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PATRICIA L. SAIN, APPELLEE, V. RICHARD H. SAIN, APPELLANT.

319 N.W.2d 107

Filed May 7, 1982. No. 44311.

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

John B. Ashford of Bradford, Coenen & Ashford, for appellant.

Steven J. Lustgarten of Lustgarten & Roberts, for appellee.

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

KRIVOSHA, C.J.

The instant case is a companion case to *In re Guardianship of Sain, ante* p. 508, 319 N.W.2d 100 (1982), decided this day by the court. We hold that the decision of the trial court temporarily suspending appellant's rights of visitation and temporarily suspending his obligation to pay child support pending the outcome of the appeal in the guardianship case was not a final order and therefore is not appealable. See, Neb. Rev. Stat. §§ 25-1902, 25-1911 (Reissue 1979); *Essay v. Essay,* 180 Neb. 291, 142 N.W.2d 337 (1966); *Martin v. Zweygardt,* 199 Neb. 770, 261 N.W.2d 379 (1978).

APPEAL DISMISSED.

IN RE INTEREST OF DIANE MARIE AND DAWN MICHELLE BRUNGARDT, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. KATHY BRUNGARDT ET AL., APPELLANTS.

319 N.W.2d 109

Filed May 7, 1982. No. 44316.

1. **Parental Rights.** An order terminating parental rights under Neb.

Rev. Stat. § 43-209 (Reissue 1978) must be based on clear and convincing evidence.

2. **Parental Rights: Child Custody.** The State may not deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
3. _____: _____. The right of a parent to custody and control of his or her child is a natural, but not an inalienable, right. The public has a paramount interest in the protection of children from abuse and neglect.
4. **Parental Rights.** It is not the law in this state that parental rights may not be terminated unless the parent is given a reasonable opportunity to rehabilitate himself.
5. **Juvenile Courts: Parental Rights.** However, a court may order a parent to make reasonable efforts to rehabilitate, and failure of those efforts is another independent reason for justifying termination of parental rights.
6. **Parental Rights.** Termination of parental rights is a last resort and should be implemented only when no other reasonable alternative exists.
7. _____. When the natural parents cannot rehabilitate themselves within a reasonable time, the best interests of the children require that a final disposition be made without delay.
8. _____. Although termination of parental rights may not be decreed for the sole purpose of facilitating adoption, nevertheless, children have a right to grow up in a safe and healthy environment.
9. **Juvenile Courts: Appeal and Error.** Although our review of parental termination proceedings is de novo on the record, findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and the witnesses.

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

Leonard Shefren of Shefren Law Offices, P.C., for appellant Kathy Brungardt.

Melvin C. Hansen of Hansen & Engles, P.C., for appellant Daniel Brungardt.

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

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

HASTINGS, J.

This is an appeal by Kathy Brungardt and Daniel Brungardt from an order of the separate juvenile court of Douglas County terminating the parental rights of the natural mother, Kathy Brungardt, as to her minor children, Diane and Dawn, and the parental rights of the natural father, Daniel Brungardt, as to his minor child, Dawn. It had earlier been determined that Daniel was not the natural father of Diane. The appellants assign as error generally that the termination was not supported by clear and convincing evidence, and specifically that the court erred in not implementing less restrictive alternatives prior to terminating the respective parental rights.

Diane and Dawn are currently 4 and 3 years of age, respectively. Their birth dates are January 8, 1978, and January 30, 1979. A petition was filed on January 17, 1980, by the Douglas County attorney's office, alleging that the two girls came within the meaning of Neb. Rev. Stat. §§ 43-202(2)(b) and 43-209(2) (Reissue 1978), and requesting the termination of both parents' parental rights.

A detention hearing held on February 6, 1980, resulted in a finding by the court that the "children were seriously endangered in their surroundings." Consequently, the children were placed in the custody of the Douglas County Social Services for foster care placement. Following a May 15, 1980, adjudication hearing, the court found that each child fell within the meaning of §§ 43-202(2)(b) and 43-209(2) with regard to each girl's natural parents. The appellants' parental rights were taken under advisement.

A disposition hearing was held on July 1, 1980, at which time several reports from various social agencies were introduced into evidence. The court issued the following order in response to these reports: That Kathy undergo psychological and psychiatric evaluation and therapy; that Daniel con-

sent to the release of his report from the Hastings Regional Center; that both parents attend parenting classes; that both parents maintain full-time employment and adequate housing; that each visit the girls regularly; and that each cooperate with the various social services in completing a rehabilitation plan. Kathy was also to receive extended visitation rights after she had attended two parenting classes.

At a review hearing on September 3, 1980, the court received various reports outlining the results of the testing and evaluation it had ordered on July 1. In addition, it received reports from two social service workers reporting on the progress made by the parents since July 1, 1980. These latter two reports contained the recommendation that the children remain in the custody of the Douglas County Social Services, with a continuation of the extended visits earlier granted to Kathy. The court also received a recommendation from its own service officer to the effect that the children be placed in the mother's custody. The court followed this latter recommendation and placed the girls in the custody of the mother and ordered the mother to continue with her rehabilitation program.

The children were returned to the custody of the Douglas County Social Services following a September 18th incident, and a detention hearing was held on October 1, 1980. A final hearing on this matter was held on March 11, 1981, at which time the court determined that Daniel and Kathy had failed to demonstrate "that the causes of the neglect and abuse apparent from 1978 to today's date have abated, but rather that the peculiar personality traits which led to the neglect and abuse have deepened and hardened." Therefore, the court concluded that "long term foster care . . . would be totally inappropriate" in this instance and terminated the rights of both parents, pursuant to § 43-209(2).

The evidence adduced at these numerous hearings concerning the father revealed a long history of drug use and abuse and some dealing, a history of Daniel physically abusing Kathy, and reports of one instance where Daniel inadvertently struck Diane and of another instance where he slapped Diane "very hard" for crying. The evidence also revealed that Daniel made very little progress during the efforts at rehabilitation. In August 1980 he moved to Denver, Colorado, where he was infrequently employed and was reportedly discovered by Kathy to be using and dealing in drugs while living with two other men, a woman, and two children. The record also indicates that Daniel failed to make bimonthly support payments as ordered by the court, but did in fact make one lump sum payment on March 3, 1981. Daniel's visit with the girls, other than on the date of the final hearing, occurred in July 1980. Daniel's principal excuse for failing to visit the children and for not meeting the support payments was a lack of money caused by his inability to work due to injuries suffered in an October 4, 1980, accident. Finally, the record reveals that Daniel failed to participate in any parenting classes while in Colorado because, in his own words, "I feel that I treat my children right."

The record is somewhat more severe in what it reveals about Kathy and her treatment of the children. It contains the testimony of three witnesses who either observed or heard Kathy strike or verbally abuse Dawn or Diane. One of these occasions left a visible handprint and scratch on Dawn's face. The final instance involved an incident occurring on September 18, 1980, when, according to the testimony of the witness, Kathy struck Dawn in the face and about the body, kicked her with such force as to cause her to fall and strike her head on the floor, and finally threw the child back onto the couch after she had rolled off of it. After this latter incident,

Dawn stopped breathing for a short period and was taken to the hospital by Kathy for treatment. The treating physician termed Dawn's injuries, a bruised forehead and small abrasion, as not serious and was unable to say whether they resulted from child abuse. Another physician testified that the events as described by the witness met the definition of child abuse and that the cessation of breathing could result from a blow to the head. While Kathy admitted that she did hit the children at times, she denied ever having beaten them and flatly denied that the September 18, 1980, incident occurred as the witness described. No explanation was offered as to why these other witnesses would lie about the beatings.

The record also reveals that Kathy made a misrepresentation of fact to the court on at least one occasion when the court was allowed to proceed under the impression that Kathy was living in an apartment on September 3, 1980, when it returned the children to the mother's physical custody. The actual circumstances were that Kathy had been evicted from her apartment the morning of the hearing and had planned to reside with Daniel's parents after receiving custody of the children. This in part led the court to conclude that "Kathy distorts the truth whenever it suits her purposes and it becomes very difficult for the Court to glean truth from Kathy's statements about her ability to ever adequately parent her children."

The evidence and testimony make it apparent that Kathy was making a minimal effort to rehabilitate herself prior to September 18, 1980. She presented herself for evaluation by a psychologist and a psychiatrist as ordered by the court on July 1, 1980, although the reports of the psychologist spoke of her "angry hostility" during the interview and the psychiatrist noted the difficulty Kathy had trusting other people. It is also obvious that prior to the

September 18, 1980, incident, Kathy was uncooperative with the social service workers with whom she had to deal. While Kathy was inconsistent with her visits to the children prior to the July 1 hearing, she eventually did visit them regularly and was even able to take them on two extended overnight visits prior to regaining custody of them on September 3, 1980.

According to the social workers, this minimal effort was significantly altered by the September 18, 1980, incident. Thereafter, the social services caseworkers noted a change in Kathy's attitude. Since the incident, Kathy was able to obtain her G.E.D. certificate, was receiving therapy from the Nebraska Psychiatric Institute, was attending parenting classes, and was employed as a waitress. Kathy's positive parenting counselor testified that Kathy was making a good effort at improving her parenting skills, although she was not sure Kathy could apply these skills in raising her children. A caseworker noted that the children appeared to be a little more excited about seeing their mother during visitations than they had been earlier.

The social workers also commented on Kathy's emergence from the "self-denial stage," a stage during which she could not admit that her actions had caused problems for the children. One caseworker noted that a week after Dawn was taken to the hospital Kathy was able to say to her that she knew that what she had done was wrong and that she had hurt her child. However, on the witness stand during the March 11, 1981, hearing, Kathy denied having struck Dawn in the manner described by the witness, and proceeded to place the blame for all of her problems on Daniel and his family. Therefore, one must question whether Kathy had fully emerged from the "self-denial stage."

In spite of all the improvement the caseworkers had noticed in Kathy, neither was able to make a rec-

ommendation as to what course of action the court should have adopted concerning Kathy's parental rights. One caseworker even admitted that she was unsure whether Kathy could be rehabilitated. However, another caseworker felt that there would be no harm in preserving Kathy's parental rights and allowing bimonthly visitations. Based on the somewhat equivocal opinions given by the social workers, the guardian ad litem said, "I have trouble recommending termination at this time with Kathy."

With regard to the parental rights of Daniel, the court found that the "evidence convincingly shows continued deterioration in his stability, which implies that at no time in the foreseeable future would Daniel be able to adequately parent the children in interest." Consequently, the court terminated Daniel's parental rights in Dawn Michelle Brungardt. In addressing the evidence against Kathy, the court noted Kathy's "mistreatment" of the children. The court also placed much emphasis on the fact that Kathy had led the court to believe that she was prepared to receive custody of the children on September 3, 1980, when only 15 days later she inflicted sufficient harm to Dawn to require hospitalization. Feeling that it would "not [be] justified in risking the health and welfare of the children in interest," the court terminated Kathy's parental rights in both children. Both parents have appealed.

We note that an appeal from an order terminating parental rights requires a de novo review and that an order under § 43-209 must be based on clear and convincing evidence. The State may not 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,* 210 Neb. 1, 312 N.W.2d 454 (1981). We must emphasize that " '[t]he right of a parent to custody and control of his [or her] child is a natural, but not an

inalienable, right. The public has a paramount interest in the protection of children from abuse and neglect.' " *In re Interest of Wood and Linden,* 209 Neb. 18, 24, 306 N.W.2d 151, 155 (1981).

A review of the record makes it obvious that the order terminating Daniel's parental rights was supported by clear and convincing evidence. His inability to secure and maintain employment, his use and abuse of drugs, and his propensity to physical violence all indicate to a sufficient degree that he is an unfit parent and that the best interests of the children, which are the primary concern of the courts in these cases, are best served by the termination of Daniel Brungardt's parental rights.

The question raised by Mr. Brungardt regarding the court's failure to use less restrictive means of dealing with the issue has recently been addressed by this court. We have noted that "it is not the law in this state . . . that 'parental rights may not be terminated unless the parent is given a reasonable opportunity to rehabilitate himself.' " A court may, however, within its discretion, order a parent to make reasonable efforts to rehabilitate, and "failure of those efforts is another independent reason justifying termination of parental rights." *In re Interest of Wood and Linden, supra* at 23-24, 306 N.W.2d at 154. See § 43-209(6). Furthermore, "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, supra* at 7, 312 N.W.2d at 457.

In the present action, the juvenile court, even though it was not required to do so, gave Mr. Brungardt ample time to rehabilitate himself. He expended very little, if any, effort in an attempt to do so in the year and 2 months following the filing of the petition by the county attorney. It has been established by clear and convincing evidence that Mr.

Brungardt has continuously and repeatedly neglected his natural child, Dawn, and has failed to give the child the necessary parental care and protection. Therefore, the best interests of the child are served by the termination of Mr. Brungardt's parental rights, and we affirm the juvenile court's order doing so.

The circumstances surrounding Mrs. Brungardt's situation present a more complex problem. While it is quite apparent that she made little effort to rehabilitate herself prior to the September 18, 1980, incident, the evidence is uncontroverted that her attitude changed significantly thereafter. Mrs. Brungardt received her G.E.D. certificate, was undergoing psychiatric therapy, was attending parenting classes in an attempt to improve her parenting skills, and had secured employment as a waitress. All of these efforts apparently had some impact on the children as well, since it was reported that they were a little more excited about seeing their mother during visitations than they had been earlier.

We have made it clear in the past that termination of parental rights is indeed a last resort and should be implemented only when no other reasonable alternative exists. *In re Interest of Hill,* 207 Neb. 233, 298 N.W.2d 143 (1980); *In re Interest of Holley,* 209 Neb. 437, 308 N.W.2d 341 (1981). However, as we have said earlier, when the natural parents cannot rehabilitate themselves within a reasonable time, the best interests of the children require that a final disposition be made without delay. *Stoppkotte, supra.* Although termination of parental rights may not be decreed for the sole purpose of facilitating adoption, nevertheless, children have a right to grow up in a safe and healthy environment. Each day's delay in making them available for permanent placement in such surroundings causes such right to become increasingly unobtainable. *In re Interest of Carlson,* 207 Neb. 540, 299 N.W.2d 760 (1980).

Although our review is de novo, as indicated earlier, nevertheless, we have held that "findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses." *In re Interest of Chirnside,* 209 Neb. 750, 757, 311 N.W.2d 876, 879 (1981). To that extent, we are entitled to place some reliance upon the findings made by the trial court in its comments at the close of the final hearing: "There was a finding that the children shouldn't be placed in their home or in the home of either one for a time. Upon the sincerity demonstrated by Kathy Brungardt and on the recommendation of other agency personnel, the children were replaced with her. Two weeks later one of the children was hospitalized, had stopped breathing. And when you're talking about stopping breathing, in my opinion, you're discussing something that's very close to death. And that was Kathy Brungardt's obvious fear from her testimony. And what I have to weigh is whether I want to put those children in a situation where that possibly could happen again. Because I have the same sincerity before me today of Kathy Brungardt. She always seems to do quite well when the children are not with her and makes substantial strides. But as we saw two weeks after they were placed back with her, one child was traumatized, injured, and in this Court's opinion, there was no question but that Maureen McClintock was telling the truth as she knew it. And the obvious inference from that is that Kathy Brungardt was lying when she testified on the witness stand just as she has lied . . . on September 3rd."

In view of her past performance, we do not believe that Kathy should ever be allowed to be alone with these children. The record does not support a finding that she has made any appreciable improvement in her ability to safely care for these children. To the contrary, it suggests that she still refuses to face

reality and insists on now denying facts she once admitted.

In our opinion, the record supports by clear and convincing evidence the judgment of the separate juvenile court in terminating the parental rights of both parents. Its judgment is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I find that I must respectfully dissent from the majority's opinion in this case. The record discloses that just at the time when the mother appears to be making the progress which we would hope she would make, we terminate her parental rights. As noted by the majority, since September 18, 1980, the mother's attitude has noticeably changed. She has obtained her G.E.D. certificate and was receiving therapy from the Nebraska Psychiatric Institute. Moreover, she is attending parenting classes and is employed as a waitress. Her positive parenting counselor testified that she was making a good effort at improving her parenting skills, although she was not sure that she could apply these skills in raising her children. The caseworker noted that the children appeared to be a little more excited about seeing their mother during visitations than they had been earlier. Even the guardian ad litem said that he had trouble recommending termination at this time.

The majority notes that the termination of parental rights should be a last resort that should be implemented only when no other reasonable alternative exists, citing *In re Interest of Hill,* 207 Neb. 233, 298 N.W.2d 143 (1980), and *In re Interest of Holley,* 209 Neb. 437, 308 N.W.2d 341 (1981). Because I agree with that proposition of law, I do not believe that this record clearly and convincingly establishes that termination is the only reasonable alternative remaining. I would have reversed the trial court's order terminating the parental rights of the children

as to the mother and would have continued the program of rehabilitation under court supervision. Once the parental rights of the mother are not terminated, little purpose is served in terminating the rights of the father. For that reason, I would have reversed and remanded this case so as to continue the children in supervised foster care, with the expectation that the mother's behavior would continue to improve, as it was improving, and that ultimately the children could be returned to their mother. If that did not prove out, there would still be time to terminate the parental rights.

STATE OF NEBRASKA, APPELLEE, V. BRENT HUBBARD, APPELLANT.

319 N.W.2d 116

Filed May 7, 1982. No. 44506.

1. **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.
2. _____: _____. Premeditation and deliberation and a purpose to kill are not elements of felony murder.
3. **Homicide: Lesser-Included Offenses: Jury Instructions.** Where an information charges a defendant with a killing committed in the perpetration of or attempt to perpetrate one of the specific felonies set out in Neb. Rev. Stat. § 28-303(2) (Reissue 1979), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested.

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

Dennis P. Lee of Thompson, Crounse & Pieper, for appellant.

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

Heard before BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired, and RONIN, D.J., Retired.

MCCOWN, J.

After trial to a jury the defendant was found guilty of killing Joseph Johnson during the perpetration of or attempt to perpetrate a robbery. Defendant appeals from a sentence of life imprisonment.

The record shows that the defendant Brent Hubbard, Juan Bradley, and Crystal Reynolds were together on the afternoon and early evening of March 8, 1981. Bradley wanted to rob someone in order to buy drugs. Bradley asked the defendant to help "do a robbery." The defendant agreed and Bradley gave defendant a gun. At around 8 p.m., while Bradley and Reynolds waited on the sidewalk, the defendant knocked on the front door of a house at 3110 Nicholas Street in Omaha, Nebraska. When his knock was answered the defendant attempted to gain entrance into the house but was unsuccessful.

When the defendant returned to the sidewalk, Bradley, Reynolds, and the defendant continued to walk in the area. Bradley told the defendant: "I want you to make me some money, man." Reynolds testified that at that point the defendant decided to rob "just anybody."

Shortly thereafter, the defendant went to the home of the victim at 3111 Myrtle Street. When the victim answered the door the defendant apparently asked for directions. When the victim stepped out onto the porch the defendant shot and fatally wounded the victim, Joseph Johnson. When Bradley and Reynolds heard the shot they ran from the scene.

The defendant's principal contention on appeal is that the trial court erred in refusing to instruct the jury on second degree murder and manslaughter. The defendant's position is that these are lesser-included offenses as to which he was entitled to an

instruction where the offense charged was first degree felony murder under Neb. Rev. Stat. § 28-303(2) (Reissue 1979).

Ordinarily 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. *State v. Rowe,* 210 Neb. 419, 315 N.W.2d 250 (1982). The defendant's argument as to lesser-included offenses in the case at bar ignores the critical differentiation between a felony murder charge and a regular first degree murder charge with respect to intent.

In *State v. Montgomery,* 191 Neb. 470, 473, 215 N.W.2d 881, 883 (1974), 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."

In *State v. McDonald,* 195 Neb. 625, 636-37, 240 N.W.2d 8, 15 (1976), 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. Second degree murder or manslaughter are included within a regular charge of first degree murder because the mental state of the defendant determines the degree of the crime. 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. Where an information charges a defendant with a killing committed in the perpetration of a robbery, it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of manslaughter, even though such an instruction is requested."

In *State v. Bradley,* 210 Neb. 882, 317 N.W.2d 99 (1982), we held that 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, and that premeditation and deliberation and a purpose to kill are not elements of felony murder. We approved the statement: " '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 . . . .' " *Id.* at 885, 317 N.W.2d at 101-02.

Where an information charges a defendant with a killing committed in the perpetration of or attempt to perpetrate one of the specific felonies set out in § 28-303(2), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested.

There being no error, the judgment of the District Court is affirmed.

AFFIRMED.

IN RE VALUATION AND EQUALIZATION OF PROPERTY FOR THE TAX YEAR 1981.

CHUCK BEERMANN ET AL., APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT OF THE STATE OF NEBRASKA, APPELLEE.

319 N.W.2d 118

Filed May 7, 1982. No. 81-584.

Tax Assessments: Administrative Orders: Appeal and Error. The burden of proof is on the appellant to establish that an order of the State Board of Equalization and Assessment was erroneous.

Appeal from the State Board of Equalization and Assessment. Affirmed.

Smith, Smith & Boyd, for appellants.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellee.

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

PER CURIAM.

The appellants are owners of irrigated land in Dakota County, Nebraska. They appeal from an order of the State Board of Equalization and Assessment that increased the valuation of all irrigated land in Dakota County, Nebraska, by 17.64 percent.

On May 28, 1981, the county board of equalization of Dakota County, Nebraska, decreased the valuation of all irrigated land in Dakota County by 15 percent. On July 9, 1981, Dakota County was ordered to appear and show cause on July 21, 1981, why the valuation of all classes of irrigated land in Dakota County should not be increased 17.64 percent.

The appellants appeared by counsel at the hearings on July 21, 1981, and August 4, 1981. Evidence was presented on behalf of the appellants and by the Department of Revenue. At the conclusion of hearings on August 4, 1981, the State Board voted to in-

crease the valuation of all irrigated land in Dakota County, Nebraska, by 17.64 percent. The effect of the order was to reverse the 15 percent reduction in value made by the county board of equalization. It is from this order the appeal was taken.

The record shows that in 1981 the county assessor of Dakota County assessed irrigated agricultural land at the values established in the Nebraska Agricultural Land Valuation Manual prepared by the Department of Revenue. The 1980 edition of the manual is similar to the manual described in *Box Butte County v. State Board of Equalization & Assessment,* 206 Neb. 696, 295 N.W.2d 670 (1980). In that case we approved the action of the State Board in equalizing the assessment of farmland throughout the state upon the basis of the values set forth in the manual.

The most that can be said for the evidence which the appellants presented to the board is that it conflicted with that presented by the Department of Revenue. The appellants contended there was a smaller differential involved between dryland and irrigated land in Dakota County because of the rainfall received in the county. There were not sufficient sales of farmland to furnish evidentiary support for this theory, and the question was one which had to be resolved on the basis of opinion. The evidence submitted by the Department of Revenue supported the action of the State Board.

The burden of proof was on the appellants to establish that the action of the State Board was erroneous, arbitrary, and capricious. This they failed to do.

The order of the State Board of Equalization and Assessment is supported by the record and is, therefore, affirmed.

AFFIRMED.

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

STEVEN J. JENSEN, APPELLEE, V. DEBRA J. JENSEN, APPELLANT.

319 N.W.2d 75

Filed May 7, 1982. No. 81-617.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

R. Steven Geshell of Robak & Geshell, for appellant.

Mark M. Sipple of Luckey, Sipple & Hansen, for appellee.

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

PER CURIAM.

The instant appeal involves a domestic relations matter. The sole issue on appeal is whether the trial court abused its discretion in permitting the custodial parent to move the children outside of the State of Nebraska. The general rule in cases where a custodial parent wishes to leave the jurisdiction for any legitimate reason is that the minor children will be allowed to accompany the custodial parent if the court finds it to be in the best interests of the children to continue to live with that parent. *Jafari v. Jafari,* 204 Neb. 622, 284 N.W.2d 554 (1979).

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.

FLOYD D. GASTINEAU, APPELLANT, V. TOMAHAWK OIL COMPANY, LIMITED, ET AL., APPELLEES.

319 N.W.2d 107

Filed May 7, 1982. No. 81-852.

1. **Employment Security Law: Words and Phrases.** An employee

who leaves work "voluntarily without good cause" is disqualified for unemployment benefits for the week in which he left and for not less than 7 nor more than 10 weeks immediately following. Neb. Rev. Stat. § 48-628(a) (Reissue 1978).

2. _____: _____. To leave work voluntarily means to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment.

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

Monica Kirk and Ron Sanchez, for appellant.

Pamela A. Mattson, for appellee Hanlon.

No appearance for appellee Tomahawk.

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

PER CURIAM.

Floyd D. Gastineau, the claimant, appeals from the judgment of the District Court affirming the decision of the Nebraska Appeal Tribunal that he was disqualified from receiving unemployment compensation for the week ending January 24, 1981, through March 21, 1981.

The claimant was employed as a service station attendant by Tomahawk Oil Company, Limited, at North Platte, Nebraska. When the claimant reported for work on January 22, 1981, the manager of the station refused to allow the claimant to work that day. The claimant had been drinking the day before, which was his regular day off from work. According to the manager, the claimant "wasn't fit —able to work."

The manager took the claimant home and told the claimant he, the manager, would let the claimant "know something" in a few days. That same day, the claimant filed a claim for unemployment compensation. The claimant did not contact the employer again until 2 weeks later. At that time the

manager said there were no openings. In April the manager offered to reemploy the claimant and the claimant went back to work.

The issue is whether the claimant voluntarily left his employment. An employee who leaves work "voluntarily without good cause" is disqualified for unemployment benefits for the week in which he left and for not less than 7 nor more than 10 weeks immediately following. Neb. Rev. Stat. § 48-628(a) (Reissue 1978). To leave work voluntarily means to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment. *School Dist. No. 20 v. Commissioner of Labor,* 208 Neb. 663, 305 N.W.2d 367 (1981); *Powers v. Chizek,* 204 Neb. 759, 285 N.W.2d 501 (1979).

The fact that the claimant filed a claim for unemployment compensation on the same day that he was not allowed to work, and did not contact the employer again until some 2 weeks later, is strong evidence that the claimant left his work voluntarily without good cause. The claimant's explanation for this conduct is that he did not believe the manager when the latter said he would let the claimant know something in a few days. We do not find that to be persuasive.

Upon review de novo, we find the evidence supports the conclusion reached by the appeal tribunal and the District Court. The judgment is, therefore, affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. The majority has determined that an employee who is taken home for allegedly drinking and told he should remain at home until the employer lets him know something in a few days has voluntarily left his employment *without good cause,* thereby disqualifying himself for unemployment

benefits for the week in which he left and for not less than 7 nor more than 10 weeks immediately following. An employee is not required to remain at home unemployed and uncompensated until the employer decides what further action, if any, he will take. It may very well be that the employer had good cause to terminate the employee. He chose, however, not to do so. He was not, therefore, at liberty to make the employee "stand in the corner" until he, the employer, decided what further punishment, if any, should be administered. Having refused to permit the employee to work and earn a salary without discharging him, the employee had good cause to leave his employment. I would have so held.

WHITE, J., joins in this dissent.

CLARENCE W. SPILKER AND HELENA R. SPILKER, HUSBAND AND WIFE, APPELLEES, V. THE FIRST NATIONAL BANK AND TRUST COMPANY OF LINCOLN, A CORPORATION, TRUSTEE, APPELLEE, RAYMOND F. SPILKER AND MILDRED E. SPILKER, HUSBAND AND WIFE, APPELLANTS.

319 N.W.2d 429

Filed May 14, 1982. No. 43983.

1. **Easements.** An easement is appurtenant, and not in gross, if the nature of the easement is an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use and if there is nothing to show that the parties intended the easement to be a mere personal right.
2. **Easements: Presumptions.** An easement in gross is never presumed when it can fairly be construed as appurtenant to some other estate.
3. **Easements: Conveyances.** An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a less interest is effectively manifested. No words of inheritance or other special words are necessary to transfer a fee simple. Neb. Rev. Stat. § 76-104 (Reissue 1976).

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

Fredrick L. Swartz, for appellants.

Lewis R. Ricketts of Mattson, Ricketts, Davies, Stewart, Calkins & Duxbury, for appellee First National.

John F. Akin and Pierson, Ackerman, Fitchett & Akin, for appellees Spilker.

Heard before BOSLAUGH and WHITE, JJ., and CLARK and KNAPP, D. JJ., and RONIN, D.J., Retired.

RONIN, D.J., Retired.

In this action the plaintiffs, Clarence W. Spilker and his wife, Helena R. Spilker, seek to determine that a written easement for irrigation purposes is appurtenant to their 160-acre farm tract in Section 18, Gage County, Nebraska, and legally described in their purchase contract. William F. Spilker is the father of the plaintiff Clarence and the defendant Raymond F. Spilker. William purchased this subject tract in 1947. Clarence acquired 80 acres of the subject tract by purchase from William in 1967, and the balance of the tract from a special bequest in William's will on his death in 1972. Clarence later made his wife, Helena, a joint tenant of this subject tract.

The Buss estate land lies between the east bank of the Big Blue River and the west boundary of Clarence's subject tract. In 1957 Raymond began farming the Buss estate land as a tenant. He was able to substantially increase its productivity by pumping water for irrigation purposes from the adjoining Big Blue River. Raymond was also leasing the subject tract from William, who was the owner of it at that time. On December 20, 1957, Fred Carstens, an attorney and the trustee of the Buss estate, leased the Buss estate land to Raymond. The 5-year lease provided that Raymond could pump water across the

Buss estate land to irrigate other land that he either owned or was farming in the said Section 18. In 1958 Raymond began irrigating the subject land which he leased from William by transporting water across the Buss estate land.

On December 6, 1960, Carstens, as trustee of the Buss estate, granted an easement for irrigation purposes to William, the subject landowner, and not to Raymond, the lessee of both the dominant and servient estates. The transferability of this irrigation easement is the issue in controversy between the two Spilker brothers, Clarence and Raymond. The instrument grants, without any conditions, to William "an easement and the right to pump water for irrigation purposes through a pipeline or through irrigation ditches . . . ." The easement specifically describes its point of origin on the east bank of the Big Blue River, which is also the west boundary of the Buss estate land, and its course across the Buss estate land for a width of 100 feet and a length of 520 feet to its east boundary line where it adjoins the subject tract then owned by William. The easement includes the right to enter said area for the operation and maintenance of the irrigation pipelines. There is no restriction in the document as to what area of land would be served or any limitation as to the quantity of water to be transported. The easement recites that the consideration for giving it is the payment of the sum of $1. No express reference is made as to whether the easement would run with the land, nor does the instrument include the heirs or assigns of the grantee William Spilker.

In 1965 Raymond and his wife, Mildred, purchased the Buss estate land. Raymond also continued farming William's dominant estate tract until the latter's death in 1972. Raymond continued leasing this subject tract from Clarence, who had inherited 80 acres of it from William. On March 29, 1979, Clarence and Helena sold their dominant 160-acre

tract in Section 18 and the irrigation easement to the defendant-appellee, First National Bank and Trust Company of Lincoln. Raymond was an unsuccessful bidder at the auction sale and raised the question as to whether Clarence legally owned the easement for irrigation purposes. The bank has refused to close the sale transaction until the title objection to the easement is resolved. If Clarence's title to the irrigation easement is transferable then it is marketable, and, conversely, if the easement is not transferable then it is not marketable and would not comply with the terms of the farm sale contract. This action is brought by Clarence to resolve the controversy with Raymond as to whether the easement document is appurtenant or in gross. After trial in the District Court of Gage County, Nebraska, the trial court held that the easement was appurtenant to the subject tract of land owned by the plaintiffs. The defendants Spilker have appealed. The defendant First National is ready to complete its purchase of the 160-acre farm involved in this action if and when it is determined by this court that the sellers are capable of conveying a marketable title to the irrigation easement.

In determining whether the instrument granting the easement in this case was intended to be an easement appurtenant or simply a mere personal right and therefore an easement in gross, an examination of the document discloses that it does not contain any of the common-law words of inheritance, such as "to him, his heirs and assigns forever." The appellants make reference to this fact. We hold that the omission of such words of inheritance is of no consequence in determining that the document conveys an easement appurtenant by reason of Neb. Rev. Stat. § 76-104 (Reissue 1976), enacted in 1941, and which provides: "An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power

to convey, unless an intent to transfer a less interest is effectively manifested. *No words of inheritance or other special words are necessary to transfer a fee simple.*" (Emphasis supplied.)

The statute removes any requirement that the easement must contain words of inheritance for the easement to be inherited by Clarence as provided in William's will.

We further point out that § 76-104 provides that if a lesser interest is intended to be conveyed, it must be "effectively manifested." We find this irrigation easement contains no words or any condition that the grantee, William, received only a personal right, and that Carstens, as trustee of the Buss estate, transferred the entire interest in this easement to William.

We also hold that § 76-104 is applicable to easements as well as deeds and other conveyances of an interest in real estate. This irrigation easement is an interest in real estate and constitutes a conveyance of property. While we are unable to cite any case from our jurisdiction, cases from other jurisdictions with similar statutes apply to easements. See *Weigold v. Bates,* 144 Misc. 395, 258 N.Y.S. 695 (1932), which upheld an easement for obtaining water as well as the right to a 35-foot space to turn a car around after securing the water, and which easement survived the death of its grantee. See, also, *Hale v. Ziegler,* 180 Kan. 249, 303 P.2d 190 (1956).

The rule determining whether an easement is appurtenant to the land or whether the easement grants only a personal right which ceases on the death of the grantee is stated in *County of Johnson v. Weber,* 160 Neb. 432, 438, 70 N.W.2d 440, 445 (1955), as follows: "We have held that: ' "A grant *in gross* is never presumed when it can fairly be construed as appurtenant to some other estate. * * * Whether an easement in a given case is appurtenant

or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it. * * * If it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant to the land, and not an easement in gross, * * *.'' ' Smith v. Garbe, 86 Neb. 91, 124 N.W. 921, 136 Am. S.R. 674. See, also, Neilson v. Leach, 140 Neb. 764, 1 N.W.2d 822.''

The record in this case is undisputed that the subject irrigation easement is by its nature an appropriate, useful, and valuable adjunct of the interest in the land conveyed with regard to William's intended use in irrigating his otherwise dry farmland.

The evidence of the appellants as to the intentions of the parties to the easement document consists of the testimony of Fred W. Carstens and Herman Buss. Carstens testified that the easement was given as a reward for Raymond's efforts in farming the Buss land and to encourage him to continue his tenancy. The testimony of Herman Buss is to the same effect. We believe the trial court was correct in its ruling on the admission of this evidence. For evidence to be admissible under the ambiguity exception to the parol evidence rule, the oral testimony must clarify an existing ambiguity, and cannot establish an understanding at variance with the plain terms of the written instrument. This evidence was introduced for explanatory purposes and was not inconsistent with the written terms of the instrument. See 30 Am. Jur. 2d *Evidence* § 1070 (1967).

We agree with the finding of the trial court that the appellants' evidence falls short of proving that the parties intended an easement in gross. The testimony of Carstens and Herman Buss relate to the consideration for the granting of the easement but

not as to its substance. There is no evidence that the parties intended it to be a mere personal right of the grantee William. The easement was rather to benefit William's land which was farmed by Raymond. The pertinent question as to why the easement was given to William if it was to be a reward for Raymond is never answered by the appellants. There is no evidence as to any condition or restriction as to the length of time the easement is to continue. Likewise, there is no evidence that the easement would be terminated if Raymond quit farming or if William would sell his farm, or on the death or disability of either Raymond or William. The document is an unequivocal grant of an irrigation easement appurtenant to William's farm.

We find from a review of the entire record in this case that the plaintiffs have proved by a preponderance of the evidence that the irrigation easement in this case is appurtenant to the plaintiffs' 160-acre farm legally described in the purchase contract; that the plaintiffs are lawfully seized of said easement and have the power and authority to convey the same; and that the defendant First National is hereby specifically ordered to perform its contract of purchase with plaintiffs for said real estate and easement appurtenant. Costs of this action are taxed to the defendants Raymond F. Spilker and Mildred E. Spilker.

The judgment of the District Court is affirmed.

AFFIRMED.

PAULINE DUKES, APPELLANT, V. DALE M. BARKDOLL AND LINDA L. BARKDOLL, APPELLEES.

319 N.W.2d 432

Filed May 14, 1982. No. 44034.

1. **Summary Judgment.** Upon a motion for summary judgment the

court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled.

2. **Negligence: Licensee.** The owner or occupant of property owes to the 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.

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

D. C. Bradford of Bradford, Coenen & Ashford, for appellant.

Eugene P. Welch of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellees.

Heard before BOSLAUGH, MCCOWN, and HASTINGS, JJ., and QUIST, D.J., and RONIN, D.J., Retired.

QUIST, D.J.

The plaintiff, Pauline Dukes, was a social guest in the home of her daughter and son-in-law, the defendants, Linda L. Barkdoll and Dale M. Barkdoll. At about 3:30 p.m. on October 14, 1978, the plaintiff went to the basement to remove a dress from the clothes dryer and, while walking down the basement staircase, fell, sustaining injuries.

During the week preceding October 14, 1978, the defendants had undertaken renovation of their basement, including removing a part of the bottom step and the entire right-hand wall. In removing the wall, defendants also removed the handrailing which had been attached thereto.

Defendants moved for summary judgment on the grounds that the defendants had not breached any duty of care owed by them to plaintiff, or, in the alternative, that the fall sustained by plaintiff was the result of her own conduct or negligence going

down the stairway. The District Court sustained the motion for summary judgment and dismissed the case. Plaintiff appeals, contending that the lower court erred in granting the motion, on the grounds that there were material facts at issue which should have been submitted to the court.

"Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. The burden is upon the party moving for summary judgment to show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. In considering a motion for summary judgment the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may be drawn therefrom." *Johnson v. Metropolitan Utilities Dist.,* 176 Neb. 276, 278, 125 N.W.2d 708, 709 (1964).

Accordingly, the question that must be answered is whether the plaintiff presented any evidence which could be submitted to a jury to the effect that the defendants breached a duty to the plaintiff which proximately resulted in her injuries. The plaintiff as a social guest in the defendants' home had the status of a licensee.

"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." *Casey v. Addison,* 190 Neb. 634, 636, 211 N.W.2d 410, 411 (1973).

By the plaintiff's testimony, she fell downward "maybe three, four from the bottom and, ah, went down." The evidence shows that the bottom step was the only step that had been altered by the remodeling. The absence of the handrail cannot be

considered as an involvement or contributing circumstance to plaintiff's fall, as she testified in her deposition that she knew when she was at the top of the stairs there was no railing. There being no evidence presented that the changes caused by the remodeling in any way caused or contributed to the plaintiff's fall, the District Court was correct in granting defendants' motion for summary judgment, and is therefore affirmed.

AFFIRMED.

JOHN DEERE COMPANY, A CORPORATION, APPELLEE, V. RICHARD L. HAND, APPELLANT.

319 N.W.2d 434

Filed May 14, 1982. No. 44114.

1. **Negotiable Instruments: Pleadings.** When the signatures on a negotiable instrument are admitted, the production of the instrument entitles the holder to recover on it unless the defendant establishes a defense. Such a defense must be affirmatively pleaded.
2. **Summary Judgment.** The primary purpose of the summary judgment statute is to pierce sham pleadings and to further dispose of cases where there is no genuine claim or defense.
3. _____. The court examines the evidence, with a view most favorable to the party against whom a motion for summary judgment is directed, to discover if any real issue of fact exists. If reasonable persons might reach different conclusions, the motion should be denied and the case tried on its merits.
4. **Uniform Commercial Code: Sales: Warranty.** Under Neb. U.C.C. § 2-719 (Reissue 1980), a warranty agreement may limit or alter the measure of damages recoverable, as by limiting the buyer's remedy to repair or replacement of nonconforming goods or parts.
5. _____: _____: _____. When a buyer's limited remedy of repair or replacement of defective parts fails of its essential purpose because of seller's inability to cure nonconformities within a reasonable time, buyer may be entitled to pursue any other remedies under the Uniform Commercial Code, including consequential damages, and breach of implied warranties of merchantability or fitness for a particular purpose.
6. **Warranty.** Whether there has been a failure of the essential pur-

pose of a limited warranty is ordinarily a matter to be determined by the trier of the facts.

Appeal from the District Court for Cherry County: HENRY F. REIMER, Judge. Affirmed in part, and in part reversed and remanded.

Vince Kirby, for appellant.

Nelson & Harding, John K. Green, and Richard S. Reiser, for appellee.

Heard before BOSLAUGH, CLINTON, and WHITE, JJ., and CLARK and KNAPP, D. JJ.

CLARK, D.J.

The appellant, Richard L. Hand, appeals from an order of the District Court for Cherry County, which sustained a motion for summary judgment against Hand, in favor of the appellee, John Deere Company (Deere), and dismissed Hand's cross-petition for breach of warranties which asked for actual and consequential damages. Hand assigns as error the admission of an affidavit in support of the motion for summary judgment, which was not timely filed and served; the granting of the summary judgment; and the dismissal of the cross-petition. We affirm as to the granting of the motion for summary judgment on Deere's petition, but reverse on dismissal of Hand's cross-petition and remand for further proceedings.

On July 31, 1976, Woods Implement Co. (Woods), a Deere dealership in Valentine, Nebraska, sold to Hand a Deere stackwagon and windrower with hay conditioner, at which time Hand executed a purchase agreement. On August 1, 1976, Hand executed a purchase money security agreement and promissory note, designated a retail installment contract. The contract provided for five yearly installments to cover the remaining part of the purchase price. Hand failed to make any required installment payments. Deere's action for money damages on the

purchase money security agreement and promissory note was begun in January of 1979. Hand did not raise any affirmative defense in his answer, but did cross-petition for breach of express and implied warranties and sought consequential damages.

On July 2, 1980, Deere filed a motion for summary judgment, and hearing was had on the motion on July 17, 1980. At the hearing Deere offered the deposition of Hand and an affidavit of Jerry Garland, an employee of Woods, which were received into evidence. The affidavit of Garland was not served or filed until the time of the hearing. The only objection to the offer of Garland's affidavit was that parts of it were irrelevant, and the affidavit was received subject to that objection. The court granted Hand additional time to respond to the evidence offered by Deere. Hand filed his affidavit on August 1, 1980. Hearing was resumed on January 22, 1981, at which time the court granted summary judgment to Deere on its petition for money damages and dismissed Hand's cross-petition.

Hand assigns as error the court's action in allowing into evidence the affidavit of Garland, since it was not served on Hand prior to the day of the hearing as required by Neb. Rev. Stat. § 25-1332 (Reissue 1979). As previously noted, Hand failed to make timely objection to such offer on the grounds now argued, and the court did allow Hand ample time to file a counteraffidavit, which was in fact filed. If there was any error, it was harmless. See *Hi-Point Land & Cattle Co., Inc. v. Schlaphoff,* 193 Neb. 276, 226 N.W.2d 926 (1975).

The evidence offered by Deere at the hearing on motion for summary judgment fully established the allegations in Deere's petition. Hand pleaded no affirmative defense in his answer and admitted execution of the contract and note. No affirmative defense having been pleaded, no issue of fact was presented to the trial court on Deere's petition, and

summary judgment was proper. See, *Columbus Bank & Trust Co. v. High Country Stable,* 202 Neb. 724, 277 N.W.2d 81 (1979); *Blaha GMC-Jeep, Inc. v. Frerichs, ante* p. 103, 317 N.W.2d 894 (1982). The primary purpose of the summary judgment statute is to pierce sham pleadings and to further dispose of cases where there is no genuine claim or defense. See *Brown v. Nebraska P.P. Dist.,* 209 Neb. 61, 306 N.W.2d 167 (1981). The trial court was correct in granting summary judgment on Deere's petition, and it is affirmed in this regard.

The contract involved herein contained written warranties by Deere which could be summarized as follows: (1) Deere agreed to repair or replace parts which were defective in materials or workmanship for 1 year; (2) A disclaimer of any express warranties or implied warranties of merchantability or fitness for a particular purpose; (3) An exclusion of all incidental or consequential damages; and (4) Dealer (Woods) had no authority to make any representation, promise, modification, or limitation of Deere's written warranty.

Testimony included in Hand's deposition reflected that, following delivery of the equipment, Hand experienced many mechanical problems with the windrower, and that it malfunctioned and parts needed to be replaced. Parts were replaced, but it again malfunctioned. Hand testified that the problems continued throughout 1976 and 1977, and that as a result thereof he was unable to harvest some of his crop and suffered consequential damages. Parts and service were furnished by Deere, through Woods, at no cost to Hand. According to Hand, after many unsuccessful efforts to repair the windrower, it was satisfactorily repaired in August 1977.

In regard to the stacker, or stackwagon, Hand testified that it malfunctioned continuously, that Woods and Hand attempted on many occasions to repair it, unsuccessfully, and that it is not usable to this date.

Hand further deposed that he, on several occasions, had requested fieldmen from Deere to check the stacker out but that this had never occurred, although it had been promised. Hand further stated that he had taken the stacker to Woods' dealership for repair, and on one occasion had left it there for 3 months but that the needed repairs were never made. Hand testified further that he had repaired the stacker by welding parts, as directed by Woods, and that such efforts were only partially and temporarily successful. Hand testified that as a result of the inability to use the stacker he suffered consequential damages.

Deere argues that under the limited warranty, replacement of parts and repair of equipment were all that was required by Deere, that this was done, and that Deere and Woods never refused to work on the two pieces of equipment to attempt to remedy the defects. Deere further claims that under the written warranties, since express or implied warranties of merchantability or fitness for a particular purpose were excluded, as were incidental or consequential damages, the dismissal of Hand's cross-petition should be affirmed.

Under the Nebraska Uniform Commercial Code, it is clear that a seller of equipment can establish exclusive, limited written warranties and limitation of damages as a remedy for breach thereof. Neb. U.C.C. § 2-316 (Reissue 1980). "Repair and replacement" warranties and exclusion of consequential damages, which exclusion is not unconscionable, are allowed. Neb. U.C.C. § 2-719 (Reissue 1980). See, also, *Koperski v. Husker Dodge, Inc.,* 208 Neb. 29, 302 N.W.2d 655 (1981).

However, § 2-719(2) also provides: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act." The Comment under § 2-719 further provides, in referring to subsection (2):

"[W]here an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this article."

The purpose of an exclusive remedy of "repair or replacement" from a buyer's viewpoint is to give him goods which conform to the contract within a reasonable time after a defect is discovered. Where the seller is given a reasonable chance to correct defects and the equipment still fails to function properly, the limited remedy of repair or replacement of defective parts fails of its essential purpose. In such an event, the buyer may then invoke any remedies available under the Uniform Commercial Code, including breach of warranties of merchantability or fitness for a particular purpose. The same would be true regarding provable consequential damages, even though specifically excluded by the written warranty. See, *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978); *Goddard v. G.M.C.*, 60 Ohio St. 2d 41, 396 N.E.2d 761 (1979); *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978); *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977); *Eckstein v. Cummins*, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974); *Ehlers v. Chrysler Motors Corp.*, 88 S.D. 612, 226 N.W.2d 157 (1975); *Kure v. Chevrolet Motor Division*, 581 P.2d 603 (Wyo. 1978).

In this case it is clear that there is some evidence that Deere may not have effectively performed its obligation to repair the equipment properly and within a reasonable time. There is, therefore, a question of fact to be determined by the trier of fact as to whether the limited warranties have failed in their purpose so as to deprive Hand of the substantial value of the bargain and thus give Hand the right to pursue other remedies provided by the Uniform Commercial Code. In a motion for summary

judgment the moving party is not entitled to judgment unless there exists no genuine issue as to any material fact and where, under the facts, he is entitled to judgment as a matter of law. Further, the court should take the view of the evidence most favorable to the party against whom the motion is directed and give to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. If reasonable persons might reach different conclusions, the motion should be denied and the case tried on its merits. See *Brown v. Nebraska P.P. Dist.,* 209 Neb. 61, 306 N.W.2d 167 (1981).

The District Court is reversed in its action in dismissal of the cross-petition of defendant Hand, and the matter is remanded for trial on that issue. The District Court is affirmed in its action granting summary judgment on the petition of plaintiff Deere.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN SAYERS, APPELLANT.

319 N.W.2d 438

Filed May 14, 1982. No. 44212.

1. **Attorney and Client: Stipulations.** A client is bound by the oral stipulations of his attorney made out of court if within the scope of the attorney's duties and powers, if such stipulations are established by the testimony of the attorney making the same.
2. **Criminal Defendants: Attorney and Client.** Except for such basic decisions as to whether to plead guilty, waive a jury trial, or testify in his or her own behalf, a defendant in a criminal trial is bound by the tactical or strategic decisions made by counsel.
3. **Criminal Defendants: Absence from Trial: Attorney and Client.** In situations where a defendant has voluntarily absented himself from trial, tactical or strategic decisions made by that defendant's counsel will be binding upon the defendant in spite of his or her voluntary absence.

4. **Trial: Attorneys at Law.** The decision to object or not to object to offers of evidence is part of trial strategy, which would include that decision to waive foundational requirements for the reception of evidence.
5. **Appeal and Error.** This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt.
6. **Criminal Defendants: Absence from Trial: Jury Instructions.** Where a defendant has voluntarily absented himself from a portion of his trial, the jury is entitled to know that fact, the fact that his absence was not caused by unjust governmental action, but should be directed to draw no other conclusions or inferences from the fact of defendant's absence.

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 Patrick T. O'Brien, for appellee.

Heard before BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired, and RONIN, D.J., Retired.

HASTINGS, J.

The defendant, Steven Sayers, was charged by information with theft by unlawful taking of a microwave oven, valued over $300 but less than $1,000, from a Montgomery Ward store. Following a trial by jury, the defendant was found guilty on February 13, 1981, by the District Court for Douglas County, and was sentenced to a term of 359 days in the Douglas County Correctional Complex. He has appealed from that conviction and sentence, contending that the evidence presented was insufficient as a matter of law to support his conviction; that certain exhibits were improperly admitted by the trial court; and that the trial court improperly instructed the jury with regard to the defendant's absence from the trial. We affirm.

As noted above, this case involves the alleged theft of a microwave oven from the Montgomery Ward store located at the Westroads Shopping Center in Omaha, Nebraska. At some point during November 1980, the retail store sales manager in charge of major appliances at that store noted an unaccounted-for decrease in the inventory of model 8201 microwave ovens. The manager reported this situation to the store's security manager, Valerie Moen, in the latter part of November 1980. After investigating the matter, Moen and another security officer, Douglas Jasa, began surveillance of the store's shipping, receiving, and customer pickup entrance during the afternoon of December 18, 1980. At approximately 8:15 p.m. on that date, they observed the defendant, who worked in the receiving department of the Ward store, approach the receiving area and enter the store through the customer entrance. About an hour later, at 9:15 p.m., defendant was seen by the security personnel walking on the dock and getting into a Pinto automobile parked in the parking lot near the docks. With the aid of binoculars, the security personnel were able to observe defendant sitting in the parked Pinto for about 5 minutes, after which he got out of the car and once again approached the dock area. Upon reaching the docks, the defendant was observed crouching behind some truck trailers, apparently observing some activity on the dock for several minutes. Defendant then approached one of the overhead doors located on the dock; raised it a few inches and then lowered it; looked under the truck trailers a second time; and then raised the same door, pulled a microwave oven box out from behind the door, and then lowered the door. Defendant then carried the box to his car, placed it in the car, and drove away. Both security personnel stated that the particular box was a sealed carton in which a model 8201 microwave oven was shipped.

An attempt to stop the defendant before he got out of the parking lot was unsuccessful, although Jasa was able to approach the defendant on foot and identify himself as a member of Ward's security force before the defendant drove away. At this point Jasa and Moen returned to Ward's to obtain defendant's address and call the police. Having done so, the two proceeded to defendant's home, where they established surveillance for the rest of the night. They observed defendant arrive home at about 4:25 a.m., leave about 4:30 a.m., and return home for the rest of the night at about 4:45 a.m. Jasa and Moen waited until 6:30 a.m., at which time they drove by the Pinto and were able to see that there was no microwave oven box in the car. Upon making this observation they went to the police station to report the matter to the police. A subsequent search of defendant's home by the police on December 19, 1980, failed to produce any property belonging to Montgomery Ward. The defendant was convicted on the basis of the testimony of Jasa and Moen regarding the observations they had made on December 18 and 19, 1980.

The nature of the assignments of error makes it necessary to address the matter of the admissibility of certain evidence prior to discussing the sufficiency of the evidence to support the conviction. Defendant contests the admission of exhibits 7, 8, and 9. Exhibit 7 was a "package pickup log" which was allegedly signed by all the customers who carried merchandise out of the dock area which was the target of the surveillance on December 18, 1980. Exhibit 8 was a "home demonstration log" which was allegedly signed by all Montgomery Ward employees who take merchandise home. Exhibit 9 was a log of all "no sales" deliveries, which were deliveries made to a customer's home without an actual purchase being made of the item delivered.

These three exhibits were offered following the

testimony of Valerie Moen. Moen testified to the contents of the exhibits, to the purpose served by each record, and to the fact that there were no other records that would relate to merchandise removed from the store through the area observed during the surveillance. Furthermore, Moen stated that the records were all stored in the "customer accommodation center" of the store under the supervision of a separate manager, but that she, Moen, had the authority to take whatever records she needed in connection with her duties as security manager. However, during cross-examination, Moen admitted that she had nothing to do with the creation or keeping of these records, and, most importantly, had nothing to do with the verification of the accuracy of the various records.

On the basis of this information, the court originally sustained an objection to the foundation laid for the admission of exhibits 7, 8, and 9. However, for reasons discussed hereafter, the court reversed itself and admitted the exhibits, none of which contain the defendant's signature and circumstantially show that the defendant did not have the authority or permission to remove a microwave oven from the Montgomery Ward store on December 18, 1980.

The circumstances surrounding the court's reversal of its decision revolve around the defendant's absence from his trial. While the defendant was present at the commencement of the trial and did appear briefly on the second day, he was not present for most of the second day of testimony for some unexplained reason. The proceedings on this second day included the testimony of Valerie Moen and the offering of the exhibits in dispute. At some time prior to the defendant's disappearance, and before the court had originally sustained the objections to exhibits 7, 8, and 9, his counsel had discussed these exhibits again with the prosecution and had agreed to waive any foundational objections he might have

had concerning these three exhibits. However, following his client's disappearance, counsel was ordered by the court to continue to represent the defendant with "vigor, including cross-examination and making final argument." Pursuant to this order, defense counsel felt obligated to object to the offer of the exhibits in his client's absence.

After being presented with this explanation of the situation, the court noted that it would "reconsider its previous rulings on Exhibits 7, 8 and 9 and when we reconvene, the Court will receive Exhibits 7, 8 and 9 into evidence without further foundation."

The defendant now assigns such action by the trial court as error, contending that insufficient foundation was established to meet the business records exception to the hearsay rule found in Neb. Rev. Stat. § 27-803 (Reissue 1979). The State counters this argument by contending that sufficient foundation was presented in the testimony of Valerie Moen, who, in the State's opinion, meets the requirements of a "qualified witness" within the provisions of the aforementioned statute.

A preliminary matter requiring our attention is whether the waiver of foundation for the exhibits in question by the defendant's counsel was binding upon the defendant. Neb. Rev. Stat. § 7-107 (Reissue 1977) provides in part: "An attorney or counselor has power: . . . (2) to bind his client by his agreement in respect to any proceeding *within the scope of his proper duties and powers;* but no evidence of any such agreement is receivable except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court . . . ." (Emphasis supplied.)

While this statute has yet to be applied in a criminal action, we have noted in the past that "[t]he language of this section is unambiguous, and its meaning is too plain to admit of more than one construc-

tion. A client is only bound by the oral stipulations of his attorney made out of court, when the same are established by the testimony of the attorney making the same. The purpose and object of the legislature in adopting the above section was to relieve the courts from enforcing oral agreements of attorneys entered into out of court, in regard to a matter pending in court, in all cases *except* where the contract is established by the evidence of the attorney of the client against whom it is sought to be enforced." (Emphasis supplied.) *German-American Ins. Co. v. Buckstaff,* 38 Neb. 135, 140-41, 56 N.W. 692, 694 (1893).

In the present action the record makes it quite clear that the agreement to waive foundation for the exhibits in question was established by the statement of the defense attorney. Following the court's refusal to admit the exhibits, the defendant's counsel made the following remarks to the judge in chambers: "Now, I talked with them [the State] and I said that I would not object on foundational grounds to the fact that she [Moen] wasn't the keeper of the records, et cetera, and that that wouldn't be any grounds for my objecting to those exhibits if they were available and if they were brought in. That occurred last night. . . . I felt that if the evidence was there and the State had it, I wasn't going to object on those foundational grounds." Counsel later admitted that the only reason he had objected to the exhibits was due to the defendant's absence. Therefore, under *Buckstaff,* defendant is bound by his counsel's waiver of foundation on these exhibits if the ability to make that waiver was "within the scope of his [counsel's] proper duties and powers." § 7-107.

While there are numerous cases on the matter, it is difficult to formulate a general rule concerning the powers and duties of defense counsel in a criminal action. However, a general consensus of some

of those courts that have dealt with this issue is that, except for such basic decisions as to whether to plead guilty, waive a jury trial, or testify in his or her own behalf, a defendant is bound by the tactical or strategic decisions made by his or her counsel. *Sims v. State,* 295 N.W.2d 420 (Iowa 1980); *Townsend v. Superior Court of Los Angeles County,* 15 Cal. 3d 774, 543 P.2d 619, 126 Cal. Rptr. 251 (1975); *Gallup v. State,* 559 P.2d 1024 (Wyo. 1977); *The People v. Williams,* 36 Ill. 2d 194, 222 N.E.2d 321 (1966); *State v. Mihill,* 394 A.2d 1179 (Me. 1978); *State v. Ames,* 222 Kan. 88, 563 P.2d 1034 (1977); *State v. Graham,* 19 N.J. Super. 70, 88 A.2d 5 (1952). See, also, *Wainwright v. Sykes,* 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) (Burger, C.J., concurring); ABA Standards for Criminal Justice, *The Defense Function,* Stand. 4-5.2 (2d ed. 1980).

The rationale behind such a rule has been noted to be that " 'only counsel is competent to make such a decision, that counsel must be the manager of the law-suit, that if such decisions [strategic and tactical decisions] are to be made by the defendant, he is likely to do himself more harm than good, and that a contrary rule would seriously impair the constitutional guaranty of the right to counsel.' " *The People v. Williams, supra* at 204, 222 N.E.2d at 326.

It should be noted that in many of these cases the waiver of the defendant's rights was made in the presence of the defendant, allowing the courts to find an implied acquiescence to the waiver by the defendant's silence. Indeed, those general propositions of law that exist in this area assert that a waiver is only good if made in the presence of the defendant. 7A C.J.S. *Attorney & Client* § 208 c. (1980), or if the waiver is made after consultation with the defendant. ABA Standards for Criminal Justice, *supra.* However, such consultation with the defendant was made impossible in this instance by the defendant's voluntary absence from the trial.

In light of such a voluntary absence from the trial, we are persuaded by the rationale in *State v. Mihill, supra,* that the defendant remains bound by a waiver of the foundational requirement made outside his presence and without consultation with him. "If, once a defendant has voluntarily absented himself, the trial court is to be able to move forward, certain stipulations by the attorneys short of an admission of guilt, must be recognized as binding the respective parties. Otherwise, the progress of the trial would be needlessly impeded. These stipulations should be distinctly made and not left to inference." *Id.* at 1180. Therefore, in situations where a defendant has voluntarily absented himself from trial, we conclude that a tactical or strategical decision by that defendant's counsel will be binding upon that defendant in spite of his or her voluntary absence.

It has clearly been established by this court in cases dealing with ineffective assistance of counsel that "[t]he decision to object or not to object is *part of trial strategy* . . . ." (Emphasis supplied.) *State v. Bartlett,* 199 Neb. 471, 476, 259 N.W.2d 917, 921 (1977). See, *State v. Fowler,* 201 Neb. 647, 271 N.W.2d 341 (1978); *State v. Auger,* 206 Neb. 666, 294 N.W.2d 379 (1980). Similarly, we must conclude that in this instance the decision on the part of the defendant's counsel to waive the foundational requirement for the exhibits in question was a tactical decision on his part and as such bound the defendant. We conclude that defendant's second assignment of error is without merit.

We must now consider the defendant's first assignment of error, challenging the sufficiency of the evidence to support his conviction. We do this in light of our conclusion that the exhibits showing a lack of consent by the owner of the merchandise to the defendant's possession of that merchandise were properly received in evidence. It is well settled that this

court " ' "will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt." ' [Citations omitted.]

"Moreover, we have repeatedly said: 'In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.' [Citations omitted.]" *State v. Rolling,* 209 Neb. 243, 248, 307 N.W.2d 123, 126 (1981).

Having reviewed the record in this case, we cannot conclude that the evidence is so lacking in probative force that it is insufficient to support the verdict of guilt. The circumstances surrounding defendant's activities on the day in question were entirely consistent with the establishment of his guilt. The defendant's first assignment of error is also without merit.

This brings us to the third and final assignment of error, which challenges the propriety of the instruction given to the jury regarding the defendant's absence from the concluding phase of his trial. This instruction reads as follows: "You are to draw no conclusions or inferences from the fact that the defendant is not present in Court. The defendant's absence is not in any way due to any actions or conduct of the State of Nebraska, of Mr. Sigler, or of Mr. Riley." Mr. Sigler was the prosecutor in the action and Mr. Riley was the defense counsel.

On two occasions in the past we have approved of a "flight" instruction being given to the jury in situations involving flight from the scene of the crime, not the defendant's absence from trial, as is in-

volved herein. *Davis v. State,* 171 Neb. 333, 106 N.W.2d 490 (1960); *State v. Lincoln,* 183 Neb. 770, 164 N.W.2d 470 (1969). In these instances the jury was allowed to consider the evidence of flight from the scene of a crime in connection with all the other evidence in the case in order to determine the defendant's guilt or innocence. By contrast, the court in the present action explicitly informed the jury that they were to draw no conclusion or inferences from the defendant's absence from trial.

Various other jurisdictions have adopted assorted methods for dealing with the situation arising from the defendant's failure to appear on an appointed date or absenting himself during the course of a trial. New Jersey allows the court to instruct the jury that failure to appear may be indicative of guilt in instances where it is clearly shown that the defendant's motive for fleeing was to evade the criminal process. *State v. Andrial,* 150 N.J. Super. 198, 375 A.2d 292 (1977). On the other hand, California permits its courts to instruct the jury to consider the defendant's absence as a relevant fact even in the absence of proof of a motive for flight. *People v. Snyder,* 56 Cal. App. 3d 195, 128 Cal. Rptr. 297 (1976). Massachusetts' juries can only draw an inference of guilt from the defendant's failure to appear if they find beyond a reasonable doubt that the defendant's departure indicated a consciousness of guilt. The instruction cannot demand that such an inference be drawn. *Com. v. Patch,* 418 N.E.2d 344 (Mass. App. Ct. 1981). An instruction allowing the jury to consider the defendant's disappearance during trial as another relevant fact in determining guilt or innocence was given in *Skinner v. State,* 270 Ind. 52, 383 N.E.2d 307 (1978), and such an instruction was found to be appropriate on appeal. Finally, the Supreme Court of Georgia has approved the giving of a flight instruction to the jury in an action where the defendant failed to appear for his trial, having been

released on bond. *Bradberry v. The State,* 238 Ga. 83, 230 S.E.2d 885 (1976).

Of special note is the approach taken by an appellate court in Maryland. In *Pearson v. State,* 28 Md. App. 464, 347 A.2d 239 (1975), the jury was informed that the defendant's disappearance following the lunch break was entirely voluntary but that they should not hold it against him and were to evaluate the evidence just as if the defendant had been present throughout the trial. While the issue was not properly before the appellate court, the court did note that the jury was entitled to know what had happened to the defendant, and that in informing the jury of the defendant's absence the court was careful to caution it that it was not to affect the outcome of the trial.

State v. Jefferson, 11 Wash. App. 566, 524 P.2d 248 (1974), involved the giving of an instruction to the effect that the jury was to consider the fact that the defendant had failed to appear at the start of his trial was a relevant circumstance to consider in determining the defendant's guilt or innocence. On appeal, the court noted that "evidence of 'flight' should not be the subject of an instruction," in that such evidence is " 'only marginally probative as to the ultimate issue of guilt or innocence. The interest of justice is perhaps best served if this matter is reserved for counsel's argument, with little if any comment by the bench.' " *Id.* at 571, 524 P.2d at 251. However, no error was found on appeal.

Finally, defendant points to *State v. Staples,* 354 A.2d 771 (Me. 1976), in support of his contention that the court erred in giving the particular instruction in question. In *Staples* the defendant fled from trial after a coconspirator implicated him on the stand. In noting the defendant's absence, the trial judge told the jury: " '. . . I assume it to be a voluntary act on the part of Mr. Staples and, if anything is prejudicial, he has brought the prejudice upon him-

self.' " *Id.* at 778. However, on three other occasions the judge informed the jury that the defendant's actions were not to have a bearing on the question of his guilt or innocence. In finding no prejudicial error in the trial court's action, the appellate court noted: "The State is entitled to have the jury know that no unjust governmental action has prevented the defendant from being present at his trial. Therefore, when it is feasible, the jury should be informed only that the defendant has made *a choice not to be present* at the trial." (Emphasis in original.) *Id.* at 779.

From the presentation of cases above, it is obvious that no clear rule exists in this area. However, we must agree with *Pearson* in concluding that the jury was entitled to know what happened to the defendant, and we must also agree with *Staples'* conclusion that the State was entitled to have the jury know that no unjust governmental action was preventing the defendant from being present at his trial. While this information may not be considered as relevant in determining the defendant's guilt or innocence in this particular circumstance, we note that the explicit wording of the instruction is that "no conclusions or inferences" were to be drawn from the defendant's absence.

The rule in Nebraska is: " 'It is presumed a jury followed the instructions given in arriving at its verdict and, unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded.' " *Schluter v. State,* 151 Neb. 284, 295, 37 N.W.2d 396, 402 (1949). In this instance, presuming that the jury followed the explicit instructions of the court, one cannot conclude that the defendant was prejudiced by the instruction. The defendant's third assignment of error is without merit, and we affirm his conviction.

AFFIRMED.

KHRISTYNE TRUAX KRUEGER, APPELLEE, V. STEVEN JACKIE KRUEGER, APPELLANT.

319 N.W.2d 445

Filed May 14, 1982. No. 44503.

1. **Child Custody.** A decree fixing custody of a minor child will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action.
2. _____. In determining the question of who should have the care and custody of the minor children of the parties to an action for the dissolution of a marriage, the controlling consideration is the best interests and welfare of the children.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed in part, and in part reversed and remanded with directions.

A. James McArthur, for appellant.

Richard H. Osborne, for appellee.

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

PER CURIAM.

This is a proceeding to modify a decree of dissolution of marriage by changing custody of the parties' minor son from the mother to the father. The District Court found that the father had not met his burden of proof to justify modification of the decree, but placed legal custody of the minor child in the court and physical custody with the mother. The father has appealed. The sole issue is the custody of the minor child.

Steven Jackie Krueger and Khristyne Truax were married in 1975. Khristyne was 16 and Steven was 19 years old. Jeremy Paul Truax was born in February 1975. Shortly after the marriage and birth of the child, Steven was incarcerated in the Nebraska Penal Complex on a conviction for assault and a sub-

sequent conviction for attempted escape.

Khristyne filed her petition for dissolution of marriage in November 1976. Steven filed a voluntary appearance while still incarcerated. The decree of dissolution of marriage was entered January 26, 1977. The decree granted permanent custody of Jeremy to Khristyne, with reasonable rights of visitation to Steven.

Khristyne and Jeremy lived with a man named Keane in Lincoln, Nebraska, for a time and moved to Denver, Colorado, with him in 1977. While in Denver with Keane, Khristyne began work as a prostitute. Khristyne married Keane and later divorced him. In 1977, while in Colorado, Khristyne met a man named McKenzie. Khristyne, Jeremy, and McKenzie moved to California sometime in 1977 and lived together for approximately 2 years. During this time Khristyne engaged in and ran a prostitution ring and she and McKenzie were both users of drugs. McKenzie had a son approximately Jeremy's age who lived with them, and McKenzie physically beat Khristyne, his own son, and occasionally Jeremy. Sometime early in 1979 Khristyne took Jeremy and moved to Colorado in an attempt to hide from McKenzie. In Colorado she again worked in a house of prostitution until she was injured in a barroom brawl in October 1979.

Meanwhile, Steven was released from the penal complex in March 1978 and sometime thereafter went to work for the railroad company as an operating employee. Sometime in 1979 Steven located Khristyne and Jeremy in Colorado and visited them several times over the next few months. In November of 1979, while Steven was visiting Khristyne in Colorado, they agreed that Steven could take Jeremy to Lincoln, Nebraska, for a 2-week visit, and Steven and Jeremy returned to Lincoln. Before the 2 weeks were up, McKenzie came to Colorado and threatened Khristyne. She telephoned Steven re-

questing that Jeremy be returned immediately, but Steven did not return Jeremy and sought the advice of his attorney.

Khristyne returned to California with McKenzie and married him on January 10, 1980. She testified that she married McKenzie because he and his friends in California thought it would improve her chances to get Jeremy back. Sometime in 1980, when Khristyne had gone to Colorado again, McKenzie came to Colorado, threatened Khristyne at gunpoint, and left her handcuffed to her bed until she was found by the police. Khristyne has habitually carried a gun since that occasion but has not seen McKenzie since then.

On April 15, 1980, Steven filed a motion for temporary custody and an application for modification of the original decree in the District Court for Lancaster County, Nebraska. The motion and application prayed for a continuation of the physical custody of Jeremy, a grant of temporary custody following hearing, and requested modification of the original decree by changing the custody of Jeremy from Khristyne to Steven on the basis of some of the facts set out above. Following a hearing on the motion on April 21, 1980, at which Khristyne and McKenzie appeared, the District Court found that the court should assume legal custody of Jeremy and that physical custody should be given to Steven until the further order of the court. The court further found that a custody investigation should be undertaken by the court investigator and directed both parties to cooperate with such investigation. The court also appointed a guardian ad litem for Jeremy.

On June 30, 1980, upon the motion of the guardian ad litem reciting that he had been unable to obtain a custody investigation of Khristyne from Colorado, the District Court entered an order directing a custody investigation of Khristyne's home, living ar-

rangements, and other relevant factors in Colorado. Various pleadings, interrogatories, and motions were filed in preparation for trial, and a psychologist was appointed by the court to make a special investigation and report. The matter was tried over a 3-day period in July 1981.

Essentially the evidence at trial showed that since November 1979 Steven had taken care of Jeremy, first at his mother's house and later at a rented house in Lincoln, Nebraska. The record indicates that Jeremy was healthy, well clothed and fed. Jeremy was in kindergarten during the fall semester of 1980 and the spring semester of 1981, and his report card showed satisfactory progress and effort in all school subjects, although it also indicated some problems in personal and social growth. Steven took care of Jeremy himself when he was not working, and when he was called to work, Jeremy was taken care of by one of the teachers' aides at the school which he attended. She had three children of her own at home, and presumably Jeremy was cared for along with them.

The record established that although Steven had been employed by the railroad company since his release in 1978, he had little seniority and on some occasions would not be called to work for several weeks. The record also showed that he had some problems with alcohol and had been convicted of driving while intoxicated on one occasion and jailed for 17 days while he had custody of Jeremy.

The psychologist appointed by the court testified that it was an unusually complicated case and that attempting to predict future behavior is uncertain at best, but that, in his opinion, Khristyne was the more capable parent of the two. The psychologist felt that a man named Verner, with whom Khristyne had been living for over a year, was a stable influence in her life and that she was better able to communicate with Jeremy than Steven. The psy-

chologist felt that Steven, because of his lack of a family background, had a difficult time trusting, loving, or communicating with anyone on a happy, stable family level. The psychologist testified that both Khristyne and Steven loved the child in their own way.

The guardian ad litem recognized the fact that the circumstances of both Khristyne and Steven had changed since the date of the original decree and that projection of the future was difficult. The guardian recommended that under all the circumstances Jeremy's custody should be placed in Lincoln with Steven, but recommended that the custody be monitored very closely. Both the psychologist and the guardian ad litem expressed the view that custody of Jeremy should not be given to the Department of Public Welfare for foster home placement but, instead, should be awarded to one or the other of the parents.

On July 10, 1981, the District Court found that Steven had not met the burden of proof to justify modification of the decree, that legal custody of Jeremy should remain with the court pending further review, and that physical custody be returned to Khristyne. The District Court specifically found that both Steven and Khristyne were fit and proper parents, that the provisions allowing reasonable visitation should remain in effect, and that all costs and fees awarded by the court were to be paid equally by each party. The court also found that the matter should be called up for review on December 2, 1981, and that the Colorado custodial arrangement should be monitored in the meantime. The District Court therefore overruled the application for modification of the original decree except to maintain legal custody in the court pending review, and ordered that Jeremy be delivered to Khristyne on July 12, 1981. The matter was appealed by Steven and docketed in this court in due course.

On December 2, 1981, the District Court held a review hearing in accordance with the July order. A further report by the psychologist reflected that Jeremy had done reasonably well in Colorado with Khristyne and that, although academically a bit weak and a bit lower than average, he was getting along reasonably well in school. Jeremy has expressed a preference to be with his mother. Following the December hearing the District Court reserved rulings pending the outcome of this appeal, but indicated that if it were to make a ruling, it would reaffirm the rulings of the July 10, 1981, order.

This court has consistently held that a decree fixing custody of a minor child will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action. *Bokelman v. Bokelman,* 202 Neb. 17, 272 N.W.2d 916 (1979).

The issues of granting or changing custody of a minor child are considered by this court de novo on the record. In determining the question of who should have the care and custody of the minor children of the parties to an action for the dissolution of a marriage, the controlling consideration is the best interests and welfare of the children. *Hoback v. Hoback,* 201 Neb. 639, 271 N.W.2d 336 (1978). On the record in the case at bar there can be no question that there has been a substantial change of circumstances as to both of the parties since the date of the original decree granting custody. In some respects the changes have been for the better and in other respects the changes have been for the worse. Each of the parties has had custody of the minor child for extended periods of time over the years. The trial court found that both parents were fit to have custody. That finding is subject to considerable doubt. Neither parent can be said to be a satisfactory parent under many standards of meas-

urement. In such a case the controlling consideration is the best interests and welfare of the child.

As the psychologist noted in his initial report in May of 1981: "This is an unusually complicated case. It is almost impossible to sift through the chaotic backgrounds of both parents, and trying to predict future behavior of either can quickly degenerate into endless speculative meandering." We agree with the conclusion of the psychologist, the guardian ad litem, and the trial court that this is not a case in which the physical custody of Jeremy should be placed in a foster home or the Department of Public Welfare. Having reached that conclusion we must now determine which of the two parents can better provide for the best interests and welfare of Jeremy.

We believe the stability of Steven's employment and residential situation is very persuasive. He has been regularly employed by the railroad company since March 1978. During the approximately 2 years that Steven had the physical custody of Jeremy, which included Jeremy's first year in school, the evidence is undisputed that Jeremy's physical needs were well taken care of and that his school grades were satisfactory. The psychologist favors Khristyne's family situation, primarily because of the stability and personality of the man with whom Khristyne is now living. While that relationship has now lasted for approximately 2 years, Khristyne's past history demonstrates the frailty of any reliance upon her stable, permanent relationship with any one man. The psychologist's concern with the violence which permeates Khristyne's former relationships, particularly with respect to Jeremy, is a justifiable concern. Neither is there any real indication of a substantial change in that respect, and Khristyne apparently still habitually carries a gun.

We are convinced that the best interests of Jeremy will not be served by constant custody disputes and

a shifting of physical custody and control from one parent to the other. A review of the entire record persuades us that the District Court was correct in retaining legal custody of Jeremy in the court, but that the physical custody of Jeremy should be awarded to Steven with provisions for regular monitoring of the situation in such fashion as the District Court may deem appropriate. Reasonable rights of visitation should be granted to Khristyne on such conditions as the court may deem proper.

That part of the decree of the District Court of July 10, 1981, maintaining legal custody of Jeremy Paul Truax in the District Court is affirmed. That part of the decree returning physical custody of the minor child to the petitioner Khristyne is vacated. The District Court is directed to place physical custody in the respondent Steven, and to make such additional orders as may be appropriate in accordance with this opinion. The parties are to pay their own costs.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., and WHITE, J., concur in the result.

STATE OF NEBRASKA, APPELLEE, V. LYNN ANN SPAULDING, APPELLANT.

319 N.W.2d 449

Filed May 14, 1982. No. 44524.

1. **Bad Checks: Words and Phrases.** In a prosecution under Neb. Rev. Stat. § 28-611(1) (Reissue 1979), the proper definition of "present value of any kind" is that contained in Neb. Rev. Stat. § 28-109(22) (Reissue 1979).
2. **Bad Checks: Evidence: Words and Phrases.** Evidence that an insufficient fund draft deposited in a checking account was credited to the account satisfies the requirement of "present value of any kind" contained in Neb. Rev. Stat. § 28-611(1) (Reissue 1979).
3. **Lesser-Included Offenses.** An instruction on a lesser-included of-

fense is not required unless the evidence produces a rational basis for an acquittal of the offense charged and a conviction of the lesser offense.

4. _____. Where the prosecution has offered uncontroverted evidence on an element necessary for conviction of the greater crime, but not necessary for the lesser offense, the defendant must offer at least some evidence to dispute the issue if he wishes to have the benefit of a lesser-included offense instruction.
5. **Constitutional Law: Rules of Evidence.** Admission of bank records under Neb. Rev. Stat. § 27-803(5) (Reissue 1979) did not violate the defendant's right of confrontation.
6. _____: _____. Each confrontation claim must stand on its own facts. The fundamental question is whether the hearsay has sufficient indicia of trustworthiness and reliability.
7. _____: _____. The important inquiry is as to the reliability of the evidence and the likelihood that cross-examination could impeach its credibility or authenticity.
8. **Courts: Rules of Evidence.** A trial court has great discretion in determining whether a document is trustworthy and admissible under Neb. Rev. Stat. § 27-803(5) (Reissue 1979).

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

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

BOSLAUGH, J.

The defendant, Lynn Ann Spaulding, was convicted of obtaining "property, services, or present value of any kind" by issuing an insufficient fund check and was sentenced to 2 years' probation. She has appealed and contends the evidence was insufficient to support the judgment; documentary evidence was erroneously admitted at the trial; and the trial court erred in failing to give three requested instructions.

The defendant maintained accounts in both the First National Bank, Lincoln, Nebraska, and the

Government Employees Credit Union, Lincoln, Nebraska. On July 27, 1979, the defendant deposited in her account at the bank a draft drawn on her account in the credit union in the amount of $600. This item was credited to her account but was dishonored and returned unpaid. It was returned to the bank on August 6, 1979, and charged back against her account. In the interim it had been recorded as a credit in her bank account.

The evidence shows the defendant was engaged in a "kiting" scheme whereby checks against the bank account were covered by drafts against the credit union account, and drafts against the credit union account were covered by checks against the bank account. The net result of the scheme, so far as the bank was concerned, was an overdrawn balance of $1,120.75 on August 24, 1979.

The defendant was charged with violating Neb. Rev. Stat. § 28-611(1) (Reissue 1979), which requires proof that the defendant obtained "property, services, or present value of any kind" by issuing or passing the check. The defendant contends that the definition of value contained in Neb. U.C.C. § 3-303 (Reissue 1980) is applicable and establishes that the defendant did not receive value or "present value" for the $600 draft deposited in the bank on July 27, 1979.

The State contends that the definition of "thing of value" contained in Neb. Rev. Stat. § 28-109(22) (Reissue 1979) was applicable. In that subsection a thing of value is defined as "real property, tangible and intangible personal property, contract rights, choses in action, services, and any rights of use or enjoyment connected therewith." The trial court used this definition in its instructions and refused the defendant's requested instruction based on § 3-303.

The definition contained in § 28-109 was applicable here and the instruction given was correct. The defendant received "property, services, or present

value of any kind" when her account was given credit for the $600 draft. Between July 27, the date of deposit, and August 6, the date a debit memo was posted in the account, the balance contained the $600 credit. During this time checks amounting to $3,000 and drawn in favor of the credit union were charged to her account. Since the account was overdrawn as of August 2, three checks amounting to $2,250 were returned unpaid to the credit union on August 6 and credit memos posted to her account for these items.

The defendant also requested an instruction based on NJI 14.81 and a lesser-included offense instruction based on the theory she did not receive value for the $600 draft. The court gave NJI 14.81 verbatim as an instruction on credibility. There was no error in refusing the requested instruction.

So far as a lesser-included offense instruction is concerned, the rule is that such an instruction is not required unless the evidence produces a rational basis for an acquittal of the offense charged and a conviction of the lesser offense. The evidence in this case concerning the element of value was largely documentary and uncontradicted. Under these circumstances the lesser-included offense instruction was not required. In *State v. Vicars,* 207 Neb. 325, 334-35, 299 N.W.2d 421, 427 (1980), we said: "[W]here the prosecution has offered uncontroverted evidence on an element necessary for conviction of the greater crime, but not necessary for the lesser offense, the defendant must offer at least some evidence to dispute the issue if he wishes to have the benefit of a lesser-included offense instruction." See, also, *State v. Tamburano,* 201 Neb. 703, 271 N.W.2d 472 (1978).

The defendant's final assignment of error is that "[t]he court erred in admitting most of the documentary evidence." She argues that bank and credit union records, including deposit slips, statements of account, and checks and drafts deposited or

returned unpaid, were improperly admitted, either because they did not meet the requirements of the business records exception to the hearsay rule, or because such exception violates article I, § 11, of the Nebraska Constitution which provides: "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ."

The defendant states that her "primary concern . . . is the failure of the State to produce the potential witness who processed and altered the condition of the exhibits to include specific information . . . ." The testimony of each individual "teller or processor" is not required under Neb. Rev. Stat. § 27-803(5) (Reissue 1979). The requirements of § 27-803(5) were met through the "testimony of the custodian or other qualified witness" for each bank record introduced.

According to Wigmore, "It is generally agreed that the process of confrontation has two purposes, a main and essential one, and a secondary and dispensable one: (1) The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*" (Emphasis in original.) 5 Wigmore on Evidence § 1395 at 150 (1974). Wigmore goes on to note that the common-law right of cross-examination "was *not a right devoid of exceptions.* The right to subject opposing testimony to cross-examination is the right to have the hearsay rule enforced; for the hearsay rule is the rule requiring cross-examination. . . . The [hearsay] rule had always involved the idea of exceptions, and the constitution-makers indorsed the general principle merely as such. They did not attempt to enumerate exceptions; they merely named and described the principle sufficiently to indicate what was intended . . . . The rule sanctioned by the Constitution is the hearsay rule as to cross-examination, with all the exceptions that may legitimately be

found, developed, or created therein." (Emphasis in original.) Wigmore, *supra,* § 1397 at 158.

The defendant's argument is just the opposite: that the framers of the Nebraska Constitution intended article I, § 11, to freeze use of the hearsay rule in criminal trials to the exceptions then generally recognized. The authorities do not support such an argument.

Kay v. United States, 255 F.2d 476, 480-81 (4th Cir. 1958), *cert. denied* 358 U.S. 825, 79 S. Ct. 42, 3 L. Ed. 2d 65, states: "[The confrontation clause] was intended to prevent the trial of criminal cases upon affidavits, not to serve as a rigid and inflexible barrier against the orderly development of reasonable and necessary exceptions to the hearsay rule.

"The power of the Congress and of a state legislature to provide for the admission of evidence is not subject to any such arbitrary limitation . . . . They may carve out a new exception to the hearsay rule, without violating constitutional rights, where there is reasonable necessity for it and where it is supported by an adequate basis for assurance that the evidence has those qualities of reliability and trustworthiness attributed to other evidence admissible under long-established exceptions to the hearsay rule."

Wigmore notes that the U. S. Supreme Court "has refused to equate the Sixth Amendment's confrontation clause and any particular version of the hearsay rule—ancient or modern. The net result is acknowledgement by the Court of the possibility of legitimate expansion and supplementation of the classically recognized exceptions, with however the corollary possibility of disapproval of the application in some circumstances of the recognized exceptions." § 1397 at 184. *Mancusi v. Stubbs,* 408 U.S. 204, 213, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972), states: "[R]ecent decisions of this Court . . . have dealt at some length with the requirements of the Confrontation

Clause . . . . The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant,' . . . and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement . . . .' "

With regard to the business records exception to the hearsay rule, Wigmore notes that it stems from the old shopbook doctrine, of which he says: "[A] cardinal feature of the attitude of the courts, peculiar to the United States, was that the evidence was treated on the same grounds already set forth . . . as underlying the hearsay exceptions generally —the principles of necessity and of a circumstantial guarantee of trustworthiness. . . . The guarantee of trustworthiness was that which we now recognize in the regularity of the entries . . . ." Wigmore, *supra,* § 1518 at 429. Necessity for the business records exception, he continues, stems from "[t]he practical impossibility, on grounds of *mercantile inconvenience,* of producing all the clerks, salesmen, teamsters, or the like, who have contributed their knowledge on making up the items of voluminous accounts . . . ." (Emphasis in original.) Wigmore, *supra,* § 1521 at 442.

Compliance with the requirements of a particular exception to the hearsay rule does not necessarily mean that a defendant's confrontation right has not been violated. " '[C]ompliance with a state's hearsay rule does not *ipso facto* insure compliance with the constitutional mandate for confrontation in a criminal case.' " *State v. Olson,* 75 Wis. 2d 575, 585-86, 250 N.W.2d 12, 18 (1977). *Hagenkord v. State,* 100 Wis. 2d 452, 476, 302 N.W.2d 421, 434 (1981), notes: "Each confrontation claim must stand on its own facts . . . ." Also, n. 3 at 475, 302 N.W.2d at 433, states: "The fundamental question remains the

same: Does the hearsay have sufficient indicia of trustworthiness and reliability that it will 'advance a practical concern for the accuracy of the truth-determining process.' " *State v. Olson, supra* at 588, 250 N.W.2d at 19, adds: "Determining whether the right to confront and to cross-examine must give way in any particular instance 'calls into question the ultimate " 'integrity of the fact-finding process' " and requires that the competing interest be closely examined.' " Finally, *Hagenkord, supra* at 477, 302 N.W.2d at 434, notes that "[b]asically, however, the important inquiry is the reliability of the evidence and the likelihood that cross-examination could impeach its credibility or authenticity."

As to the presence of "sufficient indicia of trustworthiness and reliability," *United States v. Colyer,* 571 F.2d 941, 947 (5th Cir. 1978), *cert. denied* 439 U.S. 933, 99 S. Ct. 325, 58 L. Ed. 2d 328, notes: "Th[e] cases indicate that the trial court has great discretion in determining whether the document is trustworthy. We find no abuse of discretion where the witness testified that these [bank credit card] records were made and kept in the regular course of business and it was the regular course of business to make such records, that he was the custodian of the records, and the witness was knowledgeable as to how they arrived at his bank and how they were handled once they were received at the bank. Nothing more is required." Similarly, in *Hanley v. United States,* 416 F.2d 1160, 1167 (5th Cir. 1969), *cert. denied* 397 U.S. 910, 90 S. Ct. 908, 25 L. Ed. 2d 91 (1970), bank collection slips were found to be sufficiently trustworthy "because of their being created in the ordinary course of business affairs, as routine recurring entries to identify routine transactions. Mrs. Martin, the bank Vice President in charge of collections, testified that she routinely over a course of ten years filled out similar slips for Hanley and for other customers of the bank . . . ."

In the present case, knowledgeable witnesses from each applicable financial institution testified as to the routine creation of the documents which were admitted under § 27-803(5), that they were created in the regular course of business, that it was the regular course of the institution's business to create such documents, or the notations upon them, and that the documents or notations thereon were generated under the witnesses' supervision.

The record here does not show that the production of the cash teller or clerk who "altered or processed" each documentary exhibit would have increased the trustworthiness of the evidence here. The trial court did not abuse its discretion in finding the challenged documents sufficiently trustworthy and reliable to protect the defendant's right to confrontation, and it was not error to admit the documentary evidence of which defendant complains.

The judgment of the District Court is affirmed.

AFFIRMED.

WILLIAM MANN, APPELLANT, V. CITY OF OMAHA, APPELLEE.

319 N.W.2d 454

Filed May 14, 1982. No. 81-662.

1. **Workmen's Compensation.** In cases under the compensation act involving heart attacks, the principal issue is usually one of causation. The disability or death is not compensable unless the injury or death arose out of the employment. There is no fixed formula by which the issue may be resolved and the issue must be determined by the facts of each case.
2. _____. If it is claimed that the injury was the result of exertion in the employment, the evidence must show that the employment contributed in some material and substantial degree to cause the injury. The question to be determined is whether the injury was the result of a personal rather than an employment risk. The presence of a preexisting disease or condition enhances the degree of

proof required to establish that the injury arose out of the employment.

3. _____. It is no longer necessary that the injury be caused by a single traumatic event, but the exertion in the employment must contribute in some material and substantial degree to cause the injury.

4. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the compensation court on rehearing have the same force and effect as a jury verdict in a civil case and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and remanded with directions.

M. H. Weinberg of Weinberg & Weinberg, P.C., for appellant.

Herbert M. Fitle, City Attorney, and George S. Selders, Jr., for appellee.

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

WHITE, J.

The appellant, William Mann, a 19-year veteran of the Omaha Police Department, brought this action in the Workmen's Compensation Court to recover disability benefits for a heart attack he suffered on October 2, 1980. After trial the one-judge compensation court held that appellant was entitled to compensation benefits in the sum of $180 per week for 30 weeks for temporary total disability to the date of the hearing, which was held on April 29, 1981, and thereafter, and in addition thereto, the sum of $180 per week for so long in the future as the appellant shall remain totally disabled as a result of the heart attack. The City of Omaha refused to accept the award and filed an application for rehearing to the compensation court. The parties stipulated that no rehearing was needed to gather additional facts, and they submitted the case on the transcript of the

hearing before the single judge and the exhibits that were introduced at that trial. The three-judge panel on rehearing reversed the single judge's award and dismissed the appellant's petition. We reverse.

Appellant assigns a number of errors, but principally they may be directed to the three-judge court's findings. The three-judge panel in its order dated September 9, 1981, stated: "Thus, while it may be said that the stresses and strains of the plaintiff's employment contributed to the development of his coronary disease, it may as truly be said that the other risk factors were equally at work. There is not sufficient evidence for the Court to single out stress as the primary or leading causal agent in the plaintiff's disease."

The court went on to hold that in order for a presumably job-related heart attack to be compensable, the evidence must "identify a specific incident or incidents, stressful in character, or a specific change in routine or job duties involving a higher level of continuing stress, to which to tie either the myocardial infarctions or the more rapid increase of atherosclerosis."

It will be necessary to recite the facts of the case in some detail. William Mann was 48 years old at the time of the incident. He was the father of three children and had served as a police officer for the City of Omaha for nearly 19 years prior to his disability retirement. He had suffered a previous heart attack on September 24, 1978, and subsequently underwent a coronary bypass on November 16, 1978, for a blockage in the proximal anterior descending coronary artery. He was returned to work as a police officer, completely recovered, with no limitations or disabilities. Officer Mann testified that for 3 days prior to the attack of October 2, 1980, he had noticed numbness in his left arm and tightness in his chest. Officer Mann testified that the tightness and numbness subsided when he left the

job. During the evening of October 2, 1980, Officer Mann experienced what he described as "pressure in my chest and a lump in my upper chest just under my throat." When his wife returned from work she took him to the emergency room at Immanuel Hospital. He was examined, given an electrocardiogram test, and was released and sent home with three nitroglycerin tablets. After a few hours at home, Officer Mann experienced increased pain and was taken by the rescue squad to the coronary care unit at Methodist Hospital where he underwent a heart catheterization test. It was determined that he had suffered another myocardial infarction and that there was a blockage at a different location than the 1978 infarction. The tests showed the blockage to be in the inferior posterior wall of the coronary artery rather than the proximal anterior descending coronary artery as the first arteriogram in 1978 showed. Dr. James Morgan testified: "On the first heart catheterization the right coronary artery was essentially normal. There is possibly some very minimal irregularity of the lining of the vessel. There is absolutely no evidence of any obstruction at all. This was on 11-8-78. On 11-6-80 the repeat arteriogram shows a complete obstruction of the right coronary artery very near its origin, and in an area that looked very normal on the previous catheterization." When asked to explain that finding, Dr. Morgan testified: "This is not an average process of arteriosclerosis. An average person with arteriosclerotic artery disease has a gradual accumulation of material in the lumen of the vessel so that it gradually is narrowed down and then would occlude, causing a heart attack. I have never seen one that could happen in as short a period of time as this. And the picture look of the vessel does not look like the average coronary artery obstruction, it is much more discrete. . . . The most likely and in my medical judgment the cause of that obstruction is

that an arteriosclerotic plaque that may have been part of this minimal irregularity that was in the vessel earlier was elevated, and the force of the bloodstream then pushed it out into the bloodstream and occluded the blood vessel. This would be called hemorrhage under a plaque. It might be considered a form of coronary artery dissection." When asked if there was any way he could relate Officer Mann's work as a police officer to the cause of a heart condition, Dr. Morgan testified: "There are very few circumstances that would cause a rapid enough change in blood pressure to lift up a plaque, to dissect it out and to occlude a coronary artery. I would feel that it would have to be an acute rise in blood pressure. Now, we have a man who was not hypertensive during any of his hospitalizations, his blood pressures were normal in several determinations, and I did go back and look at his records to make sure of that. They range from 110 to 130. Then all of a sudden here is some indication that there has been a marked, if transient, increase of blood pressure to raise this plaque up and to obstruct the vessel. Now, the stress of an acute stress would be the type of thing that would do that. And I find it very easy to picture a policeman going through that type of acute stress. I think that any type of thing where you were going after someone, or chasing someone, or saw the possibility of guns being fired, would cause a very marked rise in the blood pressure, and that marked rise in the blood pressure is what I consider as the cause of the second heart attack." Dr. Morgan was also asked: "In other words, you found his blood pressure on numerous occasions prior to his second myocardial infarction basically normal? A. Yes. Q. And the rise in blood pressure that would be normally associated with police work would be the type of stress-related activity that could cause the problem? A. I agree with that. Q. So that if there were a number of incidents at or

about the time of the heart attack that were stressful, and that if there were no outside incidents at home or in other forms at that time, that with reasonable medical probability, medically using your own judgment, you could draw the conclusion that the heart attack, or the hemorrhage, was caused by police work? A. Yes." Dr. Morgan further testified in response to the following question: "You noted in there [a letter dated January 30, 1981] that he had a family history of early myocardial infarctions, and you noted he was a heavy smoker, and that he was mildly overweight, but he had never been hypertensive and had no other significant risk factors. I hate to be ignorant about this, but what are the risk factors, could you explain in simple terms to an attorney without much background in cardiology what the risk factors are? A. Risk factors are those that are associated with higher incidence than average of coronary artery disease. There are a large number of them, they vary from authority to authority on just what constitutes a risk factor, but commonly accepted risk factors are high blood pressure, cigarette smoking, high cholesterol, some people say high triglycerides, some people say high uric acid, stress in various forms, and family history is a very important risk factor. Other risk factors are all part of a large equation, and out of the end of the equation comes arteriosclerosis. And we don't even know what all the risk factors are, much less which ones are important and which ones have major importance and which ones have minor importance . . . . Q. May I ask why you specifically related the second incident to stressful police work as being the principal and main factor? A. As the coronary arteriograms were normal in 1978, and showed a complete obstruction with a very abrupt cutoff in 1980, I couldn't think of alternative explanations for why that should be that were acceptable to me other than hemorrhage under a plaque.

When I think about what can cause hemorrhage under a plaque, it narrows down in my mind to something that can cause a very abrupt rise in blood pressure, and I think that it is very logical to assume that police work would be associated with intermittent rises in blood pressure."

On cross-examination Dr. Morgan was asked: "Q. Then, Doctor, with the factors that have been listed in Mr. Mann's case, and assuming that we go to the American Heart Association risk factors and your risk factors, and we take someone such as Mr. Mann who was male, to begin with, . . . can you still say with reasonable medical certainty that these other factors could not have caused the heart attack in 1980, or could not have been equally contributing factors in the heart attack in 1980 as well as the stress? A. I find it inconceivable that they were significant contributors to the heart attack in 1980. If this same heart attack had happened in 1988, then I would say that those risk factors may have been a significant problem, because those risk factors would be expected to cause an acceleration of an arteriosclerotic process. But I can't conceive of that accelerating to the point that the vessel is normal in 1978 and totally obstructed in 1980 because of any of those other risk factors. Q. All right, and you would think that even though there were no X rays taken between 1978 and '80 in order to trace what the history of this possible plaque breaking away might be? A. Yes, I think even with that. In all the rest of the coronary arteries there has been no change, there hasn't been increased blockages in the other coronary arteries. If those risk factors are going to total one blood vessel, they should have changed some of the others, at least partially."

Other testimony adduced at trial showed that Officer Mann had been assigned to district 105 in Omaha for 1½ years prior to the October 2, 1980, infarction. This area abuts patrol district 104 to the

north which runs from Ames Street to Redick Street and from 30th Street to North 11th Avenue in Omaha. District 104 contains a racially mixed population with older and modest homes. District 105 runs from 30th Street east, Redick Street to Ponca Road. Among the inhabitants of the area were a group of motorcyclists which were referred to in the evidence as Hell's Angels. Officer Mann testified that he was frequently summoned to district 104, which he described as essentially a ghetto area. Officer Mann also testified that in district 105, at about the time of his heart attack, there was generally a heavy call load. Officer Mann testified that there were a great deal of burglary calls, vandalism, and family disturbances. While district 105 was not considered an area of high risk for officers, the family disturbance calls were always thought of as being extremely dangerous to officers. Officer Mann testified that districts 104 and 103, the ghetto areas, where he was frequently called into to assist, were high-risk areas. He also testified that at the time of the heart attack school had just started and there were a considerable number of fights and vandalism, as well as a special investigation involving a rapist who attacked older women in that area. He did not testify as to any specific incident that precipitated the pain while he was on duty, but simply that in the 3 days prior to the actual heart attack he suffered a numb, aching feeling in his left arm and tightness in his chest while on the job. Officer Mann further testified that there were no family difficulties, that he was under no undue stress in his home, that his three children were well, and that his relations with his wife were excellent.

There was considerable testimony by a Dr. John Stratton, director of psychological services for the sheriff's department in Los Angeles, California, concerning the stresses incident to normal police activity. The evidence was accepted as credible by

the three-judge compensation court which found: "There is a considerable amount of credible and persuasive evidence in the record to indicate that police officers, especially those serving in densely populated urban areas, suffer significantly more stress than the population generally. According to this evidence, police officers suffer a significantly higher incidence of digestive and circulatory problems, divorce and suicide, and their life expectancy is significantly shorter than the national average. The evidence points to the conclusion that the police profession is a high risk profession in terms of stress." The City makes no argument that the stress suffered by Officer Mann was not greater than the stress of his nonemployment life. See *Beck v. State,* 184 Neb. 477, 168 N.W.2d 532 (1969), where the court held that a heart attack would be compensable only if the employment contribution takes the form of exertion greater than that of nonemployment life. The evidence in this case overwhelmingly supports the conclusion of the compensation court that Officer Mann was subject on the job to a great deal of stress, greater than that in the normal nonemployment life of himself and other persons.

The appellee, City of Omaha, offered no medical evidence. To dispute the conclusions of Dr. Morgan and Dr. Stratton that stress was the cause of the myocardial infarction of October 2, 1980, they merely point to the existence of what they called the contributory risk factors. All of the contributory risk factors were discounted by the other evidence. The compensation court, in the absence of expert testimony supporting its conclusions, found that there is not sufficient evidence for the court to single out stress as the primary or leading causal agent in the appellant's disease.

"In cases under the compensation act involving heart attacks, the principal issue is usually one of causation. The disability or death is not compensa-

ble unless the injury or death arose out of the employment. There is no fixed formula by which the issue may be resolved and the issue must be determined by the facts of each case." *Sellens v. Allen Products Co., Inc.,* 206 Neb. 506, 509, 293 N.W.2d 415, 417 (1980); *Reis v. Douglas County Hospital,* 193 Neb. 542, 227 N.W.2d 879 (1975).

If it is claimed that the injury was the result of exertion in the employment, the evidence must show that the employment contributed in some material and substantial degree to cause the injury. The question to be determined is whether the injury was the result of a personal rather than an employment risk. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. *Sellens v. Allen Products Co., Inc., supra; Brokaw v. Robinson,* 183 Neb. 760, 164 N.W.2d 461 (1969).

In *Crosby v. American Stores,* 207 Neb. 251, 298 N.W.2d 157 (1980), we said that it is no longer necessary that the injury be caused by a single traumatic event, but the exertion in the employment must contribute in some material and substantial degree to cause the injury.

The findings of fact made by the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong. *Union Packing Co. v. Klauschie,* 210 Neb. 331, 314 N.W.2d 25 (1982).

In this case there was a sufficient showing that the appellant experienced greater stress in his employment life than in his nonemployment life. It has often been stated by this court that the opinions of experts are not binding on the trier of fact. *Irving v. Tri-Con Industries,* 210 Neb. 339, 314 N.W.2d 253 (1982). See, also, *Union Packing Co. v. Klauschie, supra.* However, where the medical testimony is

uncontroverted, unimpeached, and is given in matters of medical diagnosis which are peculiarly within the range of the knowledge of the expert, the compensation court is not free to substitute its own diagnosis. It is not true that in every case the uncontested opinion of an expert is binding on the trier of fact, but where, as here, the testimony is based on firsthand knowledge, is credible, and has no demonstrable weaknesses or failure of foundation, such testimony cannot be ignored. We therefore hold that the decision of the Workmen's Compensation Court denying compensation to William Mann, appellant, was clearly wrong and the judgment of the three-judge Workmen's Compensation Court is reversed and the cause is remanded to enter judgment for the appellant awarding him total and permanent disability.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS E. METZGER, APPELLANT.

319 N.W.2d 459

Filed May 14, 1982. No. 81-723.

1. **Criminal Law: Constitutional Law.** A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder.
2. _____: _____. The dividing line between what is lawful and unlawful cannot be left to conjecture.
3. **Criminal Law: Statutes.** Penal statutes prohibiting the doing of certain things and providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another.
4. **Criminal Law: Statutes: Constitutional Law.** A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as

to its application violates the first essential elements of due process of law.

5. **Criminal Law: Statutes.** The test to determine whether a statute defining an offense is void for uncertainty is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. The dividing line between what is lawful and what is unlawful cannot be left to conjecture.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and dismissed.

Dennis R. Keefe, Lancaster County Public Defender, and Dorothy A. Walker, for appellant.

John C. McQuinn II, Assistant City Prosecutor, for appellee.

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

KRIVOSHA, C.J.

The appellant, Douglas E. Metzger, was convicted in the municipal court of the city of Lincoln, Nebraska, of violating § 9.52.100 of the Lincoln Municipal Code. The judgment was affirmed by the District Court for Lancaster County, Nebraska, and Metzger has appealed to this court. For reasons set out below, we reverse and dismiss.

Metzger has raised several alleged errors. There is, however, a threshold question which we must address and which is dispositive of the entire matter. According to the evidence, Metzger lived in a garden-level apartment located in Lincoln, Nebraska. A large window in the apartment faces a parking lot which is situated on the north side of the apartment building. At about 7:45 a.m. on April 30, 1981, another resident of the apartment, while parking his automobile in a space directly in front of Metzger's apartment window, observed Metzger standing naked with his arms at his sides in his

apartment window for a period of 5 seconds. The resident testified that he saw Metzger's body from his thighs on up.

The resident called the police department and two officers arrived at the apartment at about 8 a.m. The officers testified that they observed Metzger standing in front of the window eating a bowl of cereal. They testified that Metzger was standing within a foot of the window and his nude body, from the mid-thigh on up, was visible.

The pertinent portion of § 9.52.100 of the Lincoln Municipal Code, under which Metzger was charged, provides as follows: "It shall be unlawful for any person within the City of Lincoln . . . to commit any indecent, immodest or filthy act in the presence of any person, or in such a situation that persons passing might ordinarily see the same."

Metzger argues that nudity, per se, is not obscene and is a form of free expression guaranteed by the first and fourteenth amendments of the U.S. Constitution, citing *Schad v. Mount Ephraim,* 452 U.S. 61, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981). We need not, however, address that issue in this case. The more basic issue presented to us by this appeal is whether the ordinance, as drafted, is so vague as to be unconstitutional. We believe that it is. There is no argument that a violation of the municipal ordinance in question is a criminal act. Since the ordinance in question is criminal in nature, it is a fundamental requirement of due process of law that such criminal ordinance be reasonably clear and definite. *Markham v. Brainard,* 178 Neb. 544, 134 N.W.2d 84 (1965); *State v. Adams,* 180 Neb. 542, 143 N.W.2d 920 (1966). Moreover, a crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. *State v. Huffman,* 202 Neb. 434, 275 N.W.2d 838 (1979); *State v. Nelson,* 168 Neb. 394,

95 N.W.2d 678 (1959). The dividing line between what is lawful and unlawful cannot be left to conjecture. *State v. Adams, supra; State v. Nelson, supra.* A citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose in advance what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things and providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another. *State v. Huffman, supra.* A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application violates the first essential elements of due process of law. *Connally v. General Const. Co.,* 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1925); *State v. Pocras,* 166 Neb. 642, 90 N.W.2d 263 (1958). It is not permissible to enact a law which in effect spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrongdoers may also be caught. *State v. Adkins,* 196 Neb. 76, 241 N.W.2d 655 (1976).

In *State ex rel. English v. Ruback,* 135 Neb. 335, 281 N.W. 607 (1938), this court laid down guidelines to assist in determining whether a statute defining an offense is void for uncertainty. In *Ruback* at 341, 281 N.W. at 610, we said: " 'The test to determine whether a statute defining an offense is void for uncertainty (1) is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences,

thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. [Citation omitted.] (2) The dividing line between what is lawful and what is unlawful cannot be left to conjecture. [Citations omitted.]' "

In the case of *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972), the U.S. Supreme Court said: "Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids.' "

In *Papachristou, supra,* the U.S. Supreme Court declared a vagrancy statute of the city of Jacksonville, Florida, invalid for vagueness, saying at 165: "This aspect of the vagrancy ordinance before us is suggested by what this Court said in 1876 about a broad criminal statute enacted by Congress: 'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.' "

Several other jurisdictions which have viewed ordinances with the same general intent in mind have reached similar conclusions. In the case of *State v. Sanders,* 37 N.C. App. 53, 245 S.E.2d 397 (1978), the South Carolina Court of Appeals was presented with a statute making it a misdemeanor for members of the opposite sex to occupy the same bedroom at a hotel for "any immoral purpose." In finding the ordinance too vague and indefinite to comply with constitutional due process standards, the court said at 55, 245 S.E.2d at 398: "A criminal statute or ordinance must be sufficiently definite to inform citizens of common intelligence of the particular acts which are forbidden. [Citation omitted.] G.S. 14-186 fails to define with sufficient precision exactly what the term 'any immoral purpose' may encompass. The word *immoral* is not equivalent to the

word *illegal;* hence, enforcement of G.S. 14-186 may involve legal acts which, nevertheless, are immoral in the view of many citizens. One must necessarily speculate, therefore, as to what acts are immoral. If the legislative intent of G.S. 14-186 is to proscribe illicit sexual intercourse the statute could have specifically so provided." (Emphasis in original.)

And in the case of *City of Detroit v. Sanchez,* 18 Mich. App. 399, 171 N.W.2d 452 (1969), the Michigan Court of Appeals was asked to determine whether an ordinance prohibiting ogling, insulting, annoying, following, or pursuing any person in any public street in the city was overbroad. In holding the ordinance void, the Michigan court said at 401-02, 171 N.W.2d at 453: "We are compelled to decide thus because this provision of the ordinance is unconstitutionally vague. By 'vague' we do not mean here that sort of vagueness referred to by the Supreme Court of Michigan in *People* v. *Austin* (1942), 301 Mich 456 [3 N.W.2d 841], that is, that the ordinance is put in terms which require men of common intelligence to guess as to its meaning and differ as to its application. The vagueness which invalidates this ordinance is its over-breadth of coverage rather than imprecise terminology or phraseology. The conviction cannot be sustained, because the ordinance makes criminal innocent as well as culpable conduct." See, also, *State v. Sullivan,* 298 N.W.2d 267 (Iowa 1980).

The ordinance in question makes it unlawful for anyone to commit any "indecent, immodest or filthy act." We know of no way in which the standards required of a criminal act can be met in those broad, general terms. There may be those few who believe persons of opposite sex holding hands in public are immodest, and certainly more who might believe that kissing in public is immodest. Such acts cannot constitute a crime. Certainly one could find many who would conclude that today's swimming attire

found on many beaches or beside many pools is immodest. Yet, the fact that it is immodest does not thereby make it illegal, absent some requirement related to the health, safety, or welfare of the community. The dividing line between what is lawful and what is unlawful in terms of "indecent," "immodest," or "filthy" is simply too broad to satisfy the constitutional requirements of due process. Both lawful and unlawful acts can be embraced within such broad definitions. That cannot be permitted. One is not able to determine in advance what is lawful and what is unlawful.

We do not attempt, in this opinion, to determine whether Metzger's actions in a particular case might not be made unlawful, nor do we intend to encourage such behavior. Indeed, it may be possible that a governmental subdivision using sufficiently definite language could make such an act as committed by Metzger unlawful. We simply do not decide that question at this time because of our determination that the ordinance in question is so vague as to be unconstitutional.

We therefore believe that § 9.52.100 of the Lincoln Municipal Code must be declared invalid. Because the ordinance is therefore declared invalid, the conviction cannot stand.

REVERSED AND DISMISSED.

BOSLAUGH, J., dissenting.

The ordinance in question prohibits indecent acts, immodest acts, *or* filthy acts in the presence of any person. Although the ordinance may be too broad in some respects, it would seem the defendant in this case lacks standing to raise the issue. See 16A Am. Jur. 2d *Constitutional Law* § 461 (1979). The exhibition of his genitals under the circumstances of this case was, clearly, an indecent act.

Statutes and ordinances prohibiting indecent exposure generally have been held valid. I do not subscribe to the view that it is only "possible" that such

conduct may be prohibited by statute or ordinance. See Neb. Rev. Stat. § 28-806 (Reissue 1979).

CLINTON and HASTINGS, JJ., join in this dissent.

MARIE BODZEK, APPELLEE, V. DAVID W. CALLAHAN, HARVEY CALLAHAN, AND MARIANNE CALLAHAN, APPELLANTS.

319 N.W.2d 721

Filed May 21, 1982. No. 43973.

1. **Judgments: Appeal and Error.** Where a party has sustained the burden and expense of trial and has succeeded in securing the judgment of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured.
2. **Trial: Appeal and Error.** A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial but consents to take the chance of a favorable verdict.

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

Ray C. Simmons, P.C., for appellants.

No appearance for appellee.

Heard before KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MURPHY and WHITEHEAD, D. JJ.

MURPHY, D.J.

This is an action brought by the plaintiff, Marie Bodzek, for personal injuries resulting from an automobile collision with the defendant David W. Callahan. The defendants admitted liability but denied that the plaintiff was injured. After trial, the jury returned a verdict for the defendants. In granting plaintiff's motion for a new trial, the trial court found "that there were irregularities in the proceedings by the prevailing party which prevented the plaintiff from having a fair trial." The defendants

appeal from the order setting aside the judgment for the defendants and granting the plaintiff a new trial.

Counsel for the plaintiff did not file a brief or appear for argument.

Although there is nothing in the record to indicate the nature of the "irregularities" the trial court referred to in ruling on the plaintiff's motion for a new trial, a review of the entire record leads to the conclusion that the trial court was concerned with a prior accident in 1968, at which time the defendants' attorney represented the plaintiff.

During direct examination of the plaintiff, her attorney elicited testimony about injuries she received in the 1968 accident.

On cross-examination of the plaintiff, the attorney for the defendants asked the following questions, and the plaintiff gave the following answers: "Q. Now, Mrs. Bodzek, this morning you were asked about this accident you had in 1968, with the redimix [sic] truck, do you recall that? A. What? Q. When you had your accident in 1968 with the Arp's truck? A. Yes, sir. Q. And my notes here are that your attorney asked you what your injuries were in that accident and you said your forearm was hurt and you had general soreness? A. Yes, sir, you were my attorney. Q. Was that your answer though, this morning? A. I said I had general body soreness and general body strain and contusions of the right forearm. Q. That's what you said this morning? A. Yes, sir."

The defendants' attorney then went on to question the plaintiff about further injuries resulting from the 1968 collision as reflected in her petition and deposition filed subsequent to that collision.

After the plaintiff had rested, the trial court held a conference with counsel for the parties, at which time the court inquired if there would be a problem about the prior representation of the plaintiff by the attorney for the defendants.

At this conference it was brought out that the plaintiff had revealed the 1968 accident, her injuries, and hospitalization in answers to interrogatories prior to trial. The plaintiff's attorney also admitted that he was aware of the plaintiff's representation by the defendants' attorney in the prior accident. The court then invited the plaintiff's attorney to take whatever action he deemed necessary at that time by reason of the prior representation of the plaintiff by the defendants' attorney, in the following words: "I'm bringing it up so that you [plaintiff's attorney] can do what you want to do now, because I don't want to be faced with a new trial because of this."

No motions for a mistrial were made. Nor did the plaintiff's attorney make any objections or move to strike the comment by the plaintiff about her prior representation.

The defendants then proceeded with their case and rested. Following final argument and instructions of law, the jury returned a verdict for the defendants.

It is well established that where a party has sustained the burden and expense of trial and has succeeded in securing the judgment of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *McKinney v. County of Cass,* 180 Neb. 685, 144 N.W.2d 416 (1966); *Sleezer v. Lang,* 170 Neb. 239, 102 N.W.2d 435 (1960).

The verdict of the jury should not be disturbed unless said verdict is clearly wrong. There is no indication that the verdict in this case was clearly wrong or of prejudicial error in the proceedings by which the verdict was secured.

The trial court's order granting a new trial to the plaintiff does not specify the nature of the "irregularities" which prevented the plaintiff from having a fair trial. However, an examination of the record would indicate that the trial court was referring to

the prior representation of the plaintiff by the attorney for the defendants.

Although invited to do so by the trial court, counsel for the plaintiff elected not to move for a mistrial.

A party may not complain of misconduct of opposing counsel when, with knowledge of such alleged misconduct, he does not ask for a mistrial but consents to take the chance of a favorable verdict. *State v. Wounded Arrow,* 207 Neb. 544, 300 N.W.2d 19 (1980); *Johnson v. Nathan,* 161 Neb. 399, 73 N.W.2d 398 (1955).

Therefore, the order of the trial court in sustaining the plaintiff's motion for a new trial and vacating the judgment of dismissal is reversed, with directions to reinstate the verdict.

REVERSED WITH DIRECTIONS.

EUNICE KNUTSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF EUGENE H. KNUTSON, DECEASED, APPELLANT, V. HERMAN BROS., INC., ET AL., APPELLEES.

319 N.W.2d 723

Filed May 21, 1982. No. 43997.

1. **Negligence: Motor Vehicles.** The mere skidding of a motor vehicle without more does not prove negligence.
2. **Depositions.** If only part of a deposition of a witness is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts relevant to the issues and not introduced. Neb. Rev. Stat. § 25-1267.04(4) (Reissue 1979).

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

Warren C. Schrempp and John J. Hanley, for appellant.

Nelson & Harding, Kermit A. Brashear II, and Pamela K. Black, for appellee Herman Bros.

Larry E. Welch of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee Swanson.

Heard before BOSLAUGH, MCCOWN, WHITE, and CAPORALE, JJ., and FINN, D.J.

MCCOWN, J.

This is an action for damages for personal injuries resulting from an automobile-truck collision. The plaintiff alleged that the negligence of both defendant Darrold E. Swanson and defendant Herman Bros., Inc., was the proximate cause of the accident and resulting injuries. The original plaintiff died of an unrelated heart attack and the action was revived in the name of his personal representative. At trial the District Court granted a motion for directed verdict in favor of the defendant Herman Bros., Inc., and the jury returned a verdict in favor of the defendant Swanson. The plaintiff has appealed.

The collision involved in this case was one of a series of collisions which occurred on Interstate 80 in Omaha, Nebraska, on January 2, 1974. The accident occurred at approximately 9 a.m. in the eastbound three lanes of Interstate 80 at a point near 68th Street. From several blocks west to the place of the accident the eastbound lanes are slightly downgrade. The surface of the highway was icy and extremely slick on the morning of the accident. The original plaintiff, Eugene Knutson, an over-the-road truckdriver, was driving his rig eastbound in the center lane of the three eastbound lanes of Interstate 80. A Herman Bros. truck had passed him shortly before and was ahead of Knutson in the center lane, and a brown car was between them. By deposition, Knutson's testimony was that his speed was 25 to 30 miles per hour, but he could not estimate the speed of the Herman Bros. truck. Knutson testified that he saw the Herman Bros. rig commence to fishtail. He concluded that the Herman Bros. truck was out of control and Knutson moved to the left lane and

was proceeding in that lane when he observed the Swanson car stalled and parked ahead of him. The evidence is in conflict as to whether the Swanson vehicle was off the traveled portion of the highway or was protruding from the median into the left lane. Knutson struck the Swanson vehicle and the vehicles came to rest in the median. The Herman Bros. truck jackknifed in the center lane and was struck from behind by the brown automobile.

Knutson received injuries to his face and left eye. He died in 1978 from a heart attack and this action was revived in the name of his personal representative. The case was tried in September 1980. The District Court sustained Herman Bros.' motion for a directed verdict at the conclusion of plaintiff's case. The jury returned a verdict for the defendant Swanson, and the plaintiff has appealed.

Plaintiff contends that Herman Bros. was not entitled to a directed verdict. The argument is plaintiff is entitled to have the benefit of all inferences that may be deduced from the evidence on a motion for directed verdict, and that the evidence of skidding or fishtailing is sufficient to go to the jury on the issue of Herman Bros.' negligence, and whether that negligence, if any, was a proximate cause of the accident and injuries.

The issue is whether the fishtailing and subsequent loss of control of the Herman Bros. truck are sufficient in themselves to support an inference that the driver of the Herman Bros. truck was negligent, and that such negligence was a proximate cause of the Knutson collision with Swanson. This court has recently held that the mere skidding of a motor vehicle without more does not prove negligence. In *Porter v. Black,* 205 Neb. 699, 289 N.W.2d 760 (1980), this court adopted that rule in a case in which the evidence established icy conditions, a skidding, and a subsequent loss of control where there was no evidence of excessive speed. This court stated: "A

jury could arrive at a conclusion of negligent loss of control only by engaging in conjecture. There must be evidence of some fact or circumstance from which an inference can be drawn that the skidding could have been prevented by the exercise of ordinary care." *Id.* at 707-08, 289 N.W.2d at 765.

In the case at bar there is no evidence of excessive speed. The evidence is undisputed that the road surface was icy and extremely slick. There is no evidence in the record that the Herman Bros. driver failed to maintain a proper lookout or was otherwise negligent, and there was no contact between the two trucks. The trial court was correct in sustaining the motion of Herman Bros., Inc., for a directed verdict.

Plaintiff also contends that the jury verdict in favor of defendant Swanson should be set aside because the court erred in admitting the remainder of a deposition of the defendant Swanson after the plaintiff had offered a portion of it as an admission against interest.

In the plaintiff's case in chief the plaintiff offered a portion of a deposition of the defendant Swanson in evidence as an admission against interest and was allowed to read that portion to the jury. Counsel for Swanson requested that the entire deposition be read and the trial court ruled that plaintiff's attorney could not be required to read the entire deposition if he did not wish to do so but that Swanson could thereafter offer the deposition. The deposition dealt with the circumstances under which the Swanson car came to be parked and the fact that no lights were left on.

At the beginning of defendant Swanson's case the entire deposition was offered and received. On rebuttal the plaintiff called Swanson and cross-examined him with respect to the deposition.

Plaintiff contends that there was no sufficient foundation to permit the testimony by deposition as required by Neb. Rev. Stat. § 25-1267.04(3) (Reissue

1979). That section provides that the deposition of any witness, whether or not a party, may be used by any party for any purpose if the witness is dead, out of the country, unable to attend or testify because of age, sickness, infirmity, or imprisonment, or if other showings of unavailability are made. Plaintiff contends that since Swanson was present in court none of the foundational requirements were met and the deposition could not be used on Swanson's behalf.

Section 25-1267.04(4) is dispositive of the issue. It provides: "(4) If only part of a deposition of a witness is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts relevant to the issues and not introduced." The plaintiff, having offered and introduced a part of the deposition, cannot complain when the adverse party introduces the remainder of the deposition on the same subject.

In the case at bar the jury returned its verdict in favor of the defendant Swanson and there was competent evidence to support that verdict. The verdict of the jury will not be disturbed unless it is clearly wrong.

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

AFFIRMED.

THOMAS HARVEY, APPELLANT, V. ROBERT VAN AELSTYN AND CARLENA WARREN, DOING BUSINESS AS THE MILL BAR AND LOUNGE, APPELLEES.

319 N.W.2d 725

Filed May 21, 1982. No. 44001.

1. **Innkeepers: Negligence.** The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the prem-

ises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm

2. _____: _____. The possessor of the premises is not bound to anticipate the unforeseeable independent acts of third persons, and it is only when such acts can reasonably be anticipated that the possessor has the duty to take some precautionary measures to protect against such independent acts.

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

Thomas M. Sonntag of Peetz, Peetz & Sonntag, for appellant.

Leland K. Kovarik of Holtorf, Kovarik, Nuttleman & Ellison, P.C., for appellee Warren.

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

PER CURIAM.

This action for damages for personal injuries was brought by the plaintiff, Thomas Harvey, in the District Court for Cheyenne County, Nebraska, alleging two causes of action. The first is against the defendant Robert Van Aelstyn for an assault and battery which occurred on June 17, 1979, in a tavern in Sidney, Nebraska, known as The Mill. The second cause is against the defendant Carlena Warren, the owner and operator of The Mill, for alleged negligence in failing to prevent the assault. The trial court held that Van Aelstyn was liable as a matter of law. It granted the defendant Warren's motion for a directed verdict. The jury returned a verdict against Van Aelstyn for $24,000. Van Aelstyn has not appealed.

The plaintiff appeals from the order directing the verdict for the defendant Warren. The issue on ap-

peal is whether the evidence required the issues of the defendant Warren's alleged negligence and its relation to the assault as proximate cause to be submitted to the jury.

The plaintiff alleged that Warren was negligent in the following ways: "a. In permitting the Defendant, Robert Van Aelstyn, to enter into and remain upon the premises of said Defendant, The Mill, when said Defendant, its agents, servants, workmen or employees knew or had reason to know that on prior occasion the Defendant, Robert Van Aelstyn, had become obstreperous, boisterous and prone to violent action toward patrons of the Mill;

"b. In failing to aid or attempt to aid Plaintiff while he was being assaulted, battered and violently attacked by the Defendant, Robert Van Aelstyn;

"c. In failing to exercise reasonable care and caution in protecting Plaintiff from the assault, beating and violent action of the Defendant, Robert Van Aelstyn;

"d. In failing to afford proper protection to its guests and patrons;

"e. In failing to maintain order on said premises;

"f. In failing to employ security personnel for the protection of Plaintiff and other guests and patrons;

"g. In failing to report the incident described herein to law enforcement authorities;

"h. In failing to report similar incidents which have occurred at the Mill to law enforcement authorities"—one or more of which alleged acts were a proximate cause of plaintiff's injuries.

There is no dispute as to the facts of the assault which occurred on June 17, 1979. The plaintiff was a regular patron of The Mill. Following a softball game in which he participated, he with others came into the bar, sat at a booth, and began to drink beer. It was a Sunday and only wine and beer were being sold. About 10 patrons were present, including the plaintiff. The defendant Warren was tending bar.

No other employees of the bar were present. Later, plaintiff's former wife, Lina Harvey, entered the bar. At sometime during the evening she and a female friend sat down at the booth at which the plaintiff was seated. Shortly thereafter, the plaintiff, apparently made uncomfortable by Lina's presence, left the booth and went to the bar. Lina and a female friend persuaded the plaintiff to return to the booth. Thereafter, at the suggestion of a friend, the plaintiff asked Lina to dance. The two began to dance in the area provided for dancing, which was separated from the bar by the booths and restrooms. One other couple was on the dance floor. One of the dancers was Alan Anderson. At that time the defendant Van Aelstyn, who had not previously been present, entered the east door of the tavern, strode rapidly to the dance floor, tossed his coat at Anderson, grabbed Lina by the shoulders, and shoved her aside with such force as to propel her to the floor. He immediately struck plaintiff in the face, knocking him to the floor, unconscious. He then kicked and stomped on him with his feet. Immediately, Anderson, one Darwin Glassburn, an off-duty, part-time employee of the tavern who was seated at the bar, and other male patrons restrained Van Aelstyn and removed him from the tavern. Plaintiff suffered serious injuries and was taken to the hospital immediately by friends.

Plaintiff was unaware of Van Aelstyn's presence in the tavern until Lina was knocked to the floor. He then saw Van Aelstyn's fist coming toward him and remembered nothing else until regaining consciousness in the hospital. It is clear that he had no opportunity to defend himself. Glassburn testified that less than a minute elapsed from the time Van Aelstyn entered the east door of the tavern until the assault was complete. Anderson testified that he was not aware of Van Aelstyn's presence until the coat hit him. He did not know whom Van Aelstyn was

going to attack. Anderson pushed the girl with whom he was dancing away and shouted a warning. All the witnesses agree that Van Aelstyn said nothing before the assault. Glassburn, who saw him enter, stated Van Aelstyn had a peculiar look in his eye.

At the time the assault occurred, and for 5 to 6 months earlier, Van Aelstyn was living with Lina Harvey and the three children of the plaintiff and Lina at Lina's place of residence. Van Aelstyn entered the bar because he was looking for Lina and had earlier tried to find her at the "Eagles." Harvey was acquainted with Van Aelstyn and had visited his own children at the home where Van Aelstyn and Lina lived when both Van Aelstyn and Lina were present. He stated he had no reason to believe Van Aelstyn would hit him and that there had been no "bad blood" between them. Van Aelstyn's motive for the attack was disclosed by his own statement while stomping on Harvey, when he said, in effect, "stay away from my girl or I'll kill you." The defendant Warren saw Van Aelstyn enter the tavern but did not see the start of the assault. She saw Van Aelstyn leave but does not know how Harvey was removed from the premises. By the time she reached the "archway," everything was over.

In the case of *Hughes v. Coniglio,* 147 Neb. 829, 25 N.W.2d 405 (1946), this court adopted the rule of the Restatement of Torts § 348 (1934), now Restatement (Second) of Torts § 344 (1965), and summarized it in the following language: "The modern general rule, summarized in its simplest terms, is that the proprietor of a place of business who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discov-

ered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm. Restatement of the Law, Torts, § 348, p. 953." *Id.* at 833, 25 N.W.2d at 408. In *Coniglio* the plaintiff, a patron of a restaurant, was injured when a fight occurred between two patrons of the establishment. In that case we noted that the place of business was not one where fights had generally occurred or for any reason were likely to occur, that neither defendant had any notice that the fighting patrons had quarrelsome, violent, or disorderly propensities, or were liable for any reason to assault each other or injure patrons. We also said: "It is apparent from the evidence that both the altercation and resulting injury to plaintiff all happened suddenly and unexpectedly, without any warning, and by the exercise of reasonable care could not either have been discovered or prevented by defendant." *Id.* at 832, 25 N.W.2d at 408.

We have reiterated the general rule in subsequent cases. In *Fimple v. Archer Ballroom Co.,* 150 Neb. 681, 35 N.W.2d 680 (1949), the altercation and assault occurred in a dancehall equipped with booths at which the proprietor sold "setups," i.e., ice, glasses, and mix, which the patrons were permitted to mix with alcohol and consume on the premises. In that case the plaintiff was seated in a booth. In the adjacent booth were four intoxicated young men. As time passed these young men became more intoxicated and boisterous in their conduct and language, breaking glasses and on one occasion throwing a whiskey bottle. All of this went on for about an hour and a half. As the plaintiff got up to leave, one of the young men tossed a bottle and struck the plaintiff on the right side of the nose, inflicting serious injury. We held this evidence made a submissible case of the proprietor's negligence under the general

rule, but reversed for errors in instructions.

In *Crane v. Whitcomb,* 160 Neb. 527, 70 N.W.2d 496 (1955), the plaintiff Crane was shot outside the tavern owned and operated by the defendant. Her husband, a codefendant, made the assault following an altercation which began in the tavern. The court submitted the case to the jury on the issue of liability of both defendants, and the jury returned a verdict against both. The defendant husband did not appeal. This court reversed the verdict as to the operator-owner, relying upon the general rule we have earlier stated and pointing out that there was no evidence the owner knew or permitted the husband to have the weapon with him on the premises. This court recited the following evidence: "Defendant was up in the tavern nearly all evening from 8 or 9 p.m., working and visiting with customers. There is evidence that she was back of the bar when Whitcomb went downstairs [to obtain the gun]. She did not see him go to the basement. She took an empty case to the garage at the back and when she returned the place was empty and she wondered why. She heard no warning that people should leave, did not know that Whitcomb had the gun, and heard no shot. She looked up just as he went out the door and when she started toward the door plaintiff came inside the tavern again.

"It will be observed from the foregoing that defendant was not guilty of any negligence proximately causing plaintiff's injuries . . . ." *Id.* at 537, 70 N.W.2d at 502.

We again cited the general rule in *Welsh v. Zuck,* 192 Neb. 1, 218 N.W.2d 236 (1974). This case involved the accidental shooting of a patron in a tavern operated by the defendant Zuck, by another patron, Rima. The defendant proprietor had a pistol target-shooting gallery in the basement of the tavern. He permitted Rima, his codefendant, to use the gallery for the purpose of "targeting" his per-

sonal handgun. Two days before the shooting Zuck and Rima targeted the pistol. Zuck then checked to see that it was unloaded and handed it back to Rima. Rima, when he went upstairs to the bar, handed it to the bartender and asked him to put it behind the bar until he returned later. This the bartender did. There was evidence that Zuck saw Rima give the gun to the bartender, although this was disputed. On the day of the shooting Rima returned to the tavern and asked the bartender for the gun, and it was given to him. Rima then left the tavern and during that time put four shells in the weapon. He returned about 45 minutes later. He showed the gun to the plaintiff Welsh, a patron. About that time Rima thought he heard someone say something disparaging about his wife. He raised the pistol and pointed it in the air. Another patron, fearing violence, sought to disarm him and in the course of the struggle they fell to the floor, the weapon was discharged, and the plaintiff Welsh was wounded. The jury returned a verdict against both Zuck and Rima. This court on appeal (one judge dissenting) set aside the verdict against Zuck, saying, after reciting the general rule we have earlier quoted: "After examining the evidence in the light most favorable to plaintiff, and considering such evidence in the light of the standard of care set forth above, we conclude that such evidence was not sufficient to establish the existence of actionable negligence on the part of defendant Zuck, and we reverse the judgment of the lower court." *Id.* at 6, 218 N.W.2d at 239.

Restatement (Second) of Torts § 344, Comment d. at 225 (1965), in discussing the standard of reasonable care, says in part: "A . . . possessor of land who holds it open to the public for entry for his business purposes is not an insurer of the safety of such visitors against the acts of third persons, or the acts of animals. He is, however, under a duty to exercise reasonable care to give them protection. In

many cases a warning is sufficient care if the possessor reasonably believes that it will be enough to enable the visitor to avoid the harm, or protect himself against it. There are, however, many situations in which the possessor cannot reasonably assume that a warning will be sufficient. He is then required to exercise reasonable care to use such means of protection as are available, or to provide such means in advance because of the *likelihood* that third persons . . . may conduct themselves in a manner which will endanger the safety of the visitor." (Emphasis supplied.)

It is clear from the foregoing evidence that the defendant Warren could not at the time the assault occurred have done anything to restrain Van Aelstyn. No reasonable opportunity to do so existed. Neither could she reasonably be expected to have given a warning unless she is to be charged with the unreasonable obligation of being able to discern Van Aelstyn's intention at the moment he entered the tavern. The evidence indicated that Van Aelstyn had not been in the tavern for a year or more prior to this incident.

The plaintiff presented the following evidence to show that Warren had notice of Van Aelstyn's assaultive disposition, from which arose her duty to warn and restrain Van Aelstyn and protect the plaintiff. The evidence shows that on one occasion a year or more prior to the present assault Van Aelstyn, while in the tavern, slapped or struck another patron by the name of Bayne. No details of this incident are shown by the evidence. On another occasion, apparently prior to the Bayne incident, Van Aelstyn, while a patron of The Mill, left the building and walked across the street to slap a young man who had purchased a soft drink at the bar and then went across the street to sit at the curb to drink his purchase. The evidence shows Warren witnessed the Bayne incident and was later told by Glassburn, who

apparently was the employee on duty at the time, of the other incident involving Van Aelstyn.

The plaintiff also introduced evidence of prior occurrences in or near the tavern, which plaintiff argues, when taken together with Warren's knowledge of Van Aelstyn's disposition, gave rise to a duty at all times to employ security personnel for the protection of patrons, including the plaintiff. A detective lieutenant of the Sidney Police Department testified at trial, which took place on November 20, 1980, that he had occasion to investigate "assaults, disturbances or fights," about 10 in all, which occurred at The Mill since January 1, 1975. He described only three of these incidents. The first occurred on October 3, 1975. In that instance one patron, a Mr. Davis, while in the restroom of The Mill, vomited, dirtying the shoes of another patron, a Mr. Benzel, who was also using the restroom. Benzel pushed Davis away, and the latter pulled a knife and stabbed the former. Mrs. Warren was on duty at the bar on this occasion.

The second incident occurred on December 8, 1975. On that occasion one patron struck another several times with a beer bottle. This incident was reported to the police immediately after the incident by the barmaid who could not get to the telephone during the altercation because the participating parties blocked the route to the telephone. Warren was present on this occasion. No other details are shown.

The third incident occurred on July 29, 1978, not in the bar, but on the steps at the west entry to the building. These steps are adjacent to the public sidewalk. The person assaulted was about to enter the building when he was met by another person who attacked him with his fists. Whether the person who committed the assault was a patron of the bar is not disclosed by the evidence.

The assault on Harvey by Van Aelstyn was re-

ported to the police department by a third party several days after the incident.

Under the general rule we have earlier cited and as we have applied it in the four cases from which we have quoted, it is clear that the possessor of the premises is not bound to anticipate the unforeseeable independent acts of third persons, and it is only when such acts can reasonably be anticipated that the possessor has the duty to take some precautionary measures to protect against such independent acts. The following cases from other jurisdictions also support this position. *Moore v. Yearwood,* 24 Ill. App. 2d 248, 164 N.E.2d 215 (1960) (assault with beer bottle by one patron against another as the latter was being escorted from the bar by the bartender because he was intoxicated and arguing); *Evanish v. V. F. W. Post No. 2717,* 269 Minn. 209, 130 N.W.2d 331 (1964) (defendant bar operator, who was sponsoring a convention taking place on part of the bar premises, furnished firecrackers for use outside the bar and a person outside the bar entered and threw a firecracker, injuring a patron); *Pierce v. Lopez,* 16 Ariz. App. 54, 490 P.2d 1182 (1971) (assault with a pool cue by one patron against another arising out of an altercation stemming from the former accidentally spilling beer on the latter). In each of these cases the court, applying the general rule, held that the operator was, as a matter of law, not guilty of negligence which was the proximate cause of the plaintiff's injuries.

We held as a matter of law that the defendant Warren was not bound to anticipate the unforeseen entry of Van Aelstyn on the premises and the totally unexpected subsequent assault upon the plaintiff when no warning of any kind had been given and the motive for the assault could have occurred only after Van Aelstyn observed Lina dancing with plaintiff. It would be pure speculation to assume that the presence of a security person could have prevented

the assault, when the evidence showed that Anderson, who was within an arm's length of Van Aelstyn, and others near at hand could not react until after the plaintiff was knocked to the floor. The action of the District Court was correct and is affirmed.

AFFIRMED.

OMAHA PUBLIC SCHOOLS, APPELLANT, V. JERALD HALL, APPELLEE.

319 N.W.2d 730

Filed May 21, 1982. No. 44035.

1. **Statutes.** In the construction of a statute which is clear and unambiguous, the courts cannot supply missing language. It is not within our power to read into a statute a meaning which the clear language does not warrant.
2. **Equal Opportunity Commission: Jurisdiction.** The Equal Opportunity Commission, having exercised powers not specifically granted by statute, acted in excess of those powers and its action is therefore void and of no effect.
3. _____: _____. The parties to this action cannot grant the Equal Opportunity Commission jurisdiction by acquiescence or consent, or by participation in the procedures.

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

Alex M. Clarke and John P. Heil of Baird, Holm, McEachen, Pedersen & Hamann, for appellant.

Timothy J. Augustyn of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee.

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

WHITE, J.

This is an appeal from a decree of the District Court for Douglas County, Nebraska, which affirmed an order of the Nebraska Equal Opportunity

Commission finding that appellee, Jerald Hall, had been discriminated against by hiring practices of appellant, Omaha Public Schools.

Several assignments of error are argued, but we shall discuss only one, i.e., whether at the time of the action taken, the Nebraska Equal Opportunity Commission had jurisdiction to hear discrimination complaints by employees of the subdivisions of the State of Nebraska. We agree with appellant that the commission did not have jurisdiction and, accordingly, reverse the order of the District Court and dismiss the complaint.

The Nebraska Fair Employment Practice Act was adopted by the 1965 Legislature (1965 Neb. Laws, Ch. 276, p. 782) and is found at Neb. Rev. Stat. §§ 48-1101 et seq. (Cum. Supp. 1965). After declaring the policy of the act in § 48-1101, § 48-1102(2) defined the employers subject to the act: "(2) Employer shall mean a person engaged in an industry who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (a) the United States, a corporation wholly owned by the government of the United States, an Indian tribe, or the state or any *political subdivision thereof* . . . ." (Emphasis supplied.)

The 1967 Legislature (1967 Neb. Laws, Ch. 306, § 1, p. 829) amended § 48-1102(2) by striking the words "or the state or any political subdivision thereof."

The Legislature later further amended § 48-1102(2) to read: "Employer shall mean a person engaged in an industry who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, *and includes the State of Nebraska, governmental agencies, and political subdivisions, regardless of the number of*

employees . . . ." (Emphasis supplied.) (1979 Neb. Laws, L.B. 67, § 1.)

Appellant, a teacher, is confined to a wheelchair. He made application for employment with appellee school district in 1975 and was not hired. In 1975 a complaint was filed with the commission. Both the commission and the District Court found that the school district discriminated against appellant because of his disability. Had we had opportunity to reach that issue, we would have been inclined to agree with the findings of the commission and the District Court. No question exists that Jerald Hall was a person covered by the act as a disabled person, as provided by Neb. Rev. Stat. § 48-1104 (Reissue 1974), and would have been entitled to relief, provided jurisdiction of the commission had existed prior to the effective date of the 1979 legislation.

Appellee concedes that the 1967 amendment does not by its terms subject political subdivisions to the jurisdiction of the commission. He, however, points out the legislative history of 1967 Neb. Laws, L.B. 357, as introduced by Senator Danner: "The purpose of the bill is to provide that the State of Nebraska, and any agency of the State, or any political subdivision of the State shall be subject to the Fair Employment Practice Act, Statute 48-1102, Chapter 48, Article 11, Revised Statutes Supplement, 1965. The State of Nebraska and its political subdivisions were inadvertently left out . . . ."

Appellee also points to the hearing on 1967 Neb. Laws, L.B. 357, in which the purposes of the introducer were quite clear and explicit.

It is extremely unfortunate in this otherwise meritorious case that the same care taken to compose the statement of purpose was not used to draft an amendment capable of accomplishing the intended purpose. When the state and political subdivisions were removed from the exclusion within § 48-1102(2), they were not automatically included as an em-

ployer subject to the act. To be covered by § 48-1102(2), they must first meet the definition of "person," as defined in § 48-1102(1), unless they were specifically included within the definition of "employer."

The language of § 48-1102 (Cum. Supp. 1967) is extremely clear. The state and political subdivisions were not included in the definition of "employer" or "person" and therefore are not subject to the act.

In the construction of a statute which is clear and unambiguous, the courts cannot supply missing language. It is not within our power to read into a statute a meaning which the clear language does not warrant. See *Ragland v. Norris P.P. Dist.,* 208 Neb. 492, 304 N.W.2d 55 (1981).

The Equal Opportunity Commission, having exercised powers not specifically granted by statute, acted in excess of those powers and its action is therefore void and of no effect. See *Transport Workers of America v. Transit Auth. of City of Omaha,* 205 Neb. 26, 286 N.W.2d 102 (1979). Nor could the parties have granted the commission jurisdiction by acquiescence or consent, or by participation in the procedures. *Nebraska P.P. Dist. v. Huebner,* 202 Neb. 587, 276 N.W.2d 228 (1979).

Accordingly, the judgment is reversed and the cause remanded to the District Court with directions to dismiss the complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

CAPORALE, J., concurring.

I concur; however, since we do not reach the merits of the cause, I prefer not to speculate as to how those issues would have been resolved had we done so.

BOSLAUGH and HASTINGS, JJ., join in this concurrence.

DARRYL A. WATSON, APPELLANT, V. CITY OF GRAND ISLAND, NEBRASKA, A MUNICIPAL CORPORATION, AND DWIGHT JOHNSON, APPELLEES.

319 N.W.2d 733

Filed May 21, 1982. No. 44049.

Police Officers and Sheriffs: Labor and Labor Relations. Action of city manager denying a merit pay raise to police officer held to be within legitimate administrative discretion and not arbitrary or capricious.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Affirmed.

J. Murry Shaeffer, for appellant.

Keith Sinor, City Attorney, for appellees.

Heard before MCCOWN, HASTINGS, and CAPORALE, JJ., and STUART and HIPPE, D. JJ.

HIPPE, D.J.

The trial court refused the plaintiff's request that the court order Grand Island to promote him. He was a patrolman wanting a pay advancement. The promotion came later, but he wanted an order to make it effective approximately 6 months sooner. We agree with the trial court, and we affirm.

Under a collective bargaining agreement between the City of Grand Island and Local No. 516, International Brotherhood of Police Officers, seven pay steps were set up for police officers.

The dispute in this case comes from the plaintiff's belief that he should have been promoted from step 5 to step 6 in October 1978. His immediate supervisors completed an evaluation certifying him to be satisfactory in all but one of six categories. Police officers were evaluated in six categories and could get either an outstanding, satisfactory, improvement needed, or unsatisfactory rating in each of the six categories. There is also a summary rating. The plaintiff's regular anniversary employment

date was October 1977 to October 1978. His evaluation showed him satisfactory in five categories, improvement needed in one category, and a summary rating of satisfactory. This was approved by all of the supervisors in the police department. When it went to higher administrative channels for a pay increase, it was denied by the city manager, Dwight Johnson. He said: "I have reviewed the merit evaluation of Patrolman Watson and the recommendation for a merit increase from Step 5 to Step 6 submitted by Deputy Chief Beilke. After careful review, I do not believe the recommendation for a merit increase should be accepted at this time. While Mr. Watson appears to have some commendable virtues as a patrolman, it also appears that there are some problem areas which are somewhat troublesome. Accordingly, I would ask that Mr. Watson's merit increase be deferred until such time as definite progress is shown in the problem areas. I would assume that it would take approximately three to six months to establish definite progress over a period of time. The current personnel rules (under which the Police Department is now operating) provides [sic] for management descretion [sic] in the granting of merit pay increases. Also, the language of the now pending police contract for the current year provide [sic] for descretion [sic] in merit increases. Therefore, we are not undermining the present negotiations with this action.

"Please feel free to contact me should you wish to discuss this matter further. Thank you."

This notice was dated October 20, 1978. At that time, the previous collective bargaining agreement had expired by its own terms and a new agreement was being negotiated, but it had not been finalized. About 2 months after the city manager refused the pay increase, the police union and the City reached a second collective bargaining agreement. It was

signed on December 27, 1978. All parties backdated the effectiveness of the agreement to August 1, 1978. Accordingly, it was agreed that this new agreement would be effective on October 20, 1978.

Both collective bargaining agreements incorporated by reference all of the provisions of the City's personnel system and civil service commission provisions which did not conflict with specific points covered in the respective collective bargaining agreements.

Both agreements provided, under their management rights sections, the following language: "Except where limited by express provisions elsewhere in this Agreement, nothing in the Agreement shall be construed to restrict, limit, or impair the rights, powers, and the authority of the City as granted to it under the laws of the State of Nebraska, and the City's ordinances. These rights, powers, and authority include, but are not limited to the following:

. . . .

"The right to classify jobs and to allocate individual employees to appropriate classifications based upon duty assignments. The City will not abolish or change any bargaining unit classifications for the purpose of depriving the bargaining unit employees of their benefits under this Agreement."

The plaintiff contends that the first agreement was held over and applied to October 1978 raises. Its language was mandatory as to how long an officer would remain in one step. He claims that the passage of time and approved evaluation required an immediate raise. Even if discretion could be used in granting the promotion, he claims it was arbitrarily used to deny it.

The trouble with this argument is that the second contract was agreed to be the controlling agreement. It clearly gives final management discretion to the city manager in granting these promotions.

The manager did have reasons for refusing the in-

crease and gave them in his letter denying the request. Evidence showed other instances of like treatment to other departments. No favoritism or unequal instances were shown. The city manager had a written policy that was followed when any evaluation had one category less than satisfactory. That policy provided that a raise would be postponed unless and until a counterbalancing rating above satisfactory was achieved. All departments and employees affected by this policy were shown by the evidence to be treated the same way.

We therefore conclude that the trial court was correct in its judgment that final discretion was with the city manager to decide on the raise. We also agree that he was not arbitrary or capricious in exercising it. Therefore, the judgment of dismissal is affirmed.

AFFIRMED.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT, V. ART KRAFT SIGNS, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

319 N.W.2d 463

Filed May 21, 1982. No. 44065.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Paul L. Douglas, Attorney General, and Sharon M. Lindgren, for appellant.

Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley; and Luebs, Dowding, Beltzer, Leininger & Smith, for appellees.

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

PER CURIAM.

This is an action by the State of Nebraska, Depart-

ment of Roads, against Art Kraft Signs, Inc., to enjoin the maintenance of an advertising sign which is visible from the main-traveled way of Interstate 80. It is alleged that the erection and maintenance of the sign violates Neb. Rev. Stat. § 39-1320.06 (Reissue 1978) and rules and regulations of the Department of Roads relating to the control of advertising in areas adjacent to the Interstate highway. Among the defenses alleged is that § 39-1320.06 is unconstitutional.

This case is controlled by our opinion in *State v. Mayhew Products Corp., ante* p. 300, 318 N.W.2d 280 (1982). Although additional issues are raised in this case not raised in *Mayhew*, we cannot, in the light of our holding in *State v. Mayhew Products Corp., supra,* reach those issues.

AFFIRMED.

STATE OF NEBRASKA EX REL. KIZZIER CHEVROLET COMPANY, INC., OF SCOTTSBLUFF, NEBRASKA, ET AL., APPELLEES, V. GENERAL MOTORS CORPORATION, OLDSMOBILE DIVISION, ET AL., APPELLANTS.

319 N.W.2d 735

Filed May 21, 1982. No. 44094.

Administrative Orders: Collateral Attack. It is settled law that where an administrative body acting in a quasi-judicial capacity has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.

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

Stephen H. Nelsen and Douglas F. Duchek of Cline, Williams, Wright, Johnson & Oldfather, and Otis M. Smith and Wendell R. Tucker, for appellant GMC.

Paul E. Hofmeister of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant Dalton.

Wright & Simmons, for appellees.

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

WHITE, J.

This is a related case to *S & T Motors v. General Motors Corp.,* 203 Neb. 188, 277 N.W.2d 701 (1979), in which this court reversed an order of the District Court which held that General Motors Corporation had rightfully terminated S & T Motors' franchise to sell Oldsmobile automobiles in Scottsbluff, Nebraska.

A brief recitation of the facts is necessary. The initial determination of the District Court from which the successful appeal resulted was made on February 28, 1978. Our opinion was filed on April 24, 1979. The decree of the District Court was not superseded. On March 6, 1978, after this court acquired jurisdiction, General Motors Corporation entered into a dealer sales and service agreement for Oldsmobile motor vehicles with James Dalton, doing business as Dalton Buick-Oldsmobile, of Scottsbluff, Nebraska.

Kizzier Chevrolet Company, Inc., the purchaser of S & T Motors and a party to the previous action, on November 26, 1979, filed an "Application" before the Motor Vehicle Industry Licensing Board reciting the above facts and requesting the board to "issue an Order to General Motors Corporation to terminate supplying Oldsmobile motor vehicles . . . to Dalton Buick-Oldsmobile, and to Dalton Buick-Oldsmobile to cease acting as an Oldsmobile motor vehicle dealership . . . until there is compliance with Section 60-1424, R.R.S. 1943 . . . ."

Neb. Rev. Stat. § 60-1424 (Reissue 1978) states: "If a franchisor seeks to terminate or not continue any franchise, or seeks to enter into a franchise establishing an additional motor vehicle, combination motor vehicle and trailer, motorcycle or trailer dealer-

ship of the same line-make, the franchisor shall file an application with the board for permission to terminate or not continue the franchise, or for permission to enter into a franchise for additional representation of the same line-make in that community."

It is the theory of appellee Kizzier Chevrolet Company that a valid franchise existed in Scottsbluff on March 6, 1978, and that the action of appellant General Motors Corporation in granting a franchise to Dalton was void.

Notice was served on all parties to that proceeding and a hearing was held on January 15, 1980. On April 3, 1980, the board entered an order finding that on March 6, 1978, no valid Oldsmobile franchise existed in Scottsbluff and that it was not necessary for General Motors Corporation to make application. Appeal from the decision of the board was had to the District Court for Lancaster County by Kizzier. The disposition of that appeal is not disclosed by the record in this case.

This action was filed on April 11, 1980, in the District Court of Scotts Bluff County. In the prayer the plaintiff asked for an order restraining General Motors Corporation from delivering Oldsmobile automobiles and products to Dalton and an order restraining James Dalton, doing business as Dalton Buick-Oldsmobile, from selling Oldsmobile automobiles and products until there was compliance with the Motor Vehicle Industry Licensing Act.

There were a number of issues raised in that proceeding, but two are of primary importance. The first was whether the action filed in the Scotts Bluff District Court was a collateral attack on an adverse decision of an administrative agency, and therefore prohibited, and, second, the effect of this court's reversal of the judgment of the District Court in *S & T Motors v. General Motors Corp., supra.* Stated simply, did this court's reversal have the effect of reinstating the franchise of S & T Motors during the

period between the District Court decree and the date of our opinion, thus mandating that General Motors Corporation apply to the board and receive permission before granting a franchise to Dalton? The District Court resolved the issues in favor of Kizzier. General Motors and Dalton appeal.

We do not reach the intriguing question of the rights of third parties which accrued during the period in which a District Court judgment was rendered and its subsequent reversal by this court. Rather, we determine that the action filed in the Scotts Bluff District Court was a collateral attack on the adverse decision of an administrative agency. Accordingly, we reverse and dismiss this action.

The issues before the Motor Vehicle Industry Licensing Board and the District Court are identical. The board had jurisdiction of the subject matter and the parties. Neb. Rev. Stat. § 60-1403 (Reissue 1978) provides in part: "The board shall have full power to regulate the issuance and revocation of licenses in accordance with and subject to the provisions of this act, to perform all acts and duties provided for herein necessary to the administration and enforcement of this act, and to make and enforce rules and regulations relating to the administration of but not inconsistent with the provisions of this act. . . ."

Kizzier suggests that since the board lacked the power to enforce its own judgment, the decision is somehow void and of no effect. *Transport Workers of America v. Transit Auth. of City of Omaha,* 205 Neb. 26, 286 N.W.2d 102 (1979). Appellee's reliance on that case is misplaced. In *Transport* we determined that the statutes creating the Commission of Industrial Relations did not grant it the power to declare the rights, duties, and obligations of existing labor contracts and, further, that under Nebraska's Constitution the commission could not issue orders essentially judicial in character. As in this case, in

the event of noncompliance, the proper forum was the District Court.

It is settled law that where an administrative body acting in a quasi-judicial capacity has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. *Schilke v. School Dist. No. 107,* 207 Neb. 448, 299 N.W.2d 527 (1980); *Richardson v. Board of Education,* 206 Neb. 18, 290 N.W.2d 803 (1980); *Christensen v. Boss,* 179 Neb. 429, 138 N.W.2d 716 (1965).

Kizzier voluntarily submitted the identical claim here that had previously been submitted to the Motor Vehicle Industry Licensing Board. The board had jurisdiction of the cause and the parties. The board rendered its decision and Kizzier appealed. Now Kizzier seeks an independent action to collaterally attack or, more appropriately, to ignore the unfavorable decision. We will not permit it to do so.

The judgment is therefore reversed and remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. VICTOR LUNA, APPELLANT.

319 N.W.2d 737

Filed May 21, 1982. No. 44259.

1. **Habitual Criminals.** In the prosecution of an alleged habitual criminal, the evidence relating to previous convictions must be relevant and material to the charge of recidivism.
2. _____. The existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.
3. **Habitual Criminals: Indictments and Informations.** The essential elements which an information must contain for a charge under the

habitual criminal act are that said person has been (1) twice previously convicted of crime, (2) sentenced, and (3) committed to prison for terms of not less than 1 year each.

4. **Habitual Criminals: Sentences.** Sentences and commitments which do not set a minimum of at least 1 year are not disqualified from consideration in determining whether a defendant is an habitual criminal.

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

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

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

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

CAPORALE, J.

Victor Luna, defendant-appellant herein, appeals from convictions and sentences entered by the District Court of Nebraska, Fourth Judicial District, in and for Douglas County, following a jury trial. Luna was charged in an amended information with one count of first degree assault, in violation of Neb. Rev. Stat. § 28-308 (Reissue 1979); one count of second degree assault, in violation of Neb. Rev. Stat. § 28-309(1)(a) (Reissue 1979); and with being an habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 1979). The defendant entered a plea of not guilty to the counts alleged in the information. Luna was found guilty of first degree assault under count I; not guilty of second degree assault, but guilty of the lesser-included offense of third degree assault under count II. Thereafter, in a separate proceeding, the defendant was found to be an habitual criminal. Subsequently, the trial court sentenced Luna to 8 months' imprisonment in the Douglas County Correctional Center on count II and to a term of from 20 to 30 years' imprisonment in the Nebraska Penal and Correctional

Complex on the first degree assault and habitual criminal charges.

Luna has appealed from the judgment and sentence of the District Court, alleging that the habitual criminal charge filed against him should have been dismissed for the reason that there was insufficient evidence to establish that he met the statutory definition of an habitual criminal. Luna has not contested his guilt on the assault convictions. We find defendant's claim to be without merit and affirm the trial court.

Section 29-2221, the Nebraska habitual criminal act, provides in pertinent part: "(1) Whoever has been *twice convicted of crime, sentenced and committed* to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, *for terms of not less than one year each,* shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal, and shall be punished by imprisonment in the Nebraska Penal and Correctional Complex for a term of not less than ten or more than sixty years . . . .

. . . .

"(3) If the person so convicted shall show to the satisfaction of the court before whom such conviction was had that he was released from imprisonment, upon either of such sentences, *upon a pardon granted for the reason that he was innocent, such conviction and sentence shall not be considered* as such under sections 29-2221 and 29-2222." (Emphasis supplied.)

In the present case, the evidence adduced at trial to prove the existence of the defendant's prior felony convictions consists of the accused's oral testimony and certified records of convictions from Idaho and Oregon. During direct examination by his counsel, the following testimony was elicited from defendant: "Q. You have a felony conviction, you have some

felony convictions in your past; is that right? A. Yes. I do have two. Q. None of them are of a violent nature? A. No, sir. Q. Do you recall what the charges were? Burglary? A. Burglary and arson. Q. Do you remember when these were, about, what years they were, just to your best estimate. A. Between 1970 and 1972."

In addition, the State offered into evidence certified copies of defendant's 1971 conviction in Idaho for first degree burglary and his 1972 conviction in Oregon for first degree arson. These records reveal that defendant has used several aliases in the past and that he was tried, convicted, and sentenced in Idaho and Oregon under the names of Bernardo Torres and Arron H. Perez, also known as Yograir Sinclair.

In Idaho, defendant was sentenced "for an indeterminate period of time, not to exceed five (5) years . . ." to the State Board of Correction. In Oregon, he was sentenced to the Corrections Division at the State Penitentiary "for a period without limitation of time, the maximum of which is hereby fixed at eight (8) years . . . ."

At trial, defense counsel objected to the admission of these conviction records on the basis they lacked relevancy. The trial judge reserved ruling upon the objection until further foundational testimony was presented to establish identity. A qualified expert in fingerprint identification subsequently testified that he made a comparison of defendant's known prints with the fingerprint cards from the alleged prior convictions. Based upon the comparison, it was the expert's opinion that the fingerprints on all the cards were made by the same person and matched the known prints of the defendant. Although the trial court failed to specifically state that it overruled the objection to the admission of the records, it is obvious that the expert's evidence and all relevant exhibits were admitted by the trial court when it held:

"Upon consideration of the evidence adduced at the hearing today and on March 17th, also taking judicial notice of the testimony adduced by the defendant on direct and cross examination at the time of trial of the cause, the Court finds that the defendant is, as set out in Count 3 of the Amended Information, a habitual criminal . . . ."

In the prosecution of an alleged habitual criminal, the evidence relating to previous convictions must be relevant and material to the charge of recidivism. It is well established that the existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities. See cases collected at 39 Am. Jur. 2d *Habitual Criminals, etc.* § 26 (1968). This court has also stated that fingerprint identity testified to by a qualified expert is perhaps the best known method of the highest probative value in establishing identification. *State v. Pena,* 208 Neb. 250, 302 N.W.2d 735 (1981).

To hold the objection was not overruled and the records of the prior convictions were not admitted merely because the trial judge failed to incant words such as "objection overruled, exhibits received," would, under the circumstances of this case, be to make a meaningless game out of the pursuit of justice. We refuse to do so and hold that the records of prior convictions were properly received in evidence.

The question thus becomes whether the evidence establishes that defendant is an habitual criminal. In *State v. Nance,* 197 Neb. 257, 248 N.W.2d 339 (1976), we held that the essential elements which an information must contain for a charge under the habitual criminal act are that said person has been (1) twice previously convicted of crime, (2) sen-

tenced, and (3) committed to prison for terms of not less than 1 year each.

The habitual criminal act is not a separate offense but, by its terms, provides for the enhancement of the sentence on the principal charge with a minimum sentence of 10 years and a maximum sentence of 60 years for each conviction committed by one found to be an habitual criminal even though, absent conviction as an habitual criminal, the minimum or maximum sentence might be less. *State v. Rolling,* 209 Neb. 243, 307 N.W.2d 123 (1981); *State v. Journey,* 201 Neb. 607, 271 N.W.2d 320 (1978); *State v. Gaston,* 191 Neb. 121, 214 N.W.2d 376 (1974).

The question appears to be one of first impression for this state. However, it is clear the fact that the Idaho and Oregon sentences and commitments do not set a minimum of at least 1 year does not disqualify them from consideration in determining whether defendant is an habitual criminal. The statute provides only that a pardon on the basis of innocence results in the exclusion of a conviction and commitment of at least a year. No showing was made that defendant was pardoned by either Idaho or Oregon for any reason whatsoever.

We agree with the rationale of *Haley v. Hollowell,* 208 Iowa 1205, 227 N.W. 165 (1929), that a prior sentence of 1 to 7 years' imprisonment satisfied Iowa's habitual criminal statute's requirement that a prior sentence be for a term of "not less than three years," inasmuch as the defendant "might have served the full seven years." We find no error in this case. The proceedings before the trial court were fair and reasonable and established defendant's identity as an habitual offender. We determine that the judgment of the trial court must be affirmed.

AFFIRMED.

THOMAS P. DUNNE, APPELLEE, V. MARTHA F. DUNNE, APPELLANT.

319 N.W.2d 741

Filed May 21, 1982. No. 44390.

1. **Divorce: Appeal and Error.** In domestic relations cases the rule is, and always has been, that on appeal to this court we must try the issues de novo. We are required to make independent conclusions of fact without reference to the conclusion reached by the trial court. However, we will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite.
2. **Child Custody: Sexual Misconduct.** Sexual misconduct, although not necessarily determinative of the issue of child custody, is a factor which may be considered in deciding that issue.
3. **Child Custody.** Additional factors to be considered on the issue of child custody are the desires and wishes of the children if of an age of comprehension and when the same are based on sound reasoning, and the emotional relationship between the children, their parents, and siblings, as well as the effect of continuing or disrupting an existing relationship.
4. **Child Custody: Appeal and Error.** Orders fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person who has custody is unfit for that purpose or that the best interests of the child require such action.

Appeal from the District Court for Loup County: JAMES R. KELLY, Judge. Reversed and remanded with directions.

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

Tedd C. Huston, P.C., for appellee.

Heard before MCCOWN, HASTINGS, and CAPORALE, JJ., and STUART and HIPPE, D. JJ.

HASTINGS, J.

The District Court granted the application of petitioner, Thomas P. Dunne, to transfer physical custody of the parties' two children from the respondent, Martha F. Dunne, to him. The respondent has appealed.

The two children are Matthew, born November 15, 1970, and Melissa, born May 1, 1973. Matthew, the natural child of respondent, was adopted by petitioner, and Melissa is a child of the marriage. The decree dissolving the marriage was entered on October 29, 1975. Legal custody of the children was retained in the court, but physical custody was granted to the respondent. On March 15, 1977, petitioner filed an application for modification of the decree, alleging that respondent "had been consorting with one Rick Thorman," and, further, that petitioner, after having been convicted of drunk driving, committed himself for alcohol treatment, and because of that treatment asked that his child support payments be reduced from the court-ordered $250 per month. Some 7 days later, he filed an additional application, alleging that respondent was pregnant and unmarried, and asked that custody of the children be placed with him. Pursuant to a written stipulation signed by the parties, the court entered an order on July 11, 1977, reducing the child support to $150 per month for both children, and continued physical custody in the respondent.

The application to modify the custody arrangements which precipitated this appeal was filed on December 19, 1980. It alleged that respondent had increased her consumption of alcohol, that the children were not properly fed or clothed and were living in unsanitary conditions, and that the respondent had taken up residence with Rick Thorman to whom she was not married and who was an excessive user of alcohol.

Following a 2-day trial, the court entered an order dated April 9, 1981, finding that "the home of the Respondent, Martha F. Dunne, who is living with Rick Thorman as man and wife without having become married, is an immoral and illegal atmosphere to raise the minor children and that the Respondent is unfit to have the care, custody and control of said

minor children . . . ." The court then awarded physical custody to the petitioner, with reasonable rights of visitation in the respondent. A supersedeas bond has been posted by the respondent.

In domestic relations cases the rule is, and always has been, that on appeal to this court we must try the issues de novo. We are required to make independent conclusions of fact without reference to the conclusion reached by the trial court. However, we will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. *Schuller v. Schuller,* 191 Neb. 266, 214 N.W.2d 617 (1974).

The areas of concern raised by the pleadings and evidence in this case include not only the respondent and Mr. Thorman's living arrangement and marital status but also their use of alcohol, the physical atmosphere of the residence in which the children reside, and the children's health care, education, and religious training.

Without setting forth the evidence in great detail, it can be said that the petitioner has enjoyed the status of a recovered alcoholic during the past 5 years. He is engaged in the hardware and plumbing business in Taylor, Nebraska, and is considered a stable businessman with a good reputation in the community. He is single and resides with his 60-year-old mother, a schoolteacher in the local schools. He apparently works 6 days a week, and during the times of his visitations with the children, it has been his mother who devotes most of the time to their care. She owns a rather large, comfortable, family-type house in Taylor.

The testimony of the respondent and Thorman discloses that his recovery from alcohol abuse was of much shorter duration than that of the petitioner, having begun for the second time some 2 to 3 months prior to the hearing in this matter, and, consequent-

ly, the results of that treatment are not yet assured. He had completed a course of treatment at Valley Hope, and some years earlier had undergone similar treatment at the VA Hospital in South Dakota. There is no substantial evidence of present alcohol abuse on the part of respondent, although she has been known to drink on occasions.

Steven O. Stumpff, a practicing attorney in Broken Bow and the court investigator in the original dissolution proceedings between the parties, was appointed by the court to investigate the entire situation of both parties at this time relating to the welfare of the children. He made a thorough investigation, which included at least two inspections of the respondent's home and interviews with a number of witnesses. His first contact with the respondent at her home on this investigation occurred on February 13, 1981, and was unannounced. He described the kitchen as "filthy." There were dirty dishes all over, and he thought he detected the odor of spoiled food. The living room was dirty and the dining room cluttered, but nothing like the kitchen. The rest of the house, including the bathroom and bedrooms, was "clean as a whistle." A search was made particularly for liquor or beer containers, but none were found. On a subsequent prearranged visit to the respondent's home on March 13, 1981, the house was found to be "spic and span."

Mr. Stumpff's visit with several of the respondent's friends confirmed the fact that respondent's house was generally a mess, and that the respondent and Thorman spent a lot of time around the Hungry Horse Saloon before Thorman went for treatment.

An investigation into the home maintained by the petitioner's mother disclosed that she maintained a very nice home which would be adequate for raising the children.

Mr. Stumpff also learned certain facts relating to the health of the children from the petitioner's

mother. After talking to the family's physician and dentist, however, Mr. Stumpff concluded that the children were receiving adequate medical treatment. It should be noted, however, that Melissa's teeth were in terrible condition, and that Matthew had not been examined as of yet by that particular dentist.

An interview by Mr. Stumpff with the children's two schoolteachers disclosed that Matthew was probably the best student in his class, and, although he was not very clean at the beginning of the school year, all of that had changed about Christmastime. Melissa's teacher reported that she knew the house where the children lived was very untidy, but that Melissa came to school clean and neat, and was a very lovable child who was an average to above average student.

Finally, Mr. Stumpff also had the opportunity to visit with each child privately. Both children expressed the desire to remain with their mother and the rest of the family. They also said that they enjoyed the visitations with their father, although Matthew complained that he did not get enough time with his father on those visits.

The investigation also revealed that the respondent had been employed as a cook at the Hungry Horse Saloon for from 3 to 5 nights per week. It was learned that Mr. Thorman worked at the Thunderbolt Ranch as a skilled workman, welding and erecting steel. The babysitting was done by a neighbor girl who seemed adequate for the job.

The interview with Thorman revealed that he appeared to be a hard worker, that he loved the children, and that he had had financial problems in the past. Thorman also stated that while he had had problems with drinking and drunken driving, he felt that he had the drinking problem controlled. He was currently making $8 per hour on his job but was expecting a promotion to maintenance supervisor on

the first of May 1981, which paid $9 per hour.

An interview with the sheriff disclosed that on September 28, 1980, he was involved in a minor incident with the respondent and Thorman and he believed that both were intoxicated at the time. He went on to say that although he believed the respondent and Thorman spent quite a bit of time at the Hungry Horse Saloon before Thorman went to treatment, he was satisfied that they were no longer doing that except for the time necessary for respondent to discharge her employment obligations.

At least two witnesses testified to having seen the respondent with a number of other women on one particular evening at the Starlight Lounge in Ord, Nebraska, having a drink.

Information obtained from two bankers in Taylor, Nebraska, revealed that the petitioner enjoyed a good reputation as a stable person. The head of the local chapter of Alcoholics Anonymous revealed that the petitioner was getting along fine and had just received his 5-year no-drinking pin.

According to the testimony of the petitioner, he was a chronic alcoholic, and, following an arrest for second offense DWI, he elected to seek treatment as an alternative to a jail sentence, and has had nothing to drink since that time.

The petitioner also testified to the fact that he had made an unannounced and unauthorized inspection of the respondent's house on October 31, 1980, where he said he discovered a dirty kitchen with food left in a skillet, the odor of spoiled food in the refrigerator, and the smell of alcohol in the house, with several empty beer cans and an empty vodka bottle present. He took several pictures, including one which showed the beer cans and vodka bottle among the many dirty dishes and kitchen utensils. Although he denied the fact on several occasions during the course of his testimony, he finally admitted that he had "staged" this picture by arranging the beer

cans and the vodka bottle himself. As a consequence, his lawyer withdrew the pictures from evidence.

The petitioner also provided some additional information concerning the children's health care by relating an incident that occurred during the first or second week of August when the children came to visit and had medicine for scabies which their mother had sent along. He further alleged that the children had informed him that the respondent had also had scabies. There was also some evidence offered by the grandmother that the children had always needed a bath when they came to visit, until the papers in connection with this last hearing were served.

Regarding the matter of scabies, the respondent testified that all of the parents received a letter from the Ericson schools which stated that scabies was going around. Moreover, she noted that, according to her doctor, neither she nor the children had actually had scabies. She also stated that the children were bathed every night.

Regarding the various other matters raised by the petitioner, the respondent testified that Mr. Thorman does not drink at all now, and that although she does drink on occasion, she does not drink at home. She also noted that she attends church and the children go to Sunday School, although this happens less frequently since they have moved to Ericson. She also noted that she has attended almost every school function to which parents have been invited. By contrast, the respondent claims that the petitioner never goes to church, never takes the children to Sunday School, and has attended only one school function. Finally, the respondent noted that she believes neither the people in the community nor the children know that she and Thorman are not married. Furthermore, she claims that they intend to get married and had planned to do so on two occa-

sions, but that on one occasion one of the children got sick and the other time a court hearing interfered.

In attempting to apply the law to the facts of this case, we should emphasize at the outset that, contrary to the finding of the trial judge, we are aware of no statute, at least, which would declare the living arrangement in which the children are residing an "illegal atmosphere." Neb. Rev. Stat. § 28-928 (Reissue 1975), which did make it a misdemeanor for unmarried persons to live in a state of fornication, was repealed, effective January 1, 1979, as a part of the newly adopted Nebraska Criminal Code. There remains for consideration, however, whether the arrangement creates an "immoral atmosphere."

We have said a number of times that sexual misconduct, although not necessarily determinative of the issue of child custody, is a factor which may be considered in deciding that issue. *Ahlman v. Ahlman,* 201 Neb. 273, 267 N.W.2d 521 (1978). Although we hesitate to attempt to "color match" cases, it may be helpful to quote in some detail from *Ahlman.* "Arlene [mother] had exposed the children to an immoral and improper atmosphere by cohabiting with Greg and bearing an illegitimate child . . . Arlene had used marijuana in her home when the children were present and permitted a minor to use that substance in her home; Arlene had failed to provide religious training for the children and failed to properly provide for their medical and dental care; Greg had an unstable employment record and had not contributed to the stability and fitness of Arlene's home; Nathan [father] had provided religious training for the children and is able to provide proper medical and dental care . . . Nathan's home is a more stable, fit, and secure home for the children than is Arlene's home." *Id.* at 276, 267 N.W.2d at 523. This court went on to state: "Although any one of the factors relied on by the trial court, stand-

ing alone, might not be sufficient to warrant a change in custody, viewed together we believe that they support the conclusion of the trial court." *Id.* at 278, 267 N.W.2d at 524.

The petitioner places a great deal of reliance upon the case of *Marts v. Marts,* 206 Neb. 38, 290 N.W.2d 816 (1980), and refers to the following language: "We conclude on independent examination of the record that there has been a change in circumstances in the deteriorating lifestyle of Shelley [mother], detrimental to the environment of a child of Heather's age, whereas Robert's attitude as a father has matured and improved to the point where it is fairly obvious that he is in a position to provide a more stable and natural home life for Heather at this time." *Id.* at 41-42, 290 N.W.2d at 818. However, in reaching that conclusion, we considered the fact that the mother had made frequent moves around the country as well as within the city; her illicit relations were neither stable nor exclusive; she was interested in the theater as a career, as was her then current boyfriend; and she admitted that further travels might be necessary to further that career. The child involved was found to be somewhat independent and adult-oriented, a result of little if any contact with children of her own age.

Additional factors to be considered on the issue of child custody are the "desires and wishes of the children if of an age of comprehension . . . when such desires and wishes are based on sound reasoning . . . ," Neb. Rev. Stat. § 42-364 (Reissue 1978), and the emotional relationship between the children, their parents, and siblings, as well as the effect of continuing or disrupting an existing relationship. *Moninger v. Moninger,* 202 Neb. 494, 276 N.W.2d 100 (1979).

We must also remember that orders fixing custody of minor children will not be modified unless there has been a change of circumstances indicating

that the person who has custody is unfit for that purpose or that the best interests of the child require such action. *Swearingen v. Swearingen,* 201 Neb. 255, 267 N.W.2d 514 (1978). There is considerable doubt in our minds that there has been any change in circumstances since 1977, at least in regard to the chief complaint of cohabitation, when the petitioner stipulated and the trial court ordered that there be no change in the custody arrangement except that the petitioner's responsibility for child support should be decreased.

