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MYRTLE M. SCHULTZ, APPELLANT, V. LEROY SCHULTZ, APPELLEE.

322 N.W.2d 824

Filed August 13, 1982. No. 81-923.

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

John A. Wagoner, for appellant.

Arend R. Baack of Luebs, Dowding, Beltzer, Leininger & Smith, for appellee.

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

PER CURIAM.

This appeal involves a domestic relations matter.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRY JAMESON, APPELLANT.

322 N.W.2d 824

Filed August 13, 1982. No. 82-187.

Appeal from the District Court for Kearney County: WILLIAM G. CAMBRIDGE, Judge. Affirmed as modified.

Terry Jameson, pro se.

No appearance for appellee.

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

PER CURIAM.

This is an appeal from a charge of driving while intoxicated, third offense. The defendant was convicted and sentenced to a term of 20 months to 5 years in an institution subject to the jurisdiction of the Department of Corrections, with credit being given for jail time served, the sentence to be consecutive to any other sentence then being served.

There is no error in the record requiring reversal of the judgment of conviction. However, while this appeal was pending, L.B. 568, which reduced the maximum sentence for the offense of which the defendant was convicted, became effective July 17, 1982. This case is governed by our decisions in *State v. Randolph,* 186 Neb. 297, 183 N.W.2d 225 (1971); *State v. Peiffer, ante* p. 299, 322 N.W.2d 445 (1982); and *State v. Phillips, ante* p. 303, 322 N.W.2d 447 (1982).

The sentence is reduced to 6 months' imprisonment with credit given for jail time served awaiting trial. The sentence is consecutive to any other being served at the time sentence was imposed in the District Court.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF HERMAN A. R. CAMIN, DECEASED. MARTIN ACHTERBERG ET AL., APPELLANTS, V. FARMERS STATE BANK & TRUST COMPANY, LEXINGTON, NEBRASKA, ET AL., APPELLEES.

323 N.W.2d 827

Filed August 20, 1982. No. 44233.

1. **Wills.** The burden is upon the proponent of a will, both in the county court and in the District Court on appeal, to prove by a preponderance of the evidence not only the lawful execution of the will but also the testamentary capacity of the testator at the time when the will was made. However, if the proponent makes a prima facie

case in chief as to both, then it devolves upon a contestant to proceed and to adduce sufficient competent evidence to overcome the presumption arising therefrom, after which the burden of going ahead and proving the issues of lawful execution and testamentary capacity by a preponderance of the evidence devolves upon the proponent.

2. _____. Under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-1601 et seq. (Reissue 1979), prima facie proof of the testator's testamentary capacity is established by the introduction of a self-proved will without the presentation of the testimony of *all* of the attesting witnesses. Such prima facie proof is rebuttable with competent evidence to the contrary, although in the final analysis the burden of persuasion remains with the proponent of the will at all times.
3. _____. Although it may be good form in some instances for a witness to a will to explore with the testator the latter's testamentary capacity, the nature of the document, and its voluntary character, a failure to do so in and of itself will not disqualify that person from serving as an attesting witness under the provisions of Neb. Rev. Stat. § 30-2327 (Reissue 1979).
4. _____. A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to the results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testator had a constant and abiding scheme for the distribution of his property.
5. _____. 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, such testator is mentally competent to make a will.
6. **Evidence: Appeal and Error.** The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence in a jury trial will generally not be reviewed by this court, unless it is clearly or plainly shown that the trial court abused its discretion.
7. **Collateral Evidence: Appeal and Error.** The receipt or rejection of collateral evidence is largely within the discretion of the trial judge, and his rulings in that regard will rarely be disturbed.
8. **Witnesses.** As a general rule, a party should not be permitted to cross-examine a witness as to matters foreign to the scope of the direct examination, particularly where it relates to matters that are collateral to the issues in the case.
9. **Wills: Proof: Jury Instructions.** Where the court's instructions impose a greater burden of proof on the proponents of a will than is required by law, it cannot be said that the opponents were thereby prejudiced.

10. **Jury Instructions.** It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and the evidence.
11. **Wills: Jury Instructions.** An instruction to the jury that a disposition under a will need not be reasonable, conventional, or judicious is not erroneous so long as the testator has the requisite mental capacity to execute a will and has not been subjected to undue influence.

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

Kenneth Cobb and Dale E. Dahlin of Law Offices of Kenneth Cobb, P.C., for appellants.

M. J. Bruckner of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellees.

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

HASTINGS, J.

This is an appeal from a judgment of the District Court for Custer County admitting to probate the last will and testament of the decedent, Herman A. R. Camin, following a jury verdict in favor of the proponents. The appellants have assigned numerous errors on this appeal, including that the proponents of the will failed to establish a prima facie proof of testamentary capacity of the decedent by failing to present the testimony of all the available attesting witnesses of the will; that the attestations of the attesting witnesses were invalid and ineffective; that the trial court erred in admitting into evidence prior wills executed by the decedent; that the trial court erred in limiting the appellants' cross-examination of a witness; and, finally, that the trial court erred in instructing the jury and in submitting an improper standard for testamentary capacity in the verdict of jury form. Upon consideration of these various assignments of error, we affirm.

The decedent, Herman A. R. Camin, died at the age of 77 on July 16, 1979, in Custer County, Nebraska. The petition for formal probate of his last will

and testament was filed in county court on the following day by Bernard Smith as attorney for the petitioners, Melvin, Herman, and Martin Achterberg, and the Farmers State Bank & Trust Company. The terms of this will, which was executed on February 1, 1979, appointed several personal representatives and instructed them to liquidate the assets of the estate at public auction. Following the payment of all taxes and expenses from the proceeds of the auction, the will set forth specific monetary bequests of $1,000 each to 12 of the decedent's relatives, and of $750 each to six of the relatives of the deceased wife of decedent. Finally, the will established a trust for the benefit of the Trinity Evangelical Lutheran Congregation of the Unaltered Augsburg Confession Church of Lexington, Nebraska, in which the residue of the estate was to be placed. The will also established a formula for the distribution of the principal and income of the trust to the church over a period of years, under the direction of a designated trustee. At the time this document was drafted, the decedent allegedly valued his estate, which consisted of land and numerous certificates of deposit, at approximately $1,000,000.

The contestants filed their objections to the probate of the will on August 10, 1979, alleging that the decedent was not of sound mind or mentally capable of making a will, and that "on the date of said purported will and for a long time prior thereto and continuously thereafter until his death said decedent was not competent to make a last will and testament." Nevertheless, the Custer County Court admitted the will to formal probate on October 5, 1979. An appeal was taken to the District Court wherein the issue of the decedent's competency was tried to a jury, which found that the document executed on February 1, 1979, "is a valid Last Will and Testament and the said deceased was mentally competent

at the time he signed the same." This appeal followed that verdict.

The appellants' first assignment of error challenges the manner by which the proponents attempted to prove a prima facie case in support of the decedent's testamentary capacity. By statute, the proponents of a will have the burden of establishing prima facie proof of testamentary capacity, as well as the ultimate burden of persuasion as to that matter. Neb. Rev. Stat. § 30-2431 (Reissue 1979). However, this section does not go forward to describe the manner by which such prima facie proof must be presented. In this respect, the provisions of Neb. Rev. Stat. § 30-2430(b) (Reissue 1979) appear to be directly applicable. This section provides in part that "*If the will is self-proved,* compliance with signature requirements for execution is conclusively presumed and *other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will* and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit." (Emphasis supplied.) The instrument in the present action was executed by the decedent and attesting witnesses in a manner consistent with the provisions of Neb. Rev. Stat. § 30-2329 (Reissue 1979), and consequently qualifies as a "self-proved" will as that term is used in the statutory provisions governing probate in Nebraska.

The appellants contend that the proponents failed to establish prima facie proof of the decedent's testamentary capacity due to their failure to offer the testimony of all of the available attesting witnesses, or, in lieu thereof, in failing to offer evidence of their unavailability. The record reveals that the proponents called only one of the three attesting witnesses during the trial of this matter and that the remaining two witnesses were available to present their testimony at trial. The appellants base their

contention that such a failure to call the attesting witnesses causes the proponents to fall short of the requisite prima facie proof of testamentary capacity upon the cases of *In re Estate of Coons,* 154 Neb. 690, 48 N.W.2d 778 (1951); *First Trust Co. v. Lanyon,* 156 Neb. 21, 54 N.W.2d 262 (1952); and *Moore v. Moore,* 158 Neb. 620, 64 N.W.2d 301 (1954).

Although the appellants have accurately stated the law of those cases, they appear to have failed to realize the total impact of the probate reform which took place in 1974 with the passage of L.B. 354. The aforementioned cases were adjudicated prior to the passage of L.B. 354, at a time when the law required the testimony of one subscribing witness to probate a will in an uncontested action. Neb. Rev. Stat. § 30-218 (Reissue 1964). This court in *In re Estate of Coons, supra,* found that this provision gave rise to a strong inference that all available witnesses must testify in a contested case, and consequently it promulgated a rule which provided that "a proponent is required to present all attesting witnesses if their testimony is available, otherwise a prima facie case is not made." *Id.* at 695, 48 N.W.2d at 781. We note, however, that § 30-218 was repealed by L.B. 354, and that the only statutory requirement for the testimony of an attesting witness appears in § 30-2430(a), which applies only to wills that are not "self-proved." Therefore, it is understandable that some confusion exists as to whether one must call every available attesting witness to a self-proved will in a contested case.

The commentary appearing after each section of the statutes governing probate provides some insight into this matter. With regard to a self-proved will, the Comment notes in part that "A self-proved will may be admitted to probate as provided in sections 30-2416, 30-2429 and 30-2430 without the testimony of any subscribing witness, but otherwise it is treated no differently than a will not self-proved.

Thus, a self-proved will may be contested (except in regard to signature requirements), revoked, or amended by a codicil in exactly the same fashion as a will not self-proved." § 30-2329. The Nebraska Comment to the section expressly dealing with the testimony of attesting witnesses states that "*This section changes prior Nebraska law* which required court testimony from one witness even if there was no will contest and that in the event of a will contest, it was indispensible [sic] that all available attesting witnesses be called to testify. See repealed section 30-218; In re Estate of Coons, 154 Neb. 690, 48 N.W.2d 778 (1951)." (Emphasis supplied.) § 30-2430. Finally, the Nebraska Comment to the section dealing with the allocation of the burden of proof in a will contest states that the "Nebraska modification of the section retains the previous requirement that the proponent of a will has the burden of establishing testamentary capacity. In re Estate of Coons, 154 Neb. 690, 48 N.W.2d 778 (1951); In re Estate of Kaiser, 150 Neb. 295, 34 N.W.2d 366 (1948)." § 30-2431.

When one analyzes the commentaries, the cases cited therein, the Uniform Probate Code, upon which the Nebraska probate laws were in part based, and the enacted provisions of the probate law, little confusion remains as to the issue at hand. We stated in *In re Estate of Kaiser,* 150 Neb. 295, 302-03, 34 N.W.2d 366, 372 (1948), that "This court has consistently held that the burden is upon proponent of a will, both in the county court and in the district court on appeal, to prove by a preponderance of the evidence not only the lawful execution of the will, but also the testamentary capacity of the testator at the time when the will was made. However, if the proponent makes a prima facie case in chief as to both, then it devolves upon a contestant to proceed and adduce sufficient competent evidence to overcome the presumption arising therefrom, after which the burden of going ahead and proving those issues by a

preponderance of the evidence devolves upon proponent." This proposition of law was reiterated in *In re Estate of Coons, supra.* However, the Uniform Probate Code provided that "Contestants of a will have the burden of establishing lack of *testamentary intent or capacity,* undue influence, fraud, duress, mistake or revocation." (Emphasis supplied.) Unif. Prob. Code § 3-407, 8 U.L.A. 411 (1972). Finally, when enacted as a part of L.B. 354 and codified as § 30-2431, the section dealing with the burden of proof was modified so as to comport with the adjudicated law of Nebraska by placing the burden of proving capacity upon the proponent. It is quite clear that this is the only portion of *In re Estate of Coons, supra,* that was meant to be preserved by § 30-2431.

This conclusion is made all the more apparent by the express provisions of § 30-2430 and the comments thereafter. By enacting the self-proved will provisions, the Legislature was expressly nullifying the requirement that all attesting witnesses must be called in order to provide prima facie proof of testamentary capacity as called for under *In re Estate of Coons, supra,* and its progeny.

Therefore, the state of the law in Nebraska regarding this issue is similar to that which exists in the State of Texas where, under similar probate provisions dealing with self-proved wills and the burden of proof, the court noted with reference to these sections that "We believe that the two sections of the Code [probate code] provide nothing more than a method for the proponent of a will to prove his testator's testamentary capacity, *prima facie,* without the necessity of obtaining the testimony of the subscribing witnesses. . . . It appears to be the more cogent reasoning that a self-proving affidavit attached to a will allows a proponent a manner of proof in which to make out a *prima facie* case, but does not remove from him the burden of proving the

testamentary capacity of his testator. As a matter of law he still belabors under that burden, but once he has produced the self-proved will into evidence, the contestant, to rebut the presumption, must go forward with his evidence." *Reynolds v. Park,* 485 S.W.2d 807, 816 (Tex. Civ. App. 1972). See, also, *Soto v. Ledezma,* 529 S.W.2d 847 (Tex. Civ. App. 1975).

Similarly, under the probate provisions in Nebraska, as amended in 1974 and thereafter, a prima facie proof of the testator's testamentary capacity is established by the introduction of a self-proved will without the presentation of the testimony of all of the attesting witnesses. Such prima facie proof is rebuttable with competent evidence to the contrary, and the burden of persuasion remains with the proponent of the will at all times. Therefore, the proponents in the present action successfully established prima facie proof of the decedent's testamentary capacity through the offer of the self-proved will and the testimony of Bernard Smith, an attesting witness who testified that the decedent possessed sufficient capacity to execute a will at the time this instrument was executed. It was not necessary to call the remaining attesting witnesses, although they may have been available to testify.

We turn next to the appellants' second assignment of error wherein the appellants challenge the validity of the attesting witnesses' signatures on the basis that two of the attesting witnesses did not have sufficient knowledge on which to base their attestations that the decedent possessed testamentary capacity at the time he executed the purported will. This contention is based upon the depositions of these witnesses, wherein each admitted merely observing the decedent sign the will and having had no discussions with the decedent concerning his knowledge of his estate or heirs.

The appellants have cited the following language from *In re Estate of Kaiser,* 150 Neb. 295, 34 N.W.2d

366 (1948), and *In re Estate of Smith,* 130 Neb. 739, 266 N.W. 611 (1936), in support of this assignment of error: "The statutory provisions controlling the manner in which wills must be executed are generally held to be mandatory and subject to strict construction, and if not substantially complied with, the will is inoperative. [Citations omitted.] . . . 'The attestation required of witnesses to a will consists in their seeing that those things exist and are done which the statute requires to exist or to be done in order to make the instrument, in law, the will of the testator. [Citation omitted.]' " *In re Estate of Kaiser, supra* at 303, 34 N.W.2d at 372. However, in both instances the "statutory provisions" referred to were those provisions which required that a will be "signed by the testator, or by some person in his presence, and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses . . . ." Comp. Stat. § 30-205 (1929); Neb. Rev. Stat. § 30-204 (1943). Consequently, the requirement that an attesting witness abide by the statutory provisions does not necessarily mandate that the witness inquire into the testator's mental capacity.

Similarly, the present probate code merely requires a will to be signed "by the testator or in the testator's name by some other individual in the testator's presence and by his direction, and is required to be signed by at least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will." Neb. Rev. Stat. § 30-2327 (Reissue 1979). Furthermore, the code provides that "Any individual generally competent to be a witness may act as a witness to a will." Neb. Rev. Stat. § 30-2330(a) (Reissue 1979). Finally, we note that the attestation clause to the will in question conforms with the provisions of § 30-2329, in that it merely states that the attesting witness believes "to the best of his knowl-

edge" that the testator is of sound mind. Clearly, the statutes remain devoid of any requirement that the attesting witness must probe into the testator's mental capacity prior to signing the will as a witness.

However, we have held in the past that " 'The term "competent witness," as used in the statute relating to the execution of wills, means a person who, at the time of making the attestation, could legally testify in court to the facts which he attests by subscribing his name to the will.' *In re Estate of Wiese,* 98 Neb. 463 [153 N.W. 556 (1915)]; *Hayden v. Hayden,* 107 Neb. 806 [186 N.W. 972 (1922)]." *In re Estate of Charles,* 118 Neb. 634, 640, 225 N.W. 869, 871 (1929). At issue in these cases was whether an heir, devisee, spouse of a devisee, or an executor of an estate could be deemed a "competent witness" to a will. At no point, however, have we been called upon to determine whether a will attested to by witnesses who admittedly were unaware of the testator's testamentary capacity has been properly executed.

With respect to one who is "legally" qualified to testify in court, the appellants have cited *Thomas v. Vaughan,* 181 Neb. 673, 679, 150 N.W.2d 241, 245 (1967), wherein we stated that "A nonexpert witness who is shown to have had a more or less intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person by giving the facts and circumstances upon which the opinion is based. Schlitz v. Topp, 158 Neb. 583, 64 N.W.2d 116. It must appear that the witness has in mind the quality of mental capacity essential to the making of a valid will and that the facts and circumstances testified to are sufficient upon which to base an opinion. In re Estate of Witte, 145 Neb. 295, 16 N.W.2d 203." In fact, as a matter of law, "A witness may not testify as to a matter unless evidence is introduced sufficient to support a finding that he

has personal knowledge of the matter." Neb. Rev. Stat. § 27-602 (Reissue 1979).

When taken in the context set forth above, it may appear that the attesting witnesses to the present will would not have been "legally" qualified to testify at trial as to the question of the decedent's testamentary capacity at the time the will was executed. This conclusion is made in light of the fact that the record does not reveal that each attesting witness possessed personal knowledge regarding the decedent's testamentary capacity. We must note, however, that the witnesses were not asked during their depositions whether they did indeed possess such knowledge at the time they witnessed the will.

We also note that a sufficient number of other jurisdictions have been faced with a similar issue to enable one commentator to draw the following purported "general rule": "Despite the very generally recognized duty of attesting witnesses to observe or satisfy themselves as to the testator's capacity, their failure to do so, or their failure to recollect their impression, has generally been held, at least in the absence of specific statute, not to affect the validity of the will, or to affect their competency to testify as to the testator's capacity in probate proceedings or will contests, even though the credibility or weight of their testimony may have been held or recognized to have been affected thereby." Annot., 69 A.L.R.2d 662, 664 (1960). Of those jurisdictions having addressed the issue, the general consensus appears to be that "while it is highly desirable that one attesting a will should observe and satisfy himself as to the testamentary capacity of the testator, it is not a duty imposed by law, the omission of which renders the will invalid." *In re Mitchell's Estate,* 41 Wash. 2d 326, 345, 249 P.2d 385, 396 (1952). See, also, *Strahl v. Turner,* 310 S.W.2d 833 (Mo. 1958); *In re Estate of Wognum,* 279 So. 2d 66 (Fla. App. 1973), *cert. denied* 284 So. 2d 216 (Fla. 1973). It is of special interest

that the opinion in *Strahl v. Turner, supra,* cited *In re Estate of Charles, supra,* for a definition of "competent witness," although the court appeared to narrow this definition to those witnesses who would be disqualified to testify in a court by reason of mental incapacity, interest, the commission or conviction of a crime, want of religious belief, or other causes. Consequently, it does not appear that the court in *Strahl* considered the lack of personal knowledge to be a sufficient factor to disqualify a witness from testifying in court. As noted above, such a lack of personal knowledge will disqualify a witness from testifying in a court in the State of Nebraska. § 27-602.

In addressing this express issue for the first time, the court is not unmindful of the general practice among the bar when obtaining the necessary attesting witnesses to draw on members of their staffs or fellow attorneys. Many of these persons generally will not have the type of personal knowledge of the testator's capacity, and most certainly would not have a "more or less intimate acquaintance" with the testator, as *Thomas v. Vaughan, supra,* and the appellants would demand. To require that all attesting witnesses become more or less intimately acquainted with the testator before they can be considered "competent" witnesses to a will would be burdensome, if not unworkable. Consequently, we find that we must agree with the court in *In re Estate of Wognum, supra* at 69, when it stated that "While it may be good form in some instances for a witness to explore with the testator the latter's testamentary capacity, the nature of the document, and its voluntary character, such in our opinion is not essential to qualify as an attesting witness under § 731.07 [the counterpart to § 30-2327]. The legislature has not seen fit to impose such requirements on one who would serve as a witness to a will, and in our judgment it would be unwise to do so by judicial opinion because such would inevitably

lead to the destruction of wills, to say nothing of the reasonable expectations of one's testamentary beneficiaries."

Therefore, we conclude that the present will was not invalid due to the fact that the attesting witnesses may not have possessed personal knowledge of the decedent's testamentary capacity. However, this does not mean that such a lack of personal knowledge might not prevent an attesting witness from testifying at trial due to § 27-602, and, in any event, an attesting witness' lack of personal knowledge can certainly be used to decrease the weight given to that witness' testimony should he testify at trial. However, for the purpose of this appeal, we find the appellants' second assignment of error to be without merit.

The appellants' third assignment of error alleges that it was error for the trial court to admit several prior wills of the decedent into evidence. The record reveals that seven wills were introduced into evidence during the trial, including the purported final will, which was executed on February 1, 1979. The other wills which were introduced were executed on January 3, 1979, December 30, 1976, November 18, 1969, April 14, 1965, May 22, 1964, and February 15, 1957. Error is assigned as to the admission of each will except for the one executed on November 18, 1969, which was offered by the appellants.

The court has adopted the following rule on other occasions: " 'A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testator (and grantor) had a constant and abiding scheme for the distribution of his

property.' " *In re Estate of Bose,* 136 Neb. 156, 173-74, 285 N.W. 319, 329 (1939). See, also, *Blochowitz v. Blochowitz*, 122 Neb. 385, 240 N.W. 586 (1932); *In re Estate of Wahl,* 151 Neb. 812, 39 N.W.2d 783 (1949). An essential element of this rule was pointed out in an earlier sentence in *Bose* wherein we noted that prior wills, "as to which there are no substantial claims of testamentary incapacity," may also be considered in determining the question of testamentary capacity. *In re Estate of Bose, supra* at 170, 285 N.W. at 327.

In the present action the appellants raised the question of the decedent's testamentary capacity in the following manner in their petition objecting to probate: "[T]he undersigned objectors and contestants: . . . 4. Allege that on the date of said purported will *and for a long time prior thereto* and continuously thereafter until his death said decedent was not competent to make a last will and testament." (Emphasis supplied.)

As noted earlier, the proponents of a will bear the burden of persuasion as to the matter of the decedent's testamentary capacity. The proponents also must bear the burden of providing adequate foundation for the admission of prior wills which they offer into evidence, including the establishment of the fact that the testator possessed adequate testamentary capacity at the time the prior wills were executed. We conclude that the proponents met that burden in the present instance, and that therefore it was not error to admit the prior wills into evidence.

At the point when the January 3, 1979, will was offered into evidence by the proponents, Bernard Smith, the drafter of that specific document, had described numerous details contained in that will during both direct and cross-examination, without objection by the appellants. Furthermore, Mr. Smith had also testified to the fact that he had known the decedent for at least 30 years and saw him from

three to seven times a year; that he had prepared at least five wills for the decedent, including the one at issue; and, most importantly, that, in Mr. Smith's opinion, the decedent possessed the requisite testamentary capacity to execute a will. The January 3, 1979, will was admitted on the basis of this testimony.

The introduction of the remaining wills to which the appellants object did not occur until after the presentation of the contestants' case, during which the contestants called a total of 17 witnesses, 12 of whom offered their opinion that the decedent was not competent to make a will. We must note, however, that 9 of these 12 witnesses offering opinions on the decedent's capacity were related to the decedent in some respect and stood to inherit sizable amounts of money in the event the will was denied probate. Furthermore, the opinions as to the decedent's capacity were offered in response to questions concerning the decedent's ability to execute a will between December 1978 and March 1979. In that respect, the evidence offered by the contestants fails to address the question of whether the decedent was competent at the time these prior wills were executed, other than the one executed on January 3, 1979.

In rebuttal, the proponents offered the testimony of a bank president who had been the decedent's friend and banker for 30 years; a doctor who had seen the decedent at least monthly since 1956; a banker who had met the decedent in 1979 to discuss trusts; the person who had prepared the decedent's taxes "for years"; a rancher who had rented pasture from the decedent since 1963; and the pastor of the Trinity Lutheran Church, the beneficiary of the residual trust in the will at issue. An opinion as to the decedent's testamentary capacity was elicited from each witness, and each felt that the decedent was indeed capable of executing a valid will. While

many of these opinions were also limited to the period between December 1978 and March 1979, it was the opinion of Dr. Melvin Chaloupka, who had known the decedent as a friend and a patient since 1956, that the decedent was never at any time incompetent to make a will. Furthermore, Dr. Chaloupka executed an affidavit shortly before the execution of the 1976 will in which he stated that the decedent was, in his opinion, aware of the nature of his estate and was acquainted with his relatives. It was only after the doctor's testimony and the introduction of the affidavit that the remaining wills were introduced into evidence.

We have frequently held that " '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.' " *In re Estate of Kleeb,* 211 Neb. 763, 767, 320 N.W.2d 459, 461 (1982). The record in the present action presents conflicting evidence regarding the decedent's testamentary capacity at the time the January 3 and February 1, 1979, wills were executed. However, in the face of Dr. Chaloupka's testimony, there is no conflict regarding the decedent's capacity prior to 1978. Consequently, the proponents adequately established the fact of the decedent's capacity at the time he executed the wills in 1976, 1965, 1964, and 1957, and it was not error for the court to allow their admission into evidence under the rules set forth in *In re Estate of Bose,* 136 Neb. 156, 285 N.W. 319 (1939). Furthermore, with regard to the admission of the January 3, 1979, will, we note that " 'The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not be reviewed by an appellate court, unless it is clearly or plainly shown that the trial court abused its discretion.' " *Westover v.*

Kerr, 168 Neb. 494, 498, 96 N.W.2d 421, 424 (1959). From the conflicting evidence concerning the decedent's testamentary capacity at the time he executed the January 1979 will, we cannot say that it was a clear abuse of discretion for the trial court to have admitted the will into evidence. Therefore, the appellants' third assignment of error is also without merit.

For their fourth assignment of error, the appellants contend that it was error for the trial court to have limited the cross-examination of the pastor of the Trinity Lutheran Church concerning the church's annual budget. Such questioning was objected to on the grounds of relevancy, and the objection was sustained. The appellants claim that they were prejudiced by this action, in that the church's annual budget was far less than the annual bequest the church was to receive under the terms of the residual trust, which fact was offered to show that the decedent was totally unaware of the extent of his estate and the nature of the bequest he had made to the church.

" 'The receipt or rejection of collateral evidence is largely within the discretion of the trial judge, and his rulings in that regard will rarely be disturbed.' [Citations omitted.]" *Barry v. Anderson,* 89 Neb. 332, 334, 131 N.W. 591, 592 (1911). Furthermore, "It is the general rule that a party should not be permitted to cross-examine a witness as to matters foreign to the scope of the direct examination, particularly where it relates to matters that are collateral to the issues in the case. In such situations a party is usually required to call the witness as his own and thus present the evidence material to the case. Where the cross-examination is within the scope of the issues, the trial court has a discretion as to the extent of the cross-examination to be permitted and it is only an abuse of such discretion that constitutes prejudicial error. . . . The extent of cross-examination to be permitted in testing the ac-

curacy and credibility of the witness usually poses a matter of discretion by the trial court. . . . 'The rule of strict cross-examination has been adopted and is in force in this state. The ruling of the trial court in regard to the scope of cross-examination will be sustained unless it is an abuse of discretion.' " *Beranek v. Petracek,* 184 Neb. 516, 520, 169 N.W.2d 275, 278 (1969).

In light of these general rules we cannot say that the trial court abused its discretion in limiting the cross-examination of the witness, thereby prohibiting the admission of evidence concerning the annual budget of the Trinity Lutheran Church. The objection to the questioning was based upon relevancy. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Rev. Stat. § 27-401 (Reissue 1979). However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of confusion of the issues or misleading the jury. Neb. Rev. Stat. § 27-403 (Reissue 1979); *Herman v. Midland Ag Service, Inc.,* 200 Neb. 356, 264 N.W.2d 161 (1978).

The very definition of "relevancy" makes it apparent that it was not error to exclude the pastor's testimony. The mere fact that one's bequest to a church exceeds the budget of the church by any amount does not make it more or less probable that the testator did not know the extent of his estate. The size of one's bequest to a church may only show the testator's charitable nature, or, as is apparent in the present action from the decedent's conversations with his attorney during the drafting of this will, the testator's concern with burdensome federal estate taxes. The probative value of the pastor's testimony was so little in this instance that even were we to find that it was error to exclude it, the error would

not have been prejudicial to the appellants' cause. Consequently, we find no merit to the fourth assignment of error.

The final assignments of error concern the instructions and verdict of jury forms submitted to the jury. The verdict of jury forms submitted to the jury required the jury to find the will valid should they find the deceased was "mentally competent" when he executed the will, or to find that the will was invalid if they found the decedent to be "mentally incomptent [sic]."

In so alleging, the appellants accurately point out that the proper standard by which one's ability to execute a will is judged is not "mental competence," but, rather, it is whether one is of "sound mind" or possesses "testamentary capacity." Neb. Rev. Stat. §§ 30-2326 and 30-2431 (Reissue 1979). Throughout its instructions to the jury, the trial court frequently used the terms "testamentary capacity" and "sound mind," while only using "mental capacity" on one occasion. Therefore, the verdict of jury form may very well have been erroneous in its use of the term "mental competence."

However, the appellants' only basis for alleging that it was prejudicial error to submit such a verdict form to the jury lies in the contention that "mental competence" is a greater standard to overcome than mere soundness of mind or testamentary capacity. As pointed out on several occasions above, the burden of proving capacity was not upon the appellants, but was upon the proponents of the will. In fact, the court clearly pointed out this fact to the jury in its instruction No. 18. Consequently, the parties that would have been prejudiced by the imposition of a greater standard of proof, such as the appellants claim has occurred here, would be the proponents, the parties bearing the burden of persuasion. The appellants were not prejudiced by the error in this instance.

Finally, the appellants claim that the trial court erred in instructing the jury on one point and in failing to instruct the jury on three other points. We have long held that "It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and the evidence." *High-Plains Cooperative Assn. v. Stevens,* 204 Neb. 664, 669-70, 284 N.W.2d 846, 850 (1979). In this instance, the appellants claim that it was error not to give the jury the following instruction: "Unjust, unreasonable, or unnatural provisions of a will are matters for consideration in determining soundness of mind or testamentary capacity." Although authority supporting such an instruction does exist, it has arisen generally in instances wherein the decedent's purported last will substantially ignored sons or daughters when making bequests, or in which preference was given to distant relatives over heirs at law or other more closely related persons. See, *In re Estate of Gunderman,* 102 Neb. 590, 168 N.W. 359 (1918); *In re Estate of Kerr,* 117 Neb. 630, 222 N.W. 63 (1928); *In re Estate of Alexander,* 128 Neb. 334, 258 N.W. 655 (1935); *In re Estate of Bose,* 136 Neb. 156, 285 N.W. 319 (1939); and *In re Estate of Wahl,* 151 Neb. 812, 39 N.W.2d 783 (1949). At no time has such language been used when nephews and nieces of the decedent have been left substantial bequests, with the residue of the estate being left to a nonrelated party, such as a church. It is difficult to imagine such a bequest as being unjust, unreasonable, or unnatural in light of the fact that we have repeatedly said that a testator may dispose of his property as he pleases and need not recognize his relatives with bequests of any sort. *In re Estate of Bose, supra; In re Estate of Wahl, supra; Urbanovsky v. Foral,* 191 Neb. 308, 215 N.W.2d 74 (1974). Consequently, it was not error for the court to refuse the instruction in this instance.

The appellants also contest the court's refusal to give instructions regarding the decedent's alleged

"insane delusions," which they contend affected the decedent's testamentary capacity and prejudiced the decedent against certain of the contestants. We have stated that one form of an insane delusion is " 'a dislike for natural objects of testator's bounty, or repulsion for them, often based on an erroneous belief that such persons have been guilty of misconduct. If this belief is not based on evidence and can not be removed by evidence, it may amount to an insane delusion.' " *In re Estate of Wahl, supra* at 824, 39 N.W.2d at 790. The only evidence that the decedent was prejudiced against his heirs by any delusions was a statement he once made to the effect that his family "hadn't done too much for him." While it is apparent from the record that his nieces and nephews did indeed do much for the decedent, that one mere statement made by the decedent is insufficient evidence that the decedent suffered from an insane delusion which gave rise to a dislike or repulsion for his family.

The appellants also contend that an "insane delusion" instruction was proper in light of the substantial amount of evidence offered to show that the decedent believed he was going "crazy" or insane. In this respect, we have held that "the question to be determined is whether he [the decedent] was the victim of such delusions as controlled his actions and rendered him insensible to the ties of blood and kindred." *In re Estate of Wahl, supra* at 824, 39 N.W.2d at 790. In this instance the jury was instructed to consider any such circumstances as delusions, infirmities of mind, etc., along with all other evidence in the case, in reaching a decision as to whether the decedent possessed testamentary capacity at the time he executed the will in question. Consequently, we cannot conclude that the appellants were prejudiced by the failure to instruct the jury as to insane delusions, even were we to find such a failure to be error.

Finally, the appellants object to the court instructing the jury that the disposition under the will "need not be reasonable or conventional or judicious." We have held in the past that the right to dispose of property by will "is in no manner based upon its judicious exercise," and that a testator "may be unjust to his children or other relatives" so long as he has the requisite mental capacity to execute a will and has not been subjected to any undue influence. *Benge v. Sutton,* 169 Neb. 769, 781, 100 N.W.2d 857, 864 (1960). We continue to adhere to such rules, and therefore fail to find that the appellants were prejudiced by the instruction objected to. The trial court met its duty to instruct the jury on the issues presented by the pleadings and evidence, and we find no reversible error.

The judgment of the District Court admitting the will to probate is affirmed.

AFFIRMED.

ROBERT D. BARBOUR, APPELLEE, V. JENSON COMMERCIAL DISTRIBUTING CO., A CORPORATION, APPELLANT.

323 N.W.2d 824

Filed August 20, 1982. No. 44340.

1. **Verdicts: Remittitur.** Where a verdict is excessive, but not so much as to indicate passion or prejudice on the part of the jury, the error may be corrected by remittitur, if the excess can be estimated with reasonable certainty.
2. **Verdicts: Remittitur: Appeal and Error.** Where the trial court has ordered a reduction of the verdict as a condition of denying a new trial, such order will not ordinarily be reversed unless an abuse of discretion is shown.

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

James B. Cavanagh of Erickson, Sederstrom,

Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellant.

William Jay Riley of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee.

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

MCCOWN, J.

This is an action to recover compensation allegedly due under an employment contract. The jury returned a verdict in favor of the plaintiff in the amount of $29,346.78. The trial court ordered a remittitur of $6,581.18, and entered judgment in favor of the plaintiff for $22,765.60, plus an attorney fee of $7,550. The defendant has appealed.

The plaintiff is a salesman who had worked for various employers for many years. The defendant is a Nebraska corporation engaged in the business of selling Maytag commercial appliances, laundry equipment, and other products. Harold Jenson is president of the defendant corporation.

The plaintiff and Jenson met in February 1971 and entered into an oral employment agreement. According to plaintiff's testimony, he was to receive $500 per month flat salary, plus a 5 percent commission on all sales. Jenson denied that he agreed to pay a 5 percent commission and testified that the agreement reached was reflected in a written contract dated March 1, 1971.

When plaintiff arrived at defendant's offices for work on March 1, 1971, he was asked to sign a written contract which had been drafted by company attorneys. The contract provided for a guarantee of $500 per month, to be an advance against earned commissions or bonus each month. It provided for a 4 percent commission on commercial appliances sold at list prices, and lesser commissions on certain other sales. The contract also provided for an over-

riding bonus commission of 1 percent on all products sold during the term of the contract if plaintiff was in the company's employ on the date of expiration of the contract, which covered the period of March 1, 1971, to December 31, 1971.

Plaintiff told the bookkeeper who presented the contract to him that it was not the contract agreed upon between him and Jenson in February. Plaintiff testified that he signed the contract, however, to obtain a copy of it, and so that the bookkeeper could complete plaintiff's employment paperwork. Jenson was not in the office that day and plaintiff left the office and began to look for another job.

Plaintiff testified that a few days later, after a telephone call from Jenson, he and Jenson reached an agreement for a revised contract. According to plaintiff's testimony, he was to receive $500 per month guaranteed salary, plus a 5 percent commission on all sales. Four percent of the commission was to be paid monthly and 1 percent was to be deferred until the end of the year. Plaintiff would have the option to accumulate the 1 percent deferred commission. No interest was to be paid on the accumulated amounts, and the deferral was to be handled in a salesman's escrow account.

On March 8, 1971, the plaintiff wrote and mailed a certified letter to Jenson and to the employment agency through which the employment contact had originally been made, setting out the various facts and terms of the employment contract agreed upon. Jenson's testimony was that plaintiff never complained about the terms of the March 1 written contract, but that 2 or 3 weeks after plaintiff began work Jenson changed the terms of the written contract and agreed to pay a straight 4 percent commission on all sales and a straight salary of $500 per month rather than an advance against commissions. Jenson testified that the plaintiff did not object to those terms.

Plaintiff began working for defendant in March 1971 and continued to work for the defendant until July 1979. He was paid a 4 percent commission on all sales, except for special transactions, and he received a salary and a monthly expense sum. Commissions were paid only after the defendant received payment from the customer. Plaintiff was never paid an additional 1 percent. Over the years he received occasional raises in salary and expense payments. The plaintiff testified that each year he prepared reports of his sales for the year and met with Jenson, and that at almost every meeting the deferred 1 percent commission was discussed, and Jenson always indicated that it was available. Jenson denied that the 1 percent deferred commission was discussed.

In November 1978 plaintiff notified defendant's bookkeeper that he planned to withdraw his deferred commission at the end of the year and supplied the bookkeeper with copies of the March 1, 1971, written contract and the March 8, 1971, letter. At a meeting in December 1978 Jenson denied plaintiff's right to any deferred commission and denied that the March 8, 1971, letter stated the agreement. Plaintiff continued to work for defendant until July 3, 1979. Jenson terminated plaintiff's employment by letter dated July 10, 1979.

The case was submitted to the jury under instructions which are not objected to, and the jury returned a verdict for the plaintiff in the sum of $29,346.78. The court found that the verdict should be decreased in the amount of $6,581.18 to conform with the evidence and ordered a remittitur in that amount. Plaintiff, preserving his right under Neb. Rev. Stat. § 25-1929 (Reissue 1979), accepted the remittitur. The District Court then entered judgment in favor of the plaintiff in the sum of $22,765.60, together with an attorney fee of $7,550, plus costs. Defendant has appealed.

The defendant contends that the verdict of the jury is manifestly excessive and clearly wrong, and that a new trial must be awarded when the damages are excessive. Defendant argues that it is clear that the jury either ignored the judge's instructions or disregarded the evidence and there is no way to ascertain the basis of the jury verdict.

The law is well established that where a verdict is excessive, but not so much as to indicate passion or prejudice on the part of the jury, the error may be corrected by remittitur, if the excess can be estimated with reasonable certainty. *Hays v. County of Douglas,* 192 Neb. 580, 223 N.W.2d 143 (1974).

The record in the case at bar establishes without serious dispute that the jury intended to find for the plaintiff on all essential issues supported by the evidence. In view of the jury's inquiry about costs, there is a strong inference that the excess amount of the verdict represented attorney fees and costs when the verdict was $7,000 more than the amount requested by plaintiff and roughly one-third of that amount. Plaintiff's counsel, in final argument, requested the jury to bring in a verdict of $22,436.78. That amount, however, mistakenly omitted one item of $323, which would have made a total of $22,759.78, a sum within $5.82 of the amount ordered by the trial court's remittitur. The discrepancy between plaintiff's records of 1 percent of total sales and defendant's records of the same sales for the entire period of 1971 through 1979 was $328.82, which, in turn, accounts for the $5.82 difference. The evidence in the present case, using the defendant's own business records as to the total amount of sales, sustains the exact amount of the remitted verdict.

Generally, where the damages awarded are greater than the amount claimed in the declaration, or, from the facts disclosed by the evidence, are clearly excessive, and the illegal portion is distinguishable from the legal, the defect may usually be remedied

by a remittitur of the excess, if it can be readily calculated with reasonable certainty, whether the action is one of tort or on contract, and although such act of the successful litigant obviates an otherwise prejudicial error. See 66 C.J.S. *New Trial* § 76 d. (1950).

The defendant argues that Neb. Rev. Stat. § 25-1142(5) (Reissue 1979) requires the granting of a new trial in a contract action wherever the assessment of the amount of recovery is too large. It seems obvious, however, that when the amount of excess can be reasonably ascertained and a remittitur granted, the amount of the recovery no longer is too large. Where the trial court has ordered a reduction of the verdict as a condition of denying a new trial, such order will not ordinarily be reversed unless an abuse of discretion is shown. *McCann v. Omaha & C. B. Street R. Co.*, 117 Neb. 786, 222 N.W. 633 (1929). In the case at bar the record establishes the amount of the excess with reasonable certainty. There is no complaint as to the instructions, and the granting of the remittitur avoids the expense and delay of the further trial of the same facts. There was no abuse of discretion on the part of the trial court.

The defendant also complains as to the award of attorney fees. The record shows that plaintiff's claim was made under the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 1978). Section 48-1231 provides that the award of an attorney fee of not less than 25 percent of the unpaid wages is mandatory. The record includes the actual contract for attorney services and there is no evidence that the amount fixed by the court was unreasonable. The court considered the relevant factors required to be considered in determining the value of legal services and there was no abuse of discretion. See *Schmer v. Hawkeye-Security Ins. Co.*, 194 Neb. 94, 230 N.W.2d 216 (1975).

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

AFFIRMED.

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

CAPORALE, J., disqualified.

IN RE ESTATE OF LAYTON.

LESTER J. LUTZ AND WARD THOMPSON, COPERSONAL REPRESENTATIVES OF THE ESTATE OF HARRY H. LAYTON, DECEASED, APPELLANTS, V. JAMES C. EICH, APPELLEE.

323 N.W.2d 817

Filed August 20, 1982. No. 44361.

1. **Equity: Contracts: Decedents' Estates.** A suit to enforce an alleged oral contract to make a will is a suit in equity to be tried to the court. If a jury is called in the trial of such a case, its functions are advisory only.
2. **Jurisdiction: Contracts: Decedents' Estates.** A county court does have jurisdiction to hear actions on oral contracts to make a will, even though they are equitable in nature, under its general authority to hear all matters relating to a decedent's estate.
3. **Equity: Specific Performance: Decedents' Estates: Appeal and Error.** On appeal to this court of an equitable action to compel specific performance of a promise made to make a will, we must hear and determine the matter de novo and reach an independent conclusion without being influenced by the findings of the trial court.
4. **Decedents' Estates: Contracts: Proof.** Where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory, and unequivocal.
5. **Contracts: Decedents' Estates: Statute of Frauds.** 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.
6. **Contracts: Decedents' Estates.** The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract.

7. **Contracts: Decedents' Estates: Proof.** The burden is upon the claimant in a suit on an oral contract to make a will to prove both the existence of the contract and its terms and the acts constituting performance such as were referable solely to the contract sought to be enforced.
8. **Contracts: Decedents' Estates: Evidence.** Evidence of declarations of a deceased person concerning a parol contract does not amount to direct proof of the facts claimed to have been admitted by those declarations, and such evidence, when not supported by other evidence, is generally entitled to but little weight.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and dismissed.

James T. Gleason, for appellants.

James B. Cavanagh of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellee.

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

HASTINGS, J.

This is the second appearance of this action in this court. For a complete recitation of the facts, reference is made to the former opinion, reported at 207 Neb. 646, 300 N.W.2d 802 (1981). The case arises from the appellee's filing of what is purported to be a "claim" and an "amended claim" against the estate of Harry H. Layton. These documents allege that the decedent had promised the appellee during the last 10 years of the decedent's life that, in return for the appellee's long and faithful service, the decedent would execute a will leaving the appellee the inventory, the goodwill, the equipment, and the business building in which the Layton Hardware Store is located. In closing, the documents allege that the appellee "should receive the Layton Hardware Store business."

We determined in the initial appeal of this action that the Sarpy County District Court had erred in determining that the county court had not had juris-

diction over a matter of this nature. In so doing, we held that upon the filing of an intestacy proceeding in the county court, the county court acquires jurisdiction by law over all matters relating to the decedent's estate, including actions similar to the one filed in this case.

On remand, the action was tried to a jury in the District Court, resulting in a verdict for the appellee in the amount of $15,381.37 plus a requirement that the estate convey the building and lots upon which the Layton Hardware Store is located. The appellants perfected this appeal and assign as error the trial court's treatment of the jury verdict as dispositive rather than advisory; the trial court's failure to grant their motions for summary judgment, directed verdict, and judgment notwithstanding the verdict; the instructions the court submitted or refused to submit to the jury; the admittance of certain evidence; and the fact that the jury verdict is contrary to law and the evidence. We reverse.

The appellants' initial assignment of error arises from a dispute among the parties as to whether this action is legal or equitable in nature. As noted above, the appellee contends that he is entitled to and should be awarded the building, inventory, equipment, and goodwill of the Layton Hardware Store under the terms of an alleged oral promise made by the decedent that this property would be left to the appellee in the decedent's will. The appellants have interpreted such language to be a request for specific performance of an oral promise which, they contend, is an equitable action in which a jury verdict is advisory only and is not binding upon the District Court's disposition of the matter on appeal from the county court. On the other hand, the appellee characterizes this case as a common claim against an estate, which he contends is to be tried to a jury on appeal to the District Court under the provisions of Neb. Rev. Stat. §§ 30-1606 and 25-1104 (Reissue 1979).

We have long since decided this issue in *Peterson v. Estate of Bauer,* 76 Neb. 652, 107 N.W. 993 (1906), *aff'd* 76 Neb. 661, 111 N.W. 361 (1907). In that case a "claim" was filed against a decedent's estate alleging that the decedent was indebted to the claimant in the sum of $9,000, said debt arising out of services rendered for the decedent by the claimant for which the decedent had agreed to pay by devise or bequest to the claimant an amount not less than one-half of the decedent's entire estate at death. Upon the decedent's failure to make such a provision in his last will and testament, the claimant placed a value upon the estate of $18,000 and filed a claim requesting a judgment for one-half of that sum. The county court granted a judgment for $6,000, and the estate appealed to the District Court, where a jury returned a verdict for the estate.

Upon appeal of the matter, this court was called upon to discuss certain errors alleged to have arisen from the District Court's instruction to the jury. In doing so, the court noted that "The proceeding is in the form of an action at law, having originated in the district court in an appeal from an allowance by the county court of a money demand filed against the estate of the deceased, *but the nature of the claim, notwithstanding its form, is really and practically a suit to compel a specific performance of the alleged contract and like all such demands is addressed to the conscience of the trial judge sitting as a chancellor. The issue is one with which from its very nature and essence a court of law is incompetent to deal, and the present attempt to litigate it in such a tribunal is, so far as our information goes, without precedent. . . .* The suit is one to bind specifically the estate, real and personal, of the deceased with a contract alleged to have been made by him in his lifetime, which is confessedly void by positive statute both in form and in substance, but which it is contended that equity will nevertheless enforce for

the purpose of preventing fraud and doing exact justice. To such a suit the persons claiming title to the lands of the decedent as heirs or devisees, and asserting rights as distributees of the personalty by will or by statute, are indispensable parties without whose presence a final determination of the controversy cannot be made. It follows that such a claim is not litigable in the ordinary course of probate administration, but must be prosecuted, if at all, in a court of original and general equitable jurisdiction and powers, the executor or administrator being a proper but not in all instances a necessary party. . . . *It further follows that, when a jury is called in the trial of such a case, its functions are advisory only,* and the court cannot commit reversible error in the giving or refusal of instructions." (Emphasis supplied.) *Id.* at 659-60, 107 N.W. at 995-96. This language was adopted by the court on rehearing, with the following affirmation: "The conclusions of the former opinion that such an action as this, to appropriate one-half of the net value of the estate, should be in chancery, where all persons interested may be made parties, are sound and are adhered to." *Id.* at 665, 111 N.W. at 363.

It is readily apparent that the appellants have accurately characterized this action under *Peterson* as being equitable in nature, in spite of the fact that it is couched in the terms of a "claim" against the decedent's estate. Consequently, this action does not fall within that class of appeals from "the allowance or disallowance of claims filed against an estate," which are governed by § 25-1104, but rather falls within the final provision of § 30-1606, which provides that "all other appeals shall be triable to the court *as a suit in equity* in the manner provided in section 25-1105." (Emphasis supplied.) Neb. Rev. Stat. § 25-1105 (Reissue 1979) provides for a trial to the court "subject to its [the court's] power to order any issue or issues to be tried by a jury."

We have noted on prior occasions that the predecessors to § 25-1105 preserve the right of a court to submit a question of fact to a jury in an equitable action. *Alter v. Bank of Stockham,* 53 Neb. 223, 73 N.W. 667 (1897); *Omaha Fire Ins. Co. v. Thompson,* 50 Neb. 580, 70 N.W. 30 (1897). Therefore, it was not error for the District Court to submit the present action to a jury. However, as noted in *Peterson v. Estate of Bauer,* 76 Neb. 652, 660, 107 N.W. 993, 996 (1906), and a number of other cases, "when a jury is called in the trial of such a case, *its functions are advisory only* . . . ." (Emphasis supplied.) See, also, *Bank of Stockham v. Alter,* 61 Neb. 359, 85 N.W. 300 (1901); *Simmons v. Baker,* 109 Neb. 853, 192 N.W. 511 (1923); *Oft v. Dornacker,* 131 Neb. 644, 269 N.W. 418 (1936); *In re Guardianship of Warner,* 137 Neb. 25, 288 N.W. 39 (1939).

Upon reading the record of these proceedings, it becomes obvious that the District Court failed to treat the jury's findings as advisory only. At two points in the record the court noted that had it tried the case alone, it would have "come to a different conclusion." It was error under *Peterson, supra,* for the District Court to do so, and, consequently, the appellants' first assignment of error has merit. The effects of this error remain to be seen.

Our action in this appeal does not alter our opinion in the initial appeal of this matter and should not be interpreted as doing so. A county court still retains jurisdiction over matters of this nature following the filing of intestacy proceedings, in light of its authority to hear all matters relating to the decedent's estate. However, upon appeal of a case of this nature, wherein the underlying nature of the "claim" is to compel specific performance of an alleged contract entered into by the decedent, the matter is properly triable as a suit in equity in conformance with §§ 30-1606 and 25-1105.

In light of our decision to treat this action as an

equitable action to compel specific performance of a promise made by the decedent, we must hear and determine the matter de novo. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Cass v. Pense,* 155 Neb. 792, 54 N.W.2d 68 (1952); *Friehe Farms, Inc. v. Haberman,* 191 Neb. 292, 214 N.W.2d 916 (1974). We are also required to "reach an independent conclusion without being influenced by the findings of the trial court except to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying . . . ." *Engel v. Rhen Marshall, Inc.,* 206 Neb. 265, 266, 292 N.W.2d 307, 308 (1980).

It is well established in this jurisdiction that " 'Where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory, and unequivocal.

" 'Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires.

" 'The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract—something that the claimant would not have done unless on account of the agreement and with the direct view to its performance—so that nonperformance by the other party would amount to fraud upon him.

" 'The burden in the light of this rule has devolved upon the plaintiff to prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract.' " *O'Neal v. First Trust Co.,* 160 Neb.

469, 474, 70 N.W.2d 466, 470-71 (1955).

It is equally well established that each case of this nature " 'is to be determined from the facts, circumstances, and conditions as presented therein.' " *Id.* at 475, 70 N.W.2d at 471. It is on the basis of these rules that we must now set forth to review the evidence presented by the parties to this action.

As noted earlier, the appellee alleges that during the last 10 years of the decedent's life, the decedent promised on numerous occasions that he would execute a will leaving the Layton Hardware Store and inventory to the appellee in return for the appellee's long and faithful service as an employee at that store. The evidence adduced by the appellee revealed that he had worked at the hardware store for 50 years and that the decedent had operated the store since 1948, having taken over the business from his father. During this period of time, the appellee stated he had been offered two other jobs, one following the end of World War II and the other in 1950, both of which he declined to accept. According to the appellee, the decedent became aware of these other offers and responded by promising the appellee that the store and the inventory would be his when the decedent reached the age of 65. It was the appellee's contention that he remained at the Layton Hardware Store, working 10 hours per day, 6 days a week, at what he felt were low wages, because of this promise. However, this promise apparently was altered several times prior to the death of the decedent.

In 1969, when the decedent turned age 65, the appellee said the decedent informed him that his wife was ill and that as long as she was in the nursing home, he, the decedent, would remain at the store. The appellee maintains that the decedent reiterated at this time that the appellee was still going to get the store and inventory. Upon the death of the decedent's wife in 1974, the appellee stated the decedent

informed him that he, the decedent, desired to remain at the store but that the store and inventory would be given to the appellee upon the decedent's death. The appellee testified that this last promise was reiterated by the decedent on several occasions after 1974. However, the appellee also noted that the decedent informed him in April 1978 that he would give the appellee the store but would sell him the inventory. The decedent made no further mention of the disposition of the store prior to his death on August 5, 1978.

While the record is replete with allusions to an "agreement" between the appellee and the decedent, the following statement by the appellee best sets forth the terms of any such "agreement" that might have existed: "Well, he [the decedent] agreed if I'd stay on, that's the agreement there, that he would give me the store and the stock if I would stay on and run the store for him." When asked to relate the manner in which he responded to the decedent's promises, the appellee admitted that he merely remained working at the store as he had been doing for years, and at no time did he verbally accept the offer. Although the appellee testified that he had told the decedent several times that he would remain working at the store, he admitted that these statements were not made in conjunction with the decedent's promises to leave him the store if he remained.

In an apparent attempt to support his contention that he had performed his portion of the "agreement," the appellee offered his wage and tax statements for the years of 1965 to 1977. During this period, the appellee's wages ranged from approximately $5,600 in 1965 to $10,700 in 1977, with annual raises of several hundred dollars. As noted, these wages were for a job at which the appellee worked 10 hours per day, 6 days a week, although the record also reveals that the appellee did not work on Thurs-

day afternoons. It is apparent from the appellee's statements on the stand that he considered these to be low wages and that it was implicit in the "agreement" between the appellee and the decedent that the gift of the store and inventory at some point would rectify the situation. However, the appellee was unable to point to a specific instance where the decedent had stated that the gift of the store and inventory was to be in lieu of higher wages.

In addition to his own testimony the appellee offered the testimony of six other persons who had been acquaintances of the decedent. Each witness testified about conversations he had had with the decedent between 1974 and his death in 1978 concerning the appellee and the disposition of the store. Three of these witnesses were only able to relate conversations in which the decedent is alleged to have spoken in broad terms concerning the disposition of the store. For instance, the decedent is alleged to have said that one day the appellee would "take over" and be the "main honcho" when the decedent was gone; or that one of these days the store would be the appellee's; or that the decedent desired to be able to take care of the appellee and would be able to following the death of his wife. However, none of these witnesses was aware of any agreement between the appellee and the decedent by which the appellee would "take over" or be "taken care of," and at least one witness conceded that for all he knew the appellee might have already owned the store at the time he had spoken with the decedent.

The remaining witnesses offered by the appellee were able to attest to the fact that the decedent had told them that he intended to "give" the store to the appellee at some point. However, one of the witnesses could not state the terms by which the appellee was to be "given" the store, and the other two witnesses gave conflicting accounts of the terms of the agreement.

The decedent's housekeeper testified that the decedent had informed her in February 1977 that he, the decedent, intended to give everything to the appellee. However, this witness also stated that the decedent had told her in February 1978 that the appellee would have to pay for the inventory but would be given everything else. Finally, a part-time employee testified regarding an agreement between the appellee and the decedent under which the "gift" of the store would be contingent upon the appellee getting the store's inventory "down to a reasonable or normal level."

With regard to the testimony of these six witnesses concerning conversations they had had with the decedent, we need remind ourselves that " 'Evidence of declarations of a deceased person, concerning a parol contract, does not amount to direct proof of the facts claimed to have been admitted by those declarations. Such evidence, when not supported by other evidence, is generally entitled to but little weight.' " *O'Neal v. First Trust Co.*, 160 Neb. 469, 474, 70 N.W.2d 466, 471 (1955). See, also, *Lunkwitz v. Guffey*, 150 Neb. 247, 34 N.W.2d 256 (1948); *Overlander v. Ware*, 102 Neb. 216, 166 N.W. 611 (1918). In this instance, the only evidence supporting the decedent's alleged declarations is the testimony of the appellee himself, as well as the fact that the decedent remained employed at the store for over 50 years.

Upon reviewing the evidence adduced by the appellee as set forth above, we can only conclude that the appellee has fallen short of carrying his burden of proof in several respects. As noted at the outset, the appellee bore the burden of proving by clear, satisfactory, and unequivocal evidence the existence of an oral contract and the terms thereof. This he has not done.

The evidence adduced by the appellee reveals not one but several agreements with varying terms un-

der which the appellee might have obtained ownership of the Layton Hardware Store. Initially, it is unclear whether the appellee is claiming that the store and inventory were to be his in return for his long and faithful service or merely as an inducement to encourage him to reject other offers of employment. It is equally unclear whether the appellee was to receive the store and inventory upon the decedent reaching the age of 65, or upon the death of the decedent's wife in 1974, or, finally, upon the death of the decedent in 1978. Finally, the evidence produced at trial leaves it uncertain whether the appellee was to be "given" the entire store, including the inventory, or whether the "gift" included only the store and the appellee would have to purchase the inventory, or, finally, whether the "gift" was contingent upon the appellee achieving a "reasonable or normal" level of inventory.

It can hardly be said that by offering such conflicting evidence the appellee has proved the clear, satisfactory, and unequivocal terms of an alleged oral contract to bequeath the Layton Hardware Store and its inventory to him at the decedent's death. " 'It is very proper that the assertion of such a contract, especially when it is claimed to be entirely in parol, should be regarded by the court with grave suspicion, and the establishment thereof required by evidence which clearly indicates the minds of the parties met upon the terms of the contract sought to be established.' " *Rudolph v. Hartung,* 202 Neb. 678, 683, 277 N.W.2d 60, 63 (1979). One can hardly say that the minds of the parties met upon the terms of an oral agreement when the record does not reveal with certainty what the terms of the alleged agreement were.

Furthermore, we are also unable to conclude that the appellee has shown that the acts alleged to have been performed under the agreement " 'were such as were referable solely to the contract sought to be

enforced . . . .' " *O'Neal v. First Trust Co., supra* at 474, 70 N.W.2d at 471. The following exchange between the appellee and his counsel is especially informative in this respect: "Q. . . . After you had these discussions with Mr. Layton that you talked about [discussions concerning the disposition of the store] did you do anything pursuant to these discussions? A. *No.* Q. Did you agree to do anything for Mr. Layton? A. *Not anymore than what I had been doing.* Q. Which is what? A. Working long hours." (Emphasis supplied.) We must note that the appellee continued to be compensated for his services following the making of the purported agreement and received annual raises in that compensation. There is not evidence in the record, other than the appellee's bare assertions, to indicate that the appellee was being undercompensated for the work he was doing. Consequently, the appellee has by his own admission made it impossible to distinguish between his performance rendered under his employment contract and his performance rendered under the alleged agreement at issue herein. We are unable to draw such a distinction and therefore must conclude that the appellee has failed to prove that his performance following the making of the alleged agreement was " 'not such as might have been referable to some other or different contract.' " *O'Neal v. First Trust Co., supra* at 474, 70 N.W.2d at 471. See, also, *Theobald v. Agee,* 202 Neb. 524, 276 N.W.2d 191 (1979).

We therefore conclude from a de novo review of the record that the appellee has failed to satisfy his burden of proof both as to the existence of any oral contract to make a will and as to his performance being solely referable to such alleged agreement. Accordingly, the judgment of the District Court is reversed and the action ordered dismissed.

REVERSED AND DISMISSED.

STATE EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. DONALD C. GLESS, RESPONDENT.

324 N.W.2d 252

Filed August 20, 1982. No. 82-569.

Original action. Judgment of disbarment.

PER CURIAM.

This matter was submitted upon a complaint against Donald C. Gless of Fremont, Nebraska, made by the counsel on discipline of the Nebraska State Bar Association, and his voluntary surrender of license and consent to the entry of a disciplinary order against him.

Upon due consideration, it is ordered by the court, based upon the charges described in the complaint and the respondent's voluntary surrender of his license, waiver of disciplinary proceedings, and consent to the entry of an order of disbarment, that said Donald C. Gless be, and hereby is, disbarred.

Dated this 20th day of August 1982.

JUDGMENT OF DISBARMENT.

LEO A. DALY COMPANY, APPELLANT, V. OMAHA-DOUGLAS PUBLIC BUILDING COMMISSION, APPELLEE.

324 N.W.2d 252

Filed September 3, 1982. No. 44069.

1. **Contracts.** It is the general rule under Nebraska law that the proper construction of a written contract is a matter of law to be determined by the court.
2. _____. An integrated agreement is a writing or writings constituting the final or complete expression of an agreement. Whether there is an integrated agreement is to be determined by the court.
3. **Judgments: Appeal and Error.** A proper judgment will not be reversed even if the trial court did not give the right reason for its rendition.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Stephen L. Gerdes of Matthews & Cannon, P.C., for appellant.

Herbert M. Fitle, City Attorney, and Charles K. Bunger, for appellee.

Heard before MCCOWN and HASTINGS, JJ., and BRODKEY, J., Retired, and STUART and HIPPE, D. JJ.

PER CURIAM.

Plaintiff, Leo A. Daly Company, appeals to this court from the judgment entered by the District

Court for Douglas County, following trial to the court sitting without a jury, in favor of the defendant, Omaha-Douglas Public Building Commission, in an action brought by the plaintiff to recover for extra services and expenses performed by the plaintiff in connection with the construction of the Omaha-Douglas County Civic Center, or, to be more specific, for services and expenses of the plaintiff in the subsequent repair or rebuilding of a slurry wall along Farnam Street which had collapsed during the course of construction of the civic center. We affirm the judgment of the District Court.

By way of background, the record reveals that on October 9, 1968, Daly and the Omaha-Douglas County Civic Center Corporation entered into an agreement in which the civic center employed Daly to serve as an architect for the construction of the Omaha-Douglas County Civic Center, which contract was subsequently assigned to the Omaha-Douglas Public Building Commission. This contract for architectural services shall hereinafter be referred to in this opinion as the 1968 contract. As previously stated, on January 19, 1974, almost 6 years after the execution of the 1968 contract, a slurry wall along Farnam Street and adjacent to the civic center collapsed during the course of the construction. Almost immediately thereafter, to wit, on January 30, 1974, the various parties who had performed work or supplied materials for the construction of the civic center entered into an agreement to cooperate for the purpose of minimizing any delay in the construction of the building and any losses that might ultimately result therefrom. This agreement was signed by the Omaha-Douglas Public Building Commission, County of Douglas, City of Omaha, Leo A. Daly Company, Metropolitan Utilities District, P & Z Co., Inc., and Hawkins Construction Company, and will hereafter be referred to in this opinion as the seven-party agreement, or as the 1974 agreement.

Subsequent to the execution of the seven-party agreement above referred to, the plaintiff performed corrective work on the collapsed slurry wall, and the action brought by plaintiff in the District Court was for the purpose of recovering its labor costs and outside consulting costs with reference to the replacement of that wall. Plaintiff's action did not involve recovery on a quantum meruit theory, nor did it involve claims of unjust enrichment, those doctrines not having been pleaded.

It will be helpful at this point to examine the pleadings upon which the case was tried before the district judge. In its second amended petition, filed in the District Court for Douglas County on October 6, 1978, plaintiff alleges the execution of the October 9, 1968, agreement and its subsequent assignment to the defendant. The petition further alleges that on January 30, 1974, following the collapse of a portion of the foundation wall on January 19, 1974, the plaintiff, defendant, and others entered into the seven-party agreement, and a copy of that agreement is attached to the petition. Plaintiff specifically alleges as follows: "Plaintiff performed all of its duties under the contract of October 9, 1968 including extra services and disbursements incidental to unusual circumstances as provided in sections III (B) of Exhibit 'A' and *as required by Exhibit 'D'*." (Emphasis supplied.) Exhibit D, referred to, is the seven-party agreement.

Plaintiff further alleges that the extra services were rendered and expenditures made at the request and with the approval of the defendant; that the defendant is the proper party to bring a suit to determine the liability for the collapse, but has not done so; and, further, that plaintiff submitted to defendant a statement for the extra work but that defendant has refused payment thereof.

It is to be noted that the plaintiff in its petition pleads both the 1968 contract and the 1974 agree-

ment and alleges that the work was performed under both contracts, thereby admitting judicially in its pleading that the work was performed under the 1974 agreement as well as under the 1968 contract.

The 1968 contract between the Commission and the architect sets out the duties of the architect and divides such duties into basic services for which an agreed fee was to be 6 percent of the construction costs, to be paid monthly as certain levels of construction were reached. This case does not involve this type of charge. However, the 1968 contract also provides for the payment of extra services of the architect "if performed due to unusual circumstances," and provides that the extra expense shall be paid for by the nonprofit corporation as a "Multiple of Direct Personnel Expenses," including, generally, making planning surveys and special analyses; making measured drawings of existing construction; revising previously approved drawings or specifications to accomplish changes ordered by the nonprofit corporation; consultation concerning replacement of any work damaged by fire or other cause during construction, and furnishing professional services of the type set forth in the preceding paragraph of the original contract as may be required in connection with the replacement of such work; arranging for the work to proceed should the contractor default due to delinquency or insolvency; providing for contract administration and observation of construction; preparing "as-built" drawings, showing construction changes in the work, etc.; and the cost of all reproductions of drawings, and the cost of any special consultants, etc.

In its brief on appeal plaintiff contends that it is entitled to recover its expenses because of the provisions of the 1968 contract, which it claims is applicable. Defendant, however, claims that the work in reconstructing the slurry wall was performed under the provisions of the 1974 agreement and not under

the 1968 contract, and that plaintiff's right to recover depends upon the terms and provisions of the seven-party agreement, a copy of which is attached to plaintiff's second amended petition and was also received in evidence during the trial. Because of the importance of this issue, we discuss this latter agreement in some detail.

The purpose of the seven-party agreement entered into by all the parties engaged in the construction of the civic center is well summarized in the opening paragraphs of that agreement, and we quote those paragraphs in full: "WHEREAS, the Omaha Douglas Public Building Commission, hereinafter called 'Commission', engaged Leo A. Daly Company, hereinafter called 'Daly', to design and supervise the construction of a building designated in the construction contract as The City of Omaha and Douglas County Administration Building, and now known as the Omaha Douglas Civic Center, to be located on the block bounded by 18th and 19th Streets and by Farnam and Harney Streets, Omaha, Nebraska; and,

"WHEREAS, the City of Omaha, hereinafter called 'City', and Douglas County, hereinafter called 'County', each have representatives among the membership of said Commission; and,

"WHEREAS, the Commission awarded the general contract for the construction of said building to Hawkins Construction Company, hereinafter called 'Hawkins'; and,

"WHEREAS, Hawkins entered into a subcontract with P & Z Co., Inc., for the construction of the slurry wall system surrounding the building; and

"WHEREAS, a casualty occurred on January 19, 1974 involving a partial collapse of the North slurry wall along Farnam Street, a partial collapse of the pavement of Farnam Street, the breaking of two water mains owned and maintained by Metropolitan Utilities District, the breaking of a storm sewer and

breaking away of the subgrade of Farnam Street owned and maintained by the City of Omaha, and damages to material and equipment installed, stockpiled and located in the basement of the building and the excavation; and,

"WHEREAS, the cause or causes of said casualty is undetermined and is under investigation; and,

"WHEREAS, the parties hereto, each denying liability for said casualty but each wishing, without admitting liability for any part of said casualty and without prejudice to their individual rights and positions with respect thereto, to cooperate for the purpose of minimizing any delay in the construction of said building and any losses that may ultimately result therefrom:

"NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, the parties hereto mutually agree as follows:

"1. Each party may, through such representatives, including experts, as it may wish, conduct its own separate investigation of the cause or causes of said casualty at the site of the occurrence; . . . .

"2. Daly, at its own expense *pending final determination of liability for the casualty as settled and compromised among the parties or as finally determined by courts of competent jurisdiction, shall*:

"(a) If necessary, in Daly's opinion, design a support system for the West slurry wall along 19th Street;

"(b) Design a support system for Farnam Street, including stabilization of the paving;

"(c) Design a replacement wall for the collapsed North section of the slurry wall system;

"(d) Investigate and designate any remedial work required; and,

"(e) Instruct Hawkins when to remove the debris and remanants [sic] and instruct Hawkins as to the sequence in which they are to be removed as provided hereinabove." (Emphasis supplied.)

There is a similar provision in the agreement affecting the contractor Hawkins, and paragraph 3 of the seven-party agreement provides with reference thereto: "3. Hawkins, at its own expense pending final determination of liability for the casualty as settled and compromised among the parties or as finally determined by courts of competent jurisdiction, shall:

"(a) Perform the construction work directed by Daly; and

"(b) Remove and preserve the debris and remanants [sic] as directed by Daly as hereinabove stated; provided however, that if a party wishes to have any item or items removed and preserved, the removal and preservation of which requires unusual equipment or skill, the removal and preservation of said item or items shall be arranged for and be done at the expense of the requesting party."

The agreement then provides with reference to the duties of the city that the city shall keep 19th Street closed to vehicular traffic between Harney and Farnam Streets until the last slab of concrete is poured, and shall also keep such parts of Farnam Street closed to vehicular traffic between 18th and 20th Streets as public safety requires.

We particularly call attention to paragraph 5 of the 1974 agreement, and set it out verbatim, as we believe that it is of great value and assistance in determining the meaning and purpose of the seven-party agreement. That provision is as follows: "5. *It is specifically understood and agreed that the above and foregoing agreement is entered into without prejudice to any right of any party hereto, each party denying liability for the aforedescribed casualty and each party preserving all of its legal rights against every other party hereto and against all other persons, associations, partnerships, corporations or entities whatsoever.*" (Emphasis supplied.)

To this point we have discussed, in brief, the con-

tents of plaintiff's second amended petition and the two contracts involved in the action attached to and incorporated in said petition. The defendant herein filed an amended answer to plaintiff's second amended petition on August 7, 1980, admitting certain of the allegations of the petition, specifically admitting that plaintiff and defendant, and others, entered into the seven-party agreement, denying certain other allegations contained in plaintiff's petition, and specifically alleging: "FURTHER ANSWERING, Defendant affirmatively alleges that the Agreement, Exhibit 'D' mentioned hereinabove, precludes Plaintiff from recovering alleged fees from Defendant until final determination of liability for collapse of the foundation wall. Such liability is presently being litigated in the following pending actions: [then follow the titles and docket numbers of five specific cases]." Finally, in its concluding paragraph defendant alleges: "Defendant, for further answer to the Second Amended Petition of the Plaintiff heretofore filed herein, alleges and states that any work performed by the Plaintiff in connection with rebuilding of the slurry wall after its collapse on January 19, 1974 was done voluntarily by said Plaintiff for its own benefit, under the terms of Exhibit 'D' [the seven-party agreement] attached to Plaintiff's Second Amended Petition, and without any request of any kind or nature by this Defendant." The defendant then prays that plaintiff's second amended petition be dismissed with prejudice and that it recover its costs expended in the action.

On October 31, 1980, the plaintiff filed its reply to the amended answer of the defendant, denying, among other things, that the liability of the plaintiff to the defendant is now being litigated in the cases set out in defendant's answer, but alleging that the defendant has voluntarily withdrawn therefrom and that the pending cases cannot, as between plaintiff and defendant, determine liability. Plaintiff also al-

leges that the seven-party agreement does not relieve the defendant of all liability to the plaintiff, but only defers it, and further alleges that the defendant is estopped from reliance on the agreement on account of its failure to seek the determination referred to in the seven-party agreement. Finally, plaintiff alleges that defendant has permitted the right of action to determine "liability" to be barred by the statute of limitations, and also alleges that the seven-party agreement was unenforceable because of want of consideration.

The foregoing constitutes a resume of the contents of the pleadings of the parties and the two contracts in question introduced at the trial, following which, as previously stated, the District Court judge hearing the matter found for the defendant and against the plaintiff.

A review of the record in this case convinces us that the work performed by the plaintiff in connection with the reconstruction of the collapsed slurry wall was performed under the provisions of the seven-party agreement and not the 1968 contract. Lest it be argued that the two contracts constitute an integrated contract, we point out that Restatement (Second) of Contracts § 209 at 115 (1981) defines "integrated agreements" as follows: "(1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.

"(2) Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.

"(3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression."

We believe in the instant case that the second contract, the seven-party agreement, cannot in any sense be construed as part of the original architectural contract, for the reasons that the 1974 agreement was entered into almost 6 years following the 1968 contract and the two contracts were not between the same parties, although two of the parties were the same as in the 1968 contract. Black's Law Dictionary 726 (5th ed. 1979) states in its definition of an "integrated contract": "An agreement is integrated where the parties thereto adopt the writing or writings as the final and complete expression of the agreement and an 'integration' is the writing or writings so adopted."

Clearly the two contracts involved in this case cannot be considered as an integrated contract, but we are convinced that the seven-party agreement was a separate and independent contract, not connected with the 1968 contract. Plaintiff admits in its petition that its work was "required" by the terms of the 1974 agreement. It is the general rule under Nebraska law that the proper construction of a written contract is a question of law to be determined by the courts. *Dockendorf v. Orner,* 206 Neb. 456, 293 N.W.2d 395 (1980). We interpret that agreement as providing, as set out in paragraph 2 thereof, that Daly (and also, in paragraph 3, Hawkins) shall perform the required repair work as set out in said sections "pending final determination of liability for the casualty as settled and compromised among the parties or as finally determined by courts of competent jurisdiction."

It is clearly implied in said agreement that once the question of liability for the casualty is determined in the manner specified, the parties may thereafter proceed to recover their damages against the party so found liable. There is absolutely nothing in the record before this court indicating a final determination of liability for the casualty, ei-

ther as settled or compromised or as finally determined by any court of competent jurisdiction. We need go no further in disposing of this appeal.

We have examined the other errors and issues argued by plaintiff and find that they are without merit.

In its judgment in this case the District Court held that the plaintiff was not entitled to recover under either the 1968 contract or the 1974 agreement, its reasoning being that under the 1968 contract, as the court interpreted it, payment for other work must be requested and agreed to by the defendant. The court found that there was no evidence whatsoever that the defendant agreed to pay plaintiff for the additional work. The court also found, with reference to the seven-party agreement, that the defendant "did not make any agreement to pay for anything or, indeed, to do anything."

As is apparent from what we have stated earlier in this opinion, we rest our decision on other grounds. However, it has long been the rule in this jurisdiction that a proper judgment will not be reversed even if the trial court did not give the right reason for its rendition. *Strauss v. Square D Co.,* 201 Neb. 571, 270 N.W.2d 917 (1978); *Riederer v. Siciunas,* 193 Neb. 580, 228 N.W.2d 283 (1975). We conclude that the District Court reached the right result in this case and that its judgment should be, and hereby is, affirmed.

AFFIRMED.

HIPPE, D.J., concurring in the result.

With all respect, the opinion's reliance on the seven-party agreement is misplaced.

First, the architect's attorney made it clear to the trial judge that the original agreement, not the seven-party agreement, was its claimed basis for recovery. The same position was taken in the briefs and argument on appeal. It seems that the plaintiff's attorney, the defense attorney, the trial judge,

and now the five judges on this panel all agree on one point: the plaintiff cannot recover because of anything in the seven-party agreement.

It seems odd, therefore, that pages and pages of the opinion discuss that agreement and conclude it does not form a basis for recovery. No one ever said it did.

Second, the parties to the seven-party agreement wanted it to be "without prejudice to any right of any party hereto." The opinion, in contrast, kicks the plaintiff out of court because of it.

The background for the agreement shows why it should be given no effect one way or the other.

To build this slurry wall, the contractor poured the wall with concrete and reinforced it by connecting anchors in the ground to the wall with cables. After excavating inside, the serrated clamps holding the cables apparently slipped and the wall caved in. A street had fallen, sewer lines were broken, the building under construction was in jeopardy, and the walls had to be replaced under different circumstances than when they were originally designed and built. In addition, the cause of the collapse had to be investigated, and all parties wanted a complete and fair investigation.

In this setting, the seven parties agreed to ground rules for investigating the collapse and assigned responsibilities to get the streets open, the sewer running, and the building construction back on track.

It is clear that this agreement studiously proceeds upon three bases. First, no one admits any fault for the collapse. Second, no one agrees to pay a dime to anyone for anything. Third, all parties did not want the agreement to prejudice any right, and each "preserv[ed] all of its legal rights against every other party hereto and against all other[s] . . . ." I therefore believe it should be given its expected ineffectiveness and not be the basis for deciding this case.

The third reason the seven-party agreement should have nothing to do with the result of the case involves some confusing pleading.

The architect anticipated the defense that this agreement would be used to claim that its extra work was volunteered and that it expected no payment for it. This is because the agreement has the following language: 'Daly, at its own expense pending final determination of liability for the casualty as settled and compromised among the parties or as finally determined by courts of competent jurisdiction, shall: [redesign the wall].''

The problem comes from the fact that the architect had no way to see that the liability for the casualty could be determined. It was not the purchaser of any product and thus able to claim a breach of warranty. It was not the user of any product and thus able to claim a defective product. It was not a foreseeably damaged person to claim that any work was negligently done. Only the defendant owner, the contractor, or the subcontractor for the wall could make any of those claims. Since they did not do it, after all these years, Daly claimed that the owner was estopped to use the quoted language as a shield. It would permit the defendant to profit from neglecting to pursue the alleged wrongdoers.

This is the reason the seven-party agreement found its way into the plaintiff's pleading. It was explained at length to the trial court during the trial and to this court in briefs and argument. It was never intended that the plaintiff was claiming it did the extra work because of that agreement. It has maintained throughout that it did the work because of the original 1968 architect's agreement, and that agreement is the one it claims entitles it to a recovery.

Therefore, I am of the opinion that the case should be decided by analyzing the original 1968 architect's agreement and not by reliance upon the 1974 agreement.

One good reason for doing so is that the 1968 agreement is the only agreement between the plaintiff and the defendant alone. It is the agreement that outlines who should pay for what, and on what basis. This lawsuit involves a dispute between an architect and a building owner for the payment of extra services performed after a building construction project was well underway. The 1968 agreement is the written contract that deals with those points.

It provides that the architect is obliged to perform extra services above and beyond the design, drawings, bid letting, and building supervision. The contract also provides that the owner will pay for that extra work by reimbursing the architect 2.5 times actual out-of-pocket labor time for architectural employees, and reimburse for outside consulting fees that the architect had to pay. The clause providing for this reimbursement is one dealing with many extra services that may come up. It deals with extra work made necessary to replace parts of the job that were damaged by fire or other cause. Other clauses for extra work deal with other kinds of extra work made necessary for various reasons.

Some of the extra-work clauses expressly provide that the architect has to ask first before going ahead and doing the extra work. Some of the clauses do not say anything about asking first. The clause for casualty, relied upon by plaintiff, is one of those silent ones.

The point actually litigated to the trial court was whether the architect was required to ask first before it could do this extra work and expect payment for it. The architect claimed that it did not have to; the owner claimed that it did have to. The owner won.

There was no issue that the architect actually got prior approval before doing the work. It simply did not do it. As I have already explained, the seven-party agreement should not be used as a prior ap-

proval because that would give it effect on this dispute, and it should not have any effect.

I am of the opinion that the architect would have to ask first before being entitled to pay for the extra work done. The clause is silent on this point, but it refers to the preceding clause, which does require prior approval. The contract has language in other parts that requires prior approval before the architect is entitled to recover out-of-pocket expenses for hiring outside consultants. Also, to hold otherwise would give the architect a blank check to do whatever extra work it deemed necessary and the owner would have no way to control costs if it did not have a veto over extra expenses.

This is the reasoning given by the trial judge in deciding that the plaintiff was entitled to no extra fee. It seems adequate reasoning to me. It simply finds as a fact that the acts performed by the architect do not fit the requirements of the contract to entitle it to the claimed reimbursement. That is quite a different thing from legally construing a contract.

The court's opinion claims this case stands for three rules of law.

First, it claims that construction of contracts is a judge's task, not a fact finder's job. The contracts here do not call for any construction. The meaning is not ambiguous, just complicated. If this case had been tried to a jury, the holding would mean it should have been decided by the court as a matter of law. That rule will take a lot of juries out of a lot of breach of contract cases. All such cases have one side claiming that it did what was called for by the contract and the other side claiming contra. This fact of litigation should not subject cases involving fact issues to 2 days in court, 1 at the trial and another on appeal.

The second rule of law deals with the rule of integrated contracts. That rule simply defines when the parol evidence rule applies. No parol evidence

was used in this case, and it was not an issue in any way.

I would respectfully suggest that this case stands for no rule of law at all. It simply involves applying extraneous facts to a complicated written contract and concludes that the facts do not fit the rights defined by that contract. Anything further is dictum.

I agree that the trial court's decision should be affirmed, but I cannot agree with the reasons given in the court's opinion for doing so.

RALPH OLSON, EUGENE OLSON, AND LEO SINSEL, APPELLANTS, V. DEAN BONHAM AND CONNIE BONHAM, HUSBAND AND WIFE; NEBRASKA TURKEY RANCH, INC., A CORPORATION, ET AL., APPELLEES, KEARNEY COUNTY, NEBRASKA, ET AL., INTERVENORS-APPELLANTS.

324 N.W.2d 260

Filed September 3, 1982. No. 44360.

1. **Adverse Possession: Highways.** By continuous adverse use under claim of right for 10 years the public may acquire a highway along a section line.
2. **Adverse Possession: Highways: Easements.** The extent and nature of an easement is determined from the use made of the property during the prescriptive period, and the width of the public highway acquired by prescription must be determined as a question of fact by the character and extent of the use or the amount dedicated to public use, but it may be more or less than the width of a public highway as prescribed by statute.
3. **Easements: Words and Phrases.** "Extent," within the term extent of easement claimed in land as right-of-way for a road, means the width.
4. **Adverse Possession: Highways.** If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path, but the right extends to such width as is reasonably necessary for public travel.
5. **Political Subdivisions: Highways.** A county cannot, even under the applicable statutes, open a section line road without giving notice to the landowners, hearing the landowners' claim for damages,

or appointing appraisers and making provisions for payment of the landowners' damages, and if it attempts to do so it is a trespasser.

6. **Adverse Possession: Highways.** Where a prescriptive right for highway use has been acquired along a section line, the right extends to the beaten path and such width as is reasonably necessary for public travel. It does not extend to the statutory width unless that width has been established by the use.

Appeal from the District Court for Kearney County: FRED R. IRONS, Judge. Affirmed.

Jacobsen, Orr & Nelson, for appellants Olson et al.

Brock & Seiler, for appellee Nebraska Turkey Ranch.

Jerry C. Stirtz, Kearney County Attorney, and Thomas G. Lieske, for intervenors-appellants Kearney County et al.

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

CLINTON, J.

Plaintiffs, Ralph Olson, Eugene Olson, and Leo Sinsel, commenced this action in equity against the defendant Nebraska Turkey Ranch, Inc., and others, to establish the rights of the parties in using the "disputed road" referred to in the petition.

The petition prayed for injunctive relief against the defendant's barricading the road and a declaration that a public road existed. The petition alleged that "the disputed road lies thirty feet along each side of a Kearney County section line and is under the above passed resolution, a section line road which had been maintained and used by the public as a road from its creation over ninety years ago until May of 1977." The reference to a resolution, enacted by the county board on June 19, 1882, is as follows: " 'On motion, all section lines in Kearney County are declared public highways and road supervisors are ordered to open and work on the same as provided by Section 46, Page 44, Compiled Stat-

utes, 1881.' " The petition further alleged facts showing the road had been established by adverse use. Paragraph XVI of the petition stated as follows: "That the disputed road will not be maintained by the County as a section road unless this Court declares that said disputed road is a public road and maintainable by Kearney County as a public road." Kearney County intervened in the action, asking for a declaration that the "disputed road" "is a public road; that the same is not less that [sic] forty, nor more than sixty-six feet in width; permanently enjoining the Defendant, Nebraska Turkey Ranch, Inc., from barricading or blocking said road in any manner whatsoever; declaring any barricade now exsisting [sic] to be a public nuisance and ordering the same to be removed and abated . . . ."

After trial the court found "that the Plaintiffs have failed to prove the relief stipulated to i.e. Adverse Possession.

"As between the Principal Parties to this litigation the five elements required to prove adverse possession have not been shown by the Plaintiffs, and the Cross-Petition of . . . Kearney County is without merit."

The defendant ranch is the record title owner of the northwest quarter and the west half of the northeast quarter of Section 26, Township 8, Range 14, and of the south 27½ acres of the southwest quarter of Section 23, Township 8, Range 14; thus it is record title owner of property on each side of the section line along which the "disputed road" allegedly runs.

The plaintiffs introduced evidence showing that from 1913 to at least 1938 a trail or track road existed along the section line between Sections 26 and 23. Other evidence indicated the trail road was used until 1977. The witnesses' testimony indicated that the road's visible marks consisted of "grooves" from vehicle wheel tracks. While the tracks' exact path was not shown, it was described as "nearly" lined

up with an extension of a now-established oil mat and gravel section line road to the west. Plaintiffs' testimony indicated that the general public used the trail and that cattle were sometimes driven along it.

No evidence showed that the county ever maintained the "disputed road." Plaintiffs did not contend that the resolution of the county board described in the petition was ever implemented by the appointment of appraisers and determination of damages as required by the provisions of Comp. Stat. Ch. 78, §§ 46 and 21 et seq. (1881), or successor statutes, to wit, Comp. Stat. §§ 39-145 and 39-119 (1929), and Neb. Rev. Stat. § 39-122 (Reissue 1952), or the present statute, Neb. Rev. Stat. § 39-1410 (Reissue 1978).

In 1977 the plaintiff Ralph Olson, after having been absent from the neighborhood since 1938, acquired land nearby and for convenience desired to use the "disputed road." He and Sinsel brought discs and earthmovers to the area and began to open the road. At that time the trail was overgrown with vegetation and could not be seen. Olson took this action on his own authority and without the sanction of the county commissioners.

Defendant presented the following testimony. A former owner of the land, now owned and occupied by the defendant, testified that he acquired the property in 1942 and sold it in 1956. At the time of trial he lived within ¼ mile of the property. From 1942 he farmed the land described as the "disputed road." He knew of no trail along the section line. He never fenced off the section line because he said there was no need to. When he acquired the property, a shelterbelt existed along the south side of the section line and that shelterbelt still exists.

The defendant acquired the land in about 1960, using it for raising turