows a contrary intention.' . . . 'It is not the certainty of possession or enjoyment which distinguishes a vested remainder, but the certainty of the right of future possession or enjoyment if the remainderman who is ascertained lives until the determination of the preceding estate.'" *Goodrich v. Bonham*, 142 Neb. 489, 495-96, 6 N.W.2d 788, 791 (1942). Tested by these rules it is clear that the life estate is vested in Marie Clouse Long and the remainder estate vested in the six named aunts at the instant of the death of the testator.

In *Hanley v. Craven*, 200 Neb. 81, 93, 263 N.W.2d 79, 85 (1978), we said: "'"Where the devise is to the remainderman 'from and after' or 'after' or 'at' or 'on' the death of the life tenant, or words of similar import are employed, such expressions are construed as relating to the time of the enjoyment of the estate and not as to its vesting, and such remainder is a vested one. The uncertainty as to whether or not the remainderman will live to come into actual possession or enjoyment of the estate does not make the remainder contingent, for that is an uncertainty which attaches to all remainders."'"

It is appellants' point in this appeal that the provision of the will is ambiguous because it does not indicate whether the testator intended that the remaindermen should survive the life tenant.

It is clear from a reading of the will that it was the primary intention of the testator to provide for his sister during her lifetime and to leave the remainder of all personal and real property to his six aunts, naming each of them. There is nothing in the will itself which suggests that it was the intention of the testator that the interest of any of the six aunts was contingent upon their surviving Marie Clouse Long. Indeed, in view of the absence of any such intention or any language from which such an intent could be construed, this court will not imply a condition of survivorship.

The judgment and decision of the trial court determining that the remainder of the estate of Martin J. Clouse vested in the six named remaindermen as of the date of the testator's death is correct and is hereby affirmed. The real estate should be partitioned in accord therewith.

AFFIRMED.

MARK ABBOUD, APPELLANT, V.
STATE OF NEBRASKA EX REL.
STATE REAL ESTATE COMMISSION, APPELLEE.

316 N.W.2d 608

Filed February 26, 1982. No. 43861.

1. **Administrative Law: Evidence: Appeal and Error.** Upon an appeal from an order of the State Real Estate Commission the questions to be determined are whether the order is supported by substantial evidence, whether the commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable.
2. **Principal and Agent.** Generally, an agent is required to act solely for the benefit of his principal in all matters connected with the agency and adhere faithfully to the instructions of the principal.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

E. Terry Sibbernsen of Welsh, Sibbernsen & Bowen for appellant.

Robert H. Petersen, Special Assistant Attorney General, for appellee.

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

BOSLAUGH, J.

Mark Abboud appeals from the judgment of the District Court affirming the order of the State Real Estate Commission suspending his salesperson's license

for 6 months.

A complaint filed before the commission on October 11, 1979, alleged that the appellant had engaged in an unfair trade practice as defined by Neb. Rev. Stat. §§ 81-885.24(28) and 81-885.24(22) (Reissue 1976), which provide as follows:

"(28) Demonstrating unworthiness or incompetency to act as a broker, associate broker, or salesman, whether of the same or of a different character as hereinbefore specified."

"(22) Acting for more than one party in a transaction without the knowledge of all parties for whom he acts."

The complaint arose out of a transaction involving the sale of a bar in Arlington, Nebraska, owned by Ben Hurst. Hurst had listed the bar for sale with Real Estate Associates, Inc., for $29,950. The appellant and Van Brownson are agents and employees of Real Estate Associates. On March 23, 1979, Van Brownson, who was the listing agent, presented two purchase agreements to Hurst, one from Robert Ball for $27,500, and one from Robin Jo Abboud, a sister of the appellant, for $28,000. Hurst accepted the offer from Robin Jo Abboud but added several terms to the purchase agreement.

On the following day, Ball increased his offer to $29,950. The purchase agreement from Robin Jo Abboud had been delivered to the appellant but had not been delivered to the purchaser. Van Brownson reached the appellant by telephone and advised him that Hurst did not want to accept the offer of Robin Jo Abboud for the property and had revoked his acceptance of the agreement. The appellant, however, delivered the purchase agreement to Robin Jo Abboud who then placed it of record.

Hurst eventually completed the sale to Robin Jo Abboud, receiving $1,950 less for the property than if it had been sold to Ball.

Upon an appeal from an order of the State Real Estate Commission the questions to be determined are whether the order is supported by substantial evidence,

whether the commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. *Herink v. State ex rel. State Real Estate Commission*, 198 Neb. 241, 252 N.W.2d 172 (1977).

The appellant makes a number of arguments concerning the rights of the parties to the transaction and the legal effect of what happened. In this proceeding we are concerned only with the conduct of the appellant after he had been advised that Hurst did not want to accept the offer of Robin Jo Abboud and had revoked his acceptance of the purchase agreement.

Generally, an agent is required to act solely for the benefit of his principal in all matters connected with the agency and adhere faithfully to the instructions of the principal. *Allied Securities, Inc. v. Clocker*, 185 Neb. 524, 176 N.W.2d 914 (1970); *Winchell v. National Bank of Commerce Trust & Sav. Assn.*, 181 Neb. 870, 152 N.W.2d 2 (1967).

The appellant was the agent of Hurst and was required to act in accordance with the instructions of his principal. The salesperson was the agent of the seller only. *Wisnieski v. Harms*, 188 Neb. 721, 199 N.W.2d 405 (1972).

When the appellant delivered the purchase agreement to Robin Jo Abboud, after he had been advised that Hurst had revoked his acceptance of the purchase agreement, he violated his duty to his principal.

The order of the State Real Estate Commission was supported by substantial evidence; the order was within the scope of the authority of the commission; and the order was not arbitrary, capricious, or unreasonable.

The judgment of the District Court is affirmed.

AFFIRMED.

KEITH ARNOLD GOTTSCHALL, APPELLANT, V. LOUISE LYNN GOTTSCHALL, APPELLEE.

316 N.W.2d 610

Filed February 26, 1982. No. 43873.

1. **Divorce: Visitation.** The law contemplates visitation by the noncustodial parent within the state.
2. **Divorce: Child Custody.** It is the best policy to keep the children within the jurisdiction of this state unless the best interests of the children demand otherwise.
3. ——: ——. Whether the custodial parent should be allowed to remove the children to another state depends upon what is in the best interests of the children.

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

Frank J. Skorupa of Johnson & Skorupa for appellant.

Raymond E. Baker and David A. Beck of Baker & Beck, P.C., for appellee.

Heard before BOSLAUGH and WHITE, JJ., and BUCKLEY and CANIGLIA, District Judges, and RONIN, Retired District Judge.

CANIGLIA, District Judge.

This is an appeal by petitioner from an order of the District Court granting the respondent's application to remove the three minor children of the parties from the State of Nebraska to the State of Louisiana. The trial court found that it was in the best interests of the children to grant the respondent's application for removal.

The parties generally agree on the law governing the issues in this case. The law contemplates visitation by the noncustodial parent within the state. See, *Bauer v. Bauer*, 184 Neb. 777, 172 N.W.2d 231 (1969); *Prell v. Prell*, 181 Neb. 504, 149 N.W.2d 104 (1967). It is the best policy to keep the children within the jurisdiction of this state unless the best interests of the children

demand otherwise. See, *Caporale v. Hale*, 169 Neb. 751, 100 N.W.2d 847 (1960); *Campbell v. Campbell*, 156 Neb. 155, 55 N.W.2d 347 (1952). Whether the custodial parent should be allowed to remove the children to another state depends upon what is in the best interests of the children. See, Neb. Rev. Stat. § 42-364(1) (Reissue 1978); *Jafari v. Jafari*, 204 Neb. 622, 284 N.W.2d 554 (1979); *Campbell v. Campbell, supra.* The trial court, after hearing evidence, entered an order granting the respondent the right to remove the children.

A review of the evidence heard by the trial court and upon which the trial court based its judgment discloses the following facts: The marriage between the parties was dissolved on March 13, 1980; all three of the children were under 10 years of age; the petitioner exercises his visitation regularly, and has met his support obligations; respondent intends to remarry; her fiance is an ironworker whose income will permit the respondent to remain at home with the children; the children would be housed in an adequate, comfortable, three-bedroom trailer in La Place, Louisiana; the trailer home is within 5 or 6 blocks of the public schools the children would be attending; the children would remain in the same church; and respondent would agree to modification of the visitation schedule. The respondent's future husband is a union ironworker, 24 years of age at the time of trial, and a high school graduate with 1½ years of college. He has on occasion babysat with the children; enjoys their company; plays games with them; shows them love; has bought them clothing; and has a good relationship with the children and is ready to settle down.

Having reviewed all the evidence de novo, as we are required to do, we find no abuse of discretion of the trial court in granting the application to remove the children. At the hearing the petitioner did not testify in his behalf. He apparently was unwilling or unable to undertake the responsibility of custody. We do not feel

that an award of custody to a parent should be interpreted as a sentence to immobilization.

We affirm the findings of the trial court that under these circumstances it is in the best interests of the children to remain in the custody of their mother and to remove them to the State of Louisiana. Respondent is allowed a fee of $300 for legal services in this court, and the costs are assessed against the petitioner.

AFFIRMED.

WILLIAM R. FRASIER AND BARBARA L. FRASIER, HUSBAND AND WIFE, APPELLANTS, V. TRANS-WESTERN LAND CORPORATION, A CORPORATION, G. FREDRIC WOOD, AND TED DEYLE AND PLATTE VALLEY LAND COMPANY, A CORPORATION, APPELLEES.

316 N.W.2d 612

Filed February 26, 1982. No. 44217.

1. **Corporations: Stock.** When there is no constitutional, statutory, or charter prohibition and the rights of other stockholders or of creditors of the corporation are not involved, a corporation has the power to issue shares of its stock as full paid on payment of less than its par value, whether in money or in property, in labor or services, and the agreement under which they are so issued will be binding as between the parties, so that the corporation can neither deny the other party the rights of a stockholder nor compel him to pay for stock contrary to the agreement.
2. **Corporations: Contracts: Estoppel.** A party who has had the benefit of an agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains.

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

Jim Zimmerman of Atkins, Ferguson, Hahn, Zimmerman & Carney for appellants.

Robert W. Mullin of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke for appellees.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

KRIVOSHA, C.J.

The instant appeal presents to the court what appears to be a matter of first impression in this jurisdiction. It concerns a dispute between stockholders as to whether certain stock of Trans-Western Land Corporation (Trans-Western), held in the name of William R. Frasier and Barbara L. Frasier (Frasiers), was issued without consideration and therefore void. The result of that fact would be to find that the Frasiers were not stockholders of Trans-Western on August 17, 1979, the relevant date in question, and not entitled to notice of the anticipated sale of substantially all of the assets of Trans-Western, pursuant to the provisions of Neb. Rev. Stat. § 21-2078 (Reissue 1977). The trial court found that the stock issued to the Frasiers was void because the Frasiers had not paid an equivalent in money or labor done or property delivered to Trans-Western, and that Trans-Western was not required to give notice to the Frasiers. We reverse.

The facts surrounding the instant case are somewhat complicated, though not substantially in dispute. William Frasier, a real estate broker, builder, and developer, and G. Fredric Wood (Wood), an acquaintance of Frasier for some 10 years earlier, were both living in Colorado early in 1977. Wood contacted Frasier and asked him if he was interested in returning to Nebraska. They discussed the possibility of returning to Alliance, Nebraska, and starting a land development, construction, and real estate company. Wood advised Frasier at that time that Wood's uncle, Ted Deyle (Deyle), would fund them if they returned to Nebraska and started such a project. As a result of that conversation, Wood and Frasier did return to Alliance in March

of 1977 and subsequently proceeded to look for land which could be developed. In November of 1977 Frasier and Wood located some ground which they purchased in the name of Kincaider Companies, Inc. (Kincaider), a Nebraska corporation consisting of Frasier and Wood. Each initially paid into the corporation $1,000 and later paid an additional $500 apiece when they purchased the Peterson Subdivision. The land purchased was generally described as Peterson Subdivision to the City of Alliance, Box Butte County, Nebraska, and was purchased for a total purchase price of $45,000.

The purchase agreement covering the Peterson property required a payment of $12,000 to be made by Kincaider at the time of closing. Kincaider did not have sufficient funds to make the payment, and Wood and Frasier borrowed the money individually from Deyle and personally executed a promissory note for the $12,000. Wood and Frasier then proceeded to develop the land, including revising the plat and redividing certain of the lots.

On December 23, 1977, Frasier and Wood signed a memorandum of understanding which was then sent to Deyle. The agreement provided in part: "In consideration and receipt of $12,000.00 from Ted Deyle, dba Deyle Construction, Inc., (hereinafter called Deyle), the following is stipulated as a letter of intent and agreement.

. . . .

"4. Deyle, Wood and Frasier shall form immediately and as soon as possible a Nebraska Corporation to be known as DeKin, Incorporated, with each party having a fully paid and non-assessable 33 1/3rd% interest in said corporation.

. . . .

"6. Frasier and Wood shall handle and be responsible for all zoning, platting and duties relative to development of Peterson Subdivision in a manner in the best interest of DeKin, Incorporated.

"7. Deyle shall provide all funds necessary to facilitate development of said subdivision as deemed necessary by the parties hereto, interest rate to be determined.

"8. DeKin, Incorporated, shall, through the efforts of Wood and Frasier, sell said subdivision in parts or parcels, in a manner agreeable to all parties hereto, with the intent of profit to Dekin, Incorporated.

"9. Until such time as DeKin Incorporated is incorporated and title conveyed, this agreement shall be construed as each party hereto having a 33 1/3rd percent interest in Petereson [sic] Subdivision, subject to encumbrances referenced and/or of record. ie: Deyle 33 1/3rd% ownership Wood 33 1/3rd ownership Frasier 33 1/3rd% ownership. These interests shall inure to the benefit of their heirs."

Trans-Western is in fact the corporation referred to as DeKin in the agreement of December 23, 1977. Trans-Western was incorporated on January 30, 1978, and a certificate of incorporation was issued by the Secretary of State on February 17, 1978, the stock certificates having been dated February 12, 1978, and issued to the three stockholders. The par value of each share of stock was established in the amount of $.50 and each shareholder received 5,000 shares of common stock.

In May of 1978 Wood approached Frasier and advised him that he thought they had to put $2,500 in cash into the corporation. Frasier refused to do so, saying that he felt that the agreement clearly specified it was up to Deyle to fund everything necessary for the corporation and that Frasier and Wood were to do work for their shares. At Wood's suggestion, however, they wrote checks to the corporation in the amount of $2,500 and then had the corporation write checks back to them in a similar amount. They sought to satisfy Deyle's contribution by executing a mortgage in the amount of $50,000, though they agreed the value of the Peterson land was then only $47,500. They concluded that the additional $2,500

represented Deyle's contribution to the corporation. Upon receipt of the mortgage in the amount of $50,000, Deyle accepted the stock and gave the corporation the necessary money to pay off its obligations in connection with the purchase of the Peterson property, as well as canceling the $12,000 note. Frasier continued to work on developing the property, including seeking a change in zoning.

In June of 1978 Wood received a letter from Deyle, advising him that Deyle did not want the $2,500 to be reflected in the mortgage, and, instead, issued a receipt for $2,500 which his letter said "was deducted from proceeds of note dated 6-1-78 for stock to coincide with repayment of like amount for stock to you & Bill." There is no evidence that Frasier knew of the letter at this time.

In February of 1979 Frasier received a letter from an attorney representing Trans-Western suggesting that the manner in which the payment for the stock had been conducted was not proper and requesting that he pay $2,500 to the corporation. Wood received a similar letter. Subsequent to receiving the letter, Wood actually paid $2,500 into the corporation, though Frasier continued to deny that he was obligated in any respect to pay any money for his stock, maintaining that he was to receive his shares in return for work. Some 12 months had elapsed between the time the stock was issued and Frasier received the letter demanding the payment.

Frasier ultimately resigned as an officer and director of Trans-Western, though he remained what he thought was a stockholder. Thereafter, on March 19, 1979, a meeting was held between Wood and Deyle as directors and officers of Trans-Western. At that meeting the Frasiers' shares of stock were canceled and treated as redeemed and as treasury stock. The record fails to disclose that information of that fact was ever conveyed to Frasier.

On August 17, 1979, the Peterson Subdivision land

was conveyed by Trans-Western to Deyle for the sum of $57,000. As part payment the note and mortgage for $50,000 held by Deyle was canceled. Frasier received no notice of the corporation's intent to convey all of its assets to Deyle. Thereafter, on September 28, 1979, a lease agreement was entered into by and between Wood and his wife, Deyle and his wife, and a third party, as owners of the Peterson Subdivision tract, with the Alliance Day Care Center, Inc., as lessee. The record does not disclose how either Wood or the third party acquired their interest in the land. The lease agreement provided that a building was to be constructed on the property and thereafter leased to Alliance Day Care Center for a period of 10 years at an annual rental of $33,600.

Wood and Deyle have argued, and the trial court apparently found, that the stock of Trans-Western could not have been issued for services to be rendered, both because of the provision of Neb. Rev. Stat. § 21-2018 (Reissue 1977) and the fact that the stock in Trans-Western was to be issued pursuant to § 1244 of the Internal Revenue Code. 26 U.S.C. § 1244 (1976 & Supp. II 1978). It is true that § 21-2018 provides in part: "No corporation shall be permitted to issue stock except for an equivalent in money paid or labor done, or property actually received and applied to the purpose for which such corporation was created. Neither promissory notes nor future services shall constitute payment or part payment for issuance of shares of a corporation."

Likewise, section 1244 stock may not be issued for services rendered or to be rendered, but may only be in exchange for money or other property, except stocks or securities.

Those facts, however, do not resolve the issues presented by this appeal.

The fact that the stock may not qualify as section 1244 stock goes to its treatment for tax purposes and does not resolve the question of the validity of its

issuance. To begin, the articles of incorporation of Trans-Western permit the issuance of stock for services and make the directors the sole judges of the value of the services. The articles of incorporation of Trans-Western provide in part as follows: "All or any portion of the capital stock may be issued from time to time for such considerations in money, property, services or other right or thing of value, for the uses and purposes of the corporation, as may be fixed from time to time by the Board of Directors, who shall be sole judges of the value of any property, right or thing acquired in exchange for capital stock. All said stock shall be issued fully paid and non-assessable for any purpose."

Furthermore, as earlier noted, each of the parties agreed that Frasier was to receive his shares for work to be performed and that each party was in fact a one-third owner of the corporation. The record leaves little doubt that, in reliance on this agreement, Frasier did in fact perform valuable services for the corporation just as he agreed he would, believing his interest in the corporation was secure, long before any contrary demand was made.

The real question we must answer by this appeal is whether the stock allegedly issued in violation of § 21-2018, but in accordance with an agreement between all of the stockholders, is void in its inception or merely voidable as to certain persons under certain conditions. A reading of the Nebraska Business Corporation Act leads us to the conclusion that a violation of § 21-2018 may cause the stock to be voidable but not void. As an example, § 21-2018 provides in part: "In the absence of fraud in the transaction, the judgment of the board of directors or the stockholders, as the case may be, as to the value of the consideration received for stock shall be conclusive."

We must not lose sight of the fact that this is a suit between informed and consenting stockholders, as opposed to creditors or uninformed stockholders. The

distinction is legally significant.

As one examines the relatively few cases which have addressed this issue, it is clear that the rule which permits a corporation in the first instance and a court thereafter to declare the issuance of stock void or to otherwise obligate a stockholder to make further payment is applied in one manner as it relates to creditors of the corporation and in a totally different manner to stockholders who, with knowledge, participated in the plan which is thereafter attacked by the participating stockholders.

In 18 C.J.S. *Corporations* § 245 at 686 (1939), we find: "By the weight of authority, when there is no constitutional, statutory, or charter prohibition . . . and the rights of other stockholders . . . or of creditors of the corporation . . . are not involved, a corporation has the power to issue shares of its stock as full paid on payment of less than its par value, whether in money or in property, in labor or services, and the agreement under which they are so issued will be binding as between the parties, so that the corporation can neither deny the other party the rights of a stockholder nor compel him to pay for the stock contrary to the agreement . . . ." See, also, 18 Am. Jur. 2d *Corporations* § 268 (1965).

Further, at 18 C.J.S. *Corporations* § 257 d. at 720-21 (1939), we find: "Except when such stock is made absolutely void by statute, in which case the corporation is not estopped from asserting the illegality, even against a purchaser for value and without notice, acquiescence, laches, or estoppel is a bar to relief against stock irregularly issued without consideration on an insufficient consideration, or for less than par. The corporation itself, and all persons participating in or assenting to such issue, are bound thereby and will not be heard to complain . . . ."

In the case of *Kimmel Sales Corporation v. Lauster*, 167 Misc. 514, 4 N.Y.S.2d 88 (1938), an action was brought by Kimmel, as a stockholder on behalf of

Kimmel Sales Corporation, for the cancellation and surrender of certificates representing shares of stock claimed to have been issued to the defendants Roy A. Lauster, Charles C. Peck, and Harold G. Hutchens for insufficient consideration and a determination that the stock was void in their hands under then § 69 of the Stock Corporation Law of New York. In holding that the contesting stockholders were estopped to maintain their claim and must be held to have ratified the action, the court said at 519-20, 4 N.Y.S.2d at 93-94: "The consequences are different where rights of creditors or of the public are involved. Where the controversy is solely between the corporation and its stockholders, it is held that the stockholders unanimously can do what they will with the corporate assets which are their own. (*Blum v. Whitney*, 185 N.Y. 232; *Gilbert Paper Co. v. Prankard*, 204 App. Div. 83, 88; *Kent v. Quicksilver Mining Co.*, 78 N.Y. 159; *Markson v. Markson's Furniture Stores, Inc.*, 267 id. 137.)

. . . .

"It is said that stock issued in violation of section 69 is prohibited by law, and, therefore, not within the principles of the leading case of *Kent v. Quicksilver Mining Co.* (78 N.Y. 159). Such an interpretation misconstrues the basic distinction there drawn. Where the public is concerned, *e.g.*, in the violation of a statute limiting the powers of a public service corporation (*Berkey v. Third Avenue R. Co.*, 244 N.Y. 84, 90, 92), or where creditors' interests are adversely affected, there can be no waiver or estoppel as a result of action or inaction by the stockholders, but where only the interests of the stockholders themselves are at stake, the contrary holds good. Some statutes are for the protection of stockholders, whereas others are for the protection of creditors or of the public. The same statute under some circumstances protects stockholders alone and under other circumstances protects creditors. No principle of public policy prevents a stockholder from waiving the benefit of a statute enacted for his own protection. He has the power to

surrender voluntarily his own rights whether they are conferred on him by statute or otherwise, provided that he does not destroy rights of others under the guise of parting with his own. Where creditors are involved, the remedy is provided by section 70 and is not to cancel the stock but to hold the stockholder liable to the extent of the inadequacy of the consideration for which it was issued. On the other hand, stockholders whose equity in the assets of the corporation has been diluted by the issuance of shares without lawful consideration, have been granted relief in actions for cancellation upon the theory that the stock is voidable at their election. (*American Macaroni Corp. v. Saumer*, 174 N.Y. Supp. 183. See, also, *Pollitz v. Gould*, 202 N.Y. 11.)"

The *Kimmel Sales Corporation* case goes on further to point out at 521-22, 4 N.Y.S.2d at 96: "'"The very authorities which hold that the declaration that the stock is fully paid and unassessable is not binding upon creditors, also hold that the corporation cannot repudiate it and proceed to collect either from the person receiving the stock or his transferee the unpaid part of the par value * * * There is no doubt that, if this were a suit by creditors to enforce payment of the unpaid portion of the stock subscription, the fact that the stock certificates declared that they were fully paid and unassessable would be no defense; but it is a suit of stockholders in the right of the corporation, and as between the corporation and its stockholders the declaration that the shares are fully paid up and unassessable is a valid one."'"

Likewise, in the later case of *Murray v. Murray Laboratories, Inc.*, 223 Ark. 907, 270 S.W.2d 927 (1954), the Arkansas Supreme Court was presented with a case in which Murray Laboratories sued Dr. Murray to cancel 45 shares of stock issued to and held by Dr. Murray, alleging failure of consideration for said stock, for the reason that the shares of stock were not issued for money or property actually received or

labor done and were in violation of article 12, § 8, of the Constitution of Arkansas, and were therefore void and cancelable. In holding that the stock could not be canceled and must be considered validly held by Dr. Murray, the Arkansas Supreme Court said at 912-14, 270 S.W.2d at 930-32: "There was no innocent third party involved here and no change in the stock ownership. No fraud has been shown. The corporation owes no debts, but on the contrary, has substantially profited. Those seven men, as the only stockholders and directors, who owned the corporation determined among themselves that the value of Dr. Murray's formula to them was $50.00 per share, the par value of the stock.

. . . .

"There is no rule of law better settled than that '"'A party who has had the benefit of an agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains.'"'"

In *Finch, et al., v. Warrior Cement Corp., et al.*, 16 Del. Ch. 44, 61-62, 141 A. 54, 62 (1928), the Delaware Court of Chancery, in discussing the right of a consenting stockholder to object to the issuance of stock for less than full consideration, said: "If creditors' rights were being asserted against the issuance of the stock to Deer, we would be confronted with an entirely different situation from that which we have here, where a stockholder seeks to undo that which her prior conduct, based on full knowledge, shows she had agreed to and participated in. Acquiescence and participation in an issue of stock, without consideration or for an insufficient consideration, will bar the right of the assenting stockholder to complain against its issuance. In this state the issuance of stock without consideration does not render the issue void, though an attempt to exempt the issue from liability to pay lawful considera-

tion therefor is void. . . . If mere acquiescence with knowledge will estop a stockholder, a fortiori acts of participation will do so. I accordingly hold that the assent and active participation on the part of the complainant, manifested by her exchange of Gulf stock for Warrior stock with full and complete knowledge of all the facts, bar her from any right to complain against the issuance of the twenty thousand shares to Deer, even though it be conceded that no or an inadequate consideration was paid by him therefor. 1 *Cook on Corporations*, (8th Ed.) § 39; 5 *Fletcher, Cyc. Corp.*, § 3586; 14 *C.J.* 477, § 696."

Appellees argue that the provisions of § 21-2018 require our finding that the issuance of stock for less than full value is void regardless of who is involved. The language they rely upon is that portion of § 21-2018 which provides: ". . . and all *fictitious increase* of stock shall be void." (Emphasis supplied.) We believe that appellees misread the statute. What it provides is that the *fictitious increase* is void, not the *stock* itself. This language makes it clear that, notwithstanding that the stock may recite that it is fully paid and nonassessable, creditors may impose liability upon the holders of such stock. An example of the contrary is the Wisconsin statute as it existed prior to repeal in 1953. Wis. Stat. § 182.206 (1953) provided: "No corporation shall issue any stock other than dividend stock, except in consideration of money or of labor or property estimated at its true money value, actually received by it, equal to the par value thereof . . . and all stocks . . . issued contrary to the provisions of law . . . shall be void." See *Frey v. Geuder, Paeschke & Frey Co.*, 4 Wis. 2d 257, 90 N.W.2d 765 (1958). By the provisions of the Wisconsin statute, the stock itself was void and not just the increase.

The provision of § 21-2018 making all fictitious increases of stock void relates to a creditor's right against a holder of "watered stock" and not to the validity of the stock itself. The creditor has a cause

of action against the individual holder because, indeed, the individual holder is a stockholder. Were the courts to hold the stock itself void, the holder could not be liable to the creditor. This is true even though the corporation itself cannot maintain an action. See 19 Am. Jur. 2d *Corporations* § 765 (1965).

An examination of our own statute, as compared to those statutes where the issuance of stock for less than full value are held to be void, makes it clear that our statute does not require that, as between consenting stockholders, we hold the stock to be void. It seems clear that the Nebraska statute follows those lines of cases which determine that issuing stock for less than full value does not cause the stock to be void but only voidable.

An entire examination of this record makes it quite clear that, creditors aside, the payment for the stock was not critical to the operation of this corporation or its success. What appears to be more critical were the efforts made by the parties, including Frasier. It strikes us as being wholly inequitable and improper to permit the corporation and its remaining stockholders to allow Frasier to operate under the belief embodied in the written agreement that he was a stockholder and then remove him just at a point when it appears that a profit would be realized because of his refusal to make a cash capital contribution of funds not needed and previously waived. We believe that the issuance of the stock was only voidable and not void, and neither Wood nor Deyle was in a position to object. They participated and acquiesced in the manner in which the stock was issued to the Frasiers. The fact that a creditor may have another right against the corporation is not significant to this case.

The parties agreed at a pretrial conference that if Frasier was a stockholder, appellees violated § 21-2078 and the Frasiers would be entitled to judgment according to Neb. Rev. Stat. § 21-2080 (Reissue 1977). Such an order should have been entered by

the trial court. We therefore believe that the judgment of the trial court should be reversed and remanded with directions to find that the stock issued to the Frasiers was lawfully and validly issued and owned by the Frasiers at the time that the substantial assets of the corporation were sold, and they are entitled to their statutory rights under the provisions of § 21-2080.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. LEN ROBERT BOLTON, APPELLANT.

316 N.W.2d 619

Filed February 26, 1982. No. 44222.

1. **Criminal Law: Speedy Trial.** The primary burden is upon the State to bring the accused person to trial within the time provided by law, and if he is not brought to trial within that time, he is entitled to an absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute.
2. ____: ____. The State has the burden of proving that one or more of the excluded periods of time under subsection (4) of Neb. Rev. Stat. § 29-1207 (Reissue 1979) is applicable if the defendant is not tried within 6 months of the commencement of the criminal action.
3. **Trial: Mental Incompetence.** The test of mental competency to stand trial is whether the defendant has capacity to understand the nature and object of the proceedings against him; to comprehend his own condition in reference to such proceedings; and to make a rational defense.
4. ____: ____. If facts are brought to the attention of the court which raise a doubt as to the sanity of the defendant, the question of competency should be determined at that time. The question of competency to stand trial is one of fact to be determined by the court and the means employed in resolving the question are discretionary with the court.
5. **Evidence: Appeal and Error.** In determining the sufficiency of evidence necessary to sustain a conviction, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass on credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Douglas County:

JAMES M. MURPHY, Judge. Affirmed.

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

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

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

CAPORALE, J.

The defendant-appellant, Len Robert Bolton, appeals from his conviction of one count of assault in the first degree and one count of assault in the second degree. We affirm.

The criminal charges brought against the defendant originate from an unprovoked assault he committed on James Minard and injury inflicted on Police Officer Irl Carmean on September 9, 1979. Minard stated that he was walking in the vicinity of 16th and Wirt Streets in Omaha, when he "brushed" into the defendant who was walking in the other direction. Minard felt a sharp pain in his chest and found that he had been stabbed in the region below his collarbone. Only after the assault did Minard see the knife that defendant was carrying, and he sought aid at a nearby residence.

Omaha police officers responded to the assault call and found the defendant still in the vicinity. They observed that he was carrying a boning knife. Bolton refused to put down the knife and he resisted the efforts of the police to disarm him. He was verbally abusive and invited the police to kill him. During this time, Officer Irl Carmean was seriously injured by defendant with a facial cut which extended from near his left ear down through his mouth. Bolton escaped into a nearby house where he was ultimately subdued and arrested.

An information charging the defendant with the assaults upon Minard and Carmean was filed on October 12, 1979. A poverty affidavit was filed by the

defendant on October 25, 1979, and the Douglas County public defender's office was appointed to represent him. The defendant was arraigned and pled not guilty to the charges.

The record indicates that Bolton did not cooperate with his appointed counsel in seeking a psychiatric evaluation, and on February 15, 1980, defense counsel had the District Court issue a capias for defendant's arrest. On February 27, 1980, the defendant's family independently, and without notice to the court, filed a petition with the Douglas County Board of Mental Health seeking to have Bolton committed as a mentally ill dangerous person. On February 27, 1980, the defendant was picked up upon the mental health board order. No action was ever taken on the court's capias. On March 14, 1980, Bolton was adjudged to be a mentally ill dangerous person by the Douglas County Board of Mental Health and was committed to the Douglas County Hospital for treatment. Bolton was diagnosed to suffer from an antisocial personality disorder, possibly paranoid schizophrenia, and was transferred to the Lincoln Regional Center on March 24, 1980.

On December 18, 1980, in response to an inquiry by the Douglas County attorney's office, the superintendent of the Lincoln Regional Center sent a report to the District Court informing the court of the defendant's mental status, which included a number of staff notes. The note dated April 29, 1980, included an evaluation by Dr. Willis, a psychologist, that Bolton was then competent to stand trial. Thereafter, the court ordered Bolton returned to Omaha and, on December 30, 1980, a hearing was held at which time the defendant made a motion for discharge on the ground he was not given a timely trial as required by Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Reissue 1979). The court denied the motion and appointed two psychiatrists to examine the defendant. On February 4, 1981, the reports of the psychiatrists were stipulated

into evidence and the court found the defendant competent to stand trial.

Following a bench trial on February 25, 1981, Bolton was convicted of one count of assault in the first degree and of one count of assault in the second degree. On April 1, 1981, the trial court sentenced defendant to a term of 7 to 15 years on the first degree assault charge and to a term of 5 years on the second degree assault charge, said terms to be served concurrently.

Defendant alleges that the trial court erred in denying his motion for discharge on the ground he was not timely tried, and erred in finding that the defendant was legally sane at the time of the assaults in question.

We have held that § 29-1207 requires that every person charged with a criminal offense be brought to trial within 6 months after the filing of the information. *State v. Stewart*, 195 Neb. 90, 236 N.W.2d 834 (1975). That statute provides in pertinent part:

"(1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.

"(2) Such six-month period shall commence to run from the date the indictment is returned or the information filed. . . .

. . . .

"(4) The following periods shall be excluded in computing the time for trial:

"(a) The period of *delay resulting from other proceedings concerning the defendant*, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial . . . ." (Emphasis supplied.)

We have also held the primary burden is upon the State to bring the accused person to trial within the time provided by law, and if he is not brought to trial within that time, he is entitled to an absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute. *State v.*

Kinstler, 207 Neb. 386, 299 N.W.2d 182 (1980). The State also has the burden of proving that one or more of the excluded periods of time under subsection (4) of § 29-1207 is applicable if the defendant is not tried within 6 months of the commencement of the criminal action. *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978).

Defendant concedes that the time period beginning with his commitment on March 14, 1980, is excludable under § 29-1207(4)(a), but he alleges that he was competent to stand trial as of April 29, 1980, and that the time period after that date is not tolled by the statute. The basis for defendant's claim in this regard is the internal staff note of the Regional Center dated April 30, 1980, in which a psychologist indicates that Bolton was not currently psychotic and was competent to stand trial.

We note, however, that other medical and psychiatric reports admitted into evidence tend to refute that psychologist's characterization of Bolton and outline a long-term program for his treatment. Defendant was admitted to the Regional Center as a mentally ill dangerous person and was diagnosed as a possible paranoid schizophrenic. The reports indicate that the defendant also suffered from acute drug- and alcohol-induced organic brain syndrome and drug dependence. A staff note by the defendant's psychiatrist dated April 3, 1980, outlined a long-term treatment plan to "control his dominant psychopathology of delusions and hallucinations." Subsequent reports reveal that the defendant responded to treatment and was benefited by his continued participation in the program. Of particular note is a memorandum dated June 30, 1980, addressed to the Douglas County Board of Mental Health from the coordinator of aftercare, Mary A. Jimerson. In the report she states: "I conferred today, 6/30/80, with Dr. Coates [defendant's psychiatrist] and he related that the patient was staffed this morning, and at the present time patient's condition has not

improved to the extent that he is ready for discharge. He further stated that there is no particular reason to move fast at this time, and that plans are to move the patient through the program." The intent of the Regional Center staff to maintain the defendant in the psychiatric program is reaffirmed in subsequent reports dated July 18, 1980, and September 22, 1980.

The evidence clearly reveals that during the period between his arrest on February 27, 1980, and the finding of the court that he was competent to stand trial on February 4, 1981, Bolton was engaged in treatment programs for his psychiatric condition. This period of delay, which is attributable to psychiatric evaluations and treatment, is properly excludable as an "other proceeding" under the provisions of § 29-1207(4)(a).

Moreover, it was the duty of the trial court to make the determination as to the competency of the accused to stand trial. Neb. Rev. Stat. § 29-1823 (Reissue 1979) provides in pertinent part: "If at *any time prior to trial* it appears that the accused has become mentally incompetent to stand trial, such disability may be called to the attention of the district court by the county attorney, by the accused, or any person for the accused. *The judge of the district court of the county wherein the accused is to be tried shall have the authority to determine whether or not the accused is competent to stand trial.* The district judge may also cause such medical, psychiatric or psychological examination of the accused to be made as he deems warranted and hold such hearings as he deems necessary." (Emphasis supplied.)

The opinion of one psychologist that the accused was competent to stand trial as of April 29, 1980, an opinion which appears not to have been shared by defendant's treating psychiatrists, was not a binding determination of competency upon the District Court.

The test of mental competency to stand trial is whether the defendant has capacity to understand the nature and object of the proceedings against him; to comprehend his own condition in reference to such

proceedings; and to make a rational defense. *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980).

If facts are brought to the attention of the court which raise a doubt as to the sanity of the defendant, the question of competency should be determined at that time. The question of competency to stand trial is one of fact to be determined by the court and the means employed in resolving the question are discretionary with the court. *State v. Crenshaw*, 189 Neb. 780, 205 N.W.2d 517 (1973).

We must also reject defendant's contention that the evidence was not sufficient to support the trial court finding that Bolton was sane at the time he committed the assaults. The evidence reveals that three psychiatrists examined Bolton and only one concluded that he was not legally responsible at the time of the stabbing. The other two psychiatrists who testified at trial found the defendant to be sane at the time of the assaults and acting out of anger and not out of some drug-induced condition. We note that in determining the sufficiency of evidence necessary to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Stickelman*, 207 Neb. 429, 299 N.W.2d 520 (1980); *State v. Klatt*, 187 Neb. 274, 188 N.W.2d 821 (1971).

The evidence as to the defendant's sanity at the time of the assaults and as to his competency to stand trial was properly before the court as the trier of fact; the conflict in the evidence was resolved against the defendant and the record supports the finding of sanity.

AFFIRMED.

ANTON ROBERT POHL, APPELLEE, V. CAROL MARIE POHL, APPELLANT.

316 N.W. 2d 323

Filed February 26, 1982. No. 44327.

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

John P. Peetz III of Peetz, Peetz & Sonntag for appellant.

P. J. Heaton, Jr., for appellee.

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAY TRUE, APPELLANT.

316 N.W.2d 623

Filed February 26, 1982. No. 81-599.

1. **Criminal Law: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Aiding and Abetting.** Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient.
3. **Aiding and Abetting: Confessions.** While a voluntary confes-

sion is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of the fact and may, with slight corroborative circumstances, be sufficient to establish the defendant's guilty participation and warrant a conviction.

4. **Sentences: Appeal and Error.** In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.

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

Avis R. Andrews for appellant.

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

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

CAPORALE, J.

The defendant-appellant, Raymond F. True, appeals from the conviction by a jury of aiding and abetting a burglary. We affirm.

On the morning of August 12, 1980, at approximately 2 a.m., the Victory Liquor Store at Fremont, Nebraska, was burglarized. A police officer responding to the burglary stated he observed two men in the vicinity of the store and was able to capture one Allen Fraizer, but the other individual escaped. Other officers at the scene found that the front window glass of the store had been broken, and the owner reported that seven 12-packs of beer were missing, as well as $9.50 in change from the cash register. The beer was subsequently found in a car registered to the defendant's mother, which was parked several yards from the liquor store. As the officers investigated the burglary, the store owner reported that he saw someone hiding in a back storeroom. Victor True, the appellant's brother, was found hiding under a shelf and was arrested. After his arrest, Victor True gave a written statement to the police, which he examined and signed, which stated in part: "Me, Ray [appellant herein] & Allen got out & I went to the back

of the store, Allen & Ray went to the front. The next thing I knew I heard glass break. When I got to the front I saw the plate glass window was broken. I don't know which one of them broke it. Since I was the smallest I crawled in the store thru the window and went to the coolers. I took some Budweiser and handed it out to Allen & Ray."

Appellant went to Iowa the morning of the burglary and was arrested on March 24, 1981, when he turned himself in to the police. Upon his arrival at the police station, defendant was informed of his rights and asked if he would give a statement. He did so and stated that he had been with his brother and Allen Fraizer at about midnight on the night in question, and while they were at Wild Wood Park "they started talking about robbing a place." Appellant stated that he would drive them in the car, but that he would go home to bed because he had to go to Iowa in the morning. He stated that he did drive them to the location of the burglary, but that he walked away. Appellant stated that although he heard the glass break, he did not go into the store, nor did he receive anything from either his brother or Allen Fraizer.

At trial, Victor True repudiated the statement he had given the police on the day of his arrest, and testified that he had decided to break into the store only after his arrival there. Victor True stated that the discrepancy in his statement was due to the fact that he was hung over at the time the original statement was made. The officer who had taken the statement testified that at the time it was made Victor True did not appear to be under the influence of any drugs and was alert during the questioning.

Appellant was found guilty by a jury of aiding and abetting the burglary, a violation of Neb. Rev. Stat. §§ 28-507 and 28-206 (Reissue 1979), a Class III felony. He was sentenced to imprisonment in the Nebraska Penal and Correctional Complex for a period of not less than 2 nor more than 4 years.

Appellant alleges the trial court erred in (1) submitting the case to the jury, as there was no evidence upon which to base conviction other than his uncorroborated statement to the police, (2) excluding certain evidence purporting to explain his statement to the police, and (3) imposing an excessive sentence.

We analyze the first assignment of error in light of the rule that in determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Pena*, 208 Neb. 250, 302 N.W.2d 735 (1981); *State v. Holloman*, 209 Neb. 828, 311 N.W.2d 914 (1981).

Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient. *State v. Loveless*, 209 Neb. 583, 308 N.W.2d 842 (1981). See, also, *State v. Foster*, 196 Neb. 332, 242 N.W.2d 876 (1976); *State v. Dirgo*, 196 Neb. 36, 241 N.W.2d 351 (1976).

While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of the fact and may, with slight corroborative circumstances, be sufficient to establish the defendant's guilty participation and warrant a conviction. *Gallegos v. State*, 152 Neb. 831, 43 N.W.2d 1 (1950); *Vanderheiden v. State*, 156 Neb. 735, 57 N.W.2d 761 (1953).

Thus, in *State v. Scott*, 200 Neb. 265, 269-70, 263 N.W.2d 659, 660 (1978), we stated: "Where the crime involves physical damage to a person or property, the

prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable. In such a case there need to be no link, outside the confession, between the injury and the accused who admits having inflicted it."

In the present case there can be no dispute but that the evidence presented was sufficient to permit the jury to conclude that the appellant did aid and abet his brother and Allen Fraizer in the burglary at the Victory Liquor Store. The fact of the burglary was established without appellant's confession. The window of the store was broken, property was missing, and appellant's brother was found hiding in the store. Appellant's confession that he participated by transporting Victor True and Allen Fraizer to the liquor store in his mother's car is corroborated by the fact that the car was found near the scene. This was sufficient to make him an aider and abettor in view of the fact that, in his statement, appellant indicated that his brother and Fraizer had talked about robbing a place. Admittedly, Victor True recanted the statement implicating his brother at appellant's trial. However, it is for the trier of fact to determine at which time Victor was telling the truth. *State v. Bundy*, 184 Neb. 406, 167 N.W.2d 770 (1969).

Appellant's second assignment of error is likewise without merit. We do not understand the theory under which the trial court refused to allow the appellant to explain the statements made by him to the police on the occasion of his arrest. The question involved was: "When you stated that they started talking about robbing a place, what did you mean?" However, there was no offer of proof as to what the appellant would have testified to had he been allowed to answer the question; nor was there anything about the context within which the question was asked that makes known the substance of the evidence excluded. The appellant cannot predicate error on the court's ruling under such circumstances.

Neb. Rev. Stat. § 27-103 (Reissue 1979); *State v. Fonville*, 197 Neb. 220, 248 N.W.2d 27 (1976).

We come now to the third and last assignment of error, that the sentence was so excessive so as to constitute an abuse of discretion. The maximum possible penalty for a Class III felony is imprisonment for a maximum of 20 years, a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1979). The presentence report furnished the court includes a copy of the appellant's prior criminal record, which dates from the time he was 11 years of age in May of 1974. The sentence imposed in this case is near minimum for said offense and it is impossible to conclude that the sentence imposed was an abuse of the trial court's discretion. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. *State v. Wredt*, 208 Neb. 184, 302 N.W.2d 701 (1981).

The judgment of conviction upon the jury's finding of guilt and the sentence imposed are affirmed.

AFFIRMED.

LOETTA M. SWANSON, APPELLEE, V. WALTER A. SWANSON, APPELLANT.

316 N.W.2d 323

Filed February 26, 1982. No. 81-627.

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

George A. Sutera of Sutera & Sutera for appellant.

Baldwin & McKernan for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record de novo as it is required to do, finds that the decree of the trial court should be affirmed. Attorney fees are not allowed.

AFFIRMED.

RYBIN INVESTMENT CO., INC., APPELLEE, V. HOWARD D. WADE ET AL., APPELLANTS.

316 N.W.2d 744

Filed March 5, 1982. No. 43680.

1. **Contracts: Real Estate: Specific Performance.** Before a trial court may compel a specific performance of a real estate contract, there must be a showing that a valid, legally enforceable contract exists.
2. **Contracts: Specific Performance: Proof.** The burden of proving the contract is on the party who seeks to compel specific performance.
3. **Contracts.** To establish an express contract, there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof.
4. **Contracts: Real Estate.** In order that a binding contract for sale of real estate may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for a future arrangement.
5. **Contracts.** The acceptance of the offer must be an unconditional acceptance of the offer as made, otherwise no contract is formed. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but it is a counterproposition.
6. ——. Where one to whom an offer is made makes a counterproposition of different terms and new conditions, such counterproposition amounts to a rejection of the offer.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Reversed with directions.

Warren S. Zwieback and Robert M. Soshnik of Zwieback, Brady & Kasher, P.C., for appellant Wade.

Michael L. Schleich of Morsman, Fike, Davis & Schumacher, P.C., for appellant Dalton.

Joseph S. Daly and Ronald H. Stave of Sodoro, Johnson, Daly, Stave, Cavel & Coffey for appellee.

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

WHITE, J.

This is an action by the plaintiff, Rybin Investment Co., Inc., for specific performance of a purported contract for the purchase of the Cottonwood Marina. The District Court of Washington County, Nebraska, directed the defendants, Howard D. Wade and Robert M. Dalton, to specifically perform the purported contract. The defendants appeal. We reverse.

On November 10, 1978, defendants executed a "Purchase Contract" as an offer to purchase certain property in Washington County, Nebraska, described as the "Cottonwood Marina." The offer was executed in the presence of Eugene Eckholt of Commercial Business Services (hereafter CBS), agent for the plaintiff. The document was prepared by Eckholt and was entirely typewritten except for the signatures of the defendants.

After the defendants signed the document, Eckholt took it to George Rybin, president of plaintiff company. At the request of Rybin, Eckholt added the following language to the front of the document: "It is understood and agreed that the present tenant, Robert Tank, has first right of refusal on this offer."

After the addition of this language, Rybin signed the document in his capacity as president of Rybin Investment Co., Inc. Eckholt then took the document back to his office, expecting the defendants to still be there, but they had left. Eckholt gave the altered document to James T. Polsen, president of CBS, who agreed to deliver it to the defendants and obtain their approval. Polsen took the document home with him and the de-

fendants came to his home the same evening of November 10, 1978. Polsen showed the defendants the document and put two circles next to the altered portion of the document and asked them to initial it. Polsen testified that the defendants did not want to initial it at that time but, instead, took the document to show to their financial backers. The defendants never initialed the document and testified that they told Polsen that same night that they would not approve the contract. A meeting was held between the respective parties 4 or 5 days later for the purpose of negotiating an agreement for the purchase of the Cottonwood Marina. Negotiations fell through and the plaintiff brought this action for specific performance of the terms contained in the document.

Defendants contend that the document upon which plaintiff based its claim was merely an offer to purchase and it was refused by the plaintiff when the plaintiff made a counteroffer by altering the document.

Since this is an equity action, this court must try the issues de novo on the record. Neb. Rev. Stat. § 25-1925 (Reissue 1979).

Before a trial court may compel specific performance, there must be a showing that a valid, legally enforceable contract exists. *Panhandle Rehabilitation Center v. Larson*, 205 Neb. 605, 288 N.W.2d 743 (1980).

The burden of proving the contract is on the party who seeks to compel specific performance. *Pribil v. Ruther*, 200 Neb. 161, 262 N.W.2d 460 (1978).

To establish an express contract, there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof. *Farmers Union Fidelity Ins. Co. v. Farmers Union Co-op. Ins. Co.*, 147 Neb. 1093, 26 N.W.2d 122 (1947); *Griggs v. Oak*, 164 Neb. 296, 82 N.W.2d 410 (1957); *Wilkie v. Banse*, 166 Neb. 138, 88 N.W.2d 181 (1958).

Further, in order that a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that

nothing be left open for a future arrangement. *Farmers Union Fidelity Ins. Co. v. Farmers Union Co-op. Ins. Co., supra.*

The acceptance of the offer must be an unconditional acceptance of the offer as made, otherwise no contract is formed. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but it is a counterproposition. *Griggs v. Oak, supra.*

The basic question is whether the language added by Eckholt at the request of Rybin constitutes a counter-offer. Restatement (Second) of Contracts § 59 at 145 (1981) states: "A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer."

Restatement (Second) of Contracts § 39 at 106 (1981) states: "(1) A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer.

"(2) An offeree's power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree."

We believe the language added to the document substantially alters the offer so as to constitute a counter-offer. The defendants and Eckholt testified that they had the following language put in the document: "Sellor [sic] agrees that no verbal agreements exist that could restrict purchasers in future operations." Defendants and Eckholt testified that that particular statement was put in the offer because the defendants knew that Mr. Tank had requested a right of first refusal from Rybin. The language that was added to the document at the request of Rybin substantially alters the purpose for which the defendants had their particular statements put into the offer.

Our past decisions have been in accord with the view taken by the Restatement. "'Where one to whom an offer is made makes a counter-proposition of different terms and new conditions, such counter-proposition amounts to a rejection of the offer.'" *Farmers Union Fidelity Ins. Co. v. Farmers Union Co-op. Ins. Co., supra* at 1096-97, 26 N.W.2d at 124; *Griggs v. Oak, supra.*

Plaintiff's power to accept the offer was thereby terminated and no contract exists.

The trial court's decree for specific performance is therefore reversed and the plaintiff is ordered to return defendants' earnest money deposit of $5,000 with interest.

REVERSED WITH DIRECTIONS.

VINCENT J. KIRBY, APPELLANT, V.
ALVIN HOLLAND ET AL., APPELLEES.

316 N.W.2d 746

Filed March 5, 1982. No. 43696.

1. **Oil and Gas: Leases: Words and Phrases.** Where the primary term of an oil and gas lease has expired and the lease continues in force by production, it is elementary that the lease will come to an end when the property ceases to "produce," as that term is defined in the various jurisdictions. In such cases it is not necessary that the lessor take any action to effect termination; the lease simply expires.
2. **Real Estate: After-Acquired Title.** The doctrine of after-acquired title is one under which title to land acquired by a grantor who previously attempted to convey title to the same land which he did not then own inures automatically to the benefit of his prior grantee.
3. **Estoppel: After-Acquired Title.** The estoppel to assert an after-acquired title is restricted to the estate or interest intended to be conveyed, and unless the after-acquired title is the title, or part of the title, purportedly conveyed to the grantee it will not inure to his benefit. The estoppel will not operate as to land or an interest therein other than that which is specifically conveyed or called for by the plain import of the conveyance, and to which the covenants for title pertain.
4. **Estoppel: After-Acquired Title: Oil and Gas: Leases.** The doctrine of

estoppel to assert an after-acquired title is applicable with respect to oil, gas, and mineral leases so as to preclude the lessor from asserting a subsequently acquired title or interest as against the lessee, at least where such leases carry the usual express or implied covenants of warranty, but the estoppel is restricted to the mineral interest which the lease purports to demise.

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

Vincent J. Kirby, pro se.

Robert M. Harris and Randall L. Lippstreu for appellees.

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

CLINTON, J.

Vincent J. Kirby brought this action in the District Court for Banner County, Nebraska, to quiet title to an oil and gas lease executed in 1969 as against the interests of the defendant Alvin Holland who asserts title to the same mineral interests by virtue of an oil and gas lease subsequently executed. The leases pertain to the following described property: Section 34, Township 18 North, Range 54, and the northeast quarter of Section 3, Township 17 North, Range 54, all West of the 6th P.M., in Banner County, Nebraska. Kirby also prayed for an accounting of oil production from the leased premises by Holland, as well as injunctive relief placing Kirby in possession under the lease and barring Holland from continued operation of the oil well on the premises.

Holland answered, alleging Kirby's lease terminated by reason of cessation of oil production, and that Kirby had abandoned the lease. Holland further alleged that he was in possession of the premises and was operating the producing well by virtue of an oil and gas lease executed in 1973, and that Kirby's claim, if any, was barred by laches.

The court found the lease under which Kirby asserted

title "had terminated because of non-production," denied all claims to relief, and ordered the plaintiff's petition dismissed. Kirby then appealed to this court.

Before the theories under which Kirby's claim rests can be discussed, it is necessary to outline the relevant facts. On July 7, 1969, the landowners, Petersons, executed and delivered to Holland an oil and gas lease. The habendum clause provided a primary term of 6 months, "and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee." Neither this lease nor the subsequent ones to which we will later refer contained the usual alternate provisions for continuing the lease by commencing drilling or paying of delay rentals.

An oil well, denominated the Peterson 1-A, had been drilled on the land in 1959, but was not producing oil or gas when the 1969 lease was executed and delivered. It was apparently Holland's intention to reopen and rework the well and make it productive. In February of 1971 the Petersons extended the term of the lease to July 7, 1971. On March 24, 1971, Holland assigned the oil and gas lease to F. J. Kirby, the brother of the plaintiff Kirby. The assignment contained the following provisions: "Assignor reserves an undivided 1/16th of 8/8ths of all oil and gas produced from the premises as an overriding royalty interest. This assignment is contingent upon the drilling or reworking a former well located on the premises within a 30 day period, from the date of this assignment, unless a further extension of time is granted assignee. Assignor further reserves the right to have access to the leasehold premises at any time." The assignment warranted that Holland was "the lawful owner of and has good title to the interest above assigned in and to said lease." On April 24, 1971, F. J. Kirby assigned the lease to the plaintiff Kirby. The consideration for this assignment was a payment of $2,000 by Kirby to the company reworking the well for F. J. Kirby. Later the plaintiff Kirby made various other advances and purchased equipment necessary to

place the well in production. The equipment included a pump jack and motor (both of which were placed upon the well), in addition to a treater. Production of oil began and records indicate that the well produced as follows: June 1971, 739 barrels; July 1971, 598 barrels; August 1971, 331 barrels; and September 1971, 371 barrels. There is other evidence indicating the well may have produced until early November 1971, but that production, if it occurred, remained unsold in storage tanks on the premises. On November 3, 1971, Liberty Pipe & Supply Company, an unsecured creditor which had sold the pump jack, motor, and treater to Kirby, removed those items from the premises when Kirby failed to fully pay the balance of the debt. Various other alleged unpaid suppliers filed mechanics' liens against the leasehold estate, and in October 1973 one of the alleged suppliers began a foreclosure action, naming the other alleged lienholders, as well as the plaintiff Kirby and the defendant Holland, as defendants.

On November 19, 1971, Holland took a new oil and gas lease from the Petersons covering the same land. This lease was for a primary term of 1 year "and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee." There was no oil or gas production under this lease, although Holland treated the Peterson 1-A with chemicals from time to time and drilled another well, apparently a nonproducer, in the northwest quarter of Section 34.

In May of 1973 Petersons executed and delivered to Holland a third oil and gas lease for a primary term of 1 year (effective November 19, 1973) "and as long thereafter as oil or gas, or either of them, is produced from said land by the lessee."

In June of 1974, during the primary term of the lease, Holland began the production of oil and gas from the Peterson 1-A. On March 6, 1978, Kirby began this action. It is undisputed there was no oil or gas production from the leased premises during the period

November 1971 until Holland began production in June of 1974. The evidence indicates the price of oil per barrel in 1971 was $2.50 to $3.50 and at that price profitable oil production was not possible. Later the price of oil rose to about $40 per barrel, and the well could then produce oil in paying quantities.

In 1 Brown, The Law of Oil and Gas Leases § 5.09 at 5-56, 57 (2d ed. 1973), it says: "Where the primary term of an oil and gas lease has expired and the lease is being continued in force by production, it is elementary that the lease will come to an end when the property ceases to 'produce,' as that term is defined in the various jurisdictions." In most jurisdictions a temporary cessation of production does not terminate the lease. *Id.;* 2 Summers, Law of Oil and Gas § 305 (1959). This court has not had occasion to define the term "production" as it is used in the habendum clause, but in the case of *Long v. Magnolia Petroleum Co.*, 166 Neb. 410, 89 N.W.2d 245 (1958), by way of dicta we stated that after the primary term has expired, "production" means production in paying quantities. The court in that case did have occasion to discuss the question of whether any action by the lessor (in this case the Petersons) was required to terminate a lease when the conditions of the lease were not met. At issue in that case were the provisions for the continuance of the lease during the primary term by commencement of drilling or the payment of delay rentals. The court said: "[I]t is also true that forfeit and terminate are not synonymous. See, Schneider v. Springmann, 25 F.2d 255; Kugel v. Young, 132 Colo. 529, 291 P.2d 695; Woodson Oil Co. v. Pruett (Tex. Civ. App.), 281 S.W.2d 159; Gillespie v. Bobo, 271 F. 641; Baldwin v. Kubetz, 148 Cal. App. 2d 937, 307 P.2d 1005. As stated in Kugel v. Young, *supra:* 'While appellate courts, through the use of inaccurate terminology, have frequently referred to the termination of an unless lease as a "forfeiture," there actually is no element of forfeiture involved. The lessor is not required to do anything, but the lessee's failure to meet

the conditions of the contract automatically terminates it. The interest created in the lessee by such a lease does not become forfeited upon failure to comply with its conditions; it simply expires.' When a lease terminates by its own terms the equitable rule as to relieving against forfeitures is not applicable thereto." 166 Neb. at 424, 89 N.W.2d at 254.

In the case before us, the cessation of production was not temporary. It continued for a period of 31 months. The trial court's finding that the 1969 lease had terminated because of cessation of production was supported by the evidence. Pertinent precedents supporting this holding are *Gillespie v. Wagoner*, 28 Ill. 2d 217, 190 N.E.2d 765 (1963); *H & R Oils, Inc. v. Pioneer Am. Ins. Co.*, 541 S.W.2d 665 (Tex. Civ. App. 1976); and *Townsend v. Creekmore-Rooney Company*, 332 P.2d 35 (Okla. 1958).

Kirby's first theory is that the 1973 lease inures to his benefit under the doctrine of after-acquired title by reason of warranties of title made by Holland in his assignment to Kirby's predecessor in title, F. J. Kirby.

Whatever the theory of ownership granted by an oil and gas lease is, it is plain that it conveys an interest in real estate. 1 Brown, *supra*, §§ 3.02 et seq.; *Baumgartner v. Gulf Oil Corp.*, 184 Neb. 384, 168 N.W.2d 510 (1969).

The doctrine of after-acquired title is one under which title to land acquired by a grantor who previously attempted to convey title to the same land which he did not then own inures automatically to the benefit of his prior grantee. Black's Law Dictionary 57 (5th ed. 1979). The doctrine has been incorporated into Nebraska law by statute. Neb. Rev. Stat. § 76-209 (Reissue 1976) provides: "When a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor to the extent of that which the deed purports to convey shall accrue to the benefit of the grantee; *Provided, however*, such after-acquired interest shall not inure to the benefit of

the original grantee or his heirs or assigns, if the deed conveying said real estate was either a quitclaim or special warranty . . . ."

The key words in the statute are "to the extent of that which the deed purports to convey." The grantee gets what he was originally supposed to have been granted, but not any larger estate than was granted.

In 31 C.J.S. *Estoppel* § 30 at 319 (1964) it is said: "The estoppel to assert an after-acquired title is restricted to the estate or interest intended to be conveyed, and unless the after-acquired title is the title, or part of the title, purportedly conveyed to the grantee it will not inure to his benefit. The estoppel will not operate as to land or an interest therein other than that which is specifically conveyed or called for by the plain import of the conveyance, and to which the covenants for title are confined." Elsewhere in the same section, the writer says at 323: "The doctrine of estoppel to assert an after-aquired title has been held applicable with respect to oil, gas, and mineral leases so as to preclude the lessor from asserting a subsequently acquired title or interest as against the lessee, at least where such leases carry the usual express or implied covenants of warranty, *but the estoppel is restricted to the mineral interest which the lease purports to demise.*" (Emphasis supplied.)

The principles cited in the above texts are supported by the following case authority. *McKinnon v. Lane*, 285 S.W.2d 269 (Tex. Civ. App. 1955); *S. W. Bardill, Inc. v. Bird*, 346 S.W.2d 25 (Ky. 1961); *Cornish v. Yarbrough*, 558 S.W.2d 28 (Tex. Civ. App. 1977). *Ford v. Axelson*, 74 Neb. 92, 103 N.W. 1039 (1905), upon which Kirby relies, is not on point.

In this case Holland warranted to F. J. Kirby the leasehold estate for a term of 6 months and as long thereafter as oil or gas is produced from the premises by the lessee. Holland did not purport to convey or warrant anything beyond the duration of the 1969 lease. That lease terminated when production ceased for an unreasonable length of time. The doctrine of after-

acquired title is not applicable.

Kirby asserts that Holland is estopped to assert title as against Kirby. For purposes of discussion of this theory we assume, without determining, that title to real estate can be somehow acquired by estoppel independently of the doctrine of after-acquired title.

The bases of Kirby's claim of estoppel are (1) a letter written by Kirby's attorney to Holland, and (2) the circumstances surrounding the dismissal of the mechanic's lien foreclosure action. The letter from the attorney to Holland was written about 7 months after Kirby's production from the Peterson 1-A ceased. The letter recites that Kirby assumed that Holland, by taking the 1971 lease, was protecting his own interest and the interest of Vincent J. Kirby. Holland showed the letter to his attorney. There was no acknowledgment of Kirby's self-serving proclamation. On April 22, 1974, about 2½ years after the Kirby production ceased, the mechanic's lien foreclosure action was dismissed by the plaintiff in that action. This apparently was agreed to by all parties, including Kirby, who paid nothing to get the action dismissed. The lienholders merely abandoned their claims and dismissed the action.

The elements of estoppel have been defined by this court in *County of Scotts Bluff v. Hughes*, 202 Neb. 551, 560, 276 N.W.2d 206, 211-12 (1979), where we said: "In the case of Pester v. American Family Mut. Ins. Co., 186 Neb. 793, 186 N.W.2d 711, in an effort to further refine the position of this court with respect to equitable estoppel, we stated: 'The essential elements of equitable estoppel are: As to party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as

to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.'"

There is nothing in the record to show that Holland made any representation or concealed any facts upon which Kirby relied to his detriment, or that Kirby changed position or failed to act to his prejudice because of any reliance upon anything Holland did or failed to do. Indeed, the 1973 lease was entered into after the two transactions upon which Kirby relies had taken place. The elements of estoppel are not in any respect shown by the evidence.

The judgment is affirmed.

AFFIRMED.

LEAMER ABSTRACTING COMPANY,
A NEBRASKA CORPORATION, APPELLEE, V.
DONALD L. ROSENGARTNER AND
HELEN J. ROSENGARTNER,
HUSBAND AND WIFE, APPELLANTS.

317 N.W.2d 57

Filed March 5, 1982. No. 43709.

Principal and Agent. An agent owes to his principal the use of such skill as may be required to accomplish the object of his employment, and if he omits to exercise reasonable care, diligence, and judgment, as the result of which failure his principal is damaged, he may be held responsible for such damage.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Reversed and dismissed.

Duncan A. Young and C. Robert Vote of Young & White for appellants.

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

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

MCCOWN, J.

This is an action for breach of the covenants contained in a warranty deed brought by the assignee of the purchaser against the defendant sellers of the real estate. The District Court entered judgment for $5,000 in favor of the plaintiff assignee and against the defendants.

The defendants, Donald L. and Helen J. Rosengartner, at all times involved here were residents of Dallas County, Texas, and owned a tract of land which borders U.S. Highway 77 in Dakota County, Nebraska. In the summer of 1975 Marshall Morse of South Sioux City, Nebraska, offered to buy defendants' land and after long distance negotiations the parties agreed on a purchase price of $30,000. A purchase agreement was prepared in South Sioux City, Nebraska, which contained an extended metes and bounds description identical to the description shown on the then existing abstract of title. The purchase agreement was signed by Morse on September 16, 1975, and by the defendants in Dallas County, Texas, on October 6, 1975.

The abstract of title was delivered to the plaintiff, Leamer Abstracting Company, for extension and certification. On completion of the abstract work by plaintiff, Norris G. Leamer, an attorney in South Sioux City, Nebraska, rendered an opinion on the abstract to Marshall Morse. Leamer, as attorney for the defendants, also prepared a warranty deed which used the same metes and bounds description as shown on the purchase agreement and the abstract. The deed was executed by the defendants in Dallas County, Texas, on January 30, 1976, and thereafter delivered to Morse and the transaction closed. The charges for the

abstracting and for legal services in preparing the warranty deed were billed on the same statement from the Leamer law office and paid by the defendants.

Sometime thereafter, Morse discovered that the State of Nebraska claimed ownership of a strip of land along the highway and that the state had acquired the strip for highway right-of-way in connection with a condemnation action and the defendants had conveyed the strip of land to the state by deed dated September 4, 1973, for a consideration of $680. Upon further investigation it was discovered that the Leamer Abstracting Company had negligently failed to find the September 1973 deed in the records of the county and had negligently certified the abstract without showing that a portion of the property had been acquired by the State of Nebraska. The negligence of the plaintiff abstracting company is undisputed.

Morse went to attorney Leamer and complained that he did not receive all the land his deed called for. After some negotiations attorney Leamer, on behalf of Leamer Abstracting Company which he owned, paid Marshall Morse $5,000 for an assignment to Leamer Abstracting Company, a Nebraska corporation, of all Morse's claims or causes of action against Leamer Abstracting Company by reason of its negligence in failing to show the 1973 deed, and all claims and demands of Morse against the defendants in connection with the purchase of the property and the warranties in the warranty deed.

Thereafter, Leamer Abstracting Company brought this action for breach of warranty against the defendants based upon the assignment from Marshall Morse. The defendants' answer alleged that the negligence of the Leamer Abstracting Company in preparing and certifying the abstract was the primary and active cause of any damages to Marshall Morse, and that as between the defendants and the plaintiff, the plaintiff was responsible for any and all damages to Marshall Morse.

Mrs. Rosengartner testified at trial that the defendants did not know that the legal description on the deed and the other documents was not correct and that there was nothing which would lead them to believe that the property described was not in fact the property they owned along the highway in South Sioux City, Nebraska. It is clear that the defendants intended to sell only the property they owned and that, except for the negligence of the Leamer Abstracting Company, the description in the deed would have been correct and there would have been no loss to anyone.

The District Court treated the action as though it were an original action for breach of warranty by Morse against the defendants in which the only question was the amount of the loss sustained by the purchaser, and fixed that amount at $5,000, for which judgment was entered against the defendants.

The defendants rely upon Neb. Rev. Stat. § 76-529 (Reissue 1976), which provides in part: "An abstracter shall show each link in the chain of title, and failure to do so shall render him liable to any person injured by such omission."

The record established that the Leamer Abstracting Company and attorney Leamer were agents of the defendants in this transaction and were paid by the defendants. Under such circumstances Leamer Abstracting Company was liable to the defendants for resulting loss to the defendants caused by the negligent act of the abstracting company. The general rule is stated in Restatement (Second) of Agency § 401 (1958): "An agent is subject to liability for loss caused to the principal by any breach of duty." Comment d to that section states: "Unless he has been authorized to act in the manner in which he acts, the agent who subjects his principal to liability because of a negligent or other wrongful act is subject to liability to the principal for the loss which results therefrom." *Id.* at 239-40.

A similar statement of the rule is found in 3 Am.

Jur. 2d *Agency* § 202 (1962): "An agent owes to his principal the use of such skill as may be required to accomplish the object of his employment, and if he omits to exercise reasonable care, diligence, and judgment, as the result of which failure his principal is damaged, he may be held responsible for such damage." The same rule is set out in *Central Nat. Ins. Co. of Omaha v. Devonshire Cov.*, 426 F. Supp. 7 (D. Neb. 1976), *modified* 565 F.2d 490 (8th Cir. 1977). That case also holds that under Nebraska law, a promise of indemnity is not ordinarily construed to permit an indemnitee to recover from his indemnitor for the indemnitee's own negligence unless it clearly and unequivocally appears that such was the parties' intention. See, also, *Dombeck v. Chicago, M., St. P. & P. R. Co.*, 24 Wis. 2d 420, 129 N.W.2d 185 (1964).

In the case at bar the negligence of the plaintiff in extending and certifying the abstract is conceded, and the evidence is uncontradicted that the plaintiff and attorney Leamer were both paid agents of the defendants in connection with this real estate transaction. The plaintiff settled Morse's claim occasioned by plaintiff's own negligence by taking an assignment of the claim which it now seeks to enforce against its principals, the defendants. It is clear that the ultimate liability for the negligence of the plaintiff rests with the plaintiff. It would be a triumph of form over substance to consider only evidence of breach of warranty and disregard the fact that the plaintiff assignee in this case is the negligent party upon whom the ultimate loss must fall. With or without the provisions of § 76-529 the plaintiff is liable to the defendants for the loss occasioned by plaintiff's own negligence. To permit an abstracter agent to avoid liability for its own negligence by taking an assignment of a claim rather than a release would be unconscionable.

The judgment of the District Court is reversed and plaintiff's petition is dismissed.

REVERSED AND DISMISSED.

WALTER L. MALCOM, APPELLEE, V. FLORENCE WHITE ET AL., APPELLEES, FLORENCE V. MALCOM, APPELLANT.

316 N.W.2d 752

Filed March 5, 1982. No. 43715.

1. **Partition: Appeal and Error.** An action for partition is triable de novo on the record in the Supreme Court.
2. **Partition.** One of several tenants in common has an absolute right to a partition of their real estate, in the absence of an agreement to, or other impediments to, the contrary.
3. ——. Once joint title in real estate has been established, partition may be had as a matter of law.

Appeal from the District Court for Dixon County: FRANCIS J. KNEIFL, Judge. Affirmed and remanded with directions.

Olds, Swarts & Ensz for appellant.

Patrick G. Rogers, Paul R. Robinson, and Donald A. Fitch for appellees.

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

WHITE, J.

The plaintiff, Walter L. Malcom, brought this action to partition real estate in which he is the owner of an undivided one-fourth interest. Defendants Florence White, Ralph M. Malcom, and the heirs of Arthur R. Malcom also own an undivided one-fourth interest in the real estate in question. Florence V. Malcom, surviving spouse of Arthur R. Malcom, claimed a homestead interest in the real estate to be partitioned and alleged that the real estate was not subject to partition. The trial court determined the respective interests and entered a decree of partition. Florence V. Malcom appeals. We affirm.

There is no dispute as to the amount of real estate or the legal description of the same. William Hayes Malcom was the owner of the real estate in question and

the father of the litigants. William Hayes Malcom died intestate on August 27, 1936. The heirs of William Hayes Malcom were his wife, Inez Louisa Malcom, and their four children, Florence White, Arthur R. Malcom, Walter L. Malcom, and Ralph M. Malcom. After his death, the county court entered a decree finding that Inez Louisa Malcom had a homestead interest and life estate in the real estate, as well as an undivided one-third remainder interest. The remaining two-thirds interest in the real estate descended to each of the four children equally.

Inez Louisa Malcom died intestate on January 21, 1948. She was survived by the four children. After her death, the county court entered a decree finding that her undivided one-third interest descended to the four children equally.

Arthur R. Malcom and his wife, Florence V. Malcom, appellant herein, resided on the real estate from 1946 until the time of his death. On July 16, 1978, Arthur R. Malcom died and Florence, the surviving spouse, continued to reside on the real estate. Walter L. Malcom filed a partition suit and Florence V. Malcom asserted a homestead interest in the whole real estate and alleged that it therefore could not be partitioned. The trial court entered a decree of partition.

An action for partition is triable de novo on the record in the Supreme Court. *Cofer v. Perkins*, 199 Neb. 327, 258 N.W.2d 807 (1977). The record reflects that Arthur R. Malcom and Florence V. Malcom occupied the real estate as their home and were in possession from 1946 until the time of his death. However, the record is deplete of any evidence of an agreement between the cotenants giving Arthur or Florence a life estate in the property or the right to reside thereon permanently. This court has decided the question of when real estate may be partitioned on several occasions.

In *Windle v. Kelly*, 135 Neb. 143, 146, 280 N.W. 445, 447 (1938), this court said, "One of several tenants in common has an absolute right to a partition of their

real estate, in absence of an agreement to, or other impediments to, the contrary."

In *Yunghans v. O'Toole*, 199 Neb. 317, 321, 258 N.W.2d 810, 813 (1977), we said, "Once joint title in real estate has been established, partition may be had as a matter of law."

We are unwilling to accept appellant's argument that her possession is tantamount to a life estate. Her homestead interest is only in her deceased husband's undivided one-fourth interest in the real estate.

The decree of partition by the District Court is hereby affirmed, and this matter is to be remanded to the District Court of Dixon County, Nebraska, for further proceedings pursuant to the decree of partition as entered by the District Court.

AFFIRMED AND REMANDED WITH DIRECTIONS.

ROGER ERFTMIER, APPELLANT AND CROSS-APPELLEE, V. FRED EICKHOFF, APPELLEE AND CROSS-APPELLANT.

316 N.W.2d 754

Filed March 5, 1982. No. 43730.

1. **Contracts: Fraud.** In the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument.
2. **Fraud.** The essential elements required to sustain an action for fraudulent misrepresentation are, generally speaking, that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage.
3. **Fraud: Proof: Actions.** Fraud is never presumed but must be established by the party alleging it by clear and satisfactory evidence. The general rule is that where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie.

4. **Contracts: Consideration.** 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. The benefit rendered need not be to the party contracting but may be to anyone else at his procurement or request.
5. _____:_____. The consideration of a contract need not move to the promisor. A disadvantage to the promisee is sufficient, although the promisor derives no benefit therefrom.

Appeal from the District Court for Hall County: LLOYD W. KELLY, JR., Judge. Affirmed in part, and in part reversed and remanded for further proceedings in accordance with this opinion.

Gaines, Otis, Mullen & Carta for appellant.

Luebs, Dowding, Beltzer, Leininger & Smith for appellee.

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

MCCOWN, J.

This is an action on a guaranty and indemnity agreement. The jury returned a verdict for the plaintiff on the first cause of action for "50%" of the interest and principal due on a promissory note, and on the second cause of action, involving a farm agreement, found for the plaintiff and assessed the damages at zero dollars. The District Court granted defendant's motion for a new trial as to the first cause of action, and granted plaintiff's motion for new trial as to the second cause of action. The plaintiff has appealed and the defendant has cross-appealed.

The plaintiff, Roger Erftmier, was the owner of 1,280 acres of farmland in Keya Paha County, Nebraska, which he managed as a partnership with his daughters under the title of Seven Circle Farms. The farm is irrigated land with seven center pivot systems and its own wells and related equipment. In late summer and early winter 1976 the plaintiff Erftmier and James Boroff discussed a farm operation agreement, and on March 10, 1977, the plaintiff, as owner,

and James Boroff, as farmer, entered into a written agreement for the operation of the 1,280-acre farm. The term of the agreement was from March 1, 1977, until February 29, 1980, unless earlier terminated as provided in the agreement.

Under the agreement, on or before December 1 of each calendar year during the term of the agreement, the farmer was to deliver 42,000 bushels of No. 2 yellow corn to the elevator, which corn was the owner's share of the anticipated crop revenue. All corn or other crops in excess of the 42,000 bushels was the farmer's share. The owner paid taxes and insurance and the farmer was to pay all other expenses and costs. The agreement recognized that the farmer must arrange financing in order to perform his obligations under the agreement and required the farmer to grant the owner a security interest on the first 42,000 bushels of corn grown on the farm.

The agreement provided that if the farmer failed to observe or perform any of the conditions or covenants imposed upon him by the agreement, the owner had the right to declare the agreement terminated and had the right to reenter and repossess the farm and was entitled to any and all crops and improvements thereon "as liquidated damages for the Farmer's default hereunder." The agreement also provided: "Notwithstanding that the Owner may have terminated this Agreement pursuant to any of the terms hereof, such termination shall not prejudice the rights of Owner to recover from the Farmer any and all damages occasioned by his default hereunder."

Following the execution of the agreement, Boroff contacted several banks and financial institutions but was unable to arrange financing. After several meetings and discussions between plaintiff and Boroff, and Boroff's father-in-law, defendant Fred Eickhoff, financing the farm operation was discussed but the testimony as to the specific discussion is in conflict.

According to plaintiff's evidence, the defendant Eickhoff was willing to cosign Boroff's note and plaintiff had agreed to cosign Boroff's note along with Eickhoff as long as he had Eickhoff's personal guaranty. Eickhoff and Boroff testified that Eickhoff had refused to cosign any note and that a guaranty had never been discussed.

After discussions with the Omaha National Bank by plaintiff and Boroff, there is again a dispute in the evidence as to what occurred. The plaintiff testified that on the evening before May 5, 1977, he arranged by telephone for both Boroff and Eickhoff to come to the Omaha National Bank the next day where Boroff and plaintiff would sign the note and Eickhoff would sign the guaranty to the plaintiff. Only plaintiff and Boroff appeared at the bank. The plaintiff finally agreed to sign the note to the Omaha National Bank for $200,000, but directed that no funds be released by the bank to Boroff until he obtained the defendant's signature on the guaranty agreement.

On May 6, 1977, the plaintiff and Boroff went to Eickhoff's residence in Wood River, Nebraska. There is some conflict in the evidence as to what was said. Plaintiff testified that he told the defendant what the document was and told him to read it before signing it. The defendant testified that the plaintiff told him the document provided that if Boroff got hurt or could not perform his duties under the farm agreement the defendant would take care of the crops for Boroff. The parties agreed that the plaintiff told the defendant to read the document before signing it and that the defendant later signed the document.

The agreement provided: "To induce you to execute a note as co-maker to the Omaha National Bank for a farm loan in the amount of 200,000.00, to enable my son-in-law, James Borroff [sic], to perform his part of an agreement entered into March 10, 1977, as amended, between Seven Circle Farms as Owner and himself as the Farmer, and in consideration thereof, the

undersigned hereby guarantees the performance by the said James Borroff [sic] of all of the terms and conditions of the said Farm Agreement to be performed by James Borroff [sic] thereunder; and the undersigned undertakes to agree and indemnify and hold you and your successors and assigns harmless from and against any and all liability, loss, damage or expense, including attorneys' fees, which you may incur or sustain by reason of the failure of James Borroff [sic] to (1) fully perform and comply with the terms and the obligations of the said Farm Agreement or (2) to fully pay back the sums due under the note executed by James Borroff [sic] and Roger Erftmier with the Omaha National Bank to enable James Borroff [sic] to perform the terms and conditions of the aforesaid agreement." The plaintiff arranged for the release of the funds to Boroff on May 9, 1977.

The plaintiff became aware of financing problems in the farm operation in January or February 1978, and on April 10, 1978, plaintiff notified Boroff and Eickhoff that because of their inability to farm the land in accordance with the agreement he had been forced to seek another farmer for the property for 1978 and 1979. Meanwhile, some corn from the 1977 crop was sold and approximately $60,000 was credited to the $200,000 note on June 23, 1978. Apparently the owner's 42,000 bushels of the 1977 crop was delivered to plaintiff sometime in 1978. As of August 8, 1978, the amount due the Omaha National Bank on the note was $139,906.52. The plaintiff has subsequently executed renewal notes for that indebtedness.

On April 10, 1978, plaintiff leased the farm to John Von Heeder for the 1978-79 crop year. The rental was a 25 percent share of the corn crop with a guarantee of 21,000 bushels. The lease was renewed for the crop year 1979-80. In each year plaintiff received the guaranteed 21,000 bushels of corn which were sold for $2.05 per bushel for the 1979 year and $2.03 per bushel for the 1980 year.

The plaintiff filed this action seeking to recover on count 1 the principal balance of $139,906.52, plus interest, and on count 2 the sum of $74,818.87. The defendant alleged fraud and lack of consideration as defenses to the guaranty on both causes of action, and alleged a failure to mitigate damages as to the second cause of action.

After trial the jury returned a verdict for the plaintiff on the first cause of action for "50% note ballance [sic] and 50% interest," and on the second cause of action found in favor of the plaintiff but assessed the damages at zero dollars. As to the first cause of action the District Court overruled plaintiff's motion for judgment notwithstanding the verdict and granted defendant's motion for a new trial. As to the second cause of action the District Court overruled plaintiff's motion for judgment notwithstanding the verdict and granted plaintiff's alternative motion for a new trial. The plaintiff has appealed and the defendant has cross-appealed.

The plaintiff contends that the trial court erred in overruling the motion for directed verdict and motion for judgment notwithstanding the verdict on each of the two causes of action. Plaintiff also contends that the District Court erred in submitting the issue of damages to the jury on each cause of action, and erred in granting a new trial on the issue of liability.

The terms of the guaranty and indemnity agreement are clear. The evidence is undisputed that the defendant was told to read the agreement and that he then signed it. This court has held many times that in the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument. *Todd Brothers v. Federal Crop Ins. Corp.*, 178 Neb. 211, 132 N.W.2d 778 (1965); *Commodity Traders, Inc. v. Palmer*, 203 Neb. 667, 280 N.W.2d 49 (1979).

The defendant admits the execution and delivery of

the guaranty here, but alleges fraud and the absence of consideration as affirmative defenses. The burden of proving those affirmative defenses rested on the defendant.

The essential elements required to sustain an action for fraudulent misrepresentation are, generally speaking, that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage. See *Page v. Andreasen*, 200 Neb. 641, 264 N.W.2d 682 (1978).

Fraud is never presumed but must be established by the party alleging it by clear and satisfactory evidence. The general rule is that where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie. See *Growney v. C M H Real Estate Co.*, 195 Neb. 398, 238 N.W.2d 240 (1976). In the case at bar the evidence of the parties was that the plaintiff specifically told the defendant to read the one-page document, and that the defendant had the opportunity to do so before signing it. Under the record here the evidence was insufficient to establish an intent to deceive or justifiable reliance.

The defendant also contends that there was no consideration for the guaranty and indemnity agreement because the promissory note to the Omaha National Bank had already been signed by the plaintiff and Boroff 1 day before the guaranty was signed, and that the defendant, therefore, received no consideration for signing the guaranty. Defendant ignores the fact that plaintiff testified that he ordered the bank not to release the funds until he notified them to do so, and that he would not order them released until the defendant had signed the guaranty agreement. Plaintiff ordered the funds released after the guaranty was signed. This evidence stands

uncontradicted. 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. The benefit rendered need not be to the party contracting but may be to anyone else at his procurement or request. *Grady v. Denbeck*, 197 Neb. 795, 251 N.W.2d 164 (1977).

The consideration of a contract need not move to the promisor. A disadvantage to the promisee is sufficient, although the promisor derives no benefit therefrom. *Musser v. Zurcher*, 180 Neb. 882, 146 N.W.2d 559 (1966).

The rule governing the granting of a directed verdict has been stated many times. In every case before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden of proof is imposed. *Edquist v. Commercial Sav. & Loan Assn.*, 191 Neb. 618, 217 N.W.2d 82 (1974). In the case at bar there was not sufficient evidence upon which a jury could properly proceed to find a verdict for the defendant, upon whom the burden of proving fraud and lack of consideration was imposed.

There was no dispute or conflict in the evidence as to the amount due on the promissory note involved in the first cause of action. Where the plaintiff is entitled to a verdict on the issue of liability and the amount of loss is undisputed, he is entitled to a directed verdict for the amount established by the evidence.

With respect to the second cause of action, although the plaintiff was entitled to a directed verdict on the issue of liability, there was a direct conflict in the evidence as to the amount of damages. The defendant specifically pleaded a failure to reasonably mitigate damages and the verdict for the plaintiff is apparently inconsistent with a zero dollar award of damages.

Under such circumstances the trial court properly granted plaintiff's alternative motion for new trial on the second cause of action, although the new trial should be only as to the issue of damages.

The judgment of the District Court granting defendant's motion for new trial as to the first cause of action is reversed and the cause is remanded to the District Court with instructions to enter judgment for the plaintiff for the full amount of principal and interest on the promissory note established by the evidence. The action of the District Court in granting motion for new trial as to the second cause of action is affirmed, but modified by limiting the new trial to the issue of damages.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION.

IN RE INTEREST OF THOMAS ANTHONY SPRADLIN, JR., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ANNA MASTERSON SPRADLIN AND THOMAS ANTHONY SPRADLIN, SR., APPELLANTS.

317 N.W.2d 59

Filed March 5, 1982. No. 44334.

1. **Juvenile Courts: Expert Witnesses: Child Custody.** When the mental condition of a parent is in issue, evidence of the parent's treating psychiatrist is admissible in a juvenile court proceeding to determine child custody.
2. **Parental Rights.** The right of a parent to maintain the custody of his or her child is a natural but not an inalienable right and the public has a paramount interest in the protection of the rights of a child.
3. **Child Custody.** The first and primary consideration in any case involving the custody of a child is the best interests of the child.

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

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant Anna Spradlin.

Richard Douglas McClain for appellant Thomas Spradlin, Sr.

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

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

PER CURIAM.

This appeal challenges an order entered by the separate juvenile court of Lancaster County, Nebraska, which placed the legal custody of a minor in the Lancaster County Department of Public Welfare for foster care. We affirm.

The appellants, Anna Masterson Spradlin and Thomas Anthony Spradlin, Sr., wife and husband and parents of the minor, assert the juvenile court erred in admitting the testimony of Dr. Robert Osborne, a Lincoln psychiatrist, over objection that a physician-patient privilege existed between him and each appellant, and in finding it to be in the best interests of the minor child that his legal custody be retained by the Lancaster County Department of Public Welfare, subject to reasonable rights of visitation by the natural parents.

Dr. Osborne had treated each of the appellants for several years prior to the proceeding in question. It is the appellants' position that, as a consequence of that relationship, a physician-patient privilege exists between Dr. Osborne and each appellant and therefore, absent a waiver of that privilege, Dr. Osborne was not competent to testify. *State v. Norwood*, 194 Neb. 595, 596-97, 234 N.W.2d 601, 603 (1975), addresses this issue as follows: "Appellants object to the admission of the evidence of two psychiatrists who had treated appellants. The question requires interpretation of former section 25-1207, R.R.S. 1943 [now Neb. Rev. Stat.

§ 27-504 (Reissue 1979)], which nullifies confidential communications to a physician in proceedings under the Separate Juvenile Court Act and 'regarding injuries to children.' The term 'injury' is comprehensive. Webster's Third New International Dictionary, p. 1164, states: 'INJURY, HURT, DAMAGE, HARM, and MISCHIEF mean in common the act or result of inflicting on a person or thing something that causes loss, pain, distress, or impairment. INJURY is the most comprehensive, applying to an act or result involving an impairment or destruction of right, health, freedom, soundness, or loss of something of value * * * .' An action to protect a dependent and neglected child necessarily involves a question of impairment of a child's right to parental protection and guidance with consequent loss or destruction of mental and physical health, and the right to a normal and adequate upbringing. . . . This indicates that former section 25-1207, R.R.S. 1943, was intended to be effective when the mental condition of a parent is in issue. In the judgment of this court the neglect of a child is an injury to the child's welfare and rights. It constitutes one of the exceptions referred to in the statute and the evidence was properly admitted." Appellants urge that we overrule *Norwood.* We decline to do so.

Dr. Osborne's testimony concerned the emotional stability of the natural parents of the minor and the effect of such problems in their care of the infant. There is no question but that the mental fitness of Mr. and Mrs. Spradlin is an issue in this proceeding, and the testimony regarding their capacity to discharge their parental responsibilities was relevant to the court's determination as to whether they should be permitted to retain legal custody of the child. Dr. Osborne's testimony was properly admitted.

We turn now to the second issue. Mr. Spradlin has lived in a custodial home directed by Mary Hepburn-O'Shea since October of 1977. Mrs. Spradlin lived in the custodial home during December of 1977, and then

from August of 1978. It was there that the couple met. They were married shortly after the November 27, 1980, birth of Anthony Spradlin, the minor child who is the subject of this proceeding. It appears that after the birth Mrs. O'Shea took the Spradlins into her own home so she could supervise the care of the child.

Mrs. O'Shea, who has a master's degree in social work and has over 25 years of experience, testified that both Mr. and Mrs. Spradlin were in need of constant supervision in order to make sure medications were taken, that meals were cooked, and to supervise their spending money. She testified that after the child was born she bought prepared formula for the infant to eat; however, she would have to remind Anna to bathe and change the infant. On December 14, 1980, Anna suffered an anxiety attack and was hospitalized for treatment. Mrs. O'Shea took care of the infant for 3 days until the child could be placed in foster care with Child Protective Services.

In Mrs. O'Shea's opinion, the appellants would not be able to care for the child without constant supervision: "I feel if, as I said in this courtroom last March, if someone took on Anna and Tom and the baby as a parent and was a parent to all of them. In other words, if you adopted all three of them and maintained a daily parental function, then I think they would function as parents and I certainly think that Anna has the warmth to show the baby but I think in the communication area and in times of situations that you have in child rearing through no fault of her own, she would be unable to do that and certainly Tom would be unable to. And I say this with a great deal of feeling for my clients."

Dr. Robert Osborne testified that Mr. Spradlin has been diagnosed as a chronic undifferentiated schizophreniac. Some of the characteristics of this condition were described as a high level of anxiety, a looseness or fragmentation of thought processes, easy distractibility, and inappropriate emotional responses. Mr. Spradlin has also shown certain autistic behavior and

experienced auditory hallucinations. Dr. Osborne stated that he treated Mr. Spradlin with most major antipsychotic medications; however, Mr. Spradlin has had only limited success in responding to the treatments. Nor did Dr. Osborne believe Mr. Spradlin would respond to psychotherapy, because he has a great deal of difficulty in verbal communications. Based upon his observations over several years in a sheltered environment, Dr. Osborne was of the opinion that Mr. Spradlin would not be able to function as a wage earner or housekeeper to support the family.

As to Mrs. Spradlin, Dr. Osborne testified that she had been diagnosed as having an acute exacerbation of chronic paranoid schizophrenia. Dr. Osborne stated that her behavior is characterized by sudden reoccurrences of psychotic beliefs that people are plotting against her or trying to do her harm. Mrs. Spradlin appears to be very vulnerable to situations which others would perceive as commonplace and to which she responds with great anxiety.

Due to the problems the appellants have in maintaining their concentration, plus their anxiety to stress and fragmentation in thought processes, Dr. Osborne was of the opinion that they would not be able to cope with the stress of raising a child. During direct examination, Dr. Osborne was asked: "Q. What type of difficulty in your opinion would they have as parents? A. Well, one is maintaining appropriate and adequate interest on an ongoing basis for another human being that's a hundred percent dependent upon them. The very nature of the illnesses they each have would tend to bias the probability that they could successfully rear a child, biased the probabilities against them heavily because of the very problem of maintaining interest or maintaining concentration and over any period of time with that infant or any other person, they would feel as that infant made demands on them for the intimacy required and the fondling that — the tenderness, the love and that, that they could maintain but it would be very sporadic. It

would be very come and go kind of proposition and they may in some instances lose interest in that; much as literally playing house and saying, okay, I'm tired of playing house. Let's go play something else and move off in some other direction and return when it interested them to return and not because of any anticipated need of the child they think the child might have such as changing or feeding or so on. But perhaps in response to cry from a child, it would be, in my estimitation [sic], difficult to predict. And the demands of that infant are tremendous."

Dr. Osborne concluded that the illnesses afflicting the appellants would continue for a prolonged, indeterminate period of time. For these reasons, it was Dr. Osborne's opinion that the child should be placed in a foster home or adopted.

It should be noted that this is not a proceeding under Neb. Rev. Stat. § 43-209 (Reissue 1978) to terminate the parental rights of the Spradlins. Rather, this is a proceeding under Neb. Rev. Stat. § 43-208 (Reissue 1978), which provides in pertinent part: "When any child under the age of eighteen years shall be adjudicated to be a child as defined in subdivision (1), (2), or (4) of section 43-202, the court may permit such child to remain in its own home subject to supervision or may make an order committing the child to the . . . (5) care and custody of the Department of Public Welfare."

This section provides the statutory authority for the juvenile court to place the legal custody of a child it finds to be homeless, destitute, or lacking proper parental support in the Department of Public Welfare or other appropriate agency or home. It provides the court with the authority to place the custody of the child with a responsible party without terminating the parental rights of the natural parents.

Having reviewed this matter de novo upon the record as we are required, *In re Interest of Farmer, ante* p. 500, 315 N.W.2d 454 (1982); see, also, *In re Interest of Stoppkotte, ante* p. 1., 312 N.W.2d 454 (1981), and *In re*

Interest of McKee, 208 Neb. 623, 304 N.W.2d 918 (1981); and having in mind the rule that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parties at the trial, *Kringel v. Kringel*, 207 Neb. 241, 298 N.W.2d 150 (1980), we find appellants' second assignment of error to be without merit.

As we have held in the past, the right of a parent to maintain the custody of his or her child is a natural but not an inalienable right and the public has a paramount interest in the protection of the rights of a child. *State v. A. H.*, 198 Neb. 444, 253 N.W.2d 283 (1977). The first and primary consideration in any case involving the custody of a child is the best interests of the child. *State v. Loomis*, 195 Neb. 552, 239 N.W.2d 266 (1976); *Whitlatch v. Whitlatch*, 206 Neb. 527, 293 N.W.2d 856 (1980).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID WOODWARD, APPELLANT.

316 N.W.2d 759

Filed March 5, 1982. No. 44405.

1. **Jury Misconduct: New Trial.** In order for jury misconduct to be the basis of a new trial, the misconduct must be prejudicial to the defendant.
2. ——: ——. Misconduct of a juror sufficient to vitiate a verdict must be shown to have influenced the jury in arriving at a verdict, and it must relate to a matter in dispute.
3. **Criminal Law: Appeal and Error.** Where the trial court has determined that an unauthorized inspection of the premises was not prejudicial to the rights of the defendant, its finding will not ordinarily be disturbed by the appellate court in the absence of an abuse of discretion.
4. **Jurors: Testimony.** While a juror may not testify as to any matter or statement occurring during the course of the jury's deliberation or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict, a juror may testify as to the fact whether extraneous prejudicial information was improperly

brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

5. **Criminal Defendants: Bail Bond.** Once a defendant has been convicted of the felony charged, he is not entitled to be released on bail. Such determination is left to the discretion of the trial court who may prescribe the amount of the bond and the conditions thereof, including a requirement that the full amount of the bond be posted.

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

John P. Murphy, Lincoln County Public Defender, for appellant.

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

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

KRIVOSHA, C.J.

The appellant, David Woodward (Woodward), appeals from a jury verdict finding him guilty of the crime of burglary. He maintains that he should have been granted a new trial because he alleges that some members of the jury viewed the premises where the burglary occurred, contrary to the trial court's admonition. Woodward also maintains that the trial court erred in not permitting him to post a cash bond equal to 10 percent of the bail bond fixed by the trial court instead of the full amount of the bond during the time of appeal. We believe that the action of the trial court in both overruling the motion for new trial and in fixing the amount of the bail bond during the appeal was, in all respects, correct and the judgment and conviction is affirmed.

Woodward was charged with burglarizing a Phillips 66 service station located at 210 South Jeffers Street in North Platte, Nebraska. The station is located on the southeast corner of B and Jeffers Streets in North Platte. Robert Richardson was called by the State and testified he observed an individual leaving the Kwik Stop, which is located on the northwest corner of B and

Jeffers Streets in North Platte, at approximately 4 a.m. The individual was observed by Richardson walking toward the area of the Phillips 66 service station. Richardson was at the Kwik Stop for the purpose of delivering bread.

Richardson further testified that while in his delivery truck he heard a loud noise. He looked out the back of the truck and saw an individual kicking out a glass door at the Phillips 66 service station. He recognized the person as being the one he had seen walking out of the Kwik Stop toward the gas station just as he arrived to make the delivery. He had, on three or four previous occasions, seen the same individual walking on the streets of North Platte in the early morning hours. Richardson observed the individual enter the service station, at which point he had the Kwik Stop store clerk call the police. He identified Woodward as the individual who was at the station.

Police Officer Becky Hinton also testified that she arrived on the scene, saw the person behind the gas station, and gave chase, eventually losing track of him. Another officer determined that the distance between the Kwik Stop and the Phillips 66 service station was approximately 300 feet, though Richardson testified he thought it was only 150 feet.

At the noon recess during the trial, the presiding judge admonished the jurors not to talk to anyone about the case nor to inform themselves about the case, nor to perform any sort of investigation with reference to the case. He particularly told them not to take a look at the Phillips 66 service station. Photographs of the station were introduced in evidence.

Following the completion of the trial and after the jury began deliberation, they left the courthouse for dinner in a three-car caravan, including one car driven by the bailiff in whose charge they were. The restaurant to which they were taken was located south of the courthouse and the most direct route to the restaurant was by traveling down Jeffers Street, a one-way street in

North Platte. The jurors passed the intersection of B and Jeffers Streets as they proceeded to the restaurant, though they did not stop. When they returned to the courthouse, they took the corresponding one-way street, Dewey Street, back to the courthouse and did not pass the intersection in question. Following their deliberation, they returned a verdict finding Woodward guilty of the burglary.

At the hearing on the motion for new trial, two of the jurors were called by Woodward to testify. Both testified that no stop was made at the scene, nor was any investigation at the scene conducted. One of the jurors who testified could not recall any comment being made about the intersection. The other juror did recall that some comment was made about the intersection, but could not recall specifically what the comment was. Both jurors, however, testified that they were lifelong residents of North Platte and familiar with the intersection, having crossed it many, many times.

Woodward now urges us to adopt either a "per se rule" which would hold that an unauthorized view of the scene of the crime constitutes automatic grounds for a new trial, regardless of whether there is a showing that such a view was prejudicial, or at least a "rebuttable presumption" rule to the effect that once it is shown that the jury or some member had an unauthorized view of the scene of the crime, a rebuttable presumption should arise, with the burden on the State to show beyond a reasonable doubt that the conduct of the juror was harmless. We believe that neither rule is required or proper in a case of this nature. We have already declared that in order for jury misconduct to be the basis of a new trial, the misconduct must be prejudicial to the defendant. *State v. Isley*, 195 Neb. 539, 239 N.W.2d 262 (1976). We have further held that a motion for new trial for alleged juror misconduct is addressed to the sound discretion of the trial court, and a ruling made thereon will not be disturbed on appeal unless an abuse of discretion is shown. *State v. Robbins*, 207 Neb.

439, 299 N.W.2d 437 (1980).

More specifically, in *Phillips v. State*, 157 Neb. 419, 424, 59 N.W.2d 598, 601 (1953), we said: "Misconduct of a juror sufficient to vitiate a verdict must be shown to have influenced the jury in arriving at a verdict, and it must relate to a matter in dispute. Carpenter v. Sun Indemnity Co., 138 Neb. 552, 293 N.W. 400. The rule, concisely stated, is: It is not proper for a juror to inspect the place where the alleged crime occurred without the authorization of the court. Such an unauthorized inspection, however, will not vitiate the verdict where it is not shown to have affected the result of the verdict. Where the trial court has determined that an unauthorized inspection of the premises was not prejudicial to the rights of the defendant, its finding will not ordinarily be disturbed by the appellate court in the absence of an abuse of discretion on the part of the trial court."

Woodward acknowledges our rule in the *Phillips* case but maintains that our decision in *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978), requires us to change that rule and place a burden upon the State because of the defendant's inability to inquire of the jury what transpired. Our reading of the *Steinmark* case does not support that contention. What we said in *Steinmark* at 204, 266 N.W.2d at 753-54, following the requirements of Neb. Rev. Stat. § 27-606(2) (Reissue 1979), was: "'(2) Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, *except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. . . .*'

"Under this statute a juror may testify as to whether 'extraneous prejudicial information was improperly brought to the jury's attention.'" (Emphasis supplied.)

While it is true that one may not inquire as to whether the presence of the evidence affected the juror's mind, it is proper and necessary that evidence be presented by the objecting party to show that *extraneous prejudicial information* was improperly brought to the jury's attention. In this case, that burden, required to be carried by Woodward, was not met. All that Woodward produced was the evidence of two jurors that they had traveled by an intersection where the store in which the crime was committed was located and that some comment *may* have been made by one of the jurors concerning *what could or could not be seen.* The record does not, however, establish whether what was said was that Woodward could be seen by Richardson or that it was to the effect that Woodward could not be seen by Richardson. For all we know from the record, the comment made by one of the jurors may not only have been nonprejudicial to Woodward but, in fact, may have been beneficial. While obviously it would be better if jurors did not even pass the general area where a crime has been committed, it cannot be said that the mere passage through an intersection results in submitting to the jury *extraneous prejudicial information.* To hold otherwise would be to totally ignore the facts with regard to a host of communities in Nebraska where the jurors are intimately familiar with every aspect of the area and may not be able to even approach the courthouse without passing the area. Merely showing that jurors, when together and at the direction of the bailiff, passed the intersection in which a crime was committed, with nothing more, was insufficient to establish that the rights of the accused have been prejudicially affected or that he has in some manner been denied a fair trial. This is not similar to the situation where the evidence discloses that unauthorized and improper communications have been had with the jury. In such a

case, a rebuttable presumption does exist. See *Simants v. State*, 202 Neb. 828, 277 N.W.2d 217 (1979). There is, however, no evidence in this case of any improper communication with the jury. As we have already noted, there is not any evidence of any prejudicial evidence getting to the jury. We therefore believe that Woodward's contention that he was entitled to a new trial merely upon the showing made in this case was without support and the trial court's denial of a new trial on that basis was correct.

Following the court's overruling of Woodward's motion for new trial, a notice of appeal was filed with this court and the execution of the judgment was suspended. As is the practice, the District Court was advised by the Supreme Court that upon application and notice, the District Court *could* admit Woodward to bail in a sum and with sureties to be fixed and approved as conditioned by the District Court. The trial court, upon receiving such application from Woodward, fixed the amount of the bond in the amount of $5,000, cash or surety, and refused to permit Woodward to post the 10 percent bond referred to in Neb. Rev. Stat. § 29-901 (Reissue 1979). Woodward maintains that the trial court was in error in that regard and was required to permit him to post an appearance bond in cash in a sum not to exceed 10 percent of the amount of the bond. We believe that Woodward misreads the provisions of § 29-901 as they apply to appeals. The statute specifically provides in part: "Any bailable defendant shall be ordered released from custody *pending judgment*, on his personal recognizance, unless the judge determines in the exercise of his discretion that such a release will not reasonably assure the appearance of the defendant as required." (Emphasis supplied.) The provisions of § 29-901 apply only until the judgment has been rendered and not after. What we suspended by our order in this case following the appeal was the execution of the judgment. We did not, however, suspend the judgment. See *State ex rel. Hunter v. Jurgensen*, 135 Neb. 136, 280

N.W. 886 (1938). The provisions for bail after conviction are not governed by § 29-901 but, rather, by Neb. Rev. Stat. § 29-2303 (Reissue 1979). While the provisions of § 29-901 applicable to cases before judgment are mandatory except as to those specifically exempted by the provisions of Neb. Const. art. I, § 9, the provisions of § 29-2303 are purely discretionary. Section 29-2303 specifically provides in part: "Whenever a person shall be convicted of a felony, and the judgment shall be suspended as aforesaid, it shall be the duty of the court to order the person so convicted into the custody of the sheriff, to be imprisoned until the case in error be disposed of, or such person admitted to bail." It is clear from a reading of the above-quoted section that the right to bail, after conviction, is discretionary and not absolute. Once a defendant has been convicted of the felony charged, he is not entitled to be released on bail. Such determination is left to the discretion of the trial court who may prescribe the amount of the bond and the conditions thereof, including a requirement that the full amount of the bond be posted. See § 29-2303.

The action of the trial court is, in all respects, correct and the conviction and sentence are affirmed.

AFFIRMED.

SADALLAH (SAM) BADRAN, APPELLANT, V. VIRGINIA D. BERTRAND, APPELLEE.

316 N.W.2d 763

Filed March 5, 1981. No. 44518.

Pleadings: Proof. Proof must correspond with the allegations in the pleadings, and relief cannot be granted upon proof of a case substantially different from the case made in the pleadings.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Joseph S. Daly of Sodoro, Daly & Sodoro for appellant.

Kirk E. Naylor, Jr., for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, and HASTINGS, JJ.

PER CURIAM.

The plaintiff, Sadallah (Sam) Badran, brought this action in equity for specific performance of a written agreement to require the defendant, Virginia D. Bertrand, to convey a one-half interest in certain real estate, a residence in which the parties lived, titled in defendant's name. Plaintiff appeals from an order of dismissal entered by the District Court on motion of the defendant made at the close of plaintiff's case. The plaintiff assigns as error simply the court's action "in directing a verdict for the defendant after the 'Memorandum of Understanding' was received into evidence." We affirm.

The petition simply alleged the execution of a "Memorandum of Understanding" entered into by and between the parties which called for the conveyance by the defendant to the plaintiff of a one-half interest in 9958 Devonshire Drive, Omaha, Nebraska, which was then titled in the name of Virginia D. Bertrand. The consideration for this agreement was alleged to be that the plaintiff was "to pay one-half of all of the costs and expenses of said property, including the mortgage payments, insurance, taxes, utilities, maintenance and upkeep," as set forth in the agreement attached to the petition. The petition then alleged the "tendered performance of all of his [plaintiff's] obligations under the 'Memorandum of Understanding' but that the defendant has failed and refused to enter into the agreement referred to in the 'Memorandum of Understanding' and has also refused to execute a deed conveying the subject property to the plaintiff and the defendant as tenants in common." The prayer of

the petition is for specific performance of the "Memorandum of Understanding." The "Memorandum of Understanding" was alleged to have been executed on or about the 24th of August 1978, this action was filed on January 11, 1980, and trial had on May 26 and June 12, 1981.

According to Badran's testimony, the purchase price of the house was $200,000. He stated that the understanding was that he and the defendant would own the house 50-50, although he did not have to put up any money. The plaintiff denied that he was to make any of the monthly mortgage payments on the house, although he lived there from June or July of 1978 until January 7, 1980. These payments amount to approximately $1,600. He claimed that although his signature appeared on the "Memorandum of Understanding," he could not read or write, nor did anyone explain to him what the agreement provided. He specifically disclaimed any obligation on his part to pay one-half of the mortgage payments, the insurance, taxes, utilities, maintenance, or upkeep, all of which were specifically provided for in the "Memorandum of Understanding" upon which he brought this action.

At about the same time as the house purchase, according to the plaintiff's testimony he and the defendant purchased a restaurant for $750,000, which was to be owned jointly by the two parties, although the defendant was to put up all the money and was to and did pay the plaintiff approximately $2,000 per month to help her in her business.

The defendant was called as a witness by the plaintiff. She conceded the existence of the "Memorandum of Understanding" and the general agreement between the parties that Badran was to receive a one-half interest in the house in exchange for his paying one-half of the mortgage payments, taxes, utilities, and upkeep. She denied ever having agreed to give him a one-half interest in the house "free and clear for nothing."

We believe that it is abundantly clear from the record

that by his testimony and other evidence offered in support of his claim, the plaintiff completely repudiated the "Memorandum of Understanding" which formed the basis of the cause of action alleged in his petition. In *Russell v. Zanone*, 55 Tenn. App. 690, 693, 404 S.W.2d 539, 540 (1966), the Tennessee Court of Appeals stated that "proof must correspond with the allegations in the pleadings, and relief cannot be granted upon proof of a case substantially different from the case made in the pleadings." To the same effect is *W. T. Smith Lumber Co. v. Foshee*, 277 Ala. 71, 75, 167 So. 2d 154, 158 (1964): "To authorize relief in equity the allegations and proof must correspond, and no matter how just the demand established by complainant's proof, if it does not harmonize with the allegations of the bill, the complainant is not entitled to relief."

Not only did the plaintiff's proof not correspond to the allegations of his petition, it completely repudiated the claim upon which his action was founded. In our opinion the trial court was correct in ordering the dismissal of plaintiff's petition, and its judgment is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

CONNIE J. CAMPBELL, APPELLEE, V.
JOHN O. CAMPBELL, APPELLANT.

316 N.W.2d 765

Filed March 5, 1982. No. 81-595.

Appeal from the District Court for Platte County: JOHN M. BROWER, Judge. Affirmed.

R. Steven Geshell of Robak & Geshell for appellant.

Mark M. Sipple of Luckey, Sipple & Hansen for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The instant appeal involves a domestic relations matter. The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

LINCOLN CITY EMPLOYEES UNION, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, APPELLEE, V. CITY OF LINCOLN, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.

317 N.W.2d 63

Filed March 12, 1982. No. 43615.

1. **Commission of Industrial Relations: Appeal and Error.** The standard of review by the Supreme Court of orders and decisions of the Commission of Industrial Relations is generally restricted to considering whether the commission's order is supported by substantial evidence, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.
2. ——: ——. Absent a sufficient showing in the record of the dependence upon one another or the lack of freedom and independence in formulating their own policies and setting their own course of action, this court will not find a direct or indirect affiliation between two local unions. The mere fact that each local union can be traced back to a common international union will not be enough to show that the locals are affiliated with each other. There must be a positive showing that the national has authority and power to exercise control over both locals and that it is actually exercising that control.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed.

Dana W. Roper, Assistant City Attorney, and William A. Harding of Nelson & Harding for appellants.

J. Murry Shaeffer for appellee.

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

PER CURIAM.

The appellee, Lincoln City Employees Union, National Association of Government Employees (hereafter NAGE), petitioned the Nebraska Commission of Industrial Relations (hereafter CIR) to conduct an election and to certify NAGE as the exclusive bargaining agent of certain employees of the City of Lincoln classified as "labor, labor supervision, and trades."

The appellant City of Lincoln, Nebraska (hereafter City), interposed objections, more specifically (1) that a contract already existed between the City and the employees sought to be represented, and the contract constituted a bar to an election, and (2) that the proposed bargaining unit would consist of civilian employees and police officers since the existing police union was a local of International Brotherhood of Police Officers (hereafter IBPO), a division of NAGE. A few background facts are in order.

Prior to the time the petition was filed, the City's employees were represented by the American Federation of State, County, and Municipal Employees (hereafter AFSCME), IBPO, Amalgamated Transportation Union, and the International Association of Firefighters. In addition to these unions, the City also voluntarily recognized Lincoln City Employees Association (hereafter LCEA) as a labor organization representing employees not officially represented by the unions previously mentioned.

LCEA employees negotiated wages, hours, and fringe benefits with the City and also enjoyed checkoff privileges, bulletin board privileges, and the right to process grievances. In June 1978 the City and LCEA

reached a 2-year agreement which was to expire on August 31, 1980. The terms of the agreement covered wages, health insurance, retirement, and sick leave.

Subsequent to this agreement AFSCME, which served as the exclusive bargaining agent of the employees described in the NAGE petition, was decertified in CIR case No. 261 on November 20, 1978. With the decertification of AFSCME, LCEA sent the City personnel director a letter asking the City if LCEA could be recognized as the bargaining agent for the former AFSCME employees. The City notified LCEA that the former AFSCME employees would be eligible for membership in LCEA. The City agreed to "meet and confer" with LCEA on behalf of all employees not represented by one of the other officially recognized bargaining agents, as long as the arrangement was acceptable to the affected employees. The conditions of employment extended to LCEA members were also extended to former AFSCME members.

NAGE filed its petition for election on July 31, 1979. After determining that LCEA was a necessary party to the action, a hearing was held on September 27, 1979, to determine if a contract bar existed. On October 30, 1979, the CIR ruled that: "1. A contract bar does not exist as to those employees previously represented by AFSCME and decertified on November 20, 1978, by CIR Case No. 261. The evidence adduced by the petitioner does not support a finding that these employees were bound by the contract in question or that the City Employees Association actually had any authority to represent them. 2. There does exist a contract bar as to any employees sought to be represented by the petitioner who were represented by the City Employees Association and not represented by AFSCME on September 1, 1978."

Thereafter, the City filed a motion to dismiss based on the answers to certain interrogatories the City had served on NAGE. The City's basic contention was that the Lincoln Police Union was a local of IBPO which, in

turn, was a division of NAGE. The City argued that the direct or indirect affiliation of the police union with NAGE prevents NAGE from representing former AFSCME members since this might result in guard and nonguard employees being represented by the same union.

The CIR held a hearing on November 20, 1979, and entered its order on November 21, 1979, overruling the City's motion.

By joint stipulation of the parties, a representation election was held on February 22, 1980, which resulted in the election of NAGE as the exclusive bargaining representative. The City filed an objection to the election, stating that employees other than members of the bargaining unit acted as observers for NAGE. The CIR overruled the City's motion. Thereafter, the City filed a motion for new trial, which was overruled. The City then filed a notice of appeal to this court. After the bill of exceptions and transcript were docketed in this court, the City filed another motion for new trial based on newly discovered evidence. The CIR found that it was without jurisdiction and the City filed a supplemental praecipe to have the motion filed with this court.

The standard of review by the Supreme Court of orders and decisions of the CIR is generally restricted to considering whether the CIR's order is supported by substantial evidence, whether the CIR acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. *AFSCME Local 2088 v. County of Douglas*, 208 Neb. 511, 304 N.W.2d 368 (1981).

There is substantial evidence in the record that a contract bar did not exist. The following testimony of Walter J. Mitchell, personnel director for the City, strongly supported the CIR decision. The following questions and answers were elicited at the September 27, 1979, hearing: "Q In your agreements which you reached with formal labor unions, that agreement flows to only certain employees of the City of Lincoln desig-

nated in that contract. A That's right. Q When this agreement was reached with City Employees Association in June of 1978, to whom did those benefits accruing under that agreement flow? A Everybody who wasn't represented by one of the formal agreements that you're talking about, other than the unclassified employees. Q Those benefits did not flow, at that time, to members of the AFSCME bargaining unit? A No, because — That's right. The answer is no. Q At the time that these ordinances were passed which were introduced in September or October of 1978, the benefits agreed to with CEA also were not ratified as benefits for the AFSCME employees? A Not at that time. Q Since that time, since the ordinances were passed, there have been no negotiations between CEA and the City of Lincoln for the benefit of the former AFSCME bargaining group employees. A That's right."

It is not disputed that at the time LCEA was negotiating the June 1978 contract it was not representing any of the AFSCME members. An agreement was reached and the contract was ratified before AFSCME was decertified. At the time the contract was negotiated, it was never the intention of LCEA or the City that AFSCME members would be covered by the contract. Under these facts and circumstances, we cannot say that a contract bar exists. Therefore, the CIR order of October 30, 1979, is correct.

The City contends that the new Lincoln City Employees Union and the Lincoln Police Union are directly or indirectly affiliated with each other. The City contends that this affiliation violates well-established Nebraska law that bargaining units may not include both guard and nonguard employees, nor may unions admitting guards into membership also represent for purposes of collective bargaining nonguard employees, citing *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979).

The City alleges that NAGE exercised pervasive control of its local union. However, the City offers no

evidence that the Lincoln Police Union is being controlled by NAGE. In fact, the record contains evidence which conflicts with this contention. Dennis A. Duckworth, president of the Lincoln Police Union, gave the following testimony: "Q In conjunction with your job as a police officer, do you hold another position associated with that job? A Yes, I do. Q What is that? A I am president of the union for the police officers. Q Have you held other offices or performed other functions for the Lincoln Police Union during your membership in the union? A Yes, I have. Q What were those? A I was on the negotiating team that negotiated the contract that we are now operating under with the City. Q Would you explain to the Commission how the initial requests of the union were prepared, and any help that you might have had in preparing the request for contract negotiations? A The negotiations, what we want in the contract is just what each of the officers might come up with. They are presented to the negotiating team by the officers. We go over them then, and the negotiating team presents these offers to the City. Q The Lincoln Police Union is associated with the International Brotherhood of Police Officers, is it not? A Yes, it is. Q And it is a local of the International Brotherhood of Police Officers? A Yes, it is. Q The International Brotherhood of Police Officers is a division of an organization known as the National Association of Government Employees? A That's correct. Q During the process of negotiations and preparations for negotiations by the Lincoln Police Union, were the terms or conditions, or were suggestions made, by International Brotherhood of Police Officers, as to what had or should be in your contract? A No, it wasn't. Q Did the terms to be negotiated in the contract deal with anything other than the local situation within the Lincoln Police Department? A No. It was strictly with the local. Q You are aware that the National Association of Government Employees are attempting to represent a group of civilian employees of the City of Lincoln, are you not? A Yes, I am. Q Have

you, in any way, helped with that organization? A No, I haven't. Q Have you talked with any civilian employees of the City of Lincoln about becoming members of the National Association of Government Employees? A No, I have not. Q According to the bylaws of the Lincoln Police Union and the International Brotherhood of Police Officers, could a civilian employee of the City of Lincoln become a member of either the Lincoln Police Union or the International Brotherhood of Police Officers? A No, they could not. Q Who specifically does the Lincoln Police Union, as a local of the International Brotherhood of Police Officers, represent in negotiations? A Police officers only, of the rank of Police Officer, Sergeant, Detective and Lieutenant. Q Are any civilians represented by the union? A No, they are not. Q Was the Lincoln Police Union, as Local 544 of the International Brotherhood of Police Officers, able to secure a contract with the City of Lincoln? A Yes, they were. Q Is that contract presently in effect? A Yes, it is. Q When does that expire? A It expires August 31, 1980. Q Does the Lincoln Police Union, Local 544 of the International Brotherhood of Police Officers, or is it attempting to, represent anybody other than police officers at this time? A No, it is not. Q Has the Lincoln Police Union actively engaged or passed any resolutions to help in the organization of the civilian City employees of the City of Lincoln? A No, we have not."

This testimony indicates the separateness of the two local unions. The argument by the City that the NAGE constitution would obligate the Lincoln Police Union to honor a picket line by the Lincoln City Employees Union is not convincing. Neb. Rev. Stat. § 48-821 (Reissue 1978) specifically prohibits government employees from striking.

In light of this, absent a sufficient showing in the record of the dependence upon one another or the lack of freedom and independence in formulating their own policies and deciding their own course of action, this court will not find a direct or indirect affiliation be-

tween the two unions. The mere fact that each local union can be traced back to a common international union will not be enough to show that the locals are affiliated with each other. There must be a positive showing that the national has authority and power to exercise control over both locals and that it is actually exercising that control. Here, there is evidence that the locals are controlling their own activities. The international union was used only in the formative stages of the locals. Also, no civilian employees are allowed to become members of either IBPO or the Lincoln Police Union. Although not controlling on us, we find support for our position in *Bally's Park Place*, [1980-81] 5 Lab. Rel. Rep. (CCH) ¶ 18,314 at 29, 627-28, 107 L.R.R.M. 1580, 1581, wherein it was stated: "The Board has consistently ruled that a guard union is 'affiliated indirectly' with a nonguard union within the meaning of Section 9(b)(3) of the Act, where 'the extent and duration of [the guard union's] dependence upon [the nonguard union],' or vice versa, 'indicates a lack of freedom and independence in formulating its own policies and deciding its own course of action.' Thus, the Board has permitted substantial latitude when a guard union is assisted by a nonguard union merely during the former's formative stages. However, where the assistance rendered continues beyond the formative stages, the Board has found an indirect affiliation between guard and nonguard organizations."

The record does not reflect sufficient evidence that NAGE is controlling either local or that the locals were not acting independently. This is not to say that the Lincoln City Employees Union cannot be decertified in the future if it is shown later that NAGE is actually controlling it or that the Lincoln City Employees Union and the Lincoln Police Union are not acting independently. The evidence supports the decision of the CIR and it is therefore affirmed. We find no merit in the other assignments and therefore we do not discuss them.

AFFIRMED.

KRIVOSHA, C.J., disqualified.

WHITE, J., participating on briefs.

RALPH P. ROSNICK ET AL., APPELLANTS, V. CARL W. RENSTROM, APPELLEE.

316 N.W.2d 765

Filed March 12, 1982. No. 43912.

1. **Courts: Dismissal and Nonsuit.** "An action may be dismissed without prejudice to a future action . . . (5) by the court for disobedience by the plaintiff of an order concerning the proceedings in the action." Neb. Rev. Stat. § 25-601 (Reissue 1979).
2. **Records: Appeal and Error.** In the absence of a bill of exceptions, review on appeal is limited to the question of whether the pleadings support the judgment.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Roy G. Breeling and James R. Place of Breeling, Welling & Place for appellants.

Edward G. Garvey, Esq., of Garvey, Nye, Crawford, Kirchner & Moylan for appellee.

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

CLINTON, J.

This is an appeal by the plaintiffs Rosnick et al. from an order made on the motion of the defendant Renstrom under the provisions of Neb. Rev. Stat. § 25-601 (Reissue 1979) dismissing the plaintiffs' petition without prejudice for failure to comply with an order of the court to make the petition more definite and certain. We affirm.

The only bill of exceptions in this case is one made at the hearing on the motion for new trial. It contains the colloquy between counsel and the court and the deposition of the plaintiff Rosnick. That deposition contains

nothing pertaining to an excuse for failure to comply with the order of the court. The transcript shows the following proceedings. On May 9, 1978, the plaintiffs filed their petition for breach of an alleged contract to furnish and lend money to finance the business of the plaintiffs, which contract was alleged to have been entered into "after a series of conferences in late 1972." Following the filing of the petition, various motions and orders were filed and entered. On September 19, 1978, the defendant filed a motion to require the plaintiffs to make the petition more definite and certain in several particulars, including (1) a request to state whether the alleged contract was oral or in writing, and (2) a request to produce a copy of said contract if in writing and to incorporate the same in the petition. On October 25, 1978, the motion to make more definite and certain was granted.

The transcript shows no other activity until July 3, 1980, when the plaintiffs' counsel filed a motion to withdraw, which motion was granted on July 3, 1980. On July 3, 1980, present counsel entered their written appearance in the case. On July 31, 1980, the motion to dismiss was filed. The motion was heard on August 26, 1980, and the petition was ordered to be dismissed without prejudice. The transcript does not show the plaintiffs ever complied with the motion to make more definite and certain. There is no record to show the amended petition was ever tendered. There is nothing to show any excuse for failure to comply with the order to make more definite and certain.

The plaintiffs filed a motion for new trial on September 5, 1980. This motion was heard on October 20, 1980, and a hearing was held. The journal entry denying the motion for new trial indicated that certain documentary evidence was offered and in part received. The evidence is not preserved in any bill of exceptions and, of course, we do not know its nature. The motion for new trial was overruled on the date of hearing.

Section 25-601 provides in part: "An action may be

dismissed without prejudice to a future action . . . (5) by the court for disobedience by the plaintiff of an order concerning the proceedings in the action."

The transcript indicates that approximately 22 months elapsed from the time the order to make more definite and certain was granted until the motion to dismiss was filed. About another month elapsed before the latter motion was heard. In *Scudder v. Haug*, 197 Neb. 638, 640, 250 N.W.2d 611, 612-13 (1977), we said, quoting from *Pressey v. State*, 173 Neb. 652, 114 N.W.2d 518 (1962): "'* * * it has almost universally been held or recognized that courts have the inherent power to dismiss an action for disobedience of a court order. It is obvious that this is one of the more coercive measures to compel obedience of an order. It should be equally evident that it is necessary on occasions for courts to resort to such action in the interest of the orderly administration of justice. * * *

"'"When a plaintiff invokes the jurisdiction of a court and seeks to avail himself of it he does so with the understanding that he must abide by all lawful statutes, rules and orders applicable to him, and the court has inherent power to impose the sanction of dismissal, for its coercive effect." We say that the right of a court to enforce its lawful orders is inherent in the power of the court. Without this right, a court could not control its dockets; business before it would become congested; its functions would be impaired; and speedy justice to litigants would largely be denied.'"

In the absence of a bill of exceptions, review on appeal is limited to the question of whether the pleadings support the judgment. *Hanson v. Hanson*, 198 Neb. 675, 254 N.W.2d 699 (1977).

The transcript and motion to dismiss support the judgment of dismissal.

AFFIRMED.

SCHOOL DISTRICT NO. 17, DOUGLAS COUNTY, NEBRASKA (MILLARD SCHOOL DISTRICT), AND WESTSIDE COMMUNITY SCHOOLS (SCHOOL DISTRICT NO. 66), DOUGLAS COUNTY, NEBRASKA, APPELLANTS, V. STATE OF NEBRASKA; NEBRASKA DEPARTMENT OF EDUCATION; NEBRASKA STATE BOARD OF EDUCATION; AND THE DIRECTOR OF ADMINISTRATIVE SERVICES, APPELLEES.

316 N.W.2d 767

Filed March 12, 1982. Nos. 43939, 43938.

1. **Statutes.** Where one statute refers to another and the latter is subsequently repealed, the statute repealed, absent a contrary legislative intent, becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned.
2. **Statutes: Legislative Enactments: Judicial Construction.** When the Legislature subsequently enacts legislation which makes related preexisting law applicable thereto, it is presumed that it did so with full knowledge of such preexisting legislation and judicial decisions of the Supreme Court construing and applying it.
3. **Statutes.** In interpreting the meaning of statutory provisions, all the provisions should be read in order to arrive at a conclusion as to their proper meaning.
4. **Statutes: Legislative Intent.** To ascertain the intent of the Legislature, the Supreme Court may examine the legislative history of the act in question.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Young & White and Verne Moore, Jr., for appellants.

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

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

CAPORALE, J.

The Millard School District and the Westside Community Schools appeal to this court from orders of the District Court for Lancaster County, Nebraska,

dismissing with prejudice their actions seeking reimbursement of certain funds expended on mandated special education programs for physically and mentally handicapped children during the 1974-75 school year. The actions brought by the school districts were consolidated for briefing and oral argument before this court and will be treated as such herein. We affirm.

The background of this litigation is set out in our opinions in *Millard School Dist. v. State Department of Education*, 202 Neb. 707, 277 N.W.2d 71 (1979), and *Westside Community Schools v. State Department of Education*, 202 Neb. 712, 277 N.W.2d 73 (1979). In those cases, we affirmed orders of the District Court dismissing appellants' declaratory judgment actions and determined that the proper statutory remedy available to them from the disallowance of their claims by the Department of Administrative Services was an appeal to the District Court in the manner provided by Neb. Rev. Stat. §§ 77-2406 to 77-2409 (Reissue 1976). We examine in this appeal whether appellants followed the proper statutory procedures to perfect their appeals in the District Court.

The record reveals that during the pendency of the appellants' declaratory judgment actions to this court, the director of the Department of Administrative Services entered orders on January 5, 1978, disallowing the claims of the school districts. Thereafter, on January 13, 1978, the appellants filed notices of appeal from the disallowances of their claims, together with bonds, certified transcripts of the proceedings held before the Department of Administrative Services, and motions for leave to introduce evidence in support of the appeals. On April 26, 1979, the District Court granted the motions of the school districts and they subsequently mailed interrogatories to the office of the Attorney General to be answered by the director of the Department of Administrative Services. Objections to the interrogatories were sustained by the District Court on October 1, 1979. The court quashed

the interrogatories, based on its finding that the director of the Department of Administrative Services was not an "adverse party" as the term is used in Neb. Rev. Stat. § 25-1267.37 (Reissue 1979).

On December 3, 1979, the appellants filed motions for summary judgment with the court and a notice of the hearing on the motions was served upon the Attorney General, who filed a special appearance objecting to the District Court's jurisdiction over the appeal. The court overruled appellants' motions for summary judgment on March 27, 1980, finding that they had neither filed petitions on appeal nor had summons issued from the January 5, 1978, orders of disallowance of claims.

It appears that on April 11, 1980, appellants' counsel left motions for leave to file petitions out of time with the District Court. The court subsequently notified counsel that the motions had not been properly filed and inquired if he desired to do so. Upon being advised in the affirmative, the court ordered a hearing to show cause why appellants should be allowed to file their petitions out of time. On October 15, 1980, the District Court entered orders overruling appellants' motions and dismissed the cases. The court determined that the appellants failed to show good cause for their delay in filing their petitions on appeal after the January 5, 1978, order of disallowance.

On appeal to this court, the appellants allege that the District Court erred in its finding that § 77-2407 incorporates the appeal procedure of former justice of the peace courts as specified in Neb. Rev. Stat. § 27-1306 (Reissue 1964). They contend that since the procedure specified in § 27-1306 was repealed in 1972, the proper appeal procedure from a disallowance of claim is that set forth in Neb. Rev. Stat. § 24-544 (Reissue 1979), which provides that an appeal from a county court to the District Court is perfected upon the filing of a certified transcript within 30 days of judgment. The school districts urge that since they filed certified

transcripts with the District Court on January 13, 1978, they perfected their appeals from the January 5, 1978, orders disallowing their claims.

At this point we set out some well-established principles of law applicable to issues regarding statutory construction. Where one statute refers to another and the latter is subsequently repealed, the statute repealed, absent a contrary legislative intent, becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned. *Shull v. Barton*, 58 Neb. 741, 79 N.W. 732 (1899).

We have frequently held that when the Legislature subsequently enacts legislation which makes related preexisting law applicable thereto, it is presumed that it did so with full knowledge of such preexisting legislation and judicial decisions of the Supreme Court construing and applying it. *State v. Kock*, 207 Neb. 731, 300 N.W.2d 824 (1981); *Sidney Education Assn. v. School Dist. of Sidney*, 189 Neb. 540, 203 N.W.2d 762 (1973).

In interpreting the meaning of statutory provisions, all the provisions should be read in order to arrive at a conclusion as to their proper meaning. *Little Blue N.R.D. v. Lower Platte North N.R.D.*, 206 Neb. 535, 294 N.W.2d 598 (1980).

To ascertain the intent of the Legislature, the Supreme Court may examine the legislative history of the act in question. *PPG Industries Canada Ltd. v. Kreuscher*, 204 Neb. 220, 281 N.W.2d 762 (1979).

The statutes relevant to the disposition of this case are as follows. Section 77-2406, which provides in part: "All claims of whatever nature upon the treasury of this state, before any warrant shall be drawn for the payment of the same, shall be examined, adjusted and approved by the Department of Administrative Services." It is well established in this jurisdiction that an order disallowing a claim can be reviewed only by appeal to the District Court. *State v. Cornell*, 54 Neb.

158, 74 N.W. 398 (1898); *Pickus v. State*, 115 Neb. 869, 215 N.W. 129 (1927). The procedure to be followed in an appeal from an order of disallowance by the Department of Administrative Services is set forth in § 77-2407, which states in pertinent part: "The Director of Administrative Services shall keep a record of all claims presented to him for examination and adjustment and shall therein note the amount of such claims as shall be allowed or disallowed. In case of the disallowance of any claim, or any part thereof, the party aggrieved by the decision of the director may appeal therefrom to the district court of the county where the capital is located within twenty days after receiving official notice. *Such appeal may be taken in the manner provided by law in relation to appeals from county courts to such district courts . . . .*" (Emphasis supplied.)

The legislative history reveals that at the time § 77-2407 was last amended in 1967, Neb. Rev. Stat. § 24-544 (Reissue 1964) provided that appeals from county courts to District Court were to be *"in the manner as provided by law in cases tried and determined by justices of the peace."* (Emphasis supplied.) The appeal procedure from judgments by justices of the peace is provided for in Neb. Rev. Stat. §§ 27-1301 et seq. (Reissue 1964), which were repealed in 1972. We note that § 27-1306 specifically required that to perfect an appeal from any justice of the peace court, *the plaintiff had 50 days from judgment to file a petition in the District Court.*

In its order, the District Court found the applicable law to be that as set forth in *Shull v. Barton*, 58 Neb. 741, 79 N.W. 732 (1899), and concluded: "Where one statute (77-2407) refers to another (27-1306), which is subsequently repealed, the statute repealed (27-1306) becomes a part of the one making the reference (77-2407) and remains in force so far as the adopting statute is concerned." The appellants contend, however, that the court erred in applying the *Shull* rule in this case and that the

appeal procedure to be applied is that presently provided in the statutes at Neb. Rev. Stat. §§ 24-541 et seq. (Reissue 1979). We note, however, that these provisions have recently been repealed by 1981 Neb. Laws, L.B. 42. Present Neb. Rev. Stat. § 24-541.06 (Supp. 1981) limits District Court reviews from county or municipal courts (other than Small Claims Court) to one for error appearing on the record.

The determinative issue on appeal is whether the *Shull* reference rule relied upon by the District Court is still the law of this jurisdiction and should be given effect. We determine from a review of the case law that the *Shull* rule is still the law of this jurisdiction and, based on that rule, § 77-2407 incorporates by reference the appeal procedure of the former justice of the peace courts found in § 27-1306.

In *Hanson v. City of Omaha*, 157 Neb. 768, 61 N.W.2d 556 (1953), this court applied the *Shull* rule to resolve an eminent domain action. Neb. Rev. Stat. § 14-375 (1943) provided that landowners adversely affected by the city planning commission's assessment of damages could appeal in the manner provided by Neb. Rev. Stat. § 14-379 (1943), a section which provided that appeals were perfected to the District Court upon the filing of a transcript within 20 days from the expiration of the time allotted the city to exercise its right of abandonment. Section 14-379 was repealed by 1951 Neb. Laws, Ch. 101, § 127, pp. 505-06, and the appellants in *Hanson* argued that other appellate procedures were available to them. This court determined that notwithstanding the repeal of § 14-379, it continued in force because it was incorporated by reference as a part of § 14-375, and governed the procedure of appeal to be followed by appellants.

In *Knoefler Honey Farms v. County of Sherman*, 193 Neb. 95, 225 N.W.2d 855 (1975), this court examined the procedure to be followed in appealing from an action of a county board of equalization in a tax assessment case. The trial court had dismissed

appellant's action because it had failed to perfect jurisdiction in the District Court by not filing a written notice of appeal within 20 days of the board action as required by Neb. Rev. Stat. § 23-135 (Reissue 1977). This court reversed, noting that Neb. Rev. Stat. § 77-1510 (Reissue 1976) provided that appeals from county boards of equalization were to be made within 45 days of adjournment of the board and in the same manner as appeals were taken from the county board in the disallowance of claims. The court reviewed the legislative history of § 77-1510 and determined that the Legislature had intended the 45-day period from adjournment to apply to "all activities" necessary for perfecting appeals to the District Court. The court concluded that § 77-1510 incorporated by reference the procedure of appeal from the former justice of the peace courts, but not the time periods referred to therein. However, in *United Way of the Midlands v. Douglas County Board of Equalization*, 199 Neb. 323, 259 N.W.2d 270 (1977), this court overruled *Knoefler Honey Farms* to the extent that there was language which applied the 45-day time period to the giving of notice of appeal and the furnishing of an appeal bond, rather than the 20-day period as provided under § 23-135. We note that there is nothing in the *United Way* ruling which would indicate any intent to overrule the application of the *Shull* incorporation by reference rule.

In *Estate of Tetherow v. State*, 193 Neb. 150, 226 N.W.2d 116 (1975), this court considered the appeal procedure to be applied in relation to an appeal by the state Department of Roads in a condemnation proceeding. The issue before the court was the determination as to which party had the burden of filing the petition on appeal. The court found that Neb. Rev. Stat. § 76-717 (Reissue 1976) incorporated by reference the appellate procedure of the former justice of the peace courts which placed the burden of filing the petition on the plaintiff. However, under a 1961 amendment to § 76-717, all appeals in eminent domain

proceedings were to be docketed with the condemnee designated as the plaintiff and the condemner as defendant. Under the peculiar circumstances of *Tetherow*, the court concluded that condemnees in eminent domain actions had the burden of filing a petition on appeal, even though it was the condemner state which was the first party filing the appeal. We note that in *Hornung v. Hatcher*, 205 Neb. 449, 288 N.W.2d 276 (1980), this court recently limited the *Tetherow* decision. In *Hornung* we held that in appeals of eminent domain proceedings, the first party appealing must file a petition on appeal within 50 days from the rendition of award of judgment. Again, there is nothing in the language of *Hornung* which would indicate any limitation of the *Shull* rule or its application to the facts of this case.

We must conclude, in light of the case law, that statutes making general references to § 27-1306 have been interpreted in accordance with the *Shull* rule to determine the proper statutory procedures to be followed on appeal to the District Court. In the present case, we must determine that § 77-2407 incorporates by reference the appeal procedure of § 27-1306, which obligated the appellants to file petitions within 50 days of the disallowance of their claims to perfect their appeals to the District Court.

Appellants cite us to cases from a number of jurisdictions which hold that where reference in an adopting statute is to the law generally which governs a particular subject and not to any specific statute or part thereof, the reference will be held to include the law as it stands at the time it is sought to be applied, with all the changes made from time to time. See, *Layton School of Art & Design v. WERC*, 82 Wis. 2d 324, 262 N.W.2d 218 (1978); *State v. District Court (Delaware County)*, 253 Iowa 903, 114 N.W.2d 317 (1962); *Carruba v. Meeks*, 274 Ala. 714, 150 So. 2d 195 (1963). Whatever may be the circumstances whereunder the application of such distinction may be

appropriate, if any, it is clear from our prior decisions that the distinction does not apply to the case at hand. Our prior cases have held that the adopting language in question incorporated by reference the appeal procedure of § 27-1306.

The record clearly indicates that appellants did not follow the proper procedure in appealing from the orders of disallowance to the District Court. The District Court did not abuse its discretion in holding the school districts have not shown good cause for their failure to file petitions on appeal within the time required by statute.

It was more than a year after we held declaratory judgment actions inappropriate before the appellants took any action seeking to file petitions out of time, and a period of more than 2 years after the claims had been denied. Therefore, the judgment of the District Court was correct and must be affirmed.

AFFIRMED.

WHITE, J., dissenting.

I dissent. The court continues a procedural trap, which has no basis in logic, but is designed merely to penalize the unwary. In all appeals from administrative agencies, if the method of appeal is at all mentioned or described, an exhaustive search must be undertaken to determine in what legislative session the language describing the method of appeal was first adopted. Then a search of statutes, many long since repealed and replaced, must be had to determine, as in this case, what was the procedure of appeal from justice of the peace courts (now long since abolished) in that same year. A current set of our statutes will not be sufficient for the lawyer attempting to find the correct procedure, and the District Courts of this state, which were under the impression that as a result of careful study and legislation that appeal procedures were uniform, are confounded. I would overrule *Shull v. Barton*, 58 Neb. 741, 79 N.W. 732 (1899), and its

questionable descendents, out of hand.

KRIVOSHA, C.J., joins in this dissent.

QUINCEOLA H. DAVIS, APPELLANT, V. WESTERN ELECTRIC, APPELLEE.

317 N.W.2d 68

Filed March 12, 1982. No. 44026.

1. **Workmen's Compensation: Appeal and Error.** In reviewing workmen's compensation cases this court is not free to weigh the facts anew. Our standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case and they will not be set aside unless clearly wrong.
2. **Workmen's Compensation: Evidence.** In testing the sufficiency of the evidence to support the findings of the compensation court, every controverted fact must be resolved in favor of the successful party and such party should have the benefit of every inference that can be drawn therefrom.
3. **Workmen's Compensation: Appeal and Error.** As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the compensation court.
4. **Workmen's Compensation: Evidence: Proof.** The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment.
5. **Workmen's Compensation: Expert Witnesses.** Unless the character of an injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony.
6. ____: ____. An allegation that an employee suffers from a psychogenic pain disorder raises a subjective condition and requires competent medical testimony to show a causal connection between the alleged injury, the employment, and the disability.
7. **Expert Witnesses.** Triers of fact are not required to take the opinions of experts as binding on them.
8. ____. The value of an opinion of an expert is no stronger than the facts upon which it is based.
9. **Workmen's Compensation.** If psychiatric treatment is prescribed, refusal may be deemed unreasonable in view of the absence of any physical suffering in the treatment.

Appeal from the Nebraska Workmen's Compensation

Court. Affirmed.

Paul W. Deck of Deck & Deck for appellant.

James L. Quinlan of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

HASTINGS, J.

The plaintiff, Quinceola H. Davis, filed this action in the Nebraska Workmen's Compensation Court seeking an award of benefits for injuries which she sustained to both hands, wrists, and arms while performing duties as a machine operator in the defendant Western Electric's Omaha plant. A single-judge court determined that her injuries were compensable, but determined that the plaintiff had failed to prove any temporary or permanent disability and limited the award to the payment of bills for medical services. Following plaintiff's application, a rehearing before a three-judge panel was held, and the panel found that Mrs. Davis had failed to sustain her burden of proving that she was entitled to any disability compensation. Except for ordering payment of several minor medical bills, the award on rehearing affirmed the action of the one-judge court in denying disability benefits.

In the early part of January 1979 Mrs. Davis began operating a particular assembly machine in the course of her employment by Western Electric. This operation required repeated application of pressure with both hands between 800 and 1,200 times daily. While performing this function, she began to experience pain, swelling, and a tingling sensation in her wrists and hands. The record indicates that Mrs. Davis first reported this problem to Western Electric's medical department on January 23, 1979. She was treated with hot soaks, and was directed to return the next day for an appointment with the company physician. On January 24th she did return and was examined by a

company doctor who prescribed hot soaks at home and gave her a wristlet for her left wrist. She again came to the plant medical department on the 25th, complaining of pain in both wrists. Continued soaks were suggested, as well as the use of wristlets. She was also given a temporary medical restriction that she should only use her hands to tolerance.

Dr. Lee B. Grant, head of the Western Electric medical department, stated that the employee's supervisor is notified of such a medical restriction and is instructed not to allow the employee to do any task that aggravates the condition. The level of pain to be tolerated is up to the individual employee. On January 31st, following continued complaint, Mrs. Davis was placed on a temporary restriction of no use of the right hand. The restriction was returned to use of both hands to tolerance on February 7th. Her medical restriction was changed on February 13th to minimal use of hands and wrists, with no repetitive use of hands and wrists, and she was assigned to a sorting operation of some sort. Due to continued complaints, Mrs. Davis was moved to the "restriction room" or "convalescent room" where she would do file labeling which involved placing stickers on envelopes. She continued in this job until around the first of June.

About this time, the various physicians who had been seeing Mrs. Davis, both Dr. Grant, the company doctor, and Dr. David W. Minard, a personal physician and orthopedic surgeon of her choice, concluded that her hands were all healed up and they wanted her to take some psychological testing. She refused these tests and Dr. Minard released her, telling her there was nothing more that he could do, and Dr. Grant released her to go back to her original department. However, she was not placed on the assembly machine, but was given a job stamping dates on finished conductors with a rubber inked stamp. She complained that this caused her pain so she went to yet another doctor, Dr. William H. Johnson, who had treated her in 1975. On June 12th

Mrs. Davis called her supervisor and told him that her doctor had advised her to rest her hands and wrists and that she would not be in for work. He responded that if she failed to come in she would not be paid and would probably get fired. He also told her that if she would come in he would not make her work, but she could just sit there. Sometime around the 22nd of June she received a letter from Western Electric advising her that she was terminated.

The Western Electric medical file contains approximately 65 entries from the period January 23, 1979, to June 25, 1979. Some of these entries indicate a conference with one of the plaintiff's outside physicians, but for the most part they represent direct contacts — complaints and treatments — with Mrs. Davis.

The first outside physician who examined Mrs. Davis was Dr. Michael Morrison, an orthopedic surgeon. He did not testify, nor was his deposition taken, and therefore there is a great deal of conflict regarding his diagnosis and treatment. Following the first examination by Dr. Morrison on February 6, 1979, Mrs. Davis testified that the doctor put steel splints on her hands and wrists and advised "complete rest" for her hands, which she interpreted to mean performing no work at all. Dr. Grant, on the other hand, stated that he had spoken to Dr. Morrison and that the recommendations merely involved restricting Mrs. Davis' activities to work involving only "light gripping." It should be noted, however, that the medical file reveals that she was absent from work from February 6th until February 13th. There is a memo in the record dated February 28 from Dr. Morrison which states that Mrs. Davis had "flexor tenosynovitis both wrists" which may or may not have been caused by her job but which was aggravated by working the "punch press." It also contained the recommendation that Mrs. Davis "be allowed to continue with the present limitations." To interpret "present limitations," we must look at a letter dated February 16th from an associate of Dr. Morrison, Dr.

Richard P. Murphy, who had seen Mrs. Davis on February 16th. He determined that Mrs. Davis suffered from "synovitis in flexor tendons both wrists" and recommended "discontinuing active repetitive motions of the wrist, to immobilize the wrists in wrist splints and to return for follow-up evaluation in two weeks time." It was at or near this time that her employer placed Mrs. Davis under "minimal use of hands and wrists" and "no repetitive use of hands and wrists" limitation and moved her to the "detailing" or sorting job. It is apparent that Mrs. Davis returned in 2 weeks for further evaluation as reflected by Dr. Morrison's memo, but the record does not disclose that she ever consulted that office again.

Mrs. Davis elected to see yet a third doctor, Dr. David Minard, an orthopedic surgeon, who examined Mrs. Davis on five occasions, the first being March 12, 1979. After this initial visit Dr. Minard indicated in a letter to Western Electric that he concurred with Dr. Morrison's treatment but felt that nerve conduction studies should be performed. He also recommended that Mrs. Davis could continue to do work "which is feasible as long as she wears the wrist splints." Thereafter, Mrs. Davis was referred to Methodist Hospital where an EMG and nerve conduction studies were done, resulting in a finding that Mrs. Davis was "within the limits of normal." Following the fourth examination, Dr. Minard referred Mrs. Davis to Dr. Jerrad J. Hertzler, a neurologist, who found Mrs. Davis' performance during neurologic testing to be "bizarre," and concluded that no objective evidence of a neurologic deficit existed and that any deficits present were of a "nonorganic type." His recommendation was for further evaluation, including "psychiatric evaluation."

Dr. Minard's final visit took place on May 15, 1979, at which time he informed Mrs. Davis that she should see a clinical psychologist to take the Minnesota Multiphasic Personality Inventory evaluation. Dr. Minard stated she reacted in a "hostile" fashion to the sug-

gestion and refused to take the test. In Mrs. Davis' words, she felt "they was saying I was crazy, and I knew I wasn't going to no hospital and taking no shock treatments and no lobotomy tests and all that. So, I refused to go." Dr. Minard denied any suggestion was made regarding electric shock, drug therapy, or brain surgery, and in fact stated that he told Mrs. Davis that the test merely involved "answering some questions, multiple choice types of questions." Mrs. Davis stated at trial that she had related her fears to the doctors but that no one had ever explained what psychological or psychiatric testing involved.

Dr. Minard did not see Mrs. Davis following this discussion, but did relate his findings to Western Electric in a letter dated May 29, 1979, wherein he stated that the "psychogenic element to her problem is the primary consideration." He reiterated this opinion during his deposition and noted that as of May 15, 1979, Mrs. Davis had no physical problems with her wrists or hands. He also stated that he had no opinion regarding the relation of the psychogenic problem to the employment.

On at least one occasion, May 14, 1979, Dr. Grant had suggested psychiatric consultation to Mrs. Davis. In Dr. Grant's words, Mrs. Davis rejected the idea and "seemed to feel that we were questioning her sanity." Although Dr. Grant stated he informed Mrs. Davis that no one was questioning her sanity, he was unable to say for certain that he had explained what he meant by psychiatric consultation.

Earlier in this opinion we have referred to Mrs. Davis' visits with Dr. Johnson, a general practitioner. He first saw her on June 13th, rather than June 12th as testified to by Mrs. Davis. He found the appearance and range of motion of her hands and wrists to be normal and that the X-rays revealed no abnormalities. His diagnosis was that Mrs. Davis was suffering from acute tendinitis with secondary neuritis. He made no reference to any psychogenic problems at this time. However, he had examined Mrs. Davis in 1975 when she

claimed to have fainted at work, following which her hands were "numb, tingley." He diagnosed her at that time to have acute anxiety reaction. Mrs. Davis continued to see Dr. Johnson until her final visit on June 30, 1980. She generally had the same complaints and Dr. Johnson made the same findings through his final examination, i.e., that she was physically normal.

Since that time Mrs. Davis has been examined by Dr. A. D. Blenderman, an orthopedic surgeon, and Dr. Keith Barnett, a physician who has completed 3 years of residency in psychiatry but is not yet board certified. Dr. Blenderman had Mrs. Davis examined by Dr. Nitz, a neurologist who did an electromyographic test of the right wrist, which test was negative with no evidence of carpal tunnel syndrome. Dr. Blenderman made a diagnosis of possible mild synovitis of both wrists with a psychogenic overlay. He did not believe that the synovitis was of great significance, and was not able to express an opinion as to her capability for work as of June 1979, but as of the date of his examination, July 23, 1980, his objective findings revealed normal conditions in the wrist.

For reasons not apparent from the record, Mrs. Davis finally agreed to see Dr. Barnett on August 9, 1980, over a year after her termination by Western Electric. On that date he conducted a "mental status examination" which, when combined with the case history which he had received from Mrs. Davis, allowed him to make a diagnosis. He came to the conclusion that she suffered from depression and anxiety, as well as a psychogenic pain disorder. Dr. Barnett saw Mrs. Davis again on September 16, 1980, noted no improvement in her condition, and recommended further therapy. In his opinion Mrs. Davis requires therapy for a "prolonged time" before she achieves total recovery and can resume gainful employment.

In response to cross-examination, Dr. Barnett agreed that if the facts proved to be different from those related by Mrs. Davis with regard to the company

medical doctor and his relationship with her, his diagnosis might change. He also agreed that if Mrs. Davis would have undergone in April and May of 1979 the type of therapy which he, Dr. Barnett, now suggested, her condition might not have deteriorated to the degree that now existed. In other words, he admitted that it was possible that if she would have undergone psychiatric and psychological evaluation and treatment at that time, she might never have reached the state that he believed her to be in at the time of his examination.

In reviewing workmen's compensation cases this court recently noted that it "'is not free . . . to weigh the facts anew. Our standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.'" *Erving v. Tri-Con Industries, ante* p. 339, 342, 314 N.W.2d 253, 255 (1982). Furthermore, the order of the compensation court "'may be reversed or set aside with respect to the evidence only where there is not sufficient evidence in the record to warrant the order or judgment. In testing the sufficiency of the evidence to support the findings, every controverted fact must be resolved in favor of the successful party and he should have the benefit of every inference that can be drawn therefrom. . . . Such findings on rehearing will not be set aside on appeal unless clearly wrong.'" *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 371, 307 N.W.2d 814, 816 (1981).

Mrs. Davis assigned two errors in this matter; one regarding her disability, and the second regarding the cause of her psychogenic pain disorder. The record before this court contains sufficient competent evidence to support the compensation court's finding that Mrs. Davis suffered from no physical disability at the time she was terminated by her employer. The testimony of Dr. Minard indicated that, as of May 29, 1979, Mrs. Davis was physically normal. The report of Dr. Hertzler, the neurologist, indicated that he found no "objective evidence of any neurologic deficit" and that

any "deficits which are present are of nonorganic type." It was the general conclusion of both Dr. Minard and Dr. Grant that Mrs. Davis was in need of psychological or psychiatric assistance at the time she was reinstated to her position in the assembly department. Such testimony provides sufficient evidence to support the compensation court's finding on rehearing that "plaintiff suffered no physical impairment which would prevent her from performing the work offered by the defendant."

The testimony of Dr. Johnson, relating to his examination of Mrs. Davis in June 1979, does indicate that, in Dr. Johnson's opinion, Mrs. Davis was still suffering from "acute tendinitis" and secondary "neuralgia" in both hands. It must be noted, however, that "[a]s a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workmen's Compensation Court." *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 544-45, 308 N.W.2d 734, 738 (1981). In light of this rule, we cannot conclude that the compensation court was "clearly wrong" in finding that Mrs. Davis suffered no physical impairment preventing her from working and, therefore, must affirm that portion of the finding reached on rehearing.

The conclusion that Mrs. Davis was not physically impaired at the time she was terminated makes it apparent that any disability suffered by her at that time had to have been based upon some psychological problem. Therefore, we are confronted with Mrs. Davis' second assignment of error which concerns the propriety of the compensation court's finding that any psychological problem with which Mrs. Davis was afflicted was not compensable, as it did not arise out of her employment by Western Electric.

We have just recently restated the rule that a claimant may be allowed compensation for neurosis if it is a proximate result of her injury and results in disability. *Erving v. Tri-Con Industries, supra.* See,

also, *Lee v. Lincoln Cleaning & Dye Works*, 145 Neb. 124, 15 N.W.2d 330 (1944). Before we even reach the question of whether Mrs. Davis was disabled, the rule cited above requires an initial determination as to whether the neurosis or psychogenic disorder was the "proximate result" of the employee's injury.

"The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment." *Riha v. St. Mary's Church & School, Inc.*, *supra* at 542-43, 308 N.W.2d at 737. The compensation court determined, in Mrs. Davis' case, that "it is as likely, or more likely, that plaintiff's psychological problems were caused by personal family and domestic difficulties," and therefore denied compensation.

As noted earlier, Mrs. Davis was examined and found to be physically normal, exhibiting no objective symptoms of an injury. We have said: "'[U]nless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony.'" *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 370, 307 N.W.2d 814, 816 (1981). An allegation that an employee suffers from a psychogenic pain disorder raises a subjective condition and requires competent medical testimony to show a causal connection between the alleged injury, the employment, and the disability.

In an effort to meet this burden, Mrs. Davis presented the testimony of Dr. Barnett, a physician with 3 years of residency training as a psychiatrist. Due to Mrs. Davis' earlier refusal to seek psychiatric help as suggested by the employer's doctor, Dr. Barnett is the only person trained in psychiatry to have examined Mrs. Davis and the only one whose testimony is before this court. We are forced to proceed on the basis of this limited information.

The case history related by Mrs. Davis to Dr.Barnett included a recitation of the various physicians who had examined her, the various restrictions placed on her

activities by her employer, the moves from job to job, and her opinion that the medical department of Western Electric was not following the instructions of her various physicians. We might add parenthetically that this "fact" was vigorously denied by Dr. Grant and the medical records seem to support his position. Her case history apparently failed to mention the trouble with her hands in 1975 and the diagnosis by Dr. Johnson that she had an "acute anxiety reaction." She mentioned the fact of her divorce in 1978, but did not explain that in a responsive pleading filed on her behalf by her counsel at the time, it was alleged that her husband had abandoned her, which caused her "grief, anguish and illness which necessitated . . . being unable to work for approximately one hundred six days." Neither did she say that this same former husband was working at the same Western Electric plant when her employment was terminated.

On the basis of the case history, and a "mental status examination" administered by the doctor, Dr. Barnett was able to conclude that Mrs. Davis suffered from depression, anxiety, and a psychogenic pain disorder. Further, he was able to draw the opinion that these problems were related to Mrs. Davis' injury in January 1979, and had rendered her totally disabled as of June 1979. When asked about the relationship of the psychological problems to Mrs. Davis' job, the doctor responded, "In my opinion she was initially physically hurt and because of the kind of treatment she received, particularly from the medical plant and Dr. Grant, that anxiety and depression became more involved and at that point it became a psychogenic pain disorder." From his examination, Dr. Barnett was able to conclude that Mrs. Davis was totally disabled and not able to return to gainful employment.

It is Mrs. Davis' contention that in light of this opinion, and the fact that there is no testimony to contradict it, the compensation court was clearly wrong in finding that Mrs. Davis' disorder was related to factors

other than her employment. In this respect, this case is very similar to *Erving v. Tri-Con Industries*, *ante* p. 339, 314 N.W.2d 253 (1982), wherein we noted: "Mrs. Erving argues that where an expert testifies without contradiction or conflicting evidence, a court is required to accept the expert's testimony as true. That, of course, is not the rule in this jurisdiction. Triers of fact are not required to take the opinions of experts as binding upon them." *Id.* at 344, 314 N.W.2d at 256. Similarly, the compensation court was not bound in this instance by the uncontroverted assertion of Dr. Barnett that the psychogenic pain disorder was caused by Mrs. Davis' work-related injury and subsequent treatment thereof.

Dr. Barnett's qualifications relating to the diagnosis of psychogenic pain disorders and their relation to work were impeached. Dr. Barnett did state that diagnosing such disorders was not "unusual" for him, yet he also noted that he had not had "all that much" experience in treating persons suffering from "mental disorders or emotional problems resulting from an industrial environment." Such testimony gives one the impression that, while Dr. Barnett may be qualified to diagnose a psychogenic disorder, his qualifications in relating such a disorder to industrial causes are less than impressive and may have given the compensation court reason to discount his testimony. A related aspect of the doctor's testimony was an admission that symptoms similar to those displayed by Mrs. Davis can and do arise from nonwork-related causes, and, furthermore, that a psychogenic condition is not "limited to industrial causes." The presence of these "other causes," when combined with the doctor's less than impressive credentials in industrial-related disorders, serves to lessen the impact of his flat assertion that Mrs. Davis' condition was caused by the work-related injury she suffered in January 1979.

Finally, it should be noted that "[t]he value of an opinion of an expert is no stronger than the facts upon

which it is based." *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 545, 308 N.W.2d 734, 738 (1981). In this instance Mrs. Davis was evaluated by Dr. Barnett over a year and 1 month after she was terminated and over a year and a half after the initial injury. Such a lapse of time is of special importance in light of Dr. Barnett's statement to the effect that Mrs. Davis' perception of the facts and events that transpired between January and June 1979 formed the basis of his diagnosis and opinion. In this respect, Mrs. Davis' perception of events occurring over a year earlier may have become tainted by the lapse of time and the impending litigation. While Dr. Barnett attempted to convey his feeling that Mrs. Davis' perception of the events remained unchanged over the passage of time, he admitted on cross-examination that he was unable to determine, from reading the medical records and reports, exactly what Mrs. Davis' perception may have been at the time of the injury. His final words on the matter were that he believed Mrs. Davis "felt at that time that she had a wrist injury that kept her from working."

One finds an example of how perceptions can become tainted by the passage of time and events by comparing the testimony of Dr. Johnson with that of Dr. Blenderman and Dr. Barnett. When asked why Mrs. Davis came to see him on June 13, 1979, Dr. Johnson responded by reciting the case history she had given him on that date. This version of the case history contains no mention that the medical department ignored recommendations of treatment given to Mrs. Davis by outside doctors. Counsel for Mrs. Davis made an attempt to rectify this omission on cross-examination by reading to Dr. Johnson the histories given to Dr. Blenderman and Dr. Barnett by Mrs. Davis a year later, asking whether these were the same as the one given Dr. Johnson. These latter histories did contain comments to the effect that the medical department had "ignored" recommendations made by independent doctors regarding the use of her hands. While Dr. Johnson did respond that the

history given Dr. Blenderman was the same as the one given him, he noted that Dr. Barnett had gone into more "detail." Whether Mrs. Davis did or did not mention the alleged mistreatment by the medical department to Dr. Johnson is a question of fact to be decided by the trier of fact, the Workmen's Compensation Court in this instance.

The discrepancy pointed out above, if one does indeed exist, is just an example of the conflict surrounding the allegations concerning whether the medical department ignored recommendations that Mrs. Davis receive "complete rest" for her hands. Mrs. Davis testified that Dr. Morrison ordered complete rest following the February 6, 1979, examination, while Dr. Grant indicated that Dr. Morrison had advised him that Mrs. Davis need only be restricted to duties involving "light gripping." As noted above, this type of conflict is for the trier of fact to resolve and we cannot try the facts anew. Therefore, we are unable to say that the compensation court was clearly wrong in finding that "the defendant's conduct, and particularly that of its medical department, cannot be faulted or in any way be said to have caused or contributed to whatever disability plaintiff may have suffered."

The compensation court was free to accept or reject the testimony of Dr. Barnett regarding the cause of Mrs. Davis' condition. Without the doctor's testimony, the record is devoid of any evidence supporting a finding that Mrs. Davis' psychological condition was the proximate result of her work-related injury. Due to her failure to meet this burden, we must affirm the findings and judgment of the compensation court in all respects.

Some question is raised concerning the adequacy of evidence to support the court's conclusion that Mrs. Davis' problems were related to domestic and personal difficulties. The record before this court contains a responsive pleading filed by Mrs. Davis in her dissolution proceedings, alleging that her husband caused her grief, anguish, and illness in 1975 by abandoning her,

resulting in 106 days off work. Dr. Barnett's testimony also makes reference to the fact that Mrs. Davis "hated to depend on anyone" and that since her termination she has had to depend on her children and the city of Omaha for general assistance. He also noted that she was behind in her bills, her house was up for repossession, and that she was depressed because she could not care for herself, wash or brush her hair, or dress herself.

While it is difficult to determine what domestic problems were being alluded to by the compensation court, the record does contain evidence of such difficulties. In light of this evidence, we cannot conclude that the compensation court was clearly wrong and therefore cannot set its findings aside. Furthermore, the fact remains that Mrs. Davis failed to prove by a preponderance of the evidence that the alleged psychogenic pain disorder with which she was afflicted was the proximate result of a work-related injury. This failure precludes recovery in this instance.

Western Electric also raises the defense of the refusal by Mrs. Davis to avail herself of the psychological and psychiatric services offered to her. Neb. Rev. Stat. § 48-120 (Reissue 1978) provides: "If the injured employee unreasonably refuses . . . to avail himself of medical . . . treatment . . . the employer shall not be liable for an aggravation of such injury due to such refusal . . . and the court . . . may suspend . . . or limit the compensation . . . payable . . . ." In 1 Larson, Workmen's Compensation Law § 13.22 at 3-406 (1978), it is suggested: "If psychiatric treatment is prescribed, refusal may be deemed unreasonable in view of the absence of any physical suffering in the treatment . . . ." An award was reversed and remanded, with directions to suspend payments, under a statute similar to ours in *Commonwealth, Department of Highways v. Lindon*, 380 S.W.2d 247 (Ky. 1964). However, because of the conclusion which we earlier reached, it is not necessary to decide this issue.

The findings of the Workmen's Compensation Court

were correct, and its judgment is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH S. GEORGE, JR., APPELLANT.

317 N.W.2d 76

Filed March 12, 1982. No. 44063.

1. **Arrests.** *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), will be applied retroactively as the uniform decision of our cases to the extent it applies to all cases not final April 15, 1980.
2. ——. It is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home.
3. **Confessions.** The standards to determine the admissibility of statements made after an illegal arrest are: (1) The administration of the *Miranda* warnings to the defendant prior to the statement; (2) The temporal proximity of the arrest and the confession; (3) The intervening circumstances between the initial detention and the challenged statements; (4) The purpose and flagrancy of the official misconduct; and (5) The voluntariness of the statement must be established.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos for appellant.

Paul L. Douglas, Attorney General, and Bernard L. Packett for appellee.

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

WHITE, J.

The appellant, Joseph S. George, Jr., appeals from a conviction based upon a jury verdict finding him guilty of first degree sexual assault of a person under the age of 16 years. The trial court sentenced George

to the Nebraska Penal and Correctional Complex for a term of not less than 14 years nor more than 20 years, said sentence to run consecutive to a current term being served.

The appellant assigns the following errors: (1) The trial court erred in failing to find that the appellant's arrest was effectuated without probable cause in violation of *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); (2) The trial court erred in failing to suppress certain statements made by the appellant to a police officer shortly after his arrest; (3) The court erred in failing to grant a motion for mistrial based on comments made by the prosecutor during opening statements; and (4) The court erred in concluding that *Payton v. New York, supra,* had no application to the appellant's case.

The evidence established that on August 6, 1979, the victim, a 10-year-old boy, while on his way to a friend's home approximately 2 blocks away, was approached by a man, later identified as the appellant, who asked him if he wanted to make some money packing glasses. The appellant offered the victim $20 to go to a vacant apartment. Once in the apartment, the victim was threatened with a knife. According to the victim's testimony, he was forced, at knifepoint, to engage in oral copulation with the appellant. The victim further testified that after engaging in oral copulation, the appellant forced him to lie face down on a bed and spread his legs, at which time the appellant attempted anal intercourse on the victim. The victim reported the assault to his mother who immediately called the police. The victim reported the assault to the police, gave a composite description of the suspect, showed the police the apartment in which the assault occurred, and was taken to Lincoln General Hospital for examination.

Approximately 1 week after the incident, Officer John Winkler of the Lincoln Police Department received information from a confidential informant

that the appellant was involved in the sexual assault. The confidential informant told Winkler "an individual came to his place of business and gave him the information about an acquaintance having some trouble in regards to sexually assaulting an individual. She described the individual and the individual that gave me the information stated that those particular parties come into his place of business and he was well aware of what had happened and with this information he called me." The officer further testified that while he did not personally know the informant, the informant knew the appellant's fiancee and she was the person who told the informant that appellant was responsible for the sexual assault. The informant also knew the victim and his mother.

With this information, Officer Winkler set up a photographic lineup consisting of the appellant's mug shot and three other mug shots. The victim positively identified George as the person who had assaulted him.

Without obtaining a warrant, Officer Winkler went to the apartment occupied by the appellant and his fiancee to effectuate an arrest. The officer testified that he went to the apartment with the specific intent of arresting the appellant. The officer further testified that George answered the door and he, the officer, informed George that he would have to come to police headquarters. The record does not clearly establish whether Officer Winkler entered the apartment. However, defense counsel asked: "I mean at least when you walked in and said he had to come to the station, he was not free to leave?" Officer Winkler replied: "Right, he couldn't leave." Officer Winkler never denied defense counsel's implication that he entered the apartment.

George was immediately conveyed to police headquarters, placed in an interrogation room, and shortly thereafter was read his *Miranda* warnings. George then gave Officer Winkler a statement, orally confirming the events of the assault as related by the

victim immediately after the assault. In the statement George stated that he did not remember if he had forced the victim to engage in oral copulation with him. In response to a question of whether he attempted anal intercourse with the victim, George stated he did not remember if he did this or not. At trial, appellant testified on his own behalf and denied that there was any penetration.

Appellant contends that his arrest was made without probable cause and therefore the statements obtained from him at police headquarters are inadmissible as the "fruit of the poisonous tree" and should have been excluded from evidence. See *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Appellant further contends that his warrantless arrest was illegal under *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), since it took place in his apartment and there was no showing of exigent circumstances or a consensual arrest.

Payton was decided subsequent to the trial and conviction but prior to appellant's sentencing and ruling on his motion for new trial. Throughout the proceedings, defense counsel asserted the inadmissibility of the statements. Defense counsel asserted that the statements were inadmissible since they were obtained in violation of the appellant's *Miranda* rights and further on the ground that the arrest was made without probable cause. The appellant testified that he had requested counsel and had been refused access to counsel.

We find no merit in appellant's contention that his arrest was made without probable cause. Nebraska statutes provide that an officer may arrest without a warrant when it appears that a felony has been committed and there are reasonable grounds to believe that the person arrested has committed the offense. Neb. Rev. Stat. § 29-404.02 (Reissue 1979). At the time of the arrest, the arresting officer had sufficient

information linking the appellant to the sexual assault. The officer had a description of the appellant from the victim, a description of the place where the assault took place, information from a medical examination which revealed some evidence of trauma to the victim's anus and the presence of secretions consistent with the appellant's blood type on the victim's underwear. In addition to this, the officer had reliable information from a confidential informant that the appellant had committed the sexual assault. The officer had a photograph of the appellant which was consistent with the descriptions given by the victim and the informant. Finally, the victim positively identified the appellant in a photographic lineup. Based on this information, Officer Winkler had probable cause to believe that a felony had been committed and that the appellant had committed the felony.

Appellant's contention that the photographic array was tainted because three of the four pictures contained men with long hair and beards while the appellant's hair is short and he has only a mustache is well taken. The array itself appears to be tainted; however, in looking at the totality of the circumstances, the victim had a good look at his assailant and gave an accurate description. The lineup was not prejudicial since the victim had an independent basis from which he made a positive identification. The more serious question arises, however, with respect to the actual arrest of the appellant at his apartment. Officer Winkler testified that he had no reason to believe that the appellant was about to leave town and gave no evidence that would justify the court to find that the circumstances were exigent. Officer Winkler was not permitted to answer the question, "Why did you not go and get an arrest warrant?"

In *State v. Smith*, 209 Neb. 505, 308 N.W.2d 820 (1981), we left open the question of whether *Payton* should be applied retroactively. While not expressly applying *Payton*, this court has, in several cases before

it, impliedly followed the *Payton* ruling. In *State v. Schlothauer*, 207 Neb. 663, 300 N.W.2d 194 (1981), a verdict was rendered prior to the *Payton* decision but the case was before this court when *Payton* was finally decided. This court remanded to determine whether or not there were exigent circumstances justifying the entry into the home and whether the subsequent arrest was consensual.

In *State v. Resler*, 209 Neb. 249, 306 N.W.2d 918 (1981), this court cited *Payton* as standing for the proposition that a police officer who has not obtained either an arrest or search warrant cannot make a nonconsensual and warrantless entry into a suspect's home in the absence of exigent circumstances. The court went on to adopt the "emergency doctrine" as an exigent circumstance authorizing a warrantless or nonconsensual entry into a suspect's home.

In *State v. Tipton*, 206 Neb. 731, 294 N.W.2d 869 (1980), this court distinguished *Payton* and concluded that an arrest made in a public place does not violate *Payton*.

In *State v. Smith*, 207 Neb. 263, 298 N.W.2d 162 (1980), the defendant maintained that, because his arrest was illegal and in violation of his rights under the fourth amendment to the U.S. Constitution, evidence thereafter obtained as a result of a search of his premises made pursuant to an otherwise valid search warrant should have been suppressed. In that case this court distinguished the situation in *Payton* and held that the search warrant was, in fact, in the process of being procured, and that it had a basis independent of any illegal arrests, therefore it is not barred under the *Payton* doctrine.

Finally, in the more recent case of *State v. Billups*, 209 Neb. 737, 311 N.W.2d 512 (1981), Billups was accused of robbing the Imperial Oil Co. on March 27, 1980. The *Payton* decision was released on April 15, 1980. In that case, Billups' sister-in-law was approached by officers outside her home. She went back up to the

house, knocked, and went in with the police following her. The police placed Billups under arrest and, while leaving, they noticed a jacket, believed to be the one used in the robbery, hanging in a hallway just inside the front door. Billups argued that his arrest violated the standards established by *Payton* since it was nonconsensual and without a warrant. He further argued that since his arrest was illegal, all evidence obtained as a result of the illegal arrest was inadmissible as the "fruits of the poisonous tree." This court stated: "*Appellant's position is correct unless the trial court properly found that the entry into the Billups home was consensual.*" (Emphasis supplied.) *Id.* at 740, 311 N.W.2d at 514.

We have, in all cases which have come before us and were pending on direct appeal at the time the *Payton* decision was released, uniformly applied *Payton.*

In *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965), the U.S. Supreme Court was deciding whether the exclusionary principle enunciated in *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), applied to state court convictions which had become final before rendition of its opinion. In defining "final," the Court said in n. 5 at 622: "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp v. Ohio.*" In view of this, we believe that the appropriate rule is to limit any case involving a constitutional issue requiring suppression of evidence to those cases not finally decided. We therefore interpret the rule in *Payton* to be retroactive and the uniform decision of our cases to the extent it applies to all cases not final April 15, 1980.

Now that we have decided that *Payton* applies to this case we must address the collateral matter of whether the arrest took place in the appellant's

apartment. The State argues that the arresting officer never entered the appellant's apartment. The record neither supports nor conflicts with the State's contentions in this regard. The record does indicate that the appellant was, in fact, in his apartment when the officer came. In answering the door, the appellant was informed of his arrest. The officer testified that the appellant was not free to leave at that time.

We are inclined to the view of the 9th Circuit in *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980). The court in *Johnson* stated: "In this case, we are confronted with the situation where the suspect was arrested as he stood inside his home and the officers stood outside his home with drawn weapons. In these circumstances, it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home."

We determine that the arrest of the appellant was the result of a warrantless intrusion into the home without consent and absent any exigent circumstances. Evidence illegally obtained thereby must be suppressed.

We recently had occasion, in *State v. Smith*, 209 Neb. 505, 308 N.W.2d 820 (1981), to make an analysis of the circumstances when evidence is the "fruit of the poisonous tree" and thus suppressible. "The standards to determine admissibility of statements made after an illegal arrest as set forth in *Brown* [*v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975)] were reaffirmed recently in *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980). The five factors are: (1) The administration of the *Miranda* warnings to the defendant prior to the statement; (2) The temporal proximity of the arrest and the confession; (3) The intervening circumstances between the initial detention and the challenged statements; (4) The purpose and flagrancy of the official misconduct; and (5) The voluntariness of the statement must be established.

"The first statement given by the defendant does not meet the test for admissibility as set forth in *Brown* and *Rawlings*, and should have been suppressed. Although the *Miranda* warnings were given to the defendant prior to the confession and the rights waived, the temporal proximity of the arrest and the confession is much like the situation in *Brown*. The first statement was separated from the unlawful arrest by approximately 1 hour and there was no intervening event of significance." *Id.* at 510-11, 308 N.W.2d at 823. In the facts at hand, the appellant was immediately taken to the police station after his arrest, and after a short interval, estimated at or around ½ hour, the interrogation began and the appellant made the admissions which were received in evidence. The admissions should not have been admitted into evidence and to do so was error.

This leaves us with the problem of determining whether introduction of the confession was harmless error. Unlike *Smith*, the appellant in this case did not make more than one confession. He did, however, make certain in-court statements which corroborated what he had said in his confession. The one exception was that in his confession he could not remember if he had penetrated the victim's mouth or anus, but in his open-court statement he stated he had definitely not penetrated either the mouth or anus of the victim. We cannot here determine whether appellant's in-court testimony, taken together with all the other evidence, would be sufficient to convict the appellant of first degree sexual assault if his statements to police are suppressed. That question is for a jury.

We cannot say that the admission of appellant's statements to police is harmless error.

Other errors assigned and argued by the appellant are either without merit or, on retrial, are not likely to reoccur and, therefore, we do not discuss them. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissenting in part.

In *United States v. Peltier*, 422 U.S. 531, 95 S. Ct. 2313, 45 L. Ed. 2d 374 (1975), the U.S. Supreme Court held that the decision in *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973), was not applicable to a search made prior to the date of that decision, even though the defendant's appeal was pending at the time of that decision.

The Court noted that since the purpose of the exclusionary rule was to deter unlawful police conduct, evidence should be suppressed only if it can be said the law enforcement officer might properly be charged with knowledge that the search was unconstitutional. See, also, Annot., 65 L. Ed. 2d 1219 (1981).

A similar rule should apply to the *Payton* case, which was decided after the arrest in this case took place.

CLINTON, J., dissenting.

I dissent from the majority opinion for three reasons. First, a careful reading of *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), reveals that its principles apply only to arrests made in the home without warrant after a nonconsensual entry. Second, I do not agree that the opinion in *United States v. Johnson*, 626 F.2d 753 (9th Cir. 1980), cited in the majority opinion, supports the broad proposition the court seems to adopt in its second syllabus, namely, that the use of the voice to convey a message of arrest constitutes either a seizure or an entry barred by the fourth amendment. If the cited case does in fact stand for that proposition, then I disagree with it. Third, the evidence supports the trial court's determination and it is not the function of this court to find the facts anew.

The plain inference from the evidence in this case is that the entry into the home was consensual. The

officer appeared at the door, announced his business, and was permitted to enter. The defendant does not contend that there was a forced or nonconsensual entry and there is no evidence that there was. In *Payton* the court held that the fourth amendment prohibits the police from making a warrantless and *nonconsensual* entry into the home for the purpose of making a routine felony arrest, i.e., one supported by probable cause but absent exigent circumstances. The evidence in that case shows that the police forced their way into the residence by the use of crowbars. A reading of the entire opinion indicates without a doubt that the court was concerned only with nonconsensual entries. It quotes and relies upon an opinion by Judge Leventhal in *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970): "'[a] greater burden is placed . . . on officials who enter a home or dwelling without consent.'" *Id.* at 587. Later the Supreme Court said at 598: "[W]e have found no direct authority supporting forcible entries into a home to make a routine arrest . . . ."

In *United States v. Johnson, supra,* the police appeared at the accused's home and met him at the door with drawn weapons. The court said, "In these circumstances," it is the location, etc. That is not this case. There is here no evidence of either force or show of force.

The majority opinion in the case before us cites no authority for the proposition that the fourth amendment may be violated by a vocal intrusion, that is, an announcement by an officer of his purpose to arrest. As far as I have been able to determine, this is an absolutely unique application of the fourth amendment unsupported by authority.

Lastly, as I have pointed out, this is an appellate court. It is not our function in law actions, which a criminal prosecution is, to decide the facts anew where the evidence clearly supports the trial court's determinations. I would affirm the conviction and sentence.

DIESEL SERVICE, INC., A NEBRASKA CORPORATION, APPELLEE, V. ACCESSORY SALES, INC., APPELLANT.

317 N.W.2d 719

Filed March 12, 1982. No. 44237.

1. **Juries: Verdicts: Appeal and Error.** The verdict of a jury will not be set aside on appeal unless it is clearly wrong.
2. **Juries: Verdicts: Evidence.** In determining whether the evidence is sufficient to sustain a jury 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.
3. **Conspiracy.** A conspiracy to accomplish a lawful object by unlawful or oppressive means may be actionable.
4. ——. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another.
5. ——. To constitute a conspiracy there must be a combination of two or more persons; a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy.
6. ——. 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.
7. **Damages: Sales: Proof.** Prospective profits from an established business, prevented or interrupted by the tortious conduct of the defendant, are recoverable when it is proved (1) that it is reasonably certain such profits would have been realized except for the tort, and (2) that the lost profits can be ascertained and measured, from evidence introduced, with reasonable certainty. Such lost profits must not be speculative, remote, or imaginary, but must be established with reasonable certainty by the evidence.
8. **Damages: Sales.** Loss of prospective profits may be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. Uncertainty as to the fact of whether any damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not.
9. **Attorney Fees.** Plaintiff held entitled to recover an attorney fee under Neb. Rev. Stat. § 59-821 (Reissue 1978).

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

Donald J. Tedesco for appellant.

Wright & Simmons for appellee.

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

BOSLAUGH, J.

This is a second appeal in this case which arose out of a controversy concerning the termination of a distributorship agreement between the parties. The distributorship agreement granted the plaintiff an exclusive territory for the distribution of the R-W precleaner, an air filter or cleaner device manufactured by the defendant and used on diesel engines. During the time that the plaintiff was a distributor for the defendant, it developed a large market for the R-W precleaner.

The amended petition alleged the defendant and Thomas W. Wilson, the president of the defendant, conspired with Lenvil P. Cranston, a salesman employed by the plaintiff, to injure the plaintiff's business, restrain trade, create a monopoly, and acquire the plaintiff's business by unfair business practices and terminate the distributorship agreement.

At the first trial the case was submitted to the jury by a form of special verdict which contained eight questions. The jury found the defendant had not conspired with Cranston to injure the plaintiff's business; the plaintiff had breached the agreement by failing to pay promptly and did not correct the default within 60 days after notice; the defendant had not waived the breach of the agreement by the plaintiff; there had been no accord and satisfaction; the defendant had converted the plaintiff's catalogs and the plaintiff had been damaged in the amount of $3,000 because of the conversion of its catalogs; and the plaintiff had not been damaged because of the defendant's "bad faith" or "without cause" termination of the contract.

The trial court entered judgment for the plaintiff on

the verdict. Later, on the defendant's motion to set aside the judgment or verdict, the trial court granted a remittitur for that portion of the verdict in excess of $800.

The trial court had instructed the jury that the plaintiff was required to pay the defendant for each invoice within 30 days and that the plaintiff was in default under the agreement if it owed the defendant on an invoice 30 full days or more past its shipping date. We held this instruction was erroneous and that the evidence did not show the plaintiff was in default. We concluded that a remittitur was improper under the facts and circumstances of the case because it was probable the jury did not understand the manner of the submission of the case and the verdict was the result of error or mistake. *Diesel Service, Inc. v. Accessory Sales, Inc.*, 205 Neb. 381, 288 N.W.2d 258 (1980).

The judgment was reversed and the cause remanded for a new trial. This was a general remand and contemplated a new trial on all of the issues.

At the second trial the defendant introduced additional evidence relating to the plaintiff's indebtedness to the defendant under the agreement. This evidence tended to establish that the plaintiff was in default under the agreement on March 28, 1975, but had eliminated the default by April 21, 1975, the day on which Thomas Wilson, the president of the defendant, came to the plaintiff's office and told Daniel E. Kinnison, the president of the plaintiff, that the contract was terminated.

The trial court, however, withdrew from the jury any issue concerning whether the plaintiff was in default under the agreement on March 28, 1975. The jury was instructed specifically that the plaintiff was not in default on March 28, 1975, and that the defendant had no right to attempt to terminate the contract because of the alleged default.

The case was again submitted to the jury upon

special interrogatories. The jury returned the following verdict:

"1. Did the parties effect an 'accord and satisfaction' concluding and settling all duties and obligations owed by each to the other under their contract?

Answer ____ or ✓
Yes No

"2. Did defendant Accessory Sales, Inc., conspire with Lenvil Cranston for any of the purposes alleged by plaintiff Diesel Services, Inc. as set forth in Instruction No. 2?

Answer ✓ or ____
Yes No

"3. Amount of damages, if any, incurred by plaintiff because of defendant's conspiracy with Lenvil Cranston for the purposes alleged by plaintiff Diesel Service, Inc.

Answer $250,000.00

"4. Had the parties' contract been in existence for a reasonable period of time, within the meaning of Instructions No. 16 & 23, when defendant Accessory Sales, Inc. attempted to terminate it?

Answer ____ or ____
Yes No

"5. Did plaintiff Diesel Services, Inc. ever receive reasonable notice of defendant's intention to terminate the contract, within the meaning of Instructions No. 16 & 23?

Answer ____ or ____
Yes No

"6. Amount of damages, if any, incurred by plaintiff because of (a) the parties' contract not being in existence for a reasonable period of time prior to defendant's attempted termination: or (b) because of termination: or both (a) and (b)

Answer $ ____ "

Since the jury found that the defendant had conspired with Lenvil Cranston, the plaintiff's former salesman, to injure the plaintiff's business and acquire

its business by unfair business practices, the jury did not answer the last three interrogatories. The trial court entered judgment on the verdict and awarded the plaintiff attorney fees in the amount of $37,650 and costs in the amount of $2,117. The defendant has appealed.

The verdict of a jury will not be set aside on appeal unless it is clearly wrong. *Sortino v. Paynter*, 206 Neb. 348, 292 N.W.2d 916 (1980). In determining whether the evidence is sufficient to sustain a jury 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. *Lockhart v. Continental Cheese, Inc.*, 203 Neb. 331, 278 N.W.2d 604 (1979).

The evidence at the second trial was such that the jury could find the following facts to be true.

E. W. Wilson was the original president of the defendant Accessory. During the course of the business relationship with the plaintiff, E. W. Wilson retired and his son Thomas Wilson became president of the defendant. Prior to his father's retirement, Thomas Wilson became friendly with Cranston, the plaintiff's salesman, and eventually told other employees of the defendant that as soon as E. W. retired, he would "get rid of" the plaintiff, take over its customers, and sell the precleaner direct. Thomas Wilson also told the employees that Cranston would come to work for the defendant.

In 1973, prior to E. W.'s retirement, Thomas Wilson sent the plaintiff a notice of default stating that the distributorship agreement between the two companies would be canceled if the plaintiff did not bring its account current. The plaintiff at that time brought its account substantially current, and the contractual relationship continued.

On January 27, 1975, Thomas Wilson again sent the plaintiff a "60-day termination notice." The contract

provided that "should [a] breach continue unremedied for a period of 60 days after written notice by the party not in default . . . then the party not in default . . . may give written notice of termination for the agreement which shall become effective 10 days after the service thereof . . . ." Sixty days later, on March 28, 1975, Thomas Wilson sent the plaintiff a letter terminating the distributorship agreement because the account ostensibly had not been brought current by the plaintiff.

The defendant continued to fill orders from the plaintiff until April 21, 1975. On that day Thomas Wilson came to the plaintiff's office and told the plaintiff's president that the contract was terminated. The last sale and delivery from Accessory to Diesel took place on that date. At the time of the termination, Diesel was the only distributor of the defendant which had a contract. The plaintiff was not the only distributor behind in its payments, but it was the only one terminated.

On April 21, 1975, Cranston notified the plaintiff at 7:30 a.m. that he was quitting the plaintiff's employ. On the same day, Cranston went to work for the defendant and spent the entire day on the telephone calling the plaintiff's customers and advising them the R-W precleaner could now be purchased directly from the defendant. Shortly thereafter, Cranston called upon the same customers personally and advised them that Diesel was no longer the precleaner distributor and that they could order direct from the defendant. At this time Cranston, under Thomas Wilson's direction, picked up and destroyed the catalogs of the plaintiff which contained not only the precleaner but other products sold by the plaintiff as well. It also appears that, even before he left the plaintiff's employ, Cranston brought to the office of the defendant the books of the plaintiff's customers that he carried with him and, with Thomas Wilson's knowledge, had the secretaries at the defendant's office copy the information from the plaintiff's customer books, telling the

secretaries that the copying had to be done before he left the plaintiff. Also, before Cranston quit the plaintiff, 500 letters were prepared by the defendant's office stating that the plaintiff was no longer the distributor for the R-W precleaners and that they could now be purchased from the defendant directly. These letters were mailed to the plaintiff's customers on April 21, 1975, the same day that Cranston went to work for the defendant.

This court has recently confirmed that there is an action in Nebraska for injury to one's business. *Dixon v. Reconciliation, Inc.*, 206 Neb. 45, 291 N.W.2d 230 (1980). Numerous other jurisdictions have recognized a like cause of action. See, e.g., *Clark v. Figge*, 181 N.W.2d 211 (Iowa 1970); *Witte Transp. Co. v. Murphy Motor Freight Lines, Inc.*, 291 Minn. 461, 193 N.W.2d 148 (1971); *American Sanitary Service v. Walker*, 276 Or. 389, 554 P.2d 1010 (1976); *Buono Sales, Inc. v. Chrysler Motors Corporation*, 363 F.2d 43 (3d Cir. 1966), *cert. denied* 385 U.S. 971, 87 S. Ct. 510, 17 L. Ed. 2d 435.

A conspiracy to accomplish a lawful object by unlawful or oppressive means may be actionable. *Treptow Co. v. Duncan Aviation, Inc.*, *ante* p. 72, 313 N.W.2d 224 (1981). Where two or more persons combine to unlawfully injure another's business, the action is properly one for conspiracy.

"'An action of conspiracy sounds essentially in tort. . . . The principle [sic] element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. Without the scienter persons cannot conspire.'" *Dixon v. Reconciliation, Inc.*, *supra* at 47, 291 N.W.2d at 232. As this court noted in *Rettinger v. Pierpont*, 145 Neb. 161, 195, 15 N.W.2d 393, 411 (1944), "'To constitute a conspiracy there must be a combination of two or more persons; * * * a precon-

ceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy.'" *Davidson v. Simmons*, 203 Neb. 804, 808-09, 280 N.W.2d 645, 648-49 (1979), points out: "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."

The Nebraska case most closely in point is *Frank H. Gibson, Inc. v. Omaha Coffee Co., on rehearing* 179 Neb. 169, 137 N.W.2d 701 (1965). In *Gibson*, the defendant, a coffee wholesaler, wished to buy the retail coffee supply business of the plaintiff. The evidence showed that the defendant's president and one of the plaintiff's salesmen (who was also a director and stockholder in the plaintiff) worked out an arrangement whereby, if the plaintiff's president would not agree to sell on the defendant's terms, the defendant's president and all of the plaintiff's salesmen would simply form a new company and take over the plaintiff's equipment and customers. The defendant's president, Clark, told the plaintiff's president, Bellows, "'"Well, if we can't work something out" * * * "we are prepared to go into business ourselves, set up our own company. Your boys, men, have agreed to go with us, and we will start this company and start delivery of coffee to your customers next Monday morning.'" *Id.* at 174, 137 N.W.2d at 705. The *Gibson* opinion states: "After he [Bellows] learned that Clark and Loseke [plaintiff's salesman and a director of plaintiff] had agreed to form another company and to take over the business with the Gibson sales force, he determined he had to sell to the highest bidder. There was no way to replace his salesmen on quick notice. The last coffee order to Conroy company had not been delivered and he would be out of business without a sales force, so he was forced to sell as best he could. He secured the authorization of the

stockholders to sell and sold the physical assets of Gibson to Continental Coffee Company . . . at their book value. No good will was sold, although this fact is disputed by defendants." *Id.* at 176, 137 N.W.2d at 706.

In the first opinion in the *Gibson* case, 178 Neb. 329, 133 N.W.2d 462 (1965), we reversed the judgment for the plaintiff, citing *Hompes v. Goodrich Co.*, 137 Neb. 84, 93, 288 N.W. 367, 372 (1939), in which it was stated: "We fail to see where the cancelation of the contracts in accordance with their very terms can operate to create a liability against the defendants, either by contract or under the Junkin Act." However, in the *Hompes* opinion it was also stated: "While each of the acts of defendants were in themselves lawful, such lawful acts accompanied by an ulterior motive might be actionable. We must, therefore, look into the evidence bearing upon the question of intent." *Id.* at 94, 288 N.W. at 372. In *Hompes* we simply found there was no evidence of an unlawful motive on the part of the defendants.

On rehearing in the *Gibson* case, the first opinion was vacated and the evidence was held to be sufficient to sustain the jury's finding of conspiracy. *Frank H. Gibson, Inc. v. Omaha Coffee Co., supra.*

In the second opinion we stated: "[Here w]e do not have a refusal to do business, but rather an attempt to steal a business by taking unfair advantage of a business relationship. Here we have Clark working with Loseke, a fiduciary, to force a sale to Conroy on its own terms or to destroy the good will of Gibson. Proof of the intent, understanding, or agreement in such instances must usually rest largely on inferences. Here, however, we have direct testimony on the intent of Conroy, corroborated essentially by legitimate inferences from Loseke's actions. Also, the preliminary preparation and the promptness with which the defendants took over the Gibson routes can substantiate the inference of a preconceived plan." 179 Neb. at 180, 137 N.W.2d at 708.

The facts in the present case show that it is very similar to the *Gibson* case. Here there was direct evidence that Thomas Wilson intended to "get rid of" the plaintiff as a distributor, take over its customers, and sell the R-W precleaner directly. Cranston, the plaintiff's salesman, had the defendant's employees copy the books of plaintiff's customers and prepare a mass mailing to those customers with reference to the changeover, all while Cranston was still employed by the plaintiff. After quitting the plaintiff and joining the defendant's firm, Cranston called on the plaintiff's former precleaner customers and destroyed the plaintiff's catalogs.

On April 21, 1975, everything was in readiness for the takeover of the plaintiff's customers, through the efforts of Cranston and Thomas Wilson. Compare this citation from *Gibson*, substituting the names pertinent to the present case: "Here . . . we have direct testimony on the intent of [Wilson], corroborated essentially by legitimate inferences from [Cranston's] actions. Also, the preliminary preparation and the promptness with which the defendant took over the [plaintiff's customers] can substantiate the inference of a preconceived plan."

In *Gibson* the opinion points out the fact that even if the end goal is legitimate, that does not prevent a finding of conspiracy. "A legitimate purpose does not justify an unlawful act. . . . It is the preconceived plan to accomplish this purpose which is illegal . . . ." *Frank H. Gibson, Inc. v. Omaha Coffee Co., on rehearing* 179 Neb. 169, 181, 137 N.W.2d 701, 709 (1965). *Gibson* points out that leaving the plaintiff's employ to work for another company was not an illegal act. "There is no question that any of the plaintiff's employees, including Loseke, could leave plaintiff's employ at any time and take employment with anyone else, and it is not their leaving the employ that is actionable. It is the agreement before any sale that unless a sale was made to Conroy they would take over the Gibson business." *Id.*

at 182, 137 N.W.2d at 709.

We conclude that the evidence in this case was sufficient to sustain the finding of a conspiracy.

Because the jury found there was a conspiracy, any issue as to the defendant's right to terminate the distributorship agreement in accordance with its terms became moot. It is therefore unnecessary to consider the assignments of error relating to the instruction that the plaintiff was not in default under the agreement on March 28, 1975.

The plaintiff sought to recover damages for profits lost as a result of the defendant's tortious interference with the plaintiff's sales of R-W precleaners. "The general rule is that prospective profits from an established business, prevented or interrupted by the tortious conduct of the defendant, are recoverable when it is proved (1) that it is reasonably certain such profits would have been realized except for the tort, and (2) that the lost profits can be ascertained and measured, from evidence introduced, with reasonable certainty. . . . Such lost profits must not be speculative, remote, or imaginary, but must be established with reasonable certainty by the evidence." *K & R, Inc. v. Crete Storage Corp.*, 194 Neb. 138, 144, 231 N.W.2d 110, 114 (1975).

In *D. W. Trowbridge Ford, Inc. v. Galyen*, 200 Neb. 103, 262 N.W.2d 442 (1978), this court approved a method of computing lost profits which was substantially similar to the method used by the plaintiff in this case. "The trial court awarded [lost profits] on a per unit basis by computing the average net profit per new unit sold from the financial statements and reports of the plaintiff which were in evidence. . . . This figure appears to be reasonably accurate as a matter of computation." *Id.* at 110, 262 N.W.2d at 447.

In the present case the plaintiff computed an average net profit per unit by averaging its net profit per unit from the 2 years immediately preceding the termination of the distributorship. The plaintiff then

established the total sales of R-W precleaners made by the defendant during the 5 years subsequent to the termination, a total of nearly 24,000 precleaner kits, an average yearly sale of over 4,600 kits. Multiplied by the plaintiff's average net profit per unit, this resulted in proof of annual lost profits of approximately $57,500 per year, or nearly $300,000 for the 5 years for which the plaintiff offered evidence. By using an average annual sales figure, the plaintiff accounted for some uncertainty that it would have sold exactly the same number of precleaners as defendant did after the termination. "'[L]oss of prospective profits may . . . be recovered if the evidence shows with reasonable certainty *both* their *occurrence* and the *extent* thereof. * * * Uncertainty as to the *fact* of whether any damages were sustained at all is fatal to recovery, but uncertainty as to the *amount* is not.'" *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 705, 261 N.W.2d 358, 363-64 (1978). All of plaintiff's calculations are supported in the evidence by business records of both the defendant and plaintiff. The jury's award of $250,000 was supported by the evidence.

The defendant's final contention is that the plaintiff was not entitled to recover an attorney fee. The trial court found that the plaintiff was entitled to recover an attorney fee under Neb. Rev. Stat. § 59-821 (Reissue 1978). The statute provides: "Any person who shall be injured in his business or property by any other person or persons, by reason of anything forbidden or declared to be unlawful by sections 59-801 to 59-828, may sue therefor . . . and shall recover actual damages . . . and the costs of suit, including a reasonable attorney's fee."

The jury found the defendant had conspired with Cranston to injure the plaintiff's business, restrain trade in R-W precleaners, create a monopoly, and acquire the plaintiff's business by unfair business practices as alleged by the plaintiff. Such a conspiracy is "forbidden or declared to be unlawful" by statute. See Neb. Rev. Stat. §§ 59-801, 59-802 (Reissue 1978).

The effect of the verdict was to permit the plaintiff to recover a reasonable attorney fee under § 59-821. The trial court did not abuse its discretion in the award of an attorney fee to the plaintiff.

There being no prejudicial error, the judgment is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I respectfully dissent because the majority opinion does not confront the issues raised on the appeal. An understanding of all the issues may be obtained by referring to the original opinion and dissent. *Diesel Service, Inc. v. Accessory Sales, Inc.*, 205 Neb. 381, 288 N.W.2d 258 (1980).

On the first appeal of this case the majority opinion held that because Accessory kept its ledger on the Diesel Service account on an "open account" basis, the question of whether Diesel Service was delinquent under the contractual provisions permitting termination of the contract was to be determined by regarding the sales and payments to have been made on the basis of an open account. The evidence at the first trial was that Diesel Service was delinquent when delinquency was computed on an invoice-by-invoice basis. There was no evidence at the first trial as to whether Diesel Service was delinquent if computations were made on the basis of an open account.

This court interpreted the contract and remanded for a new trial. At the retrial, Accessory introduced evidence, which was not contradicted, showing Diesel Service was delinquent even when payments were applied on an open account basis.

On this appeal Accessory complains because the trial court at the second trial instructed the jury as follows: "IT HAS BEEN ESTABLISHED IN PREVIOUS PROCEEDINGS IN THIS CASE THAT PLAINTIFF WAS NOT IN DEFAULT ON MARCH 28, 1975 AND THAT DEFENDANT HAD NO RIGHT TO

ATTEMPT TO TERMINATE THE CONTRACT BECAUSE OF PLAINTIFF'S ALLEGED DEFAULT." It contends that the jury should have been permitted to decide whether Diesel Service was delinquent when the open account method is applied.

Accessory relies upon the following principles. The doctrine of law of the case has no application where evidence upon a material point which is lacking at the first trial is produced at the second trial. *Master Laboratories, Inc. v. Chesnut*, 157 Neb. 317, 59 N.W.2d 571 (1953). The phrase "reversed and remanded for a new trial" is a general remand and the parties stand in the same position as if the case had never been tried. *Master Laboratories, Inc. v. Chesnut, supra.* I agree with the appellant. Under the above principles, the language of the majority opinion in the first case pertaining to direction of a verdict on the issue of delinquency would apply as the law of the case only where the evidence on the issue on retrial was the same as on the first trial. In this case it was not. This is a law action. On appeal we do not decide the facts. The trial court should have submitted to the jury the issue of delinquency of the account and Accessory's right to terminate in accordance with the terms of the contract. If Accessory had the right under the contract to terminate, then cancellation could not give rise to any liability on its part. *Hompes v. Goodrich Co.*, 137 Neb. 84, 288 N.W. 367 (1939).

I would reverse and remand for a new trial.

STATE OF NEBRASKA, APPELLEE, V. ELDON L. HILKER, APPELLANT.

317 N.W.2d 82

Filed March 12, 1982. No. 44456.

1. **Drunk Driving: Proof.** A violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1980) can be proved by showing that the defendant was in physical control of the motor vehicle while under the influence of alcoholic liquor,

or of any drug, or when a person has ten-hundredths of one percent or more by weight of alcohol in his or her body fluid.

2. **Criminal Law: Evidence: Verdicts.** A verdict by a trier of fact in a criminal proceeding will be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Drunk Driving: Convictions.** For a conviction to be sustained in a trial for operating a motor vehicle while under the influence of alcohol, it is not necessary for a policeman or any other person to offer an opinion that the defendant was indeed intoxicated.

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

Mousel & Burger, P.C., for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey for appellee.

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

WHITE, J.

The defendant, Eldon L. Hilker, was found guilty in the county court of Red Willow County, Nebraska, on a charge of driving an automobile while under the influence of alcoholic liquor and of having more than ten-hundredths of one percent by weight of alcohol in his body fluid as shown by chemical analysis of his breath, to wit, sixteen-hundredths of one percent. In his appeal to the District Court, the District Court found that the State had failed to prove sufficient foundation for the admission of the Breathalyzer sample test under the rules of *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980), but found that the evidence was sufficient to sustain the conviction of the defendant for operating a motor vehicle on the highways while under the influence of alcoholic liquor. The defendant was sentenced to a term of 12 months' probation and fined $100. Defendant appeals and assigns as a single error that the evidence was insufficient as a matter of law to sustain the conviction. We affirm.

Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1980) defines one offense which can be proved by any of three ways: (1) By proof that the defendant was in physical control of a motor vehicle while under the influence of alcoholic liquor; (2) By proof that the defendant was in physical control of a motor vehicle while under the influence of any drug; or (3) By proof that the defendant was in physical control of a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his or her body fluid. *State v. Jablonski*, 199 Neb. 341, 258 N.W.2d 918 (1977).

A verdict by a trier of fact in a criminal proceeding will be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Carter*, 205 Neb. 407, 288 N.W.2d 35 (1980).

Taking a view of the evidence most favorable to the State, the facts are as follows: The defendant was arrested on November 20, 1980, by an officer of the McCook Police Department. The officer observed the defendant's eastbound pickup truck pull up to a stop sign and remain for several minutes without moving. The officer followed the truck which then turned a corner to the left, proceeded to the north, and proceeded to the right, going east again, where the officer observed the pickup traveling through a red light with no observable brake lights or slowing of the vehicle. After the light changed to green, the officer followed the pickup, stopped it, and the defendant was identified as the driver. When the officer stopped the pickup, the defendant got out of his vehicle and walked to the cruiser with slow, short steps and leaning against the box of the pickup. The defendant produced his operator's license and registration, and the officer observed, and testified, that the defendant had an odor of alcoholic beverage on his breath, that his speech was slurred, that he was confused as to whether or not the stoplight through which he had just traveled was red or green, and that his eyes were bloodshot. The officer pointed the flashlight at the defendant and observed that the defendant's

eyes were dilated and slow to react. When the defendant returned to the pickup, the officer again observed that he leaned against or used the pickup as a source of balance. A field sobriety test was given to the defendant. The defendant was asked to place his heels and toes together and bring his arms down to the side and then tilt his head back and close his eyes. The defendant was unable to perform the test, exhibiting, according to the officer, a lack of balance and coordination in the test. During the time he did tilt his head back, he swayed from side to side and in a circular motion. The defendant was asked to count to 10 while his head was tilted back and his eyes closed, and he did so very slowly. The defendant was asked to count to four as he touched his thumb to his fingers as a test of manual dexterity. He was unable to perform the test. The first time he counted incorrectly and was unable to touch two of his fingers with his thumb. The second time he eventually counted correctly, but he could not touch his thumb to any of the fingers. The defendant was then asked to bring his heels and toes together, tip his head back, bring his arms out to his side, extend his index finger and bring it around from the side to touch the tip of his nose. The defendant was unable to touch the tip of his finger to the tip of his nose. In the second test, the defendant was asked to stand as he did in the first test, extend his index finger, bring his arm around front, roll over his hand and bring his finger up to touch the tip of his nose. The defendant missed his nose with both hands and used his middle finger instead of his index finger. The heel-to-toe test was conducted and the defendant was unable to perform, losing his balance and continuing to fail to place the heel to the toe of the other foot. The defendant was asked to recite the alphabet. He did so slowly and omitted the letter "P." Finally, the defendant was asked to stand on one foot. He was asked to stand heels and toes together, bringing one foot out, holding it off the ground approximately 6 inches. He was unable to do this test at all, and when he extended

the foot, he fell down on that foot, not being able to keep his balance when lifting his foot off the ground. At the conclusion of these tests, the defendant was arrested for operating a motor vehicle while under the influence of alcoholic liquor.

Essentially, the argument of the defendant is that, in view of all this evidence, this evidence is not sufficient since the county attorney at trial did not ask the officer whether, in his opinion, the defendant was intoxicated, and it is this failure that he points out as the error requiring reversal. The defendant is mistaken. The fact finder was as equally able, in view of the evidence presented by the arresting officer, to conclude whether or not the defendant was under the influence of alcoholic liquor, and it did so. Indeed, the evidence is nearly overwhelming. We have not said, and we do not say now, that it is necessary in a trial for operating a motor vehicle while under the influence of alcoholic liquor that a policeman or some other person offer the opinion that the defendant was indeed intoxicated. Defendant cites no authority nor have we discovered any that makes such a requirement.

Defendant also cites cases in this court which relate to the circumstantial evidence rule recently discussed by this court in *State v. Buchanan, ante* p. 20, 312 N.W.2d 684 (1981). He characterizes the evidence submitted by the officer as circumstantial. The officer testified to matters which he himself observed. Even where the evidence is circumstantial, the defendant would receive no comfort from that fact since the rule is that one accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt. *State v. Buchanan, supra.*

The judgment of conviction is supported by competent evidence and is affirmed.

AFFIRMED.

DECOSTA SPORTING GOODS, INC., APPELLEE, V. MARYJOHN KIRKLAND AND JOHN C. KIRKLAND, APPELLANTS.

316 N.W.2d 772

Filed March 12, 1982. No. 81-625.

1. **Summary Judgments: Records: Appeal and Error.** In order to receive consideration on appeal, any affidavits or evidence other than the pleadings in the case used on a motion for summary judgment must have been offered in evidence in the trial court and preserved in and made a part of the bill of exceptions.
2. **Res Judicata.** The rule of res judicata is grounded, first, on a public policy and the necessity to terminate litigation, and, second, on the belief that a person should not be vexed more than once for the same cause.
3. ——. Any right or fact in issue which has been directly adjudicated upon in the determination of an action before a court of competent jurisdiction in which a judgment has been rendered upon the merits is conclusively settled by that judgment and cannot again be litigated between the parties and privies whether the claim or subject matter of the two suits is the same or not.
4. ——. Res judicata is an affirmative defense which must ordinarily be pleaded to be available.
5. **Summary Judgments: Res Judicata.** However, the defense of res judicata need not be raised by answer, but can be raised and passed upon for the first time on a motion for summary judgment.
6. **Summary Judgments: Final Orders: Appeal and Error.** An order granting a motion for summary judgment by the municipal court is final and appealable and is not converted to an interlocutory order when reversed and remanded by the District Court so as to prohibit an appeal to this court.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded with directions.

Roger R. Holthaus and James L. Rold for appellants.

William M. Homan & Associates for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

The plaintiff, DeCosta Sporting Goods, Inc., filed an action in the municipal court of Omaha seeking a money judgment against the defendants Kirkland, John C. and his daughter Maryjohn. Without filing an answer, the defendants Kirkland filed a motion for summary judgment which raised the issue of former litigation between John C. Kirkland and DeCosta as a bar to this action. The municipal court sustained the motion and entered summary judgment dismissing DeCosta's petition. On appeal to the District Court, the judgment was reversed and the cause ordered remanded to the municipal court "for trial or further appropriate proceedings." We reverse.

"A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in his favor . . . ." Neb. Rev. Stat. § 25-1331 (Reissue 1979). "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Neb. Rev. Stat. § 25-1332 (Reissue 1979). In order to receive consideration on appeal, any affidavits used on a motion for summary judgment must have been offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. *Peterson v. George*, 168 Neb. 571, 96 N.W.2d 627 (1959).

Included within the transcript is an affidavit of John C. Kirkland and a copy of a petition verified by the president of DeCosta which formed the basis for a separate, although related, proceeding in the District Court. However, neither of these items was received in evidence in the municipal court, they do not form a part of the bill of exceptions, and under the rule cited above may not be considered on appeal. Therefore, in order to determine this appeal, we are limited to the pleadings filed in the present case, as well as a copy

of the petition and judgment from the municipal court of Omaha, small claims docket SC 80, No. 1774, which were received in evidence and are found in the bill of exceptions.

DeCosta's petition alleges in substance that on or about September 12, 1978, the defendant Maryjohn Kirkland, a student and the daughter of the defendant John C. Kirkland, specially ordered some sporting goods from DeCosta; that she paid for the goods with her father's credit card, and she represented to DeCosta that she had his authority to use such card; that such action on her part was later ratified by John C. Kirkland; that the goods were returned by the Kirklands to DeCosta without authority from DeCosta; that thereafter the Kirklands filed suit against DeCosta in an action found at small claims docket SC 80, No. 1774, claiming damages of $464.59, and that judgment was entered in that amount; that garnishment proceedings were commenced; and that DeCosta will be damaged in that same amount when it is forced to pay the judgment. The petition prayed for damages against the Kirklands for $464.59, together with loss of time, attorney fees, and general damages, totaling in all the sum of $1,323.59.

John C. Kirkland's petition filed in small claims docket SC 80, No. 1774, alleged in substance that DeCosta sold to Kirkland's daughter certain goods which DeCosta knew were not authorized for use in schools which were members of the Metro Association; that the daughter used John C. Kirkland's credit card, which she was not authorized to use; that she returned the goods to DeCosta for a refund of $464.59, which was not granted; and Kirkland prayed for judgment in that amount. A judgment in the amount of $464.59 was entered against DeCosta, and there is no showing or allegation that an appeal from that judgment was ever perfected. Whether DeCosta appeared at the trial, or the judgment was by default, is of no concern in a decision on this case.

The motion for summary judgment alleges that

"each allegation made in said Petition has been previously litigated and determined adversely to Plaintiff and in defendant Kirkland's favor. AND FURTHER that said former judgments bar said Petitioner's claims against the then minor child Maryjohn Kirkland, by reason of Nebraska Law . . . and that Defendants . . . are entitled to judgment as a matter of law."

Although given the opportunity to do so, the plaintiff DeCosta declined to offer any evidence to resist the motion for summary judgment.

The pleadings in both cases leave something to be desired and the record is deficient as previously noted. However, from that part of the record which we have set forth, we believe that there is no genuine issue as to the following facts: John C. Kirkland's daughter Maryjohn purchased certain merchandise from DeCosta which was returned and a refund denied; that as a result thereof, judgment was entered in favor of John C. Kirkland and against DeCosta in the amount of $464.59 from which no appeal was taken; that DeCosta has now filed suit against John C. and Maryjohn Kirkland, alleging that Maryjohn purchased certain merchandise from DeCosta which was returned by the Kirklands to DeCosta; that the Kirklands filed a lawsuit, as described above, and obtained a judgment against DeCosta in the amount of $464.59; and that because it will have to pay that judgment to the defendant John C. Kirkland, DeCosta claims it will be damaged and seeks a judgment against that same party and one in privity with him. We believe that all of the issues raised by DeCosta in the present litigation have been decided adversely to it on the former trial.

Although not appearing in the bill of exceptions, DeCosta alleges in its brief, or it is disclosed by the transcript, that Kirkland has been subjected to two other lawsuits over this transaction, one brought by VISA on the credit transaction, and an injunction

proceeding brought by DeCosta against Kirkland in District Court. This latter action was decided adversely to DeCosta on the claim for a temporary injunction and DeCosta's counsel claimed in proceedings on the motion for summary judgment that the case had been abandoned.

It is this type of vexatious litigation which the doctrine of res judicata is designed to prevent. "We have stated that the rule of res judicata is grounded, first, on a public policy and the necessity to terminate litigation, and, second, on the belief that a person should not be vexed more than once for the same cause." *Vantage Enterprises, Inc. v. Caldwell*, 196 Neb. 671, 675, 244 N.W.2d 678, 680 (1976).

Any right or fact in issue which has been directly adjudicated upon in the determination of an action before a court of competent jurisdiction in which a judgment has been rendered upon the merits is conclusively settled by that judgment and cannot again be litigated between the parties and privies whether the claim or subject matter of the two suits is the same or not. *Vantage Enterprises, Inc. v. Caldwell, supra.*

DeCosta insists that res judicata is an affirmative defense which must be pleaded in the answer to be available. It cites *United States Nat. Bank of Omaha v. Rupe*, 207 Neb. 131, 296 N.W.2d 474 (1980), in support of that proposition. The exact quotation from that case is as follows: "Res judicata is an affirmative defense which must ordinarily be pleaded to be available." *Id.* at 138, 296 N.W.2d at 478. We would agree that the normal procedure for pleading an affirmative defense is to place it in the answer. However, the purpose of that requirement is to give the opposing party adequate opportunity to meet the defense. Bearing that in mind, we know of no reason why it cannot properly be raised in a motion for summary judgment.

We have been unable to find any cases squarely

in point. However, in *Hammer v. Town of Greenburgh*, 440 F. Supp. 27, 29 (S.D. N.Y. 1977), the court said: "'Although Rule 12(b) Fed. R. Civ. P. does not expressly prescribe collateral estoppel as a ground for pretrial dismissal, "it is generally held that, in the interest of efficient and expeditious judicial administration, *res judicata* [and, as a corollary, collateral estoppel] can be raised and considered" via pre-trial motion to dismiss.' [Citations omitted]." And in a footnote in another case, *Weston Funding Corp. v. Lafayette Towers, Inc.*, 410 F. Supp. 980, 982 n. 2 (S.D. N.Y. 1976), the court went on to say: "This is particularly true where, as here, the issue is raised by way of motion for summary judgment so that the plaintiff is provided with an adequate opportunity to present arguments rebutting the defense."

In a case in which it appeared from the opinion that a motion for summary judgment was filed immediately following the amended complaint, the Colorado Supreme Court said: "That the defense of res judicata may, in a proper case, be raised and disposed of by a summary judgment proceeding has heretofore been recognized in this state." *Kaminsky v. Kaminsky*, 145 Colo. 492, 495, 359 P.2d 675, 677 (1961). "A motion for summary judgment is a proper procedure by which to raise the defense of res judicata." *Smith v. City of Los Angeles*, 190 Cal. App. 2d 112, 128, 11 Cal. Rptr. 898, 908 (1961).

We previously have cited the particular portion of the Nebraska statutes which permits a party against whom a claim is asserted to move for a summary judgment. This allows such a motion to be made without the filing of an answer. Under the circumstances of a case like this, we can see no distinction between filing an answer raising an affirmative defense followed by a motion for summary judgment, or the inclusion of the defense in the motion itself.

DeCosta also argues that summary judgment should be denied because we have no idea of what the evi-

dence was, who the witnesses were, or what the goods were which were the subject of the sale. We believe that it makes no difference. It is apparent to us from an examination of the two pleadings that both referred to the same transaction. It is too late to change the testimony.

We are of the opinion that the municipal court was correct in sustaining the motion for a summary judgment. That leaves us but one question, not raised or briefed by either party. We have said that an order of the trial court denying a motion for a summary judgment is not a final order, and therefore is not appealable. *Otteman v. Interstate Fire & Cas. Co., Inc.*, 171 Neb. 148, 105 N.W.2d 583 (1960). At the time of the hearing in District Court, July 1, 1981, Neb. Rev. Stat. § 24-541 (Reissue 1979) required the appeal to be de novo on the record and authorized the District Court to vacate the judgment or to remand the case to municipal court for a new trial. The question presented here is whether or not this amounted to an order denying the granting of a motion for summary judgment. We think not. An order of the municipal court sustaining a motion for a summary judgment is a final and appealable order. Its character, for the purposes of appeal, is not converted to an interlocutory order by a judgment of reversal in the District Court.

The judgment of the District Court is reversed and the cause is remanded with directions to enter an order sustaining the judgment of the municipal court of the city of Omaha.

REVERSED AND REMANDED WITH DIRECTIONS.

PFIZER GENETICS, INC., A CORPORATION, APPELLEE, V. MILROY PROCHASKA, APPELLANT.

316 N.W.2d 777

Filed March 12, 1982. No. 81-684.

Pleadings. A counterclaim must arise out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

John S. Mingus of Mingus & Mingus for appellant.

Ross, Schroeder & Fritzler for appellee.

Submitted without oral argument. KRIVOSHA, C.J., BOSLAUGH, MCCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This was an action for the balance due the plaintiff under a "General Dealer Agreement." The agreement provided generally that the defendant would be a sales representative for the plaintiff's seed lines and make all payments due the plaintiff on or before June 30 of the current marketing year. The petition alleged there was due the plaintiff $4,689.05 plus interest.

The second amended answer and counterclaim denied generally and alleged the agreement was usurious; that the defendant had planted some of the seed corn purchased from the plaintiff, which corn had yielded only about 50 percent of a normal yield; that the plaintiff had made false representations concerning the seed corn; that the plaintiff had breached warranties of fitness and merchantability concerning it; and as a result the defendant had been damaged in the amount of $30,000.

The trial court sustained the plaintiff's motion to strike the counterclaim on the ground that it did not "arise out of the contract or transaction set forth in

the Petition." The plaintiff then moved for summary judgment, which motion was sustained and judgment entered for the plaintiff.

The defendant contends the trial court erred in striking the counterclaim, in granting summary judgment, and in allowing the plaintiff interest at the rate of 11 percent on the amount due.

The agreement provided that payments due the plaintiff as of June 30 of the current marketing year would be "assessed a delinquency charge of 1½% per month or the maximum allowed by the state in which dealer's place of business is located, and will be compounded monthly." This provision was not usurious but merely provided for interest at the maximum legal rate.

The evidence shows conclusively that there was no genuine issue as to any material fact concerning the balance due the plaintiff for seed delivered to the defendant. The plaintiff's evidence consisted of the defendant's deposition, his reply to the plaintiff's request for admissions, the documentary evidence of the transactions between the parties, and an affidavit of the plaintiff's regional sales manager. The defendant's only showing in resistance to the motion was an affidavit excluded from evidence because of a failure to comply with Neb. Rev. Stat. § 25-1332 (Reissue 1979).

A counterclaim must arise out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim. Neb. Rev. Stat. § 25-813 (Reissue 1979). The defendant contends that as a dealer he was entitled to plant seed corn sold to him by the plaintiff. On this theory it might be said that the counterclaim arose out of the sale of seed corn to the defendant which was at least a part of the transaction upon which the suit was brought. In the present state of the record, we believe the motion to strike the counterclaim should not have been sustained.

The summary judgment in favor of the plaintiff is affirmed, but we remand the cause to the District Court with directions to reinstate the defendant's counterclaim. Because of the defendant's counterclaim, the summary judgment is, in effect, only a partial summary judgment.

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

CLINTON, J., concurring in part and dissenting in part.

I agree with the part of the majority opinion affirming the granting of the summary judgment on the plaintiff's petition. I disagree with the portion of the opinion which reinstates the counterclaim. I do not believe that the counterclaim arises out of the "dealer agreement" or that transaction. If the defendant dealer "sells" himself some seed, he stands in no different position than any of his other customers as far as Pfizer is concerned. It seems to me that the dealer agreement does not contemplate the dealer as a user of the product. The majority opinion asserts its position gratuitously, i.e., without authority. I do likewise.

TRUMP, INC., A NEBRASKA CORPORATION, APPELLEE, V. SAPP BROS. FORD CENTER, INC., APPELLANT.

317 N.W.2d 372

Filed March 19, 1982. No. 43697.

1. **Equity: Accounting.** Generally, in order to be entitled to the equitable remedy of accounting, it is necessary to show a fiduciary or trust relationship between the parties, or a complicated series of accounts, making the remedy at law inadequate.
2. **Equity: Jurisdiction.** Where a party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded.
3. ____: ____. Where the proof fails to establish a right to equitable relief,

the court will retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter.

4. **Pleadings: Trial: Appeal and Error.** The issues as framed in the trial court, and upon which the cause was tried, are binding upon the parties in the case on appeal to this court.

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

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester for appellant.

R. David Garber of Garber & Batt for appellee.

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

HASTINGS, J.

The defendant, Sapp Bros. Ford Center, Inc., has appealed from a money judgment rendered by the District Court in an accounting action brought by the plaintiff, Trump, Inc. Sapp's assignments of error are in general terms, but essentially it argues that the equitable remedy of accounting was not proper under the facts of the case and that the evidence failed to support the findings of the trial court of the existence of a binding agreement between the parties.

Trump manufactures an aircraft deicer which is used solely at airports to wash snow and ice off the wings of aircraft before takeoff. The deicer is constructed and mounted upon a Ford C-800 truck chassis which since about 1974 has been purchased from Sapp. The agreement made between the two parties was that Trump would pay Sapp for the trucks on the basis of $400 over factory invoice price. Each truck would be ordered to specifications and Trump would be given an approximate price over the telephone. The federal excise tax was included in the basic invoice price of the truck.

Sometime in 1977 it was learned that effective January 13, 1977, the Internal Revenue Code exempted from the excise tax the sale of vehicles for off-highway uses. In order for the manufacturer, in this case the

Ford Motor Company, to obtain a rebate of the tax previously paid, it was necessary for it to prove to the federal government that it had not included the tax in the price charged for the truck, or had repaid the tax to the ultimate consumer or had obtained the written consent of the ultimate consumer to the allowance of the credit or the making of the refund. 26 U.S.C. § 6416(a)(1)(A), (B), (C) (1976). According to *Rothman v. District Director of Int. Rev. Serv. of U.S.*, 483 F.2d 1079, 1080-81 (9th Cir. 1973), "The enactment of § 6416(a) was directed toward the prevention of any unjust enrichment flowing to a taxpayer who has collected excise taxes for the government, but has at the same time passed the economic burden of the taxes on to his customers in the form of higher prices. In order for the taxpayer to qualify for a refund of an illegally collected excise tax, he must provide the government with written authority from the person or consumer who actually paid the tax."

It was discovered that the vehicles purchased by Trump qualified for this rebate. Following an inquiry, Sapp informed Trump that it would get in touch with the Ford division office about applying for refunds on those purchases. This led to the filling out of the applications which included Trump's consent to the granting of the rebate to Ford. After several calls by Trump to Sapp inquiring about the rebates, and a direct inquiry by Trump with the Ford Motor Company, it was learned that Sapp had in fact received a refund from Ford some 6 months earlier. Finally, Trump received a check from Sapp in the amount of $8,176.90 representing rebates of taxes on six trucks.

Linda Wostrel, a vice president of Trump, testified she had analyzed all of the purchase orders and invoices furnished to her by Sapp covering the purchase of trucks upon which excise taxes had been refunded. According to her, the total amount of excise taxes that had been rebated to Sapp equaled $37,649.44. Of this amount, $8,176.90 had been refunded to Trump in cash

and $10,258 had been applied as a credit in favor of Trump. This left a total of $19,214.54 in excise taxes which had been rebated to Ford and refunded to Sapp, but which had not been passed on to Trump. Actually, the president of Sapp Bros., H. Dean Sapp, did not quarrel too much with that figure.

Walter Thornton-Trump, the president of Trump, Inc., testified that he based his claim for a refund on the rebated excise taxes on "the agreement that we had that the excise tax refund there was due to us." He stated that this agreement was made in late 1977 when Dean Sapp told him that he would help Trump check with the Ford district office to find out what was needed to be done to apply for refunds for Trump. Sapp also admitted that Trump had in fact been refunded excise taxes in the amount of $8,176.90 and that he, Sapp, had acknowledged in writing the receipt of excise tax rebates from Ford Motor Company in the amount of $16,455.66 covering vehicles sold to Trump. This same writing indicated that those rebates would be applied against purchases pending on behalf of Trump. Apparently, $10,258 of that credit is the amount referred to in Linda Wostrel's testimony.

In order to consider Sapp's claim that Trump was not entitled to the equitable remedy of an accounting, it is necessary to examine the pleadings. In its petition, Trump alleged the purchase of the trucks, the payment of excise taxes within the purchase price, the rebate of the excise taxes to Sapp as provided by the Internal Revenue Code, and the withholding of a portion of those refunds from Trump. Sapp alleged in its answer that after learning of the tax exemption, it thereafter quoted purchase prices to Trump without the inclusion of such taxes; and as to those taxes which it had collected and thereafter received refunds thereof, it had, from time to time, solely for the purpose of good will, refunded a portion of those taxes to Trump.

The petition contains no allegation of a fiduciary or trust or confidential relationship, a complicated series

of accounts, nor the inadequacy of a remedy at law. Normally, one or more of these allegations is necessary to plead a cause of action in accounting. In *Dickerson v. Surety National Farm Loan Ass'n*, 127 Neb. 67, 71, 254 N.W. 679, 681 (1934), we said: "Originally, the basis of equity jurisdiction over matters of accounting was necessity for a discovery, but later authorities have added two other grounds, viz.: The complicated character of the accounts and the existence of a fiduciary or trust relation. 1 C.J. 613. We think the real basic reason for equitable jurisdiction is inadequacy of remedy at law." See, also, *Corn Belt Products Co. v. Mullins*, 172 Neb. 561, 110 N.W.2d 845 (1961); *Schmidt v. Henderson*, 148 Neb. 343, 27 N.W.2d 396 (1947).

However, Sapp neither demurred to the petition nor objected in its answer to the claim for equitable relief. "'"Where the party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded."'" *Linville v. Kowalski*, 149 Neb. 402, 407, 31 N.W.2d 281, 284 (1948). "It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation." *Kuhlman v. Cargile*, 200 Neb. 150, 156, 262 N.W.2d 454, 458 (1978).

Sapp for the first time raised its objection to equity jurisdiction in its motion to dismiss made at the close of the plaintiff's case in chief. Its grounds for that motion were that there was no basis in the record for the invoking of equity jurisdiction and the granting of an accounting. However, where the proof fails to establish a right to equitable relief, the court will retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter. *Hull v. Bahensky*, 196 Neb. 648, 244 N.W.2d 293 (1976), *overruling Gillespie v. Hynes*, 168 Neb. 49, 95 N.W.2d

457 (1959). Sapp's first claim of error is without merit.

Trump's proof in the trial court was directed toward proving an agreement to receive the rebated taxes. Sapp devotes a major portion of its brief on appeal to this issue. The trial court found generally for Trump without giving a basis for this finding. Strangely enough, in its brief, Trump rejects the contract theory and insists that the issues were framed and tried upon the basis of entitlement to the refund by virtue of § 6416(b). We do not agree. Section 6416(b) simply is not applicable for reasons we deem unnecessary to explain for the purposes of this opinion. Trump may have a legitimate claim under § 6416(a), but, if so, it may very well have waived the same. However, Trump's protestations to the contrary notwithstanding, we believe that the issue tried was one in contract. The issues as framed in the trial court, and upon which the cause was tried, are binding upon the parties in the case on appeal to this court. *Foster v. City of Lincoln*, 107 Neb. 404, 186 N.W. 317 (1922). The rule requiring agreement between pleadings and proof is not applicable where the issue was tried without objection by either party. *Hackbarth v. Hackbarth*, 146 Neb. 919, 22 N.W.2d 184 (1946).

In the final analysis it is apparent that this case was tried as a law action on the theory that an agreement existed between Trump and Sapp calling for the refunded excise taxes to be paid over to Trump by Sapp. In light of the various rules cited above regarding the powers of a court of equity over law actions, we conclude that there is sufficient evidence on the record to sustain the findings of the District Court. Its judgment is affirmed.

AFFIRMED.

IN RE APPLICATION OF GORDON TRUCKING, INC. GORDON TRUCKING, INC., APPELLANT, V. WHEELER TRANSPORT SERVICE, INC., ET AL., APPELLEES.

317 N.W.2d 85

Filed March 19, 1982. No. 43776.

1. **Motor Carriers: Proof.** The burden is on the applicant to show that the proposed service is required by public convenience and necessity.
2. **Public Service Commission: Judgments.** The determination of what is consistent with the public interest or public convenience and necessity is ordinarily an issue of fact and one that is peculiarly for the determination of the Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.

Appeal from the Nebraska Public Service Commission. Affirmed.

Scott T. Robertson of Robertson & Robertson for appellant.

Rodney Peake of Peake & Navis, P.A., and James E. Ryan of Ryan & Williams, P.C., for appellees.

Heard before BOSLAUGH, MCCOWN, and CLINTON, JJ., and HAMILTON and CASE, District Judges.

MCCOWN, J.

This is an appeal by Gordon Trucking, Inc., of Bassett, Nebraska, from an order of the Public Service Commission denying an application seeking common carrier authority to transport petroleum and petroleum products in Nebraska intrastate commerce from five specified Nebraska counties to seven other specified Nebraska counties over irregular routes.

The applicant, Gordon Trucking, Inc., was incorporated on January 22, 1980, when Don Gordon decided to place the transportation portion of his oil business in a separate corporation. Don Gordon is the owner of the applicant and the sole proprietor of Gordon Oil Company, whose principal place of business is in Bassett, Nebraska. Gordon is a jobber of American Oil Company and buys and sells Standard Oil petro-

leum products. Prior to separating the business, Gordon transported all of his Standard Oil products from various terminals in Nebraska to his own places of business and to various other petroleum dealers and farm customers in several counties. No authority from the commission was required for that transportation.

Gordon operates one semitractor, three semitrailers, three delivery trucks, and one single-axle tractor-trailer. If the application is granted the transportation portion of the Gordon Oil business will be operated separately by the applicant and conducted in substantially the same manner as it was conducted by Gordon Oil Company.

Gordon presently purchases gasoline, diesel, oil, and grease at various terminal facilities in Nebraska, with the largest share of product coming from the terminal at Norfolk, Nebraska. Petroleum products are delivered to his own bulk storage facilities at Bassett and in Newport, Nebraska, and to other dealers and farm customers. More than 80 percent of his deliveries are made to farms, and that transportation is exempt from regulation under Neb. Rev. Stat. § 75-303(5) (Reissue 1976).

Although no proof was furnished in the record, Gordon apparently incorporated the transportation portion of his business in order to obtain common carrier authority in order to meet the requirements of Standard Oil Company regarding leasing of equipment.

At the hearing on the application the applicant produced a number of witnesses. Most of the witnesses were customers of Gordon Oil Company who were satisfied with the service they had been receiving. Others were petroleum dealers who exercised little or no control over the selection of the common carrier who had been serving them, or had no complaint about the service of the common carriers they were now using but would prefer to use the applicant in order to favor the local economy. Almost without exception, the

witnesses had either not tried to use existing common carrier services or were satisfied with the service they were receiving.

At the conclusion of the hearing the commission noted that motor transportation to farms and ranches is exempt from regulation under § 75-303(5) and found that all the testimony on behalf of the applicant did not add up to a showing of any significant demand for additional common carrier services. The commission found that the applicant was fit, willing, and able properly to perform the proposed service but had failed to prove that the proposed services are required by the present or future public convenience and necessity, and denied the application.

The burden is on the applicant to show that the proposed service is required by public convenience and necessity. The determination of what is consistent with the public interest or public convenience and necessity is ordinarily an issue of fact and one that is peculiarly for the determination of the Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene. *In re Application of Schroetlin, ante* p. 508, 315 N.W.2d 630 (1982).

The record in the present case fails to establish any significant public need or demand for the proposed service. There is evidence to support the determination of the commission, and that determination was not arbitrary, capricious, or unreasonable.

AFFIRMED.

CHICAGO LUMBER COMPANY OF OMAHA, A NEBRASKA CORPORATION, DOING BUSINESS AS CHICAGO LUMBER COMPANY OF KEARNEY, APPELLANT, V. JACK M. HORNER AND R. KAY HORNER, THIRD-PARTY PLAINTIFFS, APPELLEES, V. STEVEN J. MAZURKA AND LEE ANN MAZURKA, THIRD-PARTY DEFENDANTS, APPELLEES.

317 N.W.2d 87

Filed March 19, 1982. No. 43835.

1. **Equity: Appeal and Error.** It is the duty of the Nebraska Supreme Court on appeal of an action in equity to try the issues de novo and to reach an independent conclusion without being influenced by the findings of the trial court, except to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying.
2. **Mechanics' Liens.** One who furnishes materials without performing any work or labor in installing them or putting them in place is a materialman and is given a lien because the materials furnished were used in the construction of the building or other structure.
3. ——. Mechanic's lien statutes are cumulative and remedial in nature and require a liberal construction so as to effectuate their objects and purposes and protect all claimants within their scope as well as to promote substantial justice.
4. ——. After a contract for material is substantially completed there should be no unreasonable delay in filing a claim for a lien and the time for filing cannot be delayed by furnishing minor items of material.
5. **Mechanics' Liens: Open Accounts.** An open account results where the parties intend that the individual items of the account shall not be considered independently, but as a connected series of transactions, and that the account shall be kept open and subject to a shifting balance as additional related entries of debits and credits are made, until it shall suit the convenience of either party to settle and close the account, and where, pursuant to the original express or implied intention, there is but one single and indivisible liability arising from such series of related and reciprocal debits and credits.

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

John T. Tarrell for appellant.

Ross, Schroeder & Fritzler for appellees.

Heard before KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and FUHRMAN and CAPORALE, District Judges.

CAPORALE, J.

In this appeal from the denial of a mechanic's lien the plaintiff-appellant, Chicago Lumber Company, asserts (in summary) that the trial court erred (1) in finding the house was substantially completed more than 4 months prior to the filing of the liens, (2) in finding that materials furnished by the appellant and used in the construction of a basement closet were not part of the "contract" for materials existing between Steven J. Mazurka and appellant, and (3) in excluding from evidence a letter written by Mazurka to appellant, wherein Mazurka acknowledged the debt claimed by appellant and promised to pay it. We agree the trial court erred, and we reverse.

It is the duty of this court on appeal of an action in equity to try the issues de novo and to reach an independent conclusion without being influenced by the findings of the trial court, except to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying. *Knoell Constr. Co., Inc. v. Hanson*, 209 Neb. 461, 308 N.W.2d 356 (1981). See, also, *Bonsall v. Sterrett*, 197 Neb. 753, 250 N.W.2d 910 (1977).

With the above rule in mind, we find that the appellant engages in the retail sale of lumber and other building materials. In May of 1977 Mazurka made arrangements for the construction of a new residential house in Kearney, Nebraska. He opened an account at Chicago Lumber Company to which the cost of construction materials would be charged as needed. Mazurka was not obligated to purchase any of his construction materials from the appellant; Chicago Lumber Company was to deliver only those materials ordered by Mazurka or his agents at a price specified in a lumber list.

The first materials were charged to the Mazurka account on May 17, 1977, and construction on the house started about that time.

Kim L. Summers, the contractor, apparently was released from his contract in October of 1977 because his work was completed. Thereafter, Mazurka and others performed work to finish the house. This house was the only building project in which either Mazurka or Summers was engaged. On October 13, 1977, Mr. and Mrs. Mazurka entered into a contract for the sale of the house to Jack M. and R. Kay Horner, appellees. As part of the purchase agreement, the Horners specified 12 items which were to be completed before closing the purchase; among them was the construction of a closet in the north end of the gameroom. It appears that the materials used for the construction of the closet were furnished by appellant lumber company, along with other materials purchased to complete the specified items of construction. On December 6, 1977, the closing took place, and, according to the Horners, everything in the house was done except the changing of two light fixtures.

Of the 141 invoices of the appellant, 7 totaling $543.78 in amount were incorporated into the house and are dated subsequent to November 14, 1977. However, there was no hiatus between those seven invoices and the preceding ones, particularly the prior eight invoices dated between October 31 and November 12, 1977, totaling $560.18.

On March 14, 1978, Chicago Lumber Company filed its mechanic's lien, with an affidavit of account attached thereto, in the amount of $17,211.75. The appellant alleges in its petition that payments were received from Mazurka totaling $9,019.51, and that the amount claimed under the lien should be reduced to $8,192.24.

In its order of April 2, 1980, the trial court found that the action against the Mazurkas as third-party defendants should be stayed because they had filed bankruptcy. This action, then, has proceeded only as be-

tween Chicago Lumber Company and the Horners.

The statutes applicable at the time of the transaction in question, since repealed by 1981 Neb. Laws, L.B. 512, are Neb. Rev. Stat. §§ 52-101 and 52-102 (Reissue 1978). Section 52-101 provides in relevant part: "Any person who shall perform any labor or furnish any material . . . (1) for the construction, erection, improvement . . . of any house . . . by virtue of an open running account or a contract or agreement, express or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house . . . ."

Section 52-102 provides in relevant part: "Any person or subcontractor who shall perform any labor for, or furnish any material . . . for any of the purposes mentioned in section 52-101 . . . who shall desire to secure a lien upon any of the structures mentioned in said section, may file a sworn statement of the amount due him from such contractor for such . . . material . . . together with a description of the land upon which the same was done or used, within four months from the performing of such labor or furnishing such material . . . ."

We have held that one who furnishes materials without performing any work or labor in installing them or putting them in place is a materialman and is given a lien under the provisions of §§ 52-101 et seq. because the materials furnished were used in the construction of the building or other structure. *Paxton & Vierling Steel Co. v. Barmore*, 187 Neb. 54, 187 N.W.2d 590 (1971); *Ideal Basic Industries, Inc. v. Juniata Farmers Coop. Assn.*, 205 Neb. 611, 289 N.W.2d 192 (1980). See, also, *Rosebud Lumber and Coal Co. v. Holms*, 155 Neb. 459, 52 N.W.2d 313 (1952).

We have also held that mechanic's lien statutes are cumulative and remedial in nature and require a liberal construction so as to effectuate their objects and purposes and protect all claimants within their scope as well as to promote substantial justice. *Rosebud Lumber and Coal Co. v. Holms, supra.* See, also, *Peters v.*

Halligan, 182 Neb. 51, 152 N.W.2d 103 (1967).

It is true that in *Occidental S. & L. Assn. v. Cannon*, 184 Neb. 659, 171 N.W.2d 166 (1969), there is language which states that after a contract for material is substantially completed there should be no unreasonable delay in filing a claim for a lien and the time for filing cannot be delayed by furnishing minor items of material. That language was used, however, in the context of a hiatus of at least 2 months between the furnishing of the last and the penultimate items. Language similar to that of *Occidental* is found in *Disbrow & Co. v. Peterson*, 136 Neb. 719, 287 N.W. 220 (1939), and *Gatchell v. Henderson*, 156 Neb. 1, 54 N.W.2d 227 (1952). However, *Disbrow* presented a 6-month hiatus prior to the furnishing of the last item and *Gatchell* involved the substitution of proper material in place of defective material. The lack of discontinuity in the supplying of materials by appellant distinguishes this case from *Occidental* and those of like genre.

With respect to the second assignment of error, we observe that a substantial, rather than a technical, view should be taken of the question whether a lien claim is founded on one or more contracts, and, where all the work done or materials furnished are under one continuing contract, or part of one continuous and connected transaction, or of a continuous and running account, a lien claim filed within the required time after the last item was done or furnished is sufficient as to all items. 57 C.J.S. *Mechanics' Liens* § 144 c. (1948).

To hold otherwise would seem to ignore our prior holdings that a materialman is given a lien because the material furnished was used in the construction. *Paxton & Vierling Steel Co. v. Barmore, supra; Ideal Basic Industries, Inc. v. Juniata Farmers Coop. Assn., supra.*

"An 'open running' account has been defined as one which is based upon a connected series of transactions, and which has no break or interruption. . . .

"An open account results where the parties intend that the individual items of the account shall not be

considered independently, but as a connected series of transactions, and that the account shall be kept open and subject to a shifting balance as additional related entries of debits and credits are made, until it shall suit the convenience of either party to settle and close the account, and where, pursuant to the original express or implied intention, there is but one single and indivisible liability arising from such series of related and reciprocal debits and credits." 1 Am. Jur. 2d *Accounts and Accounting* § 4 at 373-74 (1962). See, also, *Occidental S. & L. Assn. v. Cannon, supra* (Newton, J., concurring); *Lewis v. Hiskey*, 166 Neb. 402, 89 N.W.2d 132 (1958).

In considering the question of a running account in *Rochester's Suburban Lbr. Co. v. Slocumb*, 282 Minn. 124, 130, 163 N.W.2d 303, 308 (1968), the court stated: "If, as here, there is a continuous dealing and a running account, and the work was done and materials were furnished at short intervals and were appropriate to the condition and progress of the building, a presumption arises that it was understood from the beginning that the claimants were to do the work or furnish the materials for construction of the building as the same would be required and in such case the date of the last item of the account is the date from which the limitation of the time of filing is to be taken." The court also stated at 129, 163 N.W.2d at 307: "If a materialman begins to furnish materials for the erection or repair of a building without any specific agreement as to the amount to be furnished, or the time within which they are to be furnished, but there is reasonable expectation that further material will be required of him and he is afterwards called upon from time to time to furnish the same, he is generally entitled to a lien as under an entire contract. Under those circumstances the time for the filing of a lien is the date the last item of the account is rendered."

That reasoning seems apt to the case at hand. The evidence is clear that materials furnished by the appellant

were all going for the same general purpose, the construction of a residential house. Although the materials were furnished over a period of time, there was a continuous running account upon which the materials were charged. The separate orders and delivery of goods should be construed as forming a single account for the purpose of establishing the lien. If the Horners were free to claim that the closet supplies were a separate contract, it would become difficult for a materialman to know when a building was completed and when the last item was furnished under a running account. Although the closet was not in the original plans furnished by Mazurka, the materials were ordered by the owners and were of a nature that it was reasonable to believe that they were to be used to complete the house.

In view of the above findings, consideration of the remaining assignment of error is not necessary.

The decree of the trial court is reversed with directions to enter a decree in favor of appellant in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE FREEHOLDER'S PETITION.
DAROLD L. HOFFMAN, APPELLEE, V. ARTHUR ALLEN ET AL., APPELLANTS.

317 N.W.2d 91

Filed March 19, 1982. No. 43875.

Schools and School Districts: Courts: Appeal and Error. The action of the statutory board under Neb. Rev. Stat. § 79-403 (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed.

Luebs, Dowding, Beltzer, Leininger & Smith for appellants.

John R. Brogan of Brogan, McCluskey & Wolstenholm for appellee.

Heard before BOSLAUGH and WHITE, JJ., and BUCKLEY and CANIGLIA, District Judges, and RONIN, Retired District Judge.

CANIGLIA, District Judge.

The petitioner filed a freeholder's petition before the freeholder board seeking transfer of certain real estate from school district No. N-3, known as the Benedict district. A hearing held before the freeholder board resulted in an order granting the freeholder's petition and approving the transfer of the real estate. The District Court affirmed the action of the board granting the transfer, and this appeal by certain taxpayers followed.

This matter is triable de novo in this court.

Statutory authority for transferring land from one school district to another is set forth in Neb. Rev. Stat. § 79-403 (Reissue 1976).

If we determine that all of the statutory requirements have been complied with, we must then further determine whether the transfer of the land from one district to another is in the best educative interest of the child or children involved. See, *Friesen v. Clark*, 192 Neb. 227, 220 N.W.2d 12 (1974); *Klecan v. Schmal*, 196 Neb. 100, 241 N.W.2d 529 (1976).

The appellants contend that the petitioner has failed to meet the requirements of § 79-403, and specifically allege that the petitioner has failed to prove that he has paid tuition to the Polk district as required by said statute. Section 79-403, among other conditions, requires petitioner to have personally paid tuition for one or more of his children attending school in the other district (in this case, the Polk district) for a period of 2 or more consecutive years.

The evidence before the court establishes that the petitioner paid his son's tuition in the amount of $147.50 for the school year of 1977-78, and a like amount for 1978-79. In the 1979-80 school year, the petitioner paid the sum of $2,869.44 in tuition fees. Appellants contend that the tuition payments for school years 1977-78 and 1978-79 in the sum of $147.50 per year are not equal to the per pupil cost of students attending the Polk district, and that said payment therefore does not constitute payment of tuition as required by the statute, and, therefore, the petitioner has failed to meet the requirements of § 79-403.

We disagree with this contention. Section 79-403 is silent as to the amount or manner of computing the tuition payments. Appellants rely upon Neb. Rev. Stat. § 79-4,102(2) (Reissue 1976), which provides in part: "The high school tuition rate for nonresident pupils shall be determined annually by the receiving district on a uniform basis for all pupils but such rate shall in no event be less than the average per pupil cost for the preceding school year determined as provided in subsection (3) of section 79-486." However, this statute is a part of Neb. Rev. Stat. §§ 79-495 to 79-4,105 (Reissue 1976), which is a statutory scheme for providing a public high school education to children whose parents or guardians reside in a public school district which does not maintain a 4-year high school. Such tuition is generally not paid by the parents or guardian of the student. Those statutes are not applicable here where both school districts maintain a public high school. Rather, Neb. Rev. Stat. § 79-445 (Reissue 1976) is applicable, and provides in pertinent part: "The school board or board of education may also admit nonresident pupils to the district school, may determine the rate of tuition of the pupils, and shall collect such tuition in advance." No particular method of determining the rate of tuition is spelled out; therefore, it is left to the discretion of the board of education. Therefore, the establishment and the amount of tuition required to be paid by a student are the sole

responsibility of the board of education of the Polk School District. Petitioner paid the amount of tuition set by the board of education of the Polk School District. No evidence was offered that the action of the school board was improper, illegal, or fraudulent, or that the petitioner in any way contributed or influenced the school board in an unlawful or improper manner. We hold, therefore, that the petitioner has met the tuition requirements of § 79-403. See *Pischel v. Kreycik*, 184 Neb. 332, 167 N.W.2d 388 (1969).

Having determined that the petitioner has met the statutory requirements by the payment of tuition for the required number of years, we next consider appellants' contention that the District Court erred in its finding and determination that the transfer was in the best educative interest of petitioner's son. An examination of the evidence discloses that the Polk district offered 65 courses, and in only 3 of these courses was the teacher not fully endorsed. There are 21 teachers on the teaching staff of Polk district. The superintendent, principal, and two of the teachers have master's degrees.

Petitioner's son was in the 11th grade at the time the petition was filed and in the 12th grade at the time of trial. Twelve of the 23 students in the class of petitioner's son have been together since kindergarten, and this period from kindergarten to the 11th grade (now 12th) constitutes most of the school career of petitioner's son. The son enjoys his associations in the Polk district and wants to remain there. Under similar circumstances, we have held keeping children in the same school district, with the same curriculum and with the same associations, is in the best educative interest of a child. See, *Miller v. School Dist. No. 69*, 208 Neb. 290, 303 N.W.2d 483 (1981); *Klecan v. Schmal*, *supra*.

We find no error in the judgment of the District Court, and it is affirmed.

AFFIRMED.

PETER BERLOWITZ, APPELLANT, V. DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

317 N.W.2d 93

Filed March 19, 1982. No. 43879.

Administrative Agencies: Motor Vehicles: Licenses. The records of the Director of Motor Vehicles disclosing the accumulation by a person of 12 or more points within any period of 2 years come to the attention of the director upon receipt by the Department of Motor Vehicles of the final abstract of conviction, within the meaning of Neb. Rev. Stat. § 39-669.27 (Reissue 1978).

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

James E. Dunlevey for appellant.

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

Heard before BOSLAUGH, CLINTON, and WHITE, JJ., and BUCKLEY and CANIGLIA, District Judges.

BUCKLEY, District Judge.

Plaintiff appealed to the District Court from an order of the Director of Motor Vehicles revoking his license and privilege to operate a motor vehicle. The District Court affirmed and the plaintiff appealed here.

The facts are not disputed. On January 3, 1980, the defendant, Department of Motor Vehicles, received an abstract of conviction report on the plaintiff. This abstract resulted in the accumulation by the plaintiff of 12 points against his driving record and required the director to revoke plaintiff's operating privilege for a period of 6 months.

The problem lies in the fact that the director did not issue an order of revocation until March 4, 1980, 2 months after receiving the final abstract of conviction. The order revoked plaintiff's license "for a period of 6 months from the 3rd day of January, 1980."

Plaintiff contends that, by law, the Department must take action to revoke his license within 10 days after

receipt of the abstract of conviction totaling 12 points, and having failed to do so, its order of revocation is invalid.

The statutory scheme requires that notice of the order of revocation be given to the operator within 10 days. Neb. Rev. Stat. § 39-669.28 (Reissue 1978). The Department complied with this requirement. It is not required, however, that the order of revocation issue within 10 days from receipt of the final abstract of conviction. Neb. Rev. Stat. § 39-669.27 (Reissue 1978) provides in pertinent part: "Whenever it shall come to the attention of the Director of Motor Vehicles that any person has, as disclosed by the records of such director, accumulated a total of twelve or more points within any period of two years, as set out in section 39-669.26, the director shall (1) summarily revoke (a) the license and privilege of such person to operate a motor vehicle in this state . . . ."

The Department accompanied the notice of revocation by a letter signed by the director, which stated in part: "As of January 3, 1980, we received an Abstract for Conviction Report giving you twelve points assessed against your driving record. Your point revocation was brought to the attention of this office on March 4, 1980."

The director cannot excuse his responsibility to summarily revoke an operator's license whenever the accumulation of 12 points shall come to his attention by claiming that the receipt by the Department of the final abstract of conviction did not come to his attention until 2 months later. Although the Department does not explain the 2-month delay, it makes no difference. The records of the Director of Motor Vehicles disclosing the accumulation by a person of 12 or more points within any period of 2 years come to the attention of the director upon receipt by the Department of Motor Vehicles of the final abstract of conviction.

While the 2-month delay in issuing the revocation order is hardly a summary action as required by statute, and while, as pointed out by the District

Court, "[t]his delay does not indicate ideal administrative procedures," nonetheless, it does not invalidate the order of revocation.

The action required of the director was ministerial and directory. As stated in *Omaha P. P. Dist. v. Nebraska P. P. Project*, 196 Neb. 477, 479, 243 N.W.2d 770, 772 (1976): "'"Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute."'"

The direction to the director to revoke summarily relates only to the prompt accomplishment of the statutory scheme for license revocation. This was accomplished in plaintiff's case. The delay did not prejudice plaintiff. Rather, it benefited him since the revocation order was retroactive to January 3, 1980, resulting in only 4 months' actual revocation.

The judgment of the District Court is affirmed. Since the order of revocation was stayed on March 26, 1980, it shall be for a period of 6 months, less that period of time from January 3, 1980, to March 26, 1980.

AFFIRMED.

THOMAS J. SULLIVAN, APPELLEE, V. GREAT PLAINS INSURANCE COMPANY, AN INSURANCE CORPORATION, APPELLANT.

317 N.W.2d 375

Filed March 19, 1982. No. 43890.

1. **Insurance: Motor Vehicles.** Absent specific evidence to support the claim that the driver of a motor vehicle specifically intended to cause an injury similar to the type which resulted, damage to property owned by another and caused by reason of the negligent, or careless, or even willful reckless operation of an automobile does not amount to bodily injury or property damage caused intentionally by or at the direction of the insured. Therefore, such damage to property is not within the exclusion of a liability policy which specifically excludes coverage for damages to persons or property caused intentionally by or at the direction of the insured.
2. **Insurance: Motor Vehicles: Words and Phrases.** The word "accident," as used in an automobile liability policy, is a more comprehensive term than "negligence," and, in its common signification, means an unexpected happening without intention or design. A policy covering liability arising from an accident, or from injuries accidentally sustained, does not cover an injury resulting from the willful act of insured, but it does cover claims based on negligence, recklessness, or wanton misconduct, where no intent or purpose to injure is shown.

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

Jeffrey A. Silver for appellant.

Kelley, Wallace, Scritsmier, Moore, Romatzke & Byrne, P.C., for appellee.

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

KRIVOSHA, C.J.

The appellant, Great Plains Insurance Company (Great Plains), appeals from a declaratory judgment entered by the District Court for Lincoln County, Nebraska, finding Great Plains liable to Thomas J. Sullivan (Sullivan) for damages to an automobile owned by Sullivan and a power pole owned by Nebraska Public Power District (NPPD) and damaged by

Sullivan, under the terms of a certain automobile policy issued by Great Plains to Sullivan. We affirm.

At the time of the accident in question, Sullivan was a 20-year-old resident of North Platte, Nebraska, and employed as an electrician's helper at the Gerald Gentleman Power Plant south of Sutherland, Nebraska. He owned a 1974 Pontiac automobile which he had insured with Great Plains under its standard automobile policy which included, among its coverages, liability coverage and collision coverage. Specifically, the policy provided with regard to liability coverage as follows: "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 . . . ." The policy further contained several exclusions, one of which read as follows: "This policy does not apply: . . . (e) to bodily injury or property damage caused intentionally by or at the direction of the insured . . . ."

The collision coverage provided as follows: "The company will pay for loss caused by collision to the owned automobile but only for the amount of each such loss in excess of the deductible amount stated in the declaration as applicable hereto." The policy defined "collision" to mean "collision of an automobile covered by this policy with another object or with a vehicle to which it is attached or upset of such automobile." The policy defined "loss" to mean "direct and accidental loss of or damage to (a) the automobile, including its equipment."

The accident in question for which damages were sought by Sullivan from Great Plains occurred along Highway 25 south of Sutherland, Nebraska, on February 4, 1977. Sullivan's vehicle was observed northbound on Highway 25 by a member of the Nebraska State Patrol who was on aerial patrol at the time. Sullivan was clocked from the air at speeds of

105 miles per hour.

Two other state patrolmen were occupying two patrol vehicles parked along Highway 25 and were conducting a traffic check. As Sullivan's vehicle approached the location of the State Patrol traffic check, his vehicle slowed and proceeded through the traffic area check by driving in the southbound lane. From that location the Sullivan vehicle proceeded in an easterly direction on Highway 25 to a point where Highway 25 makes an abrupt turn at the crest of a hill from straight east to straight north. At that point Sullivan's vehicle left the road, went through a ditch, up an embankment, struck the NPPD power pole, and stopped in a pasture adjacent to Highway 25.

One of the two patrolmen conducting the traffic check drove immediately to the scene of the accident, arriving approximately 60 seconds after the accident had occurred, and found Sullivan's vehicle coming back onto the highway where it accelerated, spun around, and ended up in the ditch along Highway 25. Sullivan then got out of the vehicle and started running to the north along Highway 25 where he was contacted by the patrolman and placed into custody. At the time of his arrest he was hysterical and crying. Sullivan was thereafter charged with speeding and willful reckless driving. He pled not guilty to both charges and, apparently at the direction of the county court, was admitted to Mount Airy Hospital in Denver, Colorado.

The evidence discloses that Sullivan apparently had been suffering some mental difficulties for some time and had earlier been diagnosed as a paranoid schizophrenic with symptoms including paranoia, feelings that people were talking about him, and suspicious, defensive, and guarded behavior. The evidence further discloses that apparently all of this information was made known to Great Plains before the policy was issued, by a letter from the treating physician to Great Plains.

While still in treatment, Sullivan pled guilty by waiver to the charge of reckless driving and the speeding charge was dismissed.

Great Plains denied coverage for the damage to both the NPPD power pole and the Sullivan automobile on the basis that the damage to the power pole was the result of an intentional act by Sullivan, and therefore excluded from the liability coverage within the meaning of the policy, and the damage to the automobile was not a "loss" because it was not "accidental." Sullivan then filed the instant declaratory judgment action seeking a declaration that the various losses were covered by the Great Plains policy.

Turning first to the matter of the property damage and the liability coverage, we believe that Great Plains is in error in contending that the damage to the pole was not covered because it was an intentional act by Sullivan and therefore excluded from the coverage of the policy. While we have never directly passed upon this question of intention with regard to property damage under a liability coverage provision of an automobile policy, we have had occasion to discuss the matter of an "intentional act" in connection with similar language contained in homeowners' policies. Specifically, in *State Farm Fire & Cas. Co. v. Muth*, 190 Neb. 248, 207 N.W.2d 364 (1973), we held: "An injury is either expected or intended within the meaning of an exclusion in a policy of liability insurance reading as follows: 'This policy does not apply to bodily injury or property damage which is either expected or intended from the standpoint of the insured,' if the insured acted with specific intent to cause harm to a third party." (Syllabus of the court.)

To the same effect see *Allstate Ins. Co. v. Novak*, *ante* p. 184, 313 N.W.2d 636 (1981). There is simply no evidence in the record from which it may be concluded that Sullivan was driving his automobile in such a way so as to intentionally collide with the NPPD power pole and cause damage to the pole. Whatever the evidence

may disclose, it is clear that Sullivan was intending to rapidly leave the area where the pole was located and in fact negligently, but unintentionally, struck the pole. Even after Sullivan struck the pole, he sought to return to the road for the obvious purpose of continuing his efforts to flee the area. There is simply no evidence that he "intended" to leave the highway and strike the pole. If anything, the opposite is established by the evidence.

If we were to accept Great Plains' argument, we would be compelled to hold that in every accident where there is any evidence of a violation of law or any evidence that the automobile was then being knowingly and intentionally operated, though perhaps in a negligent or careless or reckless manner, there would be no coverage for the damage done to another's property by reason of the driver's operation of his vehicle. In essence, we would be virtually making insured motorists uninsured motorists by reason of their own acts. We believe that that would be totally contrary to both the intent of the policy and the protection it offers, as well as the public policy of this state. Absent specific evidence to support the claim that the driver of a motor vehicle specifically intended to cause an injury similar to the type which resulted, we hold that damage to property owned by another and caused by reason of the negligent, or careless, or even reckless operation of an automobile is covered by a liability provision of a policy, as in this policy, and is not bodily injury or property damage caused intentionally by or at the direction of the insured and therefore not within the exclusion of a liability policy which specifically excludes coverage for damages to persons or property caused intentionally by or at the direction of the insured.

We turn then to Great Plains' claim that there is no coverage under the policy for the collision by reason of the fact that this was not an "accidental loss" within the meaning of the policy. To some extent, the reasoning

directed at the arguments made by Great Plains concerning the liability coverage are equally applicable to our examination of the collision coverage. Again, we believe that Great Plains' position is in error.

It is Great Plains' position that the collision which occurred on February 4, 1977, was no "accident" but, rather, was the direct and intentional action of Sullivan. To support that argument Great Plains maintains that Sullivan's plea of guilty by waiver to a charge of willful and reckless driving prevents the occurrence from being considered an "accidental loss" as required by the policy. The decisions both in our state and elsewhere do not support such a position.

In *Riley v. National Auto Ins. Co.*, 162 Neb. 658, 664, 77 N.W.2d 241, 246 (1956), we defined an accident by saying: "'An accident, within the meaning of contracts of the kind here considered, includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby.' [Citations omitted.]"

And in *City of Kimball v. St. Paul Fire & Marine Ins. Co.*, 190 Neb. 152, 154, 206 N.W.2d 632, 634 (1973), we said: "The word 'accident' as used in liability insurance is a more comprehensive term than 'negligence' and in its common signification the word means an unexpected happening without intention. [Citation omitted.]" See, also, 45 C.J.S. *Insurance* § 829 at 887-88 (1946), wherein it is provided: "The word 'accident,' as used in an automobile liability policy, is a more comprehensive term than 'negligence,' and, in its common signification, means an unexpected happening without intention or design. A policy covering liability arising from an accident, or from injuries accidentally sustained, does not cover an injury resulting from the willful act of insured, but it does cover claims based on negligence, recklessness, or wanton misconduct, where no intent or purpose to injure is shown."

It should be kept in mind that the willful, reckless act with which Sullivan was charged was the operation

of the motor vehicle upon a public highway and not the collision with the power pole. Had the accident never occurred, Sullivan would in all likelihood still have been charged with willful, reckless driving.

In *Riley v. National Auto Ins. Co.*, *supra* at 663, 77 N.W.2d at 245-46, we quoted from *Terrien v. Pawtucket Mutual Fire Ins. Co.*, 96 N.H. 182, 71 A.2d 742 (1950), saying: "'While it could be found that the plaintiff's action in driving his truck over the holes was deliberate, he was not so far chargeable with knowledge that the resulting breakdown was probable, as to require a finding that he deliberately incurred the loss. The collapse of the truck could be found to be an untoward, unusual and unexpected event. What happened was well within the meaning attributed to the word "accidental" as commonly understood. * * * The loss which occurred to the plaintiff's automobile on July 13 was "an accidental loss" within the meaning of the policy, which contained no exclusion of loss due to negligent or intentional acts of the insured.'"

Furthermore, in *Riley*, *supra* at 664, 77 N.W.2d at 246, we said: "While it might be said that Riley intentionally drove the car while he was intoxicated, it does not follow that the accident was intentional from the fact of intoxication alone. We think the insured automobile suffered damage as a result of accident within the insuring provisions of the policy."

In the case of *Metropolitan Life Insurance Co. v. Henkel*, 234 F.2d 69, 71 (4th Cir. 1956), the U.S. Court of Appeals for the Fourth Circuit said: "It is true, of course, that insured was exposing himself to danger in driving the car at such a high rate of speed; but 'voluntary exposure to danger by the holder of an accident insurance policy will not defeat recovery for an injury caused by accidental means, where such exposure is not an exception in the policy, and the insured has no intention of producing the injury received'. 29 Am. Jur. p. 716, quoted with approval in

Suttles v. Blue Ridge Ins. Co., 238 N.C. 539, 78 S.E.2d 246, 248. Nor does the fact that the speed of the automobile was in violation of law affect the coverage of the policy, in the absence of an exception to that effect. Poole v. Imperial Mutual Life & Health Ins. Co., 188 N.C. 468, 125 S.E. 8; Zurich General Accident & Liability Ins. Co. v. Flickinger, 4 Cir., 33 F.2d 853, 856, 68 A.L.R. 161. As said by this court in the case last cited: 'If insurance companies desire to avoid liability on such ground, they should insert a clause in their policies to that effect.'"

Mr. Justice Cardozo, while still a member of the New York Court of Appeals, perhaps said it best in the case of *Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 165-66, 133 N.E. 432, 433 (1921), when he said: "Injuries are accidental or the opposite for the purpose of indemnity according to the quality of the results rather than the quality of the causes. The field of exclusion would be indefinitely expanded if the defendant's argument were pursued to the limit of its logic. Every act, if we exclude, as we must, gestures or movements that are automatic or instinctive, is willful when viewed in isolation and irrespective of its consequences. An act *ex vi termini* imports the exercise of volition (Holland, Jurisprudence [8th ed.], pp. 93, 94). Even so, if the untoward consequences are not adverted to—at all events, if the failure to advert to them is not reckless and wanton (Cf. Penal Law, sec. 1044, subd. 2)—liability for the consequences may be a liability for negligence (Holland, *supra*, pp. 97, 98; 2 Austin, Lectures, p. 103; Salmond, Jurisprudence, pp. 351, 363; *Martin* v. *Herzog*, 228 N.Y. 164, 168, Cf. 1 Street, Foundations of Legal Liability, 80; Holmes, Common Law, pp. 103, 105.) A driver turns for a moment to the wrong side of the road, in the belief that the path is clear, and deviation safe. The act of deviation is willful, but not the collision supervening. The occupant of a dwelling leaves a flower pot upon the window-sill, and the pot, dislodged by wind, falls upon

a passing wayfarer (N.Y. City Ordinances, § 250). The position of the flower pot is intended, but not the ensuing impact. The character of the liability is not to be determined by analyzing the constituent acts which, in combination, make up the transaction, and viewing them distributively. It is determined by the quality and purpose of the transaction as a whole."

There is no evidence in the record to support the claim that Sullivan was operating his motor vehicle at excessive rates of speed with the intent and purpose of driving it off the road and into the power pole or for the purpose of causing his vehicle to suffer a collision. Calm, rational consideration of the events, particularly in retrospect, might cause one to consider the possibility of such an accident occurring, but such deliberate contemplation would probably eliminate almost all, if not all, accidents. That is not what a collision policy is intended to protect against. To be sure, if evidence could be adduced to show that Sullivan deliberately and intentionally ran into the pole, a different result might be obtained. But such is simply not the case. The record discloses that Sullivan was operating his motor vehicle in a careless and reckless manner to be sure, but not with the intent of leaving the road and striking the power pole, thereby causing damage to both the pole and the motor vehicle. The damage to the vehicle, which occurred as a result of his leaving the road unexpectedly and without his control, was indeed an accident within the meaning of the policy, even though the means by which the accident came about were created by his own careless behavior. But, as we have noted, that is indeed the result in virtually every accident. As we have earlier indicated, were we to take the position advocated by Great Plains herein, we would virtually exclude from coverage every accident which occurs, on the basis that either speed was involved or some other violation of law occurred.

The trial court was correct in declaring that Great Plains was liable to Sullivan for the loss to his motor

vehicle under the terms of the policy.

Because this was a declaratory judgment action brought by Sullivan on a policy of insurance, Sullivan is likewise entitled to an attorney fee pursuant to the provisions of Neb. Rev. Stat. § 44-359 (Reissue 1978). We therefore order that an attorney fee in the amount of $1,000 be awarded against Great Plains and in favor of Sullivan to apply upon the services of his attorney in this court. The judgment is affirmed.

AFFIRMED.

ELIZABETH COHEE, APPELLANT, V. RICK COHEE, APPELLEE.

317 N.W.2d 381

Filed March 19, 1982. No. 43923.

1. **Minors: Names.** The question of whether the name of a minor child should be changed is to be determined by what is in the best interests of the child.
2. **Statutes.** A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of the 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. Generally speaking, a statute should be construed so that an ordinary person reading it would get from it the usual accepted meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it.
3. **Minors: Names.** No automatic preference as to the surname of a legitimate child now exists in Nebraska law. Each parent has an equal right and interest in determining the surname of the child.
4. ____: ____. The factors to be used in determining the surname of a child include: (1) Misconduct by one of the parents; (2) Failure to support the child; (3) Failure to maintain contact with the child; (4) The length of time a surname has been used; (5) Whether the surname is different from that of the custodial parent; and (6) Which parent has custody of the child.

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

Rae Ann Schmitz for appellant.

R. L. Gilbert for appellee.

Sarah J. Shofstall of Knapp, Mues, Sidwell, Anderson, Shofstall & Beavers and Judith I. Avner and Phyllis N. Segal for amici curiae NOW Legal Defense and Education Fund, Nat. Center on Women and Family Law, and The Center for a Woman's Own Name.

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

WHITE, J.

A single issue is presented in this marriage dissolution case. When the parents disagree as to the surname of a child, does the District Court have jurisdiction to specify the name of the child, and if so, what standard or standards are to be used to guide the District Court in its decision?

The parties to this short-lived marriage were in their late teens at their marriage date, February 24, 1979. They separated in July 1979. The appellant, Elizabeth Cohee, was pregnant at the time of the separation. A child, which the appellant named Cory Martin Dugger (appellant's maiden name), was delivered February 28, 1980. Issues as to child support, custody, and property settlement were stipulated. The cause was submitted to the District Court.

The parties both agree that the marriage was irretrievably broken. The court, after hearing the evidence, dissolved the marriage, approved the property settlement, ordered appellee, Rick Cohee, to pay child support, approved the restoration of appellant's maiden name Dugger, and ordered the appellant to amend the birth certificate of the child to "(a) the surname of the Respondent, (Cohee) or (b) the hyphenated surnames of both parties, (Dugger-Cohee)." The appellee disputes

this reading of the decree insofar as the hyphenated name requiring his surname to be last. However, the record shows that the trial court meant that the hyphenated name should carry the last name of Cohee and not Dugger. Appellant appeals, asserting that the trial court erred in requiring that the child should bear the surname of his father, the appellee.

At common law, the interest of a father in having his child bear his surname was one of inherent concern. The custom of patrilineal succession dates back many centuries. Today, patrimonial control of surnames has virtually disappeared. Since the mid-19th century there has been much progression toward marital and parental equality. In Nebraska, we now have "no fault" divorce (Neb. Rev. Stat. §§ 42-347 to 42-364 (Reissue 1978)); the "tender years" doctrine has been abolished (*Turner v. Turner*, 205 Neb. 6, 286 N.W.2d 100 (1979)); no preference is given to either parent based on sex (§ 42-364(2)); a mother as well as a father is liable for child support (Neb. Rev. Stat. § 13-102 (Reissue 1977)); and each parent has an equal and joint right to custody of the children, with custody being awarded on the best interests of the child (*Kockrow v. Kockrow*, 191 Neb. 657, 217 N.W.2d 89 (1974); *Christensen v. Christensen*, 191 Neb. 355, 215 N.W.2d 111 (1974)). For a discussion of the father's surname preference rule and its history, see *In re Marriage of Schiffman*, 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 918 (1980).

In refusing to allow the surnames of children to be changed from Spatz, the natural father's name, to Laflan, the name of the mother's second husband, we quoted with approval the Minnesota Supreme Court in *Robinson v. Hansel*, 302 Minn. 34, 223 N.W.2d 138 (1974): "'Society has a strong interest in the preservation of the parental relationship. Even though a divorce decree may terminate a marriage, courts have traditionally tried to maintain and to encourage continuing parental relationships. The link between a father and child in circumstances such as these is uncertain at best, and a change of name could further

weaken, if not sever, such a bond.'" *Spatz v. Spatz*, 199 Neb. 332, 334, 258 N.W.2d 814, 816 (1977). We further said in that case: "The question of whether the name of a minor child should be changed is to be determined by what is in the best interests of the child. The cases which have considered this question have granted a change of name only when the substantial welfare of the child requires that the name be changed. See Annotation, 53 A.L.R.2d 914. Generally, where the father has supported the children and exercised his visitation rights relief has been denied. A change of name has been granted where the father's name was positively deleterious to the child because of the father's misconduct and notoriety. Generally, minor embarrassment or emotional upset has been held not sufficient to require that a change of name be granted." *Id.* at 333, 258 N.W.2d at 815.

In 1977 the Legislature passed L.B. 72, now codified as Neb. Rev. Stat. § 71-640.01 (Cum. Supp. 1980), which provides in part: "The information pertaining to the name of an infant born in this state and reported on a birth certificate, filled out and filed pursuant to sections 71-601 to 71-648, shall comply with the following:

"(1) If the mother was married at the time of either conception or birth of the child, or at any time between conception and birth, the name of such mother's husband shall be entered on the certificate as the father of the child and *the surname of the child shall be entered on the certificate as being (a) the same as that of the husband, unless paternity has been determined otherwise by a court of competent jurisdiction, (b) the surname of the mother, (c) the maiden surname of the mother, or (d) the hyphenated surname of both parents.*" (Emphasis supplied.)

The appellant asserts that, in passing the act, the Legislature intended that the previous policy of the state automatically giving preference to the husband's surname was abolished, and each of the alternatives are of equal weight. She further argues that the trial court was not justified in finding that the best interests of the

child required that the hyphenated surname listing the husband's name last was in the best interests of the child.

"A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of the 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.

"Generally speaking, a statute should be construed so that an ordinary person reading it would get from it the usual accepted meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it." (Syllabi of the court.) *O'Neill Production Credit Assn. v. Schnoor*, 208 Neb. 105, 302 N.W.2d 376 (1981).

We believe the intent of the Legislature is clear. Each subsection is of equal weight. To accord one subsection greater weight would be contra to the U.S. Constitution and our own Nebraska Constitution. The statute merely sets out the possible choices for the surname.

The floor debate concerning the passage of 1977 Neb. Laws, L.B. 72, in the Legislature, is instructive: "Senator Fowler: . . . Basically, Senator Marsh's bill as introduced discriminated against women and the decision of how last name would be assigned to a child because it gave the preference to the father's or the husband's last name. This amendment simply makes it an equal treatment, that is, that one among four choices could be used for the last name. Generally I think the custom will remain that it is the husband's last name will be assigned to the child but this amendment is to remove the discrimination that Senator Marsh overlooked in her bill. I would move that the amendment be adopted." Floor Debate, 85th Leg., 1st Sess. 183 (January 31, 1977).

The amendment was adopted unanimously and the bill was passed. We agree with the appellant's interpretation. No automatic preference as to the surname of a legitimate child now exists in Nebraska law. We believe each parent has an equal right and interest in determining the surname of a child.

Did the trial court have jurisdiction to determine surnames in a dissolution action where the parents disagree? It appears it did. Section 42-364 provides in part: "When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified . . . ." Courts have apparently assumed this additional chore as an incident of their equity jurisdiction in dissolution cases. See Annot., 92 A.L.R.3d 1091 (1979).

As we stated previously, the standard to be used in the accomplishment of this task is the best interests of the child, the same standard used in all cases involving custody and visitation of minor children. § 42-364. The parties do not contest this.

Other jurisdictions have considered a number of factors in determining the surname of a child: (1) Misconduct by one of the parents; (2) Failure to support the child; (3) Failure to maintain contact with the child; (4) The length of time a surname has been used; and (5) Whether the surname is different from that of the custodial parent.

Applying these suggested tests to the facts in this case, we see that no evidence was presented in the record to indicate that the appellee had been guilty of misconduct, or had failed to support the child. Further, the child bore the surname of the mother (maiden name) for a period of less than 1 year. The appellant asserts that the appellee was not really a father to the child, although he did acknowledge paternity of the child before trial, and 8 months after the child's birth. Appellant was granted custody of the child.

We consider and reject the trial court's reasons that the status of legitimacy would necessarily be raised by

different surnames of mother and son.

Considering the matter de novo, we conclude that the best interests of the child require that the child bear the hyphenated surname Cohee-Dugger. We refuse to suggest or hold that a presumption exists in favor of the custodial parent. However, custody, along with the other factors, is to be considered in determining the best interests of the child. The trial court is directed to amend its decree in conformity herewith.

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., and MCCOWN, J., concur in the result.

CLINTON, J., not participating in decision.

JANICE M. CHRISTENSEN, APPELLEE, V. GILBERT D. CHRISTENSEN, APPELLANT.

317 N.W.2d 95

Filed March 19, 1982. No. 43948.

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

P. J. Heaton, Jr., for appellant.

Thomas M. Sonntag of Peetz, Peetz & Sonntag for appellee.

Heard before BOSLAUGH, MCCOWN, and CLINTON, JJ., and HAMILTON and CASE, District Judges.

PER CURIAM.

This is an appeal involving a domestic relations matter. The sole issue on appeal is the propriety of the distribution of marital assets.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court.

The judgment is affirmed.

AFFIRMED.

IN RE APPLICATIONS 15146 AND 15148 OF THE LITTLE BLUE NATURAL RESOURCES DISTRICT. LITTLE BLUE NATURAL RESOURCES DISTRICT, APPELLEE, V. LOWER PLATTE NORTH NATURAL RESOURCES DISTRICT ET AL., APPELLANTS.

317 N.W.2d 726

Filed March 19, 1982. No. 44050.

1. **Administrative Agencies: Endangered Species.** The Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. §§ 37-430 to 37-438 (Reissue 1978), imposes two obligations on all state departments and agencies. One is that all state departments and agencies must consult with the Nebraska Game and Parks Commission before carrying out programs which may affect endangered species or their habitat. The other is that no state department or agency may take any action that will result in jeopardizing the continued existence of endangered or threatened species or result in the destruction or modification of a habitat of such species.
2. **Administrative Agencies: Natural Resources Districts.** Both the Department of Water Resources and the various natural resources districts are state departments or agencies within the meaning of The Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. §§ 37-430 to 37-438 (Reissue 1978).
3. **Administrative Agencies: Endangered Species.** No action of a state department or agency nor program administered by the Governor can be permitted as long as Neb. Rev. Stat. § 37-435(3) (Reissue 1978) is in effect until the interested parties have consulted with the Nebraska Game and Parks Commission and have determined that the action contemplated will not jeopardize the continued existence of such endangered species or result in destruction or modification of habitat of such species.
4. ——:——. After consulting with the Nebraska Game and Parks Commission, the department or agency involved must determine whether it has taken all necessary action to insure that its actions will not jeopardize the continued existence of an endangered species or destroy or modify habitat critical to the existence of the species. Once that decision is made it is then subject to judicial review to ascertain whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.
5. **Administrative Agencies: Statutes.** An administrative agency is required to act under the law as it stands when its order is entered. A change of law pending an administrative determination must be followed and the new law applied, at least in relation to permits for the doing of future acts, unless the statute contains a saving clause.

Appeal from the decision of the Director of Water Resources. Reversed and remanded with directions.

George E. Svoboda, P.C., for appellants Lower Platte North et al.

James I. Shamberg of Cronin, Shamberg & Wolf for appellants Central Platte N.R.D., Wood River, Marcia Oldfather, Leslie & Charlotte A. Robinson, City of Lexington, Spring Creek Citizens Committee, County of Merrick, County of Dawson, City of Kearney, Harold Green, Jr., James B. Beltzer, John A. Wagoner, Joseph D. Martin, & Herbert F. Mayer, Jr.

William F. Austin, City Attorney, and William G. Blake for appellant City of Lincoln.

Martin D. Johnson for appellant City of Grand Island.

Duane A. Burns of Mayer & Burns for appellant Central Nebraska Conservation Assn.

Lyle B. Gill for appellant City of Fremont.

Patrick A. Parenteau for appellants National Wildlife Federation, Neb. Wildlife Federation, & Save the Platte Committee.

David C. Nuttleman of Holtorf, Hansen, Kovarik & Nuttleman for appellant North Platte N.R.D.

Jess C. Nielsen and Richard A. Birch of Jess C. Nielsen Law Offices for appellants Twin Platte N.R.D. et al.

Robert B. Crosby and Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester for appellee.

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

KRIVOSHA, C.J.

The appellants, who are various Nebraska municipalities, natural resources districts, a conservation

district, and several environmental organizations, have appealed from an order entered by the director of the Department of Water Resources (Department) which in substance granted to the appellee, Little Blue Natural Resources District (Little Blue), the authority to appropriate, under conditions prescribed in the order, waters of the North Platte River for a proposed irrigation project to be constructed by Little Blue. For reasons which we will set out in greater detail, we find that we must reverse the order of the Department's director and remand the matter back to the director for further proceedings in accordance with this opinion.

This is the second appearance of this matter before this court. The facts are fully set out in our first opinion at 206 Neb. 535, 294 N.W.2d 598 (1980) (Little Blue I), and will not be repeated herein. The effect of our order in Little Blue I was to require the director to determine whether the taking of the water contemplated by Little Blue for its proposed project should be denied because such denial was demanded by the public interest, as required by Neb. Const. art. XV, § 6. Following our decision in Little Blue I, the director instructed all the interested parties to prepare and submit briefs to him addressing only the issue of "public interest" as it pertains to the proposal of Little Blue. No further hearings were held by the director and no further testimony taken, though the appellants requested the opportunity to present additional evidence to the director.

A number of errors are assigned by appellants. Before we turn to those matters, however, it is necessary that we first address a threshold question, not required to be addressed by us in Little Blue I, concerning the significance of the provisions of Neb. Rev. Stat. §§ 37-430 to 37-438 (Reissue 1978) and cited as The Nongame and Endangered Species Conservation Act (Act). Unless we determine that the Act has no applica-

tion to the instant project or, if applicable, its provisions were satisfied, we need not address any of the other errors assigned.

In 1973 the Congress of the United States enacted the Endangered Species Act of 1973. See 16 U.S.C. §§ 1531 et seq. (1976 & Supp. III 1979). Under the provisions of the federal Endangered Species Act, states were required to pass similar endangered species legislation in order to continue receiving certain federal funds. As a result, in 1975 the Nebraska Legislature adopted the above-cited Act. 1975 Neb. Laws, L.B. 145.

The purpose of the Act is spelled out in § 37-432, which provides in part: "The Legislature finds and declares: . . . (2) That species of wildlife and wild plants normally occurring within this state which may be found to be threatened or endangered within this state shall be accorded such protection as is necessary to maintain and enhance their numbers." The pertinent portion of the Act, which is found in § 37-435(3), reads as follows: "The Governor *shall* review other programs administered by him and utilize such programs in furtherance of the purposes of sections 37-430 to 37-438. *All other state departments and agencies shall, in consultation* with and with the assistance of the commission, utilize their authorities in furtherance of the purposes of sections 37-430 to 37-438 by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 37-434, *and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the commission to be critical.*" (Emphasis supplied.) The commission referred to in the Act is defined by statute as the Nebraska Game and Parks Commission. See § 37-431(2).

Pursuant to the federal Endangered Species Act and the state Act, certain species have been declared to be endangered species, including the whooping crane and the bald eagle, both of whom either roost upon or in some manner use the Platte River area as a habitat. 50 C.F.R. § 17.11 (1980); Neb. Game and Parks Comm. Wildlife Reg. 6-4(a) (1981). There may be others.

The Act imposes two obligations on all state departments and agencies. One is that all state departments and agencies must, *after consulting* with Game and Parks, carry out programs for the conservation of endangered species, and the second is that all state departments and agencies must not take any action that will result in jeopardizing the continued existence of endangered or threatened species or result in the destruction or modification of a habitat of such species. § 37-435(3).

There is no question but that the Department of Water Resources is a department or agency within the meaning of § 37-435(3). Neb. Rev. Stat. § 46-705 (Reissue 1978). Furthermore, Little Blue, as a creature of statute and a political subdivision, is also an agency within the meaning of § 37-435(3) and bound by its provisions. Neb. Rev. Stat. § 2-3213(1) (Cum. Supp. 1980). *Schlientz v. City of North Platte*, 172 Neb. 477, 110 N.W.2d 58 (1961); *Vap v. City of McCook*, 178 Neb. 844, 136 N.W.2d 220 (1965); *Seward County Rural Fire Protection Dist. v. County of Seward*, 156 Neb. 516, 56 N.W.2d 700 (1953). Likewise, it seems clear beyond question that the development of the irrigation project by Little Blue and the issuance of a permit by the Department to Little Blue both qualify as "action" taken by a state agency and, therefore, may not jeopardize the continued existence of the endangered species or result in the destruction or modification of their habitat.

The director, in his order issued following our remand in Little Blue I, found, among other matters: "The potential affects [sic] to [fish and wildlife habitat]

either are deemed minimal *or would be mitigated* by offsetting or even enhancing circumstances derived from operation of the proposed project." (Emphasis supplied.) Neither the meaning of that finding in light of the restrictions of the Act nor the basis for that finding and the director's attempt to balance interests is made clear from the order. Nor can one determine what the effect of this project will be on the habitat of the endangered species involved by examining the voluminous record in this case. We are simply unable to determine from the record in its present state whether the proposed project will in fact jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species, contrary to the prohibitions contained in § 37-435(3). There is some evidence in the record to indicate that the habitats may be affected by the project. The extent of that effect and how it applies when examined in light of the Act is not shown so that we can determine if the Act is being violated. What is clear, however, is that the examination that has been made by both the Department and Little Blue is inadequate, and further evidence is required.

We should note at this point that the provisions of the Act may not repeal the provisions of Neb. Const. art. XV, §§ 4, 5, and 6. To the extent that the prohibition contained in the Act denied to a citizen of the State of Nebraska a right otherwise guaranteed to the citizen, the Act would have to give way. That issue is not before us at this time and we do not consider what conflicts between the Act and the Constitution of Nebraska may arise. Absent a constitutional conflict, however, the requirements imposed upon a state agency by the Act, as presently enacted, are rather clear and may not be either ignored or waived.

The relevant section of the state Act is, for all practical purposes, identical with the federal act on the same subject, and therefore the decisions of the federal

courts, including the U.S. Supreme Court, in interpreting the federal act are of great help to us in deciding this case. The U.S. Supreme Court in its decision in *TVA v. Hill*, 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978), put to rest any doubt as to how the act is to be applied. The issue in the *TVA* case was whether the Tennessee Valley Authority could complete the construction of the Tellico Dam on the Little Tennessee River once it was determined that the critical habitat of the snail darter would be totally eliminated by completion of the dam. At the time that the snail darter's existence near the damsite was first determined, millions of dollars had already been spent on the dam's construction, which was nearly completed. In enjoining the completion of the dam, the U.S. Supreme Court said at 173: "One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies 'to *insure* that actions *authorized, funded,* or *carried out* by them do not *jeopardize* the continued existence' of an endangered species or '*result* in the destruction or modification of habitat of such species . . . .' 16 U.S.C. § 1536 (1976 ed.). (Emphasis added.) This language admits of no exception." Section 7 of the federal act is almost identical with § 37-435(3) of the state Act.

The U.S. Supreme Court concluded that the history of the act clearly required the courts to follow the mandates of the legislation, regardless of what the courts might think. The Court said at 179-80: "In shaping legislation to deal with the problem thus presented, Congress started from the finding that '[t]he two major causes of extinction are hunting and destruction of natural habitat.' S. Rep. No. 93-307, p. 2 (1973). Of these twin threats, Congress was informed that the greatest was destruction of natural habitats; see 1973 House Hearings 236 (statement of Associate Deputy Chief for National Forest System, Dept. of

Agriculture); *id.*, at 241 (statement of Director of Mich. Dept. of Natural Resources); *id.*, at 306 (statement of Stephen R. Seater, Defenders of Wildlife); Lachenmeier, The Endangered Species Act of 1973: Preservation or Pandemonium?, 5 Environ. Law 29, 31 (1974). Witnesses recommended, among other things, that Congress require all land-managing agencies 'to avoid damaging critical habitat for endangered species and to take positive steps to improve such habitat.' 1973 House Hearings 241 (statement of Director of Mich. Dept. of Natural Resources). Virtually every bill introduced in Congress during the 1973 session responded to this concern by incorporating language similar, if not identical, to that found in the present § 7 of the Act. These provisions were designed, in the words of an administration witness, 'for the first time [to] *prohibit* [a] federal agency from taking action which does jeopardize the status of endangered species,' Hearings on S. 1592 and S. 1983 before the Subcommittee on Environment of the Senate Committee on Commerce, 93d Cong., 1st Sess., 68 (1973) (statement of Deputy Assistant Secretary of the Interior) (emphasis added); furthermore, the proposed bills would '*direc[t]* all . . . Federal agencies to utilize their authorities for carrying out programs *for the protection* of endangered animals.' 1973 House Hearings 205 (statement of Assistant Secretary of the Interior). (Emphasis added.)

"As it was finally passed, the Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation. Its stated purposes were 'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,' and 'to provide a program for the conservation of such . . . species . . . .' 16 U.S.C. § 1531(b) (1976 ed.). In furtherance of these goals, Congress expressly stated in § 2(c) that 'all Federal departments and agencies *shall* seek *to conserve*

endangered species and threatened species . . . .' 16 U.S.C. § 1531(c) (1976 ed.). (Emphasis added.) Lest there be any ambiguity as to the meaning of this statutory directive, the Act specifically defined 'conserve' as meaning 'to use and the use of *all methods and procedures which are necessary* to bring *any endangered species* or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.'"

The U.S. Supreme Court went on to make further comment concerning the manner in which the act is to be administered, saying at 183-84: "While the Conference Report made no specific reference to this choice of provisions, the House manager of the bill, Representative Dingell, provided an interpretation of what the Conference bill would require, making it clear that the mandatory provisions of § 7 were not casually or inadvertently included:

"'[Section 7] substantially amplifie[s] the obligation of [federal agencies] to take steps within their power to carry out the purposes of this act. A recent article . . . illustrates the problem which might occur absent this new language in the bill. It appears that the whooping cranes of this country, perhaps the best known of our endangered species, are being threatened by Air Force bombing activities along the gulf coast of Texas. Under existing law, the Secretary of Defense has some discretion as to whether or not he will take the necessary action to see that this threat disappears . . . . [O]nce the bill is enacted, [the Secretary of Defense] *would be required to take the proper steps. . . .*'

"'. . . [T]he agencies of Government can no longer plead that they can do nothing about it. *They can, and they must. The law is clear.*'"

In recognizing that the Court was required to follow the dictates of the legislation and not view the matter as merely de minimis, the U.S. Supreme Court said at 187-88: "One might dispute the applica-

bility of these examples to the Tellico Dam by saying that in this case the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter. But neither the Endangered Species Act nor Art. III of the Constitution provides federal courts with authority to make such fine utilitarian calculations. On the contrary, the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.' Quite obviously, it would be difficult for a court to balance the loss of a sum certain—even $100 million—against a congressionally declared 'incalculable' value, even assuming we had the power to engage in such a weighing process, which we emphatically do not."

Just as the U.S. Supreme Court was without choice when examining the effect of the federal Endangered Species Act and balancing it against the benefits of the nearly completed Tellico Dam, likewise, this court is without choice, in examining the effect of the state Act, to engage in such balancing. The requirements of the Act are absolute and must be met. That there may be offsetting or even enhancing circumstances derived from the operation of the project may be insufficient if the endangered species habitat is destroyed, as the Act now stands.

No action of a state department or agency nor program administered by the Governor can be permitted as long as § 37-435(3) is in effect until the interested parties have consulted with Game and Parks *and* have determined that the action contemplated will not jeopardize the continued existence of such endangered species or result in destruction or modification of habitat of such species.

We pause at this point to clearly point out that we do not, by our action today, determine that the project does indeed violate the Act. We merely decide as we do because the record before us fails to disclose that the Department and Little Blue adequately consulted with

and sought the assistance of Game and Parks in planning the project, and for the further reason that the record before us fails to disclose that the actions contemplated by both Little Blue, in constructing its project, and the Department, in authorizing the project, will not "jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the commission to be critical." Until the record contains sufficient evidence upon which such determination can be made, in the first instance by the director, and if necessary on appeal by this court, the project must be halted and the cause remanded for further proceedings.

In view of our action herein, we believe it advisable to comment on what is meant when the Act requires the parties to "consult" with the commission. The consultation required by the Act does not grant to Game and Parks absolute veto. In *National Wildlife Federation v. Coleman*, 529 F.2d 359, 371 (5th Cir. 1976), the court said: "Federal agencies are required to consult and obtain the assistance of the Secretary before taking any actions which may affect endangered species or critical habitat. However, once an agency has had *meaningful* consultation with the Secretary of Interior concerning actions which may affect an endangered species the final decision of whether or not to proceed with the action lies with the agency itself. Section 7 does not give the Department of Interior a veto over the actions of other federal agencies, provided that the required consultation has occurred." (Emphasis supplied.) See, also, *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976).

While Game and Parks, therefore, does not have absolute veto, it is clear from the Act that meaningful consultation is an absolute prerequisite to proceeding with any project. Moreover, because the commission does not have power of veto does not mean that either the Department or Little Blue can ignore the effect

of the project on the endangered species if in fact the evidence supports that conclusion.

In *National Wildlife Federation v. Coleman, supra* at 373, the court further noted: "In holding that the appellees have 'adequately considered' the effects of the highway on the crane, the district court misconstrued the directive of § 7. As we have pointed out, § 7 imposes on all federal agencies the mandatory obligation to insure that any action authorized, funded, or carried out by them does not jeopardize the existence of an endangered species or destroy critical habitat of such species. . . . Although the FEIS and the administrative record indicates that the appellees have recognized and considered the danger the highway poses to the crane, they have failed to take the necessary steps 'to insure' that the highway will not jeopardize the crane or modify its habitat." The court therefore enjoined the project and directed that the Department of Interior take a closer look at what effect, if any, construction of a highway upon the habitat of the crane would have.

The court further noted in *Coleman* that if the agency disregarded the evidence, the court would be required to review the matter, saying at 371-72: "It follows that after consulting with the Secretary the federal agency involved must determine whether it has taken all necessary action to insure that its actions will not jeopardize the continued existence of an endangered species or destroy or modify habitat critical to the existence of the species. Once that decision is made it is then subject to judicial review to ascertain whether 'the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' *Citizens to Preserve Overton Park, Inc. v. Volpe, supra,* 401 U.S. at 416, 91 S. Ct. at 824, 28 L. Ed. 2d at 153. See Title 16, U.S.C., Section 1540(g)."

In view of the fact that we are remanding this matter back to the director for further proceedings,

we deem it appropriate to comment on one further matter. Since our decision in Little Blue I, the Legislature of the State of Nebraska has amended the provisions of Neb. Rev. Stat. §§ 46-204, 46-206, 46-234, and 46-235 (Supp. 1981), all relating to transbasin diversion. 1981 Neb. Laws, L.B. 252. In particular, the Legislature has amended § 46-235 to provide that certain criteria are to be considered by the director in determining whether the public interest as required by the Constitution is met. Neb. Const. art. XV, § 6.

The substantive right to divert the water unless the public interest demands otherwise is found in the Constitution and cannot be denied by statute. Neb. Const. art. XV, § 6; *Little Blue N.R.D. v. Lower Platte North N.R.D.*, 206 Neb. 535, 294 N.W.2d 598 (1980). The function of Neb. Rev. Stat. § 46-289 (Supp. 1981) is to establish in part the procedure to be followed by the director in attempting to determine whether a denial of the application is demanded by the public interest. As such, § 46-289 is a procedural law and not a substantive law, and is to be applied to hearings held after the passage of the Act even though the application was filed prior to the passage of the procedural law. See, *Romano v. B. B. Greenberg Co.*, 108 R.I. 132, 273 A.2d 315 (1971); *Schultz v. Gosselink*, 260 Iowa 115, 148 N.W.2d 434 (1967).

In 2 Am. Jur. 2d *Administrative Law* § 326 at 149 (1962), it provides in part: "An administrative agency is required to act under the law as it stands when its order is entered. A change of law pending an administrative determination must be followed and the new law applied, at least in relation to permits for the doing of future acts, unless the statute contains a saving clause."

And in *Oviatt v. Archbishop Bergan Mercy Hospital*, 191 Neb. 224, 226, 214 N.W.2d 490, 492 (1974), we said: "[A]mendments to statutes which are procedural in nature are applicable to pending cases which have

not been tried." See, also, *Ziffrin, Inc. v. United States*, 318 U.S. 73, 63 S. Ct. 465, 87 L. Ed. 621 (1943).

We believe that, upon remand, further hearings should be held by the director and relevant evidence should be adduced relating particularly to those factors set forth in § 46-235 as now amended, as well as the project's effect upon the endangered species. In so holding we do not pass upon the validity of § 46-235.

The action of the director is therefore reversed and the matter is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
LEE MCNICHOLS, APPELLANT.

317 N.W.2d 95

Filed March 19, 1982. No. 44142.

Sentences: Appeal and Error. A sentence within statutory limits will not be disturbed on appeal in the absence of evidence showing an abuse of discretion by the trial court.

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

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

Paul L. Douglas, Attorney General, and Bernard L. Packett for appellee.

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

PER CURIAM.

The appellant, Lee McNichols (McNichols), appeals from a sentence of life imprisonment imposed upon

McNichols by reason of his having been convicted of the crime of murder in the second degree in violation of Neb. Rev. Stat. § 28-304 (Reissue 1979). Murder in the second degree is a Class IB felony punishable by imprisonment of not less than 10 years nor more than the defendant's natural life. McNichols was sentenced by the trial court to confinement to the Nebraska Penal and Correctional Complex for a period of his natural life. His single assignment of error is that the sentence to a term of life imprisonment is excessive. We believe not, and affirm the sentence of the trial court.

On the evening of November 7, 1980, McNichols and a group of his friends went to a disco nightclub in Millard, Nebraska, called "The Gathering." The victim's two brothers, David and Ronald Payne, also had gone to the same nightclub that evening. There was apparently an altercation in the bar which resulted from one of the female companions in the McNichols party accusing the victim's brothers of calling her "a bitch." Testimony from a number of witnesses is somewhat contradictory, but the victim's brothers denied that they had called the woman a bitch. The female companion told McNichols what had occurred and he approached the brothers. A discussion followed and the brothers denied making any such comment.

Apparently, throughout the remaining part of the evening, there were additional problems involving words between the parties, and finally a bouncer asked McNichols and his party to leave. During the course of the evening, David Payne had left the nightclub for approximately 1 hour, and had returned, accompanied by the victim, Archie Payne, to pick up Ronald. As McNichols and his party were leaving, David Payne was also leaving the nightclub and there were some words between them as they walked out to the parking lot. David Payne was apparently behind McNichols, and McNichols made some comment as to why he was following him. According to McNichols, David Payne's response was that he would see when "we get to the

parking lot." At the time the parties left the bar, Archie Payne had gotten out of the automobile and was approaching the bar entrance.

When the parties reached the parking lot, the testimony becomes confusing and contradictory as to what exactly occurred. However, it is clear that David Payne and McNichols continued to have words, although McNichols claims that David Payne initiated the argument and threatened to fight him. David Payne maintained that it was the other way around. At some point in the argument, McNichols, who had had a loaded pistol in his car, obtained that pistol and fired what was variously described as three to eight shots. One of the shots struck the victim, Archie Payne, in the back, causing his death.

We have oftentimes held that a sentence within statutory limits will not be disturbed on appeal in the absence of evidence showing an abuse of discretion by the trial court. *State v. Wredt*, 208 Neb. 184, 302 N.W.2d 701 (1981); *State v. Irwin*, 208 Neb. 123, 302 N.W.2d 386 (1981); *State v. Freeman*, 201 Neb. 382, 267 N.W.2d 544 (1978).

McNichols is 23 years of age and has completed high school. As in the *Freeman* case, McNichols does not have a serious criminal record, although he does have a number of minor misdemeanors. Nevertheless, one cannot ignore the seriousness of this crime. A life was needlessly taken by what the evidence indicates was an indiscriminate firing of a weapon. The evidence discloses that at some point in time McNichols went to his automobile to get the gun. Had he left the premises at that time, it is likely that no crime would have been committed. Rather than withdrawing from the battle, however, he obtained a pistol from the car and returned to the fight, firing the weapon indiscriminately. As noted by McNichols, the effect of the sentence imposed is a sentence of 10 years to life, rather than life. See *State v. Moore*, 209 Neb. 88, 306 N.W.2d 183 (1981). Under such a sentence McNichols has the full oppor-

tunity to rehabilitate himself, if he can, and convince the parole board of his right to be paroled when he has served his minimum sentence. We are unable to find any evidence to support a claim that as a matter of law the trial court abused its discretion in imposing a maximum sentence in a case as serious as this one. The judgment of the trial court must, therefore, be affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL.
NEBRASKA STATE BAR ASSOCIATION, RELATOR, V.
MARVIN L. GREEN, RESPONDENT.

317 N.W.2d 97

Filed March 19, 1982. No. 44301.

Original action. Judgment of disbarment.

Paul L. Douglas, Attorney General, for relator.

Kirk E. Naylor, Jr., for respondent.

Heard before MORAN, C.J., HAMILTON, CANIGLIA, WOLF, STANLEY, FUHRMAN, and SPRAGUE, District Judges, members of the special Nebraska Supreme Court.

MORAN, C.J.

This is disciplinary action brought under the rules of this court against the respondent, Marvin L. Green, a lawyer licensed to practice law in this state.

Jurisdiction of this court is derived from a rule adopted by the Supreme Court providing for the appointment of a special Nebraska Supreme Court in the event of disqualification of all the judges of the Supreme Court in any matter pending before the court. An order of disqualification was entered by the court, and pursuant to the rule we were appointed to hear and decide

this case.

Respondent is charged with violation of Canon 1, DR 1-102(A) (1), (3), and (4), and Canon 9, DR 9-101(C), of the Code of Professional Responsibility.

The referee appointed by the court filed his report in which he concluded that respondent had violated those canons; that he had also violated his oath of office as provided in Neb. Rev. Stat. § 7-104 (Reissue 1977); and that he was guilty of violating Neb. Rev. Stat. § 7-106 (Reissue 1977). The referee recommended that respondent be disbarred.

There were no exceptions filed to the report. We afforded the parties an opportunity to submit briefs, but neither requested to do so.

The facts found by the referee are: "1. On June 19, 1959, the Respondent, Marvin L. Green, was admitted to the practice of law in the State of Nebraska, by the Supreme Court of the State of Nebraska.

"2. In approximately July or August of 1979, Respondent, the Court Reporter for the Nebraska Supreme Court, met with Elton L. Bowman, (hereafter called 'Bowman'), Manager of Gant Publishing Company, to discuss the renewal of the company's contract to print the bound volumes of the Nebraska Reports. During that meeting the respondent advised Bowman that he was in a position to guarantee the renewal of Gant Publishing Company's contract and that he would do so if Bowman would pay him the sum of $2,500.00 per volume for each of the three volumes included in the contract. At that time Bowman declined the Respondent's offer.

"3. On or about October 15, 1979, the Respondent telephoned Bowman to discuss completion of the printing of Volume 201 of the Nebraska Reports. The Respondent then asked Bowman if he had reconsidered the Respondent's 'previous offer'. Bowman asked the Respondent if he meant that Bowman give the Respondent 'something under the table to get a contract' to which the Respondent replied 'yes'. Bowman then advised the Re-

spondent that he had not reconsidered the offer and would not do so. The conversation continued, however, and it was finally agreed that the Respondent and Bowman would meet later to continue the discussion in person. Bowman then contacted his brother, Donald Bowman, and advised him of the conversation with the Respondent. Donald Bowman advised Elton Bowman to set up a meeting with the Respondent and that in the meantime he would contact the Attorney General's office.

"4. On the morning of October 16, 1979, the Respondent went to see Bowman at Gant Publishing Company. The Respondent and Bowman went to the alley behind Gant Publishing Company and had a discussion in reference to the contract for printing the Nebraska Reports. Bowman told the Respondent that if the Respondent could guarantee him a contract he would give the Respondent $2,500.00 at that time with further payments to be made upon completion of additional volumes of the Nebraska Reports after a new contract had been signed. The Respondent said that he wanted to think the matter over for a few days. Elton Bowman then went to Donald Bowman's office where he met with Assistant Attorney General, Patrick O'Brien, and informed Mr. O'Brien of his discussions with the Respondent.

"5. At approximately 3:00 p.m. on Thursday, October 18, 1979, the Respondent went to Bowman's office at Gant Publishing Company and asked Bowman if he wanted to buy some silver. The Respondent said that he had some silver bars which he would like to sell to Bowman which he thought would be worth approximately $2,500.00 to Bowman but which would be worth approximately $700.00 to anyone else. The Respondent and Bowman agreed to meet the following afternoon at approximately 3:00 p.m. After the Respondent left, Bowman called Mr. O'Brien and Donald Bowman to advise them of the Respondent's visit.

"6. At approximately 4:30 p.m. on Friday, October

19, 1979, the Respondent parked his 1968 Chevrolet in the parking area behind Gant Publishing Company and entered the building through a rear door. The Respondent and Bowman then left the building through the front door and walked west on "N" Street for a short time then turned back and walked to the Respondent's car at the rear of Gant Publishing Company. After arriving at the car Bowman gave the Respondent the sum of $2,500.00 in cash. The Respondent then got into his car, placed the money in the glove compartment and started to back out of the parking place. At that time the Respondent was stopped by Officers of the Nebraska State Patrol and placed under arrest.

"7. Prior to the meeting at 4:30 p.m. on October 19, 1979, Bowman had been equipped with an electronic transmitting device. The conversation between Bowman and Respondent was tape recorded by means of a tape recorder in a car parked nearby by the Nebraska State Patrol. A copy of the transcript of that conversation is Exhibit #7, and has been received in evidence by the Referee."

The transcript discloses that respondent fully appreciated the ethical impropriety and possible consequences of his acts.

The conduct of the respondent warrants disbarment under doctrines announced in prior cases. See, *State ex rel. Sorensen v. Scoville*, 123 Neb. 457, 243 N.W. 269 (1932); *State ex rel. Nebraska State Bar Association v. Walsh*, 206 Neb. 737, 294 N.W.2d 873 (1980).

The referee's conclusions are worthy of note: "This is not a case where an ethical violation occurred because the offending attorney was inexperienced, inept, unknowing or overzealous. The Respondent, admitted to practice for over twenty years, deliberately set upon a course of action that he knew to be ethically wrong. For an attorney to deliberately perform an act which could undermine public confidence in our judicial system is reprehensible. For an attorney who is an employee of the State's highest court to do so warrants disbarment.

I so recommend." We adopt his conclusions as our own and enter such an order.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V. JUAN BRADLEY, APPELLANT.

317 N.W.2d 99

Filed March 19, 1982. No. 44517.

1. **Homicide.** Premeditation and deliberation and a purpose to kill are not elements of felony murder.
2. **Homicide: Intent.** No specific intention is required to constitute felony murder other than the intent to do the act which constitutes the felony during which the killing occurred.
3. **Criminal Law: Witnesses.** Violation of a sequestration order is not reversible error in the absence of prejudice to the defendant.
4. **Criminal Law.** Neb. Rev. Stat. § 25-1121 (Reissue 1979) has no application to criminal prosecutions.

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

David L. Herzog for appellant.

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

Heard before BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired, and RONIN, District Judge, Retired.

BOSLAUGH, J.

After trial to a jury the defendant was found guilty of killing Joseph Johnson during the perpetration of or an attempt to perpetrate a robbery. He appeals from a sentence to life imprisonment.

The record shows that the defendant, Juan Bradley, and Brent Hubbard and Crystal Reynolds were together on the afternoon and early evening of March 8,

1981. The defendant stated that he wanted to rob someone in order to be able to buy some dope. Hubbard agreed to help commit the robbery. At around 8 p.m., Hubbard knocked on the front door of the house at 3110 Nicholas in Omaha, Nebraska. When the knock was answered, Hubbard attempted to gain entrance into the house several times but was unsuccessful. When he returned to the sidewalk where the defendant and Crystal were waiting, the defendant grabbed Hubbard, gave him a handgun, and said, "Make some money, man, make some money."

Shortly thereafter, Hubbard went to the home of the victim at 3111 Myrtle Street. When the victim answered the door, Hubbard apparently asked for directions. When the victim stepped out onto the porch, Hubbard shot the victim in the neck, inflicting a fatal wound. After the defendant and Crystal heard the shot they ran from the scene.

The defendant's principal assignment of error relates to his contention that the "felony murder rule," as applied in this state, is unconstitutional. The defendant argues that malice is an essential element of the crime, and since the purpose to kill is conclusively presumed from the criminal intention for the robbery, the rule against irrebuttable presumptions, stated in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), is violated.

The defendant relies upon a statement in *State v. Kauffman*, 183 Neb. 817, 164 N.W.2d 469 (1969), a post conviction case. The issue in the *Kauffman* case was whether premeditation and deliberation and a purpose to kill were elements of felony murder. *Kauffman* held that proof of premeditation and deliberation and a purpose to kill was not required in a prosecution for felony murder. The opinion stated at 818-19, 164 N.W.2d at 470: "These were prosecutions under section 28-401, R.R.S. 1943, providing that whoever in the perpetration of a robbery, shall kill another, shall be deemed guilty of murder in the first degree. The defendants in their

brief raise only one issue, that there was no evidence of intent to kill or premeditation. The victim of the robbery was bound, gagged, died from suffocation, and was not found until several days after the robbery. It is also true that the record reveals no intent to kill, deliberation, or premeditated malice. Such elements are unnecessary to prove or show in a prosecution under section 28-401, R.R.S. 1943. The turpitude involved in the robbery takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for robbery. Wilson v. State, 170 Neb. 494, 103 N.W.2d 258; Garcia v. State, 159 Neb. 571, 68 N.W.2d 151; Rogers v. State, 141 Neb. 6, 2 N.W.2d 529; Swartz v. State, 118 Neb. 591, 225 N.W. 766; South v. State, 111 Neb. 383, 196 N.W. 684; Keezer v. State, 90 Neb. 238, 133 N.W. 204; Rhea v. State, 63 Neb. 461, 88 N.W. 789; State v. Hall, 176 Neb. 295, 125 N.W.2d 918."

A more accurate statement of the rule is found in *State v. Montgomery*, 191 Neb. 470, 473, 215 N.W.2d 881, 883 (1974), where we said: "No specific intention is required to constitute felony murder other than the intent to do the act which constitutes the felony in question. In this instance that was the robbery." See, also, *State v. McDonald*, 195 Neb. 625, 636-37, 240 N.W.2d 8, 15 (1976), where we said: "All that must be proved on a felony murder charge is that a death occurred in the perpetration of one of the specific felonies listed in section 28-401, R.S. Supp., 1974. If those facts are not proven, the defendant is not guilty. . . . In a felony murder case, the proof of a particular mental state is not required as to the killing. See Garcia v. State, 159 Neb. 571, 68 N.W.2d 151."

The defendant's contention is without merit. As stated in *State v. Kauffman*, *supra*, proof of a purpose to kill is not required because it is not an element of the crime of felony murder. The only intent required is the intent to do the act which constitutes the felony during which the killing occurred.

The impact of *Mullaney v. Wilbur* upon felony murder was discussed at some length in *Evans v. State*, 28 Md. App. 640, 684-86, 349 A.2d 300, 329-30 (1975). As the court there noted: "The other forms of first degree murder [including felony murder] . . . are not mere pale reflections of wilful, deliberate and premeditated killing. They stand upon their own feet as self-sufficient *definitions* of murder in the first degree. Their own sets of circumstances do not constitute first-degree murder because wilfulness, deliberation and premeditation may somehow be inferred, presumed or implied, but because such wilfulness, deliberation and premeditation are irrelevant considerations and are flatly superfluous. . . . In [felony murder] it is the particular *actus reus*, the . . . means of the murder, which we have singled out for our gravest criminal sanction and not a particular *mens rea*. . . . [Felony murder has] been designated by statute as [an] independently self-sufficient [condition] to constitute murder in the first degree [and is], therefore, not remotely affected by anything in *Mullaney v. Wilbur*." (Emphasis supplied.)

The statement in *State v. Kauffman, supra*, that "the purpose to kill is conclusively presumed from the criminal intention required for robbery" is disapproved.

The defendant contends that it was error to permit Crystal Reynolds to testify because a sequestration order at a preliminary hearing had been violated and she had been in the courtroom during testimony by the victim's widow. The applicable rule was stated in *Miller v. State*, 169 Neb. 737, 743, 100 N.W.2d 876, 880 (1960), as follows: "'Failure of the court to enforce strict sequestration of witnesses is not ground for a new trial, where an abuse of discretion does not clearly appear, where no objection was made at the time, nor, even when proper objection is made, where accused is not prejudiced. So in the absence of a showing of resulting injury, a new trial is not required by the court's action in permitting a witness to testify who has failed to ob-

serve an order of sequestration, or in excluding such a witness from testifying.'"

There was no prejudice here because Reynolds' testimony related primarily to matters which took place before the killing. Mrs. Johnson's testimony was very brief and related only to the killing itself, which was not disputed.

The defendant's request that a form of special verdict be submitted to the jury was properly refused. Neb. Rev. Stat. § 25-1121 (Reissue 1979) has no application to criminal prosecutions.

The defendant also complains that an instruction to the jury defining attempt was erroneous. Instruction No. 9 was phrased in the language of Neb. Rev. Stat. § 28-201 (Reissue 1979). We find no error in the instruction.

There being no error, the judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., disqualified.

STATE OF NEBRASKA, APPELLANT, V. GEORGE BARTLETT, APPELLEE.

317 N.W.2d 102

Filed March 19, 1982. No. 44530.

1. **Prosecuting Attorneys: Constitutional Law: Discrimination.** Abuse of prosecutorial discretion, as a violation of constitutional rights, requires proof of intentional and purposeful discrimination based on impermissible considerations such as race, religion, or the desire to prevent the prisoner from exercising his constitutional rights.
2. **Prosecuting Attorneys: Discrimination.** So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.
3. **Prosecuting Attorneys: Constitutional Law: Discrimination.** Within the limits set by the Legislature's constitutionally valid definition of

chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

4. **Effectiveness of Counsel.** Effectiveness of counsel is not to be judged by hindsight.

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

Donald L. Knowles, Douglas County Attorney, and Robert C. Sigler for appellant.

J. William Gallup for appellee.

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

PER CURIAM.

This is the third appearance of this case in this court.

In 1975 the defendant, George Bartlett, was convicted of possession of heroin with intent to deliver and sentenced to imprisonment for 20 to 30 years as an habitual criminal. That judgment was affirmed in *State v. Bartlett*, 194 Neb. 502, 233 N.W.2d 904 (1975).

In 1976, after a codefendant, John Davis, had been sentenced, the defendant sought post conviction relief on the ground that he had been denied effective assistance of counsel. The judgment denying post conviction relief was affirmed in *State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977).

In 1978 the defendant filed a petition in the U.S. District Court, alleging that he had been denied effective assistance of counsel and seeking relief under the federal habeas corpus act, 28 U.S.C. § 2254 (1976). The petition alleged eight separate instances in which omissions of trial counsel allegedly violated the defendant's rights under the sixth amendment to the Constitution of the United States. The U.S. District Court found that the defendant had exhausted his

state court remedies as to six of the alleged omissions and the State had waived the exhaustion requirement as to the other two.

At the trial on the information in the District Court of Douglas County, there was testimony which on several occasions associated the defendant with Larry Glouser. During the evidentiary hearing on the habeas corpus petition in the federal District Court, testimony was elicited concerning a juror, Ted Moscrey, who knew of the reputation of Larry Glouser as a drug pusher. Only a small portion of the record in the federal court relating to this issue is included in the record before us. The federal District Court held there had been no exhaustion of state court remedies as to the failure of trial counsel to strike the informed juror on voir dire. The petition was then dismissed without prejudice.

On September 6, 1979, the defendant again filed a motion for post conviction relief in the District Court of Douglas County, Nebraska. The motion set out the eight grounds alleged in the federal habeas corpus petition plus the failure to strike the juror Moscrey on voir dire. On September 3, 1980, the motion was amended to allege selective prosecution resulting in a denial of due process and equal protection because the codefendant, John Davis, had not been prosecuted and sentenced as an habitual criminal.

On July 29, 1981, the trial court held that the failure to charge the codefendant Davis as an habitual criminal, when both defendants were similarly situated so far as the evidence, culpability, and past records were concerned, was an abuse of prosecutorial discretion which entitled the defendant to post conviction relief. The trial court then vacated the defendant's sentence and resentenced him to 10 years' imprisonment with credit for time already served. From that judgment the State has appealed.

On September 4, 1981, the defendant moved to dismiss the appeal on the ground the notice of appeal

had been filed out of time. The motion was based on the theory that an order dated March 13, 1981, was the final order from which the State should have appealed. In that order the trial court found that the defendant "should be granted post conviction relief" and ordered that he be returned to Douglas County for a hearing on March 20, 1981. The March 13 order granted no relief and was not a final order. The order which vacated the sentence was made on July 29, 1981, and was the final order from which an appeal could be taken. The motion to dismiss is overruled.

The record shows that the codefendant Davis had a lengthy criminal record. Both the defendant and Davis had been charged as habitual criminals, and the cases had been consolidated for trial. Davis escaped during the second day of the trial, and the trial continued only as to Bartlett.

After Davis was apprehended he entered a plea of guilty, and the habitual criminal charge was dismissed. On May 12, 1975, Davis was sentenced to imprisonment for 10 years.

If we assume that Davis and the defendant were equally culpable and had similar criminal records, the fact that Davis was not charged and sentenced as an habitual criminal does not entitle the defendant to post conviction relief. Abuse of prosecutorial discretion, as a violation of constitutional rights, requires proof of intentional and purposeful discrimination based on impermissible considerations such as race, religion, or the desire to prevent the prisoner from exercising his constitutional rights. See, *United States v. Berrios*, 501 F.2d 1207 (2nd Cir. 1974); *United States v. Crow Dog*, 532 F.2d 1182 (8th Cir. 1976); *United States v. Ojala*, 544 F.2d 940 (8th Cir. 1976); *United States v. Batchelder*, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979). There is no evidence of selective prosecution for such impermissible considerations in this case.

In *State v. White*, 209 Neb. 218, 228-29, 306 N.W.2d

906, 913 (1981), we said: "The defendant's last assignment urges that the habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1979), is unconstitutional as applied and violates the due process clause of the U.S. Constitution because the prosecutor's discretion as to whether or not to file the habitual criminal count in a particular case is not subject to statutory standards or judicial review. The full scope of the defendant's argument is set forth in Note, *A Closer Look at Habitual Criminal Statutes*, 16 Am. Crim. L. Rev. 275 (1979). Neither the defendant nor the author of the article cites any case authority to support the proposition. We have rejected similar arguments. *State v. Martin*, 190 Neb. 212, 206 N.W.2d 856 (1973). The Supreme Court of the United States, in *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978), has said: 'In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."' There is no evidence in the record to indicate that the discretion in this case was based upon any such unjustifiable standard."

In *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978), during plea negotiations, the state prosecutor threatened to reindict the defendant on habitual criminal charges if he did not plead guilty to forgery, the offense with which he was then charged. The defendant pleaded not guilty and was then charged and convicted as an habitual criminal. The U.S. Supreme Court held the defendant's

right to due process had not been violated by the use of the habitual criminal charge in an attempt to induce a guilty plea "so long as the accused is free to accept or reject the prosecution's offer." *Id.* at 363. The court stated further: "While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' . . . [S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' *Oyler v. Boles*, 368 U.S. 448, 456. To hold that the prosecutor's desire to induce a guilty plea is an 'unjustifiable standard,' which, like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself." *Id.* at 364-65.

The record in this case does not support the order vacating the defendant's sentence on the ground of abuse of prosecutorial discretion.

The defendant's claim of ineffective assistance of counsel based on the failure to strike the juror Moscrey is grounded on the fact that trial counsel knew that Moscrey had a strong dislike for Larry Glouser and the defendant's assertion that counsel knew the State's evidence would show that the defendant and Glouser were closely associated. The record before

us contains only a small portion of the testimony in the federal court proceeding. Trial counsel testified that a part of the trial strategy was to keep references to the Glousers out of the evidence as much as possible. To some extent this strategy was successful.

Trial counsel testified at the post conviction hearing that he had known Moscrey personally for 20 years or more, and that he felt Moscrey would be a fair and impartial juror. As a matter of trial strategy, counsel decided to challenge an employee of the police department rather than Moscrey. According to counsel, the defendant agreed to take counsel's judgment in the matter.

Counsel now concedes, as a matter of hindsight, that his decision not to strike Moscrey may have been in error. Effectiveness of counsel, however, is not to be judged by hindsight. *State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977); *State v. Phillips*, 186 Neb. 547, 184 N.W.2d 639 (1971).

The defense of Bartlett was not an easy task. His criminal record, as shown in the presentence report, commenced at the age of 10. Bartlett had been convicted of five felonies and sentenced to imprisonment for more than 25 years prior to this prosecution.

The trial counsel was an experienced trial lawyer with experience in both civil and criminal cases. Although the jury found the defendant guilty after deliberating for 1½ days, counsel's trial strategy had been successful, at least in part, in preventing the State from introducing highly incriminating evidence against the defendant.

We think the record as a whole, including the matters considered in the previous appeal, fails to show that trial counsel's performance, measured against that of a lawyer with ordinary training and skill in the criminal law in his area, was inadequate. If errors of judgment, which occur in most trials, are to be grounds for voiding convictions, few prosecutions

will meet the test.

As we have previously observed, defense counsel conscientiously worked to protect the interests of his client and his conduct met the "lawyer with ordinary training and skill" test.

The judgment of the District Court is reversed; the sentence imposed July 29, 1981, is vacated; and the cause remanded with directions to reinstate the sentence of 20 to 30 years' imprisonment imposed on January 22, 1975.

REVERSED AND REMANDED WITH DIRECTIONS.

INDEX

Abatement, Survival, and Revivor.

1. Under most survival statutes, which merely preserve and continue the right of action which the deceased had prior to his death without creating any new cause of action, no action can be maintained where the wrongful act resulted in instantaneous death, since in such case no cause of action in deceased ever came into being, and there is none that can survive. Rhein v. Caterpillar Tractor Co. 321
2. In a revived action the personal representative may recover damages for pain and suffering endured by the deceased; for the expenses incurred, necessitated by the injuries, in the nature of medical and hospital expenses and the like; and he may recover for the loss of earnings which are sustained by the injured party during his lifetime as a result of the injuries. But in the action brought by the personal representative, in behalf of the statutory beneficiaries, to recover damages for the death caused by the wrongful act of the defendant, the recovery must be measured by the pecuniary loss suffered by those beneficiaries by being deprived of what they would have received from the earnings of the injured party from the date of his death had he lived out his full expectancy. Rhein v. Caterpillar Tractor Co. 321

Acceleration Clauses.

1. In order to take advantage of an optional acceleration provision in a promissory note, the holder of the security must take some affirmative action evidencing his election to do so. Tesoro Petroleum Corp. v. Schmidt 537
2. The filing of a petition alleging such election is a clear and unequivocal manner of declaring the holder's intention to take advantage of the optional acceleration provision and declare the entire debt due. Tesoro Petroleum Corp. v. Schmidt 537

Accounting.

Generally, in order to be entitled to the equitable remedy of accounting, it is necessary to show a fiduciary or trust relationship between the parties, or a complicated series of accounts, making the remedy at law inadequate. Trump, Inc. v. Sapp Bros. Ford Center, Inc. 824

Actions.

1. A suit to quiet the title to real estate is an action for the recovery of real property within the statute of limitations applying to such an action. Nemaha Nat. Resources Dist. v. Neeman 442
2. An action for the recovery of title or possession of lands, tenements, or hereditaments can only be brought within 10

years after the cause of action shall have accrued. Neb. Rev. Stat. § 25-202 (Reissue 1979). Nemaha Nat. Resources Dist. v. Neeman 442
3. The following actions can only be brought within 4 years: (2) an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property. Neb. Rev. Stat. § 25-207 (Reissue 1979). Nemaha Nat. Resources Dist. v. Neeman 442
4. A challenge to a legislative enactment must be by collateral attack in the form of an action for injunction or other suitable action. Copple v. City of Lincoln 504
5. In the absence of a statute to the contrary, a tenancy cannot be terminated for breach of a covenant or condition by the lessee unless there is an express condition in the lease for a forfeiture or right of reentry on occurrence of the breach. The remedy for breach where there is no provision for forfeiture or reentry is an action for damages. Hogan v. Pelton 530
6. Fraud is never presumed but must be established by the party alleging it by clear and satisfactory evidence. The general rule is that where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie. Erftmier v. Eickhoff 726

Administrative Agencies.
1. The Department of Water Resources is expressly authorized by statute, after notice and hearing, to forfeit a water right where it appears that the 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. In re Water Appropriation Nos. 442A, 461, 462, and 485 161
2. In a proceeding to cancel a water appropriation pursuant to Neb. Rev. Stat. § 46-229.02 (Reissue 1978), the initial burden of proof is upon the Department of Water Resources. This burden is met upon the filing of the verified report of the water commissioner or engineers of the Department pursuant to § 46-229.04. Thereafter, the burden is upon the appropriator to show cause why the appropriation should not be canceled. In re Water Appropriation Nos. 442A, 461, 462, and 485 161
3. In a proceeding in error the review is solely upon the record made by the tribunal whose action is being reviewed. Caniglia v. City of Omaha 404
4. If the record shows that the administrative agency acted within its jurisdiction and its findings are sustained by some competent evidence, its action must be sustained. Caniglia v. City of Omaha 404

5. Generally, an appellant has the burden to establish error in the action or order from which the appeal has been taken. Caniglia v. City of Omaha 404
6. Where the vote of the members of a tribunal is evenly divided, it is treated as a denial of any affirmative relief. Caniglia v. City of Omaha 404
7. As an administrative body, the Douglas County Sheriff's Merit Commission is limited in its authority by the statutes granting to it its powers. Freese and Johnson v. County of Douglas 521
8. The Douglas County Sheriff's Merit Commission has no authority when modifying an act of the sheriff to increase the punishment imposed by the sheriff, but may modify the sheriff's action by reducing the extent of the punishment. Freese and Johnson v. County of Douglas 521
9. 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. Bond v. Nebraska Liquor Control Comm. 663
10. The records of the Director of Motor Vehicles disclosing the accumulation by a person of 12 or more points within any period of 2 years come to the attention of the director upon receipt by the Department of Motor Vehicles of the final abstract of conviction, within the meaning of Neb. Rev. Stat. § 39-669.27 (Reissue 1978). Berlowitz v. Dept. of Motor Vehicles 843
11. The Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. §§ 37-430 to 37-438 (Reissue 1978), imposes two obligations on all state departments and agencies. One is that all state departments and agencies must consult with the Nebraska Game and Parks Commission before carrying out programs which may affect endangered species or their habitat. The other is that no state department or agency may take any action that will result in jeopardizing the continued existence of endangered or threatened species or result in the destruction or modification of a habitat of such species. Little Blue N.R.D. v. Lower Platte North N.R.D. 862
12. Both the Department of Water Resources and the various natural resources districts are state departments or agencies within the meaning of The Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. §§ 37-430 to 37-438 (Reissue 1978). Little Blue N.R.D. v. Lower Platte North N.R.D. 862
13. No action of a state department or agency nor program administered by the Governor can be permitted as long as Neb. Rev. Stat. § 37-435(3) (Reissue 1978) is in effect until the interested parties have consulted with the Nebraska Game and Parks Commission and have determined that the

action contemplated will not jeopardize the continued existence of such endangered species or result in destruction or modification of habitat of such species. Little Blue N.R.D. v. Lower Platte North N.R.D. 862

14. After consulting with the Nebraska Game and Parks Commission, the department or agency involved must determine whether it has taken all necessary action to insure that its actions will not jeopardize the continued existence of an endangered species or destroy or modify habitat critical to the existence of the species. Once that decision is made it is then subject to judicial review to ascertain whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Little Blue N.R.D. v. Lower Platte North N.R.D. 862
15. An administrative agency is required to act under the law as it stands when its order is entered. A change of law pending an administrative determination must be followed and the new law applied, at least in relation to permits for the doing of future acts, unless the statute contains a saving clause. Little Blue N.R.D. v. Lower Platte North N.R.D. 862

Administrative Hearings.

1. An appeal from a decision of the Nebraska Appeal Tribunal on an employment compensation claim is considered by both the District Court and this court de novo on the record. Bristol v. Hanlon 37
2. The review de novo on the record is limited to and governed by the standards of the Administrative Procedures Act. Bristol v. Hanlon 37

Administrative Law.

1. Acquittal or conviction on a criminal charge is not a bar to a civil action by the government, remedial in nature, arising out of the same facts on which the criminal proceeding was based. Neil v. Peterson 378
2. The right of appeal in this state is clearly statutory and unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist. Berquist v. Campbell 658
3. Under the provisions of Neb. Rev. Stat. § 79-1283 (Reissue 1976), there exists no right of appeal to the State Board of Education from an order of the Nebraska Professional Practices Commission dismissing a complaint against a member of the teaching profession for violation of the professional practices criteria promulgated under the provisions of Neb. Rev. Stat. § 79-1282 (Reissue 1976). Berquist v. Campbell 658
4. Upon an appeal from an order of the State Real Estate Com-

mission the questions to be determined are whether the order is supported by substantial evidence, whether the commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. Abboud v. State ex rel. State Real Estate Comm. 676

Administrative Orders.

1. On appeal to the District Court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish the invalidity of the order. Wroblewski v. Pearson 82
2. Upon a petition for review of an order of suspension of an operator's license by the director of the Department of Motor Vehicles, the District Court is required to consider the record made before the director. Wroblewski v. Pearson 82
3. Liability resulting from an automobile accident ultimately depends upon a resolution of many issues, including the credibility of witnesses and a comparison of the negligence, if any, of the parties involved in the accident. These are not issues to be decided upon a petition to review an order of the Director of Motor Vehicles. An order of suspension should not be set aside unless there is no reasonable possibility of a judgment being rendered against the operator in question. Wroblewski v. Pearson 82
4. In an error proceeding, the order of an administrative body must be affirmed if it acted within its jurisdiction and there is some competent evidence to sustain its findings. Kennedy v. Board of Education 274
5. The burden is on the plaintiff to show there is no competent evidence to support the order sought to be reversed. Conflicting evidence will not be weighed, and the order must be affirmed if there is competent evidence to sustain it. Kennedy v. Board of Education 274

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. Berglund v. Sisler 258
2. Claim of right or claim of ownership means hostile, and these terms describe the same element of adverse possession. Berglund v. Sisler 258
3. Ordinarily the intent with which the occupier possesses the land can best be determined by his acts and the nature of his possession. Berglund v. Sisler 258
4. The statute of limitations will not run in favor of an occupant

of real estate unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his ownership of the property. Berglund v. Sisler 258

5. Where one enters into and holds possession of land under an executory contract of purchase or bond for title, his entry and possession are in subordination to, and not adverse to, the rights of the vendor or of those holding under him. In such case a privity exists which precludes the idea of a hostile tortious possession pending the completion of the contract which can silently ripen into title by adverse possession under the statute of limitations. The vendee is equitably estopped from claiming that the possession is adverse. Where the entry is under such circumstances, the possession retains its subordinate character until payment or performance of all conditions by the vendee or until he surrenders the possession which he has had under the agreement or until he has distinctly and unequivocally repudiated the title of his vendor and such repudiation has been brought either expressly or by legal implication to the vendor's knowledge, or until execution of a conveyance by the vendor to the vendee terminating the executory character of their relationship. Leo Egan Land Co., Inc. v. Heelan 263
6. Where the purchaser of real estate under a verbal contract of sale is put in possession by the vendor under an oral agreement for the payment of the purchase price thereafter, the possession of the vendee will not become adverse until payment in full of the agreed consideration. Leo Egan Land Co., Inc. v. Heelan 263

Affidavits.

Affidavits for search warrants must be tested and interpreted in a commonsense and realistic fashion. State v. Ybanez 42

After-Acquired Title.

1. The doctrine of after-acquired title is one under which title to land acquired by a grantor who previously attempted to convey title to the same land which he did not then own inures automatically to the benefit of his prior grantee. Kirby v. Holland 711
2. The estoppel to assert an after-acquired title is restricted to the estate or interest intended to be conveyed, and unless the after-acquired title is the title, or part of the title, purportedly conveyed to the grantee it will not inure to his benefit. The estoppel will not operate as to land or an interest therein other than that which is specifically conveyed or called for by the plain import of the conveyance, and to which the covenants for title pertain. Kirby v. Holland 711

3. The doctrine of estoppel to assert an after-acquired title is applicable with respect to oil, gas, and mineral leases so as to preclude the lessor from asserting a subsequently acquired title or interest as against the lessee, at least where such leases carry the usual express or implied covenants of warranty, but the estoppel is restricted to the mineral interest which the lease purports to demise. Kirby v. Holland 711

Aggravating and Mitigating Circumstances.

1. Neither the Constitution of the United States nor the Constitution of Nebraska requires determination by a jury of the applicability of the aggravating and mitigating factors in determining under the provisions of Neb. Rev. Stat. §§ 29-2522 and 29-2523 (Reissue 1979) whether the penalty shall be death or life imprisonment, and the provision of determination of the penalty by the trial judge or a panel of judges after notice and hearing is constitutional. State v. Moore 457
2. The definitions of aggravating circumstances in Neb. Rev. Stat. § 29-2523 (Reissue 1979) are not too broad or vague and will be given a narrow construction and narrow application, and as so construed and applied are constitutional. State v. Moore 457
3. Neb. Rev. Stat. § 29-2523 (Reissue 1979) does not limit in any way the mitigating factors or circumstances which the court may consider, and the sentencing court should be liberal in admitting evidence of facts which the convicted defendant asserts are mitigating factors. State v. Moore 457
4. Neither the Constitution of the United States nor the Constitution of the State of Nebraska requires the prosecution to prove the absence of mitigating factors. State v. Moore 457

Aiding and Abetting.

1. Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient. State v. True . 701
2. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of the fact and may, with slight corroborative circumstances, be sufficient to establish the defendant's guilty participation and warrant a conviction. State v. True 701

Appeal and Error.

1. An appeal from an order terminating parental rights requires a de novo review upon the record.
   In re Interest of Stoppkotte 1
   In re Interest of Farmer 500
2. In reviewing workmen's compensation cases, this court is bound by the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1978). Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
   Shaw v. Gooch Feed Mill Corp. 17
   Union Packing Co. v. Klauschie 331
   Erving v. Tri-Con Industries 339
   Davis v. Western Electric 771
3. Failure to object timely to a jury instruction prohibits a party on appeal from contending the instructions were erroneous. State v. Buchanan 20
4. A party who desires more precise jury instructions must request them at the time the instructions are being considered and not on appeal. State v. Buchanan 20
5. If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issues from consideration of the jury, error cannot be predicated on some particular phase of the case unless proper instructions have been requested by the party complaining. State v. Buchanan 20
6. An appeal from a decision of the Nebraska Appeal Tribunal on an employment compensation claim is considered by both the District Court and this court de novo on the record. Bristol v. Hanlon 37
7. The review de novo on the record is limited to and governed by the standards of the Administrative Procedures Act. Bristol v. Hanlon 37
8. A garnishee who denies possession of property of or a debt owing to the debtor and asks to be discharged in garnishment has properly raised the issue of the applicability of garnishment as a remedy under the circumstances then existing. Darr v. Long 57
9. In equity cases, the Supreme Court reviews the record de novo and reaches an independent conclusion without reference to the findings of the trial court.
   Heywood v. Heywood 79
   Kleeb v. Kleeb 637
10. On appeal to the District Court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish the invalidity of the order. Wroblewski v. Pearson 82

11. Upon a petition for review of an order of suspension of an operator's license by the director of the Department of Motor Vehicles, the District Court is required to consider the record made before the director. Wroblewski v. Pearson 82
12. Liability resulting from an automobile accident ultimately depends upon a resolution of many issues, including the credibility of witnesses and a comparison of the negligence, if any, of the parties involved in the accident. These are not issues to be decided upon a petition to review an order of the Director of Motor Vehicles. An order of suspension should not be set aside unless there is no reasonable possibility of a judgment being rendered against the operator in question. Wroblewski v. Pearson 82
13. A party to an eminent domain proceeding who does not file a notice of appeal as required by Neb. Rev. Stat. § 76-715 (Reissue 1976) does not maintain a valid cross-appeal which prevents voluntary dismissal of the other party's appeal before final submission. Dawson v. Papio Nat. Resources Dist. 100
14. Findings of fact made by the compensation court will not be set aside on appeal unless clearly wrong. However, where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact do not support the award, this court must modify, reverse, or set aside the award. Husted v. Peter Kiewit & Sons Constr. Co. 109
15. 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 unless clearly wrong.
Pawnee Plastics, Inc. v. American Savings Co. 131
Smith v. Erftmier 486
16. As a general rule the right to appeal in a criminal case can only be exercised by the party to whom it is given, and normally only a person aggrieved or injured by a judgment may take an appeal from it. State v. Sports Couriers, Inc. 168
17. A person who has been released and discharged from further prosecution under a complaint is not legally aggrieved and therefore cannot appeal. State v. Sports Couriers, Inc. .. 168
18. Insofar as such a person's standing to appeal is concerned, it makes no difference whether the dismissal still leaves the defendant open to further prosecution for future violations. State v. Sports Couriers, Inc. 168
19. A defendant has no right to appeal in a proceeding under Neb. Rev. Stat. § 29-2317 (Reissue 1979) because such proceeding has no effect on the rights of a person who has been placed in jeopardy. State v. Sports Couriers, Inc. 168
20. The person seeking post conviction relief has the burden of establishing a basis for such relief, and the findings of the

District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous. Marteney v. State 172

21. Even though this is an equity action and upon appeal is triable de novo, it is still subject to the condition that when the evidence on material questions of fact is in irreconcilable conflict, the 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.
    Cline v. Franklin Pork, Inc. 238
    Nemaha Nat. Resources Dist. v. Neeman 442
    Chicago Lumber Co. v. Horner 833
22. The trial of an appeal from a county board of equalization involving the valuation of real estate both in the District Court and the Supreme Court is de novo as an equitable proceeding. Beaver Lake Assn. v. County Board of Equalization 247
23. Upon an appeal to this court from an order of the Public Service Commission, the order must be affirmed if the commission acted within its jurisdiction and the order is not arbitrary or capricious. If there is evidence in the record which will sustain the findings and order of the commission, its order must be affirmed.
    In re Application of Nebraska Transport Co., Inc. 269
    Kennedy v. Board of Education 274
    Caniglia v. City of Omaha 404
24. The burden is on the plaintiff to show there is no competent evidence to support the order sought to be reversed. Conflicting evidence will not be weighed, and the order must be affirmed if there is competent evidence to sustain it.
    Kennedy v. Board of Education 274
25. A sentence imposed within statutory limits will not be disturbed on appeal in an absence of an abuse of discretion on the part of the trial court.
    State v. Sabala 304
    State v. True 701
    State v. McNichols 875
26. Where a record presents nothing more than conflicting medical testimony, we will not substitute our judgment for that of the Workmen's Compensation Court.
    Union Packing Co. v. Klauschie 331
    Davis v. Western Electric 771
27. In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reason-

ably be drawn therefrom. Erving v. Tri-Con Industries . 339
28. In a proceeding in error the review is solely upon the record made by the tribunal whose action is being reviewed. Caniglia v. City of Omaha 404
29. Generally, an appellant has the burden to establish error in the action or order from which the appeal has been taken. Caniglia v. City of Omaha 404
30. Irrelevant matters should not be admitted in evidence, but their admission does not require reversal unless the effect is prejudicial. State v. Rowe 419
31. Where a certain theory has been adopted and relied upon by the parties during the trial, such theory will be adhered to on appeal regardless of whether it is correct. Smith v. Erftmier 486
32. Before a criminal matter may be appealed to this court, there must be a final judgment. No judgment will be regarded as final unless a sentence is pronounced. State v. Kaba 503
33. An appeal or error proceeding does not lie from a purely legislative act by a public body to which legislative authority has been delegated. Copple v. City of Lincoln 504
34. Neb. Rev. Stat. § 15-1201 (Reissue 1977) applies only where the bodies mentioned therein act judicially or quasi-judicially and cannot be constitutionally construed to permit appeal from a legislative enactment. Copple v. City of Lincoln 504
35. To determine whether and to what extent discipline should be imposed in a disbarment proceeding, it is necessary for this court to review the evidence de novo, considering the nature of the offense, the need for deterrence of others, maintenance of the reputation of the bar as a whole, protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. State ex rel. Nebraska State Bar Assn. v. Michaelis 545
36. No exact standard is possible for fixing the qualifications of an expert or skilled witness, and the ruling of a trial judge receiving or excluding an opinion will be reversed on appeal only when a clear abuse of discretion is shown. Herman v. Lee 563
37. Appeals in unemployment compensation benefit cases are reviewed de novo on the record. Walker Mfg. Co. v. Pogreba 619
38. The scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion. State v. Thaden 622
39. A bill of exceptions is the only vehicle for bringing evidence before this court, and evidence which does not appear in the

record cannot be considered by this court on appeal. Kleeb v. Kleeb 637
40. The right of appeal in this state is clearly statutory and unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist. Berquist v. Campbell 658
41. Under the provisions of Neb. Rev. Stat. § 79-1283 (Reissue 1976), there exists no right of appeal to the State Board of Education from an order of the Nebraska Professional Practices Commission dismissing a complaint against a member of the teaching profession for violation of the professional practices criteria promulgated under the provisions of Neb. Rev. Stat. § 79-1282 (Reissue 1976). Berquist v. Campbell 658
42. Under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 23-2406 (Reissue 1977), the findings of the District Court under the act will not be disturbed on appeal unless they are clearly wrong. Studley v. School Dist. No. 38 .. 669
43. Upon an appeal from an order of the State Real Estate Commission the questions to be determined are whether the order is supported by substantial evidence, whether the commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. Abboud v. State ex rel. State Real Estate Comm. 676
44. In determining the sufficiency of evidence necessary to sustain a conviction, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass on credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Bolton 694
State v. True 701
45. An action for partition is triable de novo on the record in the Supreme Court. Malcom v. White 724
46. Where the trial court has determined that an unauthorized inspection of the premises was not prejudicial to the rights of the defendant, its finding will not ordinarily be disturbed by the appellate court in the absence of an abuse of discretion. State v. Woodward 740
47. The standard of review by the Supreme Court of orders and decisions of the Commission of Industrial Relations is generally restricted to considering whether the commission's order is supported by substantial evidence, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or un-

reasonable. Lincoln City Employees Union v. City of Lincoln 751
48. Absent a sufficient showing in the record of the dependence upon one another or the lack of freedom and independence in formulating their own policies and setting their own course of action, this court will not find a direct or indirect affiliation between two local unions. The mere fact that each local union can be traced back to a common international union will not be enough to show that the locals are affiliated with each other. There must be a positive showing that the national has authority and power to exercise control over both locals and that it is actually exercising that control. Lincoln City Employees Union v. City of Lincoln 751
49. In the absence of a bill of exceptions, review on appeal is limited to the question of whether the pleadings support the judgment. Rosnick v. Renstrom 759
50. The verdict of a jury will not be set aside on appeal unless it is clearly wrong. Diesel Service, Inc. v. Accessory Sales, Inc. 797
51. In order to receive consideration on appeal, any affidavits or evidence other than the pleadings in the case used on a motion for summary judgment must have been offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. DeCosta Sporting Goods, Inc. v. Kirkland 815
52. An order granting a motion for summary judgment by the municipal court is final and appealable and is not converted to an interlocutory order when reversed and remanded by the District Court so as to prohibit an appeal to this court. DeCosta Sporting Goods, Inc. v. Kirkland 815
53. The issues as framed in the trial court, and upon which the cause was tried, are binding upon the parties in the case on appeal to this court. Trump, Inc. v. Sapp Bros. Ford Center, Inc. 824
54. The action of the statutory board under Neb. Rev. Stat. § 79-403 (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action. In re Freeholder's Petition .. 839

Appeal Bonds.

Where a defective bond is filed in an appeal in a probate proceeding, the appellee may move to require that a proper bond be given. If the appellant fails to comply with an order requiring that a new or amended bond be furnished, the appeal may be dismissed. In re Estate of Arnold 528

Arrests.

1. The legality of an arrest is, within constitutional limits, governed by the law of the state where the arrest takes place. State v. Palmer 206
2. *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), will be applied retroactively as the uniform decision of our cases to the extent it applies to all cases not final April 15, 1980. State v. George 786
3. It is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home. State v. George 786

Assault.

1. Serious bodily injury is defined as "bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." Neb. Rev. Stat. § 28-109(20) (Reissue 1979). State v. Thomas 298
2. A protracted or permanent hearing deficiency caused by an assault constitutes a serious bodily injury under the provisions of Neb. Rev. Stat. §§ 28-109(20) and 28-308 (Reissue 1979). State v. Thomas 298
3. Where persons acting in concert commit an assault, each is responsible for the injuries received by the victim. State v. Thomas 298

Attorney Fees.

1. As a general rule, an award of attorney fees made in favor of a litigant belongs to the litigant and not to the attorney who performed the service. Griffin v. Vandersnick 590
2. There is no authority for a court in a dissolution action to fix the amount of attorney fees which the parties are to pay their respective attorneys. Griffin v. Vandersnick 590
3. Plaintiff held entitled to recover an attorney fee under Neb. Rev. Stat. § 59-821 (Reissue 1978). Diesel Service, Inc. v. Accessory Sales, Inc. 797

Attorneys at Law.

1. In disciplinary proceedings of members of the bar, the relator must establish the allegations in the formal charges by a clear preponderance of the evidence so the court is satisfied to a reasonable certainty that the charges are true. State ex rel. Nebraska State Bar Assn. v. Michaelis 545
2. In disciplinary proceedings the findings must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof to sustain a conviction

in a criminal case. State ex rel. Nebraska State Bar Assn. v. Michaelis 545
3. In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Michaelis 545
4. To determine whether and to what extent discipline should be imposed in a disbarment proceeding, it is necessary for this court to review the evidence de novo, considering the nature of the offense, the need for deterrence of others, maintenance of the reputation of the bar as a whole, protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. State ex rel. Nebraska State Bar Assn. v. Michaelis 545
5. An attorney at law may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients. State ex rel. Nebraska State Bar Assn. v. Michaelis 545
6. An attorney may be disciplined for criticism in the heat of a political contest if such criticism is carried beyond the limits of truth and fairness. State ex rel. Nebraska State Bar Assn. v. Michaelis 545

Bail Bond.

Once a defendant has been convicted of the felony charged, he is not entitled to be released on bail. Such determination is left to the discretion of the trial court who may prescribe the amount of the bond and the conditions thereof, including a requirement that the full amount of the bond be posted. State v. Woodward 740

Billings.

1. The supervisor of all billing records is an appropriate witness with regard to such billing records, assuming such witness complies with the requirements of Neb. Rev. Stat. § 27-803(5) (Reissue 1979). City of Lincoln v. Bud Moore, Inc. 647
2. In order for the party submitting an erroneous bill for material delivered to recover on the basis of a corrected billing, the party must show that reasonable care to avoid the mistake was exercised and that the billed party was not damaged by the mistake. City of Lincoln v. Bud Moore, Inc. 647

Board of Pardons.

1. Approval of the Board of Pardons to apply 1975 Neb. Laws, L.B. 567, retroactively is required only where the changes

in L.B. 567 would result in discharge of the petitioner from custody at an earlier date than under the law in effect prior to L.B. 567. Whited v. Bolin 32

2. Where a petitioner, under a sentence imposed prior to August 24, 1975, has been granted good time credits which remain unforfeited, sufficient under prior law to require his mandatory release from the custody of the Department of Correctional Services under supervision on the same date or prior to the date when his discharge from the custody of the state would have become mandatory under the provisions of 1975 Neb. Laws, L.B. 567, consent of the Board of Pardons is not required to apply the provisions of L.B. 567 retroactively. Whited v. Bolin 32

Bonds.

A motor vehicle dealer's bond, furnished under the provisions of Neb. Rev. Stat. § 60-1419 (Reissue 1978), which creates a liability on the part of the surety to indemnify any person "by reason of any loss suffered" requires proof of an actual loss suffered before recovery is permitted, and does not cover statutory penalties. Darr v. Long 57

Child Custody.

1. The best interests of the child, not that of the parents, is the primary concern in deciding custody cases.
   In re Interest of Stoppkotte 1
   In re Interest of Spradlin 734
2. It is the best policy to keep the children within the jurisdiction of this state unless the best interests of the children demand otherwise. Gottschall v. Gottschall 679
3. Whether the custodial parent should be allowed to remove the children to another state depends upon what is in the best interests of the children. Gottschall v. Gottschall ... 679
4. When the mental condition of a parent is in issue, evidence of the parent's treating psychiatrist is admissible in a juvenile court proceeding to determine child custody. In re Interest of Spradlin 734

Circumstantial Evidence.

One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt. State v. Buchanan 20

Claims.

When governmental officials, with full knowledge of all the facts pertaining to a claim, allow and pay it, the action is

at least presumptively correct and is frequently termed conclusive. County of Douglas v. Board of Regents 573

Collateral Attack.

1. A challenge to a legislative enactment must be by collateral attack in the form of an action for injunction or other suitable action. Copple v. City of Lincoln 504
2. A judgment entered without jurisdiction of the subject matter or in excess of the court's power is void and may be collaterally attacked. Griffin v. Vandersnick 590

Commission of Industrial Relations.

1. The standard of review by the Supreme Court of orders and decisions of the Commission of Industrial Relations is generally restricted to considering whether the commission's order is supported by substantial evidence, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Lincoln City Employees Union v. City of Lincoln 751
2. Absent a sufficient showing in the record of the dependence upon one another or the lack of freedom and independence in formulating their own policies and setting their own course of action, this court will not find a direct or indirect affiliation between two local unions. The mere fact that each local union can be traced back to a common international union will not be enough to show that the locals are affiliated with each other. There must be a positive showing that the national has authority and power to exercise control over both locals and that it is actually exercising that control. Lincoln City Employees Union v. City of Lincoln 751

Confessions.

1. An accused who has expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. State v. Pittman 117
2. *Miranda* does not protect an accused, even though he has requested counsel, from a spontaneous admission made under circumstances not induced by the investigating officers or during a conversation not initiated by the officers. State v. Pittman 117
3. While a voluntary confession is insufficient, standing alone, to prove that a crime has been committed, it is, nevertheless, competent evidence of the fact and may, with

slight corroborative circumstances, be sufficient to establish the defendant's guilty participation and warrant a conviction. State v. True 701

4. The standards to determine the admissibility of statements made after an illegal arrest are: (1) The administration of the *Miranda* warnings to the defendant prior to the statement; (2) The temporal proximity of the arrest and the confession; (3) The intervening circumstances between the initial detention and the challenged statements; (4) The purpose and flagrancy of the official misconduct; and (5) The voluntariness of the statement must be established. State v. George 786

Consideration.

1. In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them. Schrempp v. Gallup 415
2. In order for there to be consideration for an agreement there must be a benefit to one of the parties or a detriment to the other. Omaha Nat. Bank v. Goddard Realty, Inc. . 604
3. A valuable consideration to support a contract need not be one translatable into dollars and cents; it is sufficient if it consists of the performance or promise thereof which the promisor treats and considers a value to him. Omaha Nat. Bank v. Goddard Realty, Inc. 604
4. There is a sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, whether or not there is any actual loss or detriment to him or actual benefit to the promisor. Omaha Nat. Bank v. Goddard Realty, Inc. 604
5. 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. The benefit rendered need not be to the party contracting but may be to anyone else at his procurement or request. Erftmier v. Eickhoff 726
6. The consideration of a contract need not move to the promisor. A disadvantage to the promisee is sufficient, although the promisor derives no benefit therefrom. Erftmier v. Eickhoff 726

Conspiracy.

1. A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or op-

pressive object, or a lawful object by unlawful or oppressive means. Treptow Co. v. Duncan Aviation, Inc. 72

2. An action of conspiracy sounds essentially in tort. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. Without the scienter, persons cannot conspire.
   Treptow Co. v. Duncan Aviation, Inc. 72
   Diesel Service, Inc. v. Accessory Sales, Inc. 797
3. The gist of an action for civil conspiracy is not the conspiracy charged but the damages the plaintiff claims to have suffered because of the wrongful acts of the defendants. If damages are shown to have resulted from the wrongful act of one or more of the defendants, then the plaintiff may recover against such defendants even though there is no proof of a conspiracy. Treptow Co. v. Duncan Aviation, Inc. 72
4. A conspiracy to accomplish a lawful object by unlawful or oppressive means may be actionable. Diesel Service, Inc. v. Accessory Sales, Inc. 797
5. To constitute a conspiracy there must be a combination of two or more persons; a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy. Diesel Service, Inc. v. Accessory Sales, Inc. 797
6. 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. Diesel Service, Inc. v. Accessory Sales, Inc. 797

Constitutional Law.

1. One cannot be said to be deprived of his property without due process of law so long as he has recourse to the courts for the protection of his rights. In re Water Appropriation Nos. 442A, 461, 462, and 485 161
2. A legislative bill on final reading requires the affirmative vote of a majority of all the members elected to the Legislature before it can become law. Center Bank v. Dept. of Banking & Finance 227
3. The Lieutenant Governor is not eligible to vote on legislative bills on final reading. Center Bank v. Dept. of Banking & Finance 227
4. The Constitution limits the action the Governor may take in regard to a legislative bill when it is presented to him

for his consideration. Center Bank v. Dept. of Banking & Finance 227
5. If the Governor returns a legislative bill to the Legislature within 5 days after it has been presented to him, with a statement of his objections to the bill, the bill cannot become law unless it is reconsidered by the Legislature, as provided in the Constitution. Center Bank v. Dept. of Banking & Finance 227
6. The death penalty is not per se cruel and unusual punishment in violation of the eighth and fourteenth amendments to the Constitution of the United States and article I, §§ 3 and 9, of the Bill of Rights of the Constitution of Nebraska. State v. Moore 457
7. Neither the Constitution of the United States nor the Constitution of Nebraska requires determination by a jury of the applicability of the aggravating and mitigating factors in determining under the provisions of Neb. Rev. Stat. §§ 29-2522 and 29-2523 (Reissue 1979) whether the penalty shall be death or life imprisonment, and the provision of determination of the penalty by the trial judge or a panel of judges after notice and hearing is constitutional. State v. Moore 457
8. The definitions of aggravating circumstances in Neb. Rev. Stat. § 29-2523 (Reissue 1979) are not too broad or vague and will be given a narrow construction and narrow application, and as so construed and applied are constitutional. State v. Moore 457
9. Neither the Constitution of the United States nor the Constitution of the State of Nebraska requires the prosecution to prove the absence of mitigating factors. State v. Moore 457
10. Neb. Rev. Stat. §§ 29-2520 and 29-2522 (Reissue 1979) are not unconstitutional because the sentencing hearing may be held and the sentence may be imposed either by the trial judge or a sentencing panel consisting of the trial judge and two other district judges. State v. Moore 457
11. A delegation of legislative power to the courts is violative of article II, § 1, of the Constitution of Nebraska. Copple v. City of Lincoln 504
12. The fifth amendment right to be free from self-incrimination is a personal right and may not be vicariously asserted. State v. Perea 613
13. The defendant lacks standing to challenge the testimony of a coparticipant who implicated defendant in the crime on the grounds that the coparticipant's right against self-incrimination was violated. State v. Perea 613
14. The right of an accused under the sixth amendment to the Constitution of the United States to confront the witnesses

against him is a fundamental right made obligatory upon the states by the fourteenth amendment. State v. Thaden 622
15. The right of cross-examination is an essential and fundamental requirement of a fair trial which is the constitutional goal of this country. State v. Thaden 622
16. The right of a defendant to engage in a searching and wide-ranging cross-examination is an essential requirement for a fair trial. State v. Thaden 622
17. Abuse of prosecutorial discretion, as a violation of constitutional rights, requires proof of intentional and purposeful discrimination based on impermissible considerations such as race, religion, or the desire to prevent the prisoner from exercising his constitutional rights. State v. Bartlett 886
18. Within the limits set by the Legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. State v. Bartlett 886

Contempt.
1. A party to an action who fails to obey an order of the court, made for the benefit of the opposing party, is ordinarily guilty of a mere civil contempt. Rhodes v. Rhodes 373
2. Where a civil contempt is charged, it may be by an affidavit by the party to the action who is injuriously affected. Procedure may be in the original action and need not be by information in the name of the state. Rhodes v. Rhodes . 373

Contracts.
1. A contract will be construed most strongly against the party preparing it when there is a question as to its meaning. Sacher v. Taco Grande of Iowa, Inc. 122
2. A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one. Pawnee Plastics, Inc. v. American Savings Co. 131
3. Where a contract is ambiguous, the court must determine the intent of the parties and the ambiguity must be resolved so as to give effect to that intent. Pawnee Plastics, Inc. v. American Savings Co. 131
4. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in plain, ordinary, and popular sense. Rodriguez v. Government Employees Ins. Co. 195

5. Where the language is plain and unambiguous, the court will not read an ambiguity into the language in order to construe it against the one who prepared the contract. Rodriguez v. Government Employees Ins. Co. 195
6. Construction of a contract of insurance ought not to be employed to make a plain agreement ambiguous for the purpose of interpreting it in favor of the insured. Rodriguez v. Government Employees Ins. Co. 195
7. An operable automobile which is being driven, albeit unlicensed, is an automobile owned by the insured under the automatic coverage provisions of the standard automobile liability insurance policy. Rodriguez v. Government Employees Ins. Co. 195
8. In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them. Schrempp v. Gallup .. 415
9. It is ordinarily incumbent upon one who relies on a special custom as a basis of recovery or defense to allege the custom and to plead and prove the other party had knowledge of the custom and contracted with reference thereto. Smith v. Erftmier 486
10. It is well recognized that, as a general rule, every contract for work or services includes an implied duty to perform the work or services skillfully, carefully, diligently, and in a workmanlike manner. Smith v. Erftmier 486
11. Where there has been a breach of a contract by one party resulting in a loss to the other, it is the duty of such other party to take all reasonable steps to reduce the amount of his damages. Smith v. Erftmier 486
12. In order for there to be consideration for an agreement there must be a benefit to one of the parties or a detriment to the other. Omaha Nat. Bank v. Goddard Realty, Inc. 604
13. A valuable consideration to support a contract need not be one translatable into dollars and cents; it is sufficient if it consists of the performance or promise thereof which the promisor treats and considers a value to him. Omaha Nat. Bank v. Goddard Realty, Inc. 604
14. There is a sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, whether or not there is any actual loss or detriment to him or actual benefit to the promisor. Omaha Nat. Bank v. Goddard Realty, Inc. 604
15. Courts will not permit a party to avoid a contract into which

he has entered on the grounds that he did not attend to its terms, that he did not read the document which he signed and supposed it was different from its terms, or that it was a mere form. Omaha Nat. Bank v. Goddard Realty, Inc. .. 604

16. A party who has had the benefit of an agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains. Frasier v. Trans-Western Land Corp. 681

17. Before a trial court may compel a specific performance of a real estate contract, there must be a showing that a valid, legally enforceable contract exists. Rybin Investment Co., Inc. v. Wade 707

18. The burden of proving the contract is on the party who seeks to compel specific performance. Rybin Investment Co., Inc. v. Wade 707

19. To establish an express contract, there must be shown what amounts to a definite proposal and an unconditional and absolute acceptance thereof. Rybin Investment Co., Inc. v. Wade 707

20. In order that a binding contract for sale of real estate may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for a future arrangement. Rybin Investment Co., Inc. v. Wade 707

21. The acceptance of the offer must be an unconditional acceptance of the offer as made, otherwise no contract is formed. There must be no substantial variation between the offer and the acceptance. If the acceptance differs from the offer or is coupled with any condition that varies or adds to the offer, it is not an acceptance, but it is a counterproposition. Rybin Investment Co., Inc. v. Wade 707

22. Where one to whom an offer is made makes a counterproposition of different terms and new conditions, such counterproposition amounts to a rejection of the offer. Rybin Investment Co., Inc. v. Wade 707

23. In the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument. Erftmier v. Eickhoff 726

24. 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. The benefit rendered need not be to the party contracting but may be to anyone else at his procurement or request. Erftmier v. Eickhoff 726

25. The consideration of a contract need not move to the

promisor. A disadvantage to the promisee is sufficient, although the promisor derives no benefit therefrom. Erftmier v. Eickhoff 726

Conveyances.

1. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. Nemaha Nat. Resources Dist. v. Neeman 442
2. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. Nemaha Nat. Resources Dist. v. Neeman 442

Convictions.

1. A conviction may be sustained if the defendant's guilt is established beyond a reasonable doubt from all the evidence in the case, including such reasonable inferences as seem justified in the light of the trier of facts' own experience. State v. Buchanan 20
2. For a conviction to be sustained in a trial for operating a motor vehicle while under the influence of alcohol, it is not necessary for a policeman or any other person to offer an opinion that the defendant was indeed intoxicated. State v. Hilker 810

Corporations.

1. Generally, corporate identity will be disregarded only where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another. George v. Board of Education 127
2. When there is no constitutional, statutory, or charter prohibition and the rights of other stockholders or of creditors of the corporation are not involved, a corporation has the power to issue shares of its stock as full paid on payment of less than its par value, whether in money or in property, in labor or services, and the agreement under which they are so issued will be binding as between the parties, so that the corporation can neither deny the other party the rights of a stockholder nor compel him to pay for stock contrary to the agreement. Frasier v. Trans-Western Land Corp. 681
3. A party who has had the benefit of an agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains. Frasier v. Trans-Western Land Corp. . 681

Courts.

1. The general rule is that while the court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case. Rhodes v. Yates 14
2. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. Matters so judicially noticed are properly considered when determining questions presented by a demurrer. Rhodes v. Yates 14
3. In the administration and interpretation of federal legislative acts, pertinent opinions of the federal courts are binding upon the state courts. Darr v. Long 57
4. One cannot be said to be deprived of his property without due process of law so long as he has recourse to the courts for the protection of his rights. In re Water Appropriation Nos. 442A, 461, 462, and 485 161
5. A district court has both statutory and inherent power to dismiss an action without prejudice for lack of prosecution. A. Hirsh, Inc. v. National Hair Co. 397
6. The power to vacate or modify a judgment during term rests in the sound discretion of the court. A. Hirsh, Inc. v. National Hair Co. 397
7. The court, in considering the meaning of its statute, should, if possible, discover the legislative intent from the language of the act and give it effect. Freese and Johnson v. County of Douglas 521
8. "An action may be dismissed without prejudice to a future action . . . (5) by the court for disobedience by the plaintiff of an order concerning the proceedings in the action." Neb. Rev. Stat. § 25-601 (Reissue 1979). Rosnick v. Renstrom . 759
9. The action of the statutory board under Neb. Rev. Stat. § 79-403 (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action. In re Freeholder's Petition 839

Criminal Defendants.

1. Before sentencing a defendant after conviction a trial judge has a broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning

defendant's life, character, and previous conduct. State v. Sabala 304
2. 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 officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Sabala 304
3. A state of mind of the accused which indicates a callous disposition to repeat the crime of murder manifests exceptional depravity by ordinary standards of morality and intelligence within the meaning of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979). State v. Moore 457
4. A substantial history of serious assaultive or terrorizing criminal activity includes a previous premeditated murder. State v. Moore 457
5. The fact that a murder is committed to conceal the identity of the perpetrator of a robbery satisfies the requirements of Neb. Rev. Stat. § 29-2523(1)(b) (Reissue 1979). State v. Moore 457
6. Neb. Rev. Stat. § 29-2523 (Reissue 1979) does not limit in any way the mitigating factors or circumstances which the court may consider, and the sentencing court should be liberal in admitting evidence of facts which the convicted defendant asserts are mitigating factors. State v. Moore 457
7. Once a defendant has been convicted of the felony charged, he is not entitled to be released on bail. Such determination is left to the discretion of the trial court who may prescribe the amount of the bond and the conditions thereof, including a requirement that the full amount of the bond be posted. State v. Woodward 740

Criminal Law.
1. A penal statute is required to be strictly construed and should be given a sensible construction. State v. Parmer 92
2. In Nebraska, all crimes are statutory and no act is criminal unless the Legislature has in express terms declared it to be so. State v. Schneckloth, Koger, and Heathman 144
3. As a general rule the right to appeal in a criminal case can only be exercised by the party to whom it is given, and normally only a person aggrieved or injured by a judgment may take an appeal from it. State v. Sports Couriers, Inc. 168
4. A person who has been released and discharged from further prosecution under a complaint is not legally aggrieved and therefore cannot appeal. State v. Sports Couriers, Inc. .. 168
5. Insofar as such a person's standing to appeal is concerned, it makes no difference whether the dismissal still leaves the

defendant open to further prosecution for future violations. State v. Sports Couriers, Inc. 168
6. A defendant has no right to appeal in a proceeding under Neb. Rev. Stat. § 29-2317 (Reissue 1979) because such proceeding has no effect on the rights of a person who has been placed in jeopardy. State v. Sports Couriers, Inc. 168
7. The test for determining the competency or effectiveness of trial counsel is that they perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area and that they conscientiously protect the interests of their client. Marteney v. State 172
8. Until hypnosis gains acceptance to the point where experts in the field widely share the view that memories are accurately improved without undue danger of distortion, delusion, or fantasy, a witness who has been previously questioned under hypnosis may not testify in a criminal proceeding concerning the subject matter adduced at the pretrial hypnotic interview. This holding does not exclude otherwise admissible evidence, leads to which were obtained during an hypnotic interview. State v. Palmer 206
9. Acquittal or conviction on a criminal charge is not a bar to a civil action by the government, remedial in nature, arising out of the same facts on which the criminal proceeding was based. Neil v. Peterson 378
10. While considerable latitude is permitted in the admission of evidence tending to show the mental condition of the accused when insanity is the defense, it must relate to the mental state of the accused at the time of the acts charged. State v. Rowe 419
11. An accused's out-of-court statements offered by him are hearsay and ordinarily inadmissible unless coming within some exception to the rule excluding hearsay evidence. State v. Rowe 419
12. Before a criminal matter may be appealed to this court, there must be a final judgment. No judgment will be regarded as final unless a sentence is pronounced. State v. Kaba 503
13. The right of an accused under the sixth amendment to the Constitution of the United States to confront the witnesses against him is a fundamental right made obligatory upon the states by the fourteenth amendment. State v. Thaden ... 622
14. The right of cross-examination is an essential and fundamental requirement of a fair trial which is the constitutional goal of this country. State v. Thaden 622
15. The right of a defendant to engage in a searching and wide-ranging cross-examination is an essential requirement for a fair trial. State v. Thaden 622
16. The primary burden is upon the State to bring the accused

person to trial within the time provided by law, and if he is not brought to trial within that time, he is entitled to an absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute. State v. Bolton 694

17. The State has the burden of proving that one or more of the excluded periods of time under subsection (4) of Neb. Rev. Stat. § 29-1207 (Reissue 1979) is applicable if the defendant is not tried within 6 months of the commencement of the criminal action. State v. Bolton 694
18. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. True .. 701
19. Where the trial court has determined that an unauthorized inspection of the premises was not prejudicial to the rights of the defendant, its finding will not ordinarily be disturbed by the appellate court in the absence of an abuse of discretion. State v. Woodward 740
20. A verdict by a trier of fact in a criminal proceeding will be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Hilker 810
21. Violation of a sequestration order is not reversible error in the absence of prejudice to the defendant. State v. Bradley 882
22. Neb. Rev. Stat. § 25-1121 (Reissue 1979) has no application to criminal prosecutions. State v. Bradley 882

Custom and Usage.

It is ordinarily incumbent upon one who relies on a special custom as a basis of recovery or defense to allege the custom and to plead and prove the other party had knowledge of the custom and contracted with reference thereto. Smith v. Erftmier 486

Damages.

1. An award of damages against an auto dealer under the terms of 15 U.S.C. § 1989(a) (1976) is a penalty and a reward to the purchasers for bringing the action successfully, and is not limited or designed to compensate one for a loss suffered. Darr v. Long 57
2. Recovery for intentional infliction of mental distress will not lie unless the character of the defendant's action is outrageous and the emotional distress inflicted upon the plaintiff is severe. Davis v. Texaco, Inc. 67

3. To be actionable the conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. Davis v. Texaco, Inc. 67
4. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Davis v. Texaco, Inc. 67
5. The mental distress for which recovery may be had must be so severe that no reasonable man could be expected to endure it. Davis v. Texaco, Inc. 67
6. An injury resulting from an act committed by an insured in self-defense is not, as a matter of law, an expected or intended act within the meaning of a policy of insurance exempting bodily injuries or property damages which are either expected or intended from the standpoint of the insured. Allstate Ins. Co. v. Novak 184
7. An insurer has a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. The insurer may not confine its investigation to the allegations of the petition filed by the party claiming damages. Allstate Ins. Co. v. Novak 184
8. In a revived action the personal representative may recover damages for pain and suffering endured by the deceased; for the expenses incurred, necessitated by the injuries, in the nature of medical and hospital expenses and the like; and he may recover for the loss of earnings which are sustained by the injured party during his lifetime as a result of the injuries. But in the action brought by the personal representative, in behalf of the statutory beneficiaries, to recover damages for the death caused by the wrongful act of the defendant, the recovery must be measured by the pecuniary loss suffered by those beneficiaries by being deprived of what they would have received from the earnings of the injured party from the date of his death had he lived out his full expectancy. Rhein v. Caterpillar Tractor Co. 321
9. Where there has been a breach of a contract by one party resulting in a loss to the other, it is the duty of such other party to take all reasonable steps to reduce the amount of his damages. Smith v. Erftmier 486
10. Prospective profits from an established business, prevented or interrupted by the tortious conduct of the defendant, are recoverable when it is proved (1) that it is reasonably certain such profits would have been realized except for the tort, and (2) that the lost profits can be ascertained and measured, from evidence introduced, with reasonable certainty. Such lost profits must not be speculative, remote, or imaginary,

but must be established with reasonable certainty by the evidence. Diesel Service, Inc. v. Accessory Sales, Inc. ... 797
11. Loss of prospective profits may be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. Uncertainty as to the fact of whether any damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not. Diesel Service, Inc. v. Accessory Sales, Inc. 797

Death Penalty.
1. The death penalty is not per se cruel and unusual punishment in violation of the eighth and fourteenth amendments to the Constitution of the United States and article I, §§ 3 and 9, of the Bill of Rights of the Constitution of Nebraska. State v. Moore 457
2. Neither the Constitution of the United States nor the Constitution of Nebraska requires determination by a jury of the applicability of the aggravating and mitigating factors in determining under the provisions of Neb. Rev. Stat. §§ 29-2522 and 29-2523 (Reissue 1979) whether the penalty shall be death or life imprisonment, and the provision of determination of the penalty by the trial judge or a panel of judges after notice and hearing is constitutional. State v. Moore 457
3. Neb. Rev. Stat. §§ 29-2520 and 29-2522 (Reissue 1979) are not unconstitutional because the sentencing hearing may be held and the sentence may be imposed either by the trial judge or a sentencing panel consisting of the trial judge and two other district judges. State v. Moore 457
4. The imposition of the death sentence in this case is justified by the application of the standards provided by Neb. Rev. Stat. § 29-2523 (Reissue 1979), as interpreted and limited by the definitions of this court. State v. Moore 457

Decedents' Estates.
1. Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties. Such transfers are by reason of the account contracts involved and Neb. Rev. Stat. § 30-2706 (Reissue 1979), and are not testamentary in nature. Miller v. Janecek 316
2. Under most survival statutes, which merely preserve and continue the right of action which the deceased had prior to his death without creating any new cause of action, no action can be maintained where the wrongful act resulted in instantaneous death, since in such case no cause of action in deceased ever came into being, and there is none that can survive. Rhein v. Caterpillar Tractor Co. 321
3. An action for damages incurred by the decedent up to the

date of his death and an action for damages suffered by his widow or widower and next of kin after his death may be joined in a single action. Rhein v. Caterpillar Tractor Co. 321

4. In a revived action the personal representative may recover damages for pain and suffering endured by the deceased; for the expenses incurred, necessitated by the injuries, in the nature of medical and hospital expenses and the like; and he may recover for the loss of earnings which are sustained by the injured party during his lifetime as a result of the injuries. But in the action brought by the personal representative, in behalf of the statutory beneficiaries, to recover damages for the death caused by the wrongful act of the defendant, the recovery must be measured by the pecuniary loss suffered by those beneficiaries by being deprived of what they would have received from the earnings of the injured party from the date of his death had he lived out his full expectancy. Rhein v. Caterpillar Tractor Co. 321
5. Where a defective bond is filed in an appeal in a probate proceeding, the appellee may move to require that a proper bond be given. If the appellant fails to comply with an order requiring that a new or amended bond be furnished, the appeal may be dismissed. In re Estate of Arnold 528

Declaratory Judgments.

1. In order to maintain an action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 (Reissue 1979), there must be an actual controversy. It cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain. There must, at the time that the declaration is sought, be an actual justiciable issue. Allstate Ins. Co. v. Novak 184
2. The existence of a justiciable issue is a fundamental requirement to a court's exercise of its discretion to grant declaratory relief. Ellis v. County of Scotts Bluff 495

Deeds.

1. Generally, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties. Ludwig v. Matter ... 87
2. It is impossible to convey an absolute title to real estate in fee simple by deed or will, and at the same time in the same

instrument convey to the same person a limited right or title in the same land. Sterner v. Nelson 358
3. If a deed or will conveys an absolute title in fee simple, an inconsistent clause in the instrument attempting merely to limit that title or convey to the same person a limited title in the same land will be disregarded. Sterner v. Nelson 358

Directed Verdict.
It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty. State v. Buchanan 20

Disciplinary Proceedings.
1. In disciplinary proceedings of members of the bar, the relator must establish the allegations in the formal charges by a clear preponderance of the evidence so the court is satisfied to a reasonable certainty that the charges are true. State ex rel. Nebraska State Bar Assn. v. Michaelis 545
2. In disciplinary proceedings the findings must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal case. State ex rel. Nebraska State Bar Assn. v. Michaelis 545
3. In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Michaelis 545
4. To determine whether and to what extent discipline should be imposed in a disbarment proceeding, it is necessary for this court to review the evidence de novo, considering the nature of the offense, the need for deterrence of others, maintenance of the reputation of the bar as a whole, protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. State ex rel. Nebraska State Bar Assn. v. Michaelis .. 545
5. An attorney at law may be subjected to disciplinary action for conduct outside the practice of law or the representation of clients. State ex rel. Nebraska State Bar Assn. v. Michaelis 545
6. An attorney may be disciplined for criticism in the heat of a political contest if such criticism is carried beyond the limits of truth and fairness. State ex rel. Nebraska State Bar Assn. v. Michaelis 545

Discrimination.

1. Abuse of prosecutorial discretion, as a violation of constitutional rights, requires proof of intentional and purposeful discrimination based on impermissible considerations such as race, religion, or the desire to prevent the prisoner from exercising his constitutional rights. State v. Bartlett 886
2. So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. State v. Bartlett 886
3. Within the limits set by the Legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. State v. Bartlett 886

Dismissal and Nonsuit.

1. The right of a plaintiff to dismiss under the provisions of Neb. Rev. Stat. § 25-601 (Reissue 1979) is not a matter of judicial grace or discretion, but may, where equity requires, be made subject to condition, such as reimbursement for costs. Dawson v. Papio Nat. Resources Dist. 100
2. "An action may be dismissed without prejudice to a future action . . . (5) by the court for disobedience by the plaintiff of an order concerning the proceedings in the action." Neb. Rev. Stat. § 25-601 (Reissue 1979). Rosnick v. Renstrom ... 759

Divorce.

1. There is no authority for a court in a dissolution action to fix the amount of attorney fees which the parties are to pay their respective attorneys. Griffin v. Vandersnick 590
2. The law contemplates visitation by the noncustodial parent within the state. Gottschall v. Gottschall 679
3. It is the best policy to keep the children within the jurisdiction of this state unless the best interests of the children demand otherwise. Gottschall v. Gottschall 679
4. Whether the custodial parent should be allowed to remove the children to another state depends upon what is in the best interests of the children. Gottschall v. Gottschall ... 679

Drunk Driving.

1. Testimony by witnesses as to acts done and words spoken by a defendant as the basis for an opinion that the defendant was under the influence of intoxicating liquor is direct

or positive, and not circumstantial, evidence. State v. Betts 348
2. A violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1980) can be proved by showing that the defendant was in physical control of the motor vehicle while under the influence of alcoholic liquor, or of any drug, or when a person has ten-hundredths of one percent or more by weight of alcohol in his or her body fluid. State v. Hilker 810
3. For a conviction to be sustained in a trial for operating a motor vehicle while under the influence of alcohol, it is not necessary for a policeman or any other person to offer an opinion that the defendant was indeed intoxicated. State v. Hilker 810

Easements.

Title to real estate, including the determination of the existence of easements and the condemnation of lands for easement purposes, and questions of law arising out of contract are judicial matters within the jurisdiction of the courts of this state and not within the jurisdiction of the Nebraska Public Service Commission. Davis-Moore Industrial Park v. Missouri Pacific Railroad Co. ... 652

Effectiveness of Counsel.

1. The test for determining the competency or effectiveness of trial counsel is that they perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area and that they conscientiously protect the interests of their client. Marteney v. State 172
2. Effectiveness of counsel is not to be judged by hindsight. State v. Bartlett 886

Eminent Domain.

A party to an eminent domain proceeding who does not file a notice of appeal as required by Neb. Rev. Stat. § 76-715 (Reissue 1976) does not maintain a valid cross-appeal which prevents voluntary dismissal of the other party's appeal before final submission. Dawson v. Papio Nat. Resources Dist. 100

Employer and Employee.

1. Misconduct has been defined by various courts as a deliberate, willful, or wanton disregard of an employer's interest or of the standards of behavior which the employer has a right to expect of his employees, or carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design. Bristol v. Hanlon 37

2. Appeals in unemployment compensation benefit cases are reviewed de novo on the record. Walker Mfg. Co. v. Pogreba 619
3. An employee who accepted a job which she knew in advance to be temporary did not "voluntarily" leave her employment when the job ceased to exist, and she was not disqualified from benefits on the basis she had voluntarily left her work without good cause. Walker Mfg. Co. v. Pogreba 619
4. An agreement of a temporary employee to quit when the job no longer existed was one for the voluntary termination of employment and did not constitute a waiver of that employee's right to unemployment compensation benefits. Walker Mfg. Co. v. Pogreba 619

Employment Contracts.

When the employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability. Alford v. Life Savers, Inc. 441

Endangered Species.

1. The Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. §§ 37-430 to 37-438 (Reissue 1978), imposes two obligations on all state departments and agencies. One is that all state departments and agencies must consult with the Nebraska Game and Parks Commission before carrying out programs which may affect endangered species or their habitat. The other is that no state department or agency may take any action that will result in jeopardizing the continued existence of endangered or threatened species or result in the destruction or modification of a habitat of such species. Little Blue N.R.D. v. Lower Platte North N.R.D. 862
2. No action of a state department or agency nor program administered by the Governor can be permitted as long as Neb. Rev. Stat. § 37-435(3) (Reissue 1978) is in effect until the interested parties have consulted with the Nebraska Game and Parks Commission and have determined that the action contemplated will not jeopardize the continued existence of such endangered species or result in destruction or modification of habitat of such species. Little Blue N.R.D. v. Lower Platte North N.R.D. 862
3. After consulting with the Nebraska Game and Parks Commission, the department or agency involved must determine whether it has taken all necessary action to insure that its actions will not jeopardize the continued existence of an endangered species or destroy or modify

habitat critical to the existence of the species. Once that decision is made it is then subject to judicial review to ascertain whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Little Blue N.R.D. v. Lower Platte North N.R.D. 862

Equity.

1. In equity cases, the Supreme Court reviews the record de novo and reaches an independent conclusion without reference to the findings of the trial court.
   Heywood v. Heywood 79
   Kleeb v. Kleeb 637
2. Even though this is an equity action and upon appeal is triable de novo, it is still subject to the condition that when the evidence on material questions of fact is in irreconcilable conflict, the 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.
   Cline v. Franklin Pork, Inc. 238
   Nemaha Nat. Resources Dist. v. Neeman 442
3. Generally, in order to be entitled to the equitable remedy of accounting, it is necessary to show a fiduciary or trust relationship between the parties, or a complicated series of accounts, making the remedy at law inadequate. Trump, Inc. v. Sapp Bros. Ford Center, Inc. 824
4. Where a party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded. Trump, Inc. v. Sapp Bros. Ford Center, Inc. ... 824
5. Where the proof fails to establish a right to equitable relief, the court will retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter. Trump, Inc. v. Sapp Bros. Ford Center, Inc. 824
6. It is the duty of the Nebraska Supreme Court on appeal of an action in equity to try the issues de novo and to reach an independent conclusion without being influenced by the findings of the trial court, except to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying. Chicago Lumber Co. v. Horner 833

Estates.

1. It is impossible to convey an absolute title to real estate in fee simple by deed or will, and at the same time in the

same instrument convey to the same person a limited right or title in the same land. Sterner v. Nelson 358
2. If a deed or will conveys an absolute title in fee simple, an inconsistent clause in the instrument attempting merely to limit that title or convey to the same person a limited title in the same land will be disregarded. Sterner v. Nelson ... 358
3. An absolute title estate or property is a fee simple estate; it is an estate without end or limitations and the largest estate a person can possibly have. Sterner v. Nelson 358
4. Where there is a grant, devise, or bequest to one in general terms only, expressing neither fee nor life estate, and there is a subsequent limitation over of what remains at the first taker's death, if there is also given to the first taker an unlimited and unrestricted power of absolute disposal, express or implied, the grant, devise, or bequest to the first taker is construed to pass a fee. The attempted limitation over, following a gift which is in fee with full power of disposition and alienation, is void. Sterner v. Nelson 358
5. In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law. Neb. Rev. Stat. § 76-205 (Reissue 1976). Znamenacek v. Menke 671
6. A future interest is vested when there is no condition precedent to its taking effect in possession other than the termination of prior estates. Znamenacek v. Menke 671
7. The law favors the early vesting of estates, and in construing a will containing a devise of a life estate and a devise of the remainder, the inference of a vested remainder is stronger than the inference of a contingent remainder if the meaning is obscure in this respect. Znamenacek v. Menke 671
8. Whenever it is possible, a future interest will be construed as vested, and hence alienable and devisable by the remainderman. Znamenacek v. Menke 671
9. A remainder is vested if the remainderman, being alive, will take at once if the life tenant were to die. It is not the certainty of possession or enjoyment which distinguishes a vested remainder, but the certainty of the right of future possession or enjoyment if the remainderman who is ascertained lives until the determination of the preceding estate. Znamenacek v. Menke 671

Estoppel.
1. A party who has had the benefit of an agreement cannot

be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains. Frasier v. Trans-Western Land Corp. 681

2. The estoppel to assert an after-acquired title is restricted to the estate or interest intended to be conveyed, and unless the after-acquired title is the title, or part of the title, purportedly conveyed to the grantee it will not inure to his benefit. The estoppel will not operate as to land or an interest therein other than that which is specifically conveyed or called for by the plain import of the conveyance, and to which the covenants for title pertain. Kirby v. Holland ... 711

3. The doctrine of estoppel to assert an after-acquired title is applicable with respect to oil, gas, and mineral leases so as to preclude the lessor from asserting a subsequently acquired title or interest as against the lessee, at least where such leases carry the usual express or implied covenants of warranty, but the estoppel is restricted to the mineral interest which the lease purports to demise. Kirby v. Holland 711

Evidence.

1. In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably deducible from it.
   Shaw v. Gooch Feed Mill Corp. 17
   Davis v. Western Electric 771

2. Where a party, without reasonable explanation, changes his testimony concerning the material facts on a vital issue, such change clearly being made to meet the exigencies of pending litigation, the testimony is discredited as a matter of law and should be disregarded. Momsen v. Nebraska Methodist Hospital 45

3. In the foregoing situation, it is immaterial whether the contradictory testimony is given in a retrial of the same proceeding, in a pretrial deposition in pending litigation, or in related litigation under the same set of facts. The important considerations are that the testimony pertains to a vital point, that the party clearly made the change to meet the exigencies of the pending case, and that no rational or sufficient explanation for the change in testimony exists. Momsen v. Nebraska Methodist Hospital 45

4. Where the facts are not in dispute, then ordinarily the evidence should be taken as true. Momsen v. Nebraska Methodist Hospital 45
5. Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony. Husted v. Peter Kiewit & Sons Constr. Co. 109
6. When the evidence upon a motion to suppress is in conflict, the decision of the trial court will not be reversed in the absence of an abuse of discretion. State v. Pittman 117
7. Newly discovered evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result. State v. Pittman 117
8. An exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which testimony was given. State v. Pittman 117
9. Extrinsic evidence is admissible both to disclose and to remove a latent ambiguity. In re Estate of Bernstrauch ... 135
10. Where a record presents nothing more than conflicting medical testimony, we will not substitute our judgment for that of the Workmen's Compensation Court. Union Packing Co. v. Klauschie 331
11. The requirement of objective symptoms of an injury produced at the time of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown. Erving v. Tri-Con Industries 339
12. Testimony by witnesses as to acts done and words spoken by a defendant as the basis for an opinion that the defendant was under the influence of intoxicating liquor is direct or positive, and not circumstantial, evidence. State v. Betts 348
13. The admission of photographs of a gruesome nature rests largely within the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. State v. Rowe 419
14. Irrelevant matters should not be admitted in evidence, but their admission does not require reversal unless the effect is prejudicial. State v. Rowe 419
15. While considerable latitude is permitted in the admission of evidence tending to show the mental condition of the accused when insanity is the defense, it must relate to the mental state of the accused at the time of the acts charged. State v. Rowe 419
16. Newly discovered evidence is not a ground for a new trial, where the exercise of due diligence before trial would have

produced it. Smith v. Erftmier 486
17. Anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination. State v. Thaden 622
18. A bill of exceptions is the only vehicle for bringing evidence before this court, and evidence which does not appear in the record cannot be considered by this court on appeal. Kleeb v. Kleeb 637
19. In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Studley v. School Dist. No. 38 669
20. Upon an appeal from an order of the State Real Estate Commission the questions to be determined are whether the order is supported by substantial evidence, whether the commission acted within the scope of its authority, and whether its action was arbitrary, capricious, or unreasonable. Abboud v. State ex rel. State Real Estate Comm. . 676
21. In determining the sufficiency of evidence necessary to sustain a conviction, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass on credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Bolton 694
22. The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment. Davis v. Western Electric 771
23. In determining whether the evidence is sufficient to sustain a jury 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. Diesel Service, Inc. v. Accessory Sales, Inc. 797
24. A verdict by a trier of fact in a criminal proceeding will be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Hilker ... 810

Expert Witnesses.
1. Triers of fact are not required to take the opinions of experts as binding upon them.
   Erving v. Tri-Con Industries 339
   Davis v. Western Electric 771
2. An opinion of vehicular speed is proper, provided a

sufficient foundation is laid to show the expertise of the witness, as well as specific knowledge of the underlying facts to deal with the question in issue. Herman v. Lee 563
3. No exact standard is possible for fixing the qualifications of an expert or skilled witness, and the ruling of a trial judge receiving or excluding an opinion will be reversed on appeal only when a clear abuse of discretion is shown. Herman v. Lee 563
4. When the mental condition of a parent is in issue, evidence of the parent's treating psychiatrist is admissible in a juvenile court proceeding to determine child custody. In re Interest of Spradlin 734
5. Unless the character of an injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony. Davis v. Western Electric 771
6. An allegation that an employee suffers from a psychogenic pain disorder raises a subjective condition and requires competent medical testimony to show a causal connection between the alleged injury, the employment, and the disability. Davis v. Western Electric 771
7. The value of an opinion of an expert is no stronger than the facts upon which it is based. Davis v. Western Electric 771

Extrajudicial Statements.

An accused's out-of-court statements offered by him are hearsay and ordinarily inadmissible unless coming within some exception to the rule excluding hearsay evidence. State v. Rowe 419

Federal Acts.

1. In the administration and interpretation of federal legislative acts, pertinent opinions of the federal courts are binding upon the state courts. Darr v. Long 57
2. An award of damages against an auto dealer under the terms of 15 U.S.C. § 1989(a) (1976) is a penalty and a reward to the purchasers for bringing the action successfully, and is not limited or designed to compensate one for a loss suffered. Darr v. Long 57
3. The terms practice and practices in 7 U.S.C. § 208(a) (1976) do not necessarily require repetitious acts. The term practice may involve only a single transaction if the unjust or unreasonable practice is among the evils the Packers and Stockyards Act was intended to remedy. Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc. 382
4. A trustee may not offset against the trust account a debt owing to the trustee individually and not as trustee. Under

the regulations issued by the Secretary of Agriculture under 7 U.S.C. § 228 (1976), the custodial account of a market agency is a trust fund of which the marketing agency is a trustee. The misuse of a custodial account by a marketing agency is an unjust practice under the provisions of 7 U.S.C. § 208(a) (1976), and the marketing agency may be liable under the provisions of 7 U.S.C. § 209(a) (1976) to the person injured by such misuse. Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc. 382

5. An order of the Secretary of Agriculture for the payment of money may be enforced in any U.S. District Court or in any state court having general jurisdiction of the parties. The findings and orders of the Secretary are prima facie evidence of the facts therein stated, 7 U.S.C. § 210(f) (1976). Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc. 382

6. Where a reparation order of the Secretary of Agriculture contains findings on all matters necessary to the plaintiff's recovery and is supported by substantial evidence and no rebutting evidence is offered, the cause may be decided on motion for summary judgment in the court having jurisdiction. Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc. 382

Final Orders.

An order granting a motion for summary judgment by the municipal court is final and appealable and is not converted to an interlocutory order when reversed and remanded by the District Court so as to prohibit an appeal to this court. DeCosta Sporting Goods, Inc. v. Kirkland ... 815

Findings of Fact.

Findings of fact must conform to and be supported by the allegations of the pleadings on which they are based. Tuch v. Tuch 601

Forcible Entry and Detainer.

The action of forcible entry is merely possessory and the question of title to real estate cannot be either tried or determined in the case. Hogan v. Pelton 530

Fraud.

1. In the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument. Erftmier v. Eickhoff 726

2. The essential elements required to sustain an action for

fraudulent misrepresentation are, generally speaking, that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage. Erftmier v. Eickhoff 726

3. Fraud is never presumed but must be established by the party alleging it by clear and satisfactory evidence. The general rule is that where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie. Erftmier v. Eickhoff 726

Garnishment.

1. Garnishment in aid of execution of a judgment is proper in Nebraska only when the garnishee has property of and is indebted to the judgment debtor. Darr v. Long 57
2. A garnishee who denies possession of property of or a debt owing to the debtor and asks to be discharged in garnishment has properly raised the issue of the applicability of garnishment as a remedy under the circumstances then existing. Darr v. Long 57
3. A creditor plaintiff seeking recovery from a garnishee has no greater rights than those of the judgment debtor himself. Darr v. Long 57
4. The test in determining liability of the garnishee defendant to the garnisheeing plaintiff is whether or not the facts would support a recovery by the principal defendant against the garnishee. Darr v. Long 57

Hearsay.

An accused's out-of-court statements offered by him are hearsay and ordinarily inadmissible unless coming within some exception to the rule excluding hearsay evidence. State v. Rowe 419

Highways.

1. It is the duty of a political subdivision to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while he is in the exercise of reasonable and ordinary care and prudence. Hendrickson v. City of Kearney 8
2. An owner must exercise ordinary care to confine his cattle to prevent them from being unattended upon a public highway, and if the owner knows or, in the exercise of ordinary diligence, should know that any of his cattle are

unattended upon a highway, it is his duty to exercise ordinary care to round them up and confine them. Dizco, Inc. v. Kenton 141
3. The state has inherent power to establish, maintain, and control the highways of the state, including those within corporate limits of municipalities. While the Legislature may properly delegate certain powers over streets, alleys, and highways to a municipality, it retains the power to legislate with reference thereto when a matter of statewide policy and concern are involved. Herman v. Lee 563
4. Any power a municipality derives over its streets is strictly statutory and is not exclusive. Herman v. Lee 563

Homicide.
1. In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter. Neb. Rev. Stat. § 29-2027 (Reissue 1979). State v. Rowe 419
2. A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. Neb. Rev. Stat. § 28-304 (Reissue 1979). State v. Rowe 419
3. A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305 (Reissue 1979). State v. Rowe 419
4. Where murder is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. In order for this rule to require an instruction on manslaughter, the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder. State v. Rowe 419
5. Malice denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. Absence of malice may exist where the killing occurs upon a sudden quarrel. State v. Rowe 419
6. It is ordinarily not necessary to define the term death in a prosecution for homicide. State v. Rowe 419
7. A state of mind of the accused which indicates a callous disposition to repeat the crime of murder manifests exceptional depravity by ordinary standards of morality and intelligence within the meaning of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979). State v. Moore 457
8. A substantial history of serious assaultive or terrorizing criminal activity includes a previous premeditated murder. State v. Moore 457

9. The fact that a murder is committed to conceal the identity of the perpetrator of a robbery satisfies the requirements of Neb. Rev. Stat. § 29-2523(1)(b) (Reissue 1979). State v. Moore 457
10. Premeditation and deliberation and a purpose to kill are not elements of felony murder. State v. Bradley 882
11. No specific intention is required to constitute felony murder other than the intent to do the act which constitutes the felony during which the killing occurred. State v. Bradley .. 882

Hypnosis.

Until hypnosis gains acceptance to the point where experts in the field widely share the view that memories are accurately improved without undue danger of distortion, delusion, or fantasy, a witness who has been previously questioned under hypnosis may not testify in a criminal proceeding concerning the subject matter adduced at the pretrial hypnotic interview. This holding does not exclude otherwise admissible evidence, leads to which were obtained during an hypnotic interview. State v. Palmer 206

Indictments and Informations.

An information must inform the accused of each fact that is an essential element of the crime intended to be charged. State v. Schneckloth, Koger, and Heathman 144

Injunction.

A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct perpetually after it is proven that no application of endeavor, science, or skill can effect a remedy where the owners cannot be induced to conduct it properly.
Cline v. Franklin Pork, Inc. 238
Botsch v. Leigh Land Co. 290

Insanity.

While considerable latitude is permitted in the admission of evidence tending to show the mental condition of the accused when insanity is the defense, it must relate to the mental state of the accused at the time of the acts charged. State v. Rowe 419

Insurable Interest.

1. An insurable interest, in the matter of life and health insurance, exists when the beneficiary because of relationship, either pecuniary or from ties of blood or marriage, has

reason to expect some benefit from the continuance of the life of the insured. Neb. Rev. Stat. § 44-103(13) (Reissue 1978). Ryan v. Tickle 630
2. The question of the lack of insurable interest in a life insurance policy may be raised only by the insurance company, and where the company recognizes the validity of the policy, as by paying the amount thereof to the person named therein or into court, adverse claimants to the fund may not raise the objection of lack of insurable interest. Ryan v. Tickle 630
3. Only an insurer has standing to complain of a lack of an insurable interest and the heirs of the insured may not proceed on such cause of action against the designated beneficiary. Ryan v. Tickle 630

Insurance.
1. An injury resulting from an act committed by an insured in self-defense is not, as a matter of law, an expected or intended act within the meaning of a policy of insurance exempting bodily injuries or property damages which are either expected or intended from the standpoint of the insured. Allstate Ins. Co. v. Novak 184
2. An insurer has a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy. The insurer may not confine its investigation to the allegations of the petition filed by the party claiming damages. Allstate Ins. Co. v. Novak 184
3. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in plain, ordinary, and popular sense. Rodriguez v. Government Employees Ins. Co. 195
4. Where the language is plain and unambiguous, the court will not read an ambiguity into the language in order to construe it against the one who prepared the contract. Rodriguez v. Government Employees Ins. Co. 195
5. Construction of a contract of insurance ought not to be employed to make a plain agreement ambiguous for the purpose of interpreting it in favor of the insured. Rodriguez v. Government Employees Ins. Co. 195
6. An operable automobile which is being driven, albeit unlicensed, is an automobile owned by the insured under the automatic coverage provisions of the standard automobile liability insurance policy. Rodriguez v. Government Employees Ins. Co. 195
7. Absent specific evidence to support the claim that the driver of a motor vehicle specifically intended to cause an

injury similar to the type which resulted, damage to property owned by another and caused by reason of the negligent, or careless, or even willful reckless operation of an automobile does not amount to bodily injury or property damage caused intentionally by or at the direction of the insured. Therefore, such damage to property is not within the exclusion of a liability policy which specifically excludes coverage for damages to persons or property caused intentionally by or at the direction of the insured. Sullivan v. Great Plains Ins. Co. 846

8. The word "accident," as used in an automobile liability policy, is a more comprehensive term than "negligence," and, in its common signification, means an unexpected happening without intention or design. A policy covering liability arising from an accident, or from injuries accidentally sustained, does not cover an injury resulting from the willful act of insured, but it does cover claims based on negligence, recklessness, or wanton misconduct, where no intent or purpose to injure is shown. Sullivan v. Great Plains Ins. Co. 846

Intent.

1. A contract will be construed most strongly against the party preparing it when there is a question as to its meaning. Sacher v. Taco Grande of Iowa, Inc. 122
2. Where a contract is ambiguous, the court must determine the intent of the parties and the ambiguity must be resolved so as to give effect to that intent. Pawnee Plastics, Inc. v. American Savings Co. 131
3. Ordinarily the intent with which the occupier possesses the land can best be determined by his acts and the nature of his possession. Berglund v. Sisler 258
4. The statute of limitations will not run in favor of an occupant of real estate unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his ownership of the property. Berglund v. Sisler 258
5. Evidence of the mere subjective intent of the maker of a promissory note not to be personally bound is insufficient to rebut the presumption of personal obligation under Neb. U.C.C. § 3-403 (Reissue 1980) when that intent is not shown to have been communicated in some manner to the other party to the note. Tesoro Petroleum Corp. v. Schmidt 537
6. In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true

intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law. Neb. Rev. Stat. § 76-205 (Reissue 1976). Znamenacek v. Menke 671
7. No specific intention is required to constitute felony murder other than the intent to do the act which constitutes the felony during which the killing occurred. State v. Bradley 882

Joinder of Actions.
An action for damages incurred by the decedent up to the date of his death and an action for damages suffered by his widow or widower and next of kin after his death may be joined in a single action. Rhein v. Caterpillar Tractor Co. 321

Joint Accounts.
Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties. Such transfers are by reason of the account contracts involved and Neb. Rev. Stat. § 30-2706 (Reissue 1979), and are not testamentary in nature. Miller v. Janecek 316

Judges.
Neb. Rev. Stat. § 27-605 (Reissue 1979) states that the judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point. Cline v. Franklin Pork, Inc. 238

Judgments.
1. 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 unless clearly wrong.
   Pawnee Plastics, Inc. v. American Savings Co. 131
   Smith v. Erftmier 486
2. An irregular judgment is one which is rendered contrary to the course of law and the practice of the courts. Haen v. Haen 380
3. A district court has both statutory and inherent power to dismiss an action without prejudice for lack of prosecution. A. Hirsh, Inc. v. National Hair Co. 397
4. The power to vacate or modify a judgment during term rests in the sound discretion of the court. A. Hirsh, Inc. v. National Hair Co. 397
5. Where the vote of the members of a tribunal is evenly divided, it is treated as a denial of any affirmative relief. Caniglia v. City of Omaha 404
6. The issue of public convenience and necessity is ordinarily

one of fact, and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary.
In re Application of Petroleum Transport Service, Inc. 411
In re Application of Schroetlin 508
7. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.
In re Application of Petroleum Transport Service, Inc. 411
In re Application of Schroetlin 508
In re Application of Gordon Trucking, Inc. 830
8. Before a criminal matter may be appealed to this court, there must be a final judgment. No judgment will be regarded as final unless a sentence is pronounced. State v. Kaba 503
9. An order of the Public Service Commission will be affirmed if it acted within the scope of its authority, if its order is reasonable and not arbitrary, and if there is evidence to support its findings. In re Application of The Mickow Corp. 580
10. A judgment entered without jurisdiction of the subject matter or in excess of the court's power is void and may be collaterally attacked. Griffin v. Vandersnick 590
11. In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Studley v. School Dist. No. 38 669

Judicial Construction.
When the Legislature subsequently enacts legislation which makes related preexisting law applicable thereto, it is presumed that it did so with full knowledge of such preexisting legislation and judicial decisions of the Supreme Court construing and applying it. School Dist. No. 17 and Westside Comm. Schools v. State 762

Judicial Notice.
1. The general rule is that while the court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case. Rhodes v. Yates 14
2. Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to

examine its own records and take judicial notice of its own proceedings and judgments in the former action. Matters so judicially noticed are properly considered when determining questions presented by a demurrer. Rhodes v. Yates 14

Judicial Sales.

1. The confirmation of judicial sales is left to the discretion of the trial court; such discretion should be sound and equitable in view of all the circumstances, and the court must act in the interest of fairness and prudence and with a just regard to the rights of all concerned and the stability of judicial sales. Kleeb v. Kleeb 637
2. The phrase "on the courthouse door," as found in Neb. Rev. Stat. § 25-1529 (Reissue 1979), is to be given a practical and reasonable interpretation, rather than a literal or technical construction, and a notice of public sale posted on a bulletin board near the courthouse door satisfies the statute's requirements. Kleeb v. Kleeb 637
3. An upset bid following a judicial sale and before a final confirmation should be considered only when it affords convincing proof that the property was not sold at an adequate price and a just regard for the rights of all concerned and the stability of judicial sales permits its acceptance. Kleeb v. Kleeb 637

Juries.

1. Where reasonable minds may draw different conclusions as to whether or not acts of negligence charged have been proved, the case must be submitted to the jury for decision. Dizco, Inc. v. Kenton 141
2. In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter. Neb. Rev. Stat. § 29-2027 (Reissue 1979). State v. Rowe 419
3. The verdict of a jury will not be set aside on appeal unless it is clearly wrong. Diesel Service, Inc. v. Accessory Sales, Inc. 797
4. In determining whether the evidence is sufficient to sustain a jury 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. Diesel Service, Inc. v. Accessory Sales, Inc. 797

Jurisdiction.

1. An order of the Secretary of Agriculture for the payment of

money may be enforced in any U.S. District Court or in any state court having general jurisdiction of the parties. The findings and orders of the Secretary are prima facie evidence of the facts therein stated. 7 U.S.C. § 210(f) (1976). Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc. 382

2. The Nebraska Public Service Commission has jurisdiction over all crossings of highways outside of incorporated villages, towns, and cities, both public and private, across, over, or under all railroads in Nebraska. It has no jurisdiction over crossings of railroads within incorporated villages, towns, and cities, except to provide regulations for the safety and convenience of the public. Davis-Moore Industrial Park v. Missouri Pacific Railroad Co. 652
3. Title to real estate, including the determination of the existence of easements and the condemnation of lands for easement purposes, and questions of law arising out of contract are judicial matters within the jurisdiction of the courts of this state and not within the jurisdiction of the Nebraska Public Service Commission. Davis-Moore Industrial Park v. Missouri Pacific Railroad Co. 652
4. Where a party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded. Trump, Inc. v. Sapp Bros. Ford Center, Inc. 824
5. Where the proof fails to establish a right to equitable relief, the court will retain jurisdiction for the purpose of administering complete relief between the parties with respect to the subject matter. Trump, Inc. v. Sapp Bros. Ford Center, Inc. 824

Juror Qualifications.

A juror who cannot subordinate his personal views on an issue of law and obey the law in deciding the case must be excused for cause. State v. Rowe 419

Jurors.

While a juror may not testify as to any matter or statement occurring during the course of the jury's deliberation or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict, a juror may testify as to the fact whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. State v. Woodward 740

Jury Instructions.

1. Failure to object timely to a jury instruction prohibits a party on appeal from contending the instructions were erroneous. State v. Buchanan 20
2. A party who desires more precise jury instructions must request them at the time the instructions are being considered and not on appeal. State v. Buchanan 20
3. If the court has instructed the jury generally on the law of the case and has not withdrawn any essential issues from consideration of the jury, error cannot be predicated on some particular phase of the case unless proper instructions have been requested by the party complaining. State v. Buchanan 20
4. Where murder is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. In order for this rule to require an instruction on manslaughter, the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder. State v. Rowe 419
5. It is ordinarily not necessary to define the term death in a prosecution for homicide. State v. Rowe 419
6. It is error to submit to the jury an issue which is not pleaded in the case. Simon v. Christie 600

Jury Misconduct.

1. In order for jury misconduct to be the basis of a new trial, the misconduct must be prejudicial to the defendant. State v. Woodward 740
2. Misconduct of a juror sufficient to vitiate a verdict must be shown to have influenced the jury in arriving at a verdict, and it must relate to a matter in dispute. State v. Woodward 740

Justiciable Issues.

1. The existence of a justiciable issue is a fundamental requirement to a court's exercise of its discretion to grant declaratory relief. Ellis v. County of Scotts Bluff 495
2. A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement. Ellis v. County of Scotts Bluff 495
3. The Nebraska Supreme Court can only declare the law and its application to a given set of facts when a justiciable controversy is presented for determination. It is not empowered to render advisory opinions. Ellis v. County of Scotts Bluff 495

Juvenile Courts.

When the mental condition of a parent is in issue, evidence of the parent's treating psychiatrist is admissible in a juvenile court proceeding to determine child custody. In re Interest of Spradlin 734

Kidnapping.

1. Neb. Rev. Stat. § 28-313 (Reissue 1979), the Nebraska kidnapping statute, creates only a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded the victim. State v. Schneckloth, Koger, and Heathman 144
2. The factors which determine which of the two penalties is to be imposed are not elements of the offense of kidnapping, but are simply mitigating factors which may reduce the sentence of those charged under Neb. Rev. Stat. § 28-313(1) (Reissue 1979), and their existence or nonexistence should properly be determined by the trial judge. State v. Schneckloth, Koger, and Heathman 144

Leases.

1. A termination of a lease which the lessor elects to assert does not terminate accrued liabilities under the lease, but it does terminate liabilities to accrue in the future, such as rent, except where, by express provision in the lease, termination is not to affect the accrual of such liabilities. Sacher v. Taco Grande of Iowa, Inc. 122
2. In the absence of a statute to the contrary, a tenancy cannot be terminated for breach of a covenant or condition by the lessee unless there is an express condition in the lease for a forfeiture or right of reentry on occurrence of the breach. The remedy for breach where there is no provision for forfeiture or reentry is an action for damages. Hogan v. Pelton 530
3. Where the primary term of an oil and gas lease has expired and the lease continues in force by production, it is elementary that the lease will come to an end when the property ceases to "produce," as that term is defined in the various jurisdictions. In such cases it is not necessary that the lessor take any action to effect termination; the lease simply expires. Kirby v. Holland 711
4. The doctrine of estoppel to assert an after-acquired title is applicable with respect to oil, gas, and mineral leases so as to preclude the lessor from asserting a subsequently acquired title or interest as against the lessee, at least where such leases carry the usual express or implied covenants of warranty, but the estoppel is restricted to the

mineral interest which the lease purports to demise. Kirby v. Holland 711

Legislative Enactments.

1. A legislative bill on final reading requires the affirmative vote of a majority of all the members elected to the Legislature before it can become law. Center Bank v. Dept. of Banking & Finance 227
2. The Lieutenant Governor is not eligible to vote on legislative bills on final reading. Center Bank v. Dept. of Banking & Finance 227
3. The Constitution limits the action the Governor may take in regard to a legislative bill when it is presented to him for his consideration. Center Bank v. Dept. of Banking & Finance 227
4. If the Governor returns a legislative bill to the Legislature within 5 days after it has been presented to him, with a statement of his objections to the bill, the bill cannot become law unless it is reconsidered by the Legislature, as provided in the Constitution. Center Bank v. Dept. of Banking & Finance 227
5. A challenge to a legislative enactment must be by collateral attack in the form of an action for injunction or other suitable action. Copple v. City of Lincoln 504
6. When the Legislature subsequently enacts legislation which makes related preexisting law applicable thereto, it is presumed that it did so with full knowledge of such preexisting legislation and judicial decisions of the Supreme Court construing and applying it. School Dist. No. 17 and Westside Comm. Schools v. State 762

Legislative Intent.

1. When the language used in the statute is ambiguous and it becomes necessary to construe it, the principal objective is to determine the intent of the Legislature and to give it effect.
   State v. Parmer 92
   Freese and Johnson v. County of Douglas 521
2. A legislative intention is to be determined from the statute taken as a whole, and the courts may properly consider the history of its passage. State v. Parmer 92
3. The legislative intent is the cardinal rule in the construction of statutes. All statutes relating to the same subject are considered as parts of a homogeneous system and later statutes are considered as supplementary to preceding enactments. Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together. Northwest High School Dist. No. 82 v. Hessel 219

4. Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes. Freese and Johnson v. County of Douglas 521
5. A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in light of the mischief to be remedied. Freese and Johnson v. County of Douglas 521
6. To ascertain the intent of the Legislature, the Supreme Court may examine the legislative history of the act in question. School Dist. No. 17 and Westside Comm. Schools v. State 762

Legislative Power.
1. A delegation of legislative power to the courts is violative of article II, § 1, of the Constitution of Nebraska. Copple v. City of Lincoln 504
2. The state has inherent power to establish, maintain, and control the highways of the state, including those within corporate limits of municipalities. While the Legislature may properly delegate certain powers over streets, alleys, and highways to a municipality, it retains the power to legislate with reference thereto when a matter of statewide policy and concern are involved. Herman v. Lee 563

Legislature.
1. The Legislature has authorized school districts to acquire buildings or equipment through lease-purchase agreements. George v. Board of Education 127
2. The Legislature has plenary authority over school districts, limited only by the provisions of the Constitution. This authority extends to the purchase and acquisition of school buildings and facilities. George v. Board of Education 127
3. It is competent for the Legislature to change statutes prescribing limitations to actions. The one in force at the time suit is brought is applicable to the cause of action. Cedars Corp. v. Swoboda 180

Lesser-Included Offenses.
Where murder is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. In order for this rule to require an instruction on manslaughter, the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder. State v. Rowe 419

Liability.

1. The test in determining liability of the garnishee defendant to the garnisheeing plaintiff is whether or not the facts would support a recovery by the principal defendant against the garnishee. Darr v. Long 57
2. A termination of a lease which the lessor elects to assert does not terminate accrued liabilities under the lease, but it does terminate liabilities to accrue in the future, such as rent, except where, by express provision in the lease, termination is not to affect the accrual of such liabilities. Sacher v. Taco Grande of Iowa, Inc. 122

Licensee.

1. One who, solely for his own personal pleasure, convenience, or benefit, enters the premises of another with the consent of the latter but without an invitation, express or implied, is a bare licensee. McCurry v. Young Men's Christian Assn. 278
2. The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care. McCurry v. Young Men's Christian Assn. 278

Licenses.

The records of the Director of Motor Vehicles disclosing the accumulation by a person of 12 or more points within any period of 2 years come to the attention of the director upon receipt by the Department of Motor Vehicles of the final abstract of conviction, within the meaning of Neb. Rev. Stat. § 39-669.27 (Reissue 1978). Berlowitz v. Dept. of Motor Vehicles 843

Limitations of Actions.

1. It is competent for the Legislature to change statutes prescribing limitations to actions. The one in force at the time suit is brought is applicable to the cause of action. Cedars Corp. v. Swoboda 180
2. A suit to quiet the title to real estate is an action for the recovery of real property within the statute of limitations applying to such an action. Nemaha Nat. Resources Dist. v. Neeman 442
3. An action for the recovery of title or possession of lands, tenements, or hereditaments can only be brought within 10 years after the cause of action shall have accrued. Neb. Rev. Stat. § 25-202 (Reissue 1979). Nemaha Nat. Resources Dist. v. Neeman 442

4. The statute of limitations does not begin to run against the rights of the beneficiaries of such a constructive trust until they are apprised of the fact that the trustee does not intend to carry out the provisions of the trust. Nemaha Nat. Resources Dist. v. Neeman 442
5. The following actions can only be brought within 4 years: (2) an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property. Neb. Rev. Stat. § 25-207 (Reissue 1979). Nemaha Nat. Resources Dist. v. Neeman 442
6. A cause of action pleaded by amendment ordinarily relates back to the original pleading for limitation purposes, provided that claimant seeks recovery on the same general set of facts. Knoell Constr. Co., Inc. v. Hanson 628

Liquor Licenses.
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. Bond v. Nebraska Liquor Control Comm. 663
2. Absence of need alone is not a sufficient reason to deny an otherwise proper application for a liquor license. Bond v. Nebraska Liquor Control Comm. 663

Livestock.
1. An owner must exercise ordinary care to confine his cattle to prevent them from being unattended upon a public highway, and if the owner knows or, in the exercise of ordinary diligence, should know that any of his cattle are unattended upon a highway, it is his duty to exercise ordinary care to round them up and confine them. Dizco, Inc. v. Kenton 141
2. The terms practice and practices in 7 U.S.C. § 208(a) (1976) do not necessarily require repetitious acts. The term practice may involve only a single transaction if the unjust or unreasonable practice is among the evils the Packers and Stockyards Act was intended to remedy. Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc. 382
3. A trustee may not offset against the trust account a debt owing to the trustee individually and not as trustee. Under the regulations issued by the Secretary of Agriculture under 7 U.S.C. § 228 (1976), the custodial account of a market agency is a trust fund of which the marketing agency is a trustee. The misuse of a custodial account by a marketing agency is an unjust practice under the provisions of 7 U.S.C. § 208(a) (1976), and the marketing agency may be liable under the provisions of 7 U.S.C. § 209(a) (1976) to the person injured by such misuse. Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc. 382

Mechanics' Liens.

1. One who furnishes materials without performing any work or labor in installing them or putting them in place is a materialman and is given a lien because the materials furnished were used in the construction of the building or other structure. Chicago Lumber Co. v. Horner 833
2. Mechanic's lien statutes are cumulative and remedial in nature and require a liberal construction so as to effectuate their objects and purposes and protect all claimants within their scope as well as to promote substantial justice. Chicago Lumber Co. v. Horner 833
3. After a contract for material is substantially completed there should be no unreasonable delay in filing a claim for a lien and the time for filing cannot be delayed by furnishing minor items of material. Chicago Lumber Co. v. Horner ... 833
4. An open account results where the parties intend that the individual items of the account shall not be considered independently, but as a connected series of transactions, and that the account shall be kept open and subject to a shifting balance as additional related entries of debits and credits are made, until it shall suit the convenience of either party to settle and close the account, and where, pursuant to the original express or implied intention, there is but one single and indivisible liability arising from such series of related and reciprocal debits and credits. Chicago Lumber Co. v. Horner 833

Medical Malpractice.

A patient of a physician or surgeon is entitled to a careful and thorough examination such as the circumstances, the condition of the patient, and the physician's opportunity for examination permit. While the doctor does not insure the correctness of his diagnosis, he is required to use reasonable care to determine through examination and diagnosis the condition of the patient and the nature of the ailment. Momsen v. Nebraska Methodist Hospital ... 45

Mental Distress.

1. Recovery for intentional infliction of mental distress will not lie unless the character of the defendant's action is outrageous and the emotional distress inflicted upon the plaintiff is severe. Davis v. Texaco, Inc. 67
2. To be actionable the conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. Davis v. Texaco, Inc. 67
3. Liability does not extend to mere insults, indignities,

threats, annoyances, petty oppressions, or other trivialities. Davis v. Texaco, Inc. 67
4. The mental distress for which recovery may be had must be so severe that no reasonable man could be expected to endure it. Davis v. Texaco, Inc. 67

Mental Health Boards.
A member of a county mental health board appointed under the provisions of Neb. Rev. Stat. § 83-1018 (Reissue 1976) is an "officer of the state or a political subdivision thereof," and, as such, is an employee of the State of Nebraska for the purposes of the Social Security Act as set forth in Neb. Rev. Stat. §§ 68-601 and 68-602(3) (Reissue 1976). Sullivan v. Hajny 481

Mental Incompetence.
1. The test of mental capacity to plead or stand trial is the same. Marteney v. State 172
2. The question of whether or not a defendant is competent to stand trial or to enter a plea is one of fact to be determined by the trial court, and the means employed in resolving the question are discretionary with the trial court. Marteney v. State 172
3. Mental capacity of the defendant at the time of an alleged offense is waived as a defense by a plea of guilty voluntarily and understandingly entered. Marteney v. State 172
4. The test of mental competency to stand trial is whether the defendant has capacity to understand the nature and object of the proceedings against him; to comprehend his own condition in reference to such proceedings; and to make a rational defense. State v. Bolton 694
5. If facts are brought to the attention of the court which raise a doubt as to the sanity of the defendant, the question of competency should be determined at that time. The question of competency to stand trial is one of fact to be determined by the court and the means employed in resolving the question are discretionary with the court. State v. Bolton ... 694

Minors.
1. The question of whether the name of a minor child should be changed is to be determined by what is in the best interests of the child. Cohee v. Cohee 855
2. No automatic preference as to the surname of a legitimate child now exists in Nebraska law. Each parent has an equal right and interest in determining the surname of the child. Cohee v. Cohee 855
3. The factors to be used in determining the surname of a child include: (1) Misconduct by one of the parents; (2) Fail-

ure to support the child; (3) Failure to maintain contact with the child; (4) The length of time a surname has been used; (5) Whether the surname is different from that of the custodial parent; and (6) Which parent has custody of the child. Cohee v. Cohee 855

Miranda Rights.

1. An accused who has expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. State v. Pittman 117
2. *Miranda* does not protect an accused, even though he has requested counsel, from a spontaneous admission made under circumstances not induced by the investigating officers or during a conversation not initiated by the officers. State v. Pittman 117

Motions for New Trial.

1. Newly discovered evidence must be of such a nature that if it had been offered and admitted at the former trial it probably would have produced a substantially different result. State v. Pittman 117
2. Newly discovered evidence is not a ground for a new trial, where the exercise of due diligence before trial would have produced it. Smith v. Erftmier 486

Motions to Suppress.

When the evidence upon a motion to suppress is in conflict, the decision of the trial court will not be reversed in the absence of an abuse of discretion. State v. Pittman 117

Motor Carriers.

1. An applicant for a certificate of public convenience and necessity must prove that it is fit, willing, and able to perform the service and that the public convenience and necessity requires the service. In re Application of Nebraska Transport Co., Inc. 269
2. In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers, contrary to public interest.

   In re Application of Nebraska Transport Co., Inc. 269

In re Application of Petroleum Transport Service, Inc. 411
In re Application of Schroetlin 508
3. The burden is on the applicant to show that the proposed service is required by public convenience and necessity.
In re Application of Petroleum Transport Service, Inc. 411
In re Application of Schroetlin 508
In re Application of Gordon Trucking, Inc. 830

Motor Vehicles.
1. An operable automobile which is being driven, albeit unlicensed, is an automobile owned by the insured under the automatic coverage provisions of the standard automobile liability insurance policy. Rodriguez v. Government Employees Ins. Co. 195
2. Intersection right-of-way is a qualified, not absolute, right to proceed through an intersection, exercising due care, in a lawful manner in preference to another vehicle. Herman v. Lee 563
3. An opinion of vehicular speed is proper, provided a sufficient foundation is laid to show the expertise of the witness, as well as specific knowledge of the underlying facts to deal with the question in issue. Herman v. Lee 563
4. The records of the Director of Motor Vehicles disclosing the accumulation by a person of 12 or more points within any period of 2 years come to the attention of the director upon receipt by the Department of Motor Vehicles of the final abstract of conviction, within the meaning of Neb. Rev. Stat. § 39-669.27 (Reissue 1978). Berlowitz v. Dept. of Motor Vehicles 843
5. Absent specific evidence to support the claim that the driver of a motor vehicle specifically intended to cause an injury similar to the type which resulted, damage to property owned by another and caused by reason of the negligent, or careless, or even willful reckless operation of an automobile does not amount to bodily injury or property damage caused intentionally by or at the direction of the insured. Therefore, such damage to property is not within the exclusion of a liability policy which specifically excludes coverage for damages to persons or property caused intentionally by or at the direction of the insured. Sullivan v. Great Plains Ins. Co. 846
6. The word "accident," as used in an automobile liability policy, is a more comprehensive term than "negligence," and, in its common signification, means an unexpected happening without intention or design. A policy covering liability arising from an accident, or from injuries accidentally sustained, does not cover an injury resulting

from the willful act of insured, but it does cover claims based on negligence, recklessness, or wanton misconduct, where no intent or purpose to injure is shown. Sullivan v. Great Plains Ins. Co. 846

Municipal Corporations.

1. An appeal or error proceeding does not lie from a purely legislative act by a public body to which legislative authority has been delegated. Copple v. City of Lincoln 504
2. Neb. Rev. Stat. § 15-1201 (Reissue 1977) applies only where the bodies mentioned therein act judicially or quasi-judicially and cannot be constitutionally construed to permit appeal from a legislative enactment. Copple v. City of Lincoln 504
3. The state has inherent power to establish, maintain, and control the highways of the state, including those within corporate limits of municipalities. While the Legislature may properly delegate certain powers over streets, alleys, and highways to a municipality, it retains the power to legislate with reference thereto when a matter of statewide policy and concern are involved. Herman v. Lee 563
4. Any power a municipality derives over its streets is strictly statutory and is not exclusive. Herman v. Lee 563
5. The Omaha city ordinance regulating funeral processions was a reasonable and valid exercise of the city's police power under Neb. Rev. Stat. § 39-697(1)(c) (Reissue 1978), and does not conflict with Nebraska's right-of-way statutes. Herman v. Lee 563

Municipal Ordinances.

1. The annexation by a city of a contiguous subdivision effected by a resolution of the city council approving and accepting the plat of such subdivision in compliance with a subdivision ordinance duly adopted by the city under the authorization contained in Neb. Rev. Stat. § 19-916 (Reissue 1977), or its predecessor, constitutes a declaration of boundaries of the city by ordinance within the meaning of Neb. Rev. Stat. § 79-801 (Reissue 1976). The date of the resolution of the city council approving and accepting such a subdivision is "the effective date of the city annexation ordinance" within the meaning of the proviso in § 79-801. Northwest High School Dist. No. 82 v. Hessel 219
2. Where there is a direct conflict between a city ordinance and a state statute, the statute is the superior law. Herman v. Lee 563
3. A city ordinance is inconsistent with a statute that is contradictory in a sense that the two legislative provisions cannot coexist. Herman v. Lee 563
4. The Omaha city ordinance regulating funeral processions

was a reasonable and valid exercise of the city's police power under Neb. Rev. Stat. § 39-697(1)(c) (Reissue 1978), and does not conflict with Nebraska's right-of-way statutes. Herman v. Lee 563

Names.

1. The question of whether the name of a minor child should be changed is to be determined by what is in the best interests of the child. Cohee v. Cohee 855
2. No automatic preference as to the surname of a legitimate child now exists in Nebraska law. Each parent has an equal right and interest in determining the surname of the child. Cohee v. Cohee 855
3. The factors to be used in determining the surname of a child include: (1) Misconduct by one of the parents; (2) Failure to support the child; (3) Failure to maintain contact with the child; (4) The length of time a surname has been used; (5) Whether the surname is different from that of the custodial parent; and (6) Which parent has custody of the child. Cohee v. Cohee 855

Natural Resources Districts.

1. The term "a majority of the supervisors," as found in Neb. Rev. Stat. § 2-1519 (Reissue 1974), as applied to this case means a majority of all the supervisors of the Otoe Soil and Water Conservation District board of supervisors. Nemaha Nat. Resources Dist. v. Neeman 442
2. Both the Department of Water Resources and the various natural resources districts are state departments or agencies within the meaning of The Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. § 37-430 to 37-438 (Reissue 1978). Little Blue N.R.D. v. Lower Platte North N.R.D. 862

Negligence.

1. A patient of a physician or surgeon is entitled to a careful and thorough examination such as the circumstances, the condition of the patient, and the physician's opportunity for examination permit. While the doctor does not insure the correctness of his diagnosis, he is required to use reasonable care to determine through examination and diagnosis the condition of the patient and the nature of the ailment. Momsen v. Nebraska Methodist Hospital 45
2. An owner must exercise ordinary care to confine his cattle to prevent them from being unattended upon a public highway, and if the owner knows or, in the exercise of ordinary diligence, should know that any of his cattle are unattended upon a highway, it is his duty to exercise ordinary care

to round them up and confine them. Dizco, Inc. v. Kenton ... 141
3. Where reasonable minds may draw different conclusions as to whether or not acts of negligence charged have been proved, the case must be submitted to the jury for decision. Dizco, Inc. v. Kenton 141
4. The owner or occupant of property owes to a licensee the duty only to refrain from injuring him by willful or wanton negligence or a designed injury, or by failure to warn of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee in the exercise of ordinary care. McCurry v. Young Men's Christian Assn. 278
5. One who attempts to cross a street at a point between intersections without looking is guilty of such negligence as would bar recovery as a matter of law. Gerhardt v. McChesney 351
6. A pedestrian who crosses a street between intersections is required to keep a *constant* lookout for his or her own safety in all directions of anticipated danger. Gerhardt v. McChesney 351
7. A pedestrian who crosses a street between intersections is charged with the exercise of a greater degree of care than one who crosses a street at a crosswalk where protection is afforded by giving the pedestrian the right-of-way. Gerhardt v. McChesney 351
8. When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him or her and suddenly moves from the place of safety into the path of such vehicle and is struck, such conduct constitutes contributory negligence more than slight as a matter of law and precludes recovery. Gerhardt v. McChesney 351
9. The presumption in an action for wrongful death that a decedent exercised reasonable care for his or her own safety has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced. Gerhardt v. McChesney 351

New Trial.
1. In order for jury misconduct to be the basis of a new trial, the misconduct must be prejudicial to the defendant. State v. Woodward 740
2. Misconduct of a juror sufficient to vitiate a verdict must be shown to have influenced the jury in arriving at a verdict, and it must relate to a matter in dispute. State v. Woodward 740

Notice.

1. The validity of a notice of sale of collateral under Neb. U.C.C. § 9-504 (Reissue 1980) does not depend upon whether the notification actually reached the person to whom it was sent. The statute is satisfied if the steps taken were such as would be reasonably required to inform the person to be notified in the ordinary course. State Bank of Litchfield v. Lucas 400
2. Evidence of the mere subjective intent of the maker of a promissory note not to be personally bound is insufficient to rebut the presumption of personal obligation under Neb. U.C.C. § 3-403 (Reissue 1980) when that intent is not shown to have been communicated in some manner to the other party to the note. Tesoro Petroleum Corp. v. Schmidt 537
3. The phrase "on the courthouse door," as found in Neb. Rev. Stat. § 25-1529 (Reissue 1979), is to be given a practical and reasonable interpretation, rather than a literal or technical construction, and a notice of public sale posted on a bulletin board near the courthouse door satisfies the statute's requirements. Kleeb v. Kleeb 637

Nuisances.

1. Ordinarily, a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact. It may become such by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of operation. Cline v. Franklin Pork, Inc. 238
2. The exercise of due care by the owner of a business in its operation is not a defense to an action to enjoin its operation as a nuisance. Cline v. Franklin Pork, Inc. 238
3. A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct perpetually after it is proven that no application of endeavor, science, or skill can effect a remedy where the owners cannot be induced to conduct it properly.
   Cline v. Franklin Pork, Inc. 238
   Botsch v. Leigh Land Co. 290

Oil and Gas.

1. Where the primary term of an oil and gas lease has expired and the lease continues in force by production, it is elementary that the lease will come to an end when the property ceases to "produce," as that term is defined in the various jurisdictions. In such cases it is not necessary that the lessor take any action to effect termination; the lease simply expires. Kirby v. Holland 711

2. The doctrine of estoppel to assert an after-acquired title is applicable with respect to oil, gas, and mineral leases so as to preclude the lessor from asserting a subsequently acquired title or interest as against the lessee, at least where such leases carry the usual express or implied covenants of warranty, but the estoppel is restricted to the mineral interest which the lease purports to demise. Kirby v. Holland 711

Open Accounts.

An open account results where the parties intend that the individual items of the account shall not be considered independently, but as a connected series of transactions, and that the account shall be kept open and subject to a shifting balance as additional related entries of debits and credits are made, until it shall suit the convenience of either party to settle and close the account, and where, pursuant to the original express or implied intention, there is but one single and indivisible liability arising from such series of related and reciprocal debits and credits. Chicago Lumber Co. v. Horner 833

Parental Rights.

1. An appeal from an order terminating parental rights requires a de novo review upon the record.
   In re Interest of Stoppkotte 1
   In re Interest of Farmer 500
2. An order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be based on clear and convincing evidence.
   In re Interest of Stoppkotte 1
   In re Interest of Farmer 500
3. The rights of parents to maintain custody of their children is a natural right subject only to the paramount interest which the public has in the protection of the rights of a child.
   In re Interest of Stoppkotte 1
   In re Interest of Spradlin 734
4. Courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
   In re Interest of Stoppkotte 1
   In re Interest of Farmer 500
5. Courts cannot deprive a parent of the custody of a child merely because a parent has limited resources or financial problems or is not socially acceptable, nor because the parent's lifestyle is different or unusual. Neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other

person could better provide for the child. In re Interest of Stoppkotte 1
6. When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the child or children require that a final disposition be made without delay.
In re Interest of Stoppkotte 1
In re Interest of Farmer 500
7. Parental rights may be terminated when such action is found to be in the best interests of the child and it appears by the evidence that a parent is unable to discharge parental responsibilities because of mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged, indeterminate period. In re Interest of Farmer 500

Parliamentary Law.
An abstention in voting is not counted as an affirmative vote in determining whether or not a particular matter or proposition has received the required number of votes. Nemaha Nat. Resources Dist. v. Neeman 442

Partition.
1. The confirmation of judicial sales is left to the discretion of the trial court; such discretion should be sound and equitable in view of all the circumstances, and the court must act in the interest of fairness and prudence and with a just regard to the rights of all concerned and the stability of judicial sales. Kleeb v. Kleeb 637
2. The phrase "on the courthouse door," as found in Neb. Rev. Stat. § 25-1529 (Reissue 1979), is to be given a practical and reasonable interpretation, rather than a literal or technical construction, and a notice of public sale posted on a bulletin board near the courthouse door satisfies the statute's requirements. Kleeb v. Kleeb 637
3. An upset bid following a judicial sale and before a final confirmation should be considered only when it affords convincing proof that the property was not sold at an adequate price and a just regard for the rights of all concerned and the stability of judicial sales permits its acceptance. Kleeb v. Kleeb 637
4. An action for partition is triable de novo on the record in the Supreme Court. Malcom v. White 724
5. One of several tenants in common has an absolute right to a partition of their real estate, in the absence of an agreement to, or other impediments to, the contrary. Malcom v. White 724
6. Once joint title in real estate has been established, partition may be had as a matter of law. Malcom v. White 724

Pedestrians.

1. One who attempts to cross a street at a point between intersections without looking is guilty of such negligence as would bar recovery as a matter of law. Gerhardt v. McChesney 351
2. A pedestrian who crosses a street between intersections is required to keep a *constant* lookout for his or her own safety in all directions of anticipated danger. Gerhardt v. McChesney 351
3. A pedestrian who crosses a street between intersections is charged with the exercise of a greater degree of care than one who crosses a street at a crosswalk where protection is afforded by giving the pedestrian the right-of-way. Gerhardt v. McChesney 351
4. When one, being in a place of safety, sees or could have seen the approach of a moving vehicle in close proximity to him or her and suddenly moves from the place of safety into the path of such vehicle and is struck, such conduct constitutes contributory negligence more than slight as a matter of law and precludes recovery. Gerhardt v. McChesney ... 351

Penalties.

1. Neb. Rev. Stat. § 28-313 (Reissue 1979), the Nebraska kidnapping statute, creates only a single criminal offense and not two separate offenses, even though it is punishable by two different ranges of penalties depending on the treatment accorded the victim. State v. Schneckloth, Koger, and Heathman 144
2. The factors which determine which of the two penalties is to be imposed are not elements of the offense of kidnapping, but are simply mitigating factors which may reduce the sentence of those charged under Neb. Rev. Stat. § 28-313(1) (Reissue 1979), and their existence or nonexistence should properly be determined by the trial judge. State v. Schneckloth, Koger, and Heathman 144

Pleadings.

1. It is ordinarily incumbent upon one who relies on a special custom as a basis of recovery or defense to allege the custom and to plead and prove the other party had knowledge of the custom and contracted with reference thereto. Smith v. Erftmier 486
2. Where a certain theory has been adopted and relied upon by the parties during the trial, such theory will be adhered to on appeal regardless of whether it is correct. Smith v. Erftmier 486
3. Findings of fact must conform to and be supported by the allegations of the pleadings on which they are based. Tuch v. Tuch 601

4. A cause of action pleaded by amendment ordinarily relates back to the original pleading for limitation purposes, provided that claimant seeks recovery on the same general set of facts. Knoell Constr. Co., Inc. v. Hanson 628
5. Proof must correspond with the allegations in the pleadings, and relief cannot be granted upon proof of a case substantially different from the case made in the pleadings. Badran v. Bertrand 747
6. A counterclaim must arise out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim. Pfizer Genetics, Inc. v. Prochaska 822
7. The issues as framed in the trial court, and upon which the cause was tried, are binding upon the parties in the case on appeal to this court. Trump, Inc. v. Sapp Bros. Ford Center, Inc. 824

Pleas.
1. A plea of guilty, if understandingly and voluntarily entered, is conclusive. Marteney v. State 172
2. A plea of guilty embodies a waiver of every defense to a charge, whether procedural, statutory, or constitutional. Marteney v. State 172
3. The test of mental capacity to plead or stand trial is the same. Marteney v. State 172
4. The question of whether or not a defendant is competent to stand trial or to enter a plea is one of fact to be determined by the trial court, and the means employed in resolving the question are discretionary with the trial court. Marteney v. State 172
5. A plea of guilty supported by a sufficient factual basis renders unnecessary the proof of the facts alleged in the complaint and cures any error which may have been made by the District Court in ruling on a plea in abatement. Marteney v. State 172
6. Mental capacity of the defendant at the time of an alleged offense is waived as a defense by a plea of guilty voluntarily and understandingly entered. Marteney v. State 172

Political Subdivisions.
1. It is the duty of a political subdivision to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while he is in the exercise of reasonable and ordinary care and prudence. Hendrickson v. City of Kearney 8
2. When governmental officials, with full knowledge of all the facts pertaining to a claim, allow and pay it, the action is at least presumptively correct and is frequently termed conclusive. County of Douglas v. Board of Regents 573

3. Under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 23-2406 (Reissue 1977), the findings of the District Court under the act will not be disturbed on appeal unless they are clearly wrong. Studley v. School Dist. No. 38 669

Post Conviction.

1. The person seeking post conviction relief has the burden of establishing a basis for such relief, and the findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous. Marteney v. State 172
2. A claim that a sentence imposed within statutory limits was excessive is not a basis for post conviction relief. Marteney v. State 172

Prejudgment Interest.

Where the damages are not liquidated and the evidence does not furnish data which, if believed, would make it possible to compute the damages with exactness, a plaintiff is not entitled to prejudgment interest. Treptow Co. v. Duncan Aviation, Inc. 72

Presumptions.

1. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Beaver Lake Assn. v. County Board of Equalization 247
2. Such presumption disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, with the burden of showing such valuation to be unreasonable resting upon the appellant on appeal from the action of the board. Beaver Lake Assn. v. County Board of Equalization 247
3. The presumption in an action for wrongful death that a decedent exercised reasonable care for his or her own safety has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced. Gerhardt v. McChesney 351

Principal and Agent.

1. Generally, an agent is required to act solely for the benefit of his principal in all matters connected with the agency

and adhere faithfully to the instructions of the principal. Abboud v. State ex rel. State Real Estate Comm. 676
2. An agent owes to his principal the use of such skill as may be required to accomplish the object of his employment, and if he omits to exercise reasonable care, diligence, and judgment, as the result of which failure his principal is damaged, he may be held responsible for such damage. Leamer Abstracting Co. v. Rosengartner 719

Principal and Surety.
A motor vehicle dealer's bond, furnished under the provisions of Neb. Rev. Stat. § 60-1419 (Reissue 1978), which creates a liability on the part of the surety to indemnify any person "by reason of any loss suffered" requires proof of an actual loss suffered before recovery is permitted, and does not cover statutory penalties. Darr v. Long 57

Promissory Notes.
1. In order for a detriment to the promisee to constitute a valid consideration for a note or contract, it must have been within the express or implied contemplation of the parties and known to and agreed to by them. Schrempp v. Gallup .. 415
2. Evidence of the mere subjective intent of the maker of a promissory note not to be personally bound is insufficient to rebut the presumption of personal obligation under Neb. U.C.C. § 3-403 (Reissue 1980) when that intent is not shown to have been communicated in some manner to the other party to the note. Tesoro Petroleum Corp. v. Schmidt ... 537
3. In order to take advantage of an optional acceleration provision in a promissory note, the holder of the security must take some affirmative action evidencing his election to do so. Tesoro Petroleum Corp. v. Schmidt 537
4. The filing of a petition alleging such election is a clear and unequivocal manner of declaring the holder's intention to take advantage of the optional acceleration provision and declare the entire debt due. Tesoro Petroleum Corp. v. Schmidt 537

Proof.
1. On appeal to the District Court from an order of the director of the Department of Motor Vehicles revoking a motor vehicle operator's license, the burden of proof is on the licensee to establish the invalidity of the order. Wroblewski v. Pearson 82
2. Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony. Husted v. Peter Kiewit & Sons Constr. Co. 109

3. A workmen's compensation award cannot be based upon possibility or speculation. If an inference favorable to the claimant can only be reached upon the basis of possibility or speculation, he cannot recover. Husted v. Peter Kiewit & Sons Constr. Co. 109
4. An award cannot be based upon conflicting inferences of equal degrees of probability. Husted v. Peter Kiewit & Sons Constr. Co. 109
5. In a proceeding to cancel a water appropriation pursuant to Neb. Rev. Stat. § 46-229.02 (Reissue 1978), the initial burden of proof is upon the Department of Water Resources. This burden is met upon the filing of the verified report of the water commissioner or engineers of the Department pursuant to § 46-229.04. Thereafter, the burden is upon the appropriator to show cause why the appropriation should not be canceled. In re Water Appropriation Nos. 442A, 461, 462, and 485 161
6. The person seeking post conviction relief has the burden of establishing a basis for such relief, and the findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous. Marteney v. State 172
7. A plea of guilty supported by a sufficient factual basis renders unnecessary the proof of the facts alleged in the complaint and cures any error which may have been made by the District Court in ruling on a plea in abatement. Marteney v. State 172
8. The burden which the appellant must carry in order to be successful on appeal is to demonstrate by the evidence that the assessment is grossly excessive and is a result of arbitrary or unlawful action, and not a mere error of judgment. It is only where such assessed valuations are not in accordance with law, or it is made to appear that they were made arbitrarily or capriciously, that courts will interfere. Beaver Lake Assn. v. County Board of Equalization 247
9. An applicant for a certificate of public convenience and necessity must prove that it is fit, willing, and able to perform the service and that the public convenience and necessity requires the service. In re Application of Nebraska Transport Co., Inc. 269
10. The burden is on the applicant to show that the proposed service is required by public convenience and necessity.
    In re Application of Petroleum Transport Service, Inc. 411
    In re Application of Schroetlin 508
    In re Application of Gordon Trucking, Inc. 830
11. Neither the Constitution of the United States nor the Con-

stitution of the State of Nebraska requires the prosecution to prove the absence of mitigating factors. State v. Moore 457

12. In disciplinary proceedings of members of the bar, the relator must establish the allegations in the formal charges by a clear preponderance of the evidence so the court is satisfied to a reasonable certainty that the charges are true. State ex rel. Nebraska State Bar Assn. v. Michaelis .. 545

13. In disciplinary proceedings the findings must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal case. State ex rel. Nebraska State Bar Assn. v. Michaelis 545

14. In a proceeding for the disbarment of an attorney at law the presumption of innocence applies, and the charge made against him must be established by a clear preponderance of the evidence. State ex rel. Nebraska State Bar Assn. v. Michaelis 545

15. In order for the party submitting an erroneous bill for material delivered to recover on the basis of a corrected billing, the party must show that reasonable care to avoid the mistake was exercised and that the billed party was not damaged by the mistake. City of Lincoln v. Bud Moore, Inc. 647

16. The burden of proving the contract is on the party who seeks to compel specific performance. Rybin Investment Co., Inc. v. Wade 707

17. Fraud is never presumed but must be established by the party alleging it by clear and satisfactory evidence. The general rule is that where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie. Erftmier v. Eickhoff 726

18. Proof must correspond with the allegations in the pleadings, and relief cannot be granted upon proof of a case substantially different from the case made in the pleadings. Badran v. Bertrand 747

19. The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment. Davis v. Western Electric 771

20. Prospective profits from an established business, prevented or interrupted by the tortious conduct of the defendant, are recoverable when it is proved (1) that it is reasonably certain such profits would have been realized except for the tort, and (2) that the lost profits can be ascertained and measured, from evidence introduced, with reasonable certainty. Such lost profits must not be speculative, remote, or imaginary, but must be established with reasonable

certainty by the evidence. Diesel Service, Inc. v. Accessory Sales, Inc. 797

21. A violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1980) can be proved by showing that the defendant was in physical control of the motor vehicle while under the influence of alcoholic liquor, or of any drug, or when a person has ten-hundredths of one percent or more by weight of alcohol in his or her body fluid. State v. Hilker 810

Property.

1. Generally, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties. Ludwig v. Matter ... 87
2. A suit to quiet the title to real estate is an action for the recovery of real property within the statute of limitations applying to such an action. Nemaha Nat. Resources Dist. v. Neeman 442
3. An action for the recovery of title or possession of lands, tenements, or hereditaments can only be brought within 10 years after the cause of action shall have accrued. Neb. Rev. Stat. § 25-202 (Reissue 1979). Nemaha Nat. Resources Dist. v. Neeman 442
4. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. Nemaha Nat. Resources Dist. v. Neeman 442
5. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. Nemaha Nat. Resources Dist. v. Neeman 442
6. The following actions can only be brought within 4 years: (2) an action for taking, detaining, or injuring personal property, including actions for specific recovery of personal property. Neb. Rev. Stat. § 25-207 (Reissue 1979). Nemaha Nat. Resources Dist. v. Neeman 442

Property Division.

1. The rules for determining a division of property in a dissolution provide no mathematical formula by which awards can be precisely determined, and ordinarily the

court will consider all pertinent facts in reaching a just and equitable settlement. Haase v. Haase 371
2. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. Rhodes v. Rhodes 373
3. A division of property must take into consideration the circumstances of the parties, the duration of the marriage, contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities. Rhodes v. Rhodes 373

Prosecuting Attorneys.
1. Abuse of prosecutorial discretion, as a violation of constitutional rights, requires proof of intentional and purposeful discrimination based on impermissible considerations such as race, religion, or the desire to prevent the prisoner from exercising his constitutional rights. State v. Bartlett 886
2. So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. State v. Bartlett 886
3. Within the limits set by the Legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. State v. Bartlett 886

Public Officers and Employees.
A member of a county mental health board appointed under the provisions of Neb. Rev. Stat. § 83-1018 (Reissue 1976) is an "officer of the state or a political subdivision thereof," and, as such, is an employee of the State of Nebraska for the purposes of the Social Security Act as set forth in Neb. Rev. Stat. §§ 68-601 and 68-602(3) (Reissue 1976). Sullivan v. Hajny 481

Public Service Commission.
1. Upon an appeal to this court from an order of the Public Service Commission, the order must be affirmed if the commission acted within its jurisdiction and the order is not arbitrary or capricious. If there is evidence in the record which will sustain the findings and order of the com-

mission, its order must be affirmed.
In re Application of Nebraska Transport Co., Inc. 269
In re Application of The Mickow Corp. 580
2. The issue of public convenience and necessity is ordinarily one of fact, and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary.
In re Application of Petroleum Transport Service, Inc. .. 411
In re Application of Schroetlin 508
3. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.
In re Application of Petroleum Transport Service, Inc. ... 411
In re Application of Schroetlin 508
In re Application of Gordon Trucking, Inc. 830
4. The Nebraska Public Service Commission has jurisdiction over all crossings of highways outside of incorporated villages, towns, and cities, both public and private, across, over, or under all railroads in Nebraska. It has no jurisdiction over crossings of railroads within incorporated villages, towns, and cities, except to provide regulations for the safety and convenience of the public. Davis-Moore Industrial Park v. Missouri Pacific Railroad Co. 652
5. The Nebraska Public Service Commission has no authority to order a railroad company to construct a crossing over its railroad at a point within the limits of a city or village where no street has been opened. Davis-Moore Industrial Park v. Missouri Pacific Railroad Co. 652
6. The judicial powers lodged in the Nebraska Public Service Commission are only such as are remedial of its regulatory powers. Davis-Moore Industrial Park v. Missouri Pacific Railroad Co. 652
7. Title to real estate, including the determination of the existence of easements and the condemnation of lands for easement purposes, and questions of law arising out of contract are judicial matters within the jurisdiction of the courts of this state and not within the jurisdiction of the Nebraska Public Service Commission. Davis-Moore Industrial Park v. Missouri Pacific Railroad Co. 652

Railroads.
1. The Nebraska Public Service Commission has jurisdiction over all crossings of highways outside of incorporated villages, towns, and cities, both public and private, across, over, or under all railroads in Nebraska. It has no jurisdiction over crossings of railroads within incorporated villages,

towns, and cities, except to provide regulations for the safety and convenience of the public. Davis-Moore Industrial Park v. Missouri Pacific Railroad Co. 652
2. The Nebraska Public Service Commission has no authority to order a railroad company to construct a crossing over its railroad at a point within the limits of a city or village where no street has been opened. Davis-Moore Industrial Park v. Missouri Pacific Railroad Co. 652

Real Estate.
1. It is impossible to convey an absolute title to real estate in fee simple by deed or will, and at the same time in the same instrument convey to the same person a limited right or title in the same land. Sterner v. Nelson 358
2. If a deed or will conveys an absolute title in fee simple, an inconsistent clause in the instrument attempting merely to limit that title or convey to the same person a limited title in the same land will be disregarded. Sterner v. Nelson ... 358
3. Title to real estate, including the determination of the existence of easements and the condemnation of lands for easement purposes, and questions of law arising out of contract are judicial matters within the jurisdiction of the courts of this state and not within the jurisdiction of the Nebraska Public Service Commission. Davis-Moore Industrial Park v. Missouri Pacific Railroad Co. 652
4. Before a trial court may compel a specific performance of a real estate contract, there must be a showing that a valid, legally enforceable contract exists. Rybin Investment Co., Inc. v. Wade 707
5. In order that a binding contract for sale of real estate may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for a future arrangement. Rybin Investment Co., Inc. v. Wade 707
6. The doctrine of after-acquired title is one under which title to land acquired by a grantor who previously attempted to convey title to the same land which he did not then own inures automatically to the benefit of his prior grantee. Kirby v. Holland 711

Records.
1. A bill of exceptions is the only vehicle for bringing evidence before this court, and evidence which does not appear in the record cannot be considered by this court on appeal. Kleeb v. Kleeb 637
2. In the absence of a bill of exceptions, review on appeal is limited to the question of whether the pleadings support the judgment. Rosnick v. Renstrom 759

3. In order to receive consideration on appeal, any affidavits or evidence other than the pleadings in the case used on a motion for summary judgment must have been offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. DeCosta Sporting Goods, Inc. v. Kirkland 815

Reparation Orders.

1. An order of the Secretary of Agriculture for the payment of money may be enforced in any U.S. District Court or in any state court having general jurisdiction of the parties. The findings and orders of the Secretary are prima facie evidence of the facts therein stated. 7 U.S.C. § 210(f) (1976). Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc. 382
2. Where a reparation order of the Secretary of Agriculture contains findings on all matters necessary to the plaintiff's recovery and is supported by substantial evidence and no rebutting evidence is offered, the cause may be decided on motion for summary judgment in the court having jurisdiction. Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc. 382

Repossessed Collateral.

A transfer of repossessed collateral to a seller by a finance company pursuant to a guaranty is not a sale or disposition of the collateral. Treptow Co. v. Duncan Aviation, Inc. 72

Res Judicata.

1. The rule of res judicata is grounded, first, on a public policy and the necessity to terminate litigation, and, second, on the belief that a person should not be vexed more than once for the same cause. DeCosta Sporting Goods, Inc. v. Kirkland .. 815
2. Any right or fact in issue which has been directly adjudicated upon in the determination of an action before a court of competent jurisdiction in which a judgment has been rendered upon the merits is conclusively settled by that judgment and cannot again be litigated between the parties and privies whether the claim or subject matter of the two suits is the same or not. DeCosta Sporting Goods, Inc. v. Kirkland 815
3. Res judicata is an affirmative defense which must ordinarily be pleaded to be available. DeCosta Sporting Goods, Inc. v. Kirkland 815
4. However, the defense of res judicata need not be raised by answer, but can be raised and passed upon for the first time on a motion for summary judgment. DeCosta Sporting Goods, Inc. v. Kirkland 815

Right-of-Way.

Intersection right-of-way is a qualified, not absolute, right to proceed through an intersection, exercising due care, in a lawful manner in preference to another vehicle. Herman v. Lee 563

Rules of Evidence.

The supervisor of all billing records is an appropriate witness with regard to such billing records, assuming such witness complies with the requirements of Neb. Rev. Stat. § 27-803(5) (Reissue 1979). City of Lincoln v. Bud Moore, Inc. 647

Sales.

1. The validity of a notice of sale of collateral under Neb. U.C.C. § 9-504 (Reissue 1980) does not depend upon whether the notification actually reached the person to whom it was sent. The statute is satisfied if the steps taken were such as would be reasonably required to inform the person to be notified in the ordinary course. State Bank of Litchfield v. Lucas 400
2. The direct effect of a sale that is not commercially reasonable under Neb. U.C.C. § 9-504 (Reissue 1980) is to alter the measure of the deficiency. In such case the fair and reasonable value of the collateral as of the time of the sale is offset against the balance due on the security agreement. State Bank of Litchfield v. Lucas 400
3. In order for the party submitting an erroneous bill for material delivered to recover on the basis of a corrected billing, the party must show that reasonable care to avoid the mistake was exercised and that the billed party was not damaged by the mistake. City of Lincoln v. Bud Moore, Inc. 647
4. Prospective profits from an established business, prevented or interrupted by the tortious conduct of the defendant, are recoverable when it is proved (1) that it is reasonably certain such profits would have been realized except for the tort, and (2) that the lost profits can be ascertained and measured, from evidence introduced, with reasonable certainty. Such lost profits must not be speculative, remote, or imaginary, but must be established with reasonable certainty by the evidence. Diesel Service, Inc. v. Accessory Sales, Inc. 797
5. Loss of prospective profits may be recovered if the evidence shows with reasonable certainty both their occurrence and the extent thereof. Uncertainty as to the fact of whether any damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not. Diesel Service, Inc. v. Accessory Sales, Inc. 797

Schools and School Districts.

1. The Legislature has authorized school districts to acquire buildings or equipment through lease-purchase agreements. George v. Board of Education 127
2. The Legislature has plenary authority over school districts, limited only by the provisions of the Constitution. This authority extends to the purchase and acquisition of school buildings and facilities. George v. Board of Education ... 127
3. The annexation by a city of a contiguous subdivision effected by a resolution of the city council approving and accepting the plat of such subdivision in compliance with a sudivision ordinance duly adopted by the city under the authorization contained in Neb. Rev. Stat. § 19-916 (Reissue 1977), or its predecessor, constitutes a declaration of boundaries of the city by ordinance within the meaning of Neb. Rev. Stat. § 79-801 (Reissue 1976). The date of the resolution of the city council approving and accepting such a subdivision is "the effective date of the city annexation ordinance" within the meaning of the proviso in § 79-801. Northwest High School Dist. No. 82 v. Hessel ... 219
4. While the term adjoin, as used in Neb. Rev. Stat. § 79-403 (Reissue 1976), ordinarily means touching or having a common boundary, it may also include a situation where the boundaries, although not touching, are separated only by a streambed which is not part of any school district. In re Freeholders Petition 583
5. The selection of a teacher to be eliminated from the staff through a reduction in force is an executive or administrative function as distinguished from quasi-judicial action. Dykeman v. Board of Education 596
6. In the absence of statutory or contractual restrictions, the decision of a school board in such a matter is generally subject to but a limited review. Dykeman v. Board of Education 596
7. In making a selection of the teacher to be dismissed pursuant to a reduction in force, the school board may exercise its discretion and consider noneducational factors as well as educational ones. Dykeman v. Board of Education ... 596
8. Under the provisions of Neb. Rev. Stat. § 79-1283 (Reissue 1976), there exists no right of appeal to the State Board of Education from an order of the Nebraska Professional Practices Commission dismissing a complaint against a member of the teaching profession for violation of the professional practices criteria promulgated under the provisions of Neb. Rev. Stat. § 79-1282 (Reissue 1976). Berquist v. Campbell 658
9. The action of the statutory board under Neb. Rev. Stat. § 79-403 (Reissue 1976) is an exercise of quasi-judicial power,

equitable in character, and upon appeal therefrom to the District Court the cause is triable de novo as though it had been originally instituted in such court, and upon appeal from the District Court to this court it is triable de novo as in any other equitable action. In re Freeholder's Petition 839

Search and Seizure.

When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, they may seize them whether they are initially in plain sight or come into sight subsequently as a result of the officers' efforts. State v. Traxler 435

Search Warrants.

1. To support a search warrant, only the probability of criminal activity must be shown. State v. Ybanez 42
2. Affidavits for search warrants must be tested and interpreted in a commonsense and realistic fashion. State v. Ybanez ... 42
3. Information supplied by a citizen who voluntarily comes forward to aid law enforcement officers is presumed to be reliable. State v. Ybanez 42
4. When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, although not included in the warrant, are reasonably identifiable as contraband, they may seize them whether they are initially in plain sight or come into sight subsequently as a result of the officers' efforts. State v. Traxler 435

Self-Incrimination.

1. The fifth amendment right to be free from self-incrimination is a personal right and may not be vicariously asserted. State v. Perea 613
2. The defendant lacks standing to challenge the testimony of a coparticipant who implicated defendant in the crime on the grounds that the coparticipant's right against self-incrimination was violated. State v. Perea 613

Sentences.

1. Approval of the Board of Pardons to apply 1975 Neb. Laws, L.B. 567, retroactively is required only where the changes in L.B. 567 would result in discharge of the petitioner from custody at an earlier date than under the law in effect prior to L.B. 567. Whited v. Bolin 32
2. Where a petitioner, under a sentence imposed prior to August 24, 1975, has been granted good time credits which remain unforfeited, sufficient under prior law to require his mandatory release from the custody of the Department of

Correctional Services under supervision on the same date or prior to the date when his discharge from the custody of the state would have become mandatory under the provisions of 1975 Neb. Laws, L.B. 567, consent of the Board of Pardons is not required to apply the provisions of L.B. 567 retroactively. Whited v. Bolin 32

3. The provisions of Neb. Rev. Stat. § 83-1,110(2) (Reissue 1976) are to be applied to consecutive sentences whether imposed before or after the effective date of 1975 Neb. Laws, L.B. 567. Whited v. Bolin 32
4. A claim that a sentence imposed within statutory limits was excessive is not a basis for post conviction relief. Marteney v. State 172
5. Before sentencing a defendant after conviction a trial judge has a broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct. State v. Sabala 304
6. 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 officer reports, police reports, affidavits, and other information, including his own personal observations. State v. Sabala 304
7. A sentence imposed within statutory limits will not be disturbed on appeal in an absence of an abuse of discretion on the part of the trial court.
   State v. Sabala 304
   State v. True 701
   State v. McNichols 875
8. Neither the Constitution of the United States nor the Constitution of Nebraska requires determination by a jury of the applicability of the aggravating and mitigating factors in determining under the provisions of Neb. Rev. Stat. §§ 29-2522 and 29-2523 (Reissue 1979) whether the penalty shall be death or life imprisonment, and the provision of determination of the penalty by the trial judge or a panel of judges after notice and hearing is constitutional. State v. Moore 457
9. Neb. Rev. Stat. § 29-2523 (Reissue 1979) does not limit in any way the mitigating factors or circumstances which the court may consider, and the sentencing court should be liberal in admitting evidence of facts which the convicted defendant asserts are mitigating factors. State v. Moore 457

10. Neb. Rev. Stat. §§ 29-2520 and 29-2522 (Reissue 1979) are not unconstitutional because the sentencing hearing may be held and the sentence may be imposed either by the trial judge or a sentencing panel consisting of the trial judge and two other district judges. State v. Moore 457
11. The imposition of the death sentence in this case is justified by the application of the standards provided by Neb. Rev. Stat. § 29-2523 (Reissue 1979), as interpreted and limited by the definitions of this court. State v. Moore 457

Specific Performance.
1. Before a trial court may compel a specific performance of a real estate contract, there must be a showing that a valid, legally enforceable contract exists. Rybin Investment Co., Inc. v. Wade 707
2. The burden of proving the contract is on the party who seeks to compel specific performance. Rybin Investment Co., Inc. v. Wade 707

Speedy Trial.
1. The primary burden is upon the State to bring the accused person to trial within the time provided by law, and if he is not brought to trial within that time, he is entitled to an absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute. State v. Bolton 694
2. The State has the burden of proving that one or more of the excluded periods of time under subsection (4) of Neb. Rev. Stat. § 29-1207 (Reissue 1979) is applicable if the defendant is not tried within 6 months of the commencement of the criminal action. State v. Bolton 694

Standing.
1. In order to have standing as an aggrieved person for the purpose of attacking a change of zone, the plaintiff must demonstrate that he suffers a special injury different in kind from that suffered by the general public. Copple v. City of Lincoln 504
2. An increase in business competition is not alone sufficient to confer standing to challenge a change of zone. Copple v. City of Lincoln 504
3. Only an insurer has standing to complain of a lack of an insurable interest and the heirs of the insured may not proceed on such cause of action against the designated beneficiary. Ryan v. Tickle 630

Statute of Limitations.
The statute of limitations will not run in favor of an occupant

of real estate unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his ownership of the property. Berglund v. Sisler 258

Statutes.

1. Approval of the Board of Pardons to apply 1975 Neb. Laws, L.B. 567, retroactively is required only where the changes in L.B. 567 would result in discharge of the petitioner from custody at an earlier date than under the law in effect prior to L.B. 567. Whited v. Bolin 32
2. Where a petitioner, under a sentence imposed prior to August 24, 1975, has been granted good time credits which remain unforfeited, sufficient under prior law to require his mandatory release from the custody of the Department of Correctional Services under supervision on the same date or prior to the date when his discharge from the custody of the state would have become mandatory under the provisions of 1975 Neb. Laws, L.B. 567, consent of the Board of Pardons is not required to apply the provisions of L.B. 567 retroactively. Whited v. Bolin 32
3. The provisions of Neb. Rev. Stat. § 83-1,110(2) (Reissue 1976) are to be applied to consecutive sentences whether imposed before or after the effective date of 1975 Neb. Laws, L.B. 567. Whited v. Bolin 32
4. A statute is not to be read as if open to construction as a matter of course. Where the words of the statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of the court to read anything plain, direct, and unambiguous out of a statute.
   State v. Parmer 92
   County of Douglas v. Board of Regents 573
5. A penal statute is required to be strictly construed and should be given a sensible construction. State v. Parmer 92
6. A statute should be construed in the context of the object sought to be accomplished, the evils and mischiefs that are sought to be remedied, and the purpose for which it serves. State v. Parmer 92
7. When the language used in the statute is ambiguous and it becomes necessary to construe it, the principal objective is to determine the intent of the Legislature and to give it effect.
   State v. Parmer 92
   Freese and Johnson v. County of Douglas 521
8. A legislative intention is to be determined from the statute

taken as a whole, and the courts may properly consider the history of its passage.
State v. Parmer 92
School Dist. No. 17 and Westside Comm. Schools v. State 762
9. In Nebraska, all crimes are statutory and no act is criminal unless the Legislature has in express terms declared it to be so. State v. Schneckloth, Koger, and Heathman 144
10. Where the language of a statute is plain and unambiguous, no interpretation is needed, and the court is without authority to change the language. State v. Schneckloth, Koger, and Heathman 144
11. The legislative intent is the cardinal rule in the construction of statutes. All statutes relating to the same subject are considered as parts of a homogeneous system and later statutes are considered as supplementary to preceding enactments. Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together. Northwest High School Dist. No. 82 v. Hessel 219
12. A statute is open to construction only where the language used requires interpretation or may reasonably be considered ambiguous. Omaha P.P. Dist. v. Nebraska State Tax Commissioner 309
13. Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes. Freese and Johnson v. County of Douglas 521
14. A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in light of the mischief to be remedied. Freese and Johnson v. County of Douglas 521
15. Where there is a direct conflict between a city ordinance and a state statute, the statute is the superior law. Herman v. Lee 563
16. A city ordinance is inconsistent with a statute that is contradictory in a sense that the two legislative provisions cannot coexist. Herman v. Lee 563
17. The Omaha city ordinance regulating funeral processions was a reasonable and valid exercise of the city's police power under Neb. Rev. Stat. § 39-697(1)(c) (Reissue 1978), and does not conflict with Nebraska's right-of-way statutes. Herman v. Lee 563
18. The right of appeal in this state is clearly statutory and unless the statute provides for an appeal from the decision of a quasi-judicial tribunal, such right does not exist. Berquist v. Campbell 658
19. Where one statute refers to another and the latter is subse-

quently repealed, the statute repealed, absent a contrary legislative intent, becomes a part of the one making the reference and remains in force so far as the adopting statute is concerned. School Dist. No. 17 and Westside Comm. Schools v. State 762

20. When the Legislature subsequently enacts legislation which makes related preexisting law applicable thereto, it is presumed that it did so with full knowledge of such preexisting legislation and judicial decisions of the Supreme Court construing and applying it. School Dist. No. 17 and Westside Comm. Schools v. State 762

21. In interpreting the meaning of statutory provisions, all the provisions should be read in order to arrive at a conclusion as to their proper meaning. School Dist. No. 17 and Westside Comm. Schools v. State 762

22. A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of the 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. Generally speaking, a statute should be construed so that an ordinary person reading it would get from it the usual accepted meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it. Cohee v. Cohee 855

23. An administrative agency is required to act under the law as it stands when its order is entered. A change of law pending an administrative determination must be followed and the new law applied, at least in relation to permits for the doing of future acts, unless the statute contains a saving clause. Little Blue N.R.D. v. Lower Platte North N.R.D. 862

Stock.

When there is no constitutional, statutory, or charter prohibition and the rights of other stockholders or of creditors of the corporation are not involved, a corporation has the power to issue shares of its stock as full paid on payment of less than its par value, whether in money or in property, in labor or services, and the agreement under which they are so issued will be binding as between the parties, so that the corporation can neither deny the other party the rights of a stockholder nor compel him to pay for stock contrary to the agreement. Frasier v. Trans-Western Land Corp. 681

Summary Judgments.

1. When the allegations of the pleadings have been pierced by the movant, and the resistance to the motion fails to show that a genuine issue of fact exists, a summary judgment will be granted. Ludwig v. Matter 87
2. Where the evidence is such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than submit it to a jury. However, where reasonable minds may differ as to the conclusions or inferences to be drawn from the evidence, or where there is a conflict in the evidence, such issues must be submitted to the jury. Gerhardt v. McChesney 351
3. Where a reparation order of the Secretary of Agriculture contains findings on all matters necessary to the plaintiff's recovery and is supported by substantial evidence and no rebutting evidence is offered, the cause may be decided on motion for summary judgment in the court having jurisdiction. Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc. 382
4. Where one party moves for a partial summary judgment on certain issues only, the other party should not be expected at the hearing on the motion for summary judgment to present evidence on issues as to which the motion does not apply. In re Freeholders Petition 583
5. In order to receive consideration on appeal, any affidavits or evidence other than the pleadings in the case used on a motion for summary judgment must have been offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. DeCosta Sporting Goods, Inc. v. Kirkland 815
6. However, the defense of res judicata need not be raised by answer, but can be raised and passed upon for the first time on a motion for summary judgment. DeCosta Sporting Goods, Inc. v. Kirkland 815
7. An order granting a motion for summary judgment by the municipal court is final and appealable and is not converted to an interlocutory order when reversed and remanded by the District Court so as to prohibit an appeal to this court. DeCosta Sporting Goods, Inc. v. Kirkland 815

Supreme Court.

The Nebraska Supreme Court can only declare the law and its application to a given set of facts when a justiciable controversy is presented for determination. It is not empowered to render advisory opinions. Ellis v. County of Scotts Bluff 495

Taxation.

1. The trial of an appeal from a county board of equalization involving the valuation of real estate both in the District Court and the Supreme Court is de novo as an equitable proceeding. Beaver Lake Assn. v. County Board of Equalization 247
2. For the purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same thing. Beaver Lake Assn. v. County Board of Equalization ... 247
3. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Beaver Lake Assn. v. County Board of Equalization 247
4. Such presumption disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, with the burden of showing such valuation to be unreasonable resting upon the appellant on appeal from the action of the board. Beaver Lake Assn. v. County Board of Equalization 247
5. The burden which the appellant must carry in order to be successful on appeal is to demonstrate by the evidence that the assessment is grossly excessive and is a result of arbitrary or unlawful action, and not a mere error of judgment. It is only where such assessed valuations are not in accordance with law, or it is made to appear that they were made arbitrarily or capriciously, that courts will interfere. Beaver Lake Assn. v. County Board of Equalization 247

Teacher Contracts.

1. A tenured teacher may not be terminated absent just cause. Schulz v. Board of Education 513
2. The critical issue in a teacher termination case is what conduct is sufficient to constitute just cause for the termination of the contract of a tenured teacher under current statutory requirements. There are few, if any, objective criteria for evaluating teacher performance or for determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must therefore be assessed on its own facts. Schulz v. Board of Education 513
3. Incompetency or neglect of duty of a tenured teacher is not measured in a vacuum or against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties. Schulz v. Board of Education 513

Tenure.

1. A tenured teacher may not be terminated absent just cause. Schulz v. Board of Education 513
2. The critical issue in a teacher termination case is what conduct is sufficient to constitute just cause for the termination of the contract of a tenured teacher under current statutory requirements. There are few, if any, objective criteria for evaluating teacher performance or for determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must therefore be assessed on its own facts. Schulz v. Board of Education ... 513
3. Incompetency or neglect of duty of a tenured teacher is not measured in a vacuum or against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties. Schulz v. Board of Education 513

Termination of Employment.

1. When the employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability. Alford v. Life Savers, Inc. 441
2. The selection of a teacher to be eliminated from the staff through a reduction in force is an executive or administrative function as distinguished from quasi-judicial action. Dykeman v. Board of Education 596
3. In the absence of statutory or contractual restrictions, the decision of a school board in such a matter is generally subject to but a limited review. Dykeman v. Board of Education 596
4. In making a selection of the teacher to be dismissed pursuant to a reduction in force, the school board may exercise its discretion and consider noneducational factors as well as educational ones. Dykeman v. Board of Education 596
5. An employee who accepted a job which she knew in advance to be temporary did not "voluntarily" leave her employment when the job ceased to exist, and she was not disqualified from benefits on the basis she had voluntarily left her work without good cause. Walker Mfg. Co. v. Pogreba 619
6. An agreement of a temporary employee to quit when the job no longer existed was one for the voluntary termination of employment and did not constitute a waiver of that employee's right to unemployment compensation benefits. Walker Mfg. Co. v. Pogreba 619

Testimony.

While a juror may not testify as to any matter or statement

occurring during the course of the jury's deliberation or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or dissent from the verdict, a juror may testify as to the fact whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. State v. Woodward 740

Torts.

1. Recovery for intentional infliction of mental distress will not lie unless the character of the defendant's action is outrageous and the emotional distress inflicted upon the plaintiff is severe. Davis v. Texaco, Inc. 67
2. To be actionable the conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. Davis v. Texaco, Inc. 67
3. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Davis v. Texaco, Inc. 67
4. The mental distress for which recovery may be had must be so severe that no reasonable man could be expected to endure it. Davis v. Texaco, Inc. 67
5. Under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 23-2406 (Reissue 1977), the findings of the District Court under the act will not be disturbed on appeal unless they are clearly wrong. Studley v. School Dist. No. 38 669

Trial.

1. Where a party, without reasonable explanation, changes his testimony concerning the material facts on a vital issue, such change clearly being made to meet the exigencies of pending litigation, the testimony is discredited as a matter of law and should be disregarded. Momsen v. Nebraska Methodist Hospital 45
2. In the foregoing situation, it is immaterial whether the contradictory testimony is given in a retrial of the same proceeding, in a pretrial deposition in pending litigation, or in related litigation under the same set of facts. The important considerations are that the testimony pertains to a vital point, that the party clearly made the change to meet the exigencies of the pending case, and that no rational or sufficient explanation for the change in testimony exists. Momsen v. Nebraska Methodist Hospital 45
3. An exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which testimony was given. State v. Pittman 117

4. Neb. Rev. Stat. § 27-605 (Reissue 1979) states that the judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point. Cline v. Franklin Pork, Inc. 238
5. Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. Smith v. Erftmier 486
6. The test of mental competency to stand trial is whether the defendant has capacity to understand the nature and object of the proceedings against him; to comprehend his own condition in reference to such proceedings; and to make a rational defense. State v. Bolton 694
7. If facts are brought to the attention of the court which raise a doubt as to the sanity of the defendant, the question of competency should be determined at that time. The question of competency to stand trial is one of fact to be determined by the court and the means employed in resolving the question are discretionary with the court. State v. Bolton ... 694
8. The issues as framed in the trial court, and upon which the cause was tried, are binding upon the parties in the case on appeal to this court. Trump, Inc. v. Sapp Bros. Ford Center, Inc. 824

Trusts.

1. A trustee may not offset against the trust account a debt owing to the trustee individually and not as trustee. Under the regulations issued by the Secretary of Agriculture under 7 U.S.C. § 228 (1976), the custodial account of a market agency is a trust fund of which the marketing agency is a trustee. The misuse of a custodial account by a marketing agency is an unjust practice under the provisions of 7 U.S.C. § 208(a) (1976), and the marketing agency may be liable under the provisions of 7 U.S.C. § 209(a) (1976) to the person injured by such misuse. Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc. 382
2. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. Nemaha Nat. Resources Dist. v. Neeman 442
3. A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. Nemaha Nat. Resources Dist. v. Neeman 442
4. The statute of limitations does not begin to run against the rights of the beneficiaries of such a constructive trust until they are apprised of the fact that the trustee does not

intend to carry out the provisions of the trust. Nemaha Nat. Resources Dist. v. Neeman 442

Uniform Commercial Code.

1. A transfer of repossessed collateral to a seller by a finance company pursuant to a guaranty is not a sale or disposition of the collateral. Treptow Co. v. Duncan Aviation, Inc. 72
2. The validity of a notice of sale of collateral under Neb. U.C.C. § 9-504 (Reissue 1980) does not depend upon whether the notification actually reached the person to whom it was sent. The statute is satisfied if the steps taken were such as would be reasonably required to inform the person to be notified in the ordinary course. State Bank of Litchfield v. Lucas 400
3. The direct effect of a sale that is not commercially reasonable under Neb. U.C.C. § 9-504 (Reissue 1980) is to alter the measure of the deficiency. In such case the fair and reasonable value of the collateral as of the time of the sale is offset against the balance due on the security agreement. State Bank of Litchfield v. Lucas 400

Valuation.

1. The trial of an appeal from a county board of equalization involving the valuation of real estate both in the District Court and the Supreme Court is de novo as an equitable proceeding. Beaver Lake Assn. v. County Board of Equalization 247
2. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Beaver Lake Assn. v. County Board of Equalization 247
3. Such presumption disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, with the burden of showing such valuation to be unreasonable resting upon the appellant on appeal from the action of the board. Beaver Lake Assn. v. County Board of Equalization 247
4. The burden which the appellant must carry in order to be successful on appeal is to demonstrate by the evidence that the assessment is grossly excessive and is a result of arbitrary or unlawful action, and not a mere error of judgment. It is only where such assessed valuations are not in accordance with law, or it is made to appear that they were made arbitrarily or capriciously, that courts will interfere. Beaver Lake Assn. v. County Board of Equalization 247

Vendor and Vendee.

Generally, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties. Ludwig v. Matter 87

Verdicts.

1. In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter. Neb. Rev. Stat. § 29-2027 (Reissue 1979). State v. Rowe 419
2. The verdict of a jury will not be set aside on appeal unless it is clearly wrong. Diesel Service, Inc. v. Accessory Sales, Inc. 797
3. In determining whether the evidence is sufficient to sustain a jury 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. Diesel Service, Inc. v. Accessory Sales, Inc. 797
4. A verdict by a trier of fact in a criminal proceeding will be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Hilker 810

Visitation.

The law contemplates visitation by the noncustodial parent within the state. Gottschall v. Gottschall 679

Waiver.

1. A plea of guilty embodies a waiver of every defense to a charge, whether procedural, statutory, or constitutional. Marteney v. State 172
2. Mental capacity of the defendant at the time of an alleged offense is waived as a defense by a plea of guilty voluntarily and understandingly entered. Marteney v. State 172

Waters.

1. The Department of Water Resources is expressly authorized by statute, after notice and hearing, to forfeit a water right where it appears that the 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. In re Water Appropriation Nos. 442A, 461, 462, and 485 161

2. Where it appears that irrigation water has not been applied to lands described in an adjudicated appropriation for the statutory period of 3 years, such nonuse will result in the loss of the right, although the right is one that is termed a vested, adjudicated right. In re Water Appropriation Nos. 442A, 461, 462, and 485 161
3. In a proceeding to cancel a water appropriation pursuant to Neb. Rev. Stat. § 46-229.02 (Reissue 1978), the initial burden of proof is upon the Department of Water Resources. This burden is met upon the filing of the verified report of the water commissioner or engineers of the Department pursuant to § 46-229.04. Thereafter, the burden is upon the appropriator to show cause why the appropriation should not be canceled. In re Water Appropriation Nos. 442A, 461, 462, and 485 161

Wills.

1. A latent ambiguity exists in a will when a beneficiary is erroneously described, where no such beneficiary has ever existed as so described, or when two or more persons or organizations answer the description imperfectly. In re Estate of Bernstrauch 135
2. Extrinsic evidence is admissible both to disclose and to remove a latent ambiguity. In re Estate of Bernstrauch ... 135
3. No charitable or benevolent bequest or devise which is otherwise valid shall be invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries. Neb. Rev. Stat. § 30-239 (Reissue 1979). This section is the statutory expression of the doctrine of *cy-pres* applicable to wills. In re Estate of Bernstrauch 135
4. The doctrine of *cy-pres* is applicable when the devise or bequest in question has an apparent dominant charitable intent and there is in existence an identifiable beneficiary whose charitable intent and purpose is reasonably close to the intent and purpose expressed by the testatrix. In re Estate of Bernstrauch 135
5. It is impossible to convey an absolute title to real estate in fee simple by deed or will, and at the same time in the same instrument convey to the same person a limited right or title in the same land. Sterner v. Nelson 358
6. If a deed or will conveys an absolute title in fee simple, an inconsistent clause in the instrument attempting merely to limit that title or convey to the same person a limited title in the same land will be disregarded. Sterner v. Nelson 358
7. Where there is a grant, devise, or bequest to one in general terms only, expressing neither fee nor life estate, and there is a subsequent limitation over of what remains at the first taker's death, if there is also given to the first taker an unlimited and unrestricted power of absolute disposal, express or implied, the grant, devise, or bequest to the first

taker is construed to pass a fee. The attempted limitation over, following a gift which is in fee with full power of disposition and alienation, is void. Sterner v. Nelson 358

8. In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true intent of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law. Neb. Rev. Stat. § 76-205 (Reissue 1976). Znamenacek v. Menke 671
9. A future interest is vested when there is no condition precedent to its taking effect in possession other than the termination of prior estates. Znamenacek v. Menke 671
10. The law favors the early vesting of estates, and in construing a will containing a devise of a life estate and a devise of the remainder, the inference of a vested remainder is stronger than the inference of a contingent remainder if the meaning is obscure in this respect. Znamenacek v. Menke 671
11. Whenever it is possible, a future interest will be construed as vested, and hence alienable and devisable by the remainderman. Znamenacek v. Menke 671
12. A remainder is vested if the remainderman, being alive, will take at once if the life tenant were to die. It is not the certainty of possession or enjoyment which distinguishes a vested remainder, but the certainty of the right of future possession or enjoyment if the remainderman who is ascertained lives until the determination of the preceding estate. Znamenacek v. Menke 671

Witnesses.

1. Where a party, without reasonable explanation, changes his testimony concerning the material facts on a vital issue, such change clearly being made to meet the exigencies of pending litigation, the testimony is discredited as a matter of law and should be disregarded. Momsen v. Nebraska Methodist Hospital 45
2. In the foregoing situation, it is immaterial whether the contradictory testimony is given in a retrial of the same proceeding, in a pretrial deposition in pending litigation, or in related litigation under the same set of facts. The important considerations are that the testimony pertains to a vital point, that the party clearly made the change to meet the exigencies of the pending case, and that no rational or sufficient explanation for the change in testimony exists. Momsen v. Nebraska Methodist Hospital 45
3. Testimony by witnesses as to acts done and words spoken by a defendant as the basis for an opinion that the defendant was

under the influence of intoxicating liquor is direct or positive, and not circumstantial, evidence. State v. Betts 348
4. Except as specifically provided otherwise by the rules of evidence, every person is competent to be a witness about those things of which he has personal knowledge. Tuch v. Tuch 601
5. The right of an accused under the sixth amendment to the Constitution of the United States to confront the witnesses against him is a fundamental right made obligatory upon the states by the fourteenth amendment. State v. Thaden ... 622
6. The right of cross-examination is an essential and fundamental requirement of a fair trial which is the constitutional goal of this country. State v. Thaden 622
7. The right of a defendant to engage in a searching and wide-ranging cross-examination is an essential requirement for a fair trial. State v. Thaden 622
8. Cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of a witness. State v. Thaden 622
9. Anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination. State v. Thaden 622
10. The scope of cross-examination of a witness rests largely in the discretion of the trial court and its ruling will be upheld on appeal unless there is an abuse of discretion. State v. Thaden 622
11. The supervisor of all billing records is an appropriate witness with regard to such billing records, assuming such witness complies with the requirements of Neb. Rev. Stat. § 27-803(5) (Reissue 1979). City of Lincoln v. Bud Moore, Inc. 647
12. Violation of a sequestration order is not reversible error in the absence of prejudice to the defendant. State v. Bradley 882

Words and Phrases.
1. Misconduct has been defined by various courts as a deliberate, willful, or wanton disregard of an employer's interest or of the standards of behavior which the employer has a right to expect of his employees, or carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design. Bristol v. Hanlon 37
2. For the purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same thing. Beaver Lake Assn. v. County Board of Equalization 247
3. Claim of right or claim of ownership means hostile, and these terms describe the same element of adverse possession. Berglund v. Sisler 258
4. One who, solely for his own personal pleasure, convenience, or benefit, enters the premises of another with the consent of

the latter but without an invitation, express or implied, is a bare licensee. McCurry v. Young Men's Christian Assn. 278

5. Serious bodily injury is defined as "bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." Neb. Rev. Stat. § 28-109(20) (Reissue 1979). State v. Thomas 298
6. In workmen's compensation cases the term "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope or sphere of the employee's job. The term "in the course of" refers to the time, place, and circumstances surrounding the accident. The two phrases are conjunctive and the claimant must establish by a preponderance of the evidence that both conditions exist. Union Packing Co. v. Klauschie .. 331
7. An accident is defined as an unexpected or unforeseen injury happening suddenly and violently and producing at the time objective symptoms of an injury. Union Packing Co. v. Klauschie 331
8. The terms "injury" and "personal injuries" shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. Union Packing Co. v. Klauschie 331
9. The terms practice and practices in 7 U.S.C. § 208(a) (1976) do not necessarily require repetitious acts. The term practice may involve only a single transaction if the unjust or unreasonable practice is among the evils the Packers and Stockyards Act was intended to remedy. Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc. 382
10. A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. Neb. Rev. Stat. § 28-304 (Reissue 1979). State v. Rowe 419
11. A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305 (Reissue 1979). State v. Rowe 419
12. Malice denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. Absence of malice may exist where the killing occurs upon a sudden quarrel. State v. Rowe 419
13. The term "a majority of the supervisors," as found in Neb. Rev. Stat. § 2-1519 (Reissue 1974), as applied to this case means a majority of all the supervisors of the Otoe Soil and Water Conservation District board of supervisors. Nemaha Nat. Resources Dist. v. Neeman 442

14. The definitions of aggravating circumstances in Neb. Rev. Stat. § 29-2523 (Reissue 1979) are not too broad or vague and will be given a narrow construction and narrow application, and as so construed and applied are constitutional. State v. Moore 457
15. A state of mind of the accused which indicates a callous disposition to repeat the crime of murder manifests exceptional depravity by ordinary standards of morality and intelligence within the meaning of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979). State v. Moore 457
16. While the term adjoin, as used in Neb. Rev. Stat. § 79-403 (Reissue 1976), ordinarily means touching or having a common boundary, it may also include a situation where the boundaries, although not touching, are separated only by a streambed which is not part of any school district. In re Freeholders Petition 583
17. The phrase "on the courthouse door," as found in Neb. Rev. Stat. § 25-1529 (Reissue 1979), is to be given a practical and reasonable interpretation, rather than a literal or technical construction, and a notice of public sale posted on a bulletin board near the courthouse door satisfies the statute's requirements. Kleeb v. Kleeb 637
18. Where the primary term of an oil and gas lease has expired and the lease continues in force by production, it is elementary that the lease will come to an end when the property ceases to "produce," as that term is defined in the various jurisdictions. In such cases it is not necessary that the lessor take any action to effect termination; the lease simply expires. Kirby v. Holland 711
19. The word "accident," as used in an automobile liability policy, is a more comprehensive term than "negligence," and, in its common signification, means an unexpected happening without intention or design. A policy covering liability arising from an accident, or from injuries accidentally sustained, does not cover an injury resulting from the willful act of insured, but it does cover claims based on negligence, recklessness, or wanton misconduct, where no intent or purpose to injure is shown. Sullivan v. Great Plains Ins. Co. 846

Workmen's Compensation.

1. In reviewing workmen's compensation cases, this court is bound by the provisions of Neb. Rev. Stat. § 48-185 (Reissue 1978). Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
   Shaw v. Gooch Feed Mill Corp. 17
   Union Packing Co. v. Klauschie 331

2. In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably deducible from it.
   Shaw v. Gooch Feed Mill Corp. 17
   Erving v. Tri-Con Industries 339
   Davis v. Western Electric 771
3. It is not the precise type of work that determines whether or not a workman is totally and permanently disabled, but, rather, total and permanent disability contemplates inability of the workman to perform any work in which he has experience or the capacity to perform. Shaw v. Gooch Feed Mill Corp. 17
4. Findings of fact made by the compensation court will not be set aside on appeal unless clearly wrong. However, where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact do not support the award, this court must modify, reverse, or set aside the award. Husted v. Peter Kiewit & Sons Constr. Co. 109
5. Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony. Husted v. Peter Kiewit & Sons Constr. Co. 109
6. A workmen's compensation award cannot be based upon possibility or speculation. If an inference favorable to the claimant can only be reached upon the basis of possibility or speculation, he cannot recover. Husted v. Peter Kiewit & Sons Constr. Co. 109
7. An award cannot be based upon conflicting inferences of equal degrees of probability. Husted v. Peter Kiewit & Sons Constr. Co. 109
8. In workmen's compensation cases the term "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope or sphere of the employee's job. The term "in the course of" refers to the time, place, and circumstances surrounding the accident. The two phrases are conjunctive and the claimant must establish by a preponderance of the evidence that both conditions exist. Union Packing Co. v. Klauschie .. 331
9. The primary purpose of the Workmen's Compensation Act is to insure an employee against accidental injury arising out of and in the course of his employment. To accomplish this purpose the act should be liberally construed, not to find that liability exists without the required quantum of

proof, but to include within the protection of the act by liberal interpretation all injuries arising out of and in the course of the employment which the act does not clearly exclude. A strict interpretation should not be resorted to in order to accomplish such exclusion. Union Packing Co. v. Klauschie .. 331

10. Where a record presents nothing more than conflicting medical testimony, we will not substitute our judgment for that of the Workmen's Compensation Court.
    Union Packing Co. v. Klauschie 331
    Davis v. Western Electric 771
11. An accident is defined as an unexpected or unforeseen injury happening suddenly and violently and producing at the time objective symptoms of an injury. Union Packing Co. v. Klauschie 331
12. The terms "injury" and "personal injuries" shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. Union Packing Co. v. Klauschie 331
13. The Supreme Court is not free in workmen's compensation cases to weigh the facts anew. The Supreme Court's standard of review must accord to the findings of the compensation court the same force and effect as a jury verdict in a civil case, and they will not be set aside unless clearly wrong.
    Erving v. Tri-Con Industries 339
    Davis v. Western Electric 771
14. The requirement of objective symptoms of an injury produced at the time of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown. Erving v. Tri-Con Industries 339
15. The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment. Davis v. Western Electric 771
16. Unless the character of an injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony. Davis v. Western Electric 771
17. An allegation that an employee suffers from a psychogenic pain disorder raises a subjective condition and requires competent medical testimony to show a causal connection between the alleged injury, the employment, and the disability. Davis v. Western Electric 771
18. If psychiatric treatment is prescribed, refusal may be deemed unreasonable in view of the absence of any physical suffering in the treatment. Davis v. Western Electric 771

Wrongful Death.

The presumption in an action for wrongful death that a decedent exercised reasonable care for his or her own safety has no probative force, is a mere rule of law, obtains only in the absence of direct or circumstantial evidence justifying an inference on the subject, and disappears when evidence is produced. Gerhardt v. McChesney 351

Zoning.

1. In order to have standing as an aggrieved person for the purpose of attacking a change of zone, the plaintiff must demonstrate that he suffers a special injury different in kind from that suffered by the general public. Copple v. City of Lincoln 504
2. An increase in business competition is not alone sufficient to confer standing to challenge a change of zone. Copple v. City of Lincoln 504