We do not approve of the lifestyle pursued by the respondent. If there were other significant factors deleteriously affecting the welfare of these children, we would have no hesitancy in approving the removal of these children from the respondent's household. However, the charges of neglect seem to be without substance. The apparent slovenly housekeeping on the part of the respondent is regrettable, but hardly grounds for a change of custody. The children seem to be well adjusted, happy, healthy, and loved, with a genuine desire to remain with their mother and younger siblings. As we so recently stated in *Krueger v. Krueger, ante* p. 568, 574-75, 319 N.W.2d 445, 448 (1982): "We are convinced that the best interests of [these children] will not be served by constant custody disputes and a shifting of physical custody and control from one parent to the other."

The judgment of the District Court is reversed and the cause is remanded with directions to that court to continue physical custody in the respondent, but immediately to implement its original order that such custody be "subject to the strict supervision of the Loup-Garfield Division of Public Welfare," with the requirement that that agency conscientiously report to the court on a regular basis its findings in the areas about which complaints have been made.

REVERSED AND REMANDED WITH DIRECTIONS.

STUART, D. J., dissents.

CATHERINE A. FERGUSON, APPELLANT, V. FREDERICK I. FERGUSON, APPELLEE.

319 N.W.2d 746

Filed May 21, 1982. No. 44490.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed as modified.

William J. Dunn of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellant.

Richard C. Gordon of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellee.

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

CLINTON, J.

This action is one for dissolution of marriage, custody of children, division of property, and alimony for the petitioner wife. The trial court found the marriage was irretrievably broken and awarded custody of the two male children of the parties, ages 7 and 4, to the wife, with specified visitation rights granted to the husband. It divided the property of the parties and awarded the wife the sum of $200 per month per child for support of the children, and alimony in the amount of $150 a month for a period of 18 months. The decree contained the following provision: "All right, title and interest in and to the real estate of the parties, subject to any and all existing encumbrances, taxes due, and liens, be, and hereby is, awarded to the petitioner. The respondent be, and hereby is, awarded a lien subordinate to all existing encumbrances, taxes due and other liens, on said property in the amount of five thousand dollars ($5,000.00) which amount shall bear interest at the rate of twelve (12) percent per annum and which sum shall be paid upon the first happening of any one of the following events: the peti-

tioner no longer occupies the premises as a home for herself and any one of the minor children of the parties; the youngest of the minor children reaches majority, marries, becomes otherwise emancipated or dies; petitioner marries or cohabits with one not her husband; petitioner conveys legal or equitable title to another or, at such earlier time as petitioner may desire." The decree also awarded the wife the sum of $600 for the services of her attorney in the District Court. The wife has appealed and urges here: (1) She received an insufficient share of the division of property; (2) The alimony is insufficient; and (3) The award for services of her attorney is insufficient.

The parties were married May 23, 1970. The decree of dissolution was entered on May 29, 1981. The husband and wife are about the same age, both having been born in 1947. At the time the parties were married both were employed by the Nashua Corporation, the husband as a printing press operator and the wife as a secretary. A few months after the marriage the husband became employed by the Omaha Fire Department as a firefighter, and was still so employed at the time of the divorce. The wife continued to work as a secretary until the birth of the first child in 1974 and has not been employed outside the home since that time.

The main focus of the wife's argument on appeal is that the alimony award is inadequate in amount and for too short a period of time and that the $5,000 award to the husband, together with interest at 12 percent as a lien against the home of the parties, is unfair and unduly burdensome.

The husband, at the time of trial, had a gross monthly wage of $1,847.12. Monthly deductions withheld from his pay were $133.40 for federal income tax, $22.68 for state income tax, and $132.10 for contribution to a firemen's retirement pension. The wife, at the time of trial, was earning $200 to $250

per month doing babysitting in her home.

The parties purchased their present home in August of 1978 for the sum of $48,000, making a downpayment of $10,000 from the profit of the sale of their previous house. The monthly payment on the mortgage, including real estate taxes, is $425. The husband testified that the present value of the residence was $60,000. In an affidavit made in connection with the application for temporary support, and which was received in evidence at trial without objection, the wife estimated the present value of the home to be $50,000.

The parties make no complaint about the division of personal property or the part of the order pertaining to payment of existing obligations, but it is necessary to say something about these two items to complete the picture. The wife was awarded most of the household goods and a 1970 Rambler, all these items being free of liens. The husband was awarded all tools, fishing gear, painting equipment, weights, hunting equipment, a camera, certain film and photographs, a bottle collection, and a fishing boat purchased in 1978 for about $4,500. He received certain household goods which were in his possession prior to the time of the decree. He was also awarded all "right, title and interest" in his pension plan acquired through his employment with the Omaha Fire Department. This plan will afford him retirement pay at 50 percent of salary at age 55 and after 25 years of service. No other details of the retirement plan are contained in the evidence.

The husband was awarded a 1981 Subaru station wagon which he purchased about 3 weeks before trial for the sum of $8,500. At about the same time he sold a pickup truck for $2,200. The proceeds from the sale of the truck, he testified, were used to pay family debts and for taxes and insurance on the Subaru and to pay his own living expenses. The money to purchase the Subaru was borrowed from

the firemen's credit union and this increased a prior loan from the union to the husband to a total of more than $12,000. The monthly payments on the loan are $348, and this amount is deducted directly from his paycheck. The husband was directed to pay all debts contracted by the parties prior to May 28, 1971.

Both parties are in good health. The wife expects sometime in the future to find employment as a secretary.

The wife estimates the monthly living expenses for herself and her children, including the house payment, are about $950 per month. The husband estimated that his monthly living expenses would be about $735 per month. This estimate does not include the debts which he will be required to pay.

We conclude on trial de novo that the award of a judgment to the husband of the sum of $5,000 with interest at 12 percent per annum is unduly burdensome and will tend to defeat one of the principal purposes for which the home was awarded to the wife, that is, to afford the children a home until the youngest reaches his majority. The wife will either be called upon to pay the husband $600 interest annually, which she cannot afford, or permit the interest to accumulate, which would have the effect of wiping out her equity in the residence.

We accordingly modify paragraph 16 of the decree to read as follows: "16. All right, title and interest in and to the real estate of the parties, subject to any and all existing encumbrances, taxes due, and liens, be, and hereby is, awarded to the petitioner. The respondent be, and hereby is, awarded a lien subordinate to all existing encumbrances, taxes due and other liens, on said property in the amount of five thousand dollars ($5,000.00) without interest, which sum shall be paid upon the first happening of any one of the following events: the petitioner no longer occupies the premises as a home for herself and any one of the minor children of the parties; both of the

minor children reach majority, marry, become otherwise emancipated or die; petitioner conveys legal or equitable title to another; or at such earlier time as the petitioner may desire."

The portion of the decree which directed the husband to pay all debts contracted by the parties prior to May 28, 1971, contains an obvious clerical error. It is clear that the date intended was May 28, 1981. The decree is amended accordingly.

AFFIRMED AS MODIFIED.

CAPORALE, J., disqualified.

STATE OF NEBRASKA, APPELLEE, V. CLARENCE L. C. WILLIAMS, APPELLANT.

319 N.W.2d 748

Filed May 21, 1982. No. 81-603.

1. **Speedy Trial.** An accused has a right to waive a speedy trial and consent to a continuance as long as he is properly advised either by counsel or the court of his right to a speedy trial.
2. **Criminal Law: Words and Phrases.** A continuing offense is defined as a continuous, unlawful act or series of acts set in motion by a single impulse and operated by an unintermittent force, however long a time it may occupy; an offense which continues day by day; a breach of the criminal law, not terminated by a single act or fact, but subsisting for a definite period and intended to cover or apply to successive similar obligations or occurrences.
3. **Criminal Law: Weapons.** Where the possession of a firearm by a felon, actual or constructive, is uninterrupted, it constitutes but a single offense.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed in part, and in part reversed and remanded.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch, for appellant.

Paul L. Douglas, Attorney General, and Shanler D. Cronk, for appellee.

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

KRIVOSHA, C.J.

The appellant, Clarence L. C. Williams (Williams), appeals from a judgment of the trial court, a jury having been waived, which found him guilty of two counts of possession of a firearm by a felon, in violation of Neb. Rev. Stat. § 28-1206 (Reissue 1979). Each count contained a further allegation that Williams was an habitual criminal as provided for in Neb. Rev. Stat. § 29-2221 (Reissue 1979). Upon proof being introduced at a subsequent hearing that Williams had been twice convicted of a crime, sentenced, and committed to prison, the trial court sentenced Williams on count I to a term of not less than 10 years' imprisonment, and on count II to a term of not less than 10 years' imprisonment, the sentence on count II to run concurrent with the sentence on count I. Williams now assigns as error that (1) the trial court erred in failing to dismiss the case due to the State's failure to provide Williams with a speedy trial, and (2) the court erred in finding the defendant guilty of both counts set out in the information. We find that Williams' claim with regard to the speedy trial is without merit, but that he is correct with regard to the matter of the two counts. For that reason, the judgment of the trial court is in part affirmed, and in part reversed and dismissed.

Turning first to the speedy trial issue, we find that Neb. Rev. Stat. § 29-1207 (Reissue 1979) provides as follows: "(1) Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section.

"(2) Such six-month period shall commence to run from the date the indictment is returned or the information filed. . . .

. . . .

"(4) The following periods shall be excluded in computing the time for trial:

. . . .

"(b) The period of delay resulting from a continuance granted at the request *or with the consent of the defendant or his counsel. . . .*" (Emphasis supplied.)

The record in this case discloses that the information was filed on November 26, 1980, and therefore the 6 months would expire on May 26, 1981, except as may be extended by reason of any period to be excluded in computing the time for trial. The record further discloses that on January 26, 1981, Williams and his attorney appeared before the trial court and, at that time, consented to a continuance and waived his constitutional and statutorily recognized right to a jury trial and in lieu thereof asked to be tried to the court. Williams now contends that the request was conditioned upon the promise that he would be tried on February 6, 1981, and therefore should not be considered in computing the 6-month period for trial. An examination of the proceedings, however, will not support that position.

The brief statements between the court, Williams, and his counsel point up that the waiver was unconditional and absolute. The following facts are disclosed:

"THE COURT: This is the case of the State of Nebraska versus Clarence L. C. Williams. It's recorded in Docket 57 at Page 147. Mr. Gooch, the Court will recognize you.

"MR. GOOCH: If it please the Court at this time we come before the Court and ask for permission to waive the defendant's constitutional and statutorily recognized right to a jury trial.

"THE COURT: Mr. Williams, you understand that you do have a constitutional right and statutory right to a jury trial, be tried by citizens of this community as the trier of facts. You understand that

you have those constitutional rights from the jury system?

"THE DEFENDANT: I do.

"THE COURT: Your attorney has indicated that you wish to waive that right.

"THE DEFENDANT: I do.

"THE COURT: And not have it. And you would be tried by the judge alone then. Do you understand that, sir?

"THE DEFENDANT: I do.

"THE COURT: Now, the jury is present in Lancaster County at this time, and you are number two on my docket, which means that you'd probably come to trial sometime later this week should you want a jury trial. However, if you waive a jury trial I'm going to have to set this at a subsequent time after this jury term which will be in February and that would be on about — how long will it take to try this case?

. . . .

"THE COURT: I'm going to set this case for the last day of the jury trial here, which would be on February 6, *with the understanding that I might have to continue it if I'm still in jury trial. Is that agreeable with you?*

"THE DEFENDANT: Yes.

"THE COURT: I'm not telling you that I'll try it at that time, because if the jury's still going on I will not be able to. But if the jury is gone at that time the Court is willing to try it on February 6. *Otherwise this will have to go on for some period of time.* And we may be able to adjust our schedule to get you in relatively soon. *But I can't promise it to you. You understand that?*

"THE DEFENDANT: Yes, sir.

"THE COURT: And thereby you are waiving your right to a speedy trial. Do you understand that, Mr. Williams?

"THE DEFENDANT: Yes, sir.

"THE COURT: That's agreeable with you?

"THE DEFENDANT: Yes, sir." (Emphasis supplied.)

Williams had a right to waive a speedy trial and consent to a continuance as long as he was properly advised either by counsel or the court of his rights to a speedy trial. See, *State v. Kinstler,* 207 Neb. 386, 299 N.W.2d 182 (1980); *State v. Alvarez,* 189 Neb. 281, 202 N.W.2d 604 (1972); *State v. Johnson,* 201 Neb. 322, 268 N.W.2d 85 (1978).

It appears that the jury trial did not end in time for trial on February 6, 1981, and was continued again. On April 23, 1981, Williams again filed a request for a speedy trial. Assuming, but not deciding, that once a defendant has waived his right to a speedy trial he can thereafter withdraw that waiver and renew his request for trial, it is clear that the time between when the waiver is first made and the request to withdraw is subsequently made must be excluded in computing the time for trial. When that is done in this case, trial on July 27, 1981, was within the 6-month period. There is no merit to Williams' first assignment of error, and it is overruled.

The second assignment of error poses a more difficult problem. Williams was charged with two separate counts of possession of a firearm by a felon. The first possession is alleged to have occurred on November 3, 1980, and the second on November 7, 1980. The question which we must address is whether possession of a firearm by a felon on 2 separate days, absent any evidence that the weapon was out of his "possession" between those 2 days, is but one continuing offense or two separate offenses. The statute itself gives us little aid in that regard. Section 28-1206(1) simply provides: "Any person who possesses any firearm with a barrel less than eighteen inches in length or brass or iron knuckles and who has previously been convicted of a felony or who is a fugitive from justice commits the offense of

possession of firearms by a felon or a fugitive from justice." Neither the statute itself nor the history leading to its enactment gives us any indication as to whether the Legislature intended that each day constitute a separate offense or whether the offense is one which is considered in the law as a continuing offense. Certainly it would have been easy enough for the Legislature to have so provided if that was its intent.

The real question is whether the idea of "possession," within a criminal statute of this nature, contemplates a continuing offense as opposed to a single incident. A continuing offense is defined as a "continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy; an offense which continues day by day; a breach of the criminal law, not terminated by a single act or fact, but subsisting for a definite period and intended to cover or apply to successive similar obligations or occurrences." 22 C.J.S. *Criminal Law* § 1 at 6 (1961).

While the word "possess" is not a word of precise definition, it is clear that "possess," when used in a criminal statute, means something more than momentary control. It has been held to mean "to have management, care, dominion, authority, and control, singly or jointly." See *United States v. Rhodes,* 433 F.2d 1307 (8th Cir. 1970). To possess a narcotic drug means to have actual control, care, and management of, and not a passing control, fleeting and shadowy in its nature. See, *United States v. Landry,* 257 F.2d 425 (7th Cir. 1958); *Pearson v. United States,* 192 F.2d 681 (6th Cir. 1951); *United States v. Wainer,* 170 F.2d 603 (7th Cir. 1948).

It would seem to follow that the crime of "possession" may be brief, if complete, or it may extend over a period of time, if uninterrupted. To hold otherwise would make it near impossible to deter-

mine when the "possession" commenced and when it terminated. Absent a statute to the contrary, the ability to determine when a criminal act commenced and when it terminated appears essential in order to determine when a subsequent crime occurs. Certainly an arrest and indictment would be sufficient to interrupt possession so that a subsequent possession would constitute another crime. 22 C.J.S., *supra,* § 281.

Our conclusions with regard to this issue are influenced by the decision of the U.S. Supreme Court in *Bell v. United States,* 349 U.S. 81, 75 S. Ct. 620, 99 L. Ed. 905 (1955). In *Bell* the petitioner was indicted on and pleaded guilty to two counts for violation of the Mann Act, each count referring to a different woman. Petitioner had transported both women on the same trip in the same vehicle. In holding that petitioner had committed but one offense and was therefore not subject to cumulative punishment, the Court said at 83-84: "It is not to be denied that argumentative skill, as was shown at the Bar, could persuasively and not unreasonably reach either of the conflicting constructions. About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving

grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes."

The reasoning of the *Bell* decision is persuasive. In the instant case, the court must either declare that a given unit of time constitutes a separate offense or arbitrarily establish a period of time which constitutes each separate offense. There appears no basis for doing so. If the Legislature desires to take such action, it is at liberty to do so, but the courts, as noted by *Bell,* are not.

While no Nebraska cases have been cited to us concerning this matter and we are unable to find any, there are several federal decisions which are helpful in the decision of this case. In *United States v. Jones,* 533 F.2d 1387 (6th Cir. 1976), the U.S. Court of Appeals for the Sixth Circuit was asked to pass upon the federal "possession of a firearm by a convicted felon" statute. In holding that possession of a firearm by a felon over a series of days was but a single offense and not multiple offenses, the court said at 1390-91: "The question whether a continuing offense exists is a question of statutory construction, since Congress has the power to punish different aspects of the same crime. . . .

"While we found no federal authority either for the proposition that possession of a contraband item is a continuing offense, or for the proposition that possession of a contraband item at different times and places can constitute separate offenses, we find the reasoning in *In re Snow,* 120 U.S. 274, 281, 7 S. Ct. 556, 559, 30 L. Ed. 658, 661 (1887), to be persuasive in

determining whether a continuing offense existed in the present case.

"In *Snow* the defendant had followed Mormon custom in sharing marital felicity with seven wives. A federal statute prohibited cohabitation of a man with more than one woman in federal territories, including Utah, where he lived. He was charged in a three-count indictment with illegal cohabitation; each count covered a different period of time. The first count charged continuous cohabitation during 1883; the second count charged the same during 1884; and the third count charged the same for the first eleven months of 1885. The Court held that illegal cohabitation is an inherently continuing offense, and that the government could not arbitrarily divide the offense into separate time periods and multiply the penalty.

"It is true that in the case at bar the Government is claiming that Jones possessed the pistol on three separate occasions, not that continuous possession existed which has been broken down into arbitrary time period. With equal propriety the Government might have charged Jones with possession on more than 1100 separate days and obtained convictions to imprison Jones for the rest of his life. The fact that the Government merely has proof that he possessed the same weapon on three separate occasions, rather than continuously for a three-year period, should not dictate the result that Jones could receive three times the punishment he would face if continuous possession for a three-year period were proved. There is no proof that there was any interruption in the possession by Jones of the weapon.

"The English case of *Crepps v. Durden,* Cowper 640 (K.B.1777), discussed in *Snow,* illustrates the principle that acts constituting a course of conduct are not punishable separately if the Legislature intends to punish the course of conduct. There a baker made and sold loaves of bread on the Sabbath

in violation of a statute prohibiting the practice of one's trade on the Lord's day. He suffered four convictions, but Lord Mansfield's opinion set aside three of them, holding that regardless of how many loaves he baked or how many hours he worked, only one offense could occur on any given Sunday.

"Possession is a course of conduct, not an act; by prohibiting possession Congress intended to punish as one offense all of the acts of dominion which demonstrate a continuing possessory interest in a firearm. If Congress had wished to punish each act of dominion it could have done so easily by forbidding the acts of dominion instead of the course of conduct."

Likewise, in the case of *United States v. Kinsley,* 518 F.2d 665 (8th Cir. 1975), the U.S. Court of Appeals for the Eighth Circuit held that the possession by a felon of several firearms was but one offense. In so holding, the court said at 666-67: "The allowable unit of prosecution for a federal offense is set by Congress. When Congress fails to set the unit of prosecution with clarity, doubt as to congressional intent is resolved in favor of lenity for the accused. This settled rule of federal criminal law has received its most celebrated expression in *Bell v. United States,* 349 U.S. 81, 75 S. Ct. 620, 99 L. Ed. 905 (1955). . . .

. . . .

"Significantly, in many of the cases in which the courts have found a *Bell*-type ambiguity, the object of the offense has been prefaced by the word 'any.' Seemingly this is because 'any' may be said to fully encompass (*i.e.,* not necessarily exclude any part of) plural activity, and thus fails to unambiguously define the unit of prosecution in singular terms." The court therefore concluded that the possession of several firearms was but a single violation of the statute.

It would appear that where, as here, the posses-

sion of a firearm by a felon, actual or constructive, is uninterrupted, it constitutes but a single offense. For that reason, the trial court was in error in finding Williams guilty on both counts. Having found Williams guilty of possession on November 7, 1981, the court should have found that all prior possessions disclosed by the evidence were included in that conviction and should have sentenced Williams only on the second count. For that reason, the court's finding of guilt on count I is reversed and the complaint is dismissed. In all other respects, the judgment and sentence of the court are affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. FRANKLIN C. BEACH, APPELLANT.

319 N.W.2d 754

Filed May 21, 1982. No. 81-640.

Pleas. A plea of guilty to a crime may be accepted by a court even though the defendant professes his innocence or denies the facts which would support a finding of guilt, provided there is a factual basis for such a finding and the court has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence. Such inquiry must be sufficient to satisfy the court that the defendant has a reasonable basis on which to enter such a plea.

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

Jerry N. Stehlik and Jacobsen, Orr & Nelson, 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.

HASTINGS, J.

On March 20, 1981, the defendant, Franklin C. Beach, as a result of a plea agreement whereby the county attorney agreed not to make any recommendation as to sentencing, entered a plea of guilty to an August 24, 1980, attempted first degree sexual assault of a girl who was less than 16 years old. Following a presentence investigation, an examination by both a psychiatrist and a psychologist, and a sentencing hearing at which the defendant testified at some length, the District Court determined that the defendant was not a mentally disordered sex offender, but ordered him committed to the Department of Correctional Services for a 90-day evaluation under the provisions of Neb. Rev. Stat. § 83-1,105(3) (Reissue 1976). On July 1, 1981, the defendant filed a motion to set aside his plea, which was heard on August 21, 1981, and dismissed. The defendant was then sentenced on September 4, 1981, to a term of probation for 3 years. He has now appealed to this court. His principal assignment of error is that the court denied his motion to set aside his guilty plea which he claimed was made involuntarily and unintelligently.

The defendant is a 35-year-old man who claims to be totally disabled. Although he stated he had an 11th grade education, he also stated that he had been tested by the State and was found to have a functional reading ability equivalent to a third grade education. A test administered by a mental health center revealed a full scale I.Q. score of 105. He is married and has two children, ages 9 and 10. On or about the 24th day of August 1980, while employed as a part-time jailer at the Dawson County jail, the defendant allegedly attempted a first degree sexual assault of a girl less than 16 years of age.

Prior to the defendant's arraignment and plea of guilty, there had been a preliminary hearing, a hearing on a plea in abatement, and a suppression

hearing. As might be expected, the statement which the victim gave to the investigating officers and that related by the defendant to the same two officers were not in complete agreement. The victim insisted that the defendant let her out of her cell, started to kiss her against her will, forcibly brought her down to the floor, removed her clothing, and attempted to rape her. The defendant's version, as contained in a statement given to a deputy sheriff, was that they started kissing, went down on the floor, and the next thing "they were doing it." He could not remember if he took off her clothes or if she did.

Following the overruling of the plea in abatement and the motion to suppress, the case was set for trial. Before trial, the defendant appeared with his lawyer and changed his plea from not guilty to guilty. Except for the areas concerning the extent to which the defendant understood the charge against him and the voluntariness of the plea, the arraignment generally satisfied all requirements of due process.

The trial court commenced the explanation of the elements of the crime charged by a verbatim and consecutive reading of Neb. Rev. Stat. § 28-201 (Reissue 1979), the attempted crime statute, Neb. Rev. Stat. § 28-319 (Reissue 1979), the sexual assault statute, and the provisions of Neb. Rev. Stat. § 28-105 (Reissue 1979) regarding the penalty for a Class III felony, followed by the statement, "Do you understand what I've read to you?" To this, the defendant answered, "Yes, Your Honor." By way of further explanation, the court stated to the defendant that, to be guilty of sexual assault in the first degree, "It would have to first be shown that you did subject another person to sexual penetration; and, secondly, that you did one of these things, and in this case that you were more than 19 years of age and that the victim was less than 16 years of age. Now, that's the

elements of sexual assault. And then in order to apply the section with regard to attempt they have to prove elements that are different, and it would have to be shown that you did intentionally engage in conduct which under the circumstances as you believed them to be constituted a substantial step in a course of conduct intended to culminate in your commission of the crime. So that in discussing these elements I believe that it would not be necessary for you to achieve sexual penetration, for instance, in order to be guilty of an attempt; but it would have to be that you engaged in conduct which under the circumstances as you believed them to be constituted a substantial step in a course of conduct intended to culminate in that. So that it would have to be shown or have to be proved that you were attempting to commit a first-degree sexual assault. . . . Do you understand that?" To which the defendant replied, "Yes." Immediately following the foregoing explanation, the court was advised by the defendant, in response to questions from the bench, that he had had an opportunity to discuss the nature of the crime at length with his attorney. We do not believe we can say as a matter of law that the trial court was wrong in making the determination that the plea was made with an understanding on the part of the defendant as to the nature of the crime charged.

Regarding the factual basis or justification for entry of the plea, this is, we believe, another matter. The court informed the defendant that although it had heard evidence in the case preliminary to that hearing, "there has been evidence on both sides of the thing, so that I would like to hear from you what you consider the facts to be that make you willing to plead guilty to this charge?" The defendant answered: "I'm guilty of some of it, Your Honor, but I ain't guilty of all of it. I didn't take a girl out to do this. I helped a lot of people up there, and I was trying to help her. And she did use me, but I didn't,

and, like I told, I thought about it, yes, but I didn't." When pressed as to what actually happened, the defendant replied: "A. Well, we were talking and I went to the bathroom. I heard something and I come out and there she was. Q. What do you mean 'there she was'? Where was she? A. She was standing right around the corner. Q. All right. A. I heard the doors open, so I assumed they took the keys. I come around the corner and there she was. Q. And then what happened? A. And we went down, and she kissed me and we went down, and I thought about it but I didn't. Q. You said she kissed you and you went down. Where did you go down? A. On the floor. Q. With Debbie? A. Yes. She was on top of me and then I rolled over and I got up and I said, 'No' and put her back in her cell. Q. Was there some state of unclothed condition with regard to one or both of you? A. Yes. Q. Would you describe that? A. Yes. She had, I couldn't, couldn't tell you for sure, she had all of them off or one leg or part way off. Q. Most of her clothes were off? A. Yes. Q. What was the condition of your clothes? A. My clothes were on. I had just come from the bathroom. I didn't have the pants zipped, I didn't get them zipped, but I didn't have them down."

A discussion then occurred between the judge, on the one hand, and the defendant and his attorney regarding the age of the victim and the defendant's knowledge of that fact. The defendant then explained to the court that the victim had been in jail about three nights, and he talked to her and she was crying each time. The court then inquired: "Q. How did she get into this unclothed state? Did you take her clothes off, or did she take her clothes off, or what happened? A. I don't know; didn't see; but she didn't have her clothes on when I come around the corner. Q. When you came around the corner from the bathroom, why, she was at that

time essentially naked? A. Right. And then after that she wanted me to let her and Rocky, that's her boy friend, out because they were going to get married and she didn't think that it was right that he be in there. And I said that I couldn't let anybody out."

The justification for the plea, beyond the factual basis, would have had to have been found in the following colloquy between the court and the defendant: "In entering this plea you have been guided partly by the plea concession or the plea bargain that the county attorney has entered, that he would not make a recommendation as to your punishment, is that right? A. Yes. Q. And you have considered the difficulties of presentation of the case in trial? A. Yes, Your Honor. Q. And in that respect, why, you have discussed it fully with your attorney? A. Right. But, I want to get my physical problem, this is just making a bigger burden on me, --- Q. You do have a physical problem of pain in your leg? A. Yes, Your Honor. THE COURT: All right. Very well. I will accept your plea and find you guilty of attempted first-degree sexual assault . . . ."

A good deal of defendant's testimony at the hearing on his motion to withdraw his plea is not particularly convincing. He claims that one of the deputy county sheriffs harassed his wife. However, when pressed to elaborate, the only thing which he could point to was that the deputy said "cute things and funny things to her that upset her." He claims that he was intimidated by the county attorney, who threatened to get some of the former jail inmates in trouble, whom Beach had helped. He insisted that on several occasions he and his family had seen members of the sheriff's department driving past their place and turning around in their driveway. He also alleged that the sheriff's office tried to have a "sheriff's sale" on his house. However, it developed that this apparently related to the involvement

of the sheriff as an officer of the court. Finally, Beach stated that he thought the crime to which he pleaded guilty related to "thinking of having sex with a girl." He based this on a conversation he claimed to have had with a deputy who told him that "if you thought it you did do it." He went on to testify that it was not until he was confined at the Regional Center for an evaluation that the crime of attempted sexual assault was explained to him, and that he concluded what he had done was not a violation of the law.

We agree that in this case there was sufficient information available to the trial court to afford a factual basis for a finding of guilt. In *State v. Leisy,* 207 Neb. 118, 295 N.W.2d 715 (1980), citing *North Carolina v. Alford,* 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), we held that a plea of guilty, voluntarily and intelligently made, might be accepted even though the defendant professes his innocence, provided there is a factual basis for a finding of guilty. Actually, *Alford* imposes one additional requirement, and that is that the judge in accepting the plea must have inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence. "Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt. . . . Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired. Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term." *Id.* at 37.

When questioned by the trial court at his arraignment, the defendant refused to admit, even denied, the facts which would have justified a finding of guilt. The agreement of the county attorney not to make a recommendation as to punishment, which supposedly influenced the defendant to enter a plea of guilty, would hardly seem to be a sufficient concession on the part of the prosecution to justify such action by a man who professed his innocence. We do not believe that the inquiry made by the trial court was sufficient to resolve the apparent conflict between "the waiver of trial and the claim of innocence."

The District Court should have granted defendant's motion to withdraw his plea of guilty. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM HOWARD HUNSBERGER, APPELLANT.

319 N.W.2d 757

Filed May 21, 1982. No. 81-660.

1. **Confessions.** To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.
2. _____. The determination of whether a statement was voluntarily made necessarily turns on the consideration of the totality of the circumstances in any particular case.
3. **Confessions: Appeal and Error.** A finding of the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Affirmed.

Mingus & Mingus, for appellant.

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

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

MCCOWN, J.

The defendant was charged with burglary, convicted by a jury, and sentenced to imprisonment for not less than 2 nor more than 8 years.

On the morning of August 12, 1980, it was discovered that a burglary had occurred in the offices of Prairie Datsun in Grand Island, Hall County, Nebraska. A stereo and approximately $340 in cash were missing. In early December 1980, after defendant had been fully advised of his constitutional rights and signed a written waiver of them, defendant made a full statement admitting that he committed the Prairie Datsun burglary with two other individuals. The defendant testified that at one point he requested a lawyer but all the officers involved specifically denied that assertion.

The defendant was arrested and charged with the Prairie Datsun burglary, and his motions to suppress all statements, admissions, and confessions were overruled after hearing. At the subsequent trial the officers testified with respect to the December statements and admissions. The defendant took the stand and admitted having made the statements and admitted his participation in the burglary. He testified, however, to a complicated and convoluted series of events which he asserts made all of his statements involuntary and made him immune from prosecution for the Prairie Datsun burglary.

The defendant testified that in February 1980 he was interrogated by police officers of the city of Kearney in connection with a burglary charge against him in Buffalo County. He testified that in that case Buffalo County law enforcement officers

made a bargain with him that he would not be returned to the penitentiary for that burglary if he would cooperate with them as an undercover person in connection with drug violations in Buffalo County, and that he agreed and did cooperate. He also testified that it was a part of the bargain that if he participated in any burglaries he would not be prosecuted for them if he reported them promptly to the Buffalo County law enforcement officers.

The defendant then testified that at sometime shortly before his December 1980 statement to Hall County officers in the case at bar, he reported to the Buffalo County officers about a burglary which had occurred in Hall County on the same day as the burglary charged in this case. The record indicates that the Buffalo County officers reported that burglary to the Hall County officers, who then questioned the defendant as to both burglaries, resulting in his December statements in the case at bar.

The defendant's position is that because he reported one Hall County burglary to the Buffalo County officers without *Miranda* warnings, all statements thereafter became involuntary because they were a violation of the bargain made with Buffalo County law enforcement officers.

The testimony of the law enforcement officers of Buffalo County was that the defendant's undercover activities were specifically limited to purchases or sales of drugs under the direction of the officers, and although defendant was told to report any planned criminal activity beforehand, the defendant was specifically told that he would be prosecuted to the fullest extent if he participated in any criminal activity other than the buying and selling of drugs. The record also establishes that in September 1980 the defendant was convicted on the original February 1980 burglary charge in Buffalo County and sentenced to 90 days in jail and 30 months' probation.

To be admissible, a statement or confession must

be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. The determination of whether a statement was voluntarily made necessarily turns on the consideration of the totality of the circumstances in any particular case. *State v. McDonald,* 195 Neb. 625, 240 N.W.2d 8 (1976).

A finding of the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. *State v. Thompson,* 198 Neb. 48, 251 N.W.2d 387 (1977).

In the case at bar, following the hearing on the motion to suppress, the trial court found that the defendant's statement was voluntarily made. The court found that defendant had been fully advised of his constitutional rights, and that he intelligently and knowingly waived those rights. That finding is amply supported by the record. In addition, the question of whether the statements made by the defendant were voluntary was also submitted to the jury under full and complete instructions. The defendant's defense of the alleged bargain with the Buffalo County law enforcement officers was also before the jury. The jury, by its finding of guilt, obviously did not accept the defendant's testimony and necessarily found his statements were voluntarily and knowingly made.

Even though it might be said that the defendant's defense was an ingenious attempt to avoid criminal responsibility, the defense was fully and fairly presented to the jury and there can be no question but that the evidence is more than sufficient to support the jury verdict.

AFFIRMED.

IN RE APPLICATION OF JOHN DAVID MAHAN FOR A WRIT OF HABEAS CORPUS.

JOHN DAVID MAHAN, APPELLANT, V. WARD GREENE, KEITH COUNTY SHERIFF, APPELLEE.

319 N.W.2d 760

Filed May 21, 1982. No. 81-677.

1. **Rules of Evidence: Extradition.** The rules of evidence, except as to privilege, are not applicable in extradition proceedings.
2. **Constitutional Law: Extradition.** There is no right of confrontation in an extradition proceeding.

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

David T. Schroeder, for appellant.

George M. Zeilinger, Deputy Keith County Attorney, for appellee.

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

BOSLAUGH, J.

The plaintiff, John David Mahan, appeals from an order of the District Court dismissing his petition for a writ of habeas corpus and remanding him to the custody of the sheriff.

While the plaintiff was in custody in Keith County, Nebraska, on several unrelated charges, it was discovered that he was a fugitive from the State of Florida. In 1978, the plaintiff, who is also known as Frederick Leroy Cheek, Jr., had been convicted in Florida of burglary and sentenced to 15 years' imprisonment. On September 25, 1979, the plaintiff escaped from the custody of the Florida Department of Corrections. Florida now seeks extradition.

The warrant of the Governor of Nebraska was served on the plaintiff on July 10, 1981. This action was filed July 16, 1981.

Although the petition contained many allegations, the only issue upon the appeal relates to the identi-

fication of the plaintiff as the fugitive wanted in Florida. At the hearing the plaintiff was identified as the fugitive by fingerprints and a photograph. These were received in evidence over the objection of the plaintiff. The plaintiff contends the evidence which was documentary and hearsay was not admissible and his right of confrontation was violated.

The case is controlled by our decision in *Dovel v. Adams,* 207 Neb. 766, 769, 301 N.W.2d 102, 103 (1981), in which we held: "The statutory rules of evidence, except those as to privilege, do not apply to, among other things, proceedings for extradition. Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 1979)."

The Nebraska statute is the same as Rule 1101 of the Federal Rules of Evidence. As pointed out in the notes of the Advisory Committee, extradition proceedings are essentially administrative in character and neither the rules of evidence nor the rules of criminal procedure are applicable. There is no right of confrontation in an extradition proceeding.

In *Simmons v. Braun,* 627 F.2d 635, 636 (2d Cir. 1980), the court said: "An extradition proceeding is not a criminal trial in which the guilt or innocence of an accused is adjudicated. *Jhirad v. Ferrandina,* 536 F.2d 478, 482 (2d Cir.), *cert. denied,* 429 U.S. 833, 97 S. Ct. 97, 50 L. Ed. 2d 98 (1976); *Sabatier v. Dabrowski,* 586 F.2d 866, 869 (1st Cir. 1978). The purpose of the hearing is simply to determine whether the evidence of the fugitive's criminal conduct is sufficient to justify his extradition under an appropriate treaty. The Federal Rules of Criminal Procedure are not applicable. See Rule 54(b)(5). Neither are the evidentiary rules of criminal litigation. *United States v. Mulligan,* 50 F.2d 687, 688 (2d Cir.), *cert. denied,* 284 U.S. 665 (1931). Hearsay evidence is admissible. *Id.* Unsworn statements of absent witnesses may be considered. *Collins v. Loisel,* 259 U.S. 309, 317, 42 S. Ct. 469, 472, 66 L. Ed.

956 (1922). There is no inherent right to the confrontation and cross-examination of witnesses. *Bingham v. Bradley,* 241 U.S. 511, 517, 36 S. Ct. 634, 637, 60 L. Ed. 1136 (1916)."

The judgment of the District Court is affirmed.

AFFIRMED.

DOROTHY J. MCFARLAND, APPELLEE, V. FRANCIS D. MCFARLAND, APPELLANT.

319 N.W.2d 463

Filed May 21, 1982. No. 81-892.

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

Murphy, Pederson, Piccolo & Anderson, for appellant.

Baskins & Rowlands, 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.

CAROL L. PUETZ, APPELLEE, V. MICHAEL J. PUETZ, APPELLANT.

319 N.W.2d 761

Filed May 21, 1982. No. 82-009.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Affirmed.

Anthony S. Troia, for appellant.

Luebs, Dowding, Beltzer, Leininger & Smith, for appellee.

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

CAPORALE, J.

This is an appeal from the orders of the District Court of Nebraska, Eleventh Judicial District, in and for Hall County, overruling respondent-appellant's motion to set aside and motion for new trial. We find the trial court was correct, and we affirm.

The action was commenced on January 21, 1980, by a petition seeking dissolution of the parties' marriage, which, in addition to general equitable relief, specifically prayed for, among other things, "a suitable division of the property accumulated by the parties . . . [and] temporary and permanent support and alimony . . . ." Appellant's voluntary appearance reserved his "statutory time within which to plead or answer." Appellant filed no pleading nor made any appearance. On May 12, 1980, trial, without notice to appellant, was had on appellee's petition. A decree was entered on May 16, 1980, which dissolved the marriage; quieted title in and to the real estate in appellee and awarded the personal property to the party having possession of same, subject to existing encumbrances; awarded appellee $10,000 in alimony, which appellant was ordered to pay at the rate of $200 per month together with inter-

est at the rate of 8 percent per annum; awarded appellee all 1979 tax refunds; restored appellee's former name; and provided that each party pay her and his own costs and attorney fees.

On May 22, 1980, appellant filed a motion to set aside the decree. The motion alleged that the decree, as entered, varied from appellee's representations that she "was not requesting alimony" and that the "parties' interest in the residential real estate was to be divided equally between the parties, subject to a second mortgage, which was to be the Respondent's responsibility." The motion further claims that appellant did not appear at the "hearing" because of his reliance upon said representations.

Appellant urges the trial judge abused his discretion in overruling his motion to set aside the decree.

At the trial held May 12, 1980, on appellee's petition, she testified that the marriage was contracted on August 16, 1975; that she was earning about $15,000 net annually; and that appellant was then earning "Thirth-Thousand [sic] a year" as a production supervisor. (Unfortunately, the record leaves us in doubt as to whether the annual earnings were thirteen thousand or thirty thousand. However, in view of our analysis and disposition, the question becomes immaterial.) There were no children. Appellant had no earnings for 1979, during which time appellee carried the financial burdens of the marriage. Prior thereto she contributed at least 90 percent to the costs. Although the trial record before us contains no evidence as to the value of the real estate (appellant's attorney later argued that there was a $28,000 equity), the trial record does show the realty was subject to a first mortgage of $47,253 and a second mortgage in an undisclosed amount. The proceeds of the second mortgage were used in an effort to establish appellant's unsuccessful business venture. Appellee also testified that she attempted

to communicate with appellant after he had moved out of the house but was unsuccessful in those efforts and that she had had no contact with him "since right after Christmas."

At the hearing on appellant's motion to set aside, appellee testified that at discussions had prior to appellant's moving out of the house, the parties had talked about getting an appraisal of the real estate but had no discussions concerning how to allocate any equity. Appellee denied stating to appellant that she sought no alimony.

Appellant, on the other hand, testified that he met and talked with appellee in January of 1980 and they agreed that any equity in the real estate would be divided between them. Appellant's motion recites that appellee represented she was not requesting alimony. At one point appellant denied signing a voluntary appearance but acknowledged doing so upon being presented with the document. He also acknowledged receiving a copy of the petition.

Appellant did not appeal from the decree but, rather, chose to move to have it set aside on the basis of fraud. Although on appeal an action for dissolution is heard de novo in this court, *Barber v. Barber,* 207 Neb. 101, 296 N.W.2d 463 (1980), such is not the case with respect to motions to set decrees of dissolution aside. Authority for such motions is found in Neb. Rev. Stat. § 42-372 (Reissue 1978), which provides that a decree of dissolution shall not become final or operative until 6 months after rendition and that, in the absence of appeal, the trial court may, within such 6 months, vacate or modify its decree. In *Howard v. Howard,* 207 Neb. 468, 299 N.W.2d 442 (1980), we reaffirmed our statements in *Miller v. Miller,* 190 Neb. 816, 212 N.W.2d 646 (1973), and *Zachry v. Zachry,* 185 Neb. 336, 175 N.W.2d 616 (1970), that control of a divorce decree during the 6-month period pending finality is within the sound judicial discretion of the trial court and that the ac-

tions of said court may not be reversed in the absence of an abuse of that discretion.

Here, the evidence as to what representations were made is in conflict. We cannot say good cause to set aside the decree was shown and cannot say the trial court abused its discretion in overruling appellant's motion.

AFFIRMED.

CHARLES L. GLEESON, APPELLANT, V. CHRIS F. FRAHM AND OLGA K. FRAHM, HUSBAND AND WIFE, APPELLEES.

320 N.W.2d 95

Filed May 28, 1982. No. 43773.

1. **Options to Buy or Sell: Contracts.** An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the holder of the option that he has the right to buy the property according to the terms and conditions of the contract.
2. _____: _____. The exercise of an option to buy or sell real estate must be unconditional and in accordance with the offer made.
3. _____: _____. Where the manner of exercise is not specified by an option contract, the holder of the option may exercise by promising to perform what the contract requires of him.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Reversed and remanded for further proceedings.

Jon A. Sedlacek, for appellant.

Gregory P. Drew, for appellees.

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

EMPSON, D.J.

This is an action for specific performance. On July 31, 1978, the defendants, Chris F. Frahm and Olga K. Frahm, executed for consideration an option, which is in pertinent part as follows: "KNOW ALL MEN BY THESE PRESENTS: That . . .

[Frahms] hereinafter referred to as First Party . . . in consideration of the sum of One Dollar and other good and valuable consideration . . . paid . . . by . . . second party . . . hereby agree to hold, until the 1st day of January, 1980, 12:00 o'clock A.M., . . . subject exclusively to the order of the said second party or his, her or their assigns, the following described property to wit: [property described] or to transfer and convey the said property by warranty deed . . . at any time within the time above prescribed, to the said second party or to such person or persons as he . . . may direct, at and for the price of One Thousand Two Hundred and Fifty (1,250) Dollars per acre payable on the following terms: 25% down payment, balance payable in ten (10) annual installments bearing interest at the rate of 8% per annum . . . .

. . . .

". . . if there should be any delay on the part of the first party in perfecting the title to the above property for more than thirty (30) days, after notice shall have been given of the election of the holder of this option to purchase the aforesaid property, then, and in that event, the holder of this option shall have the right to cancel this option, and upon the exercise of such right of cancellation, shall receive back the consideration paid for this option . . . ." The option was assigned to the plaintiff, Charles L. Gleeson.

On December 28, 1979, Gleeson mailed to the Frahms a document entitled "Acceptance of Option to Purchase," which is in pertinent part as follows: "I, Charles L. Gleeson, as Assignee . . . do under a certain option agreement made by you on the 31st day of July, 1978, for the purchase of the property described as follows: [property described] hereby elect to exercise such option to purchase, upon the terms as contained in said option agreement and do direct that you transfer and convey said property by Warranty Deed . . . to myself, Charles L. Gleeson and Richard J. Gleeson, as tenants in common.

"Please deliver abstract of title to the real estate certified to date, to my attorney . . . ." The document, received by the Frahms on December 29, 1979, neither contained nor was accompanied by any payment or specific offer of payment of any kind. Gleeson has never offered the Frahms any payment and the Frahms have never taken any steps to convey the property.

No further action was taken by either party until about the middle of January 1980, when Gleeson stopped by the Frahms' home to ask about fencing the property. Chris Frahm told him to go see their attorney, who told Gleeson the sale would not be made. This lawsuit resulted.

The Frahms' answer to Gleeson's petition alleged that the option was not exercised by Gleeson because the "downpayment" required was not tendered or paid before the option expired. They have defended throughout on that basis, and the trial court, upon that same theory, sustained the Frahms' motion to dismiss at the close of Gleeson's case.

The nature of an option has been stated by this court as follows: " ' "An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the holder of the option that he has the right to buy the property according to the terms and conditions of the contract. By such agreement the owner does not sell the land, nor does he at the time contract to sell. He does, however, agree that the person to whom the option is given shall have the right at his election or option to demand the conveyance in the manner specified." ' " *Commuter Developments & Investments, Inc. v. Gramlich,* 203 Neb. 569, 573, 279 N.W.2d 394, 396 (1979); *Phillips Petroleum Co. v. City of Omaha,* 171 Neb. 457, 106 N.W.2d 727 (1960). This definition gives rise to and is implicit in such cases as *Master Laboratories, Inc. v. Chestnut,* 154 Neb. 749, 49 N.W.2d 693 (1951), and *State Securities Co. v. Dar-*

inger, 206 Neb. 427, 293 N.W.2d 102 (1980), which hold that the exercise of an option to buy or sell real estate must be unconditional and in accordance with the offer made. Those holdings, in turn, spring from long-standing principles of contract law that the acceptance of any offer, to result in a contract, must be absolute, unconditional, and unqualified. See *Roberts v. Cox,* 91 Neb. 553, 136 N.W. 831 (1912).

The parties may contract to the effect that full or partial performance by the holder of the option is required to exercise the option. If they do so, the contract remains a unilateral one after the option is exercised, that is, the holder having performed, only the owner remains bound to perform. If they do not so contract, the holder may exercise by promising to perform, in which case the contract becomes bilateral—both parties are bound by their promises to perform the contract. Where the contract specifies the required manner of acceptance, the holder must conform. Where the manner of acceptance is not specified, the holder may exercise by promising to perform what the option requires of him. Restatement (Second) of Contracts § 32 (1981). The option contract in this case does not specify any particular manner of exercise or acceptance.

It is significant that the contract gives the Frahms 30 days to perfect title after notice of election of Gleeson to purchase. It is more significant that upon the Frahms' failure to perfect title, Gleeson shall "receive back" not the downpayment but the "consideration paid for this option," i.e., "One Dollar and other good and valuable consideration." The Frahms' contention that proper exercise of the option required a downpayment before the Frahms had displayed good title is untenable. Gleeson's letter of acceptance, couched in the words of the option contract itself, is a clear exercise of the option, by which Gleeson became bound to pay the price upon

the Frahms' showing of good title and their offer of a warranty deed.

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

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., dissenting.

I dissent. The terms of the option require a downpayment of 25 percent at the time the option is exercised. Since no downpayment was received by January 1, 1980, the option expired. I would have sustained the District Court's order dismissing the plaintiff's petition.

I am authorized to state that Brower, D.J., joins in this dissent.

STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE, V. ALLAN HOUTWED, DOING BUSINESS AS PALMER INN, APPELLANT.

320 N.W.2d 97

Filed May 28, 1982. No. 43992.

1. **Constitutional Law: Highways: Statutes.** The portion of Neb. Rev. Stat. § 39-1320.06 (Reissue 1978) which prohibits the "erection or maintenance of any advertising sign, display, or device which is visible from the main-traveled way of the National System of Interstate and Defense Highways and the system of federal-aid primary roads of the State of Nebraska" is unconstitutionally vague.
2. **Prosecuting Attorneys: Statutes.** It is the function of the county attorney under Neb. Rev. Stat. § 23-1201 (Reissue 1977) to enforce the penal provisions of the Nebraska statutes.

Appeal from the District Court for York County: WILLIAM H. NORTON, Judge. Reversed and dismissed.

John R. Brogan of Brogan, McCluskey & Wolstenholm, for appellant.

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

Heard before KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MURPHY and WHITEHEAD, D. JJ.

MURPHY, D.J.

This is an action for a permanent injunction brought by the State of Nebraska, Department of Roads, against Allan Houtwed, doing business as Palmer Inn, seeking the removal of an advertising sign adjacent to Interstate 80 near York, Nebraska. In its petition the plaintiff alleges authority for its action and the remedy sought under the provisions of Neb. Rev. Stat. § 39-1320.10 (Reissue 1978), which provides in part: "[T]he Director-State Engineer, for the department and in the name of the State of Nebraska, may apply to the district court having jurisdiction for an injunction to force compliance with any of the provisions of this act . . . ."

The petition seeks to enforce the provisions of Neb. Rev. Stat. § 39-1320.06 (Reissue 1978), which prohibits the erection of advertising signs which are visible from the main-traveled way of the Interstate highway system.

The case was tried to the court on stipulated facts, after which the court enjoined the defendant from continuing to maintain the sign and ordered its removal within 60 days. The defendant appeals from this order.

State v. Mayhew Products Corp., ante p. 300, 318 N.W.2d 280 (1982), is controlling in this case. The provision of § 39-1320.06 which prohibits the "erection or maintenance of any advertising sign, display, or device which is visible from the main-traveled way of the National System of Interstate and Defense Highways and the system of federal-aid primary roads of the State of Nebraska" was held to be unconstitutionally vague.

The plaintiff further contends that the erection of

the defendant's sign on a county road which is no longer in use but which has not been formally vacated constitutes a violation of Neb. Rev. Stat. §§ 39-703 (Reissue 1978) and 28-1312 (Reissue 1979), which prohibit the erection and maintenance of any obstructions on a public road and provide that such actions constitute a misdemeanor. This issue is not properly before the court and cannot be decided in this case. Under the provisions of Neb. Rev. Stat. § 23-1201 (Reissue 1977), it is the duty of the county attorney "when in possession of sufficient evidence to warrant the belief that a person is guilty and can be convicted of a felony or misdemeanor, to prepare, sign, verify, and file the proper complaint against such person and to appear in the several courts of his county and prosecute the appropriate criminal proceeding on behalf of the state and county."

The judgment of the District Court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

PHELPS COUNTY SAVINGS COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. DEPARTMENT OF BANKING AND FINANCE, STATE OF NEBRASKA, APPELLEE, FIRST NATIONAL BANK OF HOLDREGE, NEBRASKA, AND FIRST SECURITY BANK OF HOLDREGE, NEBRASKA, APPELLANTS.

320 N.W.2d 99

Filed May 28, 1982. No. 44125.

1. **Administrative Orders: Banks and Banking.** A decision of the Department of Banking and Finance should be affirmed where it has acted within its jurisdiction and there is some competent evidence to sustain its finding and order.
2. **Administrative Agencies: Appeal and Error.** On remand, an administrative agency is required to follow the court's determination of questions of law but it is not foreclosed from enforcing the legislative policy committed to it.

3. _____: _____. On review of the action of an administrative agency, a court must correct errors of law and on remand the agency is bound to act upon the correction. But an administrative determination in which is imbedded a legal question open to additional review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.
4. **Administrative Agencies: Evidence.** An administrative agency's duty to apply the statutory standard in determining whether an applicant is to receive a permit is the same after it falls into legal error as before. If, in the agency's judgment, new evidence is necessary to discharge its duty, the fact of a previously erroneous denial should not bar it from access to the necessary evidence for correct judgment.

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

Person, Dier, Person & Osborn, for appellants.

Knudsen, Berkheimer, Beam, Richardson & Endacott, for appellee Phelps County Savings Company.

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

CLINTON, J.

This appeal arises out of the application of the Phelps County Savings Company to the Department of Banking and Finance (hereinafter department) for a license to operate as an industrial loan and investment company under the provisions of Neb. Rev. Stat. §§ 8-401 et seq. (Reissue 1977). The appeal is from an order of the District Court for Lancaster County made on January 8, 1981, remanding the matter to the department for a hearing "with directions to proceed in conformity with" a prior order of the District Court dated August 15, 1979. The question involved on the appeal is a procedural one involving whether on the remand under the order of August 15, 1979, the department could hold an entirely new hearing as if upon an original application, or whether the scope of the hearing under the court's order of August 15, 1979, was limited to a particular

purpose. The issue involves both an interpretation of the court's order and its power to limit the scope of the rehearing.

A clear understanding of the errors assigned by the protestants-appellants makes necessary a chronological recital of the procedural history of the matter. On April 17, 1978, following its incorporation, the appellee Phelps County Savings Company filed an application for the license. No protests were filed. The application was denied by the department on August 3, 1978. The department's order contained the following: "9. That the applicant failed to show that the public necessity, convenience, and advantage of the community in which the business of Phelps County Savings Company is to be conducted will be served thereby." As required under § 8-403.01 (Cum. Supp. 1980), the applicant must show, among other things: "(3) that the public necessity, convenience and advantage of the community in which the business of the applicant is to be conducted will be served thereby." The order of the department contained the following findings: "2. No license for an industrial loan and investment company may be issued unless and until the Department of Banking and Finance shall have made the determination as required by Section 8-403.01 R.R.S. 1943, as amended. In making the determination that the public necessity, convenience, and advantage of the community will be served by the proposed industrial loan and investment company, the Director of Banking and Finance must consider the economic area to be served by the proposed institutions; the size and population of such area; the number and size of institutions within or now serving the area; the wealth of the residents within the area; the commercial and industrial development and potential growth of the area; the capability of existing institutions to handle potential growth; the earning prospects of the proposed industrial loan and investment

company; adequacy of services being provided by the existing institutions in relation to the needs of the residents of the area; the convenience of location of the proposed industrial loan and investment company; and all other facts and circumstances bearing upon or relevant to the inquiry of public necessity, convenience and advantage.

"3. All the facts and circumstances, as disclosed by the evidence and investigation support the determination that the public necessity, convenience, and advantage will not be served by permitting . . . ."

This order of the department was appealed to the District Court for Lancaster County. On August 15, 1979, after the hearing in the District Court, that court entered an order which contained the following: "5. That the appellee found that all statutory conditions were met except '(3) that the public necessity, convenience and advantage of the community in which the business of the applicant is to be conducted will be served thereby.'

"6. That paragraph 2 of appellee's order indicates that appellee made an investigation, but the record fails to disclose the contents of the investigation or the facts, if any, upon which the appellee relied in making its decision. The appellee did not give notice to appellant pursuant to Sec. 84-914 (5) R.R.S., 1943; neither did the appellee give the appellant an opportunity to contest any facts noticed by appellee." The court's order was as follows: "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the order of the appellee of August 3, 1978 should be and hereby is reversed and set aside; that this case should be and hereby is remanded to the appellee for further proceedings in conformance with the findings and order herein."

On the remand to the department it set a new hearing date, gave notice of hearing, and proceeded to hold a hearing as upon an original application. At that hearing the protestants-appellants, First Se-

curity Bank of Holdrege, Nebraska, and the First National Bank of Holdrege, Nebraska, made appearances, entered objections, and presented evidence. On February 14, 1980, the department entered its order with detailed findings of fact and conclusions of law, saying: "3. All the facts and circumstances, as disclosed by the evidence and investigation support the determination that the public necessity, convenience, and advantage will not be served by permitting the Phelps County Savings Company to engage in the business of an industrial loan and investment company at 719 Fourth Avenue, Holdrege, Phelps County, Nebraska, and that, therefore, the application should be denied and an order should be entered denying the applicant a license to conduct an industrial loan and investment company." An order denying the license was issued.

This order was then appealed to the District Court for Lancaster County. At this time a different district judge presided and affirmed the order of denial on November 24, 1980. A motion for new trial was filed, and after hearing thereon the court reversed its position after making findings and entered the following order: "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the order entered by me on October [sic November] 24, 1980, which was done in the September, 1980 term of this court is set aside.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that this matter be and it is hereby remanded with directions to proceed in conformity with Judge Fahrnbruch's order of August 15, 1979, entered in Docket 321 Page 270 of the records of this court. Costs are taxed against the appellee. This order entered in the September, 1980 term of this court."

The appellants make the following assignments of error: (1) The District Court erred in finding that it had the authority to restrict further proceedings of

an administrative agency. (2) The District Court erred in finding that the original order of remand to the department was intended to restrict the department. (3) The District Court erred in not deciding that there was sufficient evidence to support the decision of the department. (4) The District Court erred in finding that the department had not complied with the order of the District Court of August 15, 1979.

Appellants rely upon the following propositions and authorities. The District Court, in hearing an appeal from an administrative agency, is limited by the provisions of Neb. Rev. Stat. § 84-917(6) (Reissue 1976) which provides: "(6) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the agency decision is:

"(a) In violation of constitutional provisions;

"(b) In excess of the statutory authority or jurisdiction of the agency;

"(c) Made upon unlawful procedure;

"(d) Affected by other error of law;

"(e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or

"(f) Arbitrary or capricious."

A decision of the Department of Banking and Finance should be affirmed where it has acted within its jurisdiction and there is some competent evidence to sustain its finding and order. *Southwestern Bank & Trust Co. v. Dept. of Banking and Finance,* 206 Neb. 599, 294 N.W.2d 343 (1980); *First Nat. Bank & Trust Co. v. Ley,* 182 Neb. 164, 153 N.W.2d 743 (1967). On remand, an administrative agency is required to follow the court's determination of questions of law but it is not foreclosed from enforcing the legislative policy committed to it. *Federal*

Comm'n v. Broadcasting Co., 309 U.S. 134, 60 S. Ct. 437, 84 L. Ed. 656 (1940); *Braniff Airways, Incorporated v. C. A. B.,* 379 F.2d 453 (D.C. Cir. 1967); *New York, N. H. & H. R. Co., 1st Mtg. 4% B. C. v. United States,* 305 F. Supp. 1049 (S.D. N.Y. 1969); *City of Tucson v. Mills,* 114 Ariz. 107, 559 P.2d 663 (1976); *State, ex rel., v. Board,* 54 Ohio St. 2d 75, 374 N.E.2d 1355 (1978); *Metal Products v. Admr.,* 41 Ohio St. 2d 143, 324 N.E.2d 179 (1975).

In *Federal Comm'n v. Broadcasting Co., supra,* the U.S. Supreme Court was faced with a factual situation nearly identical to this case. The Pottsville Broadcasting Company had sought a permit from the FCC to operate a broadcasting station. The application was denied by the FCC and its decision was reversed by the Court of Appeals and remanded for reconsideration in accordance with the views expressed by the court. On remand, the FCC decided to conduct a new hearing with other parties and issues. The Court of Appeals then issued a writ of mandamus against the FCC, and the case was appealed to the U.S. Supreme Court. The Court held: "On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. . . . But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." 309 U.S. at 145. In *Fly v. Heitmeyer,* 309 U.S. 146, 60 S. Ct. 443, 84 L. Ed. 664 (1940), the U.S. Supreme Court said at 148: "But the Commission's duty was to apply the statutory standard in deciding which of the applicants was to receive a permit after it fell into legal error as well as before. If, in the Commission's judgment, new evidence was necessary to discharge its duty, the fact of a previously erroneous denial should not, according to the principles enunciated in the *Pottsville*

case, *ante*, bar it from access to the necessary evidence for correct judgment." The appellants also cite *City of Tucson v. Mills, supra; State, ex rel., v. Board, supra;* and *Metal Products v. Admr., supra,* which are to similar effect.

The appellee Phelps County Savings Company argues that the authorities cited by the appellants are distinguishable from the case at hand and not applicable because, on the first appeal to the District Court, that court decided not only that the department had made an error of law in not disclosing the results of its investigation but had also reached the merits of the case where it stated in its findings: "That if believed, appellant's evidence before the appellee standing alone was prima facie sufficient to show 'public necessity, convenience and advantage' under Sec. 8-401.01 R.R.S., 1943, without explanation for rejection." The appellee therefore concludes that if the department offered no evidence on the rehearing, it would be required to order the issuance of the license since the District Court had found that a prima facie case had been made if the evidence "was believed." Appellees rely upon the following propositions and authorities: When a judgment is reversed and remanded with instructions to proceed in conformance with the findings and order herein, such language indicates a decision on the merits by the court, and the findings of the court become a part of the mandate. *Rogers v. Hill,* 289 U.S. 582, 53 S. Ct. 731, 77 L. Ed. 1385 (1933); *Asbra v. Dean,* 160 Neb. 6, 68 N.W.2d 696 (1955). Where the evidence before an administrative agency is all one way, and the agency finds to the contrary, the finding so made constitutes error of law, which it is the duty of the court to reverse. *State ex rel. Spurck v. Civil Service Board,* 226 Minn. 240, 32 N.W.2d 574 (1948); *Sebring v. Caporal,* 452 P.2d 777 (Okla. 1969).

State ex rel. Spurck v. Civil Service Board, supra, involved an appeal by a civil service employee from

his dismissal. Under the applicable Minnesota statutes, the appealing employee was entitled to a trial de novo before the board with all the incidents of a trial, including the right to be heard, the production of witnesses and documents, the taking of evidence, examination and cross-examination of witnesses, representation by counsel, presentation of arguments, decision upon the merits, and everything incident thereto. The Supreme Court of Minnesota on appeal held that on certiorari the court does not reweigh the evidence and determine which of conflicting versions of the facts should be adopted, but where the evidence as a matter of law compels a certain finding and the administrative finding is to the contrary, the finding so made constitutes error of law which the court must reverse. In *Sebring v. Caporal, supra,* the Oklahoma Supreme Court said that a decision of the banking board denying the application for a banking charter was erroneous in view of reliable, probative, and substantial competent evidence that the proposed bank was economically feasible, that the capital structure of the proposed bank was adequate, that future earnings of such bank were favorable, and that there was public necessity for the proposed bank.

Rogers v. Hill, supra, did not involve an appeal from an administrative agency having special functions, but from one court to another, and the point at issue was the interpretation of the mandate made upon the reversal. *Asbra v. Dean, supra,* involved the interpretation of a mandate in an appeal from the District Court to the Supreme Court.

Section 84-917 does not provide for a de novo review on the record by the District Court or in this court. *Southwestern Bank & Trust Co. v. Dept. of Banking and Finance,* 206 Neb. 599, 294 N.W.2d 343 (1980); *First Nat. Bank & Trust Co. v. Ley,* 182 Neb. 164, 153 N.W.2d 743 (1967). In *Southwestern Bank & Trust,* we said: "[I]n *First Nat. Bank of Bellevue*

v. Southroads Bank, 189 Neb. 748, 750, 205 N.W.2d 346, 347-48 (1973): '[T]he determination of public necessity, convenience, and advantage has been committed to the discretion and expertise of the Department of Banking. This court is not a super-regulatory body to review the policy or wisdom reflected in determinations made by the Department of Banking as to such issues. Where it appears in an error proceeding that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the administrative agency will be affirmed.'

. . . .

"In 1 Michie on Banks and Banking 162-64 (rev. ed. 1973), a Nebraska case is cited as support for the proposition, discussed in the section entitled 'Discretion and Power in State Offices and Boards,' that: 'It has been held, however, that under the statutory provisions in certain states the commissioner of banking or other banking authority is vested with discretionary power to approve or reject applications for chartering a bank. And under such statutory provisions the refusal of the commissioner of banking to approve an application for a charter in a proper exercise of such discretionary power is not subject to judicial review on the ground that a different decision should have been made, unless it clearly appears that he has willfully and arbitrarily disregarded his duty, or that his decision was due to caprice, passion, partiality or corruption.' " 206 Neb. at 603-05, 294 N.W.2d at 345-46.

In the first appeal to the District Court, that court correctly remanded the cause because the department had not disclosed evidence of its investigation, if any, upon which it had relied and had not given the appellant an opportunity to challenge it. In so doing, the District Court determined the department made an error of law. We hold, however, that this particular error could be corrected by holding a

completely new hearing in accordance with the principles we have cited earlier in *Federal Comm'n v. Broadcasting Co.,* 309 U.S. 134, 60 S. Ct. 437, 84 L. Ed. 656 (1940), and *Fly v. Heitmeyer,* 309 U.S. 146, 60 S. Ct. 443, 84 L. Ed. 664 (1940).

In both hearings before the department, it concluded that the evidence did not support a finding that the public necessity, convenience, and advantage to the community in which the business of the applicant was to be conducted would be served thereby. It is for the department to determine whether the evidence, even if not contested, is of such a nature as to prove the above requirement and is to be believed.

We have examined the record of both hearings before the department. Much of the evidence in these cases necessarily takes the form of projections which are essentially predictions as to growth of the community, and in case of an industrial loan and investment company, its ability to obtain funds by issuing certificates of indebtedness and to lend those funds profitably. In neither hearing can it be said that the evidence was such that it compelled a finding of public necessity, convenience, and advantage. The order of the District Court of January 8, 1981, is reversed and the order made by the District Court on November 24, 1980, is reinstated.

REVERSED.

KRIVOSHA, C.J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. VALERIE L. WILLIAMS, APPELLANT.

320 N.W.2d 105

Filed May 28, 1982. No. 44235.

Criminal Law: Witnesses: Testimony. The testimony of a witness at a preliminary hearing where the opportunity for cross-

examination has been exercised by the defendant is admissible at the subsequent trial if the witness is unavailable. It is within the discretion of the trial court to determine whether the unavailability of the witness has been shown.

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.

MCCOWN, J.

The defendant, Valerie L. Williams, was charged with two counts of robbery and convicted by a jury on both counts. The District Court sentenced her to a term of 3 to 5 years' imprisonment on each count, the sentences to run concurrently.

At approximately 12:20 p.m. on December 31, 1980, Lenora Ortiz and Anita Straw and their children were crossing the street at 16th and Ohio Streets in Omaha, Nebraska, on their way home from the grocery store. In the middle of the street they were accosted by a woman, later identified as the defendant. The woman pulled a pistol and threatened to shoot one of the children unless the women gave her their money. The women gave her the money in their possession, which totaled $13. The robber ran from the scene just as the ex-husband of Lenora Ortiz arrived in his car. He was advised of the robbery, took a gun from the glove compartment of his car, and pursued the robber on foot. One of the women reported the robbery to the police. After a short pursuit, the robber jumped into a parked car and hid the gun and money. Rocky Ortiz drew his gun and the defendant got out of the car. A man standing at the rear of the car denied any connection with the defendant and at that point

the defendant began walking to a nearby drugstore with Ortiz following her. The man drove away in the car. The defendant was arrested by the police outside the drugstore.

At trial Lenora Ortiz identified the defendant as the individual who had robbed the two women and Rocky Ortiz identified the defendant as the individual he pursued until she was arrested by police. From the license number of the car, which had been observed by Lenora Ortiz, the police located the car and recovered from it a jacket identified as the jacket worn by the defendant at the time of the robbery. The defendant testified that the prosecution witnesses were lying or mistaken and denied any involvement in the robbery.

The testimony of Anita Straw given at the preliminary hearing was also introduced into evidence at trial. Essentially, her testimony corroborated the testimony of Lenora Ortiz and identified the defendant as the individual who robbed her. The defendant had been present at the preliminary hearing and her attorney had cross-examined Straw without restriction. The basis for offering the testimony from the preliminary hearing was that Anita Straw was unavailable at the time of trial.

The evidence established that in the week prior to trial the prosecution learned that Anita Straw had moved from her address in Omaha and there was information that she was possibly in either Creston, Iowa, Creston, Nebraska, or Crescent, Iowa. The prosecution requested a police officer to attempt to contact Straw to secure her appearance in court. The police officer testified that he made attempts to contact the witness by telephone in all three towns and the only address which corresponded with the address which the prosecution had was one in Crescent, Iowa. He contacted the sheriff's office in Crescent and asked them to send one of their deputies out, but as of the time of trial Anita Straw was still

unavailable. A subpoena had been issued for her by the prosecutor's office and the police officer had that subpoena in his possession at trial.

The defendant objected to the introduction of the testimony of Anita Straw from the preliminary hearing, but the objection was overruled. The defendant was found guilty by the jury on both counts and sentenced by the trial court. This appeal followed.

The sole assignment of error by the defendant is that the District Court erred in admitting the preliminary hearing testimony of Anita Straw. The defendant contends that the State did not make a sufficient attempt to locate the witness.

The testimony of a witness at a previous trial is admissible if the witness is unavailable. It is within the discretion of the trial court to determine whether the unavailability of the witness has been shown. *State v. Howard,* 184 Neb. 461, 168 N.W.2d 370 (1969).

Where a witness has been previously examined in open court with the opportunity for cross-examination which has been availed of and the witness is unavailable at the trial, the evidence so given at the preliminary hearing for the same offense may be used at the trial. There must be evidence of diligence on the part of the prosecution to locate the witness and evidence of the unavailability of the witness to testify. It is immaterial whether such testimony was adduced at a preliminary hearing or in a former trial for the same offense. See, *Callies v. State,* 157 Neb. 640, 61 N.W.2d 370 (1953); *Davis v. State,* 171 Neb. 333, 106 N.W.2d 490 (1960).

In the case at bar there was sufficient evidence to establish that Anita Straw was not available at the time of trial and that reasonable search and inquiry as to her whereabouts had been made. Her testimony at the preliminary hearing was made in the presence of the defendant and she was subjected to full and unrestricted cross-examination at that time. The trial court did not abuse its discretion in ad-

mitting the testimony of Anita Straw.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. OSWALD P. GONZALEZ, APPELLANT.

320 N.W.2d 107

Filed May 28, 1982. No. 44356.

Search and Seizure: Constitutional Law. The capacity to claim protection of the fourth amendment as to unreasonable searches and seizures depends not upon the property right in the invaded place but upon whether the person who claims the protection of the fourth amendment has a legitimate expectation of privacy in the invaded place.

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

Daniel K. Powers, for appellant.

Paul L. Douglas, Attorney General, Terry R. Schaaf and Bernard L. Packett, for appellee.

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

WHITE, J.

This is a companion case to *State v. Longa, ante* p. 356, 318 N.W.2d 733 (1982). The defendant-appellant, Oswald P. Gonzalez, was arrested on September 3, 1980, along with his codefendant, Cristobal Longa, and was charged with a violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1979), possession of a controlled substance with intent to deliver. Motions to suppress illegally obtained evidence were overruled and both defendants were tried jointly in the Douglas County District Court before a jury. Both defendants were convicted and Gonzalez was sentenced to from 1

year to 3 years in the Nebraska Penal and Correctional Complex. We affirm.

The evidence shows that the Omaha Police Department received information from a confidential source regarding a purchase and sale of cocaine. The informant told members of the Omaha Police Department that the parties inside the house located at 4057 Frederick Street, Omaha, Nebraska, were going to purchase a large amount of cocaine and that the party leaving that residence would have with him a large quantity of money to purchase the cocaine. The officers were told that the party would leave the residence on Frederick Street and drive to an unknown location to pick up multiple ounces of cocaine. The informant also told police that he had seen cocaine packaged for street sale in a residence located at 422 North 34th Street, Omaha, Nebraska, and at 4057 Frederick Street as well. The informant provided Omaha police officers with a sample which was tested and verified as cocaine. The officers testified that they considered their informant reliable since he provided officers with cocaine which had been clinically tested as such and had provided information on prior occasions which resulted in convictions. Further, the informant's information was verified by surveillance.

After being informed about the possible drug purchase, police officers placed the residence at 4057 Frederick Street and the residence at 422 North 34th Street under surveillance in anticipation of following individuals going to and coming from those locations, to determine the source of the suspected narcotics. The informant told police officers that on the evening of September 3, 1980, a person by the name of Ned Reynolds would be leaving his residence at 4057 Frederick Street to make a purchase of cocaine. Later another source informed the police that Reynolds would not be making the purchase; however,

somebody would leave the Frederick Street residence to make the buy.

On the basis of this information, the police obtained search warrants for both residences during the afternoon of September 3, 1980. Surveillance was established at the Frederick Street residence in late afternoon of September 3, 1980, by members of the vice and narcotics unit.

At approximately 6 or 6:30 p.m., on September 3, 1980, police officers observed a person later identified as James Sorensen leave the Frederick Street residence. Officers followed Sorensen to a residence located at 35th and Jackson Streets. Sorensen entered 3524 Jackson Street and stayed approximately 15 to 30 minutes. Sorensen was seen leaving 3524 Jackson Street carrying what appeared to be two soft black packets. Police officers followed Sorensen to 422 North 34th Street. Shortly thereafter, Sorensen was followed to 4057 Frederick Street.

Police officers were unaware of any suspicious activity or any involvement of the Jackson Street address prior to Sorensen's arrival. Officer Katherine McKillip of the Omaha Police Department maintained surveillance of the 3524 Jackson Street residence after Sorensen's departure. Approximately 10 to 15 minutes after Sorensen had left, Officer McKillip noticed four people leave the Jackson Street residence. The four talked in the yard for several moments and then two "dark complected" men walked across the yard and got into a black Cadillac containing California license plates. The 1977 Cadillac had been parked in the vicinity of the Jackson Street address at the time Sorensen was followed there. One of the men, later identified as defendant Gonzalez, was carrying what appeared to be a black shaving kit under his shirt. He placed the article in the front seat of the car, and the other man, identified as defendant Longa, removed from the car what appeared to be a pillowcase and then

dumped its contents into the trunk. The two men entered the Cadillac and drove off. Officer McKillip was picked up by Sgt. Jack O'Donnell of the Omaha vice and narcotics unit. McKillip told O'Donnell what she had seen and the two followed the Cadillac to a convenience store located at 33rd and Cass Streets.

In the parking lot of the convenience store, Sergeant O'Donnell and Officer McKillip left their unmarked police car and approached the Cadillac. Sergeant O'Donnell testified that he identified himself as a police officer and asked the driver of the Cadillac whether they had any drugs or money in the car. The driver, Gonzalez, replied that they had money in the car. At this, Sergeant O'Donnell asked if it was more than $1,000 and Gonzalez replied yes. O'Donnell testified that at that point the two men were placed under arrest and transferred to central police headquarters. The Cadillac was towed to a police holding lot and impounded.

Shortly after defendants Gonzalez and Longa's arrest, the police served search warrants at 422 North 34th Street and 4057 Frederick Street. These searches resulted in the seizure of substances which were later clinically identified as cocaine. Police officers arrested six persons at the Frederick Street residence. Based upon the evidence seized and the arrests made at these addresses, plus activities of those persons under surveillance, warrants were issued for the search of the 1977 Cadillac as well as the residence at 3524 Jackson Street. The Jackson Street address was searched at approximately 10:30 p.m. on September 3, 1980, and resulted in the seizure of substances later clinically identified to be cocaine, a large amount of money, and the arrest of one Scott Rosenkrantz. The Cadillac, which was registered to Gonzalez, was searched at about 10:45 p.m., September 3, 1980. The search of the Cadillac resulted in the seizure of a black bank bag contain-

ing $8,708 and numerous items of identification of one Oswald P. Gonzalez. A search of the automobile trunk revealed numerous items of clothing and the normal tire-changing equipment. No controlled substances were found in the Cadillac. Based on the absence of controlled substances in the Cadillac, as well as the absence of any "toilet articles," the interest of Lt. Robert Olson was aroused in discovering where Gonzalez and Longa were staying while they were in Omaha. By questioning Scott Rosenkrantz, it was discovered that Gonzalez and Longa had been staying at the New Tower Motel. A search warrant was prepared for that location. An attempt to locate the defendant's room at the New Tower proved unsuccessful and gave rise to an investigation of local motels in the area in an attempt to find where defendants Gonzalez and Longa were staying. Shortly after 12 a.m., September 4, 1980, Officer Thomas Gorgen found a room registration in the name of the defendants at the Thrifty Scot Motel. Also listed on the room sign-in sheet was the 1977 Cadillac with the California license number. The previous affidavit for the search of the New Tower Motel was altered at the direction of Lieutenant Olson by inserting Thrifty Scot wherever New Tower appeared. That affidavit, in addition to the affidavits set forth for the previous warrants, were attached to the request for a search warrant of the motel room. On the basis of all that had transpired on September 3, 1980, a warrant was issued for the search of room 407 at the Thrifty Scot Motel. The search was conducted at approximately 1:30 or 2 a.m. on September 4, 1980, and resulted in the seizure of certain notebooks and papers, $3,800 in cash, a suitcase containing cocaine, a scale, and other assorted items. Police also found a package of cocaine rolled up in a towel. All the substances seized from the motel room, 4057 Frederick Street, 422 North 34th Street, and 3524 Jackson Street clini-

cally tested as cocaine. These findings resulted in the filing of an information against defendant Gonzalez and his companion Longa.

Gonzalez assigns the following errors: (1) The District Court erred in overruling his motion to suppress illegally obtained evidence; (2) The District Court erred in admitting into evidence statements obtained when the defendant was in custody without a showing that he had been advised of his right to remain silent; (3) The District Court erred in refusing to grant the defendant a hearing on the veracity of the supporting affidavit of the search warrant used to search room 407 of the Thrifty Scot Motel; and (4) The District Court erred in commenting on the evidence incorrectly during final argument in a way which was prejudicial to the defendant.

The issue of when the arrest occurred was fully discussed in *State v. Longa, supra*, and for the same reasons set forth therein we conclude here as well that the activities of the officers prior to the actual arrest of Gonzalez and Longa were based upon a suspicion of criminal activity found within the fourth amendment guidelines and are permissible under Neb. Rev. Stat. § 29-829 (Reissue 1979).

Gonzalez moved to suppress all evidence obtained as a result of his unlawful arrest, all items obtained "as a result of the search of the Thrifty Scott Motel, Room #407," all items obtained "as a result of a search of his 1977 Cadillac," and any items seized or "derived from a search of 3524 Jackson." Again, with respect to Gonzalez' assignments (1) and (2), we reiterate the conclusion reached in *State v. Longa, supra,* that the evidence seized from the Cadillac, the Jackson Street residence, and the Thrifty Scot Motel room was not discovered as the result of an "exploitation" of the arrest claimed to have been illegal, but resulted instead from independent sources. The evidence reveals that the officers were informed by the defendant that he had more than

$1,000 in cash in the automobile prior to his arrest. Defendant's second assignment of error is without merit.

Turning to defendant's first and third assignments of error challenging the search of the Cadillac, the Jackson Street duplex, and the Thrifty Scot Motel room, we conclude that Gonzalez did not have standing to attack the search of the Jackson Street duplex. See, *State v. Vicars,* 207 Neb. 325, 299 N.W.2d 421 (1980); *State v. Ohler,* 208 Neb. 742, 305 N.W.2d 637 (1981); *State v. Kemper,* 209 Neb. 376, 307 N.W.2d 820 (1981); *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Rakas v. Illinois,* 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); *Rawlings v. Kentucky,* 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980). Those cases reflect the holdings of this court and the U.S. Supreme Court that the capacity to claim protection of the fourth amendment as to unreasonable searches and seizures depends not upon the property right in the invaded place but upon whether the person who claims the protection of the fourth amendment has a legitimate expectation of privacy in the invaded place.

There was no showing whether the defendant was, in fact, ever residing at the Jackson Street address, had a key for entry to that address, rented or owned the property, exercised any type of control over the property, or kept any clothing or personal belongings at the property. On this basis we conclude that Gonzalez did not have a legitimate expectation of privacy in the Jackson Street residence.

The discussion of probable cause for the issuance of the search warrants for the Cadillac, the Jackson Street duplex, and the Thrifty Scot Motel were fully discussed in *State v. Longa, supra.* On the basis of the conclusions reached therein, defendant's first and third assignments of error are without merit.

In his last assignment of error, defendant contends that the District Court erred in commenting on the

evidence incorrectly during final argument in a way which was prejudicial to the defendant. The court stated: "While you are on that subject and while you are stopped here in your argument, I will tell you, Mr. Riley, that Officer O'Donnell did testify that he searched 3524 Jackson Street and they recovered cocaine, so it is in evidence." Defendant contends that this statement was not a correct statement of the evidence because Officer O'Donnell had testified: "Q. Were controlled substances or suspected controlled substances recovered at that location? A. Yes. Q. And the nature of which was? A. Cocaine." Defendant's contention that the court's statement and Officer O'Donnell's actual testimony were factually incorrect is without merit. There is no prejudice to the defendant by these statements.

The judgment of the District Court is hereby affirmed.

AFFIRMED.

JAY K. THOMAS, APPELLANT, V. KAYSER-ROTH CORPORATION, APPELLEE.

320 N.W.2d 111

Filed May 28, 1982. No. 44478.

1. **Workmen's Compensation: Limitations of Actions.** If an employee suffers an injury which appears to be slight but which is progressive in its course, and which several physicians are unable to correctly diagnose, the worker's failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident.
2. _____: _____. The burden of proving that an injury is latent and progressive so as to toll the statute of limitations is upon the plaintiff.
3. _____: _____. The mere fact that the plaintiff did not know the full extent of his injury from a medical standpoint does not make it

latent, particularly where the medical facts were reasonably discoverable.

4. **Workmen's Compensation: Appeal and Error.** In reviewing a decision of the Workmen's Compensation Court, its determination is entitled to the same force and effect as a verdict of a jury in a civil case and will not be upset where there is evidence in the record to sustain its findings.

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

E. Terry Sibbernsen of Welsh, Sibbernsen & Bowen, for appellant.

Richard R. Endacott of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

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

KRIVOSHA, C.J.

The instant appeal addresses the question as to whether a workmen's compensation claim made by the appellant, Jay K. Thomas, on December 7, 1979, is barred by the statute of limitations. A single judge of the Nebraska Workmen's Compensation Court found that the claim was barred by the statute of limitations. This finding was affirmed on rehearing by a three-judge Workmen's Compensation Court, and Thomas has perfected his appeal to this court. We agree with the conclusion reached by both the single-judge Workmen's Compensation Court and the three-judge panel hearing the case on rehearing, and, accordingly, affirm the judgment.

Thomas began working with the appellee, Kayser-Roth Corporation, in 1958. Kayser-Roth manufactures women's apparel and Thomas was hired to sell the apparel to department stores and specialty shops in a designated territory. Sample garments were carried in garment bags which, when fully loaded, weighed from 40 to 60 pounds each. The bags were carried in the trunk of Thomas' car, and at each stop he was required to lift the bags up out of the trunk

and place them on racks in the department store.

In 1961 Thomas began to experience pain in his back, and after consulting with a physician it was discovered that he had sustained a herniated disc. In October of 1962 a laminectomy was performed on Thomas, and following a period of recovery he returned to work as a traveling salesman for Kayser-Roth.

In 1973, while calling on customers for Kayser-Roth in the Kearney, Nebraska, area, Thomas experienced a sharp pain in his back. The pain became so severe that, in his own words, "It doubled me over." On that day Thomas checked himself into a motel room in Kearney, Nebraska, and took a hot bath and attempted to apply as much heat as he could to the back to eliminate the pain. At various times during the hearings and in his deposition Thomas has described the pain as "severe," "acute," "a disaster," "agonizing," and "devastating."

The following day he was examined by a chiropractor in Kearney, Nebraska, and the chiropractor was able to relieve the muscle spasm he was experiencing in his back to the extent that he was able to drive from Kearney, Nebraska, to his home in Omaha, Nebraska. He did not work for the next 3 workdays and did not seek any other medical treatment except that which he had received from the chiropractor in Kearney.

Thomas continued to experience pain in his back in various degrees throughout the balance of his employment with Kayser-Roth, and, in fact, in December of 1975 Thomas bought a motor home which he converted into a showroom. This was done, he said, to eliminate the need to lift the garment bags out of the trunk. He described his ability to do his work after the 1973 accident as "not being as free and easy." He was also unable to bend and had to kneel. These problems, in varying degrees of severity, per-

sisted from 1973 to 1979 when Thomas' employment was terminated. Thomas makes some claim that the termination was in some manner related to his back problem and, in particular, to a specific experience in February of 1979 while showing wearing apparel to customers in Des Moines, Iowa. The record does not, however, support that claim. He sought no medical treatment for the alleged problem in February of 1979 and, in fact, did not testify concerning the alleged February 1979 difficulty until the rehearing. In his petition before the Nebraska Workmen's Compensation Court, he indicated that his injury was "mental depression and back pain," and that the accident and injury occurred in the following manner: "Depression after false reason for termination." What is clear from the record is that there is no evidence that between 1973, when the accident occurred, and 1979, when his employment was terminated, Thomas suffered any sudden disability which affected his ability to work or required any greater medical attention than what was required at any time after the accident in 1973. It was not until March 23, 1981, 2 years after his employment terminated, that Thomas was examined by Dr. Gerald Paul, an orthopedic surgeon practicing in Omaha, Nebraska. Dr. Paul diagnosed Mr. Thomas' condition as a herniated disc at L5-S1, occasioned by the lifting episode in 1973. When specifically asked whether he thought the injury which occurred in 1973 would be considered latent and progressive, Dr. Paul said he did not think so.

Thomas concedes that, under the provisions of Neb. Rev. Stat. § 48-137 (Reissue 1978), his action, on its face, is barred by the statute of limitations. He maintains, however, that his failure to file a claim within the statutory period is excused by what we have described as the "latent exception," which provides that if an employee suffers an injury which appears to be slight but which is progressive in its

course, and which several physicians are unable to correctly diagnose, the worker's failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident. See, *O'Connor v. Anderson Bros. Plumbing & Heating,* 207 Neb. 641, 300 N.W.2d 188 (1981); *Borowski v. Armco Steel Corp.,* 188 Neb. 654, 198 N.W.2d 460 (1972). While Thomas is correct about the law, he is in error with regard to his interpretation of the law as it applies to this case. In both the *O'Connor* case and the *Borowski* case, and cases of similar import where we have applied the latent exception, the evidence disclosed that indeed the initial accident was either trifling in nature or appeared to be healed and subsequently the injury began to get progressively worse. Specifically, in *Borowski* the employee was advised by the treating physician that while he suffered damages to the muscles of his upper leg and that it would be a slow healing process, he should not be alarmed and would fully recover. After a period of months the pain subsided. Thereafter, when the pain reoccurred, he consulted a physician on seven occasions and was assured that his condition was normal. It was not until sometime later that he was referred to an orthopedic surgeon who performed a myelogram and discovered the herniated disc caused by the initial injury.

Likewise, in *O'Connor* the employee was initially injured in September of 1965 while laying a sewer line in a ditch. He received compensation for this injury and continued thereafter working. It was not until October of 1977, when operating a cigarette machine, that the employee's left arm went completely dead. From the time of the accident until the original award, plaintiff was examined or treated by five different doctors—a general practitioner, three or-

thopedic surgeons, and a neurologist—none of whom diagnosed his subsequent condition. He repeatedly consulted his personal physician and periodically received ultrasonic treatments and physiotherapy. He was advised by a treating physician: "It's all in your head. Go see a psychiatrist." It was not until the incident resulting in the complete disability of his left arm that the worker's condition was fully diagnosed following the administration of a myelogram.

No such facts may be found in the present case. In fact, the present case is more like the case of *Ohnmacht v. Peter Kiewit Sons Co.,* 178 Neb. 741, 135 N.W.2d 237 (1965), than *O'Connor* or *Borowski.*

In *Ohnmacht,* the employee, a carpenter, tripped and sprained his ankle on July 15, 1960. He continued to work the rest of the day. He was seen by a physician and received some medication for the pain. At no time did he lose any compensable work time because of his injury. Later in 1960 the pain got worse when he worked on uneven surfaces or plowed ground. There were two occasions between July and December 1961 when the plaintiff left work early because of pain. Since the accident, he limped when working. The plaintiff always attributed his pain and difficulty with his ankle to the accident of July 1960. In holding that the injury was not latent and progressive and that, therefore, the statute of limitations did apply, we noted that there was no medical testimony as to the progressiveness, if any, of the injury following the accident. In applying the statute of limitations and dismissing the petition, we said in *Ohnmacht, supra* at 744-45, 135 N.W.2d at 239: "While it may not have been specifically so held, our cases are clear that the burden of proving that an injury is latent and progressive so as to toll the statute of limitations is upon the plaintiff. See, Bame v. Lipsett, Inc., 172 Neb. 623, 111 N.W.2d 380; Rahfeldt v. Swanson, 155 Neb. 482, 52 N.W.2d 261." We fur-

ther said in *Ohnmacht* at 746, 135 N.W.2d at 240: "It might be said that the mere fact that the plaintiff did not know the full extent of his injury from a medical standpoint does not make it latent, particularly where the medical facts were reasonably discoverable."

In the instant case, the evidence clearly establishes that the cause of Thomas' present condition was caused by the injury in 1973, and while, according to Dr. Paul, the injury "probably [has] gotten a little bit worse as the years have gone on as anything left untreated will," the evidence did not establish that it had gotten progressively worse. Nor does the evidence establish that the injury could not have been diagnosed if he had sought treatment in 1973. The injury in 1973 was not slight or trifling and Thomas was never advised by anyone that he was no longer injured. He suffered immobility and loss of work as a result of the 1973 accident. He continued to have difficulty with his back, so much so that in 1975 he was required to change the manner in which he conducted his business. He purchased a motor home which he converted into a showroom to avoid having to lift the garment bags. He did this, by his own admission, because of the difficulty he had in attempting to lift the garment bags out of the trunk. These problems, in varying degrees of severity, persisted from 1973 to 1979 and beyond. Both the one-judge court and, again, the three-judge court found that the injury was not latent or progressive and therefore not within the "latent exception" to the statute of limitations. We are unable to say that the evidence does not amply support that conclusion. In reviewing a similar situation, we said in *McGahan v. St. Francis Hospital,* 200 Neb. 406, 409, 263 N.W.2d 845, 846 (1978): "We are conscious that in reviewing a decision of the Workmen's Compensation Court, its determination is entitled to the same force and effect as a verdict of a jury in a civil case and will not

be upset where there is evidence in the record to sustain its findings. See Fite v. Ammco Tools, Inc., 199 Neb. 353, 258 N.W.2d 922." The evidence in this case supports the compensation court's conclusion that Thomas' attempt to come within the latent and progressive exception fails. Were we to hold otherwise, we would effectively repeal the provisions of § 48-137. We are not free to do so.

The compensation court's determination that there was insufficient credible evidence to establish proof of any accident in 1979 must likewise be affirmed. Thomas made no mention of the alleged 1979 incident at the first hearing or during the taking of his deposition. He likewise made no mention of it to either Dr. Paul or to Dr. Joseph Gross, who examined him on April 22, 1981. The compensation court was correct in concluding that the evidence regarding an alleged 1979 accident was insufficient. We are not at liberty to substitute our views for those of the Workmen's Compensation Court regarding questions of fact if there is evidence in the record to substantiate its conclusions. *Meyer v. First United Methodist Church,* 206 Neb. 607, 294 N.W.2d 611 (1980); *Riha v. St. Mary's Church & School, Inc.,* 209 Neb. 539, 308 N.W.2d 734 (1981).

For these reasons the decision of the three-judge compensation court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS J. PAULSON, APPELLANT.

320 N.W.2d 115

Filed May 28, 1982. No. 81-730.

1. **Post Conviction: Appeal and Error.** One seeking post conviction relief has the burden of establishing the basis for such relief; the findings of the District Court in denying relief will not be disturbed

on appeal unless they are clearly erroneous.

2. _____: _____. A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal and which do not involve questions making the judgment of conviction void or voidable under the state or federal Constitutions.
3. **Pleas.** A voluntary guilty plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional.
4. **Post Conviction.** An evidentiary hearing must be granted on a petition for post conviction relief when the facts alleged would justify relief, if true, or when a factual dispute arises as to whether a constitutional right is being denied.
5. **Effectiveness of Counsel.** The determination of sufficiency of counsel must be made within the context of the facts of a particular case, and we will not require defense counsel to develop ridiculous trial tactics because they are suggested by defendant.
6. **Post Conviction: Appeal and Error.** Under the Post Conviction Act it is within the discretion of the District Court to determine whether legal counsel shall be appointed to represent a defendant on appeal to this court, and in the absence of a showing of an abuse of discretion, the failure to appoint counsel is not error.

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

Dennis J. Paulson, pro se.

Paul L. Douglas, Attorney General, and Dale A. Comer, for appellee.

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

CAPORALE, J.

Dennis J. Paulson, defendant-appellant herein, appeals from an order entered by the District Court of Nebraska, Second Judicial District, in and for Sarpy County, Nebraska, without an evidentiary hearing, denying his request for post conviction relief as the result of his conviction for second degree murder.

The defendant has made various allegations of error in his pro se brief on appeal. Those which he has discussed with any coherence may be summarized as follows: (1) Whether defendant's guilty plea was made intelligently and voluntarily; (2) Whether defendant was denied effective assistance

of counsel; (3) Whether defendant was prejudiced by not being appointed counsel at this post conviction hearing; and (4) Whether defendant has sustained his burden of establishing a basis for post conviction relief. We find no error and affirm the District Court.

Paulson was originally charged in an information with first degree murder in connection with the June 5, 1979, shooting death of James Goslee. The factual background leading to the Goslee slaying and attempted coverup appears in *State v. Stranghoener,* 208 Neb. 598, 304 N.W.2d 679 (1981), which involves another participant in the killing. The record on appeal reflects that on January 21, 1980, Paulson appeared before the trial court with his attorney and, pursuant to a plea bargain, pled guilty to an amended information charging him with second degree murder. Before accepting the defendant's plea, the court reviewed Paulson's constitutional rights and informed him of the consequences of his guilty plea; and upon being advised that the plea was being made freely and voluntarily, the plea was accepted. A presentence investigation was conducted and, on June 3, 1980, the defendant was sentenced to a term of 15 years in the Nebraska Penal and Correctional Complex, with 345 days' credit allotted for jail time served.

It is well established that one seeking post conviction relief has the burden of establishing the basis for such relief and that the findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous. *Marteney v. State,* 210 Neb. 172, 313 N.W.2d 449 (1981); *State v. Rust,* 208 Neb. 320, 303 N.W.2d 490 (1981).

Furthermore, a defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal and which do not involve questions making the judgment of conviction void or voidable under the state or federal Constitu-

tions. *State v. Shepard,* 208 Neb. 188, 302 N.W.2d 703 (1981); *State v. Cole,* 207 Neb. 318, 298 N.W.2d 776 (1980); Neb. Rev. Stat. § 29-3001 (Reissue 1979). A voluntary guilty plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional. *State v. Coleman,* 209 Neb. 823, 311 N.W.2d 911 (1981); *State v. Country,* 202 Neb. 509, 276 N.W.2d 110 (1979).

An examination of the record convinces us that the grounds urged by defendant for post conviction relief are wholly frivolous. The original information filed in this case clearly sets forth the necessary elements of the crime of second degree murder. Following the entry of his guilty plea, the defendant was advised of the essential elements of the crime and was fully advised of his constitutional rights, which he voluntarily waived. The record from the trial court clearly establishes the facts necessary to sustain the conviction resulting from Paulson's plea. The record does not support his contention that he was in any manner ill advised as to the nature of the charge against him.

We next review defendant's claim that he was inadequately represented by his trial counsel. Defendant's assertions in this regard, which may generously be characterized as factual, are that counsel (1) did not inform defendant that intent was an element of the crime; (2) did not cross-examine witnesses; (3) did not object to evidence; (4) participated in arranging for fabricated and perjured testimony; and (5) collaborated with the prosecutor to obtain defendant's conviction.

An evidentiary hearing must be granted on a petition for post conviction relief when the facts alleged would justify relief, if true, or when a factual dispute arises as to whether a constitutional right is being denied. *Smith v. United States,* 635 F.2d 693 (8th Cir. 1980), *cert. denied* 450 U.S. 934, 101 S. Ct. 1397, 67 L. Ed. 2d 368 (1981).

Whether counsel informed defendant that intent was an element of the crime or not, the record makes clear that at the defendant's arraignment on the second degree murder charge the information was read to him. The information charged that defendant did "intentionally" kill James Goslee. The remaining complaints against counsel cannot apply as there was no trial. Counsel could neither have cross-examined witnesses nor objected to the receipt of evidence. Defendant's guilt was determined by his own voluntary and knowing plea and could not have resulted from any fabricated or perjured testimony resulting from counsel's collaboration with anyone.

It is settled that the determination of sufficiency of counsel must be made within the context of the facts of a particular case. *State v. Rust, supra.* Defendant's claim that he was denied effective assistance of counsel is likewise without merit.

The record reveals that on June 20, 1980, Paulson filed an appeal in this court from his conviction and sentence in the District Court and that he was represented by counsel. However, defendant subsequently dismissed his direct appeal upon his own motion. The defendant has proceeded pro se in this post conviction action and now assigns as error the failure of the trial court to assign counsel for appeal. This contention is likewise without merit, for under the Post Conviction Act it is within the discretion of the District Court to determine whether legal counsel shall be appointed to represent a defendant on appeal to this court, and in the absence of a showing of an abuse of discretion, the failure to appoint counsel is not error. *State v. Williams,* 182 Neb. 444, 155 N.W.2d 377 (1967); Neb. Rev. Stat. § 29-3004 (Reissue 1979). In the present case the defendant has made no showing that there was an abuse of discretion by the trial court and there has been no error in this regard.

We determine that the defendant has not established any legitimate basis upon which his action for post conviction relief may lie. An examination of the record reveals no fatal defect of the type that could not be waived by entering a guilty plea. Upon entering his plea, Paulson waived any such defect, if any, which may have existed. The conviction and sentence of the trial court are affirmed.

AFFIRMED.

DOUGLAS J. DWORAK, APPELLANT, V. F. R. MICHALS, SR., AND NEBRASKA REAL ESTATE CORPORATION, A NEBRASKA CORPORATION, APPELLEES.

320 N.W.2d 485

Filed June 4, 1982. No. 43880.

1. **Brokers.** When a broker is engaged by an owner of property to find a purchaser for it, the broker earns his commission when (1) he produces a purchaser ready, willing, and able to buy on the terms fixed by the owner, (2) the purchaser enters into a binding contract with the owner to do so, and (3) the purchaser completes the transaction by closing the title in accordance with the provisions of the contract.
2. _____. In the absence of default, refusal, or interference of the seller, the broker's right to commission against the seller comes into existence only when his buyer performs in accordance with the contract of sale.
3. **Fraud.** In an action at law, the essential elements of false representation are the making of a false representation, knowing it was false, or making it recklessly without any knowledge of its truth and as a positive assertion, with the intention that it be acted on, that it was acted on, and that the injury resulted.
4. **Judgments: Appeal and Error.** The judgment of a trial court in an action at law where the jury has been waived has the effect of a verdict of a jury and should not be set aside unless clearly wrong.
5. **Contracts.** The beneficiaries of a contract may recover thereon, though not named as parties, when it appears by express stipulation, or by reasonable intendment, that the rights and interests of such beneficiaries were contemplated and being provided for therein.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Reversed and remanded with directions.

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

Bren L. Buckley of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

Heard before BOSLAUGH, CLINTON, and WHITE, JJ., and BUCKLEY and CANIGLIA, D. JJ.

BUCKLEY, D.J.

This is an action brought by plaintiff, Douglas J. Dworak, a licensed real estate broker, against defendants, F. R. Michals, Sr., and Nebraska Real Estate Corporation, for the sum of $5,376, the same representing the amount of commission plaintiff claimed he was entitled to for having produced ready, willing, and able buyers to purchase an apartment complex owned by Michals and listed for sale with defendant Nebraska Real Estate Corporation, of which he was president.

The action was tried to the court, which determined that plaintiff was not entitled to a commission but was entitled to $250, which was one-half of the earnest money deposit, and entered judgment for that amount against both defendants. From this judgment plaintiff appeals.

The material facts are not disputed. The listing contract between Michals and Nebraska Real Estate Corporation was executed on April 6, 1977. It provided for a 6 percent commission in the event a purchaser was found "who is ready, willing and able to purchase the property before the expiration of this listing." It was a Multiple Listing Service contract, which meant that the listing was promulgated to all member realtors of the Multiple Listing Service in the Lincoln, Nebraska, area. This was accomplished by distribution of a Multiple Listing "sheet"

or "ticket" which contained a photograph of the building and information concerning the property, which included an "income estimate" and "expense estimate." The income estimate specified 12 five-room apartments at $215 per month rent and 10 garages renting for $15 monthly.

Plaintiff, at that time a self-employed realtor and a member of the Lincoln Multiple Listing Service, received the listing on April 12, 1977. He contacted Michael Johanns and A. J. Swanson, whom he knew were interested in buying an apartment building for investment purposes. He gave them a copy of the listing sheet and took them through the property. Johanns and Swanson used the income and expense information on the listing sheet to calculate the cash flow, i.e., whether or not the rental income would be sufficient to cover all expenses, including the projected mortgage payment. They relied on the information on the listing sheet in making their cash flow calculations, which they determined would meet their requirements.

They then submitted an offer to purchase the property for $256,000 on April 14, 1977, which offer was accepted by Michals on the same day. The offer was accompanied by a $500 deposit, which was held by defendant Nebraska Real Estate Corporation.

While the buyers were in the process of securing a mortgage loan, the appraiser for the mortgage lender called Johanns on May 3 and told him that while he was at the property many tenants expressed extreme concern over the increase in rents planned for June 1, and that many of them threatened to move. Johanns relayed this to Swanson. Since both buyers were totally unaware of any planned increase in rents, Swanson immediately called Michals, who admitted that at about the same time the property was listed for sale the tenants were sent notices of an increase in rent, averaging about $15 per unit, effective June 1. He also admit-

ted that the rents as shown on the listing sheet were not the rents currently in effect but in fact were the rents to be charged on June 1. When Swanson demanded that some form of action be taken over the situation, Michals immediately agreed to release the buyers from the purchase contract, which they elected to do, and the release was executed on the following day, with the $500 deposit returned to the buyers. The plaintiff Dworak first learned of the release later and, after his demand for a commission was refused, brought this suit.

The parties agree that if plaintiff is entitled to a commission it would be in the sum of $5,376, which is 2.1 percent of the sales price and his share as a nonlisting broker of the total commission due. Plaintiff contends he is entitled to the commission because he produced buyers who were ready, willing, and able to purchase the property when the contract to purchase was signed, notwithstanding that the sale was never closed. Defendants contend that plaintiff's commission would not be earned until the sale is consummated, unless the failure to consummate is the fault of the seller. They then contend that in fact the sale did not close because the buyers became unwilling and backed out of the agreement.

As to the applicable law, the defendants are correct. In the case of *Cornett v. Nathan,* 196 Neb. 277, 242 N.W.2d 855 (1976), we analyzed the law in this area. First, we noted that "[t]his court has consistently held that a broker has not earned his commission unless he produces a buyer who is ready, able, and willing to buy on terms satisfactory to the seller." *Id.* at 279, 242 N.W.2d at 857. In *Wisnieski v. Coufal,* 188 Neb. 200, 204, 195 N.W.2d 750, 753 (1972), we said: "A broker earns his commission and becomes entitled thereto when he produces a purchaser who is ready, able, and willing to purchase at a price and upon terms specified by the principal or satisfactory to him." In *Huston Co. v.*

Mooney, 190 Neb. 242, 245, 207 N.W.2d 525, 527 (1973), this court said: "Ordinarily a real estate broker, who for a commission undertakes to sell land on certain terms and within a specified period, is not entitled to compensation for his services unless he produces a purchaser within the time limited who is ready, able, and willing to buy upon the terms prescribed."

In *Cornett,* however, the buyer was financially unable to consummate the sale. It is not clear whether this condition existed when he signed the agreement to purchase. We recognized that the intent of the parties in the usual listing agreement is that the seller expects to pay a commission only if the sale is completed, because, in most cases, the only source capable of paying the commission is the proceeds from the sale of the property. We further recognized that the reason for the payment of substantial commission fees is the requirement placed upon the real estate broker that he produce not just a person who will sign an agreement to purchase on hopes and expectation, but one who is ready, willing, and able to pay.

We then went on in *Cornett* to disapprove any notion that the commission is earned as soon as the seller accepts an offer to purchase, noting that to do this would place an unreasonable and unrealistic burden on the seller to determine the buyer's readiness, willingness, and ability to complete the purchase at the time the offer to purchase is made. Rather, we placed this burden and the risk involved on the broker, since this would be his most important function in earning his commission.

We then concluded in *Cornett* that where the buyer is financially unable to close the sale, the broker has not earned his commission. In support of this conclusion, we cited the following language from *Ellsworth Dobbs, Inc. v. Johnson,* 50 N.J. 528, 551, 236 A.2d 843, 855 (1967): "When a broker is engaged

by an owner of property to find a purchaser for it, the broker earns his commission when (a) he produces a purchaser ready, willing and able to buy on the terms fixed by the owner, (b) the purchaser enters into a binding contract with the owner to do so, and (c) the purchaser completes the transaction by closing the title in accordance with the provisions of the contract." This three-part test, as generally stated, would apply to the unwilling as well as the financially unable buyer. Since the rationale previously stated for requiring consummation of the sale for the broker to earn the commission would be just as applicable to the buyer who becomes unwilling as it would to the buyer who becomes unable, we adopt the three-part test set out in *Ellsworth Dobbs* as the general rule to determine when a real estate broker earns his commission.

The adoption of this rule, however, does not alter the obligation of the seller to pay a commission if the sale is not completed due to the fault or refusal of the seller. We have always held that, in such event, the broker has a right to the commission called for. See, *Jones v. Stevens,* 36 Neb. 849, 55 N.W. 251 (1893); *Howell v. North,* 93 Neb. 505, 140 N.W. 779 (1913); *Lincoln Realty Co. v. Garden City Land & Immigration Co.,* 94 Neb. 346, 143 N.W. 230 (1913); *Wisnieski v. Coufal, supra.* This is also recognized in *Ellsworth Dobbs, Inc. v. Johnson, supra,* where the court, after setting out the three-part test, went on to say: "If the contract is not consummated because of lack of financial ability of the buyer to perform or because of any other default of his . . . there is no right to commission against the seller. On the other hand, if the failure of completion of the contract results from a wrongful act or interference of the seller, the broker's claim is valid and must be paid. In short, *in the absence of default by the seller,* the broker's right to commission against the seller comes into existence only when his

buyer performs in accordance with the contract of sale." (Emphasis supplied.) *Id.* at 551, 236 A.2d at 855.

This case, then, turns on the question of whether the buyers Johanns and Swanson had a legal right to refuse to go further with the sale. If not, they become unwilling buyers and plaintiff is not entitled to a commission. If they did, the failure to close the sale is attributable to Michals and plaintiff has earned his commission.

The trial court found that the buyers backed out of a valid purchase contract. We feel the evidence is insufficient to support that finding. The decision of Johanns and Swanson not to complete the sale was based on the representation of the rents on the listing sheet and their discovery that those rents were not the current rents but new rent increases effective almost immediately after they would become the new landlord. They faced the risk of tenants leaving, with resultant vacant units and an insufficient cash flow, the very thing they relied on in their purchase offer. It would also lock them in from June 1 as to future rent adjustments. And, as Johanns put it, "there was a general pervasive fear of whether I could trust this seller."

The buyers could have defended an action by Michals for specific performance on the ground of misrepresentation. The facts support the essential elements, namely, a representation as a statement of fact, untrue when made, known to be untrue by the maker, with the intention that it be acted upon, and acted upon with resulting detriment. *Moser v. Jeffrey,* 194 Neb. 132, 231 N.W.2d 106 (1975); *Buhrman v. International Harvester Co.,* 181 Neb. 633, 150 N.W.2d 220 (1967).

Defendants argue that the buyers were not entitled to rely on the rents shown on the listing sheet because the listing contract states: "MULTI-DWELLING LISTING. This information, although

believed to be accurate, is not guaranteed." This statement does not appear on the listing sheet given to the buyers and containing the information the buyers relied on. There is no evidence that "this information" includes the statements on the listing sheet, but even if it did, neither plaintiff nor the buyers ever saw the listing contract between the defendants or otherwise were aware of it.

Defendants produced a Lincoln real estate broker who gave an expert opinion that it would be proper to list rents on the listing ticket in April that would not be effective until June, even though no notation such as "effective June 1" was made on the ticket. The expert further testified that the information is not adequate to form the basis of a purchase. But even if the listing sheet was acceptable by real estate standards, or more information is needed by the buyer, this does not alter the fact that the representations as to rents currently in effect were made and, considering the obvious purpose of the information on the sheet is to give a prospective buyer more knowledge about the property, including its investment potential, that the seller knows and intends that this information is likely to be disseminated to the prospective buyer.

It is, of course, the rule that the finding of the trial court in a jury-waived law action will not be disturbed on appeal unless clearly wrong. *Henkle & Joyce Hardware Co. v. Maco, Inc.,* 195 Neb. 565, 239 N.W.2d 772 (1976). Here, there is no evidence in conflict which is relevant to the determination of the right of the buyers to refuse to consummate the sale. It becomes a matter of law and we find that the buyers did have a lawful right to decide not to complete the purchase and that, therefore, the failure to complete the contract to sell is attributable to the conduct of Michals, which therefore entitles the plaintiff to his commission.

Plaintiff's entitlement to the commission is from

the seller Michals, but not from defendant Nebraska Real Estate Corporation. The Multiple Listing Service contract obligates the parties to pay 2.1 percent of the sales price, or 35 percent of the 6 percent total commission, to a member broker, such as plaintiff, who procures the buyer. The plaintiff, then, is a third-party beneficiary of the listing contract. The beneficiaries of a contract may recover thereon, though not named as parties, when it appears by express stipulation, or by reasonable intendment, that the rights and interests of such beneficiaries were contemplated and being provided for therein. *Fowler v. Doran,* 123 Neb. 37, 241 N.W. 759 (1932). Since defendant Nebraska Real Estate Corporation did not receive the commission, the plaintiff's right to recover the commission due him is against defendant Michals.

The judgment of the District Court is reversed and the cause remanded with directions to enter judgment for the plaintiff against defendant Michals in the sum of $5,376 plus interest from May 15, 1977, that being the date of the scheduled closing of the sale, and to dismiss the action as to defendant Nebraska Real Estate Corporation.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., participating on briefs.

DANNY L. JONES, APPELLANT, V. JOHNSON MACHINE AND PRESS COMPANY OF ELKHART, INDIANA, A FOREIGN CORPORATION, ET AL., APPELLEES.

320 N.W.2d 481

Filed June 4, 1982. No. 44085.

Products Liability: Corporations. A corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation except (1) when the purchasing corporation expressly or impliedly agreed to assume the selling corpora-

tion's liability, (2) when the transaction amounts to a consolidation or merger of the purchaser and seller corporations, (3) when the purchaser corporation is merely a continuation of the seller corporation, or (4) when the transaction is entered into fraudulently to escape liability for such obligations.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

R. Steven Geshell and Robak and Geshell, for appellant.

Thomas M. Maul and Albert, Leininger & Grant, for appellees.

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

MCCOWN, J.

The plaintiff filed this products liability case in 1979 seeking recovery for injuries allegedly arising out of his operation of a punch press manufactured by one of the defendants in 1955. Default judgment was entered against the corporate defendant which manufactured the press. The remaining defendants other than the plaintiff's employer are corporations which succeeded the manufacturing corporation in the subsequent manufacture, distribution, and sale of the press. A special appearance was sustained as to one defendant and summary judgment in favor of the remaining defendants was entered. The plaintiff has appealed.

Plaintiff's amended petition alleges that on July 8, 1977, while working at the plant of Dale Electronics, Inc., in Columbus, Nebraska, his hand was caught in a punch press and he lost several fingers. The petition alleges that the punch press was manufactured and assembled in a defectively and unreasonably dangerous condition without warning signs or shields to prevent such an accident. It also alleged breach of implied warranty and negligent design, manufacture, assembly, sale, distribution, and installation of the punch press.

The punch press was manufactured by Johnson Machine and Press Company of Elkhart, Indiana, in 1955. In August 1956 Bontrager Corporation acquired the assets and liabilities of the Johnson company in exchange for Bontrager common stock. Johnson retained its corporate shell as a Bontrager wholly owned subsidiary but transacted no business, owned no assets but trade names, and engaged in no corporate activities. From September 1, 1956, until August 31, 1962, Bontrager manufactured presses sold under the Johnson name. The one share of Johnson stock which remained in the shell corporation was issued to Bontrager on August 20, 1962, and was by then the only share of capital stock outstanding.

On August 29, 1962, Amsted Industries Incorporated purchased all of Bontrager's assets for cash. Amsted expressly assumed certain specified liabilities of Bontrager, which did not include any liabilities for defective products. The purchase contract provided that Amsted did not assume and would not be liable for any obligations other than those expressly assumed. In addition, the contract provided that all machines sold prior to the closing date of the contract were products of Bontrager for which Bontrager alone was responsible. Bontrager and its shareholders agreed not to compete with Amsted for a period of 5 years.

On August 31, 1962, the sole share of Johnson stock outstanding in the Johnson shell corporation was transferred on the Johnson stock records from Bontrager to Amsted and a new certificate issued in Amsted's name. On the same date Amsted assigned all its rights and obligations under the purchase contract with Bontrager to South Bend Lathe, Inc., a wholly owned subsidiary of Amsted. South Bend Lathe, Inc., took possession of Bontrager's assets on September 1, 1962, and continued to manufacture presses utilizing substantially the same facility and

equipment as both Bontrager and Johnson had. The presses were sold under the Johnson trade name and Johnson continued to be merely a corporate shell.

No officer or director of Amsted was ever an officer, director, stockholder, or employee of Bontrager or Johnson, and no officer or director of Johnson or Bontrager was ever an officer or director of Amsted, prior to the 1962 sale. No officer or director of Bontrager ever became an officer or director of Amsted, although one officer of Bontrager was employed as a plant manager for approximately 4 years after the sale. Bontrager was dissolved on July 29, 1964, and its assets were distributed to its stockholders. Johnson was dissolved by Amsted on August 2, 1965, and its assets, consisting solely of trade names, were distributed to Amsted, the sole stockholder.

On September 29, 1965, South Bend Lathe, Inc., was dissolved by Amsted and its assets and liabilities transferred to Amsted, its sole shareholder. The former subsidiary was then operated as an unincorporated division of Amsted under the name of South Bend Lathe, which continued to manufacture presses sold under the Johnson trade name. In 1966 the manufacturing operations were moved from Elkhart, Indiana, to South Bend, Indiana.

In July 1975 Amsted sold the South Bend Lathe division to LWE Inc., which then changed its corporate name to South Bend Lathe, Inc., which is completely independent from Amsted. South Bend Lathe, Inc., has continued to manufacture presses in South Bend, Indiana, under the Johnson name.

On December 31, 1980, the District Court entered its order sustaining the special appearance of Bontrager Corporation. The court also found that there was no genuine issue as to any material fact, and that the motions for summary judgment of Amsted Industries Incorporated and South Bend Lathe, Inc., should be sustained, and that they were enti-

tled to judgment as a matter of law. The plaintiff has appealed from that order.

The plaintiff contends that in a products liability case where a corporation acquires all, or substantially all, of the assets of its predecessor corporation for cash and continues essentially the same manufacturing operation as the predecessor corporation, the successor corporation remains liable for the products liability claims of its predecessor.

This is a case of first impression in this state. Most courts which have addressed the issue have treated the problem as one of corporate law rather than as a special segment of products liability cases. The long-established general rule is that a corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation. There are four well-recognized exceptions to the general rule under which liability may be imposed on a purchasing corporation: (1) When the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability; (2) When the transaction amounts to a consolidation or merger of the purchaser and seller corporations; (3) When the purchaser corporation is merely a continuation of the seller corporation; or (4) When the transaction is entered into fraudulently to escape liability for such obligations. See, W. Fletcher, Cyclopedia of the Law of Private Corporations §§ 7122 and 7123 (rev. perm. ed. 1973 and Supp. 1981); *Leannais v. Cincinnati, Inc.*, 565 F.2d 437 (7th Cir. 1977); *Hernandez v. Johnson Press Corp.*, 70 Ill. App. 3d 664, 388 N.E.2d 778 (1979).

In the case at bar the corporations in whose favor summary judgment has been entered do not fit any of the exceptions to the general rule. Under traditional rules plaintiff's claim of liability would be denied unless the facts established the existence of one of the four exceptions. See *Johnson v. Marshall & Huschart Machinery*, 66 Ill. App. 3d 766, 384 N.E.2d 141 (1978).

Recently some courts have developed and applied a theory in products liability cases which imposes liability on successor corporations without regard to the "niceties" of corporate transfers where the successor acquires and continues the predecessor's business in an essentially unchanged manner. See *Ramirez v. Amsted Industries, Inc.,* 171 N.J. Super. 261, 408 A.2d 818 (1979). Such cases justify the abandonment of traditional corporate analysis on the basis of the stated social desirability of placing the risk of defective products on the marketing enterprise which manufactured and sold them. Various theories have been adopted to expand the focus of legal liability. Some courts have looked to the nature and consequences of the transaction and found a de facto merger for product liability purposes even though the formal characteristics of a corporate merger were not present. See *Shannon v. Samuel Langston Company,* 379 F. Supp. 797 (W.D. Mich. 1974).

Other courts have relied on a continuity of the enterprise theory. See *Turner v. Bituminous Casualty Co.,* 397 Mich. 406, 244 N.W.2d 873 (1976).

Still other courts have abandoned the traditional approach and have evolved a new exception called the product-line exception. See, *Ray v. Alad Corp.,* 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977); *Dawejko v. Jorgensen Steel Co.,* ____ Pa. Super. ____, 434 A.2d 106 (1981).

Under the facts in the present case we find no basic justification for a departure from the traditional rules. The public policy considerations which motivate imposition of strict liability on those who create risk and obtain profit by placing defective products in the stream of commerce do not necessarily apply equally to successor corporations. To paraphrase the language of several courts, the corporate assets purchaser, as a successor of the manufacturer of a defective product, cannot be said to

have created the risk of a product manufactured by its predecessor, and, except in a very remote way, does not realize the profit for the sale of a predecessor's product. Generally speaking, the successor corporation has neither invited use of its predecessor's product nor represented to the public that that product is safe and suitable for use.

Obviously, a corporation is subject to liability for defective products which it manufactures and sells itself, regardless of whether it is a predecessor or successor corporation. The passage of time involved in the present case, and the multiple corporate successors, accentuates the problems of altering or expanding traditional rules of corporate law in the area of strict liability in tort.

Ordinarily, strict liability for defective products has not been imposed upon a defendant corporation without some responsibility for having created or perpetuated the defect. The question of whether or not strict liability in tort policy should be substantially altered by also changing established principles of corporate succession transactions involves broad public policy issues which are more appropriately left to legislative determination.

In view of our disposition of the major issue involved, it is unnecessary to discuss the remaining assignments of error.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. GARY L. BOUC, INDIVIDUALLY, AND GARY L. BOUC, AS NEXT FRIEND OF HIS MINOR SON, JOHN BOUC, APPELLEE, V. SCHOOL DISTRICT OF THE CITY OF LINCOLN, APPELLANT, BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF LINCOLN ET AL., APPELLEES.

320 N.W.2d 472

Filed June 4, 1982. No. 44149.

1. **Moot Question: Appeal and Error.** Cases which are moot may nevertheless be heard on appeal if the issue involved is one of great public interest.
2. **Mandamus.** Before a writ of mandamus may issue the evidence must show clearly and conclusively that the relator is entitled to the particular relief requested and that there is a legal obligation on the part of the respondent to act.
3. **Schools and School Districts: Constitutional Law.** The effect of the change in language in article VII, § 11, of the Nebraska Constitution from prohibiting appropriations "in aid of" nonpublic schools to a prohibition of appropriations "to" such institutions simply prohibits appropriations made *to* a nonpublic school.
4. **Constitutional Law: Statutes.** The constitutional validity of an act of the Legislature is to be tested and determined not necessarily by what has been done or possibly may be done under it but by what the statute authorizes to be done under and by virtue of its provisions.
5. **Constitutional Law: Ordinances: Statutes.** When an ordinance or statute is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes sure its validity will ordinarily be given.
6. **Constitutional Law: Statutes: Legislature.** Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes.
7. _____: _____: _____. The record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation.
8. **Schools and School Districts.** The transportation benefits extended to nonprofit private school students by Neb. Rev. Stat. § 79-487 (Reissue 1976) are on the same basis as those benefits enjoyed by public school students, and the guidelines, restrictions, and limitations imposed upon public school students by the various local boards of education extend to and are binding upon nonprofit private school students wishing to ride on the public school system's buses.

9. **Constitutional Law: Standing.** One must be a member of a class discriminated against in order to have standing to attack a law as denying the equal protection of the laws.
10. **Constitutional Law: Statutes: Legislature.** Legislative action does not violate the first amendment's establishment clause if the statute has a secular legislative purpose, has a principal or primary effect which neither advances nor inhibits religion, and does not foster an excessive government entanglement with religion.

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

Edwin C. Perry of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellant.

Robert B. Crosby and Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee Bouc.

Kermit A. Brashear II and Marybeth Frankman of Nelson & Harding, for amicus curiae Nebraska District, Lutheran Church—Missouri Synod.

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

HASTINGS, J.

This is an action brought by the relator, Gary L. Bouc, as an individual and as the next friend of his minor son, John Bouc, seeking a writ of mandamus to compel the respondents to honor the Boucs' request for bus transportation for John to St. John the Apostle School, a nonprofit private school under the control of the Lincoln Diocese of the Catholic Church. This request was made in accordance with Neb. Rev. Stat. § 79-487 (Reissue 1976). The School District of the City of Lincoln responded by alleging that this section violated various provisions of the Constitutions of the United States and the State of Nebraska. Upon finding the statute constitutional, the District Court granted the writ of mandamus, ordering the school district to provide the requested bus transportation for John Bouc. The school district has ap-

pealed, assigning as error that § 79-487 violates article VII, § 11, and article III, § 18, of the Nebraska Constitution, and the first and fourteenth amendments to the U. S. Constitution. We affirm.

At the time this action was commenced, relator Gary L. Bouc resided with his wife and family, which included his 6-year-old son John, at 733 Sunny Slope Road in Lincoln, Nebraska. This residence is located within the area designated as the bus transportation boundaries for Meadow Lane public school, although, as noted above, John Bouc attended St. John the Apostle School. The Boucs' residence is located approximately 9 or 10 blocks east of St. John the Apostle School, which school is located "a couple blocks east of the Meadow Lane School."

Immediately prior to hearing this case, we were presented with a motion, filed by the relator-appellee, requesting that the appeal be dismissed because of mootness due to the fact that Gary Bouc and his family had moved from Lincoln to Fremont, Nebraska. The respondent-appellant resisted this motion. The case is obviously moot, and as a general rule would be subject to summary dismissal. However, that rule does not apply to appeals involving matters of public interest. *Meyer v. Colin,* 204 Neb. 96, 281 N.W.2d 737 (1979). We believe that this is such a case, and we agreed to hear arguments on the merits.

This is a mandamus action and, before the writ may issue, the evidence must show clearly and conclusively that the relator is entitled to the particular relief requested and that there is a legal obligation on the part of the respondents to act. *State ex rel. Newbold v. County of Buffalo,* 202 Neb. 813, 277 N.W.2d 246 (1979).

Although St. John's school does provide bus service for its students, the Boucs' residence was not on the route established for the St. John buses. When asked by his counsel to explain why he desired to

have his son John ride on the Lincoln Public Schools bus, Mr. Bouc replied: "Well, it's going to be a lot safer for him and a lot more convenient for us and, you know, it's a transportation service that we're supporting, just as the Lincoln Transportation System or any other public — and we feel we would like to take advantage of it like anyone else."

The statute under which the request was made, § 79-487, provides in part that in the event a public school district provides transportation facilities for schoolchildren to and from school, that district shall provide transportation facilities for children attending approved nonprofit private schools as well. Such facilities shall be provided only to private school children "who reside in a district which provides transportation to public school students, and such transportation shall extend only from some point on the regular public school route nearest or most easily accessible to their homes to and from a point on the regular public school route nearest or most easily accessible to the school or schools attended by such children. . . . Transportation shall be provided for nonprofit private school children only at times when transportation is being provided for public school children."

As alleged by the relator in his petition, the respondent School District of the City of Lincoln is providing transportation for students attending its schools in accordance with a specific policy statement. That policy statement generally provides that elementary students living farther than 1¼ miles from school shall be eligible for transportation on schoolbuses. We believe it is apparent from the record that John Bouc did not live farther than 1¼ miles from school. Therefore, under the guidelines adopted for elementary students, he would not be eligible for transportation and the relief sought in this action would have to be denied. However, it can be gathered by inference from the record that

some of those students living within the Meadow Lane School transportation district, as the Boucs did, also do not live farther than 1¼ miles from school and yet are afforded the use of bus facilities. Because of our determination at a later point in this opinion that students attending nonprofit private schools are entitled to use of the bus facilities under the same guidelines and restrictions as are public school students, we must conclude that John Bouc would be eligible for such services in this instance as well, assuming that the statute is valid.

In addition to elementary students, the guidelines adopted by the school district allowed junior high students living over 2½ miles from school to ride a bus to school. The policy of the school district was not to provide transportation for senior high school students. The parties agreed by stipulation that junior high students are not permitted to ride on those buses designated for elementary students, and elementary students are not allowed to ride the junior high buses. It is the position of the school district that § 79-487, as applied under these various regulations, is violative of various constitutional provisions.

Appellant's first contention is that § 79-487 violates article VII, § 11, of the Nebraska Constitution, which provides: "Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof . . . ."

In light of the fact that this case was submitted on appeal prior to our decision in *Lenstrom v. Thone,* 209 Neb. 783, 311 N.W.2d 884 (1981), appellant goes to great lengths to persuade this court that, in spite of the 1972 amendment of article VII, § 11, the provision still prohibits all direct or indirect aid to nonpublic institutions. Whatever may have been the intent of those electors at the time they voted in favor

of that amendment, we believe that we fully discussed the impact of that change in *Lenstrom* and that little purpose would be served in doing so again at this time. We need only to reiterate our holding in *Lenstrom* which was to the effect that when the language of article VII, § 11, was changed from prohibiting appropriations "in aid of" nonpublic schools to a prohibition of appropriations "to" such institutions, "[t]he effect of the literal language of the amendment is to prohibit appropriations made 'to' a nonpublic school." *Id.* at 788, 311 N.W.2d at 888.

Both parties cite numerous authorities from other jurisdictions in support of their respective positions regarding § 79-487 and article VII, § 11. However, in no instance was a similar busing statute challenged under a constitutional provision that expressly declared that "appropriation of public funds *shall not be made to*" a nonpublic school or institution of learning. Instead, these other jurisdictions ruled on the question in light of constitutional provisions that prohibited appropriations "to or in aid of any religious sect . . ." or "for the support of any sectarian or denominational school," Cal. Const. art. IV, § 30, and art. IX, § 8; *Bowker v. Baker,* 73 Cal. App. 2d 653, 167 P.2d 256 (1946); or that prohibited the appropriation of public money "directly or indirectly, for the use, benefit, or support of any sect, church . . . ," Okla. Const. art. 2, § 5; *Gurney v. Ferguson,* 190 Okla. 254, 122 P.2d 1002 (1942); or, finally, provisions that prohibited the use of public funds "for the direct benefit of any religious or other private educational institution," Alaska Const. art. VII, § 1; *Matthews v. Quinton,* 362 P. 2d 932 (Alaska 1961).

Due to the restrictive interpretation given article VII, § 11, by this court in *Lenstrom,* it is difficult to draw any useful analogies between the present case and those cases which interpret what appear to be much broader constitutional provisions. In *Lenstrom*

we determined that a scholarship program which involved the granting of money directly to students to use for educational expenses at eligible postsecondary institutions (including nonpublic institutions) was not violative of the "literal" language of article VII, § 11, which we determined clearly prohibited only "appropriations made 'to' a nonpublic school." *Id.* at 788, 311 N.W.2d at 888. This holding was in spite of any indirect benefit that may have inured to a nonpublic institution due to a student's receipt of a grant under the program.

The record in the present action does not reflect that this is an instance involving a direct appropriation of public funds to a nonpublic institution. Instead, it involves the direct providing of transportation services to those students who attend a nonprofit private institution and who reside in a public school district that has elected to provide transportation for its public school students. In this respect, any benefit that may inure to the nonprofit private institution is merely incidental and certainly cannot be deemed to be an "appropriation . . . to" that institution. Under *Lenstrom* such an incidental benefit is insufficient to render § 79-487 violative of article VII, § 11. Therefore, appellant's first assignment of error is without merit.

Appellant next contends that § 79-487 is in violation of article III, § 18, which provides in pertinent part: "The Legislature shall not pass local or special laws in any of the following cases, that is to say:

. . . .

"Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . ." In a related manner, the appellant also contends that § 79-487 contravenes the equal protection provisions of U.S. Const. amend. XIV, § 1. These contentions are based upon the theory that in certain instances § 79-487 might provide transportation services to

nonprofit private school students beyond those services enjoyed by similarly situated public and proprietary private school students.

Appellant has outlined four such instances, the first of which envisions a situation wherein a private elementary student residing in a Class VI school district (providing educational services only for grades 7-12) would be allowed to ride the Class VI district's buses while the public elementary students of the Class I district (providing services for grades K-6 only), which would often be located within the Class VI district and may not provide transportation to its students, would not be allowed to ride the Class VI district's buses. A second situation might occur under the statutory requirement that the Lincoln Public Schools system must provide transportation or mileage payments in lieu thereof to students in grades K-9 who live over 4 miles from their public school. There is no such requirement for public high school students. Appellant alleges that § 79-487 may allow nonprofit private high school students to ride a public school bus in the Lincoln school system while their public counterparts could not. Thirdly, appellant points to the Lincoln Public Schools regulation that provides transportation for elementary students only if they live over 1¼ miles from their school, and raises the question of whether § 79-487 would require the school district to provide transportation to those private school students living on regular bus routes who live closer than 1¼ miles from their school. Finally, the appellant notes that the Lincoln Public Schools system provides separate buses for its elementary and junior high students and does not permit one grade level to ride on a bus designated for another grade level. Once again, the appellant contends that § 79-487 might allow nonprofit private elementary school students to ride a public junior high school bus while a similar privilege is denied their public counterparts.

It is unclear from reading the statute itself whether any of the discrepancies outlined above would be permissible under its provisions. The section only outlines the following general prerequisites: that the student attend an approved nonprofit private school; that the student reside within a public school district that provides transportation for its public school students; that the private school students will only be picked up and let off the buses at points on the "regular public school route"; and that transportation will only be provided for private school students "at times when transportation is being provided for public school children."

Of these factors, only the mention of "regular public school" routes and the limitation of the times when the services will be rendered provide any indication of whether the private school students are to receive any greater service than that provided for the public school students. However, even when we consider these two limitations, we are unable to state with certainty that the section precludes the occurrence of any of the situations mentioned above.

"The constitutional validity of an act of the Legislature is to be tested and determined, not necessarily by what has been done or possibly may be done under it, but by what the statute authorizes to be done under and by virtue of its provisions." *State ex rel. Douglas v. Thone,* 204 Neb. 836, 845, 286 N.W.2d 249, 254 (1979). As noted above, it is unclear exactly what the statute authorized to be done in this particular instance. While it is true that "when an ordinance or statute is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes sure its validity will ordinarily be given," *Starman v. Shirley,* 162 Neb. 613, 616, 76 N.W.2d 749, 752 (1956), the language of § 79-487 is so ambiguous as to be prohibitive of any valid construction without further inquiry.

"Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes. [Citation omitted.] Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine legislative intent. [Citation omitted.] Legislative intent is the cardinal rule in the construction of statutes. [Citation omitted.] 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. [Citation omitted.]

"To ascertain the intent of the Legislature we examine the legislative history of the act in question. 'The record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation.' [Citation omitted.] 'In construing a legislative act, resort may be had to the history of its passage.' [Citations omitted.]" *Wang v. Board of Education,* 199 Neb. 564, 567, 260 N.W.2d 475, 477-78 (1977).

It becomes readily apparent after examining the legislative history of § 79-487, which was offered into evidence before the trial court, that the Legislature merely intended to extend the same transportation to nonprofit private school students as was being extended to public school students. Section 79-487 was introduced as L.B. 522 by the Education Committee and Senator Frank Lewis, the chairman of that committee. The following comments were made during hearings before that committee: "Senator Lewis: It [L.B. 522] simply provides that children along the route where there is transportation will be entitled to that transportation to that school regardless of what school they go to. I think the important issue at hand is that it is consistent with existing transportation. There is no transportation for public school students along the route and obviously there's no transportation for non-public students. If there is transportation for public school students, there

would be transportation provided for non-public school students along the same route where the bus is destined." Committee Hearing, 84th Leg., 1st Sess. 1 (March 17, 1975). Similar comments were made during the floor debate on this provision. "Senator Lewis: . . . The bill provides that students attending a nonpublic school will be provided transportation *as are other students* in that particular district along the same route. . . . The question before the body now is whether or not we wish to provide transportation *on the same basis for all students* regardless where they go to school. . . . It [L.B. 522] says that *all children will be treated alike* in regard to transportation. . . . Again, I think that this is important that the members of this body understand that we're not talking about the transportation, . . . of any student who is not qualified under the same condition that a student who attends a public school is qualified under." (Emphasis supplied.) Floor Debate, 84th Leg., 1st Sess. 4815, 4818 (May 16, 1975).

These remarks make it quite clear that the legislative intent and purpose in enacting § 79-487 was to extend transportation benefits to nonprofit private school students on the same basis as these benefits were enjoyed by public school students. Therefore, those guidelines and restrictions imposed upon public school students by the various local boards of education are and were intended to be equally applicable to the nonprofit private school students wishing to ride the buses of the public school system. Under no circumstances would the private school students be entitled to greater transportation benefits than those enjoyed by the public school students. Section 79-487 is not special legislation in this respect, and it contravenes neither article III, § 18, nor the equal protection clause of § 1 of the fourteenth amendment.

One last category which gives rise to the claim

that § 79-487 is special legislation violative of article III, § 18, and § 1 of the fourteenth amendment is the fact that the section provides only for those students who attend "nonprofit private schools." This, appellant contends, ignores the rights of those children who attend private proprietary schools. The record before this court presents evidence of only one such proprietary private school in the State of Nebraska: Montessori Educational Center, Inc. However, the record does not indicate whether said proprietary school has students in attendance who reside within a public school district that offers its students transportational services. As a result of that omission, we are unable to determine whether there are any students attending a proprietary private school who will be deprived of the benefits provided by § 79-487 in light of the section's restriction to "nonprofit private" school students.

Therefore, it is clear that the appellant lacks sufficient standing to challenge the section's exclusion of proprietary private school students from its benefits. Several jurisdictions have adopted the general rule that "one must be a member of the class discriminated against in order to have standing to attack a law as denying the equal protection of the laws." *Lague, Inc. v. State,* 136 Vt. 413, 416, 392 A.2d 942, 944 (1978). See, *Wirth v. Ehly,* 93 Wis. 2d 433, 287 N.W.2d 140 (1980); *Clark v. State,* 284 Md. 260, 396 A.2d 243 (1979); *Tavern Owners Ass'n v. County of Lake,* 52 Ill. App. 3d 542, 367 N.E.2d 748 (1977).

A similar rule was alluded to by the court in *Snyder v. Newton,* 147 Conn. 374, 161 A.2d 770 (1960). While the issue was not raised, the court did note the fact that Connecticut's version of § 79-487, which also distinguished between proprietary and nonprofit private school students, could not be challenged on equal protection grounds by the plaintiffs. "It does not appear that any of the plaintiffs are persons who are being denied transportation because they are at-

tending, or propose to attend, a private school conducted for profit. Since the plaintiffs are not members of the class which is claimed to be discriminated against, they cannot challenge the constitutionality of the statute on the ground in question [equal protection]." *Id.* at 380, 161 A.2d at 774.

It is obvious that, by the same token, the appellant in the present action, the School District of the City of Lincoln, is not and does not propose to be a student at a proprietary private school. Indeed, the record before the court is devoid of any evidence that there are students in the State of Nebraska who attend such proprietary institutions and who are being denied transportation on that basis under § 79-487. This lack of evidence alone provided a sufficient reason for the court in *West Morris Reg. Bd. of Ed., et al. v. Sills, et al.,* 58 N.J. 464, 279 A.2d 609 (1971), to disregard an equal protection challenge of New Jersey's counterpart to § 79-487 on the basis that the law discriminated against proprietary private school students. Similarly, we find ourselves compelled to withhold a decision on this matter until such time as a party with proper standing presents a sufficient record to raise the issue on appeal.

The appellant's final assignment of error challenges the validity of § 79-487 under the first amendment, respecting the establishment of religion. We are controlled in this area by *Everson v. Board of Education,* 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), wherein the Court found that the board of education had not violated the first amendment by authorizing the reimbursement to parents of public and nonprofit private school children of money spent by the parents for the bus transportation of their children to and from school on buses operated by the public transportation system. This action was taken by the board pursuant to a statute which allowed the board to make rules and contracts for the transportation of children, " 'including the transportation of

school children to and from school other than a public school, except such school as is operated for profit in whole or in part.' " *Id.* at 3, n. 1. While acknowledging that the board's action assisted the children to reach their private schools and indeed may have made it possible for some children to attend private schools instead of public ones, the Court analogized the provision of such services with the provision of policemen to protect children going to and coming from private schools, as well as the provision of other general government services, such as police and fire protection, sewage disposal, and public highways and sidewalks. In so doing, the Court was able to conclude: "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* at 18. Although we need not embrace in full the logic articulated in that opinion, we are controlled in this area by the holding expressed therein.

The U. S. Supreme Court has, since *Everson,* articulated a three-pronged analysis for determining whether legislative action is violative of the first amendment's establishment clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen,* 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' " *Lemon v. Kurtzman,* 403 U.S. 602, 612-13, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). See, *State ex rel. Rogers v. Swanson,* 192 Neb. 125, 219 N.W.2d 726 (1974).

Section 79-487 does indeed have a secular legislative purpose, that being "to extend the health and safety benefits of school bus transportation to children who attend nonpublic schools." Statement of

Purpose, Committee on Education, L.B. 522, 1975 Leg., 1st Sess. (March 17, 1975). Furthermore, the section's primary effect is to provide safe transportation to nonprofit private school children, which neither inhibits nor advances religion. Finally, the only interaction between religion and the government, other than the actual busing of the students, involves the furnishing to the local school board by the governing body of the private school of the names, addresses, and days of school attendance of those private school students desiring transportation on the public school's buses. This minimal interaction between government and religion does not rise to the level of "excessive government entanglement" envisioned by the final part of the three-pronged analysis set forth above.

The appellant attempts to distinguish *Everson* on the basis that the transportation benefits enjoyed by the students therein were equally enjoyed by public and private school students alike, whereas in the present case the transportation benefits enjoyed by the private school students are potentially greater than those enjoyed by the public school students. See, *Ams. United for Separation of Ch. & St. v. Benton,* 413 F. Supp. 955 (S.D. Iowa 1975); *Members of Jamestown Sch. Com. v. Schmidt,* 427 F. Supp. 1338 (D. R.I. 1977). However, in light of our determination that the intent of § 79-487 is that private school students should receive *only* those services provided to public school students, such a distinction does not exist, and those cases cited in support of the proposition are inapplicable.

Therefore, we conclude that § 79-487 is not violative of those constitutional provisions raised by the parties herein. The section does not involve an appropriation to a nonpublic institution in violation of article VII, § 11, nor is it "special legislation" in violation of article III, § 18. The appellant is without standing to raise an equal protection claim un-

der § 1 of the fourteenth amendment, based upon the profit-nonprofit distinction drawn in the statute. Finally, the provisions of the statute are not an establishment of religion in violation of the first amendment. We affirm the District Court's determination that the statute does not violate any provision of the U. S. or Nebraska Constitutions.

AFFIRMED.

CAPORALE, J., dissenting.

I respectfully dissent on the ground that in its present posture this appeal presents no case or controversy which requires judicial action.

The majority concedes the matter is moot, but justifies rendering an advisory opinion on the ground that the subject is one of public interest. I recognize there is some precedent for such a position, but question the applicability of that precedent to the matter at hand. *Meyer v. Colin,* 204 Neb. 96, 281 N.W.2d 737 (1979), recognized the general rule to be that appellate courts do not sit to give opinions in cases or controversies which have become moot and that an appeal will be dismissed where no actual controversy still exists between the parties at the time of hearing. It concluded, however, that the general rule does not apply to appeals involving matters of public interest. Yet, earlier this year we dismissed on the ground of mootness the case of *Ellis v. County of Scotts Bluff,* 210 Neb. 495, 315 N.W.2d 451 (1982), which presented an issue as to the power of county boards of commissioners over the budgets of elected officials. *Meyer* involved an ongoing budgetary practice and had become moot because the budget year in question had expired and the plaintiff was no longer the assessor. In *Ellis* there was no showing that the practice complained of would be repeated, nor was there any judicially enforceable remedy which might have been applied. Notwithstanding those distinctions between *Meyer* and *Ellis*, the latter case instructs us that the pres-

ence of a public interest standing alone is not enough to warrant an advisory opinion. The earlier case of *Braesch v. DePasquale,* 200 Neb. 726, 265 N.W.2d 842 (1978), *cert. denied* 439 U.S. 1068, 99 S. Ct. 836, 59 L. Ed. 2d 34 (1979), taught the same lesson. *Braesch* decided the enforceability of certain rules governing the conduct of participants in interscholastic athletics notwithstanding the fact the plaintiffs had graduated from school. It did so because almost no case involving disciplinary action in the field of interscholastic competition could reach us before it became moot.

That rationale does not apply to this matter. We are not yet so far behind in our docket that a proper case involving an actual controversy between parties each of whom has a stake in the outcome can not be presented to us.

The practice of rendering advisory opinions whenever we choose to declare the existence of a public interest constitutes an unwarranted intrusion by the judiciary in the affairs of society, confuses the bar as to when such opinions may be sought, confounds litigants, and contributes to the very docket congestion we all seek to avoid.

I would dismiss on the ground of mootness and vacate the judgment of the District Court.

BEVERLY A. MULFORD, APPELLANT, V. FRED A. MULFORD, APPELLEE.

320 N.W.2d 470

Filed June 4, 1982. No. 44176.

Divorce: Antenuptial Agreements. It is generally held that antenuptial agreements providing in the event of divorce or separation the spouse should forfeit his or her rights in the property of the other are contrary to public policy and void as tending to promote divorce.

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

Brogan & Stafford, P.C., for appellant.

Terry C. Dougherty, Assoc., and Lynn D. Hutton, Jr., P.C., for appellee.

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

CLINTON, J.

This is an action for dissolution of marriage brought in the District Court for Madison County by the wife, Beverly A. Mulford, against the appellee husband, Fred A. Mulford. The parties were married on October 26, 1975, and separated on January 17, 1980. At the time of the marriage Mrs. Mulford was a widow with two daughters, one a minor who lived at home. Mrs. Mulford was a person of substantial wealth. Mr. Mulford, previously divorced, was the father of three minor sons who were in the custody of their mother and for whom he paid child support of $250 per month. Mr. Mulford was employed as a superintendent of the Masonic Eastern Star Children's Home at Fremont, Nebraska. As a superintendent he received an annual salary of about $10,000 in addition to a residence, utilities, food, and an automobile.

Before the marriage Mrs. Mulford asked that the parties enter into an antenuptial agreement, which they did. The statements of worth contained in the agreement indicated that Mrs. Mulford had a worth of $571,000 and Mr. Mulford of $25,000. Mr. Mulford's worth consisted of an inheritance to be received from the estate of his father, which he did receive after the marriage. The antenuptial agreement contained the usual recitals and agreements by which each party waived his or her right and interest in the estate of the other upon death. In addition, it contained at paragraph 6 the following pro-

vision: "Each party, in the event of a separation or divorce, shall have no right as against the other by way of claims for support, alimony, attorney fees, costs or divisions of property." The court dissolved the marriage and awarded Mr. Mulford the personal property in his possession, consisting of an automobile and personal property, life insurance policies on his own life, and certain household goods which he had purchased for a summer home owned by Mrs. Mulford on Lewis and Clark Lake. It awarded Mrs. Mulford all the real and personal property in her own name. Mr. Mulford was directed to pay certain debts he had incurred, totaling about $3,000. He was awarded the sum of $25,000 as a property settlement and the sum of $2,000 as alimony, payable in five equal monthly installments.

Mrs. Mulford appeals from the decree to this court, contending that the property settlement and alimony award are unjustified, and, in so asserting, relies in part upon the provisions of paragraph 6 of the antenuptial agreement.

It is generally held that antenuptial agreements providing in the event of divorce or separation the spouse should forfeit his or her rights in the property of the other are contrary to public policy and void as tending to promote divorce. This court so indicated in the early cases of *Tiernan v. Tiernan,* 112 Neb. 707, 201 N.W. 145 (1924), and *White v. White,* 112 Neb. 850, 201 N.W. 662 (1924). That appears to be the majority rule. Annot., 57 A.L.R.2d 942 (1958).

The evidence shows that before the marriage Mr. Mulford told Mrs. Mulford he doubted that he should marry her because he could not contribute fully in a financial way to the marriage. Mrs. Mulford indicated that his lack of financial contribution would be no problem. After the marriage Mr. Mulford kept his job as superintendent of the Masonic children's home for 7 or 8 months and then quit that job for employment in Norfolk where the parties

lived in Mrs. Mulford's home. He remained employed through most of the marriage, earning between $8,500 and $13,000 per year. Mrs. Mulford's average annual income during the marriage was in excess of $50,000. At the time of the divorce Mr. Mulford was employed in a nursery at the minimum hourly wage. At the end of the marriage Mr. Mulford's $25,000 inheritance had dissipated while Mrs. Mulford's net worth had increased to about $750,000.

We will not recite the evidence in detail. On review de novo we find it supports the award made to the husband and, except for his employment, restores him to approximately his premarital financial condition.

AFFIRMED.

IN RE TRUST ESTATES KNOWN AS THE FRANCES M. JOHNSON TRUST AND THE JOHNSON RESIDUAL TRUST. FRANCES M. JOHNSON ET AL., APPELLEES, V. JENNIFER H. JOHNSON, BY AND THROUGH HER CONSERVATOR, MARJORIE N. JOHNSON, APPELLANT.

320 N.W.2d 466

Filed June 4, 1982. Nos. 44187, 44188.

1. **Wills: Intent.** The cardinal rule in construing wills is to ascertain and effectuate the intention of the testator if such intention is not contrary to the law.
2. **Wills: Trusts.** Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.
3. _____: _____. An income beneficiary of a testamentary trust, established from the residue of the estate, is entitled to income from the date of the settlor's death.

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

Jeffrey D. Toberer of Kennedy, Holland, DeLacy & Svoboda, for appellant.

George A. Penry of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee Frances M. Johnson.

Thomas R. Pansing, Jr., of Gaines, Otis, Haggart, Mullen & Carta, for appellee Omaha National Bank.

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

CAPORALE, J.

Jennifer H. Johnson, a minor and the appellant herein, by and through her conservator, Marjorie N. Johnson, appeals from orders entered by the District Court of Nebraska, Fourth Judicial District, in and for Douglas County, Nebraska. That court affirmed the actions of the county court of Douglas County, which approved distributions made by the trustees of the Frances M. Johnson Marital Trust and the Johnson Residual Trust in allocating proceeds resulting from the liquidation of the Johnson Cashway Lumber Company of Omaha to income and principal of the trusts. These actions have been consolidated for briefing and oral argument before this court and will be treated as such herein.

In summary, this action presents two issues for resolution: (1) The nature and extent of the discretionary authority granted by the will of Lawrence W. Johnson, deceased, to the trustees to make allocations between income and principal of property from the L. W. Johnson estate; and (2) Whether the allocation proposed for the proceeds derived from the liquidation of Johnson Cashway Lumber Company constitutes an abuse of the trustees' discretion. Appellant contends that the allocation of a portion of the proceeds to the income beneficiary of the marital trust constitutes an invasion of the principal and would constitute an abuse of the trustees' discretion. We disagree with appellant, find no error, and affirm the orders of the District Court.

The settlor, Lawrence W. Johnson, died on September 27, 1974, and was survived by his wife Frances M. Johnson, appellee herein, and their two sons, James F. Johnson and Fred L. Johnson. The will of Lawrence W. Johnson was filed for probate before the county court on October 4, 1974. Under the terms of the will, two trusts were created to which the settlor devised all his property, with the exception of his house, furnishings, and certain items of tangible personal property. The Frances M. Johnson Marital Trust is a marital deduction trust established under article III of the will, and names Frances as the sole income beneficiary. The trustees are authorized to use the principal of the trust for her support and maintenance, and she was given a general testamentary power over those assets remaining in the trust upon her death. The will does not place any restriction on the amount of income to be paid to Frances, nor are there any other beneficial interests created in the trust during her lifetime. The Johnson Residual Trust, established pursuant to article IV of the will, authorizes the payment of the income from the trust to Frances M. Johnson. The trust also provides that to the extent that income is not paid to Frances, equal payments are to be made to James and Fred Johnson. In the event of the death of either son, the trustee is authorized to pay or hold the income for the benefit of the surviving issue of James or Fred. The will directs the trustee to keep an accurate record of the amount of income paid from this trust to any living child and the amount accumulated for the beneficiaries so that equality between the sons' two families may be maintained. The will appointed Frances, Fred, and The Omaha National Bank as trustees of the marital trust and The Omaha National Bank and Fred L. Johnson as trustees of the residual trust. The will also directs the executor of the estate to make minimal distributions during the

pendency of the estate proceedings of $3,000 per month to Frances and $1,000 per month to each of the sons. We note that on June 2, 1977, Fred L. Johnson died and was survived by his daughter Jennifer. No successor trustee was appointed, leaving The Omaha National Bank as sole trustee. The income derived from the residual trust is being held in trust for her. The record reveals that Frances has waived her right to receive the income of the residual trust in favor of James and Jennifer.

At the time of his death, the settlor owned 780.66 shares of the outstanding stock of Johnson Cashway Lumber Company. Each of the trusts created under the will received one-half of the stock (390.33 shares) which had an estimated book value of $1,214,706 as of the date of death. In addition, the company continued to operate and earned substantial income from business activities until a plan of liquidation was adopted in 1979. As of the time of trial, it was estimated each trust would receive approximately $1,418,000 for its stock in the company upon liquidation. Of this amount, $355,023 is attributable to each trust for accumulated income from business operations, $607,353 to each trust as its share of the book value of the company assets on date of death, and $455,624 as each trust's share of other income and appreciation in value of the assets of the company. Since no dividends had been paid by the company since the settlor's death nor other income made available to the income beneficiaries, the trustees of both trusts made a decision to allocate $134,000 of the accumulated business income to the income in each trust, while the remaining $221,023 of such business income, together with the other $1,062,977 of funds, would be allocated to principal. On August 7, 1979, the trustees filed a petition in the county court seeking approval of their proposed allocation of proceeds received in liquidation to the respective trusts. An objection to the petition was filed by Marjorie N.

Johnson, conservator of Jennifer Johnson, on the grounds that the proposed allocation of $134,000 to income would violate the terms of the will and constitute an abuse of the trustees' discretion.

The cardinal rule in construing wills is to ascertain and effectuate the intention of the testator if such intention is not contrary to the law. *Wood v. Lincoln General Hospital Assn.,* 205 Neb. 576, 288 N.W.2d 735 (1980); *Page, Higgins, Clyde & Avery v. Buchfinck,* 202 Neb. 411, 275 N.W.2d 826 (1979). See, also, *Scully v. Scully,* 162 Neb. 368, 76 N.W.2d 239 (1956).

In determining the extent to which the trustees are granted authority to make discretionary allocations between the income beneficiaries and remaindermen, we turn to article VI of the will. This provision states in pertinent part: "I give to my Executor and Trustees, the following powers, in addition to and not in limitation of its common law and statutory powers, in each case to be exercised from time to time in the discretion of the Executor or Trustees and without order of the court:

. . . .

"9. To credit or to charge to income or principal, or to apportion between them, *any receipts and any disbursements* . . . and generally to determine all questions as between income and principal and to credit or charge to income or principal, or to *apportion between them any receipt or gain or any charge, disbursement,* or loss." (Emphasis supplied.)

This clause clearly authorizes the trustees to apportion receipts and gains received by them between the income beneficiaries and remaindermen of the trusts. The exercise of this authority is left to the best discretion of the trustees to make reasonable allocations without limitation.

In the matter of control over the discretionary power granted the trustees under the will, the real

question is whether it appears that the trustees are acting in that state of mind contemplated by the settlor. In *Reed v. Ringsby,* 156 Neb. 33, 39, 54 N.W.2d 318, 321 (1952), this court stated: "The rule is stated in Restatement of the Law, Trusts, § 187, p. 479, as follows: 'Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.' See, also, Clark v. Fleischmann, 81 Neb. 445, 116 N.W. 290."

We must therefore determine whether the allocation made by the trustees in the present case was an abuse of the discretion granted them under the terms of the will. The leading case in this jurisdiction is *Folsom v. Strain,* 138 Neb. 497, 293 N.W. 357 (1940), in which we held that an income beneficiary of a testamentary trust, established from the residue of the estate, is entitled to income from the date of the settlor's death. This court stated in pertinent part: "The general rule is now firmly settled that the life beneficiary of a testamentary trust for the payment of income is entitled to the income accumulating on the trust assets from the date of the testator's death, unless it is otherwise provided in the will. 2 Perry, Trusts and Trustees (7th ed.) 939, sec. 551. This is true even though the trust assets are part of the residuary estate, not capable of being determined or turned over to the trustee until administration of the estate is completed. *Restatement, Trusts,* sec. 234, and Comment *f* on Clause (a). . . .

. . . .

". . . [T]o construe the will in a manner that will deprive the beneficiary of part of the income, and enrich the remainderman by assimilating it into the corpus of the trust, will normally be contrary to the general spirit of such a bequest." *Id.* at 499-500, 293 N.W. at 358-59.

In addition to the duty of trustees to pay income to the life beneficiary from the date of the settlor's death, they also have the affirmative obligation to make the trust property produce income for all beneficiaries. Trustees may not, however, sacrifice income for the purpose of increasing the value of the principal of the trust. In Restatement (Second) of Trusts § 232, Comment b (1956), it is stated: "Although the trustee is not under a duty to the beneficiary entitled to the income to endanger the safety of the principal in order to produce a large income, he is under a duty to him not to sacrifice income for the purpose of increasing the value of the principal. Thus, the trustee is under a duty to a life beneficiary not to purchase or retain unproductive property or property which yields an income substantially lower than that which is normally earned by trust investments, although it is probable that the property will appreciate in value."

In the present case, the evidence has established that from the date of death of Lawrence W. Johnson to the date of liquidation in 1979, no dividends or other disbursements of income were paid upon the Johnson Cashway stock. During this same period, it was established that the company had earned income from business operations of approximately $710,000. The law makes it clear that the income beneficiaries of the trust were entitled to income from the substantial holdings in the lumber company, and it would be a breach of the trustees' duty not to distribute a proper amount of income to the life beneficiaries on the investment. The record reveals the basis for the decision of the trustees in allocating $134,000 to income in each trust. This amount represents a rate of return of less than 4.5 percent of the book value of the stock owned by each trust at the time of the settlor's death. In any event, the allocations made by the trustees were matters within the discretion conferred upon them under the will,

and no abuse of that discretion appears in the record. This court will not substitute its discretion for that of the trustees. Furthermore, the language of the will is clear as to the discretionary power granted the trustees, and as such there is no ambiguity or room for construction. *In re Estate of Nelson,* 132 Neb. 376, 272 N.W. 219 (1937). See, also, *Overbeck v. Estate of Bock,* 198 Neb. 121, 251 N.W.2d 872 (1977); *Marble v. City of Tecumseh,* 103 Neb. 625, 173 N.W. 581 (1919).

The orders of the District Court affirming the actions of the county court were correct and we affirm.

AFFIRMED.

EVERETT A. LILLICH, APPELLANT, V. ALVIN LOWERY ET AL., APPELLEES.

320 N.W.2d 463

Filed June 4, 1982. No. 44193.

1. **Eminent Domain: Railroads: Easements: Right-of-Way.** A railroad company which acquires its right-of-way by condemnation proceedings secures merely an easement in the right-of-way which authorizes it to build and operate its railroad as a public highway. The fee title and servient estate remain in the original owner and may be sold and conveyed by such owner to another. Whenever the right-of-way is abandoned for that purpose, it reverts at once to the owner of the servient estate.
2. **Conveyances: Railroads: Right-of-Way: Easements: Case Overruled.** An instrument of conveyance which conveys the land definitely described in such instrument, and then excepts from such conveyance a railroad right-of-way, as such, occupying a mere easement on, over, or across the land conveyed, conveys the fee to the entire tract, and the exception only operates to render the conveyance or grant subject to the easement. To the extent that *Bode v. Flobert Industries, Inc.,* 197 Neb. 488, 249 N.W.2d 750 (1977), and *Kozak v. State,* 189 Neb. 525, 203 N.W.2d 516 (1973), are in conflict with this holding, they are overruled.

Appeal from the District Court for Nuckolls County: ORVILLE L. COADY, Judge. Affirmed.

Edward F. Carter, Jr., and Barney, Carter & Johnson, P.C., for appellant.

W. E. Garrison and Garrison & Garrison, for appellees.

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

HASTINGS, J.

Plaintiff commenced this action in the District Court to quiet title against the defendants as to a strip of land 100 feet in width, extending across a portion of the north half of the northwest quarter of Section 4, Township 3 North, Range 5 West of the 6th P.M., Nuckolls County, Nebraska. Defendants filed an answer and cross-petition, requesting that title be quieted in them as to the same property. The trial court found in favor of the defendants, dismissed the plaintiff's petition, and ordered title quieted in the defendants. The plaintiff has appealed, assigning as error that the judgment was not sustained by the evidence and was contrary to law. We affirm.

The bill of exceptions consists solely of copies of deeds and various court proceedings in both the county court and the District Court. However, the facts do not seem to be in dispute. Because we determine that the defendants possess a valid fee title to the disputed strip, it is not necessary for us to discuss the obvious weakness of the plaintiff's claim to title.

In 1887 Larkin J. Fletcher acquired title by patent to the 80-acre tract described as the north half of the northwest quarter of Section 4, Township 3 North, Range 5 West. The following year, the Fremont, Elkhorn and Missouri Valley Railroad Company, apparently the predecessor of the Chicago & Northwestern Railroad Company, acquired by appropriation for right-of-way purposes a strip of land 100 feet wide across the 80-acre tract according to the

"plat and profile of said road," consisting of 1.45 acres. The defendants allege in their cross-petition, which is admitted by the plaintiff's reply, that the 100-foot-wide strip of land previously described "constituted an easement for a railroad right-of-way which easement terminated upon abandonment of the railroad in 1976."

Larkin J. Fletcher died in 1940 seized of this 80-acre tract, leaving his widow, several children, and a grandchild surviving him as heirs and devisees. During the course of the administration of this estate, it became necessary to sell the 80-acre tract to pay the debts of the estate. A license to sell was obtained in the District Court, describing the property ordered sold as: "The N½NW¼ of Section 4 . . . all in Township 3, North Range 5, in Nuckolls County, Nebraska . . . ." Pursuant to notice, a public sale was held, at which Ray J. Lowery was the successful bidder. This sale was confirmed, and the administrator was directed to execute a proper deed of conveyance to the purchaser. However, the deed executed by the administrator described the property as: "The North Half of the Northwest Quarter . . . *excepting the present right-of-way* of the C&NW Railroad Company across said lands, but otherwise free and clear of all liens and incumbrances . . . ." (Emphasis supplied.) The defendants are the heirs of Ray J. Lowery and the successors to his right, title, and interest in the property which he purchased at that judicial sale.

In order to define the scope of the estate granted by the administrator's deed, it is necessary to determine the nature of the interest excepted from the calls in that instrument. Excepted was the "present right-of-way" of the railroad company. This right-of-way had been acquired by appropriation. Since as early as *Roberts v. Sioux City & P. R. Co.*, 73 Neb. 8, 102 N.W 60 (1905), we have held that a railroad company which acquires its right-of-way by

condemnation proceedings secures merely an easement in the right-of-way which authorizes it to build and operate its railroad as a public highway. "The fee title and servient estate remains in the original owner, and *may be sold and conveyed by him to another*. . . . [A]nd whenever the right of way is abandoned for that purpose, *it reverts at once to the owner of the servient estate.*" (Emphasis supplied.) *Id.* at 22, 102 N.W. at 65. We believe it is abundantly clear in this case that the only thing excepted in the administrator's deed was the easement. The rest of the estate, including the fee title to the right-of-way, passed to the defendants' predecessor in title. Therefore, the defendants held title to the servient estate in 1976 when the railroad abandoned the right-of-way.

However, the plaintiff relies upon *Bode v. Flobert Industries, Inc.*, 197 Neb. 488, 249 N.W.2d 750 (1977), to support his proposition that a deed conveying a tract of land, except for an easement over a portion of that ground, retains in the grantor the fee title to the property underlying the easement. It is not entirely clear from a reading of that opinion, but it seems that the court was impressed by the fact that, although the patent and original conveyance of the particular tract of land covered 160 acres, the following conveyances "were for only 154 acres and presumably did not cover the railroad right-of-way." *Id.* at 492, 249 N.W.2d at 753. Additionally, the opinion takes pains to point out that the right-of-way was acquired by deed, and it emphasizes such words in the grant as " '*give, grant, bargain, sell, convey and confirm,* to the said party . . . *and to its successors and assigns forever* . . . *a strip of land* . . . . *To have, hold, and enjoy* the lands above conveyed with the appurtenances and privileges thereto pertaining,' " and further recites that in the event of an abandonment of the railroad " 'the land hereby conveyed . . . *shall revert*' to grantors, their heirs, and

assigns." *Id.* at 490-91, 249 N.W.2d at 752.

We do agree that both the language and the holding of that case lend support to the plaintiff's contention. Perhaps more importantly, *Bode* relied to a considerable extent upon *Kozak v. State,* 189 Neb. 525, 203 N.W.2d 516 (1973), the holding of which is also not completely clear. It seems that in Kozak's chain of title there was excepted from the property conveyed the right-of-way granted to the railroad company. The latter conveyed its right-of-way to the State of Nebraska. In coming to its conclusion, the *Kozak* court relied upon a number of legal principles which we conclude to be entirely sound. They were: " ' "An exception is said to be a *withdrawal from the operation of the grant, of some part of the thing granted* . . . . [A]n *exception in a deed is* nothing more than *a qualification, by which some part of the estate is not conveyed,* which would have passed to the grantee but for the exception. . . . The effect of *an exception is to exclude from the operation of the conveyance the interest specified* and it remains in the conveyor unaffected by the conveyance." ' " (Emphasis supplied.) *Id.* at 528-29, 203 N.W.2d at 518-19. Without further hesitation, the court then proceeded to reach the following conclusion: "Appellants [Kozak] premise their action herein on their contention that the railroad acquired only an easement by condemnation, and not fee title. It is not necessary for us to consider the nature of the interest acquired by condemnation. If it was less than a fee interest . . . appellants have not established sufficient title in themselves to maintain this action. . . . [A]ppellants must recover on the strength of their own title, and not on any apparent weakness that may exist in the title of the State . . . ." *Id.* at 529, 203 N.W.2d at 519.

The dissenting opinion of White, C.J., joined in by Boslaugh and Newton, JJ., met the issue head on, i.e., does a grant of title to a tract of land which ex-

empts a right-of-way or an easement withhold passage of fee title to the land underlying the easement, or does title pass to the grantee subject only to the outstanding right created by the easement? As stated in that dissenting opinion: "The construction of such language so as to except from the conveyance a strip of land such as that involved here is not only contrary to the probable intent of the parties, but also violates public policy." *Id.* at 531, 203 N.W.2d at 520. Because we believe that the holdings of *Bode* and *Kozak* are both unreasonable and illogical when cast in the light of the interpretation not unreasonably placed upon them by the plaintiff, we take this opportunity to reexamine our position in this matter.

In *Melton v. Davis,* 443 S.W.2d 605, 607 (Tex. Civ. App. 1969), citing *Lewis v. E. Texas Finance Co.,* 136 Tex. 149, 146 S.W.2d 977 (1941), the court said: " 'An instrument of conveyance which conveys land definitely described in such instrument, and then excepts from which conveyance a road, railroad right of way . . . as such, occupying a mere easement on, over, or across the land conveyed, conveys the fee to the entire tract, and the exception only operates to render the conveyance or grant subject to the easement.' " Similar language may be found in *Cravens v. Jolly,* 623 S.W.2d 569, 572 (Mo. App. 1981): "A corollary rule is that a grant of land with full covenants of warranty, which definitely describes the land conveyed, and then excepts or reserves a roadway for the use of the public, or a railroad or other right of way, as such, occupying a mere easement on, over, or across the land conveyed, conveys the fee to the entire tract subject to the easement reserved." The holding in *Cravens* was based in part on *Brown v. Weare,* 348 Mo. 135, 145, 152 S.W.2d 649, 656 (1941), in which it was said: "We cannot conceive that it was the intention of the grantor to retain the title to the servient estate in the strip over

which the right of way ran while disposing of the abutting land."

A provision in a deed excepting a portion of the premises taken by the railroad company for right-of-way was held not to operate to retain in the grantor title to such portions. *Hogg v. State,* 44 App. Div. 2d 747, 354 N.Y.S.2d 729 (1974). The court concluded that the grantee took title subject to the prior interests of the railroad company, and when such interest was extinguished, the grantee could assert title thereto in an appropriate proceeding.

In the final analysis, it must be apparent that to determine the effect of an exception in a deed it is necessary to clearly identify the nature of the right or title or interest excepted. In the case at hand, it seems beyond question that the interest held by the railroad company, and therefore excepted from the conveyance executed by the administrator, was a mere easement, which was extinguished upon abandonment and became merged with and into the servient estate, title to which is found in the defendants. The fee title to the underlying land passed by the terms of the administrator's deed. To the extent that *Kozak* and *Bode* conflict with this holding, they are overruled.

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

AFFIRMED.

IN RE ESTATE OF ELSIE A. KLEEB, DECEASED. STEWART KLEEB, APPELLEE, V. VELMA JEZBERA AND WILMA ASKEY, APPELLANTS.

320 N.W.2d 459

Filed June 4, 1982. No. 44199.

1. **Wills.** A person who understands the nature of his acts, the extent of his property, the proposed disposition of it, and the natural ob-

jects of his bounty is competent to make a will.

2. _____. In an action to set aside a will because of improper or undue influence exerted upon the testator, the burden of proof is upon the contestant.
3. _____. Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own.
4. _____. An individual does not lack testamentary capacity because he holds an unjust prejudice or belief generally regarded as peculiar and unsound.

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

Schaper and Schaper, and Wolfe, Hurd & Rierden, for appellants.

Steven O. Stumpff of Stumpff & Washburn, for appellee.

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

KRIVOSHA, C.J.

This appeal involves the last will and testament of Elsie A. Kleeb, who died on August 13, 1979. The county court for Custer County, Nebraska, over the objections of the contestants-appellants, Velma Jezbera and Wilma Askey, daughters of the decedent, admitted the will to probate. On appeal, and over the continued objections of the daughters, the District Court for Custer County, Nebraska, likewise admitted the will to probate. Velma Jezbera and Wilma Askey have now appealed to this court. We likewise find that the will of Elsie A. Kleeb should be admitted to probate and affirm the decision of the District Court for Custer County, Nebraska.

At the time of her death on August 13, 1979, Elsie A. Kleeb was 83 years of age. She had been predeceased by her husband, William Kleeb, who died in April of 1972. Mrs. Kleeb left surviving two daughters, the appellants Velma Jezbera and Wilma Askey, and a son, the appellee Stewart Kleeb. By

the terms of her will which was executed on June 20, 1974, slightly more than 5 years before her death, Mrs. Kleeb left to each of her daughters the sum of $10, and the balance of her estate, which consisted principally of two farms, to her son, Stewart. The daughters have objected to the admission of the will to probate on the basis that their mother, at the time of the making of her will, was not competent to make such a will and, moreover, was unduly influenced by their brother, Stewart.

The record in this case discloses a story too often told concerning years of bickering and dispute between siblings. Sometime in 1959 Mrs. Kleeb was first diagnosed to have Parkinson's disease. The disease, as it does in most cases, advanced over the years until, by the early 1970s, Mrs. Kleeb was generally confined to a wheelchair, though she could move about in a somewhat limited fashion with the use of a walker. Both she and her husband, who had suffered a stroke in 1965, had been residing in a nursing home in Broken Bow since that time. In 1970 they moved to a nursing home in Sargent, Nebraska, where they lived until Mr. Kleeb died in 1972.

Shortly after Mr. Kleeb's death, Velma Jezbera was appointed as conservator for Mrs. Kleeb. Disputes soon developed among the children concerning the handling of Mrs. Kleeb's properties and affairs, and particularly the rental of some property by Stewart. In April of 1974 a petition was filed, ostensibly by Mrs. Kleeb, requesting that her daughter be discharged as conservator and that her brother, Henry Haumont, be appointed in her place. In May of 1974 Mrs. Kleeb's daughters, Velma Jezbera and Wilma Askey, instituted proceedings in the county court of Custer County, Nebraska, seeking to place their mother under guardianship. This filing apparently disturbed Mrs. Kleeb, because she believed that the daughters were seeking to have her de-

clared "crazy." She stated to a number of people how distressed she was by this action and how offended she was that her daughters were seeking to have her declared insane, though, in truth and in fact, such was not the case.

On June 18, 1974, while both the guardianship and conservatorship matters were then pending in the county court of Custer County, Nebraska, Mrs. Kleeb was taken by her son, Stewart, to Ord, Nebraska, where she was examined by a Dr. Otis W. Miller. The admitted purpose of the examination was to determine whether Mrs. Kleeb was competent to execute a will in view of the fact that there was then a proceeding pending seeking to have her placed under guardianship. On June 18, 1974, Dr. Miller and his colleague, Dr. Paul R. Martin, determined that Mrs. Kleeb was competent and that, other than having Parkinson's disease, she was capable of taking care of her own affairs. The following day, on June 19, 1974, Mrs. Kleeb was taken by her son, Stewart, to Taylor, Nebraska, where Albert F. Alder, an attorney, prepared a will for Mrs. Kleeb. She returned to Taylor, Nebraska, the following day and executed the will which has been admitted to probate as her last will and testament.

Thereafter, on July 5, 1974, pursuant to an order of the county court of Custer County, Nebraska, issued in the guardianship proceedings then pending, Mrs. Kleeb was taken to the Richard Young Memorial Hospital in Omaha, Nebraska, for evaluation as to her mental capacity. While the tests disclosed that Mrs. Kleeb experienced certain motor difficulties by reason of the Parkinson's disease, she showed no evidence of psychosis or mental disease as such and no evidence of gross mental incompetence. The guardianship proceedings were subsequently dismissed by the county court, and Mrs. Kleeb's brother, Henry Haumont, was appointed as conservator in accordance with her wishes.

While the record obviously is in conflict concerning the relationship between Mrs. Kleeb and her daughters, on the one hand, and her son, on the other, the evidence is without contradiction that, at the time of the making of the will in June of 1974, Mrs. Kleeb knew who her children were, knew exactly what property she owned, and knew how she desired to have that property disposed of in the event of her death. The most significant testimony on this point was offered by Charles McCaslin, a nonrelative of Mrs. Kleeb, and by Robert Kleeb, her nephew. Both witnesses testified that in the fall of 1977 Mrs. Kleeb requested that both of them come to see her. She visited with each individually and out of the presence of the other, and told both of them of the exact contents of her will and the fact that she was doing exactly what she desired to do.

We have frequently announced that a person who understands the nature of his acts, the extent of his property, the proposed disposition of it, and the natural objects of his bounty is competent to make a will. See, *In re Estate of Witte,* 145 Neb. 295, 16 N.W.2d 203 (1944); *Spier v. Spier,* 99 Neb. 853, 157 N.W. 1014 (1916).

Furthermore, in *In re Estate of Wahl,* 151 Neb. 812, 814, 39 N.W.2d 783, 786 (1949), we said: "The mental capacity of a testator is tested by the state of his mind at the time he executed his will. If the testator knows the extent and character of his property, the natural objects of his bounty, and the purposes of his devises and bequests, he is mentally competent to make a will."

The evidence in this case amply establishes that at the time Mrs. Kleeb executed her will she met all of the necessary requirements to make her competent to execute a will. Appellants argue that there is evidence to indicate that on certain of the psychological tests performed at the Richard Young Memorial Hospital, Mrs. Kleeb, according to the psy-

chologist, displayed the judgment of one 8 or 9 years of age. The effect of those tests in terms of her mental competence to make a will are not disclosed by the record, nor are we really able to determine the extent of competence by the results of the tests, particularly in view of the fact that Mrs. Kleeb was suffering from advanced Parkinson's disease. The tests do disclose, however, that she met all of the legal requirements for competence insofar as executing a will was concerned. What is disclosed by the record is that in June of 1974 Mrs. Kleeb knew what she was doing. One need not have either an extensive vocabulary or a college degree as a prerequisite to executing a valid will. The evidence simply fails to support a claim that Mrs. Kleeb was not competent to execute a will in June of 1974 when she did in fact execute her will.

Likewise, with regard to the claim that Mrs. Kleeb was unduly influenced by her son, the record again fails to support such a claim. It is obvious that there was a tugging and pulling between the children. It is likewise clear, although perhaps without justification, that Mrs. Kleeb was incensed by her daughters' filing of the guardianship proceedings. Indeed that may have been what motivated her to take the action in 1974 she took, but the 5 years which expired between the time she executed the will and her death did not seem to change her view. In the case of *In re Estate of Bowman,* 143 Neb. 440, 447-48, 9 N.W.2d 801, 805 (1943), we said: "In an action to set aside a will because of improper or undue influence exerted upon the testator, the burden of proof is upon the contestant. . . .

. . . .

" 'Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own.' "

As we have indicated, the evidence in this case

simply does not support such a finding. An individual does not lack testamentary capacity because he holds an unjust prejudice or belief generally regarded as peculiar and unsound. See *In re Estate of Wahl, supra.* In *McDonald v. McDonald,* 207 Neb. 217, 221, 298 N.W.2d 136, 138 (1980), speaking of a gift, we said: " ' "[The] undue influence which will void a . . . (gift) is an unlawful and fraudulent influence which controls the will of the donor. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control the will of the donor." ' "

We further said in *McDonald* at 221, 298 N.W.2d 138-39: " ' "The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance." [Citation omitted.]' "

What we said in *McDonald* with regard to a gift is likewise applicable with regard to the making of a will.

And, finally, the fact that the attorney who prepared Mrs. Kleeb's will did legal work for her son, Stewart, absent any other evidence, is likewise not decisive. Again, in *McDonald, supra* at 223, 298 N.W.2d at 139, we said: " 'The mere fact that the grantee procures an attorney to prepare the deed does not prove that the deed was obtained by improper means.' " Again, we believe that the same applies with regard to the making of a will.

In reviewing the entire record, we are of the opinion that Mrs. Kleeb was, at the time of the making of her last will and testament, fully competent to make

such will and that the same was not as the result of undue influence, though it may have been as a result of unfair anger. That is not sufficient to cause us to void the will. The trial court was in all respects correct in admitting the will to probate, and the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. RICHARD W. KELLEY, APPELLEE.

320 N.W.2d 455

Filed June 4, 1982. No. 81-676.

1. **Lesser-Included Offenses.** A lesser-included offense is one, the elements of which include some, but not all, of the elements of the greater offense, i.e., the lesser is fully embraced in the greater. Stated another way, a lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged.
2. _____. Motor vehicle homicide is a lesser-included offense of manslaughter.
3. **Preliminary Hearings: Plea in Abatement.** The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceeding in the District Court.
4. _____: _____. It is fundamental that a claim that a defendant was not accorded a preliminary hearing, nor waived it, is determinable by plea in abatement.
5. **Indictments and Informations: Jurisdiction: Preliminary Hearings.** It is likewise true that the District Court is without jurisdiction to try on information one accused of committing a felony within the state unless the defendant is first accorded the privilege of a preliminary examination or waives the same.
6. **Indictments and Informations: Preliminary Hearings.** No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, unless such person shall waive his or her right to such examination, except as otherwise provided in the Uniform Criminal Extradition Act.
7. **Complaints: Indictments and Informations: Plea in Abatement.** In a prosecution by information, the complaint and information must charge the same offense, but it is sufficient if the charge in

the information is substantially the same as that alleged in the complaint. If this is so, a plea of no preliminary examination on the ground of a variance between the complaint and the information is without force.

8. **Preliminary Hearings: Complaints: Probable Cause.** If the evidence adduced at a preliminary hearing is insufficient to show probable cause that the crime charged in the complaint was committed and that the defendant committed it, the examining magistrate must dismiss the complaint.

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

George Rhodes, for appellant.

John O. Sennett of Black & Sennett, for appellee.

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

WHITE, J.

The defendant, Richard W. Kelley, was charged with manslaughter in a complaint filed in the county court of Custer County, Nebraska, on April 10, 1981. A preliminary hearing was held on April 28, 1981, in the county court. On May 4, 1981, the county court bound the defendant over to the District Court for Custer County, Nebraska, on a charge of motor vehicle homicide. The county attorney, on June 10, 1981, filed an information in the District Court for Custer County, Nebraska, charging the defendant with felony motor vehicle homicide. The defendant filed an amended plea in abatement, which was granted by the District Court. After a motion for new trial was overruled, the county attorney filed application for leave to docket error proceedings pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1979). We granted the application and this appeal ensued.

On January 7, 1981, Clarence Burge and Edmund Johnson were walking north across South E Street at the intersection between 9th and 10th Streets, in Broken Bow, Nebraska. A westbound pickup truck

driven by the defendant, Richard W. Kelley, proceeded through the intersection and struck both pedestrians. One of the pedestrians, Edmund Johnson, died as the result of the injuries he sustained in the accident.

At the preliminary hearing held on April 28, 1981, in the county court of Custer County, witnesses testified that the windshield on the pickup truck driven by Richard Kelley was fogged over except for two small areas about 7 inches square. There also was a statement from a witness that the windshield was fogged over. One of the pedestrians, Clarence Burge, testified that he and Edmund Johnson were walking across the intersection on a green light with the walk sign showing. In the investigating officer's police report, a witness told the officer that the pedestrians were in the crosswalk and were walking slowly across the intersection against a red light. At the close of the hearing, the county court judge stated: "The Court finds that the defendant caused the death of another while violating statute other than DWI or reckless driving and is therefore—that is reason to believe that he has, and that therefore there is reason to believe the defendant committed Misdemeanor Motor Vehicle Homicide and is bound over to District Court with his present bond.

. . . .

"I am reducing that to Motor Vehicle Homicide because I don't think you have enough evidence here to sustain a manslaughter charge.

. . . .

"I do not—I will not, and I am not disposed to finding guilty a manslaughter. I do not feel the facts justify a manslaugher [sic] charge."

Thereafter, on May 4, 1981, the county court entered an order binding the defendant over to the District Court for Custer County on a charge of motor vehicle homicide under Neb. Rev. Stat. § 28-306 (Reissue 1979). In that order the county court found

"[t]hat the State has failed to show probable cause that the Defendant committed the crime of Manslaughter as defined in §28-305 of the Nebraska statutes . . . ."

After the defendant was bound over to the District Court, the county attorney filed an information charging the defendant with felony motor vehicle homicide, a violation of § 28-306(3). The defendant challenged the information by filing an amended plea in abatement. In his amended plea in abatement, the defendant contends that there was insufficient evidence produced at the preliminary hearing to prove there was probable cause to believe that the defendant had committed the crime of involuntary manslaughter, and, further, that he was not bound over to the District Court on either the charge in the complaint or the charge in the information. The county attorney replied by alleging that there was sufficient evidence adduced at the preliminary hearing to establish probable cause to believe that the defendant had committed felony motor vehicle homicide. The county attorney contends that manslaughter would include felony motor vehicle homicide as a lesser-included offense and therefore an additional preliminary hearing is not needed since there is no prejudice to the defendant and the evidence would be the same. Manslaughter is defined in Neb. Rev. Stat. § 28-305 (Reissue 1979) as: "(1) 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.

"(2) Manslaughter is a Class III felony."

Motor vehicle homicide is defined in § 28-306, and provides: "(1) A person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide.

"(2) Except as provided in subsection (3) of this section, motor vehicle homicide is a Class I misdemeanor.

"(3) If the proximate cause of the death of another is the operation of a motor vehicle in violation of section 39-669.01, 39-669.03, or 39-669.07, motor vehicle homicide is a Class IV felony."

Neb. Rev. Stat. § 39-669.01 (Reissue 1978) provides: "Any person who drives any motor vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property shall be deemed to be guilty of reckless driving."

Neb. Rev. Stat. § 39-669.03 (Reissue 1978) provides: "Any person who drives any motor vehicle in such a manner as to indicate a willful disregard for the safety of persons or property is guilty of willful reckless driving."

Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1980) provides in part: "It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or when that person has ten-hundredths of one per cent or more by weight of alcohol in his or her body fluid as shown by chemical analysis of his or her blood, breath, or urine. Any person who shall operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or while having ten-hundredths of one per cent by weight of alcohol in his or her body fluid as shown by chemical analysis of his or her blood, breath, or urine shall be deemed guilty of a crime . . . ."

"A lesser-included offense is one, the elements of which include some, but not all, of the elements of the greater offense, i.e., the lesser is fully embraced in the greater." See *State v. Carter,* 205 Neb. 407, 410, 288 N.W.2d 35, 37 (1980). Stated another way, a lesser-included offense is one which includes some of

the elements of the crime charged without the addition of any element irrelevant to the crime charged. See *State v. Aby,* 205 Neb. 267, 287 N.W.2d 68 (1980). Since both crimes require that the person charged cause the death of another unintentionally while in violation of the law, motor vehicle homicide is a lesser-included offense of manslaughter. Manslaughter can be committed when someone causes the death of another unintentionally while operating a motor vehicle in violation of the law.

The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceeding in the District Court. *Kruger v. Brainard,* 183 Neb. 455, 161 N.W.2d 520 (1968).

"It is fundamental that a claim that a defendant was not accorded a preliminary hearing, nor waived it, is determinable by plea in abatement." *State v. Moss,* 182 Neb. 502, 506, 155 N.W.2d 435, 438 (1968); *State v. Forbes,* 203 Neb. 349, 278 N.W.2d 615 (1979).

It is likewise true that the District Court is without jurisdiction to try on information one accused of committing a felony within the state unless the defendant is first accorded the privilege of a preliminary examination or waives the same. *Latimer v. State,* 55 Neb. 609, 76 N.W. 207 (1898); *State v. Forbes, supra.* "No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, unless such person shall waive his or her right to such examination, except as otherwise provided in the Uniform Criminal Extradition Act. . . ." Neb. Rev. Stat. § 29-1607 (Cum. Supp. 1980).

In *Mills v. State,* 53 Neb. 263, 73 N.W. 761 (1898), this court said: "In a prosecution by information, the complaint and information must charge the same offense, but it is sufficient if the charge in the information is substantially the same as that alleged

in the complaint. If this is so, a plea of no preliminary examination on the ground of a variance between the complaint and the information is without force." (Syllabus of the court.) See, *Cowan v. State,* 22 Neb. 519, 35 N.W. 405 (1887); *Hockenberger v. State,* 49 Neb. 706, 68 N.W. 1037 (1896); *Wheeler v. State,* 79 Neb. 491, 113 N.W. 253 (1907); *Nichols v. State,* 109 Neb. 335, 191 N.W. 333 (1922); *Van Syoc v. State,* 69 Neb. 520, 96 N.W. 266 (1903).

The defendant in this case was charged with manslaughter in the complaint and with felony motor vehicle homicide in the information. The two charges are substantially the same; however, the county court ruled that there was not sufficient evidence for manslaughter, and also stated the defendant had violated a statute other than driving while intoxicated or reckless driving, two of the elements of felony motor vehicle homicide. Although the record would support either a manslaughter charge or a felony motor vehicle homicide charge, the county court, in view of its findings, should have refused to bind over the defendant and dismissed the complaint.

Since the charge in the information is at variance with the findings of the county court, the District Court was correct in granting the plea in abatement. The District Court's order granting the plea in abatement and overruling plaintiff's motion for a new trial is hereby affirmed.

AFFIRMED.

PEGGY MARIE FREDERIKSEN, APPELLEE, V. GARY DEAN FREDERIKSEN, APPELLANT.

320 N.W.2d 455

Filed June 4, 1982. No. 81-679.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Affirmed.

L. William Kelly III, for appellant.

Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellee.

Heard before 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.

IN RE ADOPTION OF DANA D. AND ERIC L. SIMONTON, MINOR CHILDREN.

HOWARD L. SIMONTON, APPELLANT, V. JULEEN L. YOUNG ET AL., APPELLEES.

320 N.W.2d 449

Filed June 4, 1982. No. 81-682.

1. **Adoption: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 24-541 (Reissue 1979), adoption proceedings were reviewable de novo on the record in both the District Court and in this court.
2. **Adoption.** In an adoption proceeding, a finding of abandonment under the provisions of Neb. Rev. Stat. § 43-104 (Reissue 1978) must be supported by clear and convincing evidence.
3. ——. As a general rule, adoption statutes will be construed strictly in favor of the rights of the natural parents in controversies

involving termination of the relation of the parent and the child, and especially is this true in those cases where it is claimed that owing to the willful abandonment of the child, the consent of the parent to the adoption is not required.

4. _____. The critical period of time during which abandonment must be shown to eliminate the necessity of obtaining consent to adoption from a parent under the provisions of Neb. Rev. Stat. § 43-104 (Reissue 1978) is the 6 months *immediately preceding* the filing of the petition for adoption. However, evidence of a parent's conduct either before or after this statutory period may be considered as relevant to a determination of whether the purpose and intent of that parent was to abandon the child or children.
5. _____. Where there has been a protracted period of totally unjustified failure to exercise parental functions, an isolated contact or expression of interest does not necessarily negate the inference that a person no longer wishes to act in the role of a parent to a child.
6. _____. In an adoption proceeding, the ties of a natural parent are not to be treated lightly.
7. _____. To prove abandonment in adoption proceedings, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forego all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities. Mere inadequacy is not the test.

Appeal from the District Court for Adams County: FRED R. IRONS, Judge. Reversed and dismissed.

William T. Wright of Parker, Grossart, Bahensky & Wright, for appellant.

Douglas Pauley of Conway and Connolly, for appellees.

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

HASTINGS, J.

The county court entered a decree which was filed on January 14, 1981, ordering the adoption of Eric and Dana Simonton, then ages 10 and 13 respectively, on the petition of Kenneth L. and Juleen L. Young, the stepfather and natural mother of said children. In doing so, it found that Howard L.

Simonton, the natural father, had "abandoned his minor children in excess of six months before the institution of these proceedings." Howard appealed to the District Court, which affirmed the county court, and the matter is now here on appeal following the filing of a notice of appeal in the trial court on August 25, 1981.

Although no bill of exceptions from the District Court appears in the record, the testimony from county court was properly filed in the District Court, and it is marked as an exhibit over the initials of the district judge. There is no objection by either party to this apparent deficiency in the record, and it is obvious that such testimony was considered as having been received in evidence. Accordingly, we will consider the same on appeal to this court. *Blaha GMC-Jeep, Inc. v. Frerichs, ante* p. 103, 317 N.W.2d 894 (1982). Insofar as this case is concerned, the standard of review in both the District Court and in this court is de novo on the record. *Riggert v. King,* 192 Neb. 607, 223 N.W.2d 155 (1974); Neb. Rev. Stat. § 24-541 (Reissue 1979).

Assigned as errors are the claims that both the county court and the District Court found abandonment *in excess of 6 months* before institution of adoption proceedings, rather than for *6 months next preceding* the filing of the adoption petition; that the finding of abandonment is not supported by clear and convincing evidence; and that the courts below considered the best interests of the children before having made the factual determination of abandonment.

We recently determined that the burden of proof as to the issues of abandonment and substitute consent in an adoption proceeding requires that an abandonment be established by clear and convincing evidence. *In re Guardianship of Sain, ante* p. 508, 319 N.W.2d 100 (1982).

Howard and Juleen were married in 1962 and their

marriage was dissolved in April of 1972 by a decree of the District Court for Lancaster County, Nebraska. Juleen was awarded custody of the two children. Juleen and Kenneth were married in November of 1975.

Juleen was allowed to testify over objection as to Howard's contacts with the children from the time of the divorce until the time of the hearing. Although Neb. Rev. Stat. § 43-104(3)(b) (Reissue 1978) requires proof of abandonment for "at least six months next preceding the filing of the adoption petition," as we will show later we believe that the testimony was properly received. We preface this discussion with Juleen's admission that although the petition for adoption was filed in the county court in August of 1980, a motion to secure the permission of the District Court for Lancaster County for the adoption was filed in April of 1979.

According to her testimony, both Juleen and Howard lived in Colorado from 1972 until 1975, and although Howard saw the boys on occasion, it was not more than once every 2 or 3 months. Juleen went on to testify that after her return to Nebraska in 1975 and up until the filing of this action, Howard saw the boys "not very much at all." After referring to her notes, Juleen said that he had had the boys for Christmas Day, 1975, for 2 days in 1976, and 2 separate days in 1977. She also mentioned that Howard had written a certified letter to her during the summer of 1980, inquiring as to whether the boys could come out to Colorado to visit. His request was refused by Juleen, she said, because "he had not seen the boys for such a long time and had not paid any child support and since we had filed the adoption, I did not feel that it would be to the best interest of the boys for them to see him at that time." Finally, in this regard, she testified that she had not refused visitations at any other time, that other than the visits mentioned Howard had not requested any visits, and

that Howard had last seen the boys just before Christmas of 1977.

With regard to child support payments, Juleen testified that Howard had made the following payments through the clerk of the Lancaster County District Court: $150 monthly support payments from June to December 1972; a $1,800 lump sum payment in December 1979; and two $150 payments in June and August of 1980. Furthermore, Juleen agreed that Howard had given her the equivalent of $550 in child support in the form of his having rented a truck and transported her things back to Nebraska in 1975.

Juleen also testified about other forms of contact Howard had maintained with the boys. She stated that during the period between 1975 and 1977 Howard had made some phone calls to the boys, sent few, if any, cards, and had given one of the boys a $20 birthday gift in January of 1977 or 1978. She also agreed that he had given each of the boys $50 for Christmas in 1979, and that just before the court appearance in the District Court for Lancaster County in June of 1980, when the court granted permission to adopt, Howard had called the boys on the telephone. He also sent them cards in the latter part of July 1980, called them again in July, and sent them cards twice in September and at Halloween.

Howard's testimony would tend to show that he made all child support payments for which he was obligated through the year 1975. He also claims to have made direct cash payments of $1,800 in 1976 and $600 in 1977. He admits paying nothing in 1978, agrees as to the $1,800 paid in 1979, and concedes that no more than $300 was paid in 1980. He contends that the payments not disclosed by the clerk's records or admitted by Juleen were direct payments by cash or checks, receipts for which he had, but that they were located at his home in Colorado. His reasons for failing to make the support payments include business conditions, an automobile accident,

and the absence of a request for payments from the children's mother. Howard also claimed to have sent cards to the boys in 1980, as related by their mother, and he had retained photocopies of them. He insisted that he had made many phone calls during the year 1980, but was only able to complete the calls on one or two occasions. He says that he was specifically refused a visitation in July of 1980, and because of trouble with visitations in the past, he filed an application in June of 1980 with the District Court for Lancaster County for specific visitations. He stated that the only reason he did not visit his boys in the period March to August of 1980 was due to Juleen's denial of visitation rights. Howard testified that he loved his children and wished to remain as a legal parent and to have opportunities to be with them.

As a general rule, adoption statutes will be construed strictly in favor of the rights of the natural parents in controversies involving termination of the relation of the parent and child, and especially is this true in those cases where it is claimed that owing to the willful abandonment of the child, the consent of the parent to the adoption is not required. *McCauley v. Stewart,* 177 Neb. 759, 131 N.W.2d 174 (1964); *In re Gregory,* 118 R.I. 178, 372 A.2d 1277 (1977); *In re Sharp,* 197 Kan. 502, 419 P.2d 812 (1966).

Section 43-104 requires consent of the parents of a child who is to be adopted, except that no consent is required of a parent who has "abandoned the child for at least six months next preceding the filing of the adoption petition." Apparently we have never defined the word "abandoned" when used in this context. However, the courts of other jurisdictions have done so. " 'To constitute abandonment under our code it must appear . . . that there has been by the parents a giving-up or total desertion of the minor child. In other words, there must be shown an absolute relinquishment of the custody and con-

trol of the minor and thus the laying aside by the parents of all care for it.' " *In re Adoption of Christofferson,* 89 S.D. 287, 290, 232 N.W.2d 832, 834 (1975). North Carolina requires that there be "willful or intentional conduct on the part of the . . . parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child, or a willful neglect and refusal to perform the natural and legal obligations of parental care and support." *In re Cardo,* 41 N.C. App. 503, 507, 255 S.E.2d 440, 442 (1979).

Willful abandonment has been defined as "a voluntary and intentional relinquishment of the custody of the child to another, with the intent to *never again* claim the rights of a parent or perform the duty of a parent; or, second, an intentional withholding from the child, without just cause or excuse, by the parent, of his presence, his care, his love and his protection, maintenance, and the opportunity for the display of filial affection . . . ." *Young v. Young,* 588 S.W.2d 207, 209 (Mo. App. 1979).

There can be no serious dispute but that the critical period of time during which abandonment must be shown is the 6 months immediately preceding the filing of the adoption petition. § 43-104(3)(b). *In re Cardo, supra; Matter of Adoption of Baby Girl Doe,* 621 S.W.2d 87 (Mo. App. 1981). However, the various definitions of abandonment do not require us to view this statutory period in a vacuum. One may consider the evidence of a parent's conduct, either before or after the statutory period, for this evidence is relevant to a determination of whether the purpose and intent of that parent was to abandon his child or children. *Young v. Young, supra.*

Where there has been a protracted period of totally unjustified failure to exercise parental functions, an isolated contact or expression of interest does not necessarily negate the inference that a person no longer wishes to act in the role of parent to a child.

Matter of Thomas F. L., 87 Misc. 2d 744, 386 N.Y.S.2d 726 (1976). The parental obligation is a positive duty which encompasses more than a financial obligation. It requires continuing interest in the child and a genuine effort to maintain communication and association with that child. Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child. *Matter of Adoption of David C.,* 479 Pa. 1, 387 A.2d 804 (1978).

The record adequately details the many shortcomings of this father in his relationship with his sons. It leaves some question as to whether he is genuinely repentant of his past behavior or simply desires to place an obstacle in the mother's plans for adoption. However, he is benefited by the legal axiom that the ties of a natural parent are not to be treated lightly. *In re Sharp, supra.*

This case is strikingly similar on its facts to that of *Matter of Susan W. v. Talbot G.,* 34 N.Y.2d 76, 356 N.Y.S.2d 34 (1974). In reviewing the factual findings of the Family Court, which found abandonment by the father, the New York Court of Appeals stated as follows: "Emphasis was placed on the fact that 'the only time this respondent even attempted to fulfill his parental duties was after petitioners instituted adoption proceedings'; but, as has been noted, the adoption proceeding was not commenced until after Talbot had indicated he was coming to visit. The court also emphasized the lack of support payments, finding it 'incredible' that Talbot could raise $1,700 on one occasion and $1,400 on another, both times being, however, the occasion of adoption proceedings. The court was critical not only of Talbot's failure to support, but also his failure to inquire after their wellbeing or proffer any sort of parental love. The court found that Talbot's 'actions in making telephone calls once or twice a year, sending birthday cards containing money and a very infrequent gift,

are a sham and contrived to give an appearance of compliance with legal requirements so as to avoid abandonment status and to thwart adoption.' " *Id.* at 79, 356 N.Y.S.2d at 36.

Nevertheless, in concluding that the petitioners had not sustained their burden of proving abandonment by the father, the court went on to say: "However much one might be impressed with Family Court's graphic denunciation of Talbot as an inadequate father, we are unable to agree with him that Talbot's 'neglect' amounts to legal abandonment. Mere inadequacy is not the test. . . . [A]bandonment can be made out only from 'a settled purpose to be rid of all parental obligations and to forego all parental rights' . . . . [T]here must be a complete 'repudiation of [parent]hood and an abandonment of [parental] rights and responsibilities' . . . . Even where the flame of parental interest is reduced to a flicker the courts may not properly intervene to dissolve the parentage." *Id.* at 79-80, 356 N.Y.S.2d at 37-38.

We conclude that the petitioners-appellees have failed to meet their burden of proving by clear and convincing evidence that appellant had acted in a manner evidencing a settled purpose to be rid of all parental obligations and to forego all parental rights. There is no evidence showing a complete repudiation of parenthood and an abandonment of parental rights and responsibilities. Therefore, we cannot find that appellant had abandoned these children within the meaning of the statutes governing adoptions, and, accordingly, the decree of adoption is vacated and the proceedings ordered dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. ALLEN E. GINGRICH, APPELLANT.

320 N.W.2d 445

Filed June 4, 1982. No. 81-811.

1. **Speedy Trial.** A defendant's right to a speedy trial as specified by Neb. Rev. Stat. § 29-1207 (Reissue 1979) begins when he is indicted or is informed against.
2. _____. The constitutional right to a speedy trial and the statutory implementation of that right under Neb. Rev. Stat. § 29-1207 (Reissue 1979) exist independently of each other. Any unreasonable delay occurring prior to the filing of an information will be considered, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial.
3. _____. Any inquiry into a claim of denial of a speedy trial necessitates a functional analysis of the right in the particular context of the case, as the right of speedy trial is necessarily relative.
4. **Search Warrants: Affidavits: Constitutional Law.** An affidavit for search warrant is sufficient to meet the standards of the fourth amendment to the Constitution of the United States if it complies with the ruling in *United States v. Harris,* 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971).
5. **Identification Procedures: Due Process.** Whether an identification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it.
6. **Records: Appeal and Error.** The inclusion of evidence in the bill of exceptions is the only vehicle for bringing evidence before this court on appeal. Evidence not included in the bill of exceptions may not be considered.

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

Curtis A. Sikyta, for appellant.

Paul L. Douglas, Attorney General, and Shandler D. Cronk, for appellee.

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

CLINTON, J.

The defendant Gingrich was convicted of burglary by a jury in the District Court for Sherman County, Nebraska, and sentenced to a term of 1 year in the

Nebraska Penal and Correctional Complex with credit being given for 42 days' jail time.

The defendant appeals to this court and makes 15 assignments of error. Those which will require discussion are the following: (1) The defendant was denied a speedy trial as required by Neb. Rev. Stat. §§ 29-1207 and 29-1208 (Reissue 1979) and by the pertinent provisions of the Constitutions of the State of Nebraska and the United States. (2) The evidence was insufficient to support the verdict. (3) The court erred in failing to suppress evidence seized in the search of a motor vehicle. (4) The court erred in not suppressing identification testimony of eyewitnesses.

The first assignment makes necessary an outline of procedural events. Some of the dates which follow cannot be determined from the transcript and are taken from recitals by counsel for the defendant during hearings before the District Court and which appear to have been accepted by both the State and the district judge as accurate. A complaint charging the defendant with the crime of robbery was filed in the county court of Sherman County on August 25, 1980. The defendant had been arrested on August 23, 2 days earlier and within a few hours of the commission of the crime. On September 24 the defendant waived preliminary hearing on the robbery charge and was released on bond. On January 14, 1981, the information charging robbery was filed in the District Court. On February 6, 1981, a plea bargain was presented to the court and refused. There is no evidence in the record indicating the nature of the plea bargain, by whom it was initiated, or the time consumed in arriving at the proposed bargain. On February 25 an information charging burglary was filed in the District Court. This charge apparently was based on the same transaction as the charge of robbery. On February 27 the defendant filed a motion to dismiss for failure to grant a

speedy trial. A hearing on that motion was held on the same day, and the motion was overruled. No evidence was introduced. At that time the defendant demanded a preliminary hearing on that charge, and the District Court sent the matter back to the county court for a preliminary hearing. On March 12, 1981, the defendant was bound over to the District Court on the burglary charge. The arraignment on the burglary charge was held on March 13, 1981, and the defendant entered a plea of not guilty. The county attorney announced his election to go to trial on the charge of burglary, and trial date was set for June 29. Ten days previous to June 29, the defendant filed a motion to dismiss for failure to grant a speedy trial as required by § 29-1208 and the constitutional provisions, and a motion to suppress. After hearing on that motion and the motion to suppress was held on June 29, they were overruled.

The defendant argues that the period between the time of filing the complaint in the county court on August 25, 1980, and the trial beginning June 29, 1981, constituted an unreasonable delay and a deprivation of the right to a speedy trial under both constitutional and statutory requirements. He further argues that in applying the statute, the period between the filing of the complaint and the filing of the information should be included.

Section 29-1207 provides that any person indicted or informed against shall be brought to trial within 6 months. The time begins to run from the date of indictment or filing of the information, excluding such periods as are specified in the statute. Section 29-1208 provides that if the defendant is not brought to trial before the running of the time for trial, as extended by the excluded periods, then the defendant is entitled to an absolute discharge.

Apparently 3 months and 20 days elapsed between the date the defendant was released on bond after waiving preliminary hearing and the time of the fil-

ing of the information on the robbery charge. Neither the defendant nor the State introduced any evidence explaining this delay.

The defendant's right to a speedy trial as specified by § 29-1207 begins when he is indicted or is informed against. *State v. Costello,* 199 Neb. 43, 256 N.W.2d 97 (1977); *State v. Spidell,* 192 Neb. 42, 218 N.W.2d 431 (1974); *State v. Born,* 190 Neb. 767, 212 N.W.2d 581 (1973).

In *Costello, supra,* we said: "The constitutional right to a speedy trial and the statutory implementation of that right under section 29-1207, R.R.S. 1943 . . . exist independently of each other. . . . Any unreasonable delay occurring prior to the filing of an information will be considered, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial." 199 Neb. at 49, 256 N.W.2d at 102. See, also, *State v. Born, supra.* Accordingly, we must examine the record to determine whether the defendant's constitutional right to a speedy trial was violated.

Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), is the leading case on the constitutional right to a speedy trial. There the U.S. Supreme Court said that a defendant's constitutional right to a speedy trial cannot be established by any inflexible rule, but can be determined only on an ad hoc balancing basis in which the conduct of the prosecution and that of the defendant are weighed. The Court said that an assessment should be made of such factors as the length of and the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. In that case more than 5 years elapsed between the time of the arrest and the trial. The prosecution obtained numerous delays related to the trial of an accomplice because it wanted to secure a conviction of the accomplice so that his testimony might be used against the defendant. The

Court noted that there was no serious prejudice to the defendant because of the delay, that he had not pressed for a speedy trial, and concluded that he had not been deprived of his due process right to a speedy trial.

The record in the case at bar shows no prejudice whatever to the defendant as a consequence of the delay in the filing of the information, nor as a result of the less than 6 months which elapsed between the filing of the information and trial. The defendant was free on bond from the time of the waiver of preliminary hearing on the robbery charge until the time of trial. He did not press for trial until February 27. According to his own counsel, some plea negotiations were taking place after the filing of the information and before February 27. It does not appear that the delay caused any loss of evidence or that preparation for trial was hindered. On March 13, immediately after the preliminary hearing on the burglary charge, the information was filed and the trial was set for June 29. We hold that under the circumstances, giving due consideration to the speedy trial policy established by §§ 29-1207 and 29-1208, the defendant was not deprived of his constitutional right to a speedy trial.

There is no merit to the defendant's claim that the evidence was insufficient to support the verdict. The evidence, if believed by the jury, would permit it to find that the defendant Gingrich and a companion, at about 11:45 p.m. on August 22, 1980, broke the lock on the door of the enclosed porch of the residence where John Pokorsky lived with his parents in Loup City, Nebraska. At the time, defendant and his companion were armed with a tire iron and a club (described in some of the testimony as a tire checker). The two men entered the porch, proceeded to the front door, and awakened Pokorsky by pounding on the door. The latter went to the door and observed the two men through the window of the

door. He opened the door slightly, and the pair "shoved" their way into the house. Each still carried the weapons described. They pushed Pokorsky into his bedroom and demanded his money. He took $90 from his billfold and gave it to them. At that time the telephone rang. It rang four or five times and then Pokorsky answered it after being told by one of the men to be careful what he said. The party calling was a neighbor, Dewey Polen. He asked Pokorsky if there was trouble. Pokorsky gave an equivocal answer, and Polen's response indicated, according to Pokorsky, that Polen had gotten the "drift." At the time Polen made the call to Pokorsky, he had just returned to his own home, which was located directly across the street from the Pokorsky residence; he had been at the home of a friend, Mark Eurek, who was celebrating his birthday. Polen had been called by his daughter who had made observations which alarmed her and caused her to believe that something unusual was going on at the Pokorsky residence. When Polen received the call from his daughter, he and Eurek got into a car and drove past the Pokorsky residence. They observed a two-tone pickup truck parked adjacent to the residence. It bore license plates county 62 and the first two of the other four digits were 10. They could not make out whether the license was commercial or farm. Polen and Eurek then went into the Polen home. Polen made the call to Pokorsky earlier referred to and then called the police. Eurek, who was observing through a window, announced that the pickup was leaving. Polen ran into the front yard, saw the pickup being driven away, and observed the person at the wheel. Eurek had seen two men come from the direction of the Pokorsky house and get into the vehicle. One was bearded, and he judged from their motions and build that both were male.

Shortly thereafter the police arrived. Pokorsky

gave the police a description of the men. Polen and Eurek gave a description of the motor vehicle and the license plate. A general search of the area around Loup City resulted in the arrest of the defendant and his companion in a pickup meeting the description of that seen at the Pokorsky house and bearing license plates as described by Polen and Eurek. Pokorsky identified the defendant at trial as one of the participants in the crime. In the pickup, a tire iron and a club meeting the description of the weapon carried by one of the men were found. Also found were rubber gloves of the type Pokorsky had described as being worn by the men when they entered the home. The evidence was clearly sufficient to support either the charge of burglary or robbery.

The motor vehicle was searched pursuant to a warrant. As a consequence, the tire iron, the club, and the gloves similar to those described by Pokorsky were found in the truck. These items were described in the warrant. An examination of the affidavit clearly shows that it stated probable cause for the issuance of the warrant. An affidavit for search warrant is sufficient to meet the standards of the fourth amendment to the Constitution of the United States if it complies with the ruling in *United States v. Harris,* 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971). The court did not err in refusing to suppress the evidence.

Pokorsky identified the two participants at a showup in the sheriff's office immediately after the arrest. The court did not permit this identification testimony to be received by the jury, but permitted Pokorsky at trial to testify to the identity of the defendant as one of the persons who had entered his home. It is clear that Pokorsky had an ample independent opportunity to observe the defendant at the time the crime was committed and make the identification wholly independent of the showup, even if we assume there was something suggestive in the

showup. Whether an identification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it. *State v. Banks,* 195 Neb. 340, 237 N.W.2d 875 (1976). The trial court did not err in permitting Pokorsky to testify as to the identity of the defendant.

The remaining assignments of error are wholly frivolous or do not find support in the evidence. Among the errors assigned are improprieties in the jury panel and misconduct of counsel. No evidence to support the alleged errors is in the record. The inclusion of evidence in the bill of exceptions is the only vehicle for bringing evidence before this court on appeal. Evidence not included in the bill of exceptions may not be considered. *Dilsaver v. Pollard,* 191 Neb. 241, 214 N.W.2d 478 (1974).

AFFIRMED.

HARRIS L. NELSON, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

320 N.W.2d 444

Filed June 4, 1982. No. 81-845.

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

George A. Sommer, for appellant.

Paul L. Douglas, Attorney General, and Warren D. Lichty, Jr., and John P. Regan, for appellee.

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

PER CURIAM.

This is an appeal from an award of appraisers in a condemnation action in the county of Scotts Bluff,

Nebraska. The notice of the award of the appraisers was made on November 15, 1978. The bond and notice of appeal were filed on December 11, 1978.

The petition on appeal was not filed until July 1981. On a motion by the State to dismiss for failure to timely file a petition on appeal, the court entered an order dismissing the plaintiff's appeal. A motion for new trial was filed and was overruled. Plaintiff prosecutes this appeal.

It is well settled that a petition on an appeal from the award of the appraisers in an eminent domain proceeding must be filed by the party first appealing within 50 days of the date of the filing of the notice of appeal. Neb. Rev. Stat. § 27-1306 (Reissue 1964). *Estate of Tetherow v. State,* 193 Neb. 150, 226 N.W.2d 116 (1975); *Jensen v. Omaha Public Power Dist.,* 159 Neb. 277, 66 N.W.2d 591 (1954).

In the absence of a showing of good cause, failure to file the petition on appeal in an eminent domain proceeding at the time may subject the appeal to dismissal in the exercise of sound discretion by the trial court. Neb. Rev. Stat. § 27-1307 (Reissue 1964); *City of Seward v. Gruntorad,* 158 Neb. 143, 62 N.W.2d 537 (1954).

Plaintiff's counsel, who had acted as such through all of the proceedings, including the proceedings in the county court, testified at length of the many litigation matters that were being handled by him for the plaintiff. The petition on appeal was very simple. Plaintiff offers no excuse except that he had difficulty locating an appraiser to testify as to values and that he was of the impression that a petition on appeal need not be filed. We previously held, in *Jensen v. Omaha Public Power Dist., supra,* that the fact that counsel is misinformed or uninformed as to the requirements of filing a petition on appeal in the District Court is not a showing of good cause within the meaning of the statute. No other suitable ex-

cuse relating to the failure to file a petition on appeal was offered. This is an obvious case of gross neglect by counsel, and the trial court did not abuse its discretion in dismissing the appeal for failure to file a petition for 2½ years after the notice of appeal was given.

The judgment of the District Court is affirmed.

AFFIRMED.

SHIRLEY MAXINE KINGERY, APPELLEE, V. FRANCIS RUSSELL KINGERY, APPELLANT.

320 N.W.2d 441

Filed June 4, 1982. No. 81-855.

1. **Alimony.** That portion of Neb. Rev. Stat. § 42-365 (Reissue 1978) which provides: "Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient," terminates the alimony by operation of law when the condition occurs.
2. _____. Awards of alimony in gross are not excluded from the operation of the provisions of Neb. Rev. Stat. § 42-365 (Reissue 1978).
3. _____. A provision in an order of the court awarding alimony in gross payable in installments is not removed from the operation of Neb. Rev. Stat. § 42-365 (Reissue 1978) merely because the order includes the provision "until the total alimony award . . . is paid in full."

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

S. Caporale, for appellant.

Donald A. Roberts of Lustgarten & Roberts, for appellee.

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

CLINTON, J.

The question raised on this appeal is whether the wife's right to alimony under a decree of dissolution entered on February 13, 1980, under the provisions of Neb. Rev. Stat. § 42-365 (Reissue 1978), was terminated by her remarriage. The decree of dissolution provided: "That the Respondent shall pay through the Clerk of the District Court of Douglas County, Nebraska as alimony for the Petitioner, the total sum of $10,000.00, payable at the rate of $150.00 per month, payable at the rate of one-half or $75.00 on the 15th of February, 1980, and one-half or $75.00 on the 1st and the 15th of each and every month thereafter until the total alimony award of $10,000.00 is paid in full." The wife, by pleading, admitted that she had remarried in February 1981.

The trial court entered an order finding that paragraph XVI provided for alimony in gross which did not terminate upon her remarriage. The husband appeals and relies upon the provisions of § 42-365, which provides in part: "Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient." The wife relies upon various decisions of this court which hold that awards of alimony in gross are not subject to modification or termination. All of the authorities upon which she relies relate to decrees entered prior to July 6, 1972, the effective date of § 42-365. Likewise, reliance is placed upon our more recent holding in *Watters v. Foreman,* 204 Neb. 670, 284 N.W.2d 850 (1979).

In *Karrer v. Karrer,* 190 Neb. 610, 211 N.W.2d 116 (1973), we held that an award of alimony in gross entered prior to July 6, 1972, was not subject to modification or termination under § 42-365, because it was beyond the power of the Legislature to provide for the modification of a judgment that was final at the time the law was enacted. We noted: "The lan-

guage of these sections of the statutes is clear. Section 42-365, R. S. Supp., 1972, provides in part: 'Except as to amounts accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown, but where alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony. Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient.' Section 42-379(3), R. S. Supp., 1972, provides: 'Sections 42-347 to 42-379 shall apply to all proceedings commenced after its effective date for the modification of a judgment or order entered prior to July 6, 1972.' It is obvious that the Legislature intended to give the courts power to modify any alimony award even though entered prior to July 6, 1972." 190 Neb. at 613, 211 N.W.2d at 118.

In *Watters, supra,* the wife had been awarded alimony of $1,000 monthly for a period of 10 years and 1 month. The decree specifically provided that the alimony should not terminate upon the death of the husband, and also provided " '*said provisions for alimony and property settlement are final and complete and not subject to revision or amendment.*' " 204 Neb. at 673, 284 N.W.2d at 852. We there held that the quoted language constituted an order "otherwise" of the court within the meaning of § 42-365 and that the wife's remarriage did not terminate the right to alimony. In so holding, we relied upon the California case of *Rheuban v. Rheuban,* 238 Cal. App. 2d 552, 47 Cal. Rptr. 884 (1965), which applied a provision of the California statute similar to § 42-365 to a decree which provided: " 'It is intended by the parties that these terms and provisions for the support and maintenance of First Party shall forever remain fixed as set forth herein and shall not be subject to change or

modification except as may be set forth herein. In this regard, First Party now and forever waives any future right to any change or modification of the provisions for her alimony and support, and the Second Party likewise joins in the waiver of any rights to so change or modify same.' " 204 Neb. at 676, 284 N.W.2d at 854.

The wife in the case at bar contends that (1) awards of alimony in gross are not subject to termination under § 42-365, and (2) the language of the decree in this case, "until the total alimony award of $10,000.00 is paid in full," evidences an intention by the court to remove the alimony award from the termination provisions of § 42-365 in the event of remarriage.

The literal language of § 42-365, "alimony orders," indicates that it applies to all orders for alimony, for no distinction is made between permanent alimony, alimony for an indefinite period, or alimony in gross, which latter classification under our prior decisions includes both alimony payable over a specified period and alimony of a definite amount payable in installments.

In *Watters, supra,* the alimony award was in gross. It is implicit in the rationale of our decision in that case that we recognized awards of alimony in gross were not excluded from termination by reason of death or remarriage under the provisions of § 42-365, because our holding was based upon a determination of the intention of the parties as set forth in the agreement. We must reject the contention that the awards of alimony in gross are excluded from the termination provisions of § 42-365, because to hold otherwise would be simply to rewrite the statute. This we cannot do.

We must, therefore, then consider the question of whether the words of the decree in this case, "until the total alimony award of $10,000.00 is paid in full," constitute an order providing "otherwise." The lan-

guage of paragraph XVI would mean the same whether it ended with the words "every month thereafter" or included the words which follow, "until the total alimony award of $10,000.00 is paid in full." Those words say no more than if the court in its order had calculated the date when the payments would end.

The words, "terminate upon the death of either party or the remarriage of the recipient," clearly show that this portion of the statute needs no order of court to effect termination. The alimony terminates by operation of law when the condition occurs. *Stokes v. Stokes,* 14 Cal. App. 3d 470, 92 Cal. Rptr. 468 (1971); *Berkely v. Berkely,* 269 Cal. App. 2d 872, 75 Cal. Rptr. 294 (1969); *Spratlen v. Spratlen,* 30 Colo. App. 91, 491 P.2d 608 (1971).

The pertinent provisions of the California Civil Code involved in *Stokes, supra,* and *Berkely, supra,* provide that the court may order support for one party by the other in any amount for any period of time. Cal. Civ. Code § 4801(a) (West Supp. 1982). It then specifies the matters which the court should take into consideration in making such support orders. § 4801(a)(1)-(9). Section 4801(b) (formerly Cal. Civ. Code § 139 (West 1954)) provides: "Except as otherwise agreed by the parties in writing, the obligation of any party under any order or judgment for the support and maintenance of the other party shall terminate upon the death of either party or the remarriage of the other party." That language has remained unchanged in the various amendments to the California marriage dissolution statutes.

In *Stokes, supra,* the court had made an award of alimony to the wife for a period of 4 years. During that period she remarried. The court held that under § 139 the obligation of the husband was terminated by operation of law. It said: "The Legislature has given special, particular meaning to the word termination, as opposed to modification or

revocation, in section 139." 14 Cal. App. 3d at 472, 92 Cal. Rptr. at 469. In *Berkely, supra,* a similar question was involved. The operative facts in that case were that the wife had remarried and then their marriage had been annulled. The court, speaking through Judge Christian, in holding that the remarriage had terminated the right to alimony, said: "Because of the existence of section 139 of the Civil Code, decisions from other states are of only illustrative value; most states do not have similar statutes providing for termination of alimony as a matter of law." 269 Cal. App. 2d at 874, 75 Cal. Rptr. at 296. In *Spratlen, supra,* the Colorado Court of Appeals was called upon to apply Colo. Rev. Stat. § 46-1-5(5) (1963), which provides: " 'The remarriage of a party entitled to alimony . . . shall relieve the other party from further payments of said alimony; but nothing in this section shall preclude the parties from providing otherwise by written agreement or stipulation.' " 30 Colo. App. at 93, 491 P.2d at 609. In that case the support payments were provided for by an agreement in writing and provided for payment of a definite monthly sum until the happening of a certain contingency, and then provided: " 'At that time this reduction of obligations of F. P. Spratlen, III, will be taken into consideration in fixing the amount of alimony.' " 30 Colo. App. at 92, 491 P.2d at 609. The wife contended that her remarriage a few months after the divorce did not terminate the alimony because the language of the agreement constituted "an agreement" to the contrary within the meaning of the statute. The court said: "We do not agree. It is clear that the section of the statute involved requires an express statement that alimony continue after remarriage, and the failure of the agreement in question to specify this point is fatal to her argument." 30 Colo. App. at 94, 491 P.2d at 610.

We hold that the order of the court in this case

does not evidence an intention that the alimony order should not terminate on remarriage.

REVERSED AND REMANDED.

CAPORALE, J., disqualified.

MARJORIE E. DEFILIPPS AND JOSEPH L. DEFILIPPS, APPELLANTS, V. ROBERT J. SKINNER AND SKINNER BROS. CATTLE CO., A NEBRASKA CORPORATION, APPELLEES.

320 N.W.2d 737

Filed June 11, 1982. No. 43977.

1. **Contracts.** A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter where the terms of the latter are inconsistent with those of the former so that they cannot subsist together.
2. _____. Where it is claimed that by reason of inconsistency between the terms of a new agreement and those of the old the old one is discharged, the fact that such was the intention of the parties must clearly appear. An inspection of the contracts, together with examination of the circumstances, may show that the latter contract was intended as supplementary to the first.
3. _____. The acts of the parties and their practical interpretation of contracts while engaged in their performance before any controversy has arisen is one of the best indications of their true intent and meaning, and the courts should ordinarily enforce such construction.

Appeal from the District Court for Dawson County: KEITH WINDRUM, Judge. Reversed and remanded with directions.

Bernard B. Smith of Smith & Smith, for appellants.

John Wightman of Wightman, Fallesen and Bacon, for appellees.

Heard before KRIVOSHA, C.J., and HASTINGS, JJ., and COADY and FAHRNBRUCH, D. JJ., and RONIN, D.J., Retired.

COADY, D.J.

This appeal involves a suit filed by the plaintiffs, Marjorie E. and Joseph L. DeFilipps, requesting the District Court to enjoin defendants from the use of the trade name Skinner Cattle Co. The trial court found for the defendants and the plaintiffs appealed that decision. We reverse and remand with directions.

Charles T. Skinner built up a large and well-known cattle feeding business called the Skinner Cattle Co. He had two children, Charles T. Skinner, Jr., and Marjorie Skinner DeFilipps. In 1964 the business began to be operated as a partnership by and among father, mother, son, and daughter.

Charles T. Skinner, Jr., had two children, Robert J. and William J. Marjorie Skinner DeFilipps has three children. In 1968, and with the partnership feeding up to 30,000 head annually, the children of Marjorie and Charles Jr. were brought into the partnership and written articles executed.

The "Partnership Articles of Skinner Cattle Co." provided that the agreement would last 6 years and bound all the persons involved in this lawsuit. Paragraph 18 therein further provided that no value was assigned the goodwill of the business and "upon any determination of the partnership each partner shall be at liberty to commence and carry on a similar business in his own or any other name not being identical with the name of the firm."

In 1970 Charles T. Skinner died, and the 6-year Skinner Cattle Co. agreement ran out in 1974. The surviving partners, also being the heirs, continued the business without any new agreement until Charles Jr. died in 1976.

On November 1, 1976, the remaining partners executed a second agreement labeled the "Partnership Articles of C. T. Skinner Sr. Cattle Co.," stating that Skinner Cattle Co. was a predecessor in interest. This agreement was to continue until October 31,

1977. Paragraph 17 therein again stated that no value was being assigned to goodwill and "upon any determination of the partnership each partner shall be at liberty to commence and carry on a similar business in his own or any other name not being identical with the name of the firm."

On or about August 12, 1977, the parties dissolved their partnership. Marjorie's side of the family began operating under the name and style of C. T. Skinner Sr. & DeFilipps Cattle Co. The wife and children of her brother began operating as Skinner Bros. and as Skinner Bros. Cattle Co. On January 1, 1979, Skinner Bros. Cattle Co. was incorporated, with Robert J. Skinner, William J. Skinner, and Francelene Skinner (Mrs. Charles T. Skinner, Jr.) as the directors, officers, and shareholders thereof.

On or about April 17, 1979, the corporation applied for the registration and use of the trade name Skinner Cattle Co., in accordance with the statutory law of this state. Marjorie and Joseph DeFilipps sued to prohibit the use of such trade name.

Marjorie testified that she had always wanted her name, DeFilipps, added to the name of the firm and partnership. It never was. Robert J. Skinner testified that his family was used to using the name Skinner Cattle Co. and it seemed natural that they should so continue.

The defendants insist, and the trial court found, that the 1976 agreement, being the partnership articles of C. T. Skinner Sr. Cattle Co., superseded the 1968 agreement, being the partnership articles of Skinner Cattle Co., and that the parties were prohibited only from using the name of C. T. Skinner Sr. Cattle Co. We disagree.

A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter where the terms of the latter are inconsistent with those of the former

so that they cannot subsist together. *In Re Estate of Wise,* 144 Neb. 273, 13 N.W.2d 146 (1944). Paragraph 18 of the first agreement and paragraph 17 of the second do not refer to each other and it is not impossible to enforce both at the same time.

Where it is claimed that by reason of inconsistency between the terms of a new agreement and those of the old the old one is discharged, the fact that such was the intention of the parties must clearly appear. An inspection of the contracts, together with examination of the circumstances, may show that the latter contract was intended as supplementary to the first. *In Re Estate of Wise, supra*; 17A C.J.S. *Contracts* § 395 (1963).

After looking at the contracts and the uncontested facts, we ask ourselves three related questions. Why did the parties cease using Skinner Cattle Co. by agreeing on the use of C. T. Skinner Sr. Cattle Co. upon executing the second agreement? The continued use of the first would have been so simple. Was the change made to indicate to the public that the business was that of senior rather than junior? A yes answer to that question is likely. Upon the execution of the second agreement, did Robert, William, and Francelene Skinner intend that Marjorie Skinner DeFilipps could operate a business under the name of Skinner Cattle Co.? Impossible.

When the parties dissolved their partnership in 1977, they operated their separate businesses as Skinner Bros. Cattle Co. and as C. T. Skinner Sr. & DeFilipps Cattle Co. until 1979 when the corporation made application for the use of the original name. A long list of cases over a long period in this state stands for the proposition that the acts of the parties and their practical interpretation of contracts while engaged in their performance before any controversy has arisen is one of the best indications of their true intent and meaning, and the courts should ordinarily enforce such construction. *School Dis-*

trict v. Estes, 13 Neb. 52, 13 N.W. 16 (1882).

The judgment of the District Court is reversed and the cause remanded. The District Court is directed to enter judgment for the plaintiffs and to enjoin Skinner Bros. Cattle Co., a corporation, from using the trade name of Skinner Cattle Co.

REVERSED AND REMANDED WITH DIRECTIONS.

HASTINGS, J., and FAHRNBRUCH, D.J., concur in the result.

IN RE ESTATE OF LAURA M. NICHOLSON.
BLANCHE J. WILLY, APPELLANT, V. MARION POWERS AND THE OMAHA NATIONAL BANK, PERSONAL REPRESENTATIVES OF THE ESTATE OF LAURA M. NICHOLSON, APPELLEES.

320 N.W.2d 739

Filed June 11, 1982. No. 44020.

1. **Contracts: Words and Phrases.** For the purposes of Neb. Rev. Stat. § 30-2351 (Reissue 1979), an oral contract is "executed" at such time as the parties become bound to each other for the performance of the terms of the agreement.
2. **Summary Judgment.** On a motion for summary judgment, we do not determine how the particular issue is to be decided but only whether or not there is a genuine issue as to any material fact in reference thereto.
3. **Contracts: Wills: Statute of Frauds.** Oral contracts to make a testamentary provision in consideration of services which are to be rendered by another are on their face void as within the statute of frauds because not in writing, and even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires.
4. **Contracts: Statute of Frauds.** The determination of whether the evidence of services rendered under an oral contract is sufficient to constitute part performance under the statute of frauds is generally a question of fact.
5. **Summary Judgment.** On a motion for summary judgment, the moving party bears the burden of proving that no genuine issue as to any material fact exists and that he is entitled to judgment as a matter of law.
6. **Wills.** Normally, one who accepts a beneficial interest under a will

thereby adopts the whole will and renounces every right or claim that is inconsistent with the will.

7. **Contracts: Wills: Estates.** If a taking under a will is inconsistent with a claim against the estate under a contract, the one act generally constitutes an election in favor of one or the other.
8. **Wills: Estates.** There is nothing inconsistent in making claim to the whole of an estate and at the same time accepting something less than the whole under the will. Property comprising a bequest of only a part of an estate would be included within a claim to the entire estate.

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

Daniel J. Duffy and Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Larry E. Welch and Gary R. Batenhorst of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellees.

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

HASTINGS, J.

The claimant, Blanche J. Willy, filed a claim in county court in the estate of Laura M. Nicholson, making claim to the entire estate, based on an alleged promise by the decedent to leave all of such estate to her. The claim was denied. An appeal was taken by the claimant to the District Court. The Omaha National Bank, a personal representative of the estate, filed a motion for summary judgment which was sustained, and the claimant's petition was ordered dismissed. This appeal followed.

The county court denied the claim on its merits. The District Court sustained the motion for summary judgment on the basis of two statutes, Neb. Rev. Stat. §§ 30-2351 and 30-2352 (Reissue 1979). Section 30-2351 provides as follows: "A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after January 1, 1977, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express ref-

erence in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills." Assuming the application of that statute, there was no compliance with any of its terms. Section 30-2352 in pertinent part states: "(a)(1) A person . . . who is [a] . . . devisee . . . under a testamentary . . . instrument . . . may renounce in whole . . . thereof, by filing a written instrument . . . (b) . . . within nine months after the death of the decedent . . . . The writing must be filed in the court of the county where proceedings concerning the decedent's estate are pending . . . ." No such writing was filed by the claimant. Compliance with the statute is important only if the appellee Omaha National Bank is correct in its assertion that the law in Nebraska is such that one who is given a benefit under a will must choose between accepting such benefit and asserting some other claim that person has against the testator's estate. That is one of the questions which we must decide.

According to the testimony of Mrs. Willy in the record submitted, she was a nonregistered nurse who had been furnishing private nursing care to claimant's husband at an hourly rate of $3.50. A short time before his death on April 7, 1973, Mr. Nicholson secured a commitment from her to take care of Mrs. Nicholson in return for which she would be "well taken care of." Further, according to Mrs. Willy, the decedent told her on many occasions from 1973 until into 1978 that she, the decedent, would "keep track of everything and take care of you when I die." On later occasions, Mrs. Willy was told, "Don't worry, I'm going to — I'm leaving you everything I have," and "Blanche, you take care of me and I'll leave you everything I have." Finally, in response to questioning by the court, the claimant

agreed that the decedent had in effect told her that if she would stay with her until she died, she would leave her everything she had.

The "care" which Mrs. Willy furnished in line with her commitment, as she put it, varied, depending upon the state of Mrs. Nicholson's health. During the balance of 1973, and on into 1978, the claimant described Mrs. Nicholson's health as from good to excellent. However, according to the claimant, she was constantly doing things for Mrs. Nicholson during this time, such as grocery shopping, taking her to the hairdresser or downtown shopping "hundreds of times," or taking her on trips out of town for various meetings and other errands. Mrs. Willy estimated that she spent from 20 hours a week, beginning in 1973, to 40 hours a week with Mrs. Nicholson until 1978. As she put it, "I was at her beck and call."

It was in the early part of 1978, as testified to by Mrs. Willy, that Mrs. Nicholson's health undertook a dramatic change for the worse. That necessitated more intensive nursing care and some hospitalization. In fact, she claimed that she spent 24 hours per day with Mrs. Nicholson, "stayed with her around the clock." Nothing appears in the record which would serve to contradict the claims of Mrs. Willy as to the nature and extent of the services which she rendered.

Sometime in June of 1978, Mrs. Nicholson requested that the claimant start billing her for her nursing services. Mrs. Willy expressed surprise, as reflected by her testimony, in which she related that she said to Mrs. Nicholson, " 'Why, Laura, after what you have been saying to me,' that's all I said to her was, 'Why,' and all she says was that I wouldn't be able to work part-time . . . . I had to give her time and she felt that I needed money and she said that." In any event, Mrs. Willy did submit bills for her services relating back to April 21, 1978, and con-

tinuing through September 12, 1978, 2 days before decedent's death. The claimant was paid the total amount of those charges in the sum of $4,697.

By the terms of Mrs. Nicholson's will, there was bequeathed the sum of $5,000, plus a davenport, large chair and footstool, a secretary, twin beds, bedroom chest, and nightstand to "my friend Blanche J. Willy . . . in appreciation of all of the kind and helpful things she has done for me." The value of her entire estate was in excess of $300,000. Although the claimant has not accepted the $5,000, and in her petition on appeal offered to renounce the same, she has received the items of personal property. However, in her affidavit in opposition to the motion for summary judgment, she stated that she knew that the decedent was planning to give certain items of personal property to family members so that she, Mrs. Willy, "understood and interpreted Laura M. Nicholson's promise to excluding [sic] tangible personal property."

The claimant insists that § 30-2351 has no application to contracts entered into prior to January 1, 1977, and that the agreement formed with the Nicholsons dates back to the year 1973. Specifically, the statute applies only to those contracts *executed* after January 1, 1977. Therefore, it becomes necessary to define the term "executed." The claimant's position is that with regard to a parol contract, it is "executed" at the moment that mutual consent is manifested by the parties. The estate claims that executed means that the parties had entered into an agreement followed by sufficient performance so as to make it an enforceable contract. We believe that the latter definition is most nearly correct.

The case most nearly on point is *M. B. Kahn Const. Co. v. Crain et al.,* 222 S.C. 17, 71 S.E.2d 503 (1952). In that case, a state use and sales tax statute exempted the gross proceeds of sales of personal property "delivered prior to January 1, 1952, under

terms of construction contracts *executed* prior to April 1, 1951." (Emphasis supplied.) In construing that portion of the statute, the court said: "The meaning of the word 'executed', upon which the decision depends, is variable as is seen by the decisions in 15A Words and Phrases 235 *et seq.* . . . We think it was used in the present statute to designate the time when the contracting parties became bound, made or entered into an enforceable contract, as here; and not when they might later sign again in formal testimony of it. . . . Moreover, 'executed' as applied to a contract ordinarily means one which has been fully performed . . . . Patently, that was not intended by the legislature when it used the word in this instance." *Id.* at 20-21, 71 S.E.2d at 504.

In *Fire Ass'n of Philadelphia v. Ruby,* 60 Neb. 216, 82 N.W. 629 (1900), this court was called upon, in effect, to determine whether or not a petition which alleged that a bond had been "entered into" was equivalent to "executed" so as to include all formal acts such as signing, approval, and filing or delivery. We concluded that it was, and said: "The term 'entered into' is of common use in legal phraseology, has a well defined meaning, and is frequently found in statutes, opinions of courts, and legal publications generally. Ordinarily, it is equivalent to the phrase 'to become bound; or obligated by a bond, recognizance, contract,' etc. In the Century Dictionary the words 'To enter into recognizances' are defined thus: '[In law] to become bound under a penalty, by a written obligation before a court of record, to do a specific act.' . . . In the statutes of Nebraska the words 'entered into' appear to be used interchangeably with, and as equivalent to, the word 'execute.' " *Id.* at 220, 82 N.W. at 630-31.

We therefore conclude that an oral contract is "executed" at such time as the parties become bound to each other for the performance of the

terms of the agreement. The question now becomes whether the parties, the claimant and the decedent, arrived at any agreement which bound each to the performance of the terms thereof, and, if so, on what date did they become bound. However, on a motion for summary judgment, we do not determine how that issue is to be decided, but only whether or not there is a genuine issue as to any material fact in reference thereto. *Hanzlik v. Paustian, ante* p. 322, 318 N.W.2d 712 (1982).

Essentially, of course, the claimant is attempting to prove an oral contract whereby the decedent agreed to make a testamentary provision in consideration of services which were to be rendered to her by the claimant. "Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear and satisfactory evidence, they are not enforceable *unless there has been such performance as the law requires.*" (Emphasis supplied.) *Overlander v. Ware,* 102 Neb. 216, 217-18, 166 N.W. 611, 612 (1918). That case has been cited with approval by this court innumerable times, and as recently as in *Rudolph v. Hartung,* 202 Neb. 678, 277 N.W.2d 60 (1979), in which we said that although an oral agreement to make a will is unenforceable under the statute of frauds, the power of a court of equity to compel specific performance of agreements in cases of part performance remains in existence.

In *C. W. Hull Co. v. Marquette Cement Mfg. Co.,* 280 F. 260 (8th Cir. 1913), the court, in affirming the District Court for the District of Nebraska, concluded that whether the evidence of services rendered under an oral contract is sufficient to constitute part performance under the statute of frauds is a question of fact. See, also, *Hurley v. Manchester,* 107 Neb. 299, 185 N.W. 974 (1921).

"On a motion for summary judgment, the moving party bears the burden of proving that no genuine

issue as to any material fact exists and that he is entitled to judgment as a matter of law. The movant may discharge this burden of proof by a showing that if the case proceeded to trial his opponent could produce no competent evidence to support a contrary position." *Hanzlik v. Paustian, supra* at 328, 318 N.W.2d at 716. The preliminary material fact with which we are here concerned is whether sufficient part performance had been established to render the alleged oral agreement enforceable, and, if so, on what date this sufficient part performance was completed. If the evidence establishes the existence of such sufficient part performance prior to January 1, 1977, the requirements of § 30-2351 are not applicable. We do not believe that such a determination can be made as a matter of law in this instance, and that therefore a genuine issue of material fact exists in this respect.

Therefore, unless claimant's failure to renounce her bequest, in the manner provided for by § 30-2352, is fatal to her claim, the motion for summary judgment should not have been sustained.

Both parties cite *Cobb v. Macfarland,* 87 Neb. 408, 127 N.W. 377 (1910), as supportive of their positions. In that case the decedent owned 1,040 acres of land, consisting of two tracts, one of 800 acres, and the other of 240 acres. By decedent's will, plaintiff was devised a life estate in an undivided one-sixth of the entire 1,040 acres. By the action filed, the plaintiff claimed an oral contract with the decedent whereby in return for a gift of $16,000 to the decedent during his lifetime, he agreed to leave by his will to the plaintiff the entire 800-acre tract. During the course of the probate proceedings, the tract of 240 acres was sold and the plaintiff participated in the proceeds of the sale in accordance with the provisions of the will. In affirming the judgment of the trial court decreeing specific performance in favor of the plaintiff, this court acknowledged the fundamental

principle of law that one who accepts a beneficial interest under a will thereby adopts the whole will and renounces every right or claim that is inconsistent with the will. The court recognized the question before it to be whether the acts of acceptance or acquiescence of the property left by the will constituted an election so as to prohibit her from claiming under the alleged contract.

The court observed that although plaintiff attempted to take both the land given her by the will and the land she claimed under the alleged contract, upon advice of counsel, such actions were undertaken under a mistake as to her rights. However, this was not the reason for the decision. The court said: "[B]ut if it had been done purposely and intentionally it could not be said to be an election. An attempt to take one and reject the other is an election, but an attempt to take both cannot be said to be. [Citation omitted.] The plaintiff cannot be said to have elected to take her share of the proceeds of the sale of the 240-acre tract as given her by the will in lieu of her right to the other tract of land under her alleged contract, unless in taking the proceeds of the sale she acted in full knowledge of her rights and intended by that act to choose the one rather than the other." *Id.* at 413, 127 N.W. at 378-79. This court seemed to have said that it is only where the taking under the will is inconsistent with the claim under a contract that the one act constitutes an election in favor of one or the other. However, there is nothing inconsistent in making claim to the whole estate and at the same time accepting something less than the whole under the will. By the very nature of the claim, property comprising a bequest of only a part of the estate would be included within a claim to the entire estate. Such was the situation here, and the claimant was not required to make an election. Consequently, she had no reason to renounce the will under the terms of § 30-2352.

The motion for summary judgment should not have been granted. The judgment of the District Court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

IN RE ESTATE OF WINFIELD C. HADDIX, DECEASED. ADNA GREENE, APPELLANT, V. LARRY W. HADDIX, PERSONAL REPRESENTATIVE OF THE ESTATE OF WINFIELD C. HADDIX, DECEASED, APPELLEE.

320 N.W.2d 745

Filed June 11, 1982. No. 44121.

1. **Estates.** The burden of proof is upon the claimant seeking compensation for services rendered during the lifetime of a deceased person to prove an agreement to pay for the services.
2. _____. Where there is a family relationship between deceased and claimant seeking compensation for services, claimant must rebut by competent evidence the presumption that the services were rendered gratuitously.
3. _____. Where one renders services to another merely upon the expectation of a legacy, unless there is a contract obligation, the promisee takes his chance of receiving the legacy, and if his expectations are disappointed, he can receive nothing.
4. **Jury Instructions.** Jury instructions should be considered as a whole.
5. **Jury Instructions: Appeal and Error.** Ordinarily, the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal.
6. **Verdicts.** A juror's understanding of the instructions constitutes neither extraneous, prejudicial information nor outside influence improperly brought to the jury's attention and his affidavit as to that understanding is incompetent and may not be received to impeach the verdict.

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

Tedd C. Huston and David C. Huston, for appellant.

John O. Sennett and Black & Sennett, for appellee.

Heard before BOSLAUGH and WHITE, JJ., and CLARK and KNAPP, D. JJ., and RONIN, D.J., Retired.

KNAPP, D.J.

Adna Greene, hereinafter called claimant, filed a claim in the estate proceedings of her deceased brother, Winfield C. Haddix, in the amount of $10,000 (later amended to $15,050), for personal and domestic services alleged to have been provided by her to decedent, their mother Sarah Haddix, and another brother, Cecil Haddix, from January 1, 1967, to July 1978, pursuant to an oral contract entered into by claimant and decedent on Thanksgiving Day 1966. The claim was disallowed by decedent's personal representative. Upon trial, the county court of Sherman County found that claimant had not proved with sufficient specificity the amount and value of the services allegedly performed, but did allow her $3,250 for mileage and $255.03 for merchandise purchased and delivered.

Claimant appealed to the District Court, where, following trial and after more than 6 hours of deliberation, a verdict for the estate was returned, signed by 10 of the 12 jurors.

Claimant appeals to this court, her 10 assignments of error encompassing essentially these three contentions: That the verdict is not sustained by and is contrary to the evidence; that the trial court erred in giving and in failing to give certain instructions; and that the trial court erred in refusing to consider the affidavits of three jurors offered in support of a motion to reconsider claimant's motion for new trial.

Claimant's evidence, in essence, was that, pursuant to request by her brothers, Winfield Haddix and Cecil Haddix, she agreed to furnish domestic services to them and to their mother at their farm home in Sherman County, Nebraska; that this request was made on Thanksgiving Day 1966; and that Winfield

Haddix promised she would be paid for her services, although the times for and methods of payments, or amounts thereof, were not then, or ever, discussed or agreed upon. Thereafter, commencing January 1, 1967, claimant drove from her home to the Haddix farm, a 70-mile round trip, at least once each week for the next 11½ years, performing such services as cooking, cleaning, laundering, chopping and sawing wood, attending to her invalid mother's personal needs, and also supplying miscellaneous items of food and clothing. Cecil died June 23, 1974; Sarah died May 16, 1975; and Winfield died July 30, 1978. None of the three paid claimant anything during their lifetimes, nor did they make any provision for her in their respective wills. No disinterested witness corroborated claimant's assertion that Winfield had promised her payment; however, her son, James Greene, testified that he was present during part of the Thanksgiving 1966 conversation, and that Winfield said, "I'll pay you when we get the money or something like that."

Rules applicable to this case include: The burden of proof is upon the claimant seeking compensation for services rendered during the lifetime of a deceased person to prove an agreement, express or implied, to pay for the services. *In re Estate of Benson,* 128 Neb. 138, 258 N.W. 60 (1934). Where there is a family relationship between deceased and claimant seeking compensation for services, claimant must rebut by competent evidence the presumption that the services were rendered gratuitously. *Hilligas v. Farr,* 173 Neb. 735, 114 N.W.2d 764 (1962). Where one renders personal services to another merely upon the expectation of a legacy, unless there is a contract obligation, the promisee takes his chance of receiving the legacy, and if his expectations are disappointed, he can receive nothing. *Hilligas v. Farr, supra.*

The jury was instructed in accord with these rules.

In addition to claimant's evidence set forth above, the record discloses that not once during the 11½ years did claimant ask her mother or brothers for any payment; she never presented them a bill for any of the merchandise allegedly purchased; she kept no records of any kind reflecting the days or hours of her visits, the services performed, the mileage accrued; and she "eased off" in her visits subsequent to her mother's death. Furthermore, on cross-examination, claimant responded as follows: "Q You never did take any action for the recovery of these monies either for your services for the trips for the items that are on those checks or for the eggs or anything else until after Winfield died and you learned that you did not receive anything out of the estate, is that right? A I was supposed to be paid. They didn't have the money to pay me along as I went and I was supposed to be paid when the last one was gone. Q You were supposed to get something from the last one's estate - - - A Yes. Q - - - to compensate you or make everything, right as far as the time that you had spent? A Yes." This is the sole reference in the record to any agreement between Winfield, Sarah, and Cecil, or any of them, on the one hand, and claimant, on the other, that her services were to be paid for out of the estate of the last of the three to die. The jury could well have found, under the evidence, that claimant had failed to meet her burden of proving an agreement, either express or implied, to pay for her services; had failed to rebut, by competent and satisfactory evidence, the presumption that her services were rendered gratuitously; and, further, that the services were apparently rendered merely upon the expectation of a legacy, if not from decedent, from his mother or brother, whoever died last. The verdict is not contrary to the evidence, but is clearly supported thereby.

At the instruction conference claimant's counsel

objected only to the court's instruction No. 8, stating: "[I]t is all right as far as it goes but that claimant's requested number 2 should also be included." Instruction No. 8 provided: "If you find that the deceased promised the claimant that his will would provide payment for her services, but that deceased failed to do so, claimant is entitled to recover the reasonable value of services rendered. If, however, she rendered the services solely in reliance on the deceased person's generosity, and the claimant was only hoping that there would be a gift by his will, then no action may be maintained for the value of the services."

Claimant's requested instruction No. 2, refused by the court, provided in part: "You are instructed that if payment for services was to be made by a *conveyance* or devise . . . ." (Emphasis supplied.) Claimant asserts that her contention that payment could have been made during decedent's lifetime as well as by will was not presented to the jury. Claimant overlooks the court's instruction No. 2, wherein claimant's position that decedent should have, but did not, compensate her "by his will or in any other manner" is clearly set out. Jury instructions should be considered as a whole. *Abbott v. Northwestern Bell Tel. Co.,* 197 Neb. 11, 246 N.W.2d 647 (1976). So considered, the complained of instruction was not erroneous.

In addition, claimant now asserts that the trial court's instruction Nos. 3 and 4, wherein the court defined "oral contract" and distinguished enforceable contracts from vague and indefinite "agreements," were so phrased as to necessarily confuse the jury. We do not find them so. Moreover, claimant, her counsel having failed to object to those instructions when they were submitted to him for review, is now precluded from raising objections thereto on appeal, absent plain error indicative of a probable miscarriage of justice. *National Bank of*

Commerce Trust and Sav. Assn. v. Katleman, 201 Neb. 165, 266 N.W.2d 736 (1978). No such error here appears.

Following denial of claimant's motion for new trial, claimant filed a motion to reconsider claimant's motion for new trial, supported by the affidavits of three jurors, only one of whom had signed the verdict. The affidavits were identical and recited that "the instructions of the Court were confusing in that . . . Affiant believed that the jury must award Claimant, Adna Greene, the full amount of $15,000.00 or nothing at all." The trial court denied the motion, and properly so. While we note that the instructions contained nothing to support the inference that the jurors' options were so restricted, affidavits of jurors as to what they believed they had a right to do under the instructions are incompetent and may not be received to impeach a verdict. A juror's understanding of the instructions constitutes neither extraneous, prejudicial information nor outside influence improperly brought to the jury's attention. *Lambertus v. Buckley,* 206 Neb. 440, 293 N.W.2d 110 (1980); Neb. Rev. Stat. § 27-606(2) (Reissue 1979).

AFFIRMED.

BRUCE E. SHELTON; BRUCE E. SHELTON, IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHAD E. SHELTON; SALLIE A. SHELTON; SANDRA JOHNSON MARCHANT, AS BEST FRIEND OF SHERRIE JOHNSON; AND SANDRA JOHNSON MARCHANT, IN HER CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DUANE N. JOHNSON, APPELLANTS, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA ET AL., APPELLEES.

320 N.W.2d 748

Filed June 11, 1982. Nos. 44130, 44131, 44132, 44133, 44134.

1. **Negligence: Proximate Cause.** Once the defendant's negligence has been established, it is necessary to find that the plaintiff's injuries were proximately caused by the defendant's negligence.
2. _____: _____. Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.
3. _____: _____. The causal connection is broken if, between the defendant's negligent act and the plaintiff's injury, there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff.
4. _____: _____. The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.
5. _____: _____. It may be stated as a general rule that when, between original negligence and an accident, there intervenes a willful, malicious, and criminal act of a third person which causes the injury but was not intended by the person originally negligent and could not have been foreseen by him, the causal chain between the original negligence and the accident is broken.
6. _____: _____. Although the question of proximate cause is originally for the determination of the jury, where only one inference can be drawn it is for the court to declare whether a given act or series of acts is the proximate cause of the injury.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

Steven E. Achelpohl and Edward F. Pohren of Dwyer, O'Leary & Martin, P.C., for appellants.

John R. Douglas of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

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

KRIVOSHA, C.J.

This appeal involves five separate cases brought on behalf of the victims of a poisoning. The cases were consolidated for argument and decision before this court. The trial court sustained demurrers filed by the appellees, Board of Regents of the University of Nebraska (Board of Regents) and Eugene C. Eppley Institute for Research in Cancer and Allied Diseases (Eppley Institute). Each of the appellants in the above-entitled cases elected to stand on his or her amended petition to which the demurrers had been filed. Accordingly, the trial court dismissed each of the actions and appeal was perfected to this court. We affirm.

Each of the actions, which are in all respects identical except for the name of the plaintiff, was filed pursuant to the provisions of the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1976). Appellants are members or the personal representatives of members belonging to two families from Omaha, Nebraska, who were involved in a poisoning incident in 1978. The poisoning involved a former employee of the Eppley Institute, Steven Roy Harper. The carcinogenic agent, dimethylnitrosamine (the poisonous drug), was taken by Harper from the Eppley Institute while Harper was employed there in 1978, though it was used by Harper against the various appellants following his discharge from employment. Harper was convicted of

murder as a result of the deaths caused by the poisonings. See *State v. Harper,* 208 Neb. 568, 304 N.W.2d 663 (1981).

Because these cases come to us following the sustaining of demurrers we have nothing more before us than the allegations of the amended petitions. *Clark & Enersen, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp.,* 194 Neb. 810, 235 N.W.2d 870 (1975). For purposes of our examination we must accept as true all facts well pleaded. *Gilbert v. Vogler,* 197 Neb. 454, 249 N.W.2d 729 (1977). We do not, however, accept as true facts not well pleaded or conclusions of law or of the pleader. *Root v. School Dist. No. 25,* 184 Neb. 570, 169 N.W.2d 464 (1969); *Berigan Bros. v. Growers Cattle Credit Corp.,* 182 Neb. 656, 156 N.W.2d 794 (1968).

The amended petitions allege that in 1973 and 1974 Harper had an emotional relationship with Sandra Johnson Marchant (Mrs. Marchant). Mrs. Marchant broke off the relationship and married Duane Johnson. On June 21, 1975, after attempting to persuade Mrs. Marchant to leave her husband, Duane Johnson, Harper attempted to kill her and her husband and the other members of her family with a shotgun blast. Several members of Mrs. Marchant's family were injured by the shotgun blast, and as a result Harper pled guilty to the crime of intent to kill, wound, or maim. On December 6, 1976, he was sentenced to an indefinite term of from 1 to 5 years in the Nebraska State Penitentiary.

The amended petitions further allege that Harper was thereafter paroled on November 16, 1977, and was on parole when he was employed by the Eppley Institute. Appellants allege that despite Harper's previous criminal involvement, he was hired by the Eppley Institute in Omaha, Nebraska, and commenced work as a research technologist on March 1, 1978. The amended petitions allege that Harper's duties at the Eppley Institute were described in his

job classification as follows: "1. Handling and some maintenance of rats. 2. Preparation of various diets. 3. Responsibility of feeding rats. 4. Animal autopsies, in particular, preparation of urinary bladder and kidneys for further processing. 5. Assist in biochemical experiments concerned with the peneablility (sic) of the urinary bladder. 6. Observe all safety rules." The amended petitions each specifically allege that *Harper's duties did not include working with the poisonous drug.*

The amended petitions then allege that, throughout his employment at the Eppley Institute, Harper had access to the poisonous drug, a highly lethal and carcinogenic substance used by the Eppley Institute to induce cancer in rats. The amended petitions allege that the Office of Research Safety of the National Cancer Institute has adopted standards for research involving chemical carcinogens, including the poisonous drug. The standards were then set out in the petitions.

The amended petitions further allege that, at all times material during his employment, the Eppley Institute failed to control Harper's access to the poisonous drug. Eppley Institute is charged with having no inventory procedures to monitor the quantities of the drug on hand at any time, nor any way of determining whether carcinogens were being taken from the premises.

Moreover, the amended petitions allege that, during Harper's employment with Eppley Institute, an employee of the institute placed an article on the Eppley Institute's bulletin board, describing a poisoning incident in Germany in which the poisonous drug was used to induce cancer and ultimate death in its victims. Appellants allege that exposing Harper to this article was negligent and was a proximate cause of the injuries and damages to each of the appellants. They further allege that the Eppley Institute failed to exercise due care in investigating

the background and history of Harper before hiring him. The amended petitions allege that the Eppley Institute was negligent in four specific ways, to wit, (1) in hiring Harper; (2) in failing to control access to the poisonous drug by Harper; (3) in failing to maintain an inventory of the drug; and (4) in permitting the posting of the article describing the poisonous drug incident which occurred in Germany. The amended petitions allege that each of the acts and omissions described above occurred between March 1, 1978, and August 18, 1978, and that as a result of the acts and omissions, the appellants suffered injury and damage.

The amended petitions further contain allegations concerning an alleged duty owed by the appellees to the various appellants. Because, however, we have determined that the amended petitions failed to allege facts from which it could be concluded that the alleged negligence of the appellees was the proximate cause of appellants' injury and damage, we do not address the issue of duty.

The law is clear that one is not always liable to another simply because one has acted in a negligent manner. In order for there to be liability, certain basic elements must be established. In *Daniels v. Andersen,* 195 Neb. 95, 101, 237 N.W.2d 397, 402 (1975), we observed: "Once the defendant's negligence has been established, it is necessary to find that the plaintiff's injuries were proximately caused by the defendant's negligence."

In discussing what constitutes "proximate cause" in the law of torts, we have said: "Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred." *Weichel v. Lojka,* 185 Neb. 819, 824, 179 N.W.2d 112, 115 (1970). See, also, *Coyle v. Stopak,* 165 Neb. 594, 86 N.W.2d 758 (1957); *Kroeger*

v. Safranek, 161 Neb. 182, 72 N.W.2d 831 (1955).

There are three basic elements which must be found in order to establish proximate cause. In *Daniels v. Andersen, supra* at 101-02, 237 N.W.2d at 402, we discussed these three elements, saying: "The first requirement is that the negligence be such that 'without which the injury would not have occurred,' commonly known as the 'but for' rule. . . .

"The second requirement is that the injury be the natural and probable result of the negligence. See 57 Am. Jur. 2d, Negligence, § 164, p. 527.

. . . .

"The third requirement is that there be no efficient intervening cause."

We believe that the appellants' amended petitions fail with regard to the third element of proximate cause, and for that reason we need not discuss any of the other elements of proximate cause.

We have frequently discussed what constitutes an efficient intervening cause. An efficient intervening cause is a new and independent force which breaks the causal connection between the original wrong and the injury. *Coyle v. Stopak, supra.* In *Coyle, supra* at 606-07, 86 N.W.2d at 768, we further said: " 'The causal connection is broken if between the defendant's negligent act and the plaintiff's injury "there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff." ' " In the instant case, even if we assume that the appellees were negligent in any of the aspects claimed by the appellants (a fact we assume for sake of argument without deciding), we have two subsequent illegal criminal acts of Harper intervening between the alleged negligence of the appellees and the injuries suffered by the appellants. We believe that those two intervening

criminal acts were of such nature as to constitute an efficient intervening cause which destroys any claim that the alleged negligence of the appellees was the proximate cause of the appellants' injuries and damage. In Restatement (Second) of Torts § 448 at 480 (1965), we find the following declaration of law: "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime." We do not believe that the facts in this case justify employing the exception to the rule. There is no allegation made, nor can one be properly inferred, to support a claim that the Eppley Institute realized or should have realized the likelihood of Harper first stealing the poisonous drug and then unlawfully breaking into the Johnson home and placing the poisonous drug into some lemonade and milk which were present in a refrigerator. We believe appellants ask us to make too great a leap of faith in this case.

As noted in Comment a to § 448 of the Restatement at 481: "Under the rule stated in this Section, the actor is not responsible for the harm thus inflicted merely because the situation which his negligence has created has afforded an opportunity or temptation for its infliction."

In an extensive annotation found at 78 A.L.R. 471 (1932), the author notes at 472: "It may be stated as a general rule that when, between original negligence and an accident, there intervenes a wilful, malicious, and criminal act of a third person which causes the injury, but was not intended by the per-

son originally negligent and could not have been foreseen by him, the causal chain between the original negligence and the accident is broken."

We have previously considered the effect of a criminal act as an efficient intervening cause. In the case of *Hersh v. Miller,* 169 Neb. 517, 99 N.W.2d 878 (1959), the plaintiff sued the defendant for injuries sustained by the plaintiff when the defendant left her motor vehicle unlocked and with the keys in it, in violation of an ordinance of the city of Omaha. In rejecting the claim that the negligence of the defendant in leaving her car unlocked was the proximate cause of the plaintiff's injury, notwithstanding the intervention of the criminal act by a third person, we said at 521-22, 99 N.W.2d at 881-82: " 'A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new efficient cause intervenes, not set in motion by him, and not connected with but independent of his acts and not flowing therefrom, and not reasonable in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the dominant cause.' [Citation omitted.]

. . . .

" '* * * the conduct of the thief was an intervening cause which the defendants were not bound to anticipate and guard against.' " To similar effect see *K & T Co. v. Woods,* 92 N.M. 697, 594 P.2d 745 (1979); *City of Mobile v. Largay,* 346 So. 2d 393 (Ala. 1977).

It is fair to say that in the instant cases the proximate cause of the appellants' injuries was Harper's stealing a poisonous drug and unlawfully and criminally breaking into a home and placing the poison in lemonade and milk which was later consumed by the various appellants. Nothing which the appellants claim the Eppley Institute failed to do was in any manner related to those acts, nor could they have been reasonably contemplated by the Eppley Institute. Unlike those cases cited to us by appel-

lants, here we have neither actual knowledge of an employee's propensity for violence or negligent entrustment. Had Eppley Institute made further investigation into Harper's background, it would not have reasonably known that it should not employ Harper to work with rats. Harper's previous crime was in no manner connected with either stealing or with the use of poison. In an extensive annotation entitled "Employer's Knowledge of Employee's Past Criminal Record as Affecting Liability for Employee's Tortious Conduct," reported in 48 A.L.R.3d 359 (1973), the author notes at 361: "Whether the hiring or retention of an employee with a prior criminal record constitutes negligence depends upon the facts and circumstances of each individual case. Thus, it has been held that no finding of negligence was warranted where, although the employer knew about the employee's criminal record, either the employer did not know about the nature of the offense, or the offense was nontortious in character, and where the prior offense was but a single incident which took place several years previously."

Neither the allegations of the amended petitions nor the law generally imposes liability upon an employer whenever he hires a person previously convicted of a felony where, as here, the job for which the employee is hired does not place anyone in a dangerous position merely by reason of the hiring. Every place of employment offers an employee the opportunity to find some item which, if stolen and improperly used, can cause another harm. Shall we hold an office employer liable if a secretary steals a pair of shears and stabs another? Shall we hold a grocery employer liable if one of its stockpersons steals rat poison and injures another? Shall we hold an automotive employer liable if one of its mechanics steals a tire iron and causes injury to another? We do not believe the law goes that far. In each case the unlawful acts of the employee must be

considered to be an efficient intervening cause, else every employer becomes an insurer of the public generally. The allegations of the amended petitions regarding Eppley Institute's hiring of Harper are not sufficient to be considered the proximate cause of the appellants' injuries in light of Harper's intervening action in stealing the poison, breaking into the Johnson home, and poisoning the lemonade and milk. Eppley Institute could not have reasonably realized the likelihood that such a situation might occur.

Likewise, the claim that the Eppley Institute failed to maintain an inventory or control access to the poisonous drug does not allege facts from which one may conclude that the negligence, if any, of the Eppley Institute was a proximate cause of the injury unaffected by Harper's intervening criminal acts. Knowing that the poisonous drug was stolen would not have afforded anyone any greater protection. The Eppley Institute would have had no way of knowing that an employee, not assigned to work with the drug, had in fact stolen the drug, and certainly would have had no way of advising the world generally or these appellants specifically of that fact. The purpose of the rules alleged by appellants is intended for the health protection of the employees working with the poison and not the public generally. Knowing that the poison was stolen could not have prevented the injuries which followed as a result of Harper's criminal acts. To impose such a burden upon an employer would be unreasonable.

And, lastly, the matter of posting the article certainly cannot be said to be a proximate cause of appellants' injuries unaffected by an efficient intervening cause. The article was posted by an employee and merely reported a matter of fact. The employer here can no more be held liable than could the publisher of the article. Moreover, there is no claim that but for the article no one would have

known of the danger of the poison.

The events involved in this case are indeed sad and tragic. Hindsight might disclose some inkling of the tragedy caused by a disturbed but nevertheless criminal mind. That hindsight is not, however, sufficient in this case to permit this court to say that Eppley Institute could have reasonably realized the likelihood of Harper's criminal acts merely because it hired him to care for experimental rats. No doubt the appellants have suffered. Undoubtedly Harper is liable to them for his actions. Those facts, however, are not sufficient to hold the appellees liable. " 'Although the question of proximate cause is ordinarily for the determination of the jury, where . . . [as alleged here] only one inference can be drawn, it is for the court to declare whether a given act or series of acts is the proximate cause of the injury.' " *Egenberger v. National Alfalfa Dehydrating & Milling Co.,* 164 Neb. 704, 712, 83 N.W.2d 523, 532 (1957).

The acts of the appellees as alleged by the appellants in the amended petitions were not the proximate cause of the appellants' injuries. The trial court was correct in sustaining the demurrers filed to the amended petitions and thereafter dismissing the various amended petitions.

AFFIRMED.

CAPORALE, J., disqualified.

THE OMAHA NATIONAL BANK OF OMAHA, NEBRASKA, TRUSTEE, ET AL., APPELLANTS, V. MELVIN E. MULLENAX ET AL., APPELLEES.

320 N.W.2d 755

Filed June 11, 1982. No. 44154.

1. **Contracts: Compromise and Settlement.** A compromise and settlement agreement is subject to the general principles of contract law and is enforceable under the same principles as other contracts.

2. **Contracts: Compromise and Settlement: Case Overruled.** An alleged oral compromise and settlement agreement not made in open court is unenforceable where it is in violation of the statute of frauds or in violation of a court rule requiring all stipulations and agreements of counsel or parties to a suit to be in writing, signed by the parties or their attorneys. To the extent *Simmons v. Murray,* 189 Neb. 695, 204 N.W.2d 800 (1973), is in conflict, it is overruled.

Appeal from the District Court for Nemaha County: WILLIAM F. COLWELL, Judge. Affirmed in part, and in part reversed and remanded with directions.

John F. Thomas of McGrath, North, O'Malley & Kratz, P.C., and Randall L. Rehmeier of Wellensiek & Rehmeier, for appellants.

Simon Lantzy of Lantzy & Parsons, for appellees.

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

MCCOWN, J.

This is an action to quiet title to real estate allegedly acquired by conveyance, accretion, and adverse possession. The District Court, upon defendants' motion, dismissed plaintiffs' petition without prejudice for failure to diligently prosecute. Plaintiffs have appealed.

On February 3, 1976, The Omaha National Bank, as trustee of a trust in which plaintiffs William F. Neal and Mary Linda Neal Reber were sole beneficiaries, filed this action against the defendants Melvin E. and Mabel C. Mullenax to quiet title to various tracts of real estate allegedly acquired by conveyance, accretion, and adverse possession.

During the pendency of the action the trust terminated and the trustee transferred specifically described portions of the land and assigned all its right, title, and interest to the plaintiffs Mary Linda Neal Reber and William F. Neal and they have continued the action. An amended petition was filed on September 28, 1976. The defendants filed an answer

and cross-petition on January 3, 1977, alleging that defendants were the owners of a portion of the real estate by virtue of adverse possession. Additional defendants filed a petition to intervene in January 1977. On March 7, 1978, the court ordered the case stricken from the trial docket unless good cause was shown within 60 days. On May 2, 1978, the case was restored to the trial docket and the motion of defendants Leatherman to intervene was granted. On May 5, 1978, the defendants filed an amended answer and cross-petition, seeking to have title quieted in the defendants and adding several additional defendants who filed voluntary appearances.

On October 16, 1979, the plaintiffs filed a second amended petition enlarging the area of the disputed real estate. Pretrial conference was held in October 1979 and the case was set for trial on February 18, 1980. On the court's motion the trial date was continued until March 24, 1980. On March 19, 1980, defendants McIntire intervened, replacing intervenors Leatherman.

On or about March 20, 1980, attorneys for the various parties and defendant Melvin E. Mullenax and other individuals participated in settlement discussions. The plaintiffs' affidavit states that a settlement agreement was reached but that when the written settlement agreement was presented to the defendant Melvin E. Mullenax, he refused to sign it. Mullenax's affidavit states that his attorney had no authority to commit him to a settlement; that the conversations were merely for the purpose of exploring the possibility of settlement; and that he rejected the written proposal when it was submitted. No trial was held on March 24, 1980, but the judge's minutes of April 1, 1980, state: "Settlement pending."

On September 29, 1980, the case was set for trial on January 26, 1981. On January 15, 1981, the plaintiffs filed a motion to enforce the settlement agreement,

supported by affidavits from counsel for plaintiffs and some of the intervenors, setting out their version of the March 20, 1980, settlement conference and the agreement allegedly rejected. On January 16, 1981, the defendants filed resistance to the motion, accompanied by an affidavit of Melvin E. Mullenax stating his version. On January 20, 1981, the District Court denied the motion to enforce the settlement agreement but granted leave to the plaintiffs to amend their petition to include the issue of settlement raised by the motion. On January 22, 1981, the plaintiffs filed an amendment to their petition setting forth a second cause of action, praying that the settlement agreement be enforced, and that the second cause of action be heard first by the court. The defendants filed a general demurrer to the second cause of action, stating that it failed to state a cause of action and was contrary to local rules of practice of the District Court. Those rules provide that no stipulations or private agreements of counsel or of parties to a suit will be recognized unless made in open court during trial, or unless they were in writing and signed by the parties or their attorneys. The court sustained the demurrer and dismissed the second cause of action.

The plaintiffs gave notice that they intended to file a separate petition for enforcement of the settlement and the parties agreed that further proceedings would be had in the present case on January 23, 1981. The plaintiffs then filed a new and separate petition to enforce the settlement agreement and filed a motion requesting a continuance in the present case based on an intent to appeal the court's ruling sustaining the demurrer to the second cause of action. Since there was no resistance to the motion for continuance, the court continued the case until the further order of the court, based on the assumption that a separate case was being filed.

On February 17, 1981, the defendants filed a mo-

tion to dismiss the present case on the grounds that the plaintiffs had failed to prosecute the separate settlement case in a timely fashion. The motion was supported by an affidavit from the clerk of the District Court stating that no praecipe for summons had been issued in the separate case as of February 17, 1981. The motion was heard on February 23, 1981, and taken under advisement. On February 27, 1981, plaintiffs filed a motion for an order vacating the demurrer to the second cause of action or for an order nunc pro tunc requesting the court to specify the grounds upon which the demurrer was sustained, and a motion for a new trial. On March 4, 1981, the plaintiffs' motions were all denied and the defendants' motion to dismiss the present case was granted on the ground of failure to diligently prosecute the action.

The plaintiffs contend that an alleged oral settlement agreement entered into by the parties to a pending lawsuit is enforceable, and rely on the case of *Simmons v. Murray,* 189 Neb. 695, 204 N.W.2d 800 (1973).

Rule 16 of the Rules of Practice of the First Judicial District provides: "All stipulations and private agreements of counsel or of parties to a suit, unless made in open court during trial, must be reduced to writing and signed by the parties or their attorneys making the same or they will not be recognized."

In the overwhelming majority of states similar statutes or court rules requiring agreements to be in writing have been held applicable to agreements of settlement or compromise and courts have refused to enforce any such oral compromise and settlement agreements. See, *Estate of Pewters v. Holland Page Industries, Inc.,* 443 S.W.2d 392 (Tex. Civ. App. 1969); *Moore v. Gunning,* 328 So. 2d 462 (Fla. App. 1976); *American Cas. Co. v. Western Cas. & Surety Co.,* 19 Wis. 2d 176, 120 N.W.2d 86 (1963). Only two

states have apparently held otherwise. Those are Georgia and New York, which were cited by this court in *Simmons*.

The rule that compromise and settlement agreements are not required to be in any particular form is generally stated as being subject to the specific exception that when local statutes or rules of court require compromises to be in writing, those local rules are applicable. The general rule is also that if the subject matter of a compromise or settlement is within the statute of frauds, the agreement must be in writing, signed by the parties. Court rules of the kind involved here are related to statutes of fraud although they are based upon additional principles of efficient judicial administration. The general rule, as set out in 15A Am. Jur. 2d *Compromise and Settlement* § 10 (1976), is: "Except to the extent that local statutes or rules of court may require compromises to be in writing, no particular form of agreement and no writing is ordinarily essential to a valid compromise. However, if the subject matter of a compromise is within the statute of frauds, the compromise must be in writing (or evidenced by a sufficient memorandum), unless there is an oral compromise agreement followed by sufficient performance to remove the agreement from the operation of the statute of frauds."

In the present case there can be no doubt that any settlement of the quiet title action involved here necessarily involves a creation, grant, assignment, surrender, or declaration of an interest in land and would also require the execution of deeds of conveyance. Neb. Rev. Stat. §§ 36-103 and 36-105 (Reissue 1978) are applicable to the alleged settlement agreement in this case, as well as court rule No. 16. In the present case there is no writing or memorandum signed by the parties or their counsel, and there was no partial performance which could be solely related to the settlement agreement. Neither was the al-

leged agreement made in open court. In addition, it is disputed by defendants that they made a settlement agreement or that their counsel had any authority to make any such agreement.

It is virtually undisputed that a compromise and settlement agreement is subject to the general principles of contract law and is enforceable under the same principles as other contracts. See, *Brown v. Brown,* 343 A.2d 59 (App. D.C. 1975); *Pyle v. Wolf Corporation,* 354 F. Supp. 346 (D. Or. 1972). It would be strange indeed if an agreement which would be unenforceable under the statute of frauds and is also unenforceable under a court rule applicable to all parties to a suit were to become enforceable simply because the matter involved in the settlement agreement was pending as a lawsuit in court. Even though the law favors and encourages settlements, the fact that a lawsuit has been filed ought not to validate an otherwise unenforceable contract.

In view of the foregoing, it is clear that the alleged oral agreement of settlement in this case cannot be enforced. An alleged oral compromise and settlement agreement not made in open court is unenforceable where it is in violation of the statute of frauds or in violation of a court rule requiring all stipulations and agreements of counsel or parties to a suit to be in writing, signed by the parties or their attorneys. To the extent *Simmons v. Murray,* 189 Neb. 695, 204 N.W.2d 800 (1973), is in conflict, it is overruled.

The remaining issue is whether or not the dismissal of the original quiet title action for lack of prosecution was proper. While dismissal on such grounds is generally within the discretion of the trial court, it is apparent from the record that the failure to prosecute the underlying quiet title action, at least in the later stages, was due to an extended effort to end the litigation by enforcing the alleged settlement agreement. While reliance on the *Simmons*

case may have been overly enthusiastic, the record does not establish that the delay was entirely due to the plaintiffs alone. In our view the record does not justify the dismissal of the quiet title action in the present case.

The action of the District Court in denying each and all of the plaintiffs' motions is affirmed. The order of the District Court granting defendants' motion to dismiss the case is reversed and the cause remanded to the District Court with directions to reinstate the action.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

MILLER CHEMICAL COMPANY, INC., A NEBRASKA CORPORATION, APPELLANT, V. ROBERT TAMS ET AL., APPELLEES.

320 N.W.2d 759

Filed June 11, 1982. No. 44156.

1. **Judgments: Appeal and Error.** The standard of review in this court of a law action is that a judgment of the District Court will not be set aside by this court on appeal unless it is clearly wrong and not supported by the evidence.
2. _____: _____. In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party. All conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
3. **Torts: Trade.** The essential elements of tortious interference with business relationships are: (1) The existence of a valid business relationship or expectancy; (2) Knowledge by the interferer of the relationship or expectancy; (3) An intentional act of interference on the part of the interferer; (4) Proof that the interference caused the harm sustained; and (5) Damage to the party whose relationship or expectancy was disrupted.
4. _____: _____. One of the basic elements of tortious interference with a business relationship requires an intentional interference inducing or causing a breach or termination of the relationship or expectancy.

5. _____: _____. One is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor if (a) the relation concerns a matter involved in the competition between the actor and the competitor, and (b) the actor does not employ improper means, and (c) the actor does not intend thereby to create or continue an illegal restraint of competition, and (d) the actor's purpose is at least in part to advance his interest in his competition with the other.
6. _____: _____. One's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors.
7. _____: _____. The fact that hatred or desire for revenge was part of the reason for the interference is insufficient to make interference improper if the conduct is directed at least in part to advancement of his own competitive interest and social benefits arising therefrom.

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

Donald J. Buresh of Swarr, May, Smith & Andersen, for appellant.

Alan M. Wood, for appellees.

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

WHITE, J.

This is an action by the plaintiff-appellant, Miller Chemical Company, against the defendants-appellees, Robert Tams and Barbara Tams, for intentionally interfering with Miller's customer relations in southeast Nebraska by reproducing and mailing anonymously to those customers price discount information which Miller had sent to its customers in its southeast Iowa trade area. The case was tried to the District Court sitting without a jury. At the close of the plaintiff's evidence the District Court ruled that there had been no showing of any intentional act on the part of the defendants Tams to interfere with the business of the plaintiff, other than competitive acts, and further that there had been no breach or termination of a seller or buyer relation-

ship between the plaintiff and any of its customers. The District Court also ruled that the damages were too speculative. On February 17, 1981, the District Court overruled plaintiff's motion for new trial and the plaintiff appealed. We affirm.

The plaintiff distributes agricultural chemicals and animal health feed additives for livestock and crops. The company distributes its products in southeast Nebraska, southwest Iowa, northwest Missouri, and northeast Kansas. These areas make up one of Miller's trade areas. Another such trade area comprises approximately 25 counties in southeast Iowa.

In February 1979 Tom Henderson, a Miller salesman in the southeast Iowa territory, abruptly resigned his position. Henderson went to work for a competitor of Miller, Lane Agri Supply. The owner of Lane Agri Supply was also an ex-Miller salesman. The company feared lost sales in that area. To encourage its customers in that trade area to continue business with them, Miller sent out the letter requesting its customers in that area to buy a 60- to 90-day supply of its products. Miller offered the customers price discounts of 5 percent on its products if they bought a 60- to 90-day supply.

Approximately 1 week after the letter was sent, Miller learned that its customers outside the southeast Iowa territory had also received the letter. Several customers in southeast Nebraska and northeast Kansas were asking for more details about the 5 percent discount. It was later learned that Robert Tams, a former Miller salesman then in competition with Miller, had also received a copy of the letter. Tams testified that when he received a copy of the discount letter, he became irritated and upset with it. He sent a copy of the letter to approximately 10 or 15 Miller customers in the southeast Nebraska trade area. Tams testified that his reason for sending the letter out was because those customers had

contacted him about the short supply of OTC and CTC, two of the products Miller was directing to the southeast Iowa trade area.

After customers in Miller's southeast Nebraska trade area learned about the discounts offered in the southeast Iowa trade area, Miller instigated a discount program in the southeast Nebraska trade area also. As a result of extending these discounts to the southeast Nebraska trade area, Miller granted discounts totaling $6,035 on products originally only discounted for customers in southeast Iowa. Also as a result of extending the discounts to southeast Nebraska, Miller was forced to pay its salesman his regular commission on the products sold. This resulted in an additional cost of $800. Further, because the products known as OTC and CTC were in short supply, Miller purchased additional supplies resulting in further costs of $950. Larry Hoffman, employee and general manager for Miller, testified that additional management time, costing $1,200, was devoted to extending the discount. The total amount of cost to Miller for extending the discounts to the southeast Nebraska trade territory totaled $8,985.

Two Miller customers from the southeast Nebraska trade area testified that they had received copies of the letter giving discounts to customers in the southeast Iowa territory. Neither customer knew who sent the letter to them, and testified that their business relationship had not ceased with Miller.

The standard of review in this court of a law action is that a judgment of the District Court will not be set aside by this court on appeal unless it is clearly wrong and not supported by the evidence. *Town & Country Realty of Kearney, Inc. v. Glidden,* 204 Neb. 820, 285 N.W.2d 828 (1979); *Crawford v. Ham,* 209 Neb. 802, 311 N.W.2d 896 (1981).

In determining whether the evidence supports the findings of the trial court in an action at law where

a jury has been waived, the evidence must be considered in the light most favorable to the successful party. All conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Aurora Cooperative Elevator Co. v. Larson,* 204 Neb. 755, 285 N.W.2d 498 (1979); *Gehrke v. General Theatre Corp.,* 207 Neb. 301, 298 N.W.2d 773 (1980); *Crawford v. Ham, supra.*

Several jurisdictions have decided cases in the interference with business relationships area. Most of the cases this court has decided in this area have dealt with civil conspiracy cases. See, *Diesel Service, Inc. v. Accessory Sales, Inc.,* 210 Neb. 797, 317 N.W.2d 719 (1982); *Dixon v. Reconciliation, Inc.,* 206 Neb. 45, 291 N.W.2d 230 (1980). The essential elements of tortious interference with business relationships are: (1) The existence of a valid business relationship or expectancy; (2) Knowledge by the interferer of the relationship or expectancy; (3) An intentional act of interference on the part of the interferer; (4) Proof that the interference caused the harm sustained; and (5) Damage to the party whose relationship or expectancy was disrupted. See, 45 Am. Jur. 2d *Interference* § 50 (1969); 5 A.L.R.4th 9 (1981); *Ulan v. Vend-A-Coin, Inc.,* 27 Ariz. App. 713, 558 P.2d 741 (1976).

This court stated in dicta in *Delay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.,* 196 Neb. 398, 410-11, 243 N.W.2d 745, 752 (1976): "One of the basic elements of tortious interference with a business relationship requires an intentional interference inducing or causing a breach or termination of the relationship or expectancy."

The evidence shows that Robert Tams was a competitor of Miller. During the trial Tams testified that he had received anonymously in the mail a copy of the discount letter Miller had sent to its customers in the southeast Iowa trade area. Tams stated that

prior to receiving the letter he had been contacted by several Miller customers inquiring whether he had any CTC or OTC. At that time CTC and OTC were in short supply in the southeast Nebraska area. After receiving Miller's letter, Tams stated that he sent copies to those Miller customers in the southeast Nebraska trade area that had inquired about the short supply of CTC and OTC so that they would know why it was in such short supply. Tams circled the following portion of the letter: "All of you are probably aware of the critical short supply of chlortetracycline and oxytetracycline. EFFECTIVE IMMEDIATELY ALL Miller Chemical production of our label CTC 50, CTC 10, Oxy 50, Oxy 10 will be TOTALLY available to customers in the previously mentioned Iowa counties and Missouri . . . AND THE 5% DISCOUNT APPLIES. However, the same stipulation on our ability to ship as of 5:00 p.m. March 7, 1979 as indicated above holds true here too. WE WILL attempt to divert our total production of CTC and Oxy to you for an UNLIMITED time (hopefully through March 30th)."

The Restatement of Torts § 768 at 71 (1939) recognizes the privilege of a competitor and provides: "(1) One is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor if (a) the relation concerns a matter involved in the competition between the actor and the competitor, and (b) the actor does not employ improper means, and (c) the actor does not intend thereby to create or continue an illegal restraint of competition, and (d) the actor's purpose is at least in part to advance his interest in his competition with the other."

The Comment on subsection (1) states in part at 72: "One's privilege to engage in business and to compete with others . . . implies a privilege to induce third persons to do their business with him rather than with his competitors. In order not to

hamper competition unduly, the rule stated in this Section entitles one not only to seek to divert custom[ers] from his competitors generally but also from a particular competitor. And he may seek to do so directly by express inducement as well as indirectly by attractive offers of his own goods or services."

Tams' actions fall within the area of privilege. The fact that he sent the letter out only to those Miller customers who contacted him about the short supply of CTC and OTC supports this position. This also indicates that his contact was not directed solely to spite or ill will. The fact that hatred or desire for revenge was part of the reason is insufficient to make interference improper if the conduct is directed at least in part to advancement of his own competitive interest and social benefits arising therefrom. See Restatement (Second) of Torts § 768, Comment on Clause (d) (1979).

We conclude that the action was justified and was competitive in nature. The business relationship between Miller and its customers is strictly an "at will" relationship. There is no evidence of any contract in the record. Further, there is no evidence that any customers had ceased doing business with Miller. Miller was forced to allow the discount in the southeast Nebraska trade area because of the competitive pressure put on it by Tams. This court refuses to grant Miller any type of monopoly or to protect it from any type of free competition in this area. The judgment of the trial court was correct and is therefore affirmed.

AFFIRMED.

BASIL O. BENTZ AND VERA A. BENTZ, HUSBAND AND WIFE, APPELLEES, V. NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

320 N.W.2d 763

Filed June 11, 1982. No. 44175.

1. **Motions for New Trial.** The discretion of the trial court in ruling on a motion for new trial is only the power to apply the statutes and legal principles to all facts of the case and grant a new trial only where legal cause exists. A trial judge may not grant a new trial merely because he reached a different conclusion than did the jury.
2. **Eminent Domain: Proof.** In a condemnation action the burden of showing the damages which the landowner will suffer rests upon him, while the burden is on the condemnor to show matters which tend to reduce or mitigate the damages.
3. **Eminent Domain: Evidence.** In a condemnation action tried before a jury, the presiding judge rules on the admissibility of evidence and other questions of law, while the jury determines questions of fact such as the value of the property taken.
4. **Eminent Domain: Expert Witnesses.** Expert opinion evidence in a condemnation case is to be considered and weighed by the trier of fact like other testimony. It is only advisory in nature and is not binding upon the jury.
5. **Eminent Domain: Witnesses.** Generally, either lay or expert witnesses may be used to testify as to the value of a tract of land taken or the value of the remainder thereof immediately before and immediately after the taking, if proper foundation is laid showing familiarity with the property, the weight and credibility of the testimony being for the jury.
6. **Eminent Domain: Appeal and Error.** The amount of damages sustained in an eminent domain action is peculiarly of a local nature and normally is to be determined by the jury; this court will not ordinarily interfere with the verdict, if evidence is conflicting, unless clearly wrong.
7. **Eminent Domain: Juries: Case Overruled.** Where a jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which, in arriving at a verdict, it may consider in connection with other competent evidence. To the extent *Wagner v. State*, 176 Neb. 589, 126 N.W.2d 853 (1964), may be inconsistent with this opinion, it is overruled.
8. **Eminent Domain: Juries.** In eminent domain proceedings, the jury is not required to accept as conclusive the estimates of value made by the witnesses at trial.

Appeal from the District Court for Chase County:

JACK H. HENDRIX, Judge. Reversed and remanded with directions.

Kelley, Wallace, Scritsmier, Moore, Romatzke & Byrne, P.C., for appellant.

Christensen Law Offices, P.C., for appellees.

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

CAPORALE, J.

This matter originated as an eminent domain proceeding brought by the appellant, Nebraska Public Power District (NPPD), seeking an easement for the construction and maintenance of an electrical transmission line across property owned by Basil and Vera Bentz, appellees herein. Following a jury verdict, the District Court of Nebraska, Fourteenth Judicial District, in and for Chase County, granted the motion of the appellees for new trial. We find the trial court erred in doing so, and reverse with directions to reinstate the verdict and to enter judgment thereon.

This action has proceeded solely upon the issue of determining the damages sustained by appellees' property. The easement acquired by NPPD includes all rights of ingress and egress across the right-of-way for maintaining and inspecting a 115,000-volt transmission line which connects substations at Grant, Nebraska, and near Enders, Nebraska. The easement reserved the right to irrigate within the easement right-of-way so long as irrigation equipment is kept at least 10 feet from the conductor poles. The award of the appraisers appointed by the county court was challenged by NPPD, which appealed from the allowance to the District Court. Trial before a jury was had on the issue of the difference in value of the property before and after the taking, and including crop damage, fence damage, and abstracting expenses. At

trial, various witnesses were called to testify as to the nature of the property, the uses to which it was being put, and the potential for irrigation of the property. The evidence adduced indicates that the Bentz ranch consists of approximately 5,953 acres in Chase County. A stream runs through the ranch for a distance of 6½ miles, with a hay meadow situated along the creek. The balance of the property consists of uncultivated pastureland and grasslands. Witnesses testified that the Bentz property had hay meadow of between 400 to 1,000 acres, pastureland of from 3,260 to 5,247 acres, and property with irrigation potential ranging from 632 to 1,710 acres. The witnesses also expressed varying opinions as to whether the easement eliminated all the irrigation potential or whether alternative irrigation methods could be used on the property. Four witnesses, including Basil Bentz, testified at trial concerning the amount of damage resulting to the property, with estimates ranging from $74,000 to $297,200. In addition to the testimony and exhibits adduced at trial, the jury was allowed to view the property after receiving instructions from the court. The issue was submitted to the jury, which returned a verdict in favor of the appellees in the amount of $50,000.

On June 9, 1980, a motion for new trial was filed by the appellees, challenging the adequacy of the jury verdict. After a hearing, the District Court granted the motion, finding that the verdict was outside the evidence. NPPD has appealed to this court, alleging that the District Court erred in its finding and in granting a new trial to the appellees.

It is the appellant's contention that no tenable legal cause existed for the action taken by the trial court in rejecting the jury verdict and that the order of the court constitutes an abuse of discretion and should be reversed. Appellees, on the other hand, contend that the granting of a new trial is committed to the discretion of the trial court and should not be

interfered with by this court on appeal unless a clear showing is made that the trial court abused its discretion.

It appears appropriate to again reexamine the rules which govern the District Court in considering motions for new trial in actions involving jury trials and the rules which govern our review of errors assigned thereon. In *Greenberg v. Fireman's Fund Ins. Co.,* 150 Neb. 695, 35 N.W.2d 772 (1949), we considered the issue, recognizing the "lack of clarity and consistency in our many decisions dealing with these questions." *Id.* at 699, 35 N.W.2d at 776. In *Greenberg* we held that where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, the integrity of the jury system requires that he be allowed to keep the benefit of the verdict unless there was *prejudicial error in the proceedings.* "A new trial is to be granted for a *legal cause* and where it appears that a legal right has been invaded or denied. A new trial is not to be granted for arbitrary, vague, or fanciful reasons. Tingley v. Dolby, [13 Neb. 371, 14 N.W. 146 (1882)]; Missouri Pacific Ry. Co. v. Hays, 15 Neb. 224, 18 N.W. 51 [(1883)]; Wagner v. Loup River Public Power District, [150 Neb.] 7, 33 N.W.2d 300 [(1948)]." (Emphasis supplied.) *Id.* at 701, 35 N.W.2d at 777.

This standard of review of motions for new trial was restated by our opinion in *State v. Wixson,* 175 Neb. 431, 122 N.W.2d 72 (1963), a condemnation action. On conflicting evidence ranging from an opinion that there was a benefit of $1,420 to a loss of $10,030, a verdict was rendered by the jury in favor of the landowner for $10,000. The State filed a motion for new trial, which was sustained, and the jury's verdict was set aside. On appeal, this court reversed the District Court, citing *Greenberg v. Fireman's Fund Ins. Co., supra,* on the ground that: " 'A new trial is to be granted for a legal cause and

where it appears that a legal right has been invaded or denied.' " *Id.* at 442, 122 N.W.2d at 78.

More recently, in *Kremlacek v. Sedlacek,* 190 Neb. 460, 209 N.W.2d 149 (1973), we approved the granting of a new trial because a juror took an unauthorized view of the scene of an intersectional collision. We observed that a new trial may not be granted for arbitrary, vague, or fanciful reasons, but held that a motion for new trial, because of alleged juror misconduct, is addressed to the sound discretion of the trial court. The question in *Kremlacek* turned on whether the evidence was sufficient to sustain the finding of the trial court that prejudicial error occurred; we held it did. See, also, *State v. Woodward,* 210 Neb. 740, 316 N.W.2d 759 (1982).

The rule to be distilled from these cases is, as we said in *Wixson, supra,* that the discretion of the trial court in ruling on motions for new trial is only the power to apply the statutes and legal principles to all facts of the case and grant a new trial only where legal cause exists. A trial judge may not grant a new trial merely because he reached a different conclusion than did the jury.

With that rule in mind, we now direct our attention to the evidence and verdict in this case.

It is the general rule in this jurisdiction that the burden of showing the damages which the landowner will suffer rests upon him, while the burden is on the condemnor to show matters which tend to reduce or mitigate the damages. *Leffelman v. City of Hartington,* 173 Neb. 259, 113 N.W.2d 107 (1962); *Twenty Club v. State,* 167 Neb. 37, 91 N.W.2d 64 (1958); *Platte Valley Public Power & Irr. Dist. v. Armstrong,* 159 Neb. 609, 68 N.W.2d 200 (1955).

In a condemnation action tried before a jury, the presiding judge rules on the admissibility of evidence and other questions of law, while the jury determines questions of fact such as the value of the property taken. 30 C.J.S. *Eminent Domain* § 286(2)

(1965). In this regard, expert opinion evidence in a condemnation case is to be considered and weighed by the trier of fact like other testimony. It is only advisory in nature and is not binding upon the jury. *Iske v. Omaha Public Power Dist.,* 185 Neb. 724, 178 N.W.2d 633 (1970); *Langdon v. Loup River Public Power District,* 144 Neb. 325, 13 N.W.2d 168 (1944).

Generally, either lay or expert witnesses may be used to testify as to the value of a tract of land taken or the value of the remainder thereof immediately before and immediately after the taking, if proper foundation is laid showing familiarity with the property, the weight and credibility of the testimony being for the jury. *Medelman v. Stanton-Pilger Drainage Dist.,* 155 Neb. 518, 52 N.W.2d 328 (1952).

The amount of damages sustained in an eminent domain action is peculiarly of a local nature and normally is to be determined by the jury; this court will not ordinarily interfere with the verdict, if evidence is conflicting, unless clearly wrong. *Sayer Acres, Inc. v. Middle Republican Nat. Resources Dist.,* 205 Neb. 360, 287 N.W.2d 692 (1980); *Iske v. Omaha Public Power Dist., supra; State v. Dillon,* 175 Neb. 444, 122 N.W.2d 223 (1963); *Kennedy v. Department of Roads and Irrigation,* 150 Neb. 727, 35 N.W.2d 781 (1949); *Wahlgren v. Loup River Public Power District,* 139 Neb. 489, 297 N.W. 833 (1941).

In addition, where a jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which, in arriving at a verdict, it may consider in connection with other competent evidence. *Leffelman v. City of Hartington, supra; Stull v. Department of Roads and Irrigation,* 129 Neb. 822, 263 N.W. 148 (1935).

The appellees' construction of Nebraska case law urges us to adopt the rule that in condemnation cases the verdict returned by the jury must always fall within the range of estimates testified to by the witnesses at trial. Representative of the cases cited

for this proposition is *Wagner v. State,* 176 Neb. 589, 126 N.W.2d 853 (1964). In *Wagner,* the District Court granted the condemnor's motion for new trial after a $3,200 verdict was returned in favor of the condemnees, on the basis that the jury award was higher than the range of estimates given by the parties' witnesses. This court affirmed the District Court, holding that a general verdict based on inconsistent special findings of fact cannot stand. That is not the case in this action; in any event, to the extent that *Wagner* may be inconsistent with this opinion, it is overruled.

We are more persuaded by the rationale found in *Chaloupka v. State,* 176 Neb. 746, 127 N.W.2d 291 (1964), a condemnation case in which the jury returned a verdict of $1,170. The trial court granted an additur of $2,000 for the reason that the verdict failed to reflect compensation for loss of access to a portion of plaintiff's property. This court reversed, Judge Spencer writing: "Essentially, the problem herein is one of the credibility of the witnesses and the weight to be given to their testimony. This is solely a matter for the jury. We may not agree with the conclusion reached, but where there is any evidence to support a jury's verdict, it is not the court's function to weigh the evidence to determine whether it would have returned a different verdict." *Id.* at 755, 127 N.W.2d at 297-98.

To hold otherwise, by adopting the rule urged by the appellees, would totally eviscerate the substantial body of law represented by NJI 1.42, which informs juries that they may or may not adopt the conclusions of expert witnesses, according to the best judgment of the jury. We are not prepared to do this and render that jury instruction meaningless.

The case law as developed in this jurisdiction makes it clear that in eminent domain proceedings, the jury is not required to accept as conclusive the estimates of value made by the witnesses at trial.

See, also, *Samuelson v. Central Nebraska Public Power and Irr. Dist.*, 125 F.2d 838 (8th Cir. 1942). Such opinions are to be used only to aid the jury in arriving at a proper conclusion under the circumstances. When the evidence, including the inferences the jury might draw from its view, is conflicting, as it was in this case, the jury verdict should not be set aside unless clearly wrong. The jurors are the judges of the credibility of the witnesses and the weight to be given their testimony. See *Kennedy v. Department of Roads and Irrigation, supra.*

In the present case, the jury was informed by the witnesses as to the terrain of the Bentz property, soil condition, and adaptability of various types of irrigation systems. Basil Bentz testified that he had no present intention to develop irrigation on his property and was content to ranch the property during his lifetime. There was a wide divergence in the testimony as to how the easement would affect the irrigation potential of the property and its relationship with the depreciation in value of the property.

While the evidence may have sustained a larger verdict than rendered by the jury, the evidence adduced was sufficient to sustain the verdict rendered. Jurors are accorded great latitude, as the trier of fact, in the consideration of the testimony, and their verdict is not required to be limited to the range of estimates opinioned by the witnesses at trial. For this reason we must conclude that the jury verdict was not clearly erroneous and determine that it was error on the part of the District Court to find that the jury verdict was outside the evidence as adduced. The order of the District Court in granting a new trial to appellees is reversed; the jury's verdict is to be reinstated and judgment entered thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., dissenting.

However stated, the majority now adopts a rule in real estate appraisal cases that accords to the jury's

view an almost mystical quality. The viewing of the property or, rather, the personal impressions of a jury or a fact finder during the viewing are not capable of review by this court. In doing so, we have removed a yardstick used by trial judges to determine whether a verdict is within the range of the evidence.

The majority has overruled, indeed, the clear Nebraska precedent of *Wagner v. State,* 176 Neb. 589, 126 N.W.2d 853 (1964), which is directly contrary to the result reached here. *Chaloupka v. State,* 176 Neb. 746, 127 N.W.2d 291 (1964), on which the majority relies, is not particularly helpful to the majority. In that case we reversed the trial court's order granting a motion for new trial. The verdict, however, was within the extremes of the lay and expert witness testimony as to value. It did not address the question in this case, and the extended discussion in that case of the magic of a jury's view was and is largely dicta.

The majority has also cast us into a minority position among the many appellate courts which have considered this question. See Annot., 1 A.L.R.3d 1397 at 1434 (1965).

JAMES P. O'TOOLE, APPELLEE, V. KATHRYN M. YUNGHANS ET AL., APPELLANTS.

320 N.W.2d 768

Filed June 11, 1982. No. 44192.

1. **Joint Tenancy: Taxes.** It is the general rule that when one of several coowners of property acquires a tax title thereto founded on default in the payment of taxes which are a common burden on all, his purchase amounts merely to a payment of the taxes or a redemption from the sale, and gives him no rights against his associates except insofar as they may fail or refuse to contribute to the expenditure so made.
2. _____: _____. The above rule is not changed by the fact that the

cotenant acquires the tax title from a stranger who purchased at the tax sale.

3. ____: ____. Neb. Rev. Stat. § 77-1843 (Reissue 1976) does not change the general principle that the purchase or extinguishment of an outstanding title, interest, or claim by one cotenant inures to the benefit of his cotenants.

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

Knudsen, Berkheimer, Beam, Richardson & Endacott, for appellants.

Dwight Griffiths, and Samuel L. Schuetz and John L. Weingart of Finley, Miller, Cashman, Schuetz & Weingart, for appellee.

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

CLINTON, J.

This is an action by the plaintiff O'Toole, filed on September 21, 1978, against the defendants Yunghans to quiet plaintiff's claimed title to an undivided one-half interest in a 560-acre tract of land and to his claimed 100 percent interest in a 120-acre tract of land, both located in Pawnee County, Nebraska, against the claims of the defendants which are founded upon a treasurer's deed. We will hereafter refer to the tracts as the Scott place and the McNabb place, respectively. The District Court for Pawnee County found in favor of the plaintiff, declaring the treasurer's deed void and removing the cloud cast upon O'Toole's title by the recording of the deed. The defendants have appealed to this court.

Since on trial de novo we conclude that the District Court was correct, it is necessary to set forth only those facts which support the findings of the trial court and our determination here.

O'Toole and Kathryn Yunghans (Yunghans) are brother and sister, and this is another chapter in a family feud. See *Yunghans v. O'Toole,* 199 Neb. 317,

258 N.W.2d 810 (1977). O'Toole and Yunghans are owners as joint tenants of the Scott place by virtue of a warranty deed from their father dated November 6, 1958. In the case of *Yunghans v. O'Toole, supra,* we held that Yunghans was entitled to have the joint tenancy and the accompanying right of survivorship severed by partition. O'Toole is the sole record title owner to the McNabb place by virtue of a deed from his father dated May 6, 1968. Subsequent to the acquisition of the above titles, O'Toole operated or supervised the operation of both places.

Real estate taxes on both tracts were unpaid for the last half of 1970 through 1973, and on December 16, 1974, the county treasurer issued a "County Treasurer's Certificate of Tax Sale.—Public. No. 1120" to Theron G. Callam, which certificate covered both the Scott and the McNabb places. Taxes for subsequent years were not paid by the owners, and the treasurer issued five "subsequent" tax certificates to Callam for taxes for the years 1974 through the first half of 1976. On August 8, 1977, Callam assigned all of his interest in the tax sale certificates to Yunghans. Thereafter, on September 8, 1977, Yunghans paid the taxes for the last half of 1976 on both tracts and received another treasurer's tax sale certificate. On December 20, 1977, Yunghans acquired a "Treasurer's Deed," which purported to convey to her title to both tracts, and recorded the deed on the same day.

O'Toole pleaded and asserted various theories on which he claims the treasurer's deed is void. However, we need consider only the theories upon which the trial court acted. The basis for decision on the two tracts is different. As such, the facts pertaining to each tract will, insofar as practical, be stated separately. As to the Scott tract, the trial court found that acquisition of the tax certificate by Yunghans from Callam, the payment of the subsequent taxes by Yunghans, and the acquisition of the treas-

urer's tax deed amounted to a redemption by a cotenant and inured to the benefit of O'Toole; that Yunghans should be paid the sum of $7,054.06 which O'Toole had paid into court at the time of the filing of his amended petition as his share of the taxes and interest; and that he should furthermore reimburse Yunghans for any taxes she subsequently paid.

The decision of the District Court was correct. It is the general rule that "when one of several coowners of property acquires a tax title thereto founded on default in the payment of taxes which are a common burden on all, his purchase amounts merely to a payment of the taxes or a redemption from the sale, and gives him no rights against his associates except in so far as they may fail or refuse to contribute to the expenditure so made." *Toole v. Lawrence,* 144 Neb. 779, 787, 14 N.W.2d 607, 611 (1944). See, also, 86 C.J.S. *Tenancy in Common* § 59 (1954). The above rule is not changed by the fact that the cotenant acquires the tax title from a stranger who purchased at the tax sale. *Saffer v. Saffer,* 133 Neb. 528, 274 N.W. 479 (1937). There is nothing in the evidence in this case which removes it from the foregoing general rule.

We now recite the additional pertinent facts relative to the McNabb place. O'Toole was the sole record owner of that tract. Yunghans was, on the record, a stranger to that title. Absent some circumstances creating a legal reason otherwise, there was nothing to prevent her from acquiring title to the McNabb tract by a valid treasurer's deed.

In his fourth cause of action O'Toole alleged that he was without funds to pay the taxes on the Scott place or the McNabb place and that, in order to obtain such funds, he advertised and offered for sale on November 18, 1977, the McNabb tract; that on November 16, 1977, 2 days before the proposed auction, Yunghans filed in the District Court for Pawnee County an action in which she claimed that O'Toole

held the McNabb place in trust pursuant to an oral agreement for a family settlement. On November 16, 1977, in that action Yunghans obtained a temporary restraining order and O'Toole was prevented from selling the McNabb place. In her petition in that action Yunghans alleged: "5. At the meeting referred to in Paragraph Three, it was orally agreed between plaintiff and defendant James P. O'Toole that plaintiff's father should deed the McNabb Pasture to one of the heirs of James J. O'Toole for a small consideration, and said heir would hold record title to the property solely as nominee for the heirs of James J. O'Toole pending a settlement agreement over distribution of the Estate of James J. O'Toole which would include distribution of the McNabb Pasture. It was agreed that when this agreement was reached, defendant James J. O'Toole would convey away the McNabb Pasture in accordance with the terms thereof.

. . . .

"10. By virtue of the death of James J. O'Toole and the oral agreement previously alleged, plaintiff is entitled to and *is the beneficial owner of an undivided one-half interest in the McNabb Pasture.*" (Emphasis supplied.)

The evidence supports the conclusion that Yunghans' claim of an interest in the McNabb place was totally groundless and false, that the action was filed for the purpose of attempting to prevent O'Toole from accomplishing his purpose of acquiring funds to pay his share of the taxes, and so that she might acquire title to both tracts.

The evidence shows that O'Toole paid to his father the sum of $9,600 for the McNabb place; that the amount was the fair value of said property; that Yunghans received the $9,600 check; and that she filed the estate tax return for her father's estate and reported the $9,600 as an asset of the estate, describing it as proceeds of sale from the McNabb

tract. It further shows that she was the notary public who took her father's acknowledgment on the deed by which the tract was conveyed to O'Toole and that the deed was witnessed by a lawyer and a banker, apparently at her behest. The evidence also shows that the petition in the action in the District Court for Pawnee County in which she asserted title to the McNabb place was filed by her on November 16, 1977, the same day the mandate of this court was filed in *O'Toole v. Yunghans,* 199 Neb. 317, 258 N.W.2d 810 (1977). It likewise shows that to the time of trial in this cause now before us, she had taken no action to cause the sale of the Scott place pursuant to the decree for partition even though judgment on the mandate was entered on November 30, 1977.

The action in which Yunghans obtained the restraining order was never pursued to final judgment. The record fully supports a finding that the action was brought in bad faith for the purpose of preventing O'Toole from paying his share of taxes and as a part of her attempt to acquire title to both tracts.

As already noted, O'Toole asserted various procedural grounds on which it is claimed the treasurer's deed was void. We need not deal with those contentions, and assume that all procedures were proper. We hold that Yunghans is estopped to assert the validity of her tax title as against O'Toole. One may not acquire title to real estate by estoppel. *Roll v. Martin,* 164 Neb. 133, 82 N.W.2d 34 (1957). However, " ' "a party may estop himself after the arrangements have been fully executed from asserting that the title he by his own acts has created or aided in creating is not the true title." . . .' " *Id.* at 140, 82 N.W.2d at 39. In that case we said, quoting from *May v. City of Kearney,* 145 Neb. 475, 17 N.W.2d 448 (1945): " ' "Equitable estoppels operate as effectually as technical estoppels. They cannot in the nature of things be subjected to fixed and settled rules of universal application, like legal estop-

pels, nor hampered by the narrow confines of a technical formula. So, while the attempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circumstances of the particular case, and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances. . . .'' ' '' 164 Neb. at 139, 82 N.W.2d at 38. O'Toole's title in this case does not arise by estoppel, it comes by deed of purchase. Yunghans' tax title was made possible by her inequitable and unconscionable conduct in preventing O'Toole from selling the McNabb place. In any event, if the allegations of paragraph 10 of the petition, previously described, are taken as true, she was, according to her own claim, a tenant in common with O'Toole in the McNabb place and the redemption for taxes by her inured to her cotenant's benefit.

Yunghans asserts that her tax title is protected by the provisions of Neb. Rev. Stat. §§ 77-1843 and 77-1844 (Reissue 1976). These sections provide: "In all controversies and suits involving the title to real property claimed and held under and by virtue of a deed made substantially by the treasurer in the manner provided by sections 77-1831 to 77-1842, the person claiming the title adverse to the title conveyed by such deed shall be required to prove, in order to defeat the title, either (1) that the real property was not subject to taxation for the years or year named in the deed; (2) that the taxes had been paid before the sale; (3) that the property had been redeemed from the sale according to the provisions of this chapter, and that such redemption was had or made for the use and benefit of persons having the right of redemption under the laws of this state; or (4) that there had been an entire omission to list or assess the property, or to levy the taxes, or to sell

the property." § 77-1843. "No person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the property had been paid by such person or the persons under whom he claims title as aforesaid." § 77-1844.

A reading of these statutes shows that they afford Yunghans no comfort. O'Toole did prove that he had title to the property at the time of sale and he therefore had standing to challenge the tax deed under § 77-1844. There is nothing in § 77-1843 which purports to set aside the general principle that the purchase or extinguishment of an outstanding title, interest, or claim by one cotenant inures to the benefit of his cotenants.

AFFIRMED.

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

F.H.T., INC., A CORPORATION, THE MABEL T. ERICKSON IRREVOCABLE TRUST, AND JAMES S. BAILEY, TRUSTEE, APPELLEES, V. DUANE R. FEUERHELM, PERSONAL REPRESENTATIVE OF THE ESTATE OF JERALD E. FEUERHELM, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND

F.H.T., INC., A NEBRASKA CORPORATION, HASTINGS PORK, INC., A NEBRASKA CORPORATION, AND BRAD FEUERHELM, THIRD-PARTY PLAINTIFFS, APPELLANTS, V. JAMES S. BAILEY, INDIVIDUALLY AND AS TRUSTEE OF THE MABEL T. ERICKSON IRREVOCABLE TRUST, GARY DUNCAN, HAYDEN THOMPSON, AND ALEX LESLIE, THIRD-PARTY DEFENDANTS, APPELLEES, AND SHARON E. FEUERHELM, INTERVENOR-APPELLANT.

320 N.W.2d 772

Filed June 11, 1982. No. 81-808.

1. **Equity: Appeal and Error.** In an action at equity, the Nebraska Supreme Court must review the record de novo and reach an independent conclusion without being influenced by the findings of the trial court, except, however, that where credible evidence is in conflict, we must give weight to the fact the trial court saw the witnesses and observed their demeanor while testifying.
2. **Restrictive Covenants: Shareholder Agreements.** Restrictive covenants in private shareholder agreements between stockholders are binding on the parties to such agreements.

Appeal from the District Court for Adams County: FRED R. IRONS, Judge. Affirmed in part, and in part remanded with directions.

Lyle E. Strom and T. Geoffrey Lieben of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellants Duane Feuerhelm, F.H.T., Hastings Pork, and Brad Feuerhelm.

Jay S. Horowitz and Gregory D. Schetina of Durham & Horowitz, and Gerald T. Whelan of Whelan, Foote & Scherr, P.C., for appellees F.H.T., Erickson Trust, Bailey, Duncan, Thompson, and Leslie.

M. J. Bruckner and W. Scott Davis of Marti, Dal-

ton, Bruckner, O'Gara & Keating, for intervenor-appellant Sharon Feuerhelm.

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

PER CURIAM.

This action represents the competing claims by two groups of stockholders for control of F.H.T., Inc. (FHT), a closely held corporation formed in this state on October 17, 1968. The appeal results from the judgment of the District Court of Nebraska, Tenth Judicial District, in and for Adams County, enforcing a buy-out provision and holding that the intervenor is not a proper party to this action. We affirm in part, and in part remand for further proceedings.

The primary issue on appeal concerns the validity of a buy-out provision entered into between the controlling shareholders of the corporation, and, if valid, whether it had been waived, abandoned, or repudiated by the parties. Other issues concern whether a proper tender was made pursuant to that provision and whether the intervenor is a proper party to this action.

FHT was formed in 1968 by Jerald Feuerhelm, Burton Hutton, and Hayden Thompson, and consisted of a contained hog production facility in Hastings, Nebraska. The three men had met in North Dakota, where Thompson was a banker with wide agricultural and commercial investments; Feuerhelm and Hutton were partners in a small hog farrowing operation. The men became friends and subsequently developed a business interest in a mass hog production business in Edgemont, South Dakota, prior to organizing the Hastings facility. Upon incorporation of FHT, the men became the sole stockholders, directors, and officers of the corporation, with Thompson and Feuerhelm each receiving a 40 percent interest and Hutton owning the remaining 20 percent. Thompson provided most of

the capitalization for FHT, while Feuerhelm's contribution consisted largely of his experience in operating pig farms. Hutton was unable to raise his share of the capital contribution and, after January of 1969, appears to have had little role in the operation of the company. Hutton was removed as an officer of FHT on June 7, 1972; however, his shares were not redeemed by FHT until January of 1974.

At a stockholder meeting held on or about December 1, 1972, a stock transfer restriction resolution was entered between Thompson and Feuerhelm. The minutes of that meeting reflect that the purpose of the resolution was to restrict "the sale or transfer of shares of the company both during the lifetime and at the death of any of the stockholders in order to assure the continuity of the ownership of the company." A pertinent part of the resolution provides: " 'BE IT RESOLVED that the *undersigned owners* of the shares of the company shown opposite their names:

Stockholder or Noteholder	No. of Shares
J. E. Feuerhelm	5,300.1
Hayden Thompson	1,028

have agreed *with the company and each other* to the sale and transfer of shares of stock owned or to be owned by them through conversion by them as follows . . . .' " (Emphasis supplied.) The first provision of the resolution consists of a lifetime stock transfer restriction requiring the shareholders to first offer their shares for sale to the company at a price equal to the then book value. The book value is to be determined by the independent certified accountants for the company. The resolution further provides the manner in which notice of a sale is to be communicated to the corporation officers and shareholders. The men agreed that the purchase price determined was to be paid by the purchaser with a promissory note due 15 years from the date of sale, bearing interest at the rate of 4 percent per annum, principal plus interest payable at the end of the 15-year term.

The resolution also contains a buy-out provision to be effective upon the death of a stockholder. The provision provided in part: " '[T]he company shall purchase and the estate or personal representative of the deceased stockholder shall sell the decedent's stock in the company for a consideration equal to the book value of such stock as established by the accountants for the company as herein provided above. . . . The closing of the sale and purchase of the shares by the company or, in the event of its inability to complete said purchase by the surviving stockholders, shall be made within 6 months after the date of the deceased stockholders' death and the purchase price shall be paid to the estate of the decedent under the terms [above].' " The resolution was endorsed by Thompson and Feuerhelm as both officers and shareholders of the corporation.

Jerald Feuerhelm died on June 5, 1980, whereupon his brother, Duane Feuerhelm, a resident of California, was appointed special administrator and personal representative of his estate. This action arises from a dispute among the parties concerning their participation in the corporation, its capitalization, and the validity of the 1972 stock transfer resolution. This action was brought on behalf of FHT, the Mabel T. Erickson Irrevocable Trust (which holds the Thompson stock in FHT), and James S. Bailey, as trustee, seeking an injunction to enforce the buy-out resolution. The Feuerhelm estate has refused to sell its shares back to FHT and has counterclaimed on behalf of FHT, alleging the 1972 resolution as void, unenforceable as being an unreasonable restraint on alienation, or as being waived or rescinded by subsequent acts of Jerald Feuerhelm and Hayden Thompson. In addition, Sharon Feuerhelm, the former wife of Jerald Feuerhelm, filed a petition in intervention to this action, alleging that the 1972 resolution was void for the reason that it

had been used to perpetrate fraud upon her during the pendency of her 1979 divorce action.

This matter came to trial on June 8-10, 1981. The court found the stock transfer resolution to be valid and properly executed by Feuerhelm and Thompson and not waived or abandoned by them. The court ordered specific performance of the 1972 resolution, quieted all right, title, and interest in the Feuerhelm stock in FHT, and ordered Duane Feuerhelm to comply with the resolution by delivering the stock to the corporation. The court denied the claim of the intervenor, without prejudice, finding she failed to prove such fraud as would vitiate the buy-out provision.

In an action at equity, this court must review the record de novo and reach an independent conclusion without being influenced by the findings of the trial court, except, however, that where credible evidence is in conflict, we must give weight to the fact the trial court saw the witnesses and observed their demeanor while testifying. *Philip G. Johnson & Co. v. Salmen, ante* p. 123, 317 N.W.2d 900 (1982); *Chicago Lumber Co. v. Horner,* 210 Neb. 833, 317 N.W.2d 87 (1982); *Sturm v. Mau,* 209 Neb. 865, 312 N.W.2d 272 (1981).

We have examined and studied the voluminous and ofttimes duplicative exhibits and pleadings contained in the unprofessionally assembled record in this case, presented to us in disorganized fashion in a box, and determine that the stock restriction resolution entered into between Feuerhelm and Thompson is valid and enforceable. We also determine that the intervenor, Sharon Feuerhelm, is not a proper party to this action and that any claim she may have must be brought against the estate of Jerald Feuerhelm.

FHT is a simple and representative example of a closely held corporation, its stock ownership and

corporate management being originally vested in three people. After Hutton's failure to raise his share of the capital contribution, he was removed as an officer of FHT, his shares were subsequently redeemed, and the control of FHT was vested in the two remaining stockholders. For a general discussion on the attributes of close corporations, see O'Neal, Close Corporations §§ 1.02 and 1.07 (2d ed. 1971 and Cum. Supp. 1981). In such corporations, stock restrictions are devices often employed to insure that the management and control of the business remains with the same group of investors or with people well known to them. Such restrictions may be embodied in the articles of the corporation, in the bylaws, or in shareholder agreements, and generally provide that upon the withdrawal or death of a stockholder, his shares will be sold or transferred only to the remaining stockholders or to the corporation, or at least will be offered to them before being sold to any outsider. Such agreements make it possible for shareholders to choose future associates and prevent unwanted outsiders from entering the business if their integrity or business acumen is in doubt. See O'Neal, *supra*, §§ 7.05 and 7.06.

In the present case there is nothing in the articles of incorporation or bylaws of FHT which provides for a stock restriction or limits or restricts the right of the shareholders to enter into a stock restriction agreement. Our review of the agreement entered into between Feuerhelm, Thompson, and FHT convinces us that it constitutes a reasonable restraint on the power to transfer those shares held by the contracting parties and covered by the terms of the agreement, and it does not impose an absolute restriction on the alienability of the stock. In *Tu-Vu Drive-In Corp. v. Ashkins,* 61 Cal. 2d 283, 391 P.2d 828, 38 Cal. Rptr. 348 (1964), Justice Tobriner held that a reasonable provision restricting the transfer

of stock (1) should not constitute an unreasonably restrictive curtailment of the right of alienation and (2) should not otherwise unreasonably deprive the shareholders of substantial rights. This court, in *Elson v. Schmidt,* 140 Neb. 646, 652, 1 N.W.2d 314, 317 (1941), quoted the case of *Baumohl v. Goldstein,* 95 N.J. Eq. 597, 124 A. 118 (1924), for the following proposition: " 'There seems to be no reason in principle why they (the stockholders of a corporation) should not be permitted to retain the control of the corporation in which they have embarked their fortunes among themselves, or such of them as stand by the vessel, where no question of a *bona fide* purchaser without notice is involved. In this court, where the intent of the parties is the thing sought to be enforced, every effort should be made to hold men to agreements into which they have voluntarily entered, where the same are not obnoxious to any law or policy, and upon the strength of which others have changed their position or circumstances, or parted with a valuable consideration. It is *their* business and *their* money which is involved. It is by their efforts that success is attained, if attained at all.' " We determine from the evidence that the stock transfer agreement is valid and was adopted by the parties for legitimate corporate purposes, and that it does not impose an unreasonable restraint on the alienability of the FHT stock.

It is alleged by the Feuerhelm estate and the intervenor that even if the resolution were properly adopted, it was subsequently waived, abandoned, and repudiated by the actions of the parties. The evidence reveals that after the adoption of the stock restriction resolution, Feuerhelm and Thompson entered into a number of business transactions which consolidated their control over FHT and other mutual business enterprises. The capital for most of these transactions was provided by McHenry County Credit Company, Monagin Credit Company, or Gen-

eral Service & Credit Company, all entities owned or controlled by Hayden Thompson. In addition, both men had occasion to pledge their stock individually and as officers of the corporation, in order to secure financing for the corporation, with entities owned by Thompson and with other commercial entities. There is no showing that these pledges were objected to by either party, or that it was a violation of the stock resolution to pledge the stock. Rather, the evidence shows that these pledges were made with the consent of both parties. The resolution does not specifically refer to "pledges" of stock; it addresses itself to the "sale or transfer" of stock. As pointed out by O'Neal, *supra*, § 7.05a, these provisions have given courts considerable trouble: "On the one hand, the courts tend to strictly construe restrictions on the transfer of stock. On the other hand, they are reluctant to give such a restriction an interpretation that will permit outsiders to become shareholders in the corporation against the wishes of those who are already participants, and thus defeat one of the principal objectives of a first option provision. Influenced by these two considerations, the courts usually hold that a nonspecific first option provision is not triggered by a pledge of stock . . . ." *Id.* at 16. The evidence clearly reveals that the parties did not intend to place any restriction on the power to pledge the stock, as it was used often as a means of securing capital for the corporation. Nor can we conclude that the parties abandoned the resolution by their failure to legend all the stock with the restriction. While the failure to do so would render the stock restriction ineffective against a third party purchaser without notice of the restriction, we are not dealing with that question here. The restriction was effective between Thompson and Feuerhelm, for they had actual knowledge of the stock restriction. See, also, *In Re Consolidated Factors Corp.*, 46 F.2d 561 (S.D. N.Y. 1931), cited with approval in

Comment 4 of Neb. U.C.C. § 8-204 (Reissue 1980), holding that restrictive covenants in private shareholder agreements between stockholders are binding on the parties to such agreements. As Feuerhelm and Thompson were both executory parties to the resolution, they are bound by it, as are their heirs, personal representatives, successors or assigns.

We turn next to the allegations pertaining to the enforcement of the stock restriction resolution. The estate has refused to surrender the stock, contending that the payment terms under the resolution are unconscionable and that no valid tender was made because the book value of the shares had not been determined by generally accepted accounting principles by the corporation's independent accountants.

In the resolution the parties agreed that the price to be paid to a selling stockholder, or a deceased stockholder's estate, would be "book value," determined by the independent certified accountants for the company in accordance with generally accepted accounting principles consistent with the method of accounting then employed by FHT, and that such valuation would be paid by delivery "of a promissary [sic] note due fifteen years from date, bearing interest at the rate of four percent (4%) per annum . . . ." The record reveals that at the date of Feuerhelm's death no *independent* certified accountants were in the employ of FHT. Rather, the determination of book value of the stock was performed by Gary Duncan, an employee of FHT and former comptroller of one of its subsidiaries. Duncan testified he determined the book value of the stock by computing the corporation's historical cost less liabilities, less depreciation. Using the general ledger of FHT and its subsidiaries, he determined a total stockholders' equity of $3,285,541. After arriving at this figure, Duncan contacted the accounting firm of Peat, Marwick, Mitchell & Co. and supplied it with his computations and the number of outstanding cor-

porate shares of stock. The accounting firm determined the book value of the stock to be $519.20 a share, but noted that its opinion was based on the financial information provided by Duncan and not according to the firm's general auditing standards. On July 10, 1980, a promissory note dated June 1, 1980, was tendered on behalf of FHT to the Feuerhelm estate in the amount of $2,751,811.92, payable 15 years after date at an interest rate of 4 percent, in exchange for the 5,300.1 shares held by the estate. The promissory note was rejected by Duane Feuerhelm. Duncan subsequently received additional financial information from two subsidiaries of FHT, which caused him to increase the book value to $563.08 per share, and he prepared an additional promissory note in the amount of $232,568.39. This note was also rejected by the estate. On appeal it is alleged that the accounting procedures utilized by Duncan wrote approximately $4,500,000 in value off the corporate books. In defense of the figures the appellees allege that the stock agreement does not provide for a certified audit and that they stand willing to perform their obligation at whatever book value might be established by such an audit.

While it is generally true that to constitute a valid tender the tenderer must offer a specific amount, such amount need not be beyond reasonable dispute. 86 C.J.S. *Tender* § 7 (1954). This would appear to be the case in the present circumstance where the resolution refers to "book value" determined by "generally accepted accounting principles." Book value, as applied to corporate stock, ordinarily means the net value shown on the corporate books of account of all assets of the corporation after deducting all liabilities. *Schaffer v. Below,* 278 F.2d 619 (3d Cir. 1960). The appellants' claim that there has been no proper tender is based on the fact that the book value determined by Duncan has not been validated by independent certified accountants. The ap-

pellants have not, however, shown the amount calculated by Duncan to be insufficient under the circumstances, nor did they retain an independent accountant to compute a different "book value." In *Haller v. Chiles, Heider & Co., Inc.*, 195 Neb. 65, 236 N.W.2d 822 (1975), this court considered the rights of the parties under a stock option purchase agreement that provided that the consideration to be paid for the shares was to be the "net book value" as of December 31, 1973. We held that the terms of the option were definite enough to bind the corporation to purchase the shares at whatever "net book value" might ultimately be determined. The evidence does not disclose any bad faith on the part of Duncan in computing the book value of the FHT shares. Furthermore, unlike the cases involving "perfect tender," as cited by the appellants, it is generally recognized that the technical rules governing tender in actions at law are not binding on a court of equity. 86 C.J.S. *Tender* § 5 (1954).

In considering how the value of the stock or "book value" of FHT is to be ascertained, the stock restriction resolution calls for a determination by independent certified accountants for the company in accordance with generally accepted accounting principles. This determination involves, primarily, an examination of the corporate books and other pertinent financial records as of the date of death of the shareholder. See Annot., Valuation of Corporate Stock Under "Buy-Out" or "First Option" Agreement Giving Option to or Requiring Corporation or Other Stockholders to Purchase Stock of Deceased or Withdrawing Stockholders, 54 A.L.R.3d 790 (1974). The rights of the parties must be determined by the language of the stock restriction. The resolution reflects an agreement by Feuerhelm and Thompson to protect the interest of each other by requiring that the book value be determined by independent certified accountants so that the fair value of the shares

owned by the selling stockholder, or by the estate of a deceased stockholder, may be realized. No formula for determining book value is established by the resolution other than a determination based on accepted accounting principles. We believe the intention of the parties is clearly expressed in the resolution and, while the Duncan figures were not shown to be erroneous, we must remand this proceeding to the District Court with instructions that a determination of the value of the stock be made by independent certified accountants. Upon this determination, the appellants are ordered to deliver the stock of the Feuerhelm estate to FHT in return for its promissory note under the terms and conditions specified in the resolution.

We also determine, as did the trial court, that the intervenor is not an indispensable party to the subject matter of this controversy: the validity and enforcement of the 1972 stock restriction resolution entered into between Feuerhelm and Thompson. She has an action pending against the Feuerhelm estate, and the actions taken by the District Court and this court on appeal shall not prejudice her right, if any, against the estate. For these reasons the order of the District Court is affirmed in part, and in part remanded for further proceedings in accordance with our instructions.

From a review of the praecipes for the transcript, we conclude that each party is responsible for the duplicative nature of the record before us, and therefore order that each party bear his, its, and her own costs incurred in connection with this appeal.

AFFIRMED IN PART, AND IN PART REMANDED WITH DIRECTIONS.

WHITE, J., concurs in the result.

TEDDY A. TEAGUE, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

320 N.W.2d 779

Filed June 11, 1982. No. 82-117.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and dismissed.

Herbert M. Fitle, City Attorney, and George S. Selders, Jr., for appellant.

M. H. Weinberg of Weinberg & Weinberg, P.C., for appellee.

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

PER CURIAM.

The instant appeal from the Nebraska Workmen's Compensation Court involves the issue as to whether payment by the City of Omaha of disability pension benefits under an unenforceable ordinance in lieu of workmen's compensation benefits estops the City from asserting the statute of limitations as a defense. Our opinion in *Kohlbeck v. City of Omaha, ante* p. 372, 318 N.W.2d 742 (1982), is dispositive of the issue. Such payments did not toll the period of limitations and the City of Omaha is not estopped from asserting the period of limitations as a defense. The award of the Nebraska Workmen's Compensation Court is reversed and the action dismissed.

REVERSED AND DISMISSED.

KELVIN WALKER, BY HIS NEXT FRIEND AND FATHER, JOHN WALKER, APPELLANT, V. LARRY E. BRADLEY ET AL., APPELLEES.

320 N.W.2d 900

Filed June 18, 1982. No. 44055.

Schools and School Districts: Due Process. In connection with a suspension of a student from school of up to 5 school days, statutory due process requires that the student be given oral or written notice of the charges against him, an explanation of the evidence the authorities have, and an opportunity to present his version of the facts.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

Craig F. Swoboda and George O. Rebensdorf of Swoboda & Katz, for appellant.

William H. Grant and Albert, Leininger & Grant, for appellees.

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

MCCOWN, J.

This is an action by a 13-year-old plaintiff, acting by his father and next friend, seeking to enjoin certain officials of the school district of the city of Columbus, Nebraska, from enforcing a 3-day suspension of the plaintiff student from Columbus Junior High School for violation of school rules against fighting. After trial, the District Court denied plaintiff's application for a permanent injunction and dissolved a pretrial temporary restraining order. The plaintiff has appealed, alleging that he was not afforded due process of law.

The plaintiff, Kelvin Walker, was a 13-year-old student in Columbus Junior High School in Columbus, Nebraska, at the time of the events involved here. Kelvin was involved in four separate fights at school during the fall of 1980. The evidence as to

each fight varies and is in some conflict, but the details of each incident are not significant for purposes of this appeal.

The first fight occurred September 9, 1980. No disciplinary action was taken against Kelvin but another boy who was involved was suspended. The principal of the junior high school requested a conference with Kelvin's parents concerning this fight but they refused to meet with him.

The second fight occurred on November 3, 1980, and did not result in any direct or immediate disciplinary action except a verbal warning to both participants.

The third fight occurred on November 5, 1980. An assistant principal interviewed the plaintiff and the other boy involved and took statements from both of them later on November 5. On the morning of November 6, the assistant principal called the mothers of both boys to arrange a conference later in the day with them and the boys to discuss the November 5 incident. He was unable to arrange a conference with the other boy's parents until the following day, November 7.

On November 6, 1980, Kelvin and his brother were involved in a fourth fight with some other boys. Approximately 2 hours before that fight, another assistant principal had met with Kelvin and told him that the school did not condone fighting and encouraged him to report any problems immediately to the office rather than to become involved in another fight.

After the fourth fight both assistant principals met with Kelvin, his mother and brother, and the parents of another boy who was also involved in the November 6 fight. At that meeting both the November 5 and November 6 fights were discussed. The students reported their versions and the assistant principal in charge of the discussion reduced those statements to writing. Since one boy involved in the No-

vember 6 incident was absent, disciplinary measures for the November 6 fight were postponed. The assistant principal read the handbook of rules for the Columbus Junior High School, which expressly prohibits "verbal or physical fights in school buildings" and "hitting, striking, kicking or in any other way harming another student . . . ." The plaintiff and his parents were all aware of the rule against fighting.

The assistant principal indicated that he intended to suspend both the plaintiff and the other boy involved in the November 5 fight. He also informed the plaintiff's mother that she had a right to discuss his decision with the principal. Plaintiff's parents decided to appeal.

On November 12, 1980, the principal met with the plaintiff and his parents. All four altercations were discussed and full information concerning each one was presented to Kelvin and his parents by various school officials. The evidence included written statements from teachers and students, the plaintiff's statement regarding the November 5 fight, and several memoranda from various school officials who had investigated one or more of the incidents. The conference lasted approximately 2 hours and plaintiff and his parents had the opportunity to and did explain their positions regarding the incidents. The principal determined that suspension for the November 5 fight alone was not warranted and sustained plaintiff's appeal on that individual incident, but determined that the plaintiff should be suspended for the cumulative effect of all four fights, and particularly the fight of November 6, after having been warned earlier on the same day. He sent a letter to plaintiff's parents advising them that he had determined to suspend plaintiff from school for 3 days for being involved in physical fighting with students on four different occasions, and that the suspension spoke to "an accumulative situation."

Plaintiff's parents appealed the principal's deci-

sion to the superintendent of schools, who held a hearing on November 24, 1980. The plaintiff and his parents, other boys and their parents, the principal and assistant principals, counsel for the superintendent of schools, and counsel for the plaintiff were all present. The school officials presented their case and the plaintiff and his parents were given an opportunity to present their side of the case. After hearing, the superintendent denied the appeal and ordered that plaintiff's suspension would run from December 2 through December 4, 1980.

Thereafter, plaintiff filed this action in the District Court and temporary injunction was allowed on December 1, 1980. On January 23, 1981, after trial, the District Court specifically found that the plaintiff was accorded due process of law in the hearings held by the school district; that although the incidents were provoked, the plaintiff could have easily avoided them and was not forced to participate; and that the incidents were more in the nature of retaliation than in self-defense. The court dissolved the previous temporary injunction, and denied the petition for permanent injunction. This appeal followed.

The plaintiff contends that he was not afforded due process of law in the series of hearings held by the school district officials. Essentially, his claim is that he only received advance notice that he was to be suspended for the November 5, 1980, incident, but did not know in advance that the other incidents were also to be considered. We disagree.

By statute a school principal may deny any student the right to attend school for a period of up to 5 school days for any violation of rules and standards of behavior within the limitations and subject to the procedures of the appropriate statutes. See Neb. Rev. Stat. §§ 79-4,178 and 79-4,176 (Reissue 1976). Those statutes specify the procedures to be followed for establishing and promulgating rules and stand-

ards of student conduct and the procedures to be followed in suspending students for violation of such rules. The statutory procedures embody all due process requirements set out in *Goss v. Lopez,* 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975). See, also, *Braesch v. DePasquale,* 200 Neb. 726, 265 N.W.2d 842 (1978).

In connection with a suspension of a student from school of up to 5 school days, statutory due process requires that the student be given oral or written notice of the charges against him, an explanation of the evidence the authorities have, and an opportunity to present his version of the facts. All of those things were done in the present case.

In the case now before us, it is not disputed that there was a specific rule of conduct prohibiting fighting, hitting, striking, kicking, or in any other way harming another student, and that the rules had been properly promulgated and distributed to students and their parents. The plaintiff and each of his parents had actual notice of the rule in advance and the plaintiff engaged in fighting in violation of the rule on four separate occasions.

The plaintiff's position is simply that the violation of the rule was justified either because it was in response to taunting or provocation by other students or was a form of self-defense. There can be no doubt that the plaintiff and his parents had notice of the date, time, and place of each violation involved and that the plaintiff and his parents were given an opportunity to explain their version of the facts, particularly with respect to the last two incidents.

All of the procedural due process requirements of the relevant statutes were followed and the plaintiff and his parents were also given an appeal hearing before the superintendent of schools, at which counsel was present. To contend, as the plaintiff does, that plaintiff was denied due process rights under the facts and circumstances of this case is utterly

frivolous. A 3-day suspension from junior high school can hardly be said to constitute such irreparable harm as to justify judicial interference with lawful and proper school disciplinary procedures.

AFFIRMED.

WHITE, J., not participating.

H. F. JACOBBERGER, APPELLANT, V. LEE TERRY, DOUGLAS COUNTY ELECTION COMMISSIONER, APPELLEE.

320 N.W.2d 903

Filed June 18, 1982. No. 44068.

1. **Pleadings: Appeal and Error.** A defense not raised by a party until after the issuance of an order dismissing the petition brought against a defendant neither raises nor preserves a defense for consideration by this court.
2. **Municipal Corporations.** A provision of a municipality's 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 is of statewide concern, the state law takes precedence over any municipal action taken under the home rule charter.
3. **Legislature: Municipal Corporations.** It is necessary to determine the "concern" of the legislative act prior to determining whether that "concern" is statewide or local.
4. ——: ——. Whether or not an act of the Legislature pertains to a matter of local or statewide concern becomes a question for the courts when a conflict of authority arises, and the courts are not bound by the Legislature's declaration on this matter.
5. **Municipal Corporations.** There is no sure test by which it is possible to distinguish between matters of strictly municipal concern and those of statewide concern, and it is therefore necessary to make such distinction on a case-by-case analysis of the issue as it arises.
6. **Voting: Constitutional Law.** The right of suffrage involves one of the basic civil rights of man.
7. **Legislature: Voting.** The Legislature's actions to protect the fundamental civil rights of suffrage and proportionate representation are of statewide as opposed to local concern.
8. **Legislature.** It is competent for the Legislature to classify objects of legislation, and if the classification is reasonable and not arbitrary, it is a legitimate exercise of legislative power.

9. **Municipal Corporations: Constitutional Law.** A reasonable distinction does exist between metropolitan class cities under the commission form of government and all other metropolitan cities, and, consequently, L.B. 329 is not special or local legislation violative of Neb. Const. art. III, § 18.
10. **Judgments: Appeal and Error.** A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

R. A. Skochdopole and William R. Johnson of Kennedy, Holland, DeLacy & Svoboda, for appellant.

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

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

HASTINGS, J.

This is an action brought by the plaintiff Jacobberger pursuant to the Nebraska Uniform Declaratory Judgments Act, seeking a determination of the constitutionality of Neb. Rev. Stat. §§ 14-201 et seq. (Cum. Supp. 1980) (hereinafter referred to as L.B. 329). The District Court found that the provisions of L.B. 329 were not violative of the Constitution of the State of Nebraska, and dismissed the action. Jacobberger has appealed, assigning as error that the subject matter of L.B. 329 addresses a matter of local concern and that its provisions directly conflict with the city of Omaha's home rule charter, contrary to Neb. Const. art. XI, § 5. He further contends that L.B. 329 is violative of Neb. Const. art. III, § 18, the prohibition against local and special legislation, and that the District Court erred in concluding that L.B. 329 limited the forms of government available to metropolitan class cities. We affirm.

The city of Omaha is a city of the metropolitan class and is governed by a home rule charter which

was adopted pursuant to article XI, § 5. This constitutional provision permits the electors of a city whose population exceeds 100,000 to adopt a home rule charter by a majority vote of the electors of that city. Omaha's current charter was adopted in 1956, and the portion pertinent to the present action provides that "The Council shall be composed of seven members who shall be known as Councilmen. All seven Councilmen *shall be elected by the people on an at large, non-partisan basis* and shall serve for a term of four years." (Emphasis supplied.) § 2.01. Three subsequent attempts to alter this provision by amendments which would have allowed some form of representation and voting by district, as opposed to an at-large basis, failed when put to a vote of the electors.

In 1979 Senator Chambers introduced L.B. 329, which was adopted by the Legislature and codified as §§ 14-201 et seq. The pertinent portion thereof provides: "The election commissioner in any county in which is situated a city of the metropolitan class shall divide the city into seven city council districts of compact and contiguous territory. Such districts shall be numbered consecutively from one to seven. *One council member shall be elected from each such district.*" (Emphasis supplied.) § 14-201.03.

The defendant Terry, as the election commissioner of Douglas County, and his predecessor in office, acted pursuant to the mandate in L.B. 329 and divided the city of Omaha into seven city council districts. While an election had not been held at the time this suit was commenced, we note that during the pendency of this appeal both a primary and general election were held in 1981, and a new city council has been elected from the newly formed districts.

Jacobberger filed this action as a citizen, taxpayer, and registered voter of the city of Omaha, seeking a temporary and permanent injunction

against the implementation of L.B. 329 as well as a determination of its constitutional validity. As noted above, the trial court dismissed the action and Jacobberger perfected this appeal.

On appeal the appellee has raised the question of whether the appellant is guilty of laches and is thereby estopped from bringing this action. We need only note that this defense was not raised in the original answer filed in this action, but was raised in an amended answer which was filed 2 days after the date appearing on the order dismissing the action. Although the trial court considered laches as a defense against the granting of a temporary injunction, it is apparent from the order rendered by the court that the defense was not considered on the merits of Jacobberger's request for a declaratory judgment. It is axiomatic that a defense not raised by a party until after the issuance of an order dismissing the petition brought against the defendant neither raises nor preserves a defense for consideration by this court. Therefore, it is appropriate for us to proceed to a discussion of the assignments of error raised by Jacobberger on appeal.

The first assignment of error raises the question of whether the subject matter of L.B. 329 is a matter of local or state concern. This issue arises out of the constitutional limitation requiring a home rule charter to be "subject to the Constitution and laws of the state." Art. XI, § 5. "This has been construed to mean 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 is of state-wide concern, the state law takes precedence over any municipal action taken under the home rule charter." *Omaha Parking Authority v. City of Omaha,* 163 Neb. 97, 104, 77 N.W.2d 862, 868 (1956).

When analyzing an issue of this nature one is re-

quired to determine the "concern" of the legislative act prior to determining whether that "concern" is statewide or local. It is obvious from the legislative history of L.B. 329 and from the express language of the statute itself that the "concern" of the bill was to insure adequate and equal representation to all socioeconomic segments of the populations of cities of the metropolitan class. The statute itself declares in part: "The Legislature finds and declares that the election of the city council at large in cities of the metropolitan class denies representation to some socioeconomic segments of the population." § 14-201.02. Furthermore, at several points, Senator Chambers, the bill's introducer, noted that the purpose of L.B. 329 was to insure "proper proportionate representation." Public Hearing, Committee on Government, Military & Veterans Affairs, 86th Leg., 1st Sess. 7 (March 9, 1979). The Legislature then dealt with this "concern" over disproportionate representation in cities of the metropolitan class by requiring the election of council members by district instead of on an at-large basis. Therefore, although L.B. 329 did alter the method of electing city council members in metropolitan class cities, the Legislature's true concern in enacting L.B. 329 was its fear that certain socioeconomic classes were being deprived of representation by elections on an at-large basis. The question then becomes whether this concern for proportionate representation is a matter of local or statewide concern.

We note in passing that the Legislature foresaw this problem and attempted to remedy the situation by declaring in part: "The Legislature further finds and declares that fair and adequate representation of all areas and all socioeconomic segments of the population of cities of the metropolitan class is a matter of general statewide concern, the provisions of any home rule charter notwithstanding." § 14-201.02. However, as we have noted on numerous

occasions, "Whether or not an act of the legislature pertains to a matter of local or state-wide concern becomes a question for the courts when a conflict of authority arises." *Axberg v. City of Lincoln,* 141 Neb. 55, 58, 2 N.W.2d 613, 615 (1942). We are not bound by the Legislature's declaration on this matter.

Although we have addressed this issue on numerous occasions, never have we attempted to formulate a definition of either local or statewide concern. Indeed, we have noted that "The Constitution does not define which laws relate to matters of strictly municipal concern and which to state affairs. There is no sure test which will enable us to distinguish between matters of strictly municipal concern and those of state concern. The court must consider each case as it arises and draw the line of demarcation." *Carlberg v. Metcalf,* 120 Neb. 481, 487, 234 N.W. 87, 90 (1930). While some jurisdictions have attempted to define one or the other category, the circuitous nature of these attempted definitions leads us to conclude that the better course remains one of a case-by-case analysis of the issue as it arises. See 2 McQuillin, Municipal Corporations § 4.85 (3d ed. rev. 1979).

In this instance, as we have noted, we are dealing with an act of the Legislature whose primary concern was to insure proportionate representation to every socioeconomic segment of the population of a metropolitan class city. When confronted with an attack on a state legislative apportionment scheme and its potential impairment of the constitutionally protected right to vote, the U. S. Supreme Court noted that such a case, with regard to the right of suffrage, " 'touches a sensitive and important area of human rights,' and 'involves one of the basic civil rights of man,' . . . . Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." *Reynolds v. Sims,* 377 U.S. 533,

561-62, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). Consequently, we must consider this case as one in which the Legislature acted in the interest of protecting a fundamental human and civil right.

In *Midwest Employers Council, Inc. v. City of Omaha,* 177 Neb. 877, 131 N.W.2d 609 (1964), this court was confronted with a challenge of an Omaha ordinance which attempted to regulate the employment practices in private businesses in Omaha. The plaintiff challenged the ordinance on the basis that the city was without the power under its home rule charter to legislate in the field of fair employment practices and civil rights due to the fact that these areas were matters of statewide concern. After pointing out the general rule concerning conflicting provisions of home rule charters and state statutes, we found the ordinance "to be unconstitutional in its entirety for the reason that the state, through the Legislature, did not delegate to the city of Omaha the power to permit its city council to legislate on fair employment practices and civil rights by passing ordinance No. 22026; and for the further reason that the power relating to labor relations and practices, and *civil rights, lies in the state, and such matters are of statewide concern and not of local concern nor municipal government concern.*" (Emphasis supplied.) *Id.* at 888, 131 N.W.2d at 616.

Similarly, we find in this instance that the Legislature's actions to protect the fundamental civil rights of suffrage and proportionate representation are also of statewide concern as opposed to local concern. Consequently, the provisions of L.B. 329 supersede the provisions of § 2.01 of the Omaha home rule charter and do not violate article XI, § 5.

The appellant places heavy reliance on *State ex rel. Fischer v. City of Lincoln,* 137 Neb. 97, 288 N.W. 499 (1939), wherein we noted that "In adopting a home rule charter, however, the city had the right to make provision therein for any form of local govern-

ment it desired, which was not in conflict with the letter and spirit of our Constitution. Its right to adopt a particular form of government was in no way dependent upon whether the legislature, by statutory enactment, had authorized such a form, nor was it subject to the statutory conditions and limitations upon which the legislature had authorized a city to adopt it." *Id.* at 103, 288 N.W. at 502. We note, however, that this case involved a conflict between an ordinance of the city of Lincoln and a state statute that by its terms was only applicable to cities operating under the commission form of government. Therefore, when we spoke of a city's right to "adopt a particular form of government," it was with reference to the adoption of a commission form of government as opposed to a mayor-city council form of government. Such language should not be taken to mean that a home rule charter city has the authority to control its citizens' right to vote and entitlement to proportionate representation.

A similar distinction can be drawn between the present action and those cases from other jurisdictions cited by the appellant. *State ex rel. v. Edmonds,* 150 Ohio St. 203, 80 N.E.2d 769 (1948); *State ex rel. v. Callahan,* 96 Okla. 276, 221 P. 718 (1923); *Triano v. Massion,* 109 Ariz. 506, 513 P.2d 935 (1973); *Strode v. Sullivan,* 72 Ariz. 360, 236 P.2d 48 (1951). These cases involved the manner in which local elections were to be conducted and reached the conclusion that such a matter was of local concern only. As noted earlier, while the action of the Nebraska Legislature in this instance directly affects the manner by which a metropolitan city selects its city council, the primary concern of the legislation was to insure the fundamental right to vote and the right to proportionate representation. Such matters are not of local concern alone and go well beyond the manner in which an election is conducted. Conse-

quently, the appellant's first assignment of error is without merit.

Appellant next contends that L.B. 329 is special or local legislation in violation of article III, § 18. This claim is based upon the fact that Neb. Rev. Stat. §§ 19-401 to 19-434 (Reissue 1977 and Cum. Supp. 1980) permits a city of 2,000 population or over to adopt a commission form of government and expressly requires such cities to elect their city councils "not by or from wards or districts, but at large." § 19-404 (Cum. Supp. 1980). Currently, as the parties concede, Omaha is the only city in Nebraska having the necessary population in excess of 300,000 inhabitants to qualify as a city of the metropolitan class. Neb. Rev. Stat. § 14-101 (Reissue 1977). However, because the Legislature may not create a "closed class" by leaving no room or opportunity for an increase in the members of the class by future growth or development, we must anticipate the possibility of an additional city qualifying as a metropolitan class city. *State ex rel. Douglas v. Marsh,* 207 Neb. 598, 300 N.W.2d 181 (1980); *City of Scottsbluff v. Tiemann,* 185 Neb. 256, 175 N.W.2d 74 (1970). Such a city may very well attain that status under a commission form of government. It is that possibility that leads the appellant to claim that the requirement of district elections contained in L.B. 329 will not operate uniformly on all metropolitan class cities in light of the provision in § 19-404 for at-large elections in cities governed by a commission, and that, therefore, L.B. 329 is special and local legislation in violation of article III, § 18.

However, we do not believe that L.B. 329 has created an unreasonable and arbitrary classification in violation of article III, § 18. " 'It is competent for the Legislature to classify objects of legislation and if the classification is reasonable and not arbitrary, it is a legitimate exercise of legislative power. . . . The power of classification rests with the Legisla-

ture and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution prohibiting local and special legislation. . . . A legislative classification, in order to be valid, must be based upon some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified. *Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.*' . . . 'Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act.' " (Emphasis in original.) *State ex rel. Douglas v. Marsh, supra* at 608-09, 300 N.W.2d at 187. The question becomes whether a metropolitan class city under any form of government other than the commission form amounts to "a proper and legitimate class with reference to the purpose of the act."

We conclude that a reasonable distinction does exist between metropolitan class cities under the commission form of government and all other metropolitan class cities, and that, therefore, L.B. 329 is not special or local legislation violative of article III, § 18. This distinction lies in the fact that the executive and administrative powers and duties of a metropolitan class city governed by a commission are divided into seven different departments, such as the department of accounts and finances, department of police, sanitation, and public safety, department of fire protection and water supply, and the

department of public improvements. § 19-414 (Cum. Supp. 1980). In turn, city council members shall be appointed as superintendents of the various departments. § 19-415 (Cum. Supp. 1980). The problems inherent in imposing the representation of the constituents of a district upon council members who must also concern themselves with the equitable administration of a department for the benefit of the entire city is readily apparent. The potential for one portion of the city whose council member is the superintendent of the department of public improvements to enjoy greater benefits from that department provides sufficient reason for the imposition of at-large elections upon those cities electing to adopt the commission form of government. It also provides a reasonable distinction from all other forms of city government.

It is evident from the Legislature's actions in 1979 that it foresaw this distinction and the potential problems arising therefrom. Prior to 1979, the mayor-city council and the commission forms of government were structured in much the same manner. In a mayor-city council structure the various city council members were designated as superintendents of the various departments, and each was elected on an at-large basis. §§ 14-217 and 14-201 (Reissue 1977). However, with the passage of L.B. 329, the Legislature not only instituted elections by district, they also repealed the provisions of § 14-217 calling for the designation of a council member as superintendent of a city department. By doing so, the Legislature removed any potential conflict that might arise between a council member's duty as administrator of a city department and his duty to his respective constituency.

For the foregoing reason, we conclude that the Legislature had a reasonable basis for distinguishing between the commission form of city government and all other forms of city government for

metropolitan class cities and the manner of elections it has provided for each. The appellant's second assignment of error is also without merit.

The appellant raises the following sentence from the trial court's order as the basis for the final assignment of error: "That LB 329 requires any city of the metropolitan class to have a city-council form of government and to elect its council members by district." It was upon this reasoning that the trial court based its conclusion that L.B. 329 did not violate article III, § 18.

It is clear from the provisions of L.B. 329 and §§ 19-401 et seq. that both are applicable to cities of the metropolitan class. In that respect, the trial court's order appears to be in error. However, "It is a familiar principle that a proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition." *Strauss v. Square D Co.,* 201 Neb. 571, 576, 270 N.W.2d 917, 920 (1978). We have also stated in the past that "Where a correct judgment or order has been made, the mere fact that it contains erroneous declarations of law does not require reversal." *Lux v. Mental Health Board of Polk County,* 202 Neb. 106, 110, 274 N.W.2d 141, 144-45 (1979). While the trial court may have misstated the scope of L.B. 329, its conclusion regarding the law's validity under article III, § 18, was, as we noted above, correct. Consequently, its decision will not be overturned on this basis.

We conclude that the concern for proportionate representation expressed by the Legislature in L.B. 329 is a matter of statewide concern. Therefore, the provisions of that act which pertain to the election of metropolitan class cities' council members by district are paramount to the conflicting provisions of the Omaha home rule charter. Further, the provision contained in L.B. 329 for district elections is not special or local legislation in violation of article III, § 18. A reasonable distinction exists between the

commission form of government, which is allowed to conduct at-large elections, and all other forms of government available to metropolitan class cities. Finally, we will not overturn what we find to be a correct finding by the trial court in spite of what appears to be a misstatement of the law in the court's order. For these reasons, we affirm the District Court's decision and uphold the validity of L.B. 329.

AFFIRMED.

CLINTON, J., concurring in the result.

It would appear upon initial consideration that whether a city having a home rule charter elects the members of its legislative body at large or by district is, just as a matter of common sense, one for the citizens of the community to decide. However, an examination of the decisions of this court applying Neb. Const. art. XI, §§ 2 through 5, discloses no formulation of any general principle by which one may determine whether any particular matter is of statewide or merely of local concern. Indeed, some of the decisions are impossible to reconcile on any rational basis. That examination further discloses that home rule charter provisions of the Constitution of Nebraska have, by decisions of this court, been gradually eroded until, except for the most insignificant matters, the home rule charter provisions are of no practical import except as a source of litigation.

The majority opinion adds further confusion to the subject by its lengthy discussion of deprivation of the right of suffrage. The Omaha home rule charter does not deprive anyone of the right of suffrage. L.B. 329 should be recognized for what it is, namely, a determination by the Legislature that in the city of Omaha a racial minority, most of whom live in one neighborhood, are entitled to representation on the local governing body. L.B. 329 is clearly designed as a specific remedy to a "local" problem.

Sections 2 through 5 of article XI of the Nebraska

Constitution have slowly been dying as the judicial hatchet has chopped away the life support system. I think our opinion today "pulls the plug." I make these separate comments in order that the demise not pass unnoticed and so that if there exists any particular interest in continuing significant home rule it can be done by a constitutional provision which somewhat precisely defines the appropriate areas of home rule rather than providing that it be "consistent with the laws of this state." The latter phrase simply does not tell the court whether the charter provisions of the Constitution prevail unless preempted by legislative act or whether the Constitution makers intended to make some sort of distinction between matters of statewide interest and those of merely local interest, as this court has held, but which distinction it has been unable to define.

There is adequate precedent for this court's decision. In *State ex rel. City of Grand Island v. Johnson,* 175 Neb. 498, 122 N.W.2d 240 (1963), we held that the percentage of votes required to issue general obligation bonds was a matter of statewide concern and the state statute requiring 60 percent approval prevailed over the charter provision requiring only majority approval. In *McMaster v. Wilkinson,* 145 Neb. 39, 15 N.W.2d 348 (1944), we held that an election contest involving the office of city councilman was governed not by charter provisions on the subject but by state statute. These cases seem to hold that matters pertaining to local elections are of statewide concern.

STEWART E. HALPIN ET AL., APPELLANTS, V. THE NEBRASKA STATE PATROLMEN'S RETIREMENT SYSTEM ET AL., APPELLEES.

320 N.W.2d 910

Filed June 18, 1982. No. 44186.

1. **State Patrolmen: Pensions.** Retirement benefits paid under the Nebraska State Patrolmen's Retirement System are not a gratuity but are deferred compensation.
2. _____: _____. The right of a state patrolman to receive benefits under the Nebraska State Patrolmen's Retirement System is contractual in nature and is protected against unconstitutional impairment.
3. _____: _____. The final average monthly salary of a state patrolman who was a member of the State Patrol on or before January 4, 1979, should be calculated by including the payment received upon retirement for unused vacation and sick leave accumulated during the final 3 years of service.
4. **Case Overruled.** To the extent that *Lickert v. City of Omaha,* 144 Neb. 75, 12 N.W.2d 644 (1944), is in conflict with this opinion, it is overruled.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with directions.

Dwyer, O'Leary & Martin, P.C., and Steven E. Achelpohl, for appellants.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellees.

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

BOSLAUGH, J.

The plaintiff Stewart E. Halpin was a member of the Nebraska State Patrol from October 15, 1947, until December 31, 1979, when he retired from the State Patrol. He is a member of the Nebraska State Patrolmen's Retirement System and is receiving benefits as a retired patrolman. He brought this action on his own behalf and on behalf of every present member of the patrol who was a member prior to

January 4, 1979, and every retired patrolman who retired on or after January 4, 1979, and is receiving benefits under the retirement system.

The plaintiffs sought a declaratory judgment that the final average monthly salary of a retiring patrolman should include the lump sum payment received for accumulated but unused vacation and sick leave.

Upon retirement a patrolman is entitled to receive an annuity which is a percentage of his final average monthly salary. Final average monthly salary is defined by statute as the sum of the patrolman's total salary during his final 3 years of service divided by 36. Neb. Rev. Stat. § 60-452.01 (Reissue 1978). From 1969 until January 4, 1979, the final average monthly salary of a patrolman was calculated by including the payment received for unused vacation and sick leave.

Commencing January 4, 1979, a patrolman's final average monthly salary was calculated by excluding the payment received for unused vacation and sick leave. This action was brought to determine that the payment received for unused vacation and sick leave should be included in the final average monthly salary.

Both parties filed motions for summary judgment. The trial court found that the payment for unused vacation and sick leave should not be included in the final average monthly salary. The defendants' motion for summary judgment was sustained and the petition dismissed. The plaintiffs have appealed.

The facts are not in dispute. The Nebraska State Patrolmen's Retirement System was created in 1947. Section 60-452.01 provides: "Any patrolman qualified for an annuity . . . shall be entitled to receive a monthly annuity for the remainder of his life. The amount of the annuity shall be a percentage of his final average monthly salary. . . . For purposes of this computation, final average monthly salary is defined to be the sum of the patrolman's total salary

during his final three years of service as a patrolman divided by thirty-six." Upon retirement patrolmen are entitled to be paid in a lump sum for one-fourth of their accumulated unused sick leave and for all of their accumulated unused vacation leave. Neb. Rev. Stat. §§ 81-1325, 81-1328 (Reissue 1976).

The computation of patrolmen's retirement annuities on the basis of a percentage of final average monthly salary began in 1969. From that time until January 4, 1979, the lump sum payments for unused vacation and sick leave were included in the computation of "final average monthly salary." After January 4, 1979, the defendant Public Employees Retirement Board, on the basis of an Attorney General's opinion dated December 26, 1978, excluded these lump sum payments from the computation of retiring patrolmen's "final average monthly salary."

At the hearing on the motions for summary judgment, the plaintiffs introduced depositions and affidavits from patrolman-members of the system, which showed that the patrolmen had been advised repeatedly that such lump sum payments would be included in computing their final average monthly salary, and that such advice had constituted a specific incentive for them to join and remain with the State Patrol. There was also testimony that inclusion of the payments in pension computation was seen as a way to discourage abuse of the sick leave policy. In addition, some officers testified that, although they were eligible to retire before the policy change, since they did not retire until after the change, their annuity was lower than they had expected since it was computed without inclusion of the lump sum payments.

The record indicates that the question of inclusion of the lump sum payments was brought to the attention of the defendant Public Employees Retirement Board in 1972 by a letter from Colonel Kruger indi-

cating that such payments were included when computing a retiring patrolman's final average monthly salary. The minutes of the board meeting of May 22, 1972, stated: "Member Morehouse suggested that the computations based on final monthly salary, which includes sick and vacation time for retiring Safety Patrol members, be continued as in the past." By deposition, the director of the board testified that "back in May of 1972 it was determined that the Board had ruled that accrued sick leave and vacation leave could be included in the salary."

In 1978 a report by the Auditor of Public Accounts raised the issue of inclusion of the lump sum payments in computing final average monthly salary and recommended "that the Public Employees Retirement Board review this procedure to determine its equality. We further recommend that clarification be obtained for the calculation of benefits." The board requested an opinion from the Department of Justice on the matter. An Attorney General's opinion of December 26, 1978, recommended that the board cease to include the lump sum payments in pension calculations. Beginning January 4, 1979, the board followed this recommendation with regard to retiring patrolmen.

The District Court's order granting defendants' motion for summary judgment stated: "The court . . . finds that the administrative policy [of including the lump sum payments in the final salary calculation] did not create contractual rights in those patrolmen who served while that policy was in effect." The court relied on *Lickert v. City of Omaha,* 144 Neb. 75, 12 N.W.2d 644 (1944), which held: "The existence of legislation making pension and retirement provisions for members of a police department and the acceptance or retention of employment as a member of a police department does not establish a contract, between the member and the city, that such members will thereafter be granted the retire-

ment and pension benefits provided in such legislation." *Id.* at 84, 12 N.W.2d at 648-49. The plaintiffs contend that this finding was in error, and that the trial court erred in failing to find that the lump sum payments should be included in calculating patrolmen's retirement benefits.

"Upon a motion for summary judgment the judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." *Manzer v. Pentico,* 209 Neb. 364, 366, 307 N.W.2d 812, 813 (1981).

The issues in dispute in the trial court were purely legal issues: (1) Whether the lump sum payments should be included in the computation of a patrolman's final average monthly salary; and (2) Whether the board's 10-year practice of including the payments created an expectation in the patrolmen protected by the law of contracts. The matter was a proper one for decision upon a motion for summary judgment.

This case involves only the rights of patrolmen who were members of the Nebraska State Patrolmen's Retirement System on or before January 4, 1979. We do not consider or determine whether § 60-452.01 requires inclusion of the leave payments in calculating retirement annuities for patrolmen who became members of the system after that date.

The question before the court is whether the board's determination to exclude leave payments from pension calculations after January 4, 1979, constitutes an impairment of contractual rights of retiring members, in violation of the Constitution. "Where . . . it is claimed that the contract clause prohibits a state's statutory modification of its own obligations, the court must determine whether contractual obligations within the purview of the con-

tract clause exist; if so, whether the state legislation under attack impaired those obligations; and if there is an impairment of contract, whether it is forbidden by the Constitution." *Pineman v. Oechslin,* 494 F. Supp. 525, 538 (D. Conn. 1980).

At the time *Lickert v. City of Omaha, supra,* was decided, it was generally held that public employees' pensions were not a matter of contract but a gratuity " 'springing from the appreciation and graciousness of the sovereign.' " *Bedford v. White,* 106 Colo. 439, 444, 106 P.2d 469, 471 (1940). However, Nebraska has long recognized that such pensions are not gratuities. In *Gossman v. State Employees Retirement System,* 177 Neb. 326, 331-32, 129 N.W.2d 97, 101-02 (1964), this court said: " 'The benefit of the retirement system awarded to a member thereof *who renders services under the act creating the system* after its enactment is not a grant of extra compensation after the services are rendered which the Constitution condemns because the increase in pay is granted immediately and from the date of the grant is being currently earned. . . . *It is the payment thereof alone which is deferred to a later date.*' . . . The benefits conferred are deferred compensation payable to the employee under the terms and conditions of the Act which he voluntarily agrees to by accepting the terms of employment." In *Wilson v. Marsh,* 162 Neb. 237, 75 N.W.2d 723 (1956), in holding that pension benefits are deferred compensation and not a gratuity, we cited *State v. Love,* 89 Neb. 149, 131 N.W. 196 (1911), to the effect that " 'the pension forms an inducement to the individual to enter and remain in the service of the [state], and . . . the pension in a sense is part of the compensation paid for those services.' " *Id.* at 253, 75 N.W.2d at 733. The decisions in other states are now generally in agreement that pension payments constitute deferred compensation for services rendered. *Brazelton v. Kansas Public Employees Retirement Sys-*

tem, 227 Kan. 443, 607 P.2d 510 (1980); *Kleinfeldt v. New York City Emp. Ret. Sys.,* 73 Misc. 2d 310, 341 N.Y.S.2d 784 (1973); *Miller v. State of California,* 18 Cal. 3d 808, 557 P.2d 970, 135 Cal. Rptr. 386 (1977); *Opinion of the Justices,* 364 Mass. 847, 303 N.E.2d 320 (1973); *Pineman v. Oechslin, supra.*

Viewing public employee pensions as deferred compensation, earned in exchange for services rendered, caused courts to simultaneously recognize that this created in the employees reasonable expectations entitled to legal protection. "For the civil service employees, the price of the pension plan, whether specifically discussed or not, is part of the total wage package negotiated when salary raises are determined. Pensions are bargained as an integral part of the wage-and-fringe benefit calculus." *Kleinfeldt v. New York City Emp. Ret. Sys., supra* at 788-89. "[A]n employee who relies upon an offer of deferred benefits to his or her detriment, and to the benefit of the employer who gains the employee's valuable services and loyalty as a consequence thereof, has expectations which are protected by the law of contracts." *Pineman v. Oechslin, supra* at 540. " 'State retirement systems create contracts between the state and its employees who are members of the system.' This is the rule followed in most recent cases on the subject, and seems to us the more enlightened view." *Singer v. City of Topeka,* 227 Kan. 356, 363, 607 P.2d 467, 473 (1980). Since Nebraska law recognizes that public pensions are deferred compensation, *Gossman v. State Employees Retirement System, supra,* it follows that Nebraska public employees, no less than those in other states, have "reasonable expectations which are protected by the law of contracts" with regard to their pension rights. *Pineman v. Oechslin, supra.* To the extent that *Lickert v. City of Omaha,* 144 Neb. 75, 12 N.W.2d 644 (1944), is in conflict, it is overruled.

Since the plaintiffs' pension rights are contractual in nature, it must next be determined whether state action has impaired those obligations, and, if so, whether the impairment is forbidden by the Constitution. " '[I]t is not every modification of a contractual promise that impairs the obligation of contract under the federal law.' . . . [T]he State 'has the "sovereign right . . . to protect the . . . general welfare of the people" ' and ' "we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary . . . .' " ' " *United States Trust Co. v. New Jersey,* 431 U.S. 1, 16, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977).

In the present case, state patrolmen had been advised from 1969 until 1979 that their "final average monthly salary" would be computed by including the lump sum leave payments they would receive at retirement. There was much undisputed testimony that plaintiffs relied upon this advice and that it constituted an incentive to many of them to enter and remain in the service of the State Patrol. In 1979 inclusion of these payments in the annuity calculation ceased, without an offsetting increase in benefits. A similar situation occurred in *County Officials v. Retirement Board,* 89 Wash. 2d 729, 575 P.2d 230 (1978). There the court held: "For 25 years, [defendant] has consistently included termination payments in the computation of 'average final compensation.' During this period numerous expectations based upon this practice have arisen in the minds of current employee-members of the system. To now hold termination payments not includable would violate those expectations and be contrary to the position of this court first expressed in *Bakenhus v. Seattle,* 48 Wn. 2d 695, 700, 296 P.2d 536 (1956), where we stated 'The promise on which the employee relies is that which is made at the time he enters employment; and the obligation of the employer is based upon this promise.' " *Id.* at 733, 575 P.2d at

232. In *Miller v. State of California,* 18 Cal. 3d 808, 815, 557 P.2d 970, 974, 135 Cal. Rptr. 386, 390 (1977), the court held: "[T]he right to pension benefits vests upon the acceptance of employment . . . ." *Kranker v. Levitt,* 30 N.Y.2d 574, 281 N.E.2d 840, 841, 330 N.Y.S.2d 791, 792 (1972), states: "The 1957 decision of the Comptroller . . . to include cash payments for accumulated vacation credits in determining the salary base for the computation of retirement benefits constitutes a valid contract between the State Employees' Retirement System and its members. . . . Accordingly, the plaintiff and all others similarly situated have acquired a vested right to the aforesaid benefit, and that benefit may not now be constitutionally impaired."

Two previous Nebraska cases held that pension rights for public employees did not vest until "the particular event happens upon which the pension is to be paid . . . ." *Lickert v. City of Omaha, supra* at 84, 12 N.W.2d at 649; *Mollner v. City of Omaha,* 169 Neb. 44, 98 N.W.2d 33 (1959). In *Mollner* a provision of the city charter specifically stated that employees' contributions to the pension plan " 'shall not give rise to any vested rights on the part of such members by reason of said contribution, unless and until said member has completed all the requirements for a pension herein provided.' " *Id.* at 64, 98 N.W.2d at 44. The *Mollner* opinion then noted: "The present charter is consistent with the former one . . ." adopted in 1922. *Id.* at 64, 98 N.W.2d at 44. Although not quoted in *Lickert,* the "former charter," with which the new charter in *Mollner* was "consistent," was the charter in effect at the time *Lickert* was decided. The no-vesting holdings in *Mollner* and *Lickert* were based on specific charter provisions which prevented vesting of pension rights until retirement. Because Neb. Rev. Stat. §§ 60-441 et seq. (Reissue 1978) contain no provision preventing vesting until a certain time, the decisions in

Mollner and *Lickert* are not applicable. We find that the board's practice of including lump sum leave payments in the annuity calculation gave rise to legitimate expectations on the part of the plaintiffs and the plaintiffs have a vested right to have this practice continued as to them. The board's failure to include such payments after January 4, 1979, in calculating retirement annuities for patrolmen who were members of the system on or before January 4, 1979, was an impairment of vested contractual rights.

However, as noted in *Pineman v. Oechslin,* 494 F. Supp. 525, 548 (D. Conn. 1980), this impairment is not necessarily unconstitutional. "[The 1975 Act] may yet pass constitutional muster if it is '*both reasonable and necessary*' to 'serve an important public purpose.' *United States Trust Co. v. New Jersey,* 431 U.S. at 29 . . . (emphasis added). However, as Justice Blackmun has noted, the application of the tests of necessity and reasonableness requires a much greater degree of judicial scrutiny in cases, such as this one, involving [state action] which purports to abrogate a state's own financial obligation than in cases involving an impairment by the state of purely private contracts." *Singer v. City of Topeka,* 227 Kan. 356, 607 P.2d 467 (1980), states the rule in this manner: " 'To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.' " *Id.* at 366, 607 P.2d at 475.

The courts agree that meeting the "important public purpose" test is no easy task. In *Miles v. Tenn. Consol. Retirement System,* 548 S.W.2d 299, 305 (Tenn. 1977), the court stated: "The record contains testimony from the Actuary and other em-

ployees of the State that the 1975 Act was passed to alleviate the funding problems of the pension system in general, as well as the pension system for judges; but, nowhere in the record is there any claim from any witness that the attempt to alleviate this funding problem by the Act of 1975 was to protect *a vital interest of the State.*" *Pineman v. Oechslin, supra* at 552, found the impairment unconstitutional because "the General Assembly which passed [this] legislation . . . was not forced to choose between abrogating its contractual commitments or permitting the state to become insolvent . . . ." *Opinion of the Justices,* 364 Mass. 847, 864, 303 N.E.2d 320, 329-30 (1973), notes: "That the maintenance of a retirement plan is heavily burdening a governmental unit has not itself been permitted to serve as justification for a scaling down of benefits figuring in the 'contract,' . . . ."

In the present case there is no evidence from which it could be found that an "important public purpose" or a "vital state interest" demanded the sudden exclusion of the leave payments from pension calculations. The Attorney General's opinion which recommended exclusion noted only that inclusion of the lump sum payments resulted in some patrolmen receiving larger annuities than others. There is no evidence that the continued financial integrity of the system depended upon exclusion of these payments or that the defendants were "forced to choose between abrogating [their] contractual commitments or permitting the state to become insolvent." *Pineman v. Oechslin, supra.* On the other hand, plaintiffs' evidence showed without dispute that the change would result in disadvantages to them without "comparable new advantages." *Singer v. City of Topeka, supra.* We find that the defendants' change in calculating plaintiffs' pension annuities resulted in an unconstitutional impairment of plaintiffs' contractual rights, and that the plain-

tiffs were entitled to summary judgment.

Since the final average monthly salary is calculated upon the total salary paid during the final 3 years of service, payment received for unused vacation and sick leave accumulated during the final 3 years of service only should be included in the calculation.

The judgment of the District Court is reversed and the cause remanded with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

DANA F. COLE & COMPANY, A PARTNERSHIP, APPELLANT, V. KENNETH BYERLY, APPELLEE.

320 N.W.2d 916

Filed June 18, 1982. No. 82-030.

1. **Equity: Appeal and Error.** In an equity action we review the record de novo and reach an independent conclusion without being influenced by the findings of the trial court, except that where credible evidence is in conflict, we must give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying.
2. **Restrictive Covenants.** The considerations to be balanced in determining whether a contract in restraint of trade is valid are the degree of inequality in bargaining power; the risk of the covenantee losing customers; the extent of respective participation by the parties in securing and retaining customers; the good faith of the covenantee; the existence of sources or general knowledge pertaining to the identity of customers; the nature and extent of the business position held by the covenantor; the covenantor's training, health, education, and needs of his family; the current conditions of employment; the necessity of the covenantor changing his calling or residence; and the correspondence of the restraint with the need for protecting the legitimate interests of the covenantee.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed in part, and in part reversed and remanded with directions.

Rollin R. Bailey of Bailey, Polsky, Cada & Todd, for appellant.

Charles R. Maser of Harold E. Connors & Charles R. Maser, P.C., for appellee.

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

WHITE, J.

This is an action in equity brought by the plaintiff, Dana F. Cole & Company, a Lincoln-based accounting partnership, to enforce a covenant not to compete against a former employee.

The case was tried to the District Court of Holt County, Nebraska. The trial court found that the contract was valid, denied the plaintiff's request for an injunction, and awarded damages of $1,000 to the plaintiff.

Since this is an equity case, we review the record de novo and reach an independent conclusion without being influenced by the findings of the trial court, except that where credible evidence is in conflict, we must give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying. *Philip G. Johnson & Co. v. Salmen, ante* p. 123, 317 N.W.2d 900 (1982); *Sturm v. Mau,* 209 Neb. 865, 312 N.W.2d 272 (1981); *Schmidt v. Henderson,* 148 Neb. 343, 27 N.W.2d 396 (1947).

The evidence reveals that the plaintiff has been engaged in the public accounting business since 1949, with its principal office in Lincoln and five branch offices located in Ord, Broken Bow, Grand Island, Beatrice, and Atkinson-O'Neill. Kenneth Byerly was hired by Dana F. Cole & Company in August 1974 to be office manager of the O'Neill, Nebraska, branch office. Byerly began work the last week of August 1974. During the period from August through December, Byerly worked under the assistant manager at the O'Neill office to learn the operation of

the branch office. On December 26, 1974, a written employment agreement was signed by the parties. Byerly assumed the duties of manager on January 1, 1975. The employment agreement contained the following clause: "For a period of two years after the termination of this Agreement, Byerly will not, within the area hereafter described, directly or indirectly, own, manage, operate, control, be employed by, participate in, or be connected in any manner, with any enterprise carrying on the business of public accounting, public bookkeeping, tax preparation, or the operation of a business advisory or consulting service, or any other business similar to the type of business conducted by the company in the State of Nebraska at the time of the termination of this Agreement. The area within which such activities are prohibited is within a radius of 75 miles in each direction from the city limits of Atkinson, Nebraska."

On August 30, 1981, defendant notified the plaintiff in writing that he was resigning effective September 30, 1981. Mr. Warren Hinze, managing partner of plaintiff, testified that after receipt of the written resignation, he made immediate contact with Byerly to learn why he was resigning. Byerly indicated to Hinze that he was disappointed in not being made a partner.

During the period that Byerly was employed by the plaintiff, the plaintiff added three new partners. Two of the three had considerably more time and experience with the partnership, while the other, an attorney as well as a certified public accountant, was a partner in another firm prior to his employment and he brought his personal accounts with him.

After Byerly left the plaintiff's employ, he opened his own accounting business in O'Neill, Nebraska. The evidence reflects that Byerly had accepted some of the plaintiff's clients. This action ensued.

Mr. Warren Hinze testified that when previous

managers had left the various branch offices and entered into their own practice in the area, the plaintiff lost 40 percent of its clients. As a result, the plaintiff required restrictive covenants not to compete in all employment contracts of managers. The managers of Beatrice, Broken Bow, and O'Neill branch offices were required to sign employment agreements with covenants not to compete. The Ord and Grand Island branch offices were protected by a partnership agreement. Mr. Hinze also testified that the branch office first opened in Atkinson, Nebraska, in 1967. From 1967 to 1974 it operated at a loss. The first profitable year was 1974. In May 1974 the manager at the Atkinson-O'Neill office resigned. In August 1975, Mr. Withrow, the assistant manager in the Atkinson-O'Neill office, left the plaintiff's employ. Approximately 40 percent of the plaintiff's clients followed Mr. Withrow. From 1975 to the time Mr. Byerly left, the plaintiff's O'Neill office again operated at a loss.

In testifying as to the reasonableness of the 75-mile restriction, Mr. Hinze stated that 75 to 80 percent of the plaintiff's clients served by the O'Neill office were located within a 75-mile radius.

In *Philip G. Johnson & Co. v. Salmen, ante* p. 123, 128, 317 N.W.2d 900, 903-04 (1982), this court stated: "At the early common law, a contract in restraint of trade was held to be against public policy and void. Over the years we have developed a balancing test and have held that such restraints, if reasonable, are enforceable. The considerations to be balanced are the degree of inequality in bargaining power; the risk of the covenantee losing customers; the extent of respective participation by the parties in securing and retaining customers; the good faith of the covenantee; the existence of sources or general knowledge pertaining to the identity of customers; the nature and extent of the business position held by the covenantor; the covenantor's training, health, edu-

cation, and needs of his family; the current conditions of employment; the necessity of the covenantor changing his calling or residence; and the correspondence of the restraint with the need for protecting the legitimate interests of the covenantee."

On the basis of the evidence adduced at trial, we find that the contract between the plaintiff and the defendant is valid. The evidence shows that the branch managers have a very personal relationship with the clients served. On the basis of past experience, Dana F. Cole & Company had the need to protect itself from the risk of an office manager taking clients with him when he left its employ. While the trade area within which the covenant controls seems broad, there is no evidence introduced which would show that the area is actually smaller. In fact, Mr. Hinze testified that 75 to 80 percent of the clients were located in the 75-mile radius. There is no inequality in bargaining power, and even though enforcing the covenant against Mr. Byerly would impose a burden upon him, it is still reasonable in light of the evidence produced. There was no evidence adduced at trial which would support the District Court's award of nominal damages in this case. The record is completely devoid of any specific monetary losses sustained by the plaintiff, prior to trial, as a result of the defendant's resignation and subsequent competition. We therefore affirm the District Court's finding that the contract was valid; we reverse as to damages and the holding that no injunction should issue; and we remand for issuance of an injunction.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

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Absence from Trial.

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2. On review of the action of an administrative agency, a court must correct errors of law and on remand the agency is bound to act upon the correction. But an administrative determination in which is imbedded a legal question open to additional review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. Phelps County Savings Co. v. Dept. of Banking & Finance 683

3. An administrative agency's duty to apply the statutory standard in determining whether an applicant is to receive a permit is the same after it falls into legal error as before. If, in the agency's judgment, new evidence is necessary to discharge its duty, the fact of a previously erroneous denial should not bar it from access to the necessary evidence for correct judgment. Phelps County Savings Co. v. Dept. of Banking & Finance 683

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Adoption.

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Affidavits.

1. Affidavits in support of an application for a wiretap order must contain a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. Neb. Rev. Stat. § 86-705(1)(c) (Reissue 1976). State v. Lane 46

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1. In determining whether the findings of the District Court are supported by the evidence, the Supreme Court must consider the evidence and all permissible inferences therefrom in a light most favorable to the successful party. Graff v. Farmers Mut. Home Ins. Co. 13

2. Where a jury has been waived and the case tried to the court, the judgment of the trial court has the effect of a verdict of a jury and will not be disturbed unless clearly wrong. Graff v. Farmers Mut. Home Ins. Co. 13
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13. The review in the District Court of an order of the State Personnel Board is on the record of the agency. Devine v. Dept. of Public Institutions 113
14. The questions to be determined are whether the findings of the board are supported by substantial evidence; whether the action taken was within the jurisdiction of the board; and whether its action was arbitrary and capricious. Devine v. Dept. of Public Institutions 113
15. In an action at equity, this court must review the record de novo and reach an independent conclusion without being influenced by the findings of the trial court, except, however, that where credible evidence is in conflict, we must give weight to the fact the trial court saw the witnesses and observed their demeanor while testifying. Philip G. Johnson & Co. v. Salmen 123
Jameson v. Nelson 259
F.H.T., Inc. v. Feuerhelm 860
Dana F. Cole & Co. v. Byerly 903
16. In testing the sufficiency of the evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Rogers v. Hansen 132
Guerra v. Iowa Beef Processors, Inc. 433

17. A finding by the trial court that a statement made by the accused is voluntary will not ordinarily be set aside on appeal unless clearly erroneous. State v. Boyer 139
State v. Hunsberger 667
18. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown. State v. Boyer 139
19. In order to predicate error on the overruling of a challenge for cause, there must be a showing that the objectionable juror was forced upon the challenging party and sat on the jury because such party had exhausted his peremptory challenges. State v. Boyer 139
20. An 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. Sandel v. Packaging Co. of America 149
21. Appeals under the Employment Security Law are reviewed de novo on the record from the District Court and it is the duty of this court to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof. To the extent that *Bristol v. Hanlon,* 210 Neb. 37, 312 N.W.2d 694 (1981), is inconsistent with this opinion, it is overruled. Heimsoth v. Kellwood Co. 167
22. A judgment on a fact issue tried to the court alone has the effect of a jury verdict and will not be set aside unless clearly wrong. Hemenway v. MFA Life Ins. Co. 193
23. In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Hemenway v. MFA Life Ins. Co. 193
Miller Chemical Co., Inc. v. Tams 837
24. The determination of the finder of fact on the issue of competency will not be disturbed unless there is insufficient evidence to support the findings. State v. Quarrels 204
25. In determining the sufficiency of evidence to sustain a conviction, it is not the province of this court to resolve

conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Scott 237
Steffen v. Ainsworth 291
State v. Beckner 442
State v. Morse 448

26. In an appeal to the District Court from an action of a freehold board transferring land from one school district to another, where the party appealing the action of the board has no standing to make such an appeal, an intervenor entering the action after the time for appeal has elapsed may not be substituted as an appellant. In re Hilbers Property Freehold Transfer 268

27. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. Steffen v. Ainsworth 291

28. In testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party and every controverted fact must be resolved in his favor and he should have the benefit of every inference that can be reasonably drawn therefrom. Steffen v. Ainsworth 291
Prudential Ins. Co. v. Greco 342

29. Alleged improper conduct of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection. Steffen v. Ainsworth ... 291

30. Where the transcript and record filed with the court are sufficient to present all issues before the court and the case is one for determination solely on matters contained within those records and the orders of the District Court, no further bill of exceptions is required for preservation of any error of law on appeal. Beeder v. Fleer 294

31. For a question of constitutionality of a statute to be considered in this court it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court. State v. Hiross 319

32. After a jury has retired to deliberate, it is error to give a further instruction out of the presence of the parties and their counsel. But if it clearly appears that prejudice did not and could not flow therefrom, it is error without prejudice and not ground for reversal. In re Estate of Corbett 335

33. There can be no appeal to this court until there has been a final order in the court below. Z & S Constr. Co., Inc. v. Collister 348
34. The jurisdiction of this court is based upon a final judgment or order in the court below. Z & S Constr. Co., Inc. v. Collister 348
35. An order overruling a special appearance is not a final order from which an appeal can be taken. Z & S Constr. Co., Inc. v. Collister 348
36. When substantial rights of the parties remain undetermined and the cause is retained for further action, the order is interlocutory and not final. Z & S Constr. Co., Inc. v. Collister 348
37. This court will not reverse a criminal conviction in the absence of prejudice to the defendant. State v. Longa 356
38. The failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal. State v. Pope 425
In re Estate of Haddix 814
39. 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. Earnest v. Lutheran Memorial Hospital 438
40. Where a record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workmen's Compensation Court. Earnest v. Lutheran Memorial Hospital 438
41. When the employer files an application for a rehearing before a three-judge compensation court and fails to obtain any reduction in the amount of the award, the court ordinarily should allow the employee a reasonable attorney fee. Earnest v. Lutheran Memorial Hospital 438
42. Where the sentence imposed is within statutory limits, it will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court. State v. Beckner 442
43. This court will dispose of a case on appeal on the theory on which it was presented in the trial court. Kearney Clinic Bldg. Corp. v. Weaver 499
44. A judgment of the trial court in a law action where a jury has been waived will be set aside when it is clearly against the weight of the evidence. Kearney Clinic Bldg. Corp. v. Weaver 499
Dworak v. Michals 716

45. The burden of proof is on the appellant to establish that an order of the State Board of Equalization and Assessment was erroneous. In re Valuation, etc., for Tax Year 1981 535
46. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. State v. Sayers 555
47. Where a party has sustained the burden and expense of trial and has succeeded in securing the judgment of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Bodzek v. Callahan 600
48. A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial but consents to take the chance of a favorable verdict. Bodzek v. Callahan 600
49. In domestic relations cases the rule is, and always has been, that on appeal to this court we must try the issues de novo. We are required to make independent conclusions of fact without reference to the conclusion reached by the trial court. However, we will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Dunne v. Dunne 636
50. Orders fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person who has custody is unfit for that purpose or that the best interests of the child require such action. Dunne v. Dunne 636
51. On remand, an administrative agency is required to follow the court's determination of questions of law but it is not foreclosed from enforcing the legislative policy committed to it. Phelps County Savings Co. v. Dept. of Banking & Finance 683
52. On review of the action of an administrative agency, a court must correct errors of law and on remand the agency is bound to act upon the correction. But an administrative determination in which is imbedded a legal question open to additional review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. Phelps County Savings Co. v. Dept. of Banking & Finance 683
53. One seeking post conviction relief has the burden of establishing the basis for such relief; the findings of the

District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous. State v. Paulson 711
54. A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal and which do not involve questions making the judgment of conviction void or voidable under the state or federal Constitutions. State v. Paulson 711
55. Under the Post Conviction Act it is within the discretion of the District Court to determine whether legal counsel shall be appointed to represent a defendant on appeal to this court, and in the absence of a showing of an abuse of discretion, the failure to appoint counsel is not error. State v. Paulson 711
56. Cases which are moot may nevertheless be heard on appeal if the issue involved is one of great public interest. State ex rel. Bouc v. School Dist. of City of Lincoln 731
57. Under the provisions of Neb. Rev. Stat. § 24-541 (Reissue 1979), adoption proceedings were reviewable de novo on the record in both the District Court and in this court. In re Adoption of Simonton 777
58. The inclusion of evidence in the bill of exceptions is the only vehicle for bringing evidence before this court on appeal. Evidence not included in the bill of exceptions may not be considered. State v. Gingrich 786
59. The standard of review in this court of a law action is that a judgment of the District Court will not be set aside by this court on appeal unless it is clearly wrong and not supported by the evidence. Miller Chemical Co., Inc. v. Tams 837
60. The amount of damages sustained in an eminent domain action is peculiarly of a local nature and normally is to be determined by the jury; this court will not ordinarily interfere with the verdict, if evidence is conflicting, unless clearly wrong. Bentz v. Nebraska P.P. Dist. 844
61. A defense not raised by a party until after the issuance of an order dismissing the petition brought against a defendant neither raises nor preserves a defense for consideration by this court. Jacobberger v. Terry 878
62. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. Jacobberger v. Terry 878

Arrests.

1. A warrantless arrest can be made only if there exists reasonable cause to believe a felony has been commit-

ted and the person to be arrested is guilty of the offense. State v. Boyer 139
2. An arresting officer may search the arrestee's person to discover and remove weapons and to seize evidence to prevent its concealment or destruction, and may also search the area within the arrestee's immediate control. State v. Weible 174
3. Absent exigent circumstances, government agents have no right to search a dwelling when the arrest is effectuated outside it. State v. Weible 174
4. A person has been "seized" within the meaning of the fourth amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. State v. Longa 356
5. The reasonableness of seizures that are less intrusive than a traditional arrest depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers. State v. Longa 356
6. The mere fact that there is an illegal arrest does not thereby cause all evidence otherwise lawfully obtained to be inadmissible per se. State v. Longa 356

Arson.

1. Generally, the willful burning of property by a stockholder of a corporation is not a defense against the collection of insurance by the corporation; nor can a corporation be prevented from collecting insurance because its agents willfully set fire to the property without the participation or authority of the corporation or all of the stockholders of the corporation. Continental Ins. Co. v. Gustav's Stable Club, Inc. 1
2. An insured corporation will not be allowed a recovery on fire insurance policies where the incendiarist owns all or practically all of the stock in the insured corporation, or is in dominant management of the corporate property. Continental Ins. Co. v. Gustav's Stable Club, Inc. 1
3. Where the beneficial owner of practically all of the stock in a corporation, or who has the dominant management and control of its affairs and property, sets fire to the property of a corporation, or causes it to be done, there is no sound reason to support the contention that the corporation should be allowed to recover on a policy for the destruction of the corporate property by a fire so occasioned. Continental Ins. Co. v. Gustav's Stable Club, Inc. 1

4. The rule as to partnerships or joint ventures is that innocent partners and joint venturers are also barred from recovery where the arson is perpetrated by a partner or joint venturer. Continental Ins. Co. v. Gustav's Stable Club, Inc. 1

Attorney and Client.

1. A client is bound by the oral stipulations of his attorney made out of court if within the scope of the attorney's duties and powers, if such stipulations are established by the testimony of the attorney making the same. State v. Sayers 555
2. Except for such basic decisions as to whether to plead guilty, waive a jury trial, or testify in his or her own behalf, a defendant in a criminal trial is bound by the tactical or strategic decisions made by counsel. State v. Sayers 555
3. In situations where a defendant has voluntarily absented himself from trial, tactical or strategic decisions made by that defendant's counsel will be binding upon the defendant in spite of his or her voluntary absence. State v. Sayers 555

Attorney Fees.

1. Where allowed, the amount of an allowance for attorney fees generally rests in the sound discretion of the court. Graff v. Farmers Mut. Home Ins. Co. 13
2. It is the practice in this state to allow the recovery of attorney fees and expenses only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery. Gates v. Howell 85
3. Where an employee's injury, which previously was diagnosed as continuing, attains maximum healing so that on further hearing a definite permanent award can be made, the employer is not deemed to have obtained a reduction in the award so as to deprive the employee of a statutory right to an attorney fee. Sandel v. Packaging Co. of America 149
4. Such attorney fee as may be awarded under the provisions of Neb. Rev. Stat. § 44-359 (Reissue 1978) must be solely and only for services actually rendered in the preparation and trial of the litigation on the policy in question. Hemenway v. MFA Life Ins. Co. 193
5. The fees of a guardian ad litem are chargeable as costs in cases which involve incompetents in litigation, and should be taxed in the court or courts in which the services were rendered. In re Guardianship of Jonas 397

6. The fact that the estate of a disabled person possessed no property out of which the fees of a guardian ad litem can be paid in noncriminal cases does not furnish any reason for imposing liability on the state to pay the same, other than as may be taxed as costs of the proceeding. In re Guardianship of Jonas 397
7. The allowance of attorney fees and costs in a dissolution of marriage case is discretionary with the trial court and depends upon a consideration of all the facts and circumstances presented. Schmer v. Schmer 414

Attorneys at Law.
1. In order to establish a violation of the sixth amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. State v. Pope ... 425
2. The possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his sixth amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. State v. Pope 425
3. The decision to object or not to object to offers of evidence is part of trial strategy, which would include that decision to waive foundational requirements for the reception of evidence. State v. Sayers 555

Bad Checks.
1. In a prosecution under Neb. Rev. Stat. § 28-611(1) (Reissue 1979), the proper definition of "present value of any kind" is that contained in Neb. Rev. Stat. § 28-109(22) (Reissue 1979). State v. Spaulding 575
2. Evidence that an insufficient fund draft deposited in a checking account was credited to the account satisfies the requirement of "present value of any kind" contained in Neb. Rev. Stat. § 28-611(1) (Reissue 1979). State v. Spaulding 575

Banks and Banking.
A decision of the Department of Banking and Finance should be affirmed where it has acted within its jurisdiction and there is some competent evidence to sustain its finding and order. Phelps County Savings Co. v. Dept. of Banking & Finance 683

Blood, Breath, and Urine Tests.
Under the provisions of Neb. Rev. Stat. § 39-669.09 (Reissue 1978), if the law enforcement officer requires the arrested party to take a breath test pursuant to Neb.

Rev. Stat. § 39-669.08 (Reissue 1978), the party does not have the option of electing a blood or urine test. The option is available only if the officer directs a test of blood or urine. State v. Morse 448

Breach of Lease.

Acceptance of rent, which accrued prior to the breach of the lease, after the breach has occurred is not a waiver of the breach. Connealy v. Mueller 484

Brokers.

1. When a broker is engaged by an owner of property to find a purchaser for it, the broker earns his commission when (1) he produces a purchaser ready, willing, and able to buy on the terms fixed by the owner, (2) the purchaser enters into a binding contract with the owner to do so, and (3) the purchaser completes the transaction by closing the title in accordance with the provisions of the contract. Dworak v. Michals 716
2. In the absence of default, refusal, or interference of the seller, the broker's right to commission against the seller comes into existence only when his buyer performs in accordance with the contract of sale. Dworak v. Michals 716

Case Overruled.

1. A single cotenant, suing alone, can maintain summary proceedings to recover possession of the premises against a stranger to the title without joinder of his cotenant as a party, and any recovery inures to the benefit of the other cotenants. *Johnson v. Hardy,* 43 Neb. 368, 61 N.W. 624 (1895), overruled. Kresha v. Kresha 92
2. In cases involving appeals from the county court to the District Court prior to the effective date of Neb. Rev. Stat. § 24-541.06 (Supp. 1981), wherein it appears obvious from the record filed in this court that both the parties and the district judge considered the county court bill of exceptions as having been received in evidence, we will so consider it on appeal to this court. To the extent that *Tunks v. O'Brien,* 195 Neb. 735, 240 N.W.2d 349 (1976), conflicts with this holding, it is overruled. Blaha GMC-Jeep, Inc. v. Frerichs 103
3. Appeals under the Employment Security Law are reviewed de novo on the record from the District Court and it is the duty of this court to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof. To the extent that *Bristol v. Hanlon,* 210 Neb. 37, 312 N.W.2d 694 (1981), is

inconsistent with this opinion, it is overruled. Heimsoth v. Kellwood Co. 167

4. An instrument of conveyance which conveys the land definitely described in such instrument, and then excepts from such conveyance a railroad right-of-way, as such, occupying a mere easement on, over, or across the land conveyed, conveys the fee to the entire tract, and the exception only operates to render the conveyance or grant subject to the easement. To the extent that *Bode v. Flobert Industries, Inc.,* 197 Neb. 488, 249 N.W.2d 750 (1977), and *Kozak v. State,* 189 Neb. 525, 203 N.W.2d 516 (1973), are in conflict with this holding, they are overruled. Lillich v. Lowery 757
5. An alleged oral compromise and settlement agreement not made in open court is unenforceable where it is in violation of the statute of frauds or in violation of a court rule requiring all stipulations and agreements of counsel or parties to a suit to be in writing, signed by the parties or their attorneys. To the extent *Simmons v. Murray,* 189 Neb. 695, 204 N.W.2d 800 (1973), is in conflict, it is overruled. Omaha Nat. Bank v. Mullenax 830
6. Where a jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which, in arriving at a verdict, it may consider in connection with other competent evidence. To the extent *Wagner v. State,* 176 Neb. 589, 126 N.W.2d 853 (1964), may be inconsistent with this opinion, it is overruled. Bentz v. Nebraska P.P. Dist. 844
7. To the extent that *Lickert v. City of Omaha,* 144 Neb. 75, 12 N.W.2d 644 (1944), is in conflict with this opinion, it is overruled. Halpin v. Nebraska State Patrolmen's Retirement System 892

Child Custody.

1. The State may not 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 Brungardt 519
2. The right of a parent to custody and control of his or her child is a natural, but not an inalienable, right. The public has a paramount interest in the protection of children from abuse and neglect. In re Interest of Brungardt 519
3. A decree fixing custody of a minor child will not be modified unless there has been a change in circumstances indicating that the person having custody is un-

fit for that purpose or that the best interests of the child require such action. Krueger v. Krueger 568
Dunne v. Dunne 636
4. In determining the question of who should have the care and custody of the minor children of the parties to an action for the dissolution of a marriage, the controlling consideration is the best interests and welfare of the children. Krueger v. Krueger 568
5. Sexual misconduct, although not necessarily determinative of the issue of child custody, is a factor which may be considered in deciding that issue. Dunne v. Dunne 636
6. Additional factors to be considered on the issue of child custody are the desires and wishes of the children if of an age of comprehension and when the same are based on sound reasoning, and the emotional relationship between the children, their parents, and siblings, as well as the effect of continuing or disrupting an existing relationship. Dunne v. Dunne 636

Collateral Attack.

It is settled law that where an administrative body acting in a quasi-judicial capacity has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. State ex rel. Kizzier Chevrolet Co., Inc. v. GMC 626

Complaints.

1. In a prosecution by information, the complaint and information must charge the same offense, but it is sufficient if the charge in the information is substantially the same as that alleged in the complaint. If this is so, a plea of no preliminary examination on the ground of a variance between the complaint and the information is without force. State v. Kelley 770
2. If the evidence adduced at a preliminary hearing is insufficient to show probable cause that the crime charged in the complaint was committed and that the defendant committed it, the examining magistrate must dismiss the complaint. State v. Kelley 770

Compromise and Settlement.

1. A compromise and settlement agreement is subject to the general principles of contract law and is enforceable under the same principles as other contracts. Omaha Nat. Bank v. Mullenax 830
2. An alleged oral compromise and settlement agreement not made in open court is unenforceable where it is in violation of the statute of frauds or in violation of a

court rule requiring all stipulations and agreements of counsel or parties to a suit to be in writing, signed by the parties or their attorneys. To the extent *Simmons v. Murray,* 189 Neb. 695, 204 N.W.2d 800 (1973), is in conflict, it is overruled. Omaha Nat. Bank v. Mullenax 830

Confessions.

1. To be admissible in evidence, a confession must be freely and voluntarily given. It cannot be induced by promises, or coerced by threats. State v. Boyer 139
   State v. Hunsberger 667
2. A "totality of the circumstances" test is followed in which factors such as age, mental condition, education, the atmosphere in which the interrogation is conducted, and any other factor which may bear on the question is considered in determining "knowing voluntariness." State v. Boyer 139
3. A person under the influence of drugs may be unable to knowingly and voluntarily make a valid, useful confession. State v. Boyer 139
4. A finding by the trial court that a statement made by the accused is voluntary will not ordinarily be set aside on appeal unless clearly erroneous. State v. Boyer 139
   State v. Hunsberger 667
5. The determination of whether a statement was voluntarily made necessarily turns on the consideration of the totality of the circumstances in any particular case. State v. Hunsberger 667

Conflict of Interest.

1. In order to establish a violation of the sixth amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. State v. Pope ... 425
2. The possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his sixth amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. State v. Pope 425

Consideration.

1. Where failure of consideration is pleaded as a defense to an action on a negotiable instrument, the burden is upon the defendant to prove such defense. Blaha GMC-Jeep, Inc. v. Frerichs 103
2. There are two kinds of consideration for a negotiable instrument, i.e., that which confers a benefit upon the promisor and that which causes a detriment to the promisee. Blaha GMC-Jeep, Inc. v. Frerichs 103

3. In order for a detriment to the promisee to constitute a valid consideration for a negotiable instrument, it must have been within the express or implied contemplation of the parties and known to and agreed to by them. Blaha GMC-Jeep, Inc. v. Frerichs 103

Conspiracy.

A showing that two or more principals are involved in one conspiracy as to one of which a sufficient affidavit has been filed is not alone sufficient to support an application as to all of the alleged principals or their telephones. State v. Lane 46

Constitutional Law.

1. The right of free speech is not absolute. Devine v. Dept. of Public Institutions 113
2. The State's suppression of evidence favorable to and requested by an accused violates due process where the evidence is material, irrespective of the good or bad faith of the prosecution. State v. Boyer 139
3. The proper standard of materiality is constitutionally violated if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist. State v. Boyer 139
4. In construing an act of the Legislature, all reasonable doubt must be resolved in favor of its constitutionality; and the burden of establishing the unconstitutionality of a statute is on the one attacking its validity, because statutes are presumed to be constitutional. State v. Mayhew Products Corp. 300
5. The due process clause of the fourteenth amendment of the Constitution of the United States requires that a statute's language must be sufficiently specific that persons of ordinary intelligence must not have to guess at its meaning. The statute must provide adequate notice of what conduct it requires or proscribes, as well as guidelines by which a violation of the statute may be fairly and nonarbitrarily determined. State v. Mayhew Products Corp. 300
6. The portion of Neb. Rev. Stat. § 39-1320.06 (Reissue 1978) which prohibits the "erection or maintenance of any advertising sign, display, or device which is visible from the main-traveled way of the National System of Interstate and Defense Highways and the system of federal-aid primary roads of the State of Nebraska" is unconstitutionally vague. State v. Mayhew Products Corp. 300
   State v. Houtwed 681

7. For a question of constitutionality of a statute to be considered in this court it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court. State v. Hiross . 319
8. A person has been "seized" within the meaning of the fourth amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. State v. Longa 356
9. In appropriate circumstances the fourth amendment allows a properly limited search or seizure on facts that do not constitute probable cause to arrest or to search for contraband or evidence of a crime. State v. Longa 356
10. The Legislature shall not pass local or special laws in any of the following cases, that is to say: Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. Neb. Const. art. III, § 18. State v. Edmunds 380
11. It is incumbent upon the Supreme Court, when reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality. If possible, a statute should be construed in such a way as to negate any constitutional infirmity. State laws are accorded a presumption of constitutionality. State v. Edmunds 380
12. In order to establish a violation of the sixth amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. State v. Pope ... 425
13. The possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his sixth amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. State v. Pope 425
14. The preemption doctrine, generally, seeks to insure the accommodation of a uniform national labor policy. Additionally, in cases where the state is seeking to regulate activities impacting commerce under federal law, preemption is constitutionally based on the supremacy clause. Jones v. Commercial Federal Savings & Loan Assn. 487
15. Admission of bank records under Neb. Rev. Stat. § 27-803(5) (Reissue 1979) did not violate the defendant's right of confrontation. State v. Spaulding 575
16. Each confrontation claim must stand on its own facts. The fundamental question is whether the hearsay has

sufficient indicia of trustworthiness and reliability. State v. Spaulding 575
17. The important inquiry is as to the reliability of the evidence and the likelihood that cross-examination could impeach its credibility or authenticity. State v. Spaulding 575
18. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. State v. Metzger 593
19. The dividing line between what is lawful and unlawful cannot be left to conjecture. State v. Metzger 593
20. A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application violates the first essential elements of due process of law. State v. Metzger 593
21. There is no right of confrontation in an extradition proceeding. In re Application of Mahan for Writ of Habeas Corpus 671
22. The capacity to claim protection of the fourth amendment as to unreasonable searches and seizures depends not upon the property right in the invaded place but upon whether the person who claims the protection of the fourth amendment has a legitimate expectation of privacy in the invaded place. State v. Gonzalez 697
23. The effect of the change in language in article VII, § 11, of the Nebraska Constitution from prohibiting appropriations "in aid of" nonpublic schools to a prohibition of appropriations "to" such institutions simply prohibits appropriations made *to* a nonpublic school. State ex rel. Bouc v. School Dist. of City of Lincoln 731
24. The constitutional validity of an act of the Legislature is to be tested and determined not necessarily by what has been done or possibly may be done under it but by what the statute authorizes to be done under and by virtue of its provisions. State ex rel. Bouc v. School Dist. of City of Lincoln 731
25. When an ordinance or statute is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes sure its validity will ordinarily be given. State ex rel. Bouc v. School Dist. of City of Lincoln 731
26. Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes. State ex rel. Bouc v. School Dist. of City of Lincoln 731

27. The record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation. State ex rel. Bouc v. School Dist. of City of Lincoln 731
28. One must be a member of a class discriminated against in order to have standing to attack a law as denying the equal protection of the laws. State ex rel. Bouc v. School Dist. of City of Lincoln 731
29. Legislative action does not violate the first amendment's establishment clause if the statute has a secular legislative purpose, has a principal or primary effect which neither advances nor inhibits religion, and does not foster an excessive government entanglement with religion. State ex rel. Bouc v. School Dist. of City of Lincoln 731
30. An affidavit for search warrant is sufficient to meet the standards of the fourth amendment to the Constitution of the United States if it complies with the ruling in *United States v. Harris,* 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971). State v. Gingrich 786
31. The right of suffrage involves one of the basic civil rights of man. Jacobberger v. Terry 878
32. A reasonable distinction does exist between metropolitan class cities under the commission form of government and all other metropolitan cities, and, consequently, L.B. 329 is not special or local legislation violative of Neb. Const. art. III, § 18. Jacobberger v. Terry 878

Contracts.

1. Insurance is a contract by which one party assumes specified risks of the other party for a consideration, and promises to pay him or his beneficiary an ascertainable sum of money on the happening of a specified contingency. It is true, however, that an insurance contract will be construed against the insurance company when the contract or policy is indefinite or ambiguous because it drafted the contract or policy and is responsible for any indefiniteness or ambiguity therein. But where the contract is plain and unambiguous in its meaning, the contract will be enforced according to its terms. Safeco Ins. Co. of America v. Husker Aviation, Inc. 21
2. The parties to an insurance contract may make the contract in any legal form they desire, and in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they

please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed. Safeco Ins. Co. of America v. Husker Aviation, Inc. 21

3. Insurance policies should be construed as any other contract and should be given effect according to the ordinary sense of the terms used; and if those terms are clear, they will be applied according to their plain and ordinary meaning. Hemenway v. MFA Life Ins. Co. .. 193

4. An insurance contract will be interpreted in accordance with the reasonable expectations of the insured at the time of the contract and, in case of doubt, the policy will be liberally construed in favor of the insured. Hemenway v. MFA Life Ins. Co. 193

5. Parol evidence is not admissible to vary the terms of a written agreement constituting an accord and satisfaction, unless said agreement is ambiguous. Meyers v. Frohm Holdings, Inc. 329

6. When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it. Meyers v. Frohm Holdings, Inc. 329

7. A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used. Meyers v. Frohm Holdings, Inc. 329

8. A contract is not ambiguous within that sense merely because it may be difficult to construe. The construction of a contract, if needed, being a question of law for the court as well as a duty that rests upon the court, there can be no ambiguity within the rule to which we have referred unless and until an application of the pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties. Meyers v. Frohm Holdings, Inc. 329

9. A contract to purchase a matured corn crop of stated acreage, to be harvested and delivered by the seller, together with the right to pasture the stalks and certain additional grassland, all for a stated gross consideration is not an output contract within the meaning of Neb. U.C.C. § 2-306(1) (Reissue 1980). Meyer v. Sandhills Beef, Inc. 388

10. An option to purchase real estate is a unilateral contract by which the owner of the property agrees with the holder of the option that he has the right to buy the

property according to the terms and conditions of the contract. Gleeson v. Frahm 677
11. The exercise of an option to buy or sell real estate must be unconditional and in accordance with the offer made. Gleeson v. Frahm 677
12. Where the manner of exercise is not specified by an option contract, the holder of the option may exercise by promising to perform what the contract requires of him. Gleeson v. Frahm 677
13. The beneficiaries of a contract may recover thereon, though not named as parties, when it appears by express stipulation, or by reasonable intendment, that the rights and interests of such beneficiaries were contemplated and being provided for therein. Dworak v. Michals 716
14. A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter where the terms of the latter are inconsistent with those of the former so that they cannot subsist together. DeFilipps v. Skinner 801
15. Where it is claimed that by reason of inconsistency between the terms of a new agreement and those of the old the old one is discharged, the fact that such was the intention of the parties must clearly appear. An inspection of the contracts, together with examination of the circumstances, may show that the latter contract was intended as supplementary to the first. DeFilipps v. Skinner 801
16. The acts of the parties and their practical interpretation of contracts while engaged in their performance before any controversy has arisen is one of the best indications of their true intent and meaning, and the courts should ordinarily enforce such construction. DeFilipps v. Skinner 801
17. For the purposes of Neb. Rev. Stat. § 30-2351 (Reissue 1979), an oral contract is "executed" at such time as the parties become bound to each other for the performance of the terms of the agreement. In re Estate of Nicholson 805
18. Oral contracts to make a testamentary provision in consideration of services which are to be rendered by another are on their face void as within the statute of frauds because not in writing, and even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires. In re Estate of Nicholson 805
19. The determination of whether the evidence of services

rendered under an oral contract is sufficient to constitute part performance under the statute of frauds is generally a question of fact. In re Estate of Nicholson 805

20. If a taking under a will is inconsistent with a claim against the estate under a contract, the one act generally constitutes an election in favor of one or the other. In re Estate of Nicholson 805

21. A compromise and settlement agreement is subject to the general principles of contract law and is enforceable under the same principles as other contracts. Omaha Nat. Bank v. Mullenax 830

22. An alleged oral compromise and settlement agreement not made in open court is unenforceable where it is in violation of the statute of frauds or in violation of a court rule requiring all stipulations and agreements of counsel or parties to a suit to be in writing, signed by the parties or their attorneys. To the extent *Simmons v. Murray,* 189 Neb. 695, 204 N.W.2d 800 (1973), is in conflict, it is overruled. Omaha Nat. Bank v. Mullenax 830

Conveyances.

1. An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a less interest is effectively manifested. No words of inheritance or other special words are necessary to transfer a fee simple. Neb. Rev. Stat. § 76-104 (Reissue 1976). Spilker v. First Nat. Bank & Trust Co. 540

2. An instrument of conveyance which conveys the land definitely described in such instrument, and then excepts from such conveyance a railroad right-of-way, as such, occupying a mere easement on, over, or across the land conveyed, conveys the fee to the entire tract, and the exception only operates to render the conveyance or grant subject to the easement. To the extent that *Bode v. Flobert Industries, Inc.,* 197 Neb. 488, 249 N.W.2d 750 (1977), and *Kozak v. State,* 189 Neb. 525, 203 N.W.2d 516 (1973), are in conflict with this holding, they are overruled. Lillich v. Lowery 757

Convictions.

This court will not reverse a criminal conviction in the absence of prejudice to the defendant. State v. Longa ... 356

Corporations.

1. Generally, the willful burning of property by a stockholder of a corporation is not a defense against the collection of insurance by the corporation; nor can a cor-

poration be prevented from collecting insurance because its agents willfully set fire to the property without the participation or authority of the corporation or all of the stockholders of the corporation. Continental Ins. Co. v. Gustav's Stable Club, Inc. 1

2. An insured corporation will not be allowed a recovery on fire insurance policies where the incendiarist owns all or practically all of the stock in the insured corporation, or is in dominant management of the corporate property. Continental Ins. Co. v. Gustav's Stable Club, Inc. 1

3. Where the beneficial owner of practically all of the stock in a corporation, or who has the dominant management and control of its affairs and property, sets fire to the property of a corporation, or causes it to be done, there is no sound reason to support the contention that the corporation should be allowed to recover on a policy for the destruction of the corporate property by a fire so occasioned. Continental Ins. Co. v. Gustav's Stable Club, Inc. 1

4. A corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation except (1) when the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability, (2) when the transaction amounts to a consolidation or merger of the purchaser and seller corporations, (3) when the purchaser corporation is merely a continuation of the seller corporation, or (4) when the transaction is entered into fraudulently to escape liability for such obligations. Jones v. Johnson Machine & Press Co. 724

Costs.

1. The fees of a guardian ad litem are chargeable as costs in cases which involve incompetents in litigation, and should be taxed in the court or courts in which the services were rendered. In re Guardianship of Jonas 397

2. The fact that the estate of a disabled person possessed no property out of which the fees of a guardian ad litem can be paid in noncriminal cases does not furnish any reason for imposing liability on the state to pay the same, other than as may be taxed as costs of the proceeding. In re Guardianship of Jonas 397

Cotenants.

A single cotenant, suing alone, can maintain summary proceedings to recover possession of the premises against a stranger to the title without joinder of his co-

tenant as a party, and any recovery inures to the benefit of the other cotenants. *Johnson v. Hardy,* 43 Neb. 368, 61 N.W. 624 (1895), overruled. Kresha v. Kresha 92

Courts.

1. Under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), suit may be brought in either state or federal court for breach of a collective bargaining agreement. Jones v. Commercial Federal Savings & Loan Assn. 487
2. State courts must follow the federal law, as fashioned by the federal courts, to effectuate the statutory policy of enforcement of collective bargaining agreements. Jones v. Commercial Federal Savings & Loan Assn. ... 487
3. The county court and not the juvenile court in each county has the authority to determine abandonment for the purpose of permitting the use of substitute consent, and has the authority to appoint the guardian who thereafter may be authorized to execute the consent. In re Guardianship of Sain 508
4. A trial court has great discretion in determining whether a document is trustworthy and admissible under Neb. Rev. Stat. § 27-803(5) (Reissue 1979). State v. Spaulding 575

Criminal Defendants.

1. Except for such basic decisions as to whether to plead guilty, waive a jury trial, or testify in his or her own behalf, a defendant in a criminal trial is bound by the tactical or strategic decisions made by counsel. State v. Sayers 555
2. In situations where a defendant has voluntarily absented himself from trial, tactical or strategic decisions made by that defendant's counsel will be binding upon the defendant in spite of his or her voluntary absence. State v. Sayers 555
3. Where a defendant has voluntarily absented himself from a portion of his trial, the jury is entitled to know that fact, the fact that his absence was not caused by unjust governmental action, but should be directed to draw no other conclusions or inferences from the fact of defendant's absence. State v. Sayers 555

Criminal Law.

1. Defendants charged in separate informations may be joined for trial if they could have been joined in a single information or complaint. State v. Brehmer 29
2. Joinder is permissible if the defendants are alleged to

have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. State v. Brehmer 29
3. Two charges arise out of the same act or transaction if they are so closely linked in time, place, and circumstance that a complete account of one charge cannot be related without relating details of the other charge. State v. Brehmer 29
4. Joinder may be permitted only where the facts of each charge can be explained adequately only by drawing upon the facts of the other charge. State v. Brehmer 29
5. The rule against jointly indicting and trying different defendants for unconnected offenses is a long-established procedural safeguard. State v. Brehmer 29
6. It is not harmless error to violate a fundamental procedural rule designed to prevent mass trials. State v. Brehmer 29
7. A trial court may not consolidate defendants' cases for trial if joinder of those same defendants is not allowed by Neb. Rev. Stat. § 29-2002(2) (Reissue 1979). State v. Brehmer 29
8. In those cases where multiple defendants are joined for trial in a manner inconsistent with Neb. Rev. Stat. § 29-2002 (Reissue 1979), such misjoinder is prejudicial per se and severance is not a matter of discretion but is a matter of right. State v. Brehmer 29
9. The only errors which require reversal of a cause are those prejudicial to the right of the accused, or which constitute the denial of a substantive legal right. State v. Brehmer 29
10. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown. State v. Boyer 139
11. The State's suppression of evidence favorable to and requested by an accused violates due process where the evidence is material, irrespective of the good or bad faith of the prosecution. State v. Boyer 139
12. The proper standard of materiality is constitutionally violated if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist. State v. Boyer 139
13. "Suppression" means nondisclosure of evidence that the prosecutor, and not the defense attorney, knew to be in existence. State v. Boyer 139
14. Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or of-

fenses charged as to have substantial probative value in determining the guilt of the accused. The balancing of the need for "other-crimes" evidence against the possible prejudice to the defendant is within the appropriate discretion of the trial court. State v. Scott 237

15. Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Scott 237

16. In determining the sufficiency of evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. The verdict of a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Scott 237

17. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. State v. Metzger 593

18. The dividing line between what is lawful and unlawful cannot be left to conjecture. State v. Metzger 593

19. Penal statutes prohibiting the doing of certain things and providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another. State v. Metzger 593

20. A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application violates the first essential elements of due process of law. State v. Metzger 593

21. The test to determine whether a statute defining an offense is void for uncertainty is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. The dividing line between what is

lawful and what is unlawful cannot be left to conjecture. State v. Metzger 593

22. A continuing offense is defined as a continuous, unlawful act or series of acts set in motion by a single impulse and operated by an unintermittent force, however long a time it may occupy; an offense which continues day by day; a breach of the criminal law, not terminated by a single act or fact, but subsisting for a definite period and intended to cover or apply to successive similar obligations or occurrences. State v. Williams 650

23. Where the possession of a firearm by a felon, actual or constructive, is uninterrupted, it constitutes but a single offense. State v. Williams 650

24. The testimony of a witness at a preliminary hearing where the opportunity for cross-examination has been exercised by the defendant is admissible at the subsequent trial if the witness is unavailable. It is within the discretion of the trial court to determine whether the unavailability of the witness has been shown. State v. Williams 693

Damages.

1. Whether a wind is of sufficient force to be within the meaning of a policy insuring against damage caused by wind must in each instance be a question of fact. Graff v. Farmers Mut. Home Ins. Co. 13

2. The loss for which recovery is sought under a tornado, cyclone, or windstorm policy seldom results from a single isolated cause, but rather from a combination of causes, such as wind and water, or wind and snow, and the like. In the absence of a specific provision in the policy to the contrary, it is generally sufficient, in order to recover upon a cyclone, tornado, or windstorm policy, to show that the cause designated therein was the efficient cause of the loss, although other causes contributed thereto. Where an object, damage from which is not expressly excluded from coverage of the policy, is blown by the force of a windstorm against the insured property, causing damage thereto, the loss is within the policy coverage, since the wind-driven object is merely the passive agent of the damage, and the windstorm by its propulsive force is the controlling causal agent directly responsible for the loss. Graff v. Farmers Mut. Home Ins. Co. 13

Debauchery.

The offense of debauching a minor is not a lesser-included offense of pandering. Mingus v. Fairbanks 81

Deceptive Trade Practices.

It is an unfair or deceptive act or practice for an insurance company to fail to promptly settle claims, when liability has become clear, under one portion of an insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage. Beeder v. Fleer 294

Declaratory Judgments.

1. A suit for declaratory judgment is an action sui generis and may involve questions of both law and equity. Hemenway v. MFA Life Ins. Co. 193
2. A judgment on a fact issue tried to the court alone has the effect of a jury verdict and will not be set aside unless clearly wrong. Hemenway v. MFA Life Ins. Co. 193

Demurrer.

For the purpose of determining on demurrer whether a petition should be dismissed, the District Court and this court are obligated to accept a petitioner's well-pleaded facts as true. Almarez v. Hartmann 243

Depositions.

If only part of a deposition of a witness is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts relevant to the issues and not introduced. Neb. Rev. Stat. § 25-1267.04(4) (Reissue 1979). Knutson v. Herman Bros., Inc. 603

Disability Contracts.

1. The provisions of the Social Security Act do not make it unlawful for an employer to establish a private pension or disability contract which offsets against disability payments those governmental benefits to which the employees may become entitled. Blue v. Champion International Corp. 480
2. Bad faith on the part of an employer pension committee in denying disability payments does not necessarily compel a finding that a wholly unrelated provision of the contract itself shall not be enforced. Blue v. Champion International Corp. 480
3. A pension or long-term disability plan provided to employees by an employer which is not offered primarily for profit nor which coverage is limited to employees and not resulting from advertisement or solicitation of insurance business from the public, and which does not

cause the employer to hold itself out as doing business as a commercial insurer, is neither "any type of insurance policy" nor "a certificate issued by a fraternal beneficiary association" within the meaning of Neb. Rev. Stat. § 44-359 (Reissue 1978). Blue v. Champion International Corp. 480

Divorce.

1. In domestic relations cases the rule is, and always has been, that on appeal to this court we must try the issues de novo. We are required to make independent conclusions of fact without reference to the conclusion reached by the trial court. However, we will give weight to the fact that the trial court observed the witnesses and their manner of testifying, and accepted one version of the facts rather than the opposite. Dunne v. Dunne 636
2. It is generally held that antenuptial agreements providing in the event of divorce or separation the spouse should forfeit his or her rights in the property of the other are contrary to public policy and void as tending to promote divorce. Mulford v. Mulford 747

Due Process.

1. Whether an identification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it. State v. Gingrich 786
2. In connection with a suspension of a student from school of up to 5 school days, statutory due process requires that the student be given oral or written notice of the charges against him, an explanation of the evidence the authorities have, and an opportunity to present his version of the facts. Walker v. Bradley 873

Easements.

1. The law treats with disfavor a claim of prescriptive right based on adverse user and requires the elements to be clearly, convincingly, and satisfactorily established. Hengen v. Hengen 276
2. An alleged easement that is too indefinite for a determinate description cannot be established and protected by a court of equity. Hengen v. Hengen 276
3. An easement by implication may flow from and be created by the existence of an element of necessity for use and occupancy or by an implied grant from what has been said or done by the parties involved. Hengen v. Hengen 276

4. An easement by implication from former use arises only where the use giving rise to the easement was in existence at the time of the conveyance subdividing the property; the use has been so long continued and so obvious as to show that it was meant to be permanent; and the easement is necessary for the proper and reasonable enjoyment of the dominant tract. Hengen v. Hengen 276
5. The failure of a grant to definitely locate an easement does not give the grantee the right to use the servient estate without limitation. In such a case the grantor may designate the location, and if he fails to do so the grantee may then make the designation which, in either case, must be reasonable. Under certain circumstances, a court of equity may fix the location of a way which the grant does not specifically describe. Hengen v. Hengen 276
6. An easement is appurtenant, and not in gross, if the nature of the easement is an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use and if there is nothing to show that the parties intended the easement to be a mere personal right. Spilker v. First Nat. Bank & Trust Co. 540
7. An easement in gross is never presumed when it can fairly be construed as appurtenant to some other estate. Spilker v. First Nat. Bank & Trust Co. 540
8. An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a less interest is effectively manifested. No words of inheritance or other special words are necessary to transfer a fee simple. Neb. Rev. Stat. § 76-104 (Reissue 1976). Spilker v. First Nat. Bank & Trust Co. 540
9. A railroad company which acquires its right-of-way by condemnation proceedings secures merely an easement in the right-of-way which authorizes it to build and operate its railroad as a public highway. The fee title and servient estate remain in the original owner and may be sold and conveyed by such owner to another. Whenever the right-of-way is abandoned for that purpose, it reverts at once to the owner of the servient estate. Lillich v. Lowery 757
10. An instrument of conveyance which conveys the land definitely described in such instrument, and then excepts from such conveyance a railroad right-of-way, as such, occupying a mere easement on, over, or across the land conveyed, conveys the fee to the entire tract,

and the exception only operates to render the conveyance or grant subject to the easement. To the extent that *Bode v. Flobert Industries, Inc.*, 197 Neb. 488, 249 N.W.2d 750 (1977), and *Kozak v. State*, 189 Neb. 525, 203 N.W.2d 516 (1973), are in conflict with this holding, they are overruled. Lillich v. Lowery 757

Effectiveness of Counsel.

The determination of sufficiency of counsel must be made within the context of the facts of a particular case, and we will not require defense counsel to develop ridiculous trial tactics because they are suggested by defendant. State v. Paulson 711

Eminent Domain.

1. A railroad company which acquires its right-of-way by condemnation proceedings secures merely an easement in the right-of-way which authorizes it to build and operate its railroad as a public highway. The fee title and servient estate remain in the original owner and may be sold and conveyed by such owner to another. Whenever the right-of-way is abandoned for that purpose, it reverts at once to the owner of the servient estate. Lillich v. Lowery 757
2. In a condemnation action the burden of showing the damages which the landowner will suffer rests upon him, while the burden is on the condemnor to show matters which tend to reduce or mitigate the damages. Bentz v. Nebraska P.P. Dist. 844
3. In a condemnation action tried before a jury, the presiding judge rules on the admissibility of evidence and other questions of law, while the jury determines questions of fact such as the value of the property taken. Bentz v. Nebraska P.P. Dist. 844
4. Expert opinion evidence in a condemnation case is to be considered and weighed by the trier of fact like other testimony. It is only advisory in nature and is not binding upon the jury. Bentz v. Nebraska P.P. Dist. 844
5. Generally, either lay or expert witnesses may be used to testify as to the value of a tract of land taken or the value of the remainder thereof immediately before and immediately after the taking, if proper foundation is laid showing familiarity with the property, the weight and credibility of the testimony being for the jury. Bentz v. Nebraska P.P. Dist. 844
6. The amount of damages sustained in an eminent domain action is peculiarly of a local nature and normally

is to be determined by the jury; this court will not ordinarily interfere with the verdict, if evidence is conflicting, unless clearly wrong. Bentz v. Nebraska P.P. Dist. 844

7. Where a jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which, in arriving at a verdict, it may consider in connection with other competent evidence. To the extent *Wagner v. State,* 176 Neb. 589, 126 N.W.2d 853 (1964), may be inconsistent with this opinion, it is overruled. Bentz v. Nebraska P.P. Dist. 844
8. In eminent domain proceedings, the jury is not required to accept as conclusive the estimates of value made by the witnesses at trial. Bentz v. Nebraska P.P. Dist. 844

Employer and Employee.

1. Appeals under the Employment Security Law are reviewed de novo on the record from the District Court and it is the duty of this court to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof. To the extent that *Bristol v. Hanlon,* 210 Neb. 37, 312 N.W.2d 694 (1981), is inconsistent with this opinion, it is overruled. Heimsoth v. Kellwood Co. 167
2. An individual who leaves work voluntarily without good cause shall be subject to the benefit disqualification period specified by statute. Heimsoth v. Kellwood Co. 167

Employment Security Law.

1. An employee who leaves work "voluntarily without good cause" is disqualified for unemployment benefits for the week in which he left and for not less than 7 nor more than 10 weeks immediately following. Neb. Rev. Stat. § 48-628(a) (Reissue 1978). Gastineau v. Tomahawk Oil Co., Limited 537
2. To leave work voluntarily means to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment. Gastineau v. Tomahawk Oil Co., Limited 537

Entrapment.

1. Where a person has no previous intent or purpose to violate the law, but does so only because he is induced to commit the act by law enforcement officers or agents, he is entitled to the defense of entrapment. But where a person already has the readiness or willingness to violate the law, the fact that an officer or agent

provides a favorable opportunity for the violation does not constitute entrapment. State v. Beckner 442
2. The mere fact that artifice or stratagem may be employed to apprehend those engaged in criminal activity does not in and of itself give rise to the defense of entrapment. State v. Beckner 442

Equal Opportunity Commission.
1. The Equal Opportunity Commission, having exercised powers not specifically granted by statute, acted in excess of those powers and its action is therefore void and of no effect. Omaha Public Schools v. Hall 618
2. The parties to this action cannot grant the Equal Opportunity Commission jurisdiction by acquiescence or consent, or by participation in the procedures. Omaha Public Schools v. Hall 618

Equity.
1. An action for an accounting may, under one set of circumstances, find its remedy in an action at law and, under another, find it within the jurisdiction of equity. Philip G. Johnson & Co. v. Salmen 123
2. Where the intimate relationships of the parties are involved, an adequate remedy is available only within the equitable jurisdiction of the court. Philip G. Johnson & Co. v. Salmen 123
3. In an action at equity, this court must review the record de novo and reach an independent conclusion without being influenced by the findings of the trial court, except, however, that where credible evidence is in conflict, we must give weight to the fact the trial court saw the witnesses and observed their demeanor while testifying. Philip G. Johnson & Co. v. Salmen 123
Jameson v. Nelson 259
F.H.T., Inc. v. Feuerhelm 860
Dana F. Cole & Co. v. Byerly 903
4. A court of equity has reasonable discretion to allow or withhold interest as is reasonably just, except in cases where interest is recoverable as a matter of right. Bankers Union Life Ins. Co. v. Nebraska Corp. 350

Estates.
1. If a taking under a will is inconsistent with a claim against the estate under a contract, the one act generally constitutes an election in favor of one or the other. In re Estate of Nicholson 805
2. There is nothing inconsistent in making claim to the whole of an estate and at the same time accepting

something less than the whole under the will. Property comprising a bequest of only a part of an estate would be included within a claim to the entire estate. In re Estate of Nicholson 805

3. The burden of proof is upon the claimant seeking compensation for services rendered during the lifetime of a deceased person to prove an agreement to pay for the services. In re Estate of Haddix 814

4. Where there is a family relationship between deceased and claimant seeking compensation for services, claimant must rebut by competent evidence the presumption that the services were rendered gratuitously. In re Estate of Haddix 814

5. Where one renders services to another merely upon the expectation of a legacy, unless there is a contract obligation, the promisee takes his chance of receiving the legacy, and if his expectations are disappointed, he can receive nothing. In re Estate of Haddix 814

Estoppel.

The essential elements of equitable estoppel are (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. Kohlbeck v. City of Omaha 372

Evidence.

1. Proof of contradictory statements of a witness may be received in evidence for the purpose of aiding the jury in estimating the credibility of the witness, but unless made as an admission by a party to the record, such statements may not be utilized as substantive evidence of the facts declared. State v. Brehmer 29

2. The State's suppression of evidence favorable to and requested by an accused violates due process where the evidence is material, irrespective of the good or bad faith of the prosecution. State v. Boyer 139

3. The proper standard of materiality is constitutionally violated if the omitted evidence creates a reasonable doubt of guilt that did not otherwise exist. State v. Boyer 139
4. "Suppression" means nondisclosure of evidence that the prosecutor, and not the defense attorney, knew to be in existence. State v. Boyer 139
5. Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused. The balancing of the need for "other-crimes" evidence against the possible prejudice to the defendant is within the appropriate discretion of the trial court. State v. Scott 237
6. Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. State v. Scott 237
7. Where reasonable minds may differ as to conclusions or inferences to be drawn from the evidence, such issues must be submitted to the jury. Prudential Ins. Co. v. Greco 342
8. The mere fact that there is an illegal arrest does not thereby cause all evidence otherwise lawfully obtained to be inadmissible per se. State v. Longa 356
9. The "fruit of the poisonous tree" doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an independent source. State v. Longa 356
10. Corroboration is sufficient if the cooperating individual is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue. State v. Beckner 442
11. Evidence that an insufficient fund draft deposited in a checking account was credited to the account satisfies the requirement of "present value of any kind" contained in Neb. Rev. Stat. § 28-611(1) (Reissue 1979). State v. Spaulding 575
12. An administrative agency's duty to apply the statutory standard in determining whether an applicant is to re-

ceive a permit is the same after it falls into legal error as before. If, in the agency's judgment, new evidence is necessary to discharge its duty, the fact of a previously erroneous denial should not bar it from access to the necessary evidence for correct judgment. Phelps County Savings Co. v. Dept. of Banking & Finance 683

13. In a condemnation action tried before a jury, the presiding judge rules on the admissibility of evidence and other questions of law, while the jury determines questions of fact such as the value of the property taken. Bentz v. Nebraska P.P. Dist. 844

Expert Witnesses.

1. Whether a specific manner of treatment or exercise of skill by a physician or surgeon demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter that must usually be proved by expert testimony. Hanzlik v. Paustian 322
2. Expert opinion evidence in a condemnation case is to be considered and weighed by the trier of fact like other testimony. It is only advisory in nature and is not binding upon the jury. Bentz v. Nebraska P.P. Dist. 844

Extradition.

1. The rules of evidence, except as to privilege, are not applicable in extradition proceedings. In re Application of Mahan for Writ of Habeas Corpus 671
2. There is no right of confrontation in an extradition proceeding. In re Application of Mahan for Writ of Habeas Corpus 671

Final Orders.

1. There can be no appeal to this court until there has been a final order in the court below. Z & S Constr. Co. v. Collister 348
2. The jurisdiction of this court is based upon a final judgment or order in the court below. Z & S Constr. Co. v. Collister 348
3. An order overruling a special appearance is not a final order from which an appeal can be taken. Z & S Constr. Co. v. Collister 348
4. When substantial rights of the parties remain undetermined and the cause is retained for further action, the order is interlocutory and not final. Z & S Constr. Co. v. Collister 348

Fireman's Rule.

1. A fireman or individual fighting a fire on the premises of an owner or occupant is a bare licensee to whom the owner or occupant owes no greater duty than to refrain from injuring him by willful or wanton negligence or a designed injury, except in certain cases where there may be the duty to warn of hidden danger or peril known to the owner or occupant but unknown to or unobservable by the fireman in the exercise of ordinary care. Lave v. Neumann 97
2. The "fireman's rule" held not applicable to a policeman injured in an attempt to stop a driverless moving truck from rolling downhill. Lave v. Neumann 97

Forcible Entry and Detainer.

A single cotenant, suing alone, can maintain summary proceedings to recover possession of the premises against a stranger to the title without joinder of his cotenant as a party, and any recovery inures to the benefit of the other cotenants. *Johnson v. Hardy,* 43 Neb. 368, 61 N.W. 624 (1895), overruled. Kresha v. Kresha .. 92

Fraud.

1. In all contracts of insurance there is an implied understanding or agreement that the risks insured against are such as the thing insured, whether it is property, or health, or life, is usually subject to, and the insured cannot voluntarily and intentionally vary them. Upon principles of public policy and morals, the fraud or the criminal misconduct of the insured is, in contracts of marine or of fire insurance, an implied exception to the liability of the insurer. Continental Ins. Co. v. Gustav's Stable Club, Inc. 1
2. A misrepresentation as to the law will not give rise to an action for fraud and deceit. Kohlbeck v. City of Omaha 372
3. In an action at law, the essential elements of false representation are the making of a false representation, knowing it was false, or making it recklessly without any knowledge of its truth and as a positive assertion, with the intention that it be acted on, that it was acted on, and that the injury resulted. Dworak v. Michals .. 716

Guardians Ad Litem.

1. The provisions of Neb. Rev. Stat § 30-2222 (Reissue 1979), authorizing a court to appoint a guardian ad litem to represent the interests of an incapacitated person, are limited to proceedings pending in that court. In re Guardianship of Jonas 397

2. Every court has inherent power to appoint a guardian ad litem to represent an incapacitated person in proceedings before that court; that power does not extend to the appointment of such guardian for the purpose of managing litigation in another court or tribunal, except for necessary appeals. In re Guardianship of Jonas ... 397
3. The fees of a guardian ad litem are chargeable as costs in cases which involve incompetents in litigation, and should be taxed in the court or courts in which the services were rendered. In re Guardianship of Jonas 397
4. The fact that the estate of a disabled person possessed no property out of which the fees of a guardian ad litem can be paid in noncriminal cases does not furnish any reason for imposing liability on the state to pay the same, other than as may be taxed as costs of the proceeding. In re Guardianship of Jonas 397
5. A guardian must be appointed for a minor child who had been abandoned by one of his parents, who in turn may execute the necessary consent required by Neb. Rev. Stat. § 43-104 (Reissue 1978). In re Guardianship of Sain 508
6. The county court and not the juvenile court in each county has the authority to determine abandonment for the purpose of permitting the use of substitute consent, and has the authority to appoint the guardian who thereafter may be authorized to execute the consent. In re Guardianship of Sain 508
7. A finding of abandonment for the purpose of substitute consent should not be made without first appointing a guardian for the minor child, who, if abandonment is found, may then be authorized to sign the consent. In re Guardianship of Sain 508
8. The guardian appointed for a minor child for whom adoption is being sought by the use of substitute consent pursuant to Neb. Rev. Stat. § 43-105 (Reissue 1978) should be an independent party not directly interested in the outcome of the adoption proceedings. In re Guardianship of Sain 508

Habeas Corpus.

1. A writ of habeas corpus is a proper remedy to use when one seeks release upon a showing that the judgment, sentence, and commitment are void. Mingus v. Fairbanks 81
2. In a habeas corpus action, the petition must set forth the facts constituting the illegal detention. It is not sufficient to state that the petitioner is illegally restrained

of his liberty, as that is a conclusion, but it must be made to appear in what the illegal restraint consists. Almarez v. Hartmann 243

Habitual Criminals.

1. In the prosecution of an alleged habitual criminal, the evidence relating to previous convictions must be relevant and material to the charge of recidivism. State v. Luna 630
2. The existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities. State v. Luna 630
3. The essential elements which an information must contain for a charge under the habitual criminal act are that said person has been (1) twice previously convicted of crime, (2) sentenced, and (3) committed to prison for terms of not less than 1 year each. State v. Luna 630
4. Sentences and commitments which do not set a minimum of at least 1 year are not disqualified from consideration in determining whether a defendant is an habitual criminal. State v. Luna 630

Highways.

The portion of Neb. Rev. Stat. § 39-1320.06 (Reissue 1978) which prohibits the "erection or maintenance of any advertising sign, display, or device which is visible from the main-traveled way of the National System of Interstate and Defense Highways and the system of federal-aid primary roads of the State of Nebraska" is unconstitutionally vague. State v. Mayhew Products Corp. 300
State v. Houtwed 681

Homicide.

1. 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. Hubbard 531
2. Premeditation and deliberation and a purpose to kill are not elements of felony murder. State v. Hubbard 531
3. Where an information charges a defendant with a killing committed in the perpetration of or attempt to perpetrate one of the specific felonies set out in Neb. Rev. Stat. § 28-303(2) (Reissue 1979), second degree murder

and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested. State v. Hubbard 531

Identification Procedures.

Whether an identification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it. State v. Gingrich 786

Impeachment.

1. A party is not permitted to get before the jury, under the guise of impeachment, an ex parte statement of a witness by calling him to the stand when there is good reason to believe he will decline to testify as desired, and when in fact he only so declines. State v. Brehmer 29
2. The State may not use a prior inconsistent statement of a witness, under the guise of impeachment, for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible. State v. Brehmer 29
3. A mere refusal to testify or testimony negative in nature indicating a lack of testimonial information does not present the grounds for impeaching the witness that affirmative testimony in favor of the opposite party gives for inquiry concerning prior statements contradictory of the testimony under oath at the trial. State v. Brehmer 29
4. The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made. State v. Brehmer 29

Independent Contractors.

1. An owner who employs an independent contractor to do work which is in the usual course of business of the owner, and who fails to require the independent contractor to procure workmen's compensation insurance, is liable as a statutory employer under Neb. Rev. Stat. § 48-116 (Reissue 1978). Rogers v. Hansen 132
2. The general test of whether work being done by an in-

dependent contractor for an owner is within the ambit of Neb. Rev. Stat. § 48-116 (Reissue 1978) is whether the work being done by the independent contractor would ordinarily be done by employees of the owner in view of the owner's past practices and the practices of employers in comparable businesses. Rogers v. Hansen 132

Indictments and Informations.

1. Defendants charged in separate informations may be joined for trial if they could have been joined in a single information or complaint. State v. Brehmer 29
2. The court, before trial, may in its discretion permit amendment of a criminal information, provided that the amendment does not change the nature or identity of the offense charged or charge a crime other than the one on which the accused has his preliminary examination. State v. Weible 174
3. The essential elements which an information must contain for a charge under the habitual criminal act are that said person has been (1) twice previously convicted of crime, (2) sentenced, and (3) committed to prison for terms of not less than 1 year each. State v. Luna 630
4. The District Court is without jurisdiction to try on information one accused of committing a felony within the state unless the defendant is first accorded the privilege of a preliminary examination or waives the same. State v. Kelley 770
5. No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, unless such person shall waive his or her right to such examination, except as otherwise provided in the Uniform Criminal Extradition Act. State v. Kelley 770
6. In a prosecution by information, the complaint and information must charge the same offense, but it is sufficient if the charge in the information is substantially the same as that alleged in the complaint. If this is so, a plea of no preliminary examination on the ground of a variance between the complaint and the information is without force. State v. Kelley 770

Innkeepers.

1. The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally

harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm. Harvey v. Van Aelstyn 607

2. The possessor of the premises is not bound to anticipate the unforeseeable independent acts of third persons, and it is only when such acts can reasonably be anticipated that the possessor has the duty to take some precautionary measures to protect against such independent acts. Harvey v. Van Aelstyn 607

Insurance.

1. Generally, the willful burning of property by a stockholder of a corporation is not a defense against the collection of insurance by the corporation; nor can a corporation be prevented from collecting insurance because its agents willfully set fire to the property without the participation or authority of the corporation or all of the stockholders of the corporation. Continental Ins. Co. v. Gustav's Stable Club, Inc. 1
2. An insured corporation will not be allowed a recovery on fire insurance policies where the incendiarist owns all or practically all of the stock in the insured corporation, or is in dominant management of the corporate property. Continental Ins. Co. v. Gustav's Stable Club, Inc. 1
3. In all contracts of insurance there is an implied understanding or agreement that the risks insured against are such as the thing insured, whether it is property, or health, or life, is usually subject to, and the insured cannot voluntarily and intentionally vary them. Upon principles of public policy and morals, the fraud or the criminal misconduct of the insured is, in contracts of marine or of fire insurance, an implied exception to the liability of the insurer. Continental Ins. Co. v. Gustav's Stable Club, Inc. 1
4. Where the beneficial owner of practically all of the stock in a corporation, or who has the dominant management and control of its affairs and property, sets fire to the property of a corporation, or causes it to be done, there is no sound reason to support the contention that the corporation should be allowed to recover on a policy for the destruction of the corporate property by a fire so occasioned. Continental Ins. Co. v. Gustav's Stable Club, Inc. 1

5. The rule as to partnerships or joint ventures is that innocent partners and joint venturers are also barred from recovery where the arson is perpetrated by a partner or joint venturer. Continental Ins. Co. v. Gustav's Stable Club, Inc. 1
6. Whether a wind is of sufficient force to be within the meaning of a policy insuring against damage caused by wind must in each instance be a question of fact. Graff v. Farmers Mut. Home Ins. Co. 13
7. If a windstorm was the efficient cause of the loss covered by a policy insuring against "loss by windstorm," the fact that other causes may have contributed to that loss does not relieve the insurer from liability. Graff v. Farmers Mut. Home Ins. Co. 13
8. The loss for which recovery is sought under a tornado, cyclone, or windstorm policy seldom results from a single isolated cause, but rather from a combination of causes, such as wind and water, or wind and snow, and the like. In the absence of a specific provision in the policy to the contrary, it is generally sufficient, in order to recover upon a cyclone, tornado, or windstorm policy, to show that the cause designated therein was the efficient cause of the loss, although other causes contributed thereto. Where an object, damage from which is not expressly excluded from coverage of the policy, is blown by the force of a windstorm against the insured property, causing damage thereto, the loss is within the policy coverage, since the wind-driven object is merely the passive agent of the damage, and the windstorm by its propulsive force is the controlling causal agent directly responsible for the loss. Graff v. Farmers Mut. Home Ins. Co. 13
9. Insurance is a contract by which one party assumes specified risks of the other party for a consideration, and promises to pay him or his beneficiary an ascertainable sum of money on the happening of a specified contingency. It is true, however, that an insurance contract will be construed against the insurance company when the contract or policy is indefinite or ambiguous because it drafted the contract or policy and is responsible for any indefiniteness or ambiguity therein. But where the contract is plain and unambiguous in its meaning, the contract will be enforced according to its terms. Safeco Ins. Co. of America v. Husker Aviation, Inc. 21
10. The parties to an insurance contract may make the contract in any legal form they desire, and in the absence of statutory provisions to the contrary, insurance

companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed. Safeco Ins. Co. of America v. Husker Aviation, Inc. 21

11. In determining whether coverage is afforded under a particular conditional receipt, the specific language of the receipt must be taken into account. Liability of the insurer, if any, is dependent upon the language of the receipt, the facts of the particular case, and the intention of the parties. Hemenway v. MFA Life Ins. Co. ... 193

12. A conditional receipt may give rise to insurance coverage, even though the policy has not been issued, provided that the conditions for such coverage are met under the terms of the receipts. Hemenway v. MFA Life Ins. Co. 193

13. Insurance policies should be construed as any other contract and should be given effect according to the ordinary sense of the terms used; and if those terms are clear, they will be applied according to their plain and ordinary meaning. Hemenway v. MFA Life Ins. Co. .. 193

14. An insurance contract will be interpreted in accordance with the reasonable expectations of the insured at the time of the contract and, in case of doubt, the policy will be liberally construed in favor of the insured. Hemenway v. MFA Life Ins. Co. 193

15. It is an unfair or deceptive act or practice for an insurance company to fail to promptly settle claims, when liability has become clear, under one portion of an insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage. Beeder v. Fleer 294

16. Under Neb. Rev. Stat. § 25-1222.01 (Reissue 1979), a party is entitled to credit on any judgment rendered against him for any payments or partial payment of damages made on behalf of such party to an injured person or on his behalf to others, including an assignee or subrogee of such injured person. Beeder v. Fleer .. 294

17. Every agent or broker who shall solicit an application for insurance of any kind shall, in any controversy between the insured or his beneficiary and the company issuing any policy upon such application, be regarded as representing the company and not the insured. Neb. Rev. Stat. § 44-329 (Reissue 1978). Ericksen v. Pearson 466

18. Any person, firm, or corporation in this state who shall

with authority receive or receipt for any money on account of, or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who shall with authority receive or receipt for money from other persons to be transmitted to any such company or individual thereof, although such policy or policies of insurance may not be signed by him or them, as agent or agents of such company, or who shall in any wise make or cause to be made any contract or contracts of insurance for or on account of such company, shall be deemed to all intents and purposes an agent or agents of such company. Neb. Rev. Stat. § 44-328 (Reissue 1978). Ericksen v. Pearson 466

19. The general rule is that in the absence of a specific statute, where the liability of a principal for a tort committed by his agent is predicated solely upon the doctrine of respondeat superior, a valid release of either of the parties in such relationship operates to release the other. Ericksen v. Pearson 466

Intent.

1. 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. Hubbard 531
2. Premeditation and deliberation and a purpose to kill are not elements of felony murder. State v. Hubbard 531
3. The cardinal rule in construing wills is to ascertain and effectuate the intention of the testator if such intention is not contrary to the law. In re Johnson Trust Estates 750

Interest.

1. While the rule is generally to the effect that unliquidated demands do not bear interest until the amounts have been liquidated, the rule is otherwise where the parties have contracted to do otherwise. Prudential Ins. Co. v. Greco 342
2. Where the parties have contracted for the payment of a particular lawful rate of interest, to be paid after the maturity of the debt and on default in payment, such contract controls and the rate thus fixed is recoverable. Prudential Ins. Co. v. Greco 342
3. A court of equity has reasonable discretion to allow or withhold interest as is reasonably just, except in cases where interest is recoverable as a matter of right. Bankers Union Life Ins. Co. v. Nebraska Corp. 350

Intervention.

1. An intervenor who is not an indispensable party cannot change the position of the original parties or change the nature and form of the action or the issues presented therein. In re Hilbers Property Freehold Transfer 268
2. In an appeal to the District Court from an action of a freehold board transferring land from one school district to another, where the party appealing the action of the board has no standing to make such an appeal, an intervenor entering the action after the time for appeal has elapsed may not be substituted as an appellant. In re Hilbers Property Freehold Transfer 268

Investigative Stops.

An investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. State v. Longa 356

Joinder of Actions.

1. Defendants charged in separate informations may be joined for trial if they could have been joined in a single information or complaint. State v. Brehmer 29
2. Joinder is permissible if the defendants are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. State v. Brehmer 29
3. Two charges arise out of the same act or transaction if they are so closely linked in time, place, and circumstance that a complete account of one charge cannot be related without relating details of the other charge. State v. Brehmer 29
4. Joinder may be permitted only where the facts of each charge can be explained adequately only by drawing upon the facts of the other charge. State v. Brehmer .. 29
5. The rule against jointly indicting and trying different defendants for unconnected offenses is a long-established procedural safeguard. State v. Brehmer .. 29
6. A trial court may not consolidate defendants' cases for trial if joinder of those same defendants is not allowed by Neb. Rev. Stat. § 29-2002(2) (Reissue 1979). State v. Brehmer 29
7. In those cases where multiple defendants are joined for trial in a manner inconsistent with Neb. Rev. Stat. § 29-2002 (Reissue 1979), such misjoinder is prejudicial per se and severance is not a matter of discretion but is a matter of right. State v. Brehmer 29

Joint and Several Liability.

The joint and several liability imposed by Neb. Rev. Stat. § 48-116 (Reissue 1978) is for the sole benefit of the injured workman. Rogers v. Hansen 132

Joint Tenancy.

1. It is the general rule that when one of several coowners of property acquires a tax title thereto founded on default in the payment of taxes which are a common burden on all, his purchase amounts merely to a payment of the taxes or a redemption from the sale, and gives him no rights against his associates except insofar as they may fail or refuse to contribute to the expenditure so made. O'Toole v. Yunghans 852
2. The above rule is not changed by the fact that the cotenant acquires the tax title from a stranger who purchased at the tax sale. O'Toole v. Yunghans 852
3. Neb. Rev. Stat. § 77-1843 (Reissue 1976) does not change the general principle that the purchase or extinguishment of an outstanding title, interest, or claim by one cotenant inures to the benefit of his cotenants. O'Toole v. Yunghans 852

Judges.

1. The right of a judge, under Neb. Rev. Stat. § 27-614(2) (Reissue 1979), to interrogate a witness should be very sparingly exercised, and generally counsel for the parties should be relied on and allowed to manage and bring out their own case. The actions of the judge in this respect should never be such as to warrant any assertion that they were with a view to assistance of the one or the other party to the cause. State v. Brehmer 29
2. Alleged improper conduct of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection. Steffen v. Ainsworth ... 291

Judgments.

1. Where a jury has been waived and the case tried to the court, the judgment of the trial court has the effect of a verdict of a jury and will not be disturbed unless clearly wrong. Graff v. Farmers Mut. Home Ins. Co. 13
2. Where the appellate court remands a cause with directions to enter judgment for the plaintiff in a certain amount, the judgment of the appellate court is a final judgment in the cause and the entry thereof in the lower court is a purely ministerial act. No modification of the judgment so directed can be made, nor may any provision be engrafted on or taken from it. That

order is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by it can have any effect, even though it may be such as the appellate court ought to have directed. Gates v. Howell 85

3. The decision of a trial judge on a question of fact in a law action will not be set aside on appeal unless clearly wrong. Blaha GMC-Jeep, Inc. v. Frerichs 103

4. In determining whether the evidence supports the findings of the trial court in an action at law where a jury has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Hemenway v. MFA Life Ins. Co. 193
Miller Chemical Co., Inc. v. Tams 837

5. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though the order actually rendered was not the order the court intended to render. Larson v. Bedke 247

6. An order nunc pro tunc cannot be used to enlarge the judgment as originally rendered or to change the rights fixed by it as it was originally intended or made, nor can it be employed where the fault in the original judgment is that it is wrong as a matter of law or to allow the court to review and reverse its action with respect to what it formerly refused to do or assent to. Larson v. Bedke 247

7. A court of record has inherent authority to amend its records so as to make them conform to the facts. It is proper for a court to make an entry nunc pro tunc so that its records will speak the truth. Such an order is proper to correct the record of a judgment, but not to correct the judgment itself. Clerical errors may be corrected by an order nunc pro tunc but judicial errors may not. Larson v. Bedke 247

8. It is not the purpose of an order nunc pro tunc to correct, change, or modify action previously taken by the court. Larson v. Bedke 247

9. A court may not, under the guise of an amendment of its records, revise or change the judgment in substance and have such amended judgment entered nunc pro tunc. The nunc pro tunc order must conform to and be no broader in its terms than the judgment originally rendered. Larson v. Bedke 247

10. A judgment of the trial court in a law action where a jury has been waived will be set aside when it is clearly against the weight of the evidence. Kearney Clinic Bldg. Corp. v. Weaver 499
Dworak v. Michals 716
11. In ascertaining whether the plaintiff is the real party in interest, the primary and fundamental test to be applied is whether the prosecution of the action will save the defendant from further harassment or vexation at the hands of other claimants to the same demand. If the defendant is not cut off from any just defense, offset, or counterclaim against the demand and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end. Peerless Ins. Co. v. Bukacek 505
12. Where a party has sustained the burden and expense of trial and has succeeded in securing the judgment of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. Bodzek v. Callahan 600
13. The standard of review in this court of a law action is that a judgment of the District Court will not be set aside by this court on appeal unless it is clearly wrong and not supported by the evidence. Miller Chemical Co., Inc. v. Tams 837
14. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. Jacobberger v. Terry 878

Juries.

1. Where a jury is permitted to view the premises involved in eminent domain litigation, the result of its observations is evidence which, in arriving at a verdict, it may consider in connection with other competent evidence. To the extent *Wagner v. State,* 176 Neb. 589, 126 N.W.2d 853 (1964), may be inconsistent with this opinion, it is overruled. Bentz v. Nebraska P.P. Dist. 844
2. In eminent domain proceedings, the jury is not required to accept as conclusive the estimates of value made by the witnesses at trial. Bentz v. Nebraska P.P. Dist. 844

Jurisdiction.

1. The Nebraska Workmen's Compensation Act is not applicable to a nonresident employer and resident employee where the contract of employment was made in this state for services to be performed in another state

and the employer was not, at the time of the contract, engaged in any trade, business, profession, or vocation in this state. Jensen v. Floair, Inc. 403

2. The Nebraska Workmen's Compensation Act is not applicable where a resident employee's employment by a nonresident employer for services to be performed outside the State of Nebraska was neither in nor incidental to any trade, business, profession, or vocation carried on by the employer in this state. Jensen v. Floair, Inc. 403

3. The county court and not the juvenile court in each county has the authority to determine abandonment for the purpose of permitting the use of substitute consent, and has the authority to appoint the guardian who thereafter may be authorized to execute the consent. In re Guardianship of Sain 508

4. The Equal Opportunity Commission, having exercised powers not specifically granted by statute, acted in excess of those powers and its action is therefore void and of no effect. Omaha Public Schools v. Hall 618

5. The parties to this action cannot grant the Equal Opportunity Commission jurisdiction by acquiescence or consent, or by participation in the procedures. Omaha Public Schools v. Hall 618

6. The District Court is without jurisdiction to try on information one accused of committing a felony within the state unless the defendant is first accorded the privilege of a preliminary examination or waives the same. State v. Kelley 770

Juror Qualifications.

In order to predicate error on the overruling of a challenge for cause, there must be a showing that the objectionable juror was forced upon the challenging party and sat on the jury because such party had exhausted his peremptory challenges. State v. Boyer 139

Jury Instructions.

1. A trial court should eliminate immaterial and superfluous matters and submit to the jury by instructions only matters properly to be decided by it in arriving at its verdict. Empire State Building Co. v. Bryde 184

2. If it becomes necessary to give further instructions to a jury while it is deliberating, the proper practice is to call the jury into open court and give any additional instructions in writing in the presence of the parties or their counsel. In re Estate of Corbett 335

3. After a jury has retired to deliberate, it is error to give a further instruction out of the presence of the parties

and their counsel. But if it clearly appears that prejudice did not and could not flow therefrom, it is error without prejudice and not ground for reversal. In re Estate of Corbett 335

4. The failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal. State v. Pope 425
In re Estate of Haddix 814

5. Where an information charges a defendant with a killing committed in the perpetration of or attempt to perpetrate one of the specific felonies set out in Neb. Rev. Stat. § 28-303(2) (Reissue 1979), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested. State v. Hubbard 531

6. Where a defendant has voluntarily absented himself from a portion of his trial, the jury is entitled to know that fact, the fact that his absence was not caused by unjust governmental action, but should be directed to draw no other conclusions or inferences from the fact of defendant's absence. State v. Sayers 555

7. Jury instructions should be considered as a whole. In re Estate of Haddix 814

Juvenile Courts.

1. Even though an appeal of a juvenile proceeding is heard de novo upon the record, findings of fact by the juvenile court should be accorded great weight because it heard and observed the parties and witnesses, and those findings should not be set aside on appeal unless they are against the weight of evidence or there is a clear abuse of discretion. In re Interest of Levey 66

2. A court may order a parent to make reasonable efforts to rehabilitate, and failure of those efforts is another independent reason for justifying termination of parental rights. In re Interest of Brungardt 519

3. Although our review of parental termination proceedings is de novo on the record, findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and the witnesses. In re Interest of Brungardt 519

Labor and Labor Relations.

1. The preemption doctrine, generally, seeks to insure the accommodation of a uniform national labor policy. Additionally, in cases where the state is seeking to

regulate activities impacting commerce under federal law, preemption is constitutionally based on the supremacy clause. Jones v. Commercial Federal Savings & Loan Assn. 487
2. Congress, by enacting comprehensive legislation which governs labor relations affecting commerce and creating a centralized administrative body charged with administering that legislation, intended to exclude the various states from enforcing conflicting regulations or procedures. Jones v. Commercial Federal Savings & Loan Assn. 487
3. Under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976), suit may be brought in either state or federal court for breach of a collective bargaining agreement. Jones v. Commercial Federal Savings & Loan Assn. 487
4. Employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents to the exclusion of all others. Jones v. Commercial Federal Savings & Loan Assn. ... 487
5. State courts must follow the federal law, as fashioned by the federal courts, to effectuate the statutory policy of enforcement of collective bargaining agreements. Jones v. Commercial Federal Savings & Loan Assn. ... 487
6. Action of city manager denying a merit pay raise to police officer held to be within legitimate administrative discretion and not arbitrary or capricious. Watson v. City of Grand Island 622

Legislature.
1. The power of classification rests with the Legislature and it will not be interfered with by the courts if real and substantial differences exist which afford a rational basis for classification. State v. Edmunds 380
2. This court will not, by interpretation or construction, usurp the function of the legislative body and give a statute a meaning not intended or expressed by the Legislature. In re Proceedings re School Dists. R-4 & R-3 453
3. Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes. State ex rel. Bouc v. School Dist. of City of Lincoln 731
4. The record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation. State ex rel. Bouc v. School Dist. of City of Lincoln 731
5. Legislative action does not violate the first amendment's establishment clause if the statute has a secular

legislative purpose, has a principal or primary effect which neither advances nor inhibits religion, and does not foster an excessive government entanglement with religion. State ex rel. Bouc v. School Dist. of City of Lincoln 731

6. It is necessary to determine the "concern" of the legislative act prior to determining whether that "concern" is statewide or local. Jacobberger v. Terry 878
7. Whether or not an act of the Legislature pertains to a matter of local or statewide concern becomes a question for the courts when a conflict of authority arises, and the courts are not bound by the Legislature's declaration on this matter. Jacobberger v. Terry 878
8. The Legislature's actions to protect the fundamental civil rights of suffrage and proportionate representation are of statewide as opposed to local concern. Jacobberger v. Terry 878
9. It is competent for the Legislature to classify objects of legislation, and if the classification is reasonable and not arbitrary, it is a legitimate exercise of legislative power. Jacobberger v. Terry 878

Lesser-Included Offenses.

1. The offense of debauching a minor is not a lesser-included offense of pandering. Mingus v. Fairbanks 81
2. A lesser-included offense is one which is necessarily established by proof of a greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. Mingus v. Fairbanks 81
3. Where an information charges a defendant with a killing committed in the perpetration of or attempt to perpetrate one of the specific felonies set out in Neb. Rev. Stat. § 28-303(2) (Reissue 1979), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested. State v. Hubbard 531
4. An instruction on a lesser-included offense is not required unless the evidence produces a rational basis for an acquittal of the offense charged and a conviction of the lesser offense. State v. Spaulding 575
5. Where the prosecution has offered uncontroverted evidence on an element necessary for conviction of the greater crime, but not necessary for the lesser offense, the defendant must offer at least some evidence to dis-

pute the issue if he wishes to have the benefit of a lesser-included offense instruction. State v. Spaulding 575

6. A lesser-included offense is one, the elements of which include some, but not all, of the elements of the greater offense, i.e., the lesser is fully embraced in the greater. Stated another way, a lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. State v. Kelley 770

7. Motor vehicle homicide is a lesser-included offense of manslaughter. State v. Kelley 770

Liability.

1. If a windstorm was the efficient cause of the loss covered by a policy insuring against "loss by windstorm," the fact that other causes may have contributed to that loss does not relieve the insurer from liability. Graff v. Farmers Mut. Home Ins. Co. 13

2. In determining whether coverage is afforded under a particular conditional receipt, the specific language of the receipt must be taken into account. Liability of the insurer, if any, is dependent upon the language of the receipt, the facts of the particular case, and the intention of the parties. Hemenway v. MFA Life Ins. Co. ... 193

Licensee.

The owner or occupant of property owes to the 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. Dukes v. Barkdoll 546

Limitations of Actions.

1. Ordinarily, a statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. Kearney Clinic Building Corp. v. Weaver 499

2. An action for deficiency in construction of an improvement to realty must be commenced within 4 years of the time such deficiency was discovered or could reasonably have been discovered. Kearney Clinic Building Corp. v. Weaver 499

3. If an employee suffers an injury which appears to be slight but which is progressive in its course, and which several physicians are unable to correctly diagnose, the worker's failure to file claim or bring suit within the time limited by law will not defeat his right to re-

covery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident. Thomas v. Kayser-Roth Corp. 704

4. The burden of proving that an injury is latent and progressive so as to toll the statute of limitations is upon the plaintiff. Thomas v. Kayser-Roth Corp. 704

5. The mere fact that the plaintiff did not know the full extent of his injury from a medical standpoint does not make it latent, particularly where the medical facts were reasonably discoverable. Thomas v. Kayser-Roth Corp. 704

Mandamus.

1. Mandamus is an extraordinary remedy which is not awarded as a matter of right. State ex rel. Fortner v. Urbom 309

2. A writ of mandamus should not issue where there is another plain and adequate remedy available. State ex rel. Fortner v. Urbom 309

3. Mandamus is not available to enforce a plea agreement or similar agreement in a criminal proceeding, because another plain and adequate remedy is available. State ex rel. Fortner v. Urbom 309

4. Before a writ of mandamus may issue the evidence must show clearly and conclusively that the relator is entitled to the particular relief requested and that there is a legal obligation on the part of the respondent to act. State ex rel. Bouc v. School Dist. of City of Lincoln 731

Medical Malpractice.

Whether a specific manner of treatment or exercise of skill by a physician or surgeon demonstrates a lack of skill or knowledge or a failure to exercise reasonable care is a matter that must usually be proved by expert testimony. Hanzlik v. Paustian 322

Mental Competency.

1. The test of mental competency to stand trial is whether the defendant has the present 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. Quarrels 204

2. 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. Quarrels 204

3. The determination of the finder of fact on the issue of competency will not be disturbed unless there is insufficient evidence to support the findings. State v. Quarrels 204
4. The test of mental capacity to plead or stand trial is the same. State v. Quarrels 204

Minors.
1. A guardian must be appointed for a minor child who had been abandoned by one of his parents, who in turn may execute the necessary consent required by Neb. Rev. Stat. § 43-104 (Reissue 1978). In re Guardianship of Sain 508
2. A finding of abandonment for the purpose of substitute consent should not be made without first appointing a guardian for the minor child, who, if abandonment is found, may then be authorized to sign the consent. In re Guardianship of Sain 508
3. The guardian appointed for a minor child for whom adoption is being sought by the use of substitute consent pursuant to Neb. Rev. Stat. § 43-105 (Reissue 1978) should be an independent party not directly interested in the outcome of the adoption proceedings. In re Guardianship of Sain 508

Moot Question.
Cases which are moot may nevertheless be heard on appeal if the issue involved is one of great public interest. State ex rel. Bouc v. School Dist. of City of Lincoln 731

Motions for New Trial.
The discretion of the trial court in ruling on a motion for new trial is only the power to apply the statutes and legal principles to all facts of the case and grant a new trial only where legal cause exists. A trial judge may not grant a new trial merely because he reached a different conclusion than did the jury. Bentz v. Nebraska P.P. Dist. 844

Motor Vehicles.
The mere skidding of a motor vehicle without more does not prove negligence. Knutson v. Herman Bros., Inc. 603

Municipal Corporations.
1. A provision of a municipality's 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 is of

statewide concern, the state law takes precedence over any municipal action taken under the home rule charter. Jacobberger v. Terry 878
2. It is necessary to determine the "concern" of the legislative act prior to determining whether that "concern" is statewide or local. Jacobberger v. Terry 878
3. Whether or not an act of the Legislature pertains to a matter of local or statewide concern becomes a question for the courts when a conflict of authority arises, and the courts are not bound by the Legislature's declaration on this matter. Jacobberger v. Terry 878
4. There is no sure test by which it is possible to distinguish between matters of strictly municipal concern and those of statewide concern, and it is therefore necessary to make such distinction on a case-by-case analysis of the issue as it arises. Jacobberger v. Terry 878
5. A reasonable distinction does exist between metropolitan class cities under the commission form of government and all other metropolitan cities, and, consequently, L.B. 329 is not special or local legislation violative of Neb. Const. art. III, § 18. Jacobberger v. Terry 878

Negligence.
1. A fireman or individual fighting a fire on the premises of an owner or occupant is a bare licensee to whom the owner or occupant owes no greater duty than to refrain from injuring him by willful or wanton negligence or a designed injury, except in certain cases where there may be the duty to warn of hidden danger or peril known to the owner or occupant but unknown to or unobservable by the fireman in the exercise of ordinary care. Lave v. Neumann 97
2. Under the rescue doctrine it is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value to be realized from meeting the danger and attempting to remove or eliminate the hazard; that is, the less the danger to the third party, the less the risk the volunteer is justified in taking. Lave v. Neumann 97
3. The owner or occupant of property owes to the 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. Dukes v. Barkdoll 546

4. The mere skidding of a motor vehicle without more does not prove negligence. Knutson v. Herman Bros., Inc. 603

5. The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm. Harvey v. Van Aelstyn 607

6. The possessor of the premises is not bound to anticipate the unforeseeable independent acts of third persons, and it is only when such acts can reasonably be anticipated that the possessor has the duty to take some precautionary measures to protect against such independent acts. Harvey v. Van Aelstyn 607

7. Once the defendant's negligence has been established, it is necessary to find that the plaintiff's injuries were proximately caused by the defendant's negligence. Shelton v. Board of Regents 820

8. Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. Shelton v. Board of Regents 820

9. The causal connection is broken if, between the defendant's negligent act and the plaintiff's injury, there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff. Shelton v. Board of Regents 820

10. The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such

a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime. Shelton v. Board of Regents 820

11. It may be stated as a general rule that when, between original negligence and an accident, there intervenes a willful, malicious, and criminal act of a third person which causes the injury but was not intended by the person originally negligent and could not have been foreseen by him, the causal chain between the original negligence and the accident is broken. Shelton v. Board of Regents 820

12. Although the question of proximate cause is originally for the determination of the jury, where only one inference can be drawn it is for the court to declare whether a given act or series of acts is the proximate cause of the injury. Shelton v. Board of Regents 820

Negotiable Instruments.

1. When the signatures on a negotiable instrument are admitted, the production of the instrument entitles the holder to recover on it unless the defendant establishes a defense. However, such a defense must be affirmatively pleaded. Blaha GMC-Jeep, Inc. v. Frerichs 103
John Deere Co. v. Hand 549

2. Where failure of consideration is pleaded as a defense to an action on a negotiable instrument, the burden is upon the defendant to prove such defense. Blaha GMC-Jeep, Inc. v. Frerichs 103

3. There are two kinds of consideration for a negotiable instrument, i.e., that which confers a benefit upon the promisor and that which causes a detriment to the promisee. Blaha GMC-Jeep, Inc. v. Frerichs 103

4. In order for a detriment to the promisee to constitute a valid consideration for a negotiable instrument, it must have been within the express or implied contemplation of the parties and known to and agreed to by them. Blaha GMC-Jeep, Inc. v. Frerichs 103

Offers to Buy or Sell.

Advertising circulars soliciting orders for merchandise are not ordinarily intended or understood as offers to sell. The construction is rather favored that such an advertisement is a mere invitation to enter into a bargain, rather than an offer. Rhen Marshall, Inc. v. Purolator Filter Div. 306

Options to Buy or Sell.

1. An option to purchase real estate is a unilateral con-

tract by which the owner of the property agrees with the holder of the option that he has the right to buy the property according to the terms and conditions of the contract. Gleeson v. Frahm 677
2. The exercise of an option to buy or sell real estate must be unconditional and in accordance with the offer made. Gleeson v. Frahm 677
3. Where the manner of exercise is not specified by an option contract, the holder of the option may exercise by promising to perform what the contract requires of him. Gleeson v. Frahm 677

Ordinances.

When an ordinance or statute is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes sure its validity will ordinarily be given. State ex rel. Bouc v. School Dist. of City of Lincoln 731

Parental Rights.

1. An appeal from an order terminating parental rights requires a de novo review upon the record. In re Interest of Levey 66
In re Interest of Shepherd 313
2. The right of a parent to maintain custody of his or her children is a natural but not an inalienable right subject only to the paramount interest which the public has in the protection of the rights of a child. In re Interest of Levey 66
In re Interest of Shepherd 313
In re Interest of Brungardt 519
3. The primary consideration in any case involving termination of parental rights is the best interests of the children. In re Interest of Levey 66
4. The separate juvenile court may terminate parental rights when it finds such action to be in the best interests of the children and where such action is supported by clear and convincing evidence that the parent has substantially and continuously or repeatedly neglected the children and refused to give them necessary parental care and protection. In re Interest of Levey 66
In re Interest of Shepherd 313
In re Interest of Brungardt 519
5. When the natural parents cannot be rehabilitated within a reasonable time, the best interests of the child require that a final disposition be made without delay. In re Interest of Hastings 209
In re Interest of Brungardt 519

6. 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 Shepherd 313
In re Interest of Brungardt 519
7. It is not the law in this state that parental rights may not be terminated unless the parent is given a reasonable opportunity to rehabilitate himself. In re Interest of Brungardt 519
8. However, a court may order a parent to make reasonable efforts to rehabilitate, and failure of those efforts is another independent reason for justifying termination of parental rights. In re Interest of Brungardt 519
9. Termination of parental rights is a last resort and should be implemented only when no other reasonable alternative exists. In re Interest of Brungardt 519
10. Although termination of parental rights may not be decreed for the sole purpose of facilitating adoption, nevertheless, children have a right to grow up in a safe and healthy environment. In re Interest of Brungardt 519

Parol Evidence.

Parol evidence is not admissible to vary the terms of a written agreement constituting an accord and satisfaction, unless said agreement is ambiguous. Meyers v. Frohm Holdings, Inc. 329

Parties.

1. An intervenor who is not an indispensable party cannot change the position of the original parties or change the nature and form of the action or the issues presented therein. In re Hilbers Property Freehold Transfer 268
2. In ascertaining whether the plaintiff is the real party in interest, the primary and fundamental test to be applied is whether the prosecution of the action will save the defendant from further harassment or vexation at the hands of other claimants to the same demand. If the defendant is not cut off from any just defense, offset, or counterclaim against the demand and a judgment in behalf of the party suing will fully protect him when discharged, then is his concern at an end. Peerless Ins. Co. v. Bukacek 505

Partnerships.

The rule as to partnerships or joint ventures is that innocent partners and joint venturers are also barred from recovery where the arson is perpetrated by a partner

or joint venturer. Continental Ins. Co. v. Gustav's Stable Club, Inc. 1

Pensions.

1. The provisions of the Social Security Act do not make it unlawful for an employer to establish a private pension or disability contract which offsets against disability payments those governmental benefits to which the employees may become entitled. Blue v. Champion International Corp. 480
2. Bad faith on the part of an employer pension committee in denying disability payments does not necessarily compel a finding that a wholly unrelated provision of the contract itself shall not be enforced. Blue v. Champion International Corp. 480
3. A pension or long-term disability plan provided to employees by an employer which is not offered primarily for profit nor which coverage is limited to employees and not resulting from advertisement or solicitation of insurance business from the public, and which does not cause the employer to hold itself out as doing business as a commercial insurer, is neither "any type of insurance policy" nor "a certificate issued by a fraternal beneficiary association" within the meaning of Neb. Rev. Stat. § 44-359 (Reissue 1978). Blue v. Champion International Corp. 480
4. Retirement benefits paid under the Nebraska State Patrolmen's Retirement System are not a gratuity but are deferred compensation. Halpin v. Nebraska State Patrolmen's Retirement System 892
5. The right of a state patrolman to receive benefits under the Nebraska State Patrolmen's Retirement System is contractual in nature and is protected against unconstitutional impairment. Halpin v. Nebraska State Patrolmen's Retirement System 892
6. The final average monthly salary of a state patrolman who was a member of the State Patrol on or before January 4, 1979, should be calculated by including the payment received upon retirement for unused vacation and sick leave accumulated during the final 3 years of service. Halpin v. Nebraska State Patrolmen's Retirement System 892

Plea Bargains.

1. Mandamus is not available to enforce a plea agreement or similar agreement in a criminal proceeding, because another plain and adequate remedy is available. State ex rel. Fortner v. Urbom 309

2. The State may withdraw from a plea bargain agreement at any time prior to, but not after, the actual entry of the guilty plea by the defendant or other action by the defendant constituting detrimental reliance upon the agreement. State ex rel. Fortner v. Urbom 309

Plea in Abatement.

1. The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceeding in the District Court. State v. Kelley 770
2. It is fundamental that a claim that a defendant was not accorded a preliminary hearing, nor waived it, is determinable by plea in abatement. State v. Kelley 770
3. In a prosecution by information, the complaint and information must charge the same offense, but it is sufficient if the charge in the information is substantially the same as that alleged in the complaint. If this is so, a plea of no preliminary examination on the ground of a variance between the complaint and the information is without force. State v. Kelley 770

Pleadings.

1. When the signatures on a negotiable instrument are admitted, the production of the instrument entitles the holder to recover on it unless the defendant establishes a defense. However, such a defense must be affirmatively pleaded. Blaha GMC-Jeep, Inc. v. Frerichs 103
   John Deere Co. v. Hand 549
2. Under the code system of pleading it is not necessary to state a cause of action or a defense in any particular terms. It is only necessary to plead the facts, not the theory of recovery or defense. Blaha GMC-Jeep, Inc. v. Frerichs 103
3. Under Neb. Rev. Stat. § 25-852 (Reissue 1979), a pleading may be amended in the furtherance of justice, to conform to the proof, if the proposed amendment does not change substantially the claim or defense. Meyer v. Sandhills Beef, Inc. 388
4. A defense not raised by a party until after the issuance of an order dismissing the petition brought against a defendant neither raises nor preserves a defense for consideration by this court. Jacobberger v. Terry 878

Pleas.

1. The test of mental capacity to plead or stand trial is the same. State v. Quarrels 204

2. A plea of guilty to a crime may be accepted by a court even though the defendant professes his innocence or denies the facts which would support a finding of guilt, provided there is a factual basis for such a finding and the court has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence. Such inquiry must be sufficient to satisfy the court that the defendant has a reasonable basis on which to enter such a plea. State v. Beach 660
3. A voluntary guilty plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional. State v. Paulson 711

Police Officers and Sheriffs.
Action of city manager denying a merit pay raise to police officer held to be within legitimate administrative discretion and not arbitrary or capricious. Watson v. City of Grand Island 622

Post Conviction.
1. One seeking post conviction relief has the burden of establishing the basis for such relief; the findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous. State v. Paulson 711
2. A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal and which do not involve questions making the judgment of conviction void or voidable under the state or federal Constitutions. State v. Paulson 711
3. An evidentiary hearing must be granted on a petition for post conviction relief when the facts alleged would justify relief, if true, or when a factual dispute arises as to whether a constitutional right is being denied. State v. Paulson 711
4. Under the Post Conviction Act it is within the discretion of the District Court to determine whether legal counsel shall be appointed to represent a defendant on appeal to this court, and in the absence of a showing of an abuse of discretion, the failure to appoint counsel is not error. State v. Paulson 711

Preliminary Hearings.
1. The sufficiency of the evidence at a preliminary hearing may be raised only by a plea in abatement filed in the criminal proceeding in the District Court. State v. Kelley 770
2. It is fundamental that a claim that a defendant was not

accorded a preliminary hearing, nor waived it, is determinable by plea in abatement. State v. Kelley 770
3. The District Court is without jurisdiction to try on information one accused of committing a felony within the state unless the defendant is first accorded the privilege of a preliminary examination or waives the same. State v. Kelley 770
4. No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, unless such person shall waive his or her right to such examination, except as otherwise provided in the Uniform Criminal Extradition Act. State v. Kelley 770
5. If the evidence adduced at a preliminary hearing is insufficient to show probable cause that the crime charged in the complaint was committed and that the defendant committed it, the examining magistrate must dismiss the complaint. State v. Kelley 770

Presumptions.

An easement in gross is never presumed when it can fairly be construed as appurtenant to some other estate. Spilker v. First Nat. Bank & Trust Co. 540

Principal and Agent.

1. Every agent or broker who shall solicit an application for insurance of any kind shall, in any controversy between the insured or his beneficiary and the company issuing any policy upon such application, be regarded as representing the company and not the insured. Neb. Rev. Stat. § 44-329 (Reissue 1978). Ericksen v. Pearson 466
2. Any person, firm, or corporation in this state who shall with authority receive or receipt for any money on account of, or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who shall with authority receive or receipt for money from other persons to be transmitted to any such company or individual thereof, although such policy or policies of insurance may not be signed by him or them, as agent or agents of such company, or who shall in any wise make or cause to be made any contract or contracts of insurance for or on account of such company, shall be deemed to all intents and purposes an agent or agents of such company. Neb. Rev. Stat. § 44-328 (Reissue 1978). Ericksen v. Pearson 466
3. The general rule is that in the absence of a specific statute, where the liability of a principal for a tort committed by his agent is predicated solely upon the doc-

trine of respondeat superior, a valid release of either of the parties in such relationship operates to release the other. Ericksen v. Pearson 466

Prior Inconsistent Statements.

1. The State may not use a prior inconsistent statement of a witness, under the guise of impeachment, for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible. State v. Brehmer 29
2. A mere refusal to testify or testimony negative in nature indicating a lack of testimonial information does not present the grounds for impeaching the witness that affirmative testimony in favor of the opposite party gives for inquiry concerning prior statements contradictory of the testimony under oath at the trial. State v. Brehmer 29
3. The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made. State v. Brehmer 29

Probable Cause.

1. In evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. State v. Longa 356
2. Probable cause is to be evaluated by the collective information of the police as reflected in the affidavit for a search warrant, and is not limited to the firsthand knowledge of the officer who executed the affidavit. State v. Longa 356
3. If the evidence adduced at a preliminary hearing is insufficient to show probable cause that the crime charged in the complaint was committed and that the defendant committed it, the examining magistrate must dismiss the complaint. State v. Kelley 770

Products Liability.

A corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation except (1) when the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability, (2) when the transaction

amounts to a consolidation or merger of the purchaser and seller corporations, (3) when the purchaser corporation is merely a continuation of the seller corporation, or (4) when the transaction is entered into fraudulently to escape liability for such obligations. Jones v. Johnson Machine & Press Co. 724

Proof.

1. Where failure of consideration is pleaded as a defense to an action on a negotiable instrument, the burden is upon the defendant to prove such defense. Blaha GMC-Jeep, Inc. v. Frerichs 103
2. It is elemental law that the burden of proof is upon the plaintiff to prove those things which constitute the necessary elements of his cause of action, and the defendant bears the burden of proving those things which constitute affirmative defenses. Empire State Building Co. v. Bryde 184
3. The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery. Empire State Building Co. v. Bryde 184
4. Abandonment for purposes of permitting substitute consent pursuant to Neb. Rev. Stat. §§ 43-104 and 43-105 (Reissue 1978) must be established by clear and convincing evidence. In re Guardianship of Sain 508
5. In a condemnation action the burden of showing the damages which the landowner will suffer rests upon him, while the burden is on the condemnor to show matters which tend to reduce or mitigate the damages. Bentz v. Nebraska P.P. Dist. 844

Property Division.

1. Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. McBride v. McBride 459
2. In determining what percentage of the marital estate each person is to receive, the court must consider all pertinent facts in reaching an award that is just and equitable. McBride v. McBride 459
3. The court, in dividing the property, must take into consideration the circumstances of the parties, the duration of the marriage, the contributions to the marriage by each party, including contributions to the care and

education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment. McBride v. McBride 459

Prosecuting Attorneys.

It is the function of the county attorney under Neb. Rev. Stat. § 23-1201 (Reissue 1977) to enforce the penal provisions of the Nebraska statutes. State v. Houtwed 681

Proximate Cause.

1. Once the defendant's negligence has been established, it is necessary to find that the plaintiff's injuries were proximately caused by the defendant's negligence. Shelton v. Board of Regents 820
2. Proximate cause, as used in the law of negligence, is that cause which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. Shelton v. Board of Regents 820
3. The causal connection is broken if, between the defendant's negligent act and the plaintiff's injury, there has intervened the negligence of a third person who had full control of the situation and whose negligence was such as the defendant was not bound to anticipate and could not be said to have contemplated, which later negligence resulted directly in the injury to the plaintiff. Shelton v. Board of Regents 820
4. The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime. Shelton v. Board of Regents 820
5. It may be stated as a general rule that when, between original negligence and an accident, there intervenes a willful, malicious, and criminal act of a third person which causes the injury but was not intended by the person originally negligent and could not have been foreseen by him, the causal chain between the original negligence and the accident is broken. Shelton v. Board of Regents 820
6. Although the question of proximate cause is originally for the determination of the jury, where only one infer-

ence can be drawn it is for the court to declare whether a given act or series of acts is the proximate cause of the injury. Shelton v. Board of Regents 820

Quiet Title.

1. An action to quiet title to real estate in this state is statutory. Connealy v. Mueller 484
2. An action to quiet title may be brought under the statute which, by the strict rules of equity, could not have been maintained. Connealy v. Mueller 484
3. An allegation that the legal remedy is adequate is not a defense to an action to quiet title brought under the statute. Connealy v. Mueller 484

Railroads.

1. A railroad company which acquires its right-of-way by condemnation proceedings secures merely an easement in the right-of-way which authorizes it to build and operate its railroad as a public highway. The fee title and servient estate remain in the original owner and may be sold and conveyed by such owner to another. Whenever the right-of-way is abandoned for that purpose, it reverts at once to the owner of the servient estate. Lillich v. Lowery 757
2. An instrument of conveyance which conveys the land definitely described in such instrument, and then excepts from such conveyance a railroad right-of-way, as such, occupying a mere easement on, over, or across the land conveyed, conveys the fee to the entire tract, and the exception only operates to render the conveyance or grant subject to the easement. To the extent that *Bode v. Flobert Industries, Inc.*, 197 Neb. 488, 249 N.W.2d 750 (1977), and *Kozak v. State*, 189 Neb. 525, 203 N.W.2d 516 (1973), are in conflict with this holding, they are overruled. Lillich v. Lowery 757

Ratification.

1. An affirmance of an unauthorized transaction by an agent can be inferred from a failure to repudiate the transaction. Kresha v. Kresha 92
2. Ratification of unauthorized acts of an agent may be by conduct or may be inferred from silence and inaction. Kresha v. Kresha 92

Real Estate.

An action for deficiency in construction of an improvement to realty must be commenced within 4 years of the time such deficiency was discovered or could rea-

sonably have been discovered. Kearney Clinic Bldg. Corp. v. Weaver 499

Records.

1. On appeal from the county court to the District Court, it is the duty of the appellant to see that a record of the evidence in the county court was properly presented in the District Court. Blaha GMC-Jeep, Inc. v. Frerichs 103
2. In the absence of a properly certified bill of exceptions, review on appeal is limited to whether the pleadings support the judgment entered by the lower court. Blaha GMC-Jeep, Inc. v. Frerichs 103
3. In cases involving appeals from the county court to the District Court prior to the effective date of Neb. Rev. Stat. § 24-541.06 (Supp. 1981), wherein it appears obvious from the record filed in this court that both the parties and the district judge considered the county court bill of exceptions as having been received in evidence, we will so consider it on appeal to this court. To the extent that *Tunks v. O'Brien,* 195 Neb. 735, 240 N.W.2d 349 (1976), conflicts with this holding, it is overruled. Blaha GMC-Jeep, Inc. v. Frerichs 103
4. Where the transcript and record filed with the court are sufficient to present all issues before the court and the case is one for determination solely on matters contained within those records and the orders of the District Court, no further bill of exceptions is required for preservation of any error of law on appeal. Beeder v. Fleer 294
5. The inclusion of evidence in the bill of exceptions is the only vehicle for bringing evidence before this court on appeal. Evidence not included in the bill of exceptions may not be considered. State v. Gingrich 786

Releases.

The general rule is that in the absence of a specific statute, where the liability of a principal for a tort committed by his agent is predicated solely upon the doctrine of respondeat superior, a valid release of either of the parties in such relationship operates to release the other. Ericksen v. Pearson 466

Rescue Doctrine.

Under the rescue doctrine it is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the

circumstances increases in proportion to the imminence of the danger and the value to be realized from meeting the danger and attempting to remove or eliminate the hazard; that is, the less the danger to the third party, the less the risk the volunteer is justified in taking. Lave v. Neumann 97

Restrictive Covenants.

1. Covenants not to compete, if reasonable, are enforceable. The considerations to be balanced are the degree of inequality in bargaining power; the risk of the covenantee losing customers; the extent of respective participation by the parties in securing and retaining customers; the good faith of the covenantee; the existence of sources or general knowledge pertaining to the identity of customers; the nature and extent of the business position held by the covenantor; the covenantor's training, health, education, and needs of his family; the current conditions of employment; the necessity of the covenantor changing his calling or residence; and the correspondence of the restraint with the need for protecting the legitimate interests of the covenantee. Philip G. Johnson & Co. v. Salmen 123
   Dana F. Cole & Co. v. Byerly 903
2. Restrictive covenants in private shareholder agreements between stockholders are binding on the parties to such agreements. F.H.T., Inc. v. Feuerhelm 860

Right-of-Way.

1. A railroad company which acquires its right-of-way by condemnation proceedings secures merely an easement in the right-of-way which authorizes it to build and operate its railroad as a public highway. The fee title and servient estate remain in the original owner and may be sold and conveyed by such owner to another. Whenever the right-of-way is abandoned for that purpose, it reverts at once to the owner of the servient estate. Lillich v. Lowery 757
2. An instrument of conveyance which conveys the land definitely described in such instrument, and then excepts from such conveyance a railroad right-of-way, as such, occupying a mere easement on, over, or across the land conveyed, conveys the fee to the entire tract, and the exception only operates to render the conveyance or grant subject to the easement. To the extent that *Bode v. Flobert Industries, Inc.,* 197 Neb. 488, 249 N.W.2d 750 (1977), and *Kozak v. State,* 189 Neb. 525, 203

N.W.2d 516 (1973), are in conflict with this holding, they are overruled. Lillich v. Lowery 757

Rules of Evidence.

1. Admission of bank records under Neb. Rev. Stat. § 27-803(5) (Reissue 1979) did not violate the defendant's right of confrontation. State v. Spaulding 575
2. Each confrontation claim must stand on its own facts. The fundamental question is whether the hearsay has sufficient indicia of trustworthiness and reliability. State v. Spaulding 575
3. The important inquiry is as to the reliability of the evidence and the likelihood that cross-examination could impeach its credibility or authenticity. State v. Spaulding 575
4. A trial court has great discretion in determining whether a document is trustworthy and admissible under Neb. Rev. Stat. § 27-803(5) (Reissue 1979). State v. Spaulding 575
5. The rules of evidence, except as to privilege, are not applicable in extradition proceedings. In re Application of Mahan for Writ of Habeas Corpus 671

Sales.

1. Under Neb. U.C.C. § 2-719 (Reissue 1980), a warranty agreement may limit or alter the measure of damages recoverable, as by limiting the buyer's remedy to repair or replacement of nonconforming goods or parts. John Deere Co. v. Hand 549
2. When a buyer's limited remedy of repair or replacement of defective parts fails of its essential purpose because of seller's inability to cure nonconformities within a reasonable time, buyer may be entitled to pursue any other remedies under the Uniform Commercial Code, including consequential damages, and breach of implied warranties of merchantability or fitness for a particular purpose. John Deere Co. v. Hand 549

Schools and School Districts.

1. In an appeal to the District Court from an action of a freehold board transferring land from one school district to another, where the party appealing the action of the board has no standing to make such an appeal, an intervenor entering the action after the time for appeal has elapsed may not be substituted as an appellant. In re Hilbers Property Freehold Transfer 268
2. The authorization to change the boundaries of school districts under Neb. Rev. Stat. §§ 79-402 and 79-402.03

(Reissue 1976) and related sections is not limited to lands in one compact contiguous area, nor is the transfer of land from one school district to another school district limited to land which is contiguous to the common boundary between the two districts. In re Proceedings re School Dists. R-4 & R-3 453

3. The effect of the change in language in article VII, § 11, of the Nebraska Constitution from prohibiting appropriations "in aid of" nonpublic schools to a prohibition of appropriations "to" such institutions simply prohibits appropriations made *to* a nonpublic school. State ex rel. Bouc v. School Dist. of City of Lincoln 731
4. The transportation benefits extended to nonprofit private school students by Neb. Rev. Stat. § 79-487 (Reissue 1976) are on the same basis as those benefits enjoyed by public school students, and the guidelines, restrictions, and limitations imposed upon public school students by the various local boards of education extend to and are binding upon nonprofit private school students wishing to ride on the public school system's buses. State ex rel. Bouc v. School Dist. of City of Lincoln 731
5. In connection with a suspension of a student from school of up to 5 school days, statutory due process requires that the student be given oral or written notice of the charges against him, an explanation of the evidence the authorities have, and an opportunity to present his version of the facts. Walker v. Bradley 873

Search and Seizure.

1. Searches and seizures inside a home without a warrant are presumptively unreasonable; a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable unless the police can show that it falls within one of the carefully designated exceptions based on the presence of "exigent circumstances." State v. Weible 174
2. An arresting officer may search the arrestee's person to discover and remove weapons and to seize evidence to prevent its concealment or destruction, and may also search the area within the arrestee's immediate control. State v. Weible 174
3. Absent exigent circumstances, government agents have no right to search a dwelling when the arrest is effectuated outside it. State v. Weible 174
4. In appropriate circumstances the fourth amendment allows a properly limited search or seizure on facts that do not constitute probable cause to arrest or to

search for contraband or evidence of a crime. State v. Longa 356
5. The "fruit of the poisonous tree" doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an independent source. State v. Longa 356
6. The capacity to claim protection of the fourth amendment as to unreasonable searches and seizures depends not upon the property right in the invaded place but upon whether the person who claims the protection of the fourth amendment has a legitimate expectation of privacy in the invaded place. State v. Gonzalez 697

Search Warrants.
1. In evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. State v. Longa 356
2. Probable cause is to be evaluated by the collective information of the police as reflected in the affidavit for a search warrant, and is not limited to the firsthand knowledge of the officer who executed the affidavit. State v. Longa 356
3. An affidavit is sufficient if it will support the issuance of a warrant after any inaccurate statements in the affidavit are disregarded. State v. Longa 356
4. An affidavit for search warrant is sufficient to meet the standards of the fourth amendment to the Constitution of the United States if it complies with the ruling in *United States v. Harris,* 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971). State v. Gingrich 786

Security Interests.
1. Neb. U.C.C. § 9-104(b) (Reissue 1980) applies only to statutory landlords' liens. Todsen v. Runge 226
2. A contractual landlord's lien must comply with the filing requirements of Neb. U.C.C. art. 9 (Reissue 1980) in order to perfect a security interest. Todsen v. Runge . 226
3. Neb. U.C.C. § 9-312(5) (Reissue 1980) is a "pure race" type statute and a secured party who was first to perfect or file his security interest will have priority over all unperfected security interests even though he had actual or constructive knowledge of a prior unperfected security interest. Todsen v. Runge 226
4. Under Neb. U.C.C. § 9-402 (Reissue 1980), there are two formal requisites of a "financing statement," i.e., (1) the signatures and addresses of both parties, and (2) a description of the collateral by type or item. A fi-

nancing statement substantially complying with the requirements of the section is effective even though it contains minor errors which are not seriously misleading. Lindsay v. First National Bank 285
5. The fundamental purpose of the code is to make the process of perfecting a security interest easy, simple, and certain. Lindsay v. First National Bank 285

Sentences.
1. Where the sentence imposed is within statutory limits, it will not be disturbed on appeal in the absence of an abuse of discretion on the part of the trial court. State v. Beckner 442
2. Sentences and commitments which do not set a minimum of at least 1 year are not disqualified from consideration in determining whether a defendant is an habitual criminal. State v. Luna 630

Sexual Misconduct.
Sexual misconduct, although not necessarily determinative of the issue of child custody, is a factor which may be considered in deciding that issue. Dunne v. Dunne 636

Shareholder Agreements.
Restrictive covenants in private shareholder agreements between stockholders are binding on the parties to such agreements. F.H.T., Inc. v. Feuerhelm 860

Speedy Trial.
1. An accused has a right to waive a speedy trial and consent to a continuance as long as he is properly advised either by counsel or the court of his right to a speedy trial. State v. Williams 650
2. A defendant's right to a speedy trial as specified by Neb. Rev. Stat. § 29-1207 (Reissue 1979) begins when he is indicted or is informed against. State v. Gingrich .. 786
3. The constitutional right to a speedy trial and the statutory implementation of that right under Neb. Rev. Stat. § 29-1207 (Reissue 1979) exist independently of each other. Any unreasonable delay occurring prior to the filing of an information will be considered, in conjunction with statutory requirements, in determining whether or not a defendant has been denied the constitutional right to a speedy trial. State v. Gingrich 786
4. Any inquiry into a claim of denial of a speedy trial necessitates a functional analysis of the right in the particular context of the case, as the right of speedy trial is necessarily relative. State v. Gingrich 786

Standing.

One must be a member of a class discriminated against in order to have standing to attack a law as denying the equal protection of the laws. State ex rel. Bouc v. School Dist. of City of Lincoln 731

State Patrolmen.

1. Retirement benefits paid under the Nebraska State Patrolmen's Retirement System are not a gratuity but are deferred compensation. Halpin v. Nebraska State Patrolmen's Retirement System 892
2. The right of a state patrolman to receive benefits under the Nebraska State Patrolmen's Retirement System is contractual in nature and is protected against unconstitutional impairment. Halpin v. Nebraska State Patrolmen's Retirement System 892
3. The final average monthly salary of a state patrolman who was a member of the State Patrol on or before January 4, 1979, should be calculated by including the payment received upon retirement for unused vacation and sick leave accumulated during the final 3 years of service. Halpin v. Nebraska State Patrolmen's Retirement System 892

Statute of Frauds.

1. Oral contracts to make a testamentary provision in consideration of services which are to be rendered by another are on their face void as within the statute of frauds because not in writing, and even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires. In re Estate of Nicholson 805
2. The determination of whether the evidence of services rendered under an oral contract is sufficient to constitute part performance under the statute of frauds is generally a question of fact. In re Estate of Nicholson 805

Statutes.

1. In construing an act of the Legislature, all reasonable doubt must be resolved in favor of its constitutionality; and the burden of establishing the unconstitutionality of a statute is on the one attacking its validity, because statutes are presumed to be constitutional. State v. Mayhew Products Corp. 300
2. The due process clause of the fourteenth amendment of the Constitution of the United States requires that a statute's language must be sufficiently specific that persons of ordinary intelligence must not have to guess

at its meaning. The statute must provide adequate notice of what conduct it requires or proscribes, as well as guidelines by which a violation of the statute may be fairly and nonarbitrarily determined. State v. Mayhew Products Corp. 300

3. The portion of Neb. Rev. Stat. § 39-1320.06 (Reissue 1978) which prohibits the "erection or maintenance of any advertising sign, display, or device which is visible from the main-traveled way of the National System of Interstate and Defense Highways and the system of federal-aid primary roads of the State of Nebraska" is unconstitutionally vague. State v. Mayhew Products Corp. 300
State v. Houtwed 681

4. It is incumbent upon the Supreme Court, when reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality. If possible, a statute should be construed in such a way as to negate any constitutional infirmity. State laws are accorded a presumption of constitutionality. State v. Edmunds 380

5. A statute must be general and uniform throughout the state, and must operate alike on all persons of a class with reference to relations and circumstances provided for. State v. Edmunds 380

6. This court will not, by interpretation or construction, usurp the function of the legislative body and give a statute a meaning not intended or expressed by the Legislature. In re Proceedings re School Dists. R-4 & R-3 453

7. Penal statutes prohibiting the doing of certain things and providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another. State v. Metzger 593

8. A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application violates the first essential elements of due process of law. State v. Metzger 593

9. The test to determine whether a statute defining an offense is void for uncertainty is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. The dividing line between what is

lawful and what is unlawful cannot be left to conjecture. State v. Metzger 593
10. In the construction of a statute which is clear and unambiguous, the courts cannot supply missing language. It is not within our power to read into a statute a meaning which the clear language does not warrant. Omaha Public Schools v. Hall 618
11. It is the function of the county attorney under Neb. Rev. Stat. § 23-1201 (Reissue 1977) to enforce the penal provisions of the Nebraska statutes. State v. Houtwed 681
12. The constitutional validity of an act of the Legislature is to be tested and determined not necessarily by what has been done or possibly may be done under it but by what the statute authorizes to be done under and by virtue of its provisions. State ex rel. Bouc v. School Dist. of City of Lincoln 731
13. When an ordinance or statute is susceptible of two constructions, under one of which it is clearly valid, while under the other its validity may be doubtful, that construction which makes sure its validity will ordinarily be given. State ex rel. Bouc v. School Dist. of City of Lincoln 731
14. Where the language used in a statute is ambiguous, recourse should be had to the legislative purposes. State ex rel. Bouc v. School Dist. of City of Lincoln 731
15. The record of a floor explanation or debate is legislative history, and it may be an extrinsic, secondary source in statutory interpretation. State ex rel. Bouc v. School Dist. of City of Lincoln 731
16. Legislative action does not violate the first amendment's establishment clause if the statute has a secular legislative purpose, has a principal or primary effect which neither advances nor inhibits religion, and does not foster an excessive government entanglement with religion. State ex rel. Bouc v. School Dist. of City of Lincoln 731

Statutory Employer.

Under the Nebraska Workmen's Compensation Act a statutory employer is entitled to indemnity from the actual employer for all amounts the statutory employer has been required to pay in satisfaction of a compensation award. Rogers v. Hansen 132

Stipulations.

A client is bound by the oral stipulations of his attorney made out of court if within the scope of the attorney's duties and powers, if such stipulations are established

by the testimony of the attorney making the same. State v. Sayers 555

Subrogation.

1. Under Neb. Rev. Stat. § 25-1222.01 (Reissue 1979), a party is entitled to credit on any judgment rendered against him for any payments or partial payment of damages made on behalf of such party to an injured person or on his behalf to others, including an assignee or subrogee of such injured person. Beeder v. Fleer .. 294
2. Conventional subrogation arises where one pays the debt of another under an agreement, existing at the time of the payment, with either the debtor or the creditor, that the person paying shall be subrogated to the liens existing as security for the debt. It differs from legal subrogation which exists only in favor of the surety for the payment of the debt, or one who is compelled to pay the debt to protect his own rights. Hoppe v. Phoenix Homes, Inc. 419
3. Conventional subrogation arises by reason of either an express or an implied agreement between the third person paying the debt and either the debtor or creditor. Hoppe v. Phoenix Homes, Inc. 419
4. No general rule can be laid down which will afford a test in all cases for conventional subrogation. Whether or not the doctrine of conventional subrogation is applicable in any particular case depends upon its particular facts and circumstances, the principle not being enforced as a matter of legal right, but in order to subserve the ends of justice in the particular controversy under consideration. Hoppe v. Phoenix Homes, Inc. .. 419
5. Where one having an interest in property pays off an encumbrance on the property in order to protect his interest, he is ordinarily entitled to be subrogated to the rights and remedies of the person paid, provided the debt secured by the encumbrance is not one for which the payor is primarily liable, and the grant of such relief is equitable. Hoppe v. Phoenix Homes, Inc. 419
6. Where one pays or advances money to pay a mortgage debt with the understanding that he is to have the benefit of the mortgage, he becomes the holder of the lien by subrogation, although the creditor is not a party to the agreement. Hoppe v. Phoenix Homes, Inc. 419

Summary Judgment.

1. On a motion for summary judgment, the question which must be decided is whether or not there is a

genuine issue as to any material fact, and not how that issue is to be decided. Hanzlik v. Paustian 322
In re Estate of Nicholson 805
2. The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of cases in which there is no genuine claim or defense. Hanzlik v. Paustian 322
John Deere Co. v. Hand 549
3. In considering a motion for summary judgment the trial court must take the view of the evidence most favorable to the party against whom the motion is directed. Hanzlik v. Paustian 322
4. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Hanzlik v. Paustian 322
5. Summary judgment should not be used to deprive a litigant of a formal trial if there is a genuine issue of fact. Hanzlik v. Paustian 322
6. On a motion for summary judgment, the moving party bears the burden of proving that no genuine issue as to any material fact exists and that he is entitled to judgment as a matter of law. Hanzlik v. Paustian 322
In re Estate of Nicholson 805
7. The movant on a motion for summary judgment may discharge his burden of proof by a showing that if the case proceeded to trial his opponent could produce no competent evidence to support a contrary position. Hanzlik v. Paustian 322
8. A prima facie showing by the movant for summary judgment, i.e., the production of enough evidence to demonstrate such party's entitlement to a judgment if evidence were uncontroverted at trial, shifts the burden of producing evidence to the party opposing the motion. Hanzlik v. Paustian 322
9. A prima facie showing for summary judgment having been made, it should be granted to the movant unless the opposing party offers competent evidence that there is a genuine issue as to a material fact. Hanzlik v. Paustian 322
10. In the absence of a prima facie showing by the movant that he is entitled to summary judgment, the opposing party is not required to reveal the evidence which he expects to produce at trial to prove the allegations of the petition. Hanzlik v. Paustian 322
11. Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. The burden is upon the party moving for summary judgment to

show that no issue of fact exists, and unless he can conclusively do so the motion must be overruled. Dukes v. Barkdoll 546

12. The court examines the evidence, with a view most favorable to the party against whom a motion for summary judgment is directed, to discover if any real issue of fact exists. If reasonable persons might reach different conclusions, the motion should be denied and the case tried on its merits. John Deere Co. v. Hand .. 549

Supreme Court.

1. Where the appellate court remands a cause with directions to enter judgment for the plaintiff in a certain amount, the judgment of the appellate court is a final judgment in the cause and the entry thereof in the lower court is a purely ministerial act. No modification of the judgment so directed can be made, nor may any provision be engrafted on or taken from it. That order is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by it can have any effect, even though it may be such as the appellate court ought to have directed. Gates v. Howell 85

2. It is incumbent upon the Supreme Court, when reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality. If possible, a statute should be construed in such a way as to negate any constitutional infirmity. State laws are accorded a presumption of constitutionality. State v. Edmunds ... 380

Tax Assessments.

The burden of proof is on the appellant to establish that an order of the State Board of Equalization and Assessment was erroneous. In re Valuation, etc., for Tax Year 1981 535

Taxation.

A suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed. In such case each must bring an action on his own behalf. Gates v. Howell 85

Taxes.

1. It is the general rule that when one of several coowners of property acquires a tax title thereto founded on default in the payment of taxes which are a common burden on all, his purchase amounts merely to a payment

of the taxes or a redemption from the sale, and gives him no rights against his associates except insofar as they may fail or refuse to contribute to the expenditure so made. O'Toole v. Yunghans 852

2. The above rule is not changed by the fact that the cotenant acquires the tax title from a stranger who purchased at the tax sale. O'Toole v. Yunghans 852

3. Neb. Rev. Stat. § 77-1843 (Reissue 1976) does not change the general principle that the purchase or extinguishment of an outstanding title, interest, or claim by one cotenant inures to the benefit of his cotenants. O'Toole v. Yunghans 852

Termination of Employment.

An individual who leaves work voluntarily without good cause shall be subject to the benefit disqualification period specified by statute. Heimsoth v. Kellwood Co. 167

Testimony.

The testimony of a witness at a preliminary hearing where the opportunity for cross-examination has been exercised by the defendant is admissible at the subsequent trial if the witness is unavailable. It is within the discretion of the trial court to determine whether the unavailability of the witness has been shown. State v. Williams 693

Torts.

1. The essential elements of tortious interference with business relationships are: (1) The existence of a valid business relationship or expectancy; (2) Knowledge by the interferer of the relationship or expectancy; (3) An intentional act of interference on the part of the interferer; (4) Proof that the interference caused the harm sustained; and (5) Damage to the party whose relationship or expectancy was disrupted. Miller Chemical Co., Inc. v. Tams 837

2. One of the basic elements of tortious interference with a business relationship requires an intentional interference inducing or causing a breach or termination of the relationship or expectancy. Miller Chemical Co., Inc. v. Tams 837

3. One is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor if (a) the relation concerns a matter involved in the competition between the actor and the competitor, and (b) the actor does not employ improper means, and (c) the actor does not intend there-

by to create or continue an illegal restraint of competition, and (d) the actor's purpose is at least in part to advance his interest in his competition with the other. Miller Chemical Co., Inc. v. Tams 837

4. One's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors. Miller Chemical Co., Inc. v. Tams 837
5. The fact that hatred or desire for revenge was part of the reason for the interference is insufficient to make interference improper if the conduct is directed at least in part to advancement of his own competitive interest and social benefits arising therefrom. Miller Chemical Co., Inc. v. Tams 837

Trade.

1. The essential elements of tortious interference with business relationships are: (1) The existence of a valid business relationship or expectancy; (2) Knowledge by the interferer of the relationship or expectancy; (3) An intentional act of interference on the part of the interferer; (4) Proof that the interference caused the harm sustained; and (5) Damage to the party whose relationship or expectancy was disrupted. Miller Chemical Co., Inc. v. Tams 837
2. One of the basic elements of tortious interference with a business relationship requires an intentional interference inducing or causing a breach or termination of the relationship or expectancy. Miller Chemical Co., Inc. v. Tams 837
3. One is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor if (a) the relation concerns a matter involved in the competition between the actor and the competitor, and (b) the actor does not employ improper means, and (c) the actor does not intend thereby to create or continue an illegal restraint of competition, and (d) the actor's purpose is at least in part to advance his interest in his competition with the other. Miller Chemical Co., Inc. v. Tams 837
4. One's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors. Miller Chemical Co., Inc. v. Tams 837
5. The fact that hatred or desire for revenge was part of the reason for the interference is insufficient to make interference improper if the conduct is directed at least in part to advancement of his own competitive interest

and social benefits arising therefrom. Miller Chemical Co., Inc. v. Tams 837

Trial.

1. It is elemental law that the burden of proof is upon the plaintiff to prove those things which constitute the necessary elements of his cause of action, and the defendant bears the burden of proving those things which constitute affirmative defenses. Empire State Building Co. v. Bryde 184
2. The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery. Empire State Building Co. v. Bryde 184
3. A trial court should eliminate immaterial and superfluous matters and submit to the jury by instructions only matters properly to be decided by it in arriving at its verdict. Empire State Building Co. v. Bryde 184
4. The test of mental competency to stand trial is whether the defendant has the present 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. Quarrels 204
5. 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. Quarrels 204
6. The decision to object or not to object to offers of evidence is part of trial strategy, which would include that decision to waive foundational requirements for the reception of evidence. State v. Sayers 555
7. A party may not complain of misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial but consents to take the chance of a favorable verdict. Bodzek v. Callahan 600

Trust Funds.

Employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents to the exclusion of all others. Jones v. Commercial Federal Savings & Loan Assn. 487

Trusts.

1. Under the Nebraska Probate Code, the county court acquires jurisdiction over a trustee by registration of the trust, or by the acceptance of the trusteeship of a registered trust or a trust of which the principal place of ad-

ministration is in this state. Neb. Rev. Stat. §§ 30-2803, 30-2804 (Reissue 1979). Raynor v. Northwestern National Bank 119
2. A trust may be registered only in the court located at the principal place of administration of the trust. Neb. Rev. Stat. § 30-2801 (Reissue 1979). Raynor v. Northwestern National Bank 119
3. Unless otherwise designated in the trust instrument, the principal place of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept. Neb. Rev. Stat. § 30-2801 (Reissue 1979). Raynor v. Northwestern National Bank 119
4. Neb. Rev. Stat. § 30-2808 (Reissue 1979) does not provide a method for obtaining jurisdiction over a trust. It is a venue provision which employs the concept of forum non conveniens to center litigation involving the trustees and beneficiaries at the principal place of administration of the trust. Raynor v. Northwestern National Bank 119
5. Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion. In re Johnson Trust Estates 750
6. An income beneficiary of a testamentary trust, established from the residue of the estate, is entitled to income from the date of the settlor's death. In re Johnson Trust Estates 750

Uniform Commercial Code.
1. Neb. U.C.C. § 9-104(b) (Reissue 1980) applies only to statutory landlords' liens. Todsen v. Runge 226
2. A contractual landlord's lien must comply with the filing requirements of Neb. U.C.C. art. 9 (Reissue 1980) in order to perfect a security interest. Todsen v. Runge 226
3. Neb. U.C.C. § 9-312(5) (Reissue 1980) is a "pure race" type statute and a secured party who was first to perfect or file his security interest will have priority over all unperfected security interests even though he had actual or constructive knowledge of a prior unperfected security interest. Todsen v. Runge 226
4. Under Neb. U.C.C. § 9-402 (Reissue 1980), there are two formal requisites of a "financing statement," i.e., (1) the signatures and addresses of both parties, and (2) a description of the collateral by type or item. A financing statement substantially complying with the requirements of the section is effective even though it

contains minor errors which are not seriously misleading. Lindsay v. First National Bank 285
5. The fundamental purpose of the code is to make the process of perfecting a security interest easy, simple, and certain. Lindsay v. First National Bank 285
6. Courts are to construe and apply the Uniform Commercial Code liberally to promote its underlying purposes and policies. Lindsay v. First National Bank 285
7. A contract to purchase a matured corn crop of stated acreage, to be harvested and delivered by the seller, together with the right to pasture the stalks and certain additional grassland, all for a stated gross consideration is not an output contract within the meaning of Neb. U.C.C. § 2-306(1) (Reissue 1980). Meyer v. Sandhills Beef, Inc. 388
8. Under Neb. U.C.C. § 2-719 (Reissue 1980), a warranty agreement may limit or alter the measure of damages recoverable, as by limiting the buyer's remedy to repair or replacement of nonconforming goods or parts. John Deere Co. v. Hand 549
9. When a buyer's limited remedy of repair or replacement of defective parts fails of its essential purpose because of seller's inability to cure nonconformities within a reasonable time, buyer may be entitled to pursue any other remedies under the Uniform Commercial Code, including consequential damages, and breach of implied warranties of merchantability or fitness for a particular purpose. John Deere Co. v. Hand 549

Venue.

A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown. State v. Boyer 139

Verdicts.

1. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Steffen v. Ainsworth 291
2. A juror's understanding of the instructions constitutes neither extraneous, prejudicial information nor outside influence improperly brought to the jury's attention and his affidavit as to that understanding is incompetent and may not be received to impeach the verdict. In re Estate of Haddix 814

Voting.

1. The right of suffrage involves one of the basic civil rights of man. Jacobberger v. Terry 878

2. The Legislature's actions to protect the fundamental civil rights of suffrage and proportionate representation are of statewide as opposed to local concern. Jacobberger v. Terry 878

Warranty.

1. Under Neb. U.C.C. § 2-719 (Reissue 1980), a warranty agreement may limit or alter the measure of damages recoverable, as by limiting the buyer's remedy to repair or replacement of nonconforming goods or parts. John Deere Co. v. Hand 549
2. When a buyer's limited remedy of repair or replacement of defective parts fails of its essential purpose because of seller's inability to cure nonconformities within a reasonable time, buyer may be entitled to pursue any other remedies under the Uniform Commercial Code, including consequential damages, and breach of implied warranties of merchantability or fitness for a particular purpose. John Deere Co. v. Hand 549
3. Whether there has been a failure of the essential purpose of a limited warranty is ordinarily a matter to be determined by the trier of the facts. John Deere Co. v. Hand 549

Waters.

1. Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation. Neb. Rev. Stat. § 31-201 (Reissue 1978). Jameson v. Nelson 259
2. An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence. Jameson v. Nelson 259

3. It is the law of this state that waters resulting from rainfall and melting snow are diffused waters which an owner may control on his own land. He may collect them, change their course, pond them upon his land, or cast them into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature. Jameson v. Nelson 259

Weapons.

Where the possession of a firearm by a felon, actual or constructive, is uninterrupted, it constitutes but a single offense. State v. Williams 650

Wills.

1. The cardinal rule in construing wills is to ascertain and effectuate the intention of the testator if such intention is not contrary to the law. In re Johnson Trust Estates 750
2. Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion. In re Johnson Trust Estates 750
3. An income beneficiary of a testamentary trust, established from the residue of the estate, is entitled to income from the date of the settlor's death. In re Johnson Trust Estates 750
4. A person who understands the nature of his acts, the extent of his property, the proposed disposition of it, and the natural objects of his bounty is competent to make a will. In re Estate of Kleeb 763
5. In an action to set aside a will because of improper or undue influence exerted upon the testator, the burden of proof is upon the contestant. In re Estate of Kleeb 763
6. Undue influence, in order to invalidate a will, must be of such character as to destroy the free agency of the testator and substitute another person's will for his own. In re Estate of Kleeb 763
7. An individual does not lack testamentary capacity because he holds an unjust prejudice or belief generally regarded as peculiar and unsound. In re Estate of Kleeb 763
8. Oral contracts to make a testamentary provision in consideration of services which are to be rendered by another are on their face void as within the statute of frauds because not in writing, and even though proved

by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires. In re Estate of Nicholson 805
9. Normally, one who accepts a beneficial interest under a will thereby adopts the whole will and renounces every right or claim that is inconsistent with the will. In re Estate of Nicholson 805
10. If a taking under a will is inconsistent with a claim against the estate under a contract, the one act generally constitutes an election in favor of one or the other. In re Estate of Nicholson 805
11. There is nothing inconsistent in making claim to the whole of an estate and at the same time accepting something less than the whole under the will. Property comprising a bequest of only a part of an estate would be included within a claim to the entire estate. In re Estate of Nicholson 805

Wiretaps.
1. Affidavits in support of an application for a wiretap order must contain a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. Neb. Rev. Stat. § 86-705(1)(c) (Reissue 1976). State v. Lane 46
2. While neither specific nor all possible investigative techniques must be tried before orders for wiretaps can be issued, nor is the government required to use a wiretap only as a last resort, nevertheless, wiretap procedures cannot be routinely employed as an initial step in criminal investigation. State v. Lane 46
3. This is true whether the wiretap sought is the first one covering a particular criminal activity, or whether a previous tap has furnished information which is the basis for the application for another tap. State v. Lane 46
4. A showing must be made that the requested wiretap is not being routinely employed as an initial step in criminal investigation. State v. Lane 46
5. A showing that two or more principals are involved in one conspiracy as to one of which a sufficient affidavit has been filed is not alone sufficient to support an application as to all of the alleged principals or their telephones. State v. Lane 46
6. The showing made in support of an application for a wiretap order must be reviewed in a practical and commonsense fashion. State v. Lane 46
7. The validity of an application for a wiretap order, and

the order, cannot be established by the exercise of hindsight. Such an application and the order must be viewed in the light of circumstances as they existed and were known or reasonably anticipated at the time and cannot be "bootstrapped" by what the wiretap later uncovered. State v. Lane 46

8. Once it is determined that a wiretap is illegal, any evidence derived from the wiretap must be suppressed. State v. Richter 63

Witnesses.

1. Proof of contradictory statements of a witness may be received in evidence for the purpose of aiding the jury in estimating the credibility of the witness, but unless made as an admission by a party to the record, such statements may not be utilized as substantive evidence of the facts declared. State v. Brehmer 29
2. However, a party is not permitted to get before the jury, under the guise of impeachment, an ex parte statement of a witness by calling him to the stand when there is good reason to believe he will decline to testify as desired, and when in fact he only so declines. State v. Brehmer 29
3. The State may not use a prior inconsistent statement of a witness, under the guise of impeachment, for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible. State v. Brehmer 29
4. A mere refusal to testify or testimony negative in nature indicating a lack of testimonial information does not present the grounds for impeaching the witness that affirmative testimony in favor of the opposite party gives for inquiry concerning prior statements contradictory of the testimony under oath at the trial. State v. Brehmer 29
5. The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made. State v. Brehmer 29
6. The right of a judge, under Neb. Rev. Stat. § 27-614(2) (Reissue 1979), to interrogate a witness should be very sparingly exercised, and generally counsel for the parties should be relied on and allowed to manage and bring out their own case. The actions of the judge in

this respect should never be such as to warrant any assertion that they were with a view to assistance of the one or the other party to the cause. State v. Brehmer 29
7. Corroboration is sufficient if the cooperating individual is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue. State v. Beckner 442
8. The testimony of a witness at a preliminary hearing where the opportunity for cross-examination has been exercised by the defendant is admissible at the subsequent trial if the witness is unavailable. It is within the discretion of the trial court to determine whether the unavailability of the witness has been shown. State v. Williams 693
9. Generally, either lay or expert witnesses may be used to testify as to the value of a tract of land taken or the value of the remainder thereof immediately before and immediately after the taking, if proper foundation is laid showing familiarity with the property, the weight and credibility of the testimony being for the jury. Bentz v. Nebraska P.P. Dist. 844

Words and Phrases.
1. The term "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising from 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. McGinn v. Douglas County Social Services Admin. 72
2. The two phrases, "arising out of" and "in the course of," are conjunctive and the claimant must establish by a preponderance of the evidence that both conditions exist. McGinn v. Douglas County Social Services Admin. 72
3. "Suppression" means nondisclosure of evidence that the prosecutor, and not the defense attorney, knew to be in existence. State v. Boyer 139
4. The exertion "greater than nonemployment life" test is to be applied by the Supreme Court only in cases involving heart attacks allegedly caused by the activities or stress of employment. Sandel v. Packaging Co. of America 149
5. The "objective symptoms" requirement of the Nebraska Workmen's Compensation Act is satisfied if the symptoms manifest themselves according to the natural course of such things without any independent intervening cause. Sandel v. Packaging Co. of America 149
6. For purposes of the Nebraska Workmen's Compensa-

tion Act, "suddenly and violently" does not mean "instantaneously and with force," but rather the element is satisfied if the injury occurs at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment. Sandel v. Packaging Co. of America 149

7. "Earning power," as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1978), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. Guerra v. Iowa Beef Processors, Inc. 433

8. An employee who leaves work "voluntarily without good cause" is disqualified for unemployment benefits for the week in which he left and for not less than 7 nor more than 10 weeks immediately following. Neb. Rev. Stat. § 48-628(a) (Reissue 1978). Gastineau v. Tomahawk Oil Co., Limited 537

9. To leave work voluntarily means to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment. Gastineau v. Tomahawk Oil Co., Limited 537

10. In a prosecution under Neb. Rev. Stat. § 28-611(1) (Reissue 1979), the proper definition of "present value of any kind" is that contained in Neb. Rev. Stat. § 28-109(22) (Reissue 1979). State v. Spaulding 575

11. Evidence that an insufficient fund draft deposited in a checking account was credited to the account satisfies the requirement of "present value of any kind" contained in Neb. Rev. Stat. § 28-611(1) (Reissue 1979). State v. Spaulding 575

12. A continuing offense is defined as a continuous, unlawful act or series of acts set in motion by a single impulse and operated by an unintermittent force, however long a time it may occupy; an offense which continues day by day; a breach of the criminal law, not terminated by a single act or fact, but subsisting for a definite period and intended to cover or apply to successive similar obligations or occurrences. State v. Williams 650

13. For the purposes of Neb. Rev. Stat. § 30-2351 (Reissue 1979), an oral contract is "executed" at such time as the parties become bound to each other for the performance of the terms of the agreement. In re Estate of Nicholson 805

Workmen's Compensation.

1. Findings of fact made by the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and, if supported by sufficient evidence, will not be disturbed 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, the Nebraska Supreme Court must modify, reverse, or set aside the award. McGinn v. Douglas County Social Services Admin. 72
   Guerra v. Iowa Beef Processors, Inc. 433
   Mann v. City of Omaha 583
   Thomas v. Kayser-Roth Corp. 704
2. It is only when an accident arises both out of and in the course of employment that an employee is entitled to benefits under the provisions of the Nebraska Workmen's Compensation Act. McGinn v. Douglas County Social Services Admin. 72
3. The term "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising from 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. McGinn v. Douglas County Social Services Admin. 72
4. The two phrases, "arising out of" and "in the course of," are conjunctive and the claimant must establish by a preponderance of the evidence that both conditions exist. McGinn v. Douglas County Social Services Admin. 72
5. Injuries resulting from exposure to the elements, such as abnormal heat, cold, snow, lightning, or storms, are generally classed as risks to which the general public is exposed, and do not "arise out of" employment unless the record discloses a hazard imposed upon the employee by reason of the employment greater than that to which the public generally in the area of the hazard is subjected. McGinn v. Douglas County Social Services Admin. 72
6. An owner who employs an independent contractor to do work which is in the usual course of business of the owner, and who fails to require the independent contractor to procure workmen's compensation insurance, is liable as a statutory employer under Neb. Rev. Stat. § 48-116 (Reissue 1978). Rogers v. Hansen 132
7. The general test of whether work being done by an independent contractor for an owner is within the ambit of Neb. Rev. Stat. § 48-116 (Reissue 1978) is whether the

work being done by the independent contractor would ordinarily be done by employees of the owner in view of the owner's past practices and the practices of employers in comparable businesses. Rogers v. Hansen 132

8. In testing the sufficiency of the evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Rogers v. Hansen 132
Guerra v. Iowa Beef Processors, Inc. 433

9. The joint and several liability imposed by Neb. Rev. Stat. § 48-116 (Reissue 1978) is for the sole benefit of the injured workman. Rogers v. Hansen 132

10. Under the Nebraska Workmen's Compensation Act a statutory employer is entitled to indemnity from the actual employer for all amounts the statutory employer has been required to pay in satisfaction of a compensation award. Rogers v. Hansen 132

11. In reviewing workmen's compensation cases the Supreme Court is not free to weigh the facts anew. The Supreme Court's 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. Sandel v. Packaging Co. of America 149

12. An 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. Sandel v. Packaging Co. of America 149

13. The exertion "greater than nonemployment life" test is to be applied by the Supreme Court only in cases involving heart attacks allegedly caused by the activities or stress of employment. Sandel v. Packaging Co. of America 149

14. The "objective symptoms" requirement of the Nebraska Workmen's Compensation Act is satisfied if the symptoms manifest themselves according to the natural course of such things without any independent intervening cause. Sandel v. Packaging Co. of America 149

15. For purposes of the Nebraska Workmen's Compensation Act, "suddenly and violently" does not mean "instantaneously and with force," but rather the element

is satisfied if the injury occurs at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment. Sandel v. Packaging Co. of America 149

16. Where an employee's injury, which previously was diagnosed as continuing, attains maximum healing so that on further hearing a definite permanent award can be made, the employer is not deemed to have obtained a reduction in the award so as to deprive the employee of a statutory right to an attorney fee. Sandel v. Packaging Co. of America 149

17. The Nebraska Workmen's Compensation Act is not applicable to a nonresident employer and resident employee where the contract of employment was made in this state for services to be performed in another state and the employer was not, at the time of the contract, engaged in any trade, business, profession, or vocation in this state. Jensen v. Floair, Inc. 403

18. The Nebraska Workmen's Compensation Act is not applicable where a resident employee's employment by a nonresident employer for services to be performed outside the State of Nebraska was neither in nor incidental to any trade, business, profession, or vocation carried on by the employer in this state. Jensen v. Floair, Inc. 403

19. "Earning power," as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1978), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. Guerra v. Iowa Beef Processors, Inc. 433

20. 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. Earnest v. Lutheran Memorial Hospital 438

21. Where a record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workmen's Compensation Court. Earnest v. Lutheran Memorial Hospital 438

22. When the employer files an application for a rehearing before a three-judge compensation court and fails to obtain any reduction in the amount of the award, the court ordinarily should allow the employee a rea-

sonable attorney fee. Earnest v. Lutheran Memorial Hospital 438

23. In cases under the compensation act involving heart attacks, the principal issue is usually one of causation. The disability or death is not compensable unless the injury or death arose out of the employment. There is no fixed formula by which the issue may be resolved and the issue must be determined by the facts of each case. Mann v. City of Omaha 583

24. If it is claimed that the injury was the result of exertion in the employment, the evidence must show that the employment contributed in some material and substantial degree to cause the injury. The question to be determined is whether the injury was the result of a personal rather than an employment risk. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. Mann v. City of Omaha 583

25. It is no longer necessary that the injury be caused by a single traumatic event, but the exertion in the employment must contribute in some material and substantial degree to cause the injury. Mann v. City of Omaha ... 583

26. If an employee suffers an injury which appears to be slight but which is progressive in its course, and which several physicians are unable to correctly diagnose, the worker's failure to file claim or bring suit within the time limited by law will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident. Thomas v. Kayser-Roth Corp. 704

27. The burden of proving that an injury is latent and progressive so as to toll the statute of limitations is upon the plaintiff. Thomas v. Kayser-Roth Corp. 704

28. The mere fact that the plaintiff did not know the full extent of his injury from a medical standpoint does not make it latent, particularly where the medical facts were reasonably discoverable. Thomas v. Kayser-Roth Corp. 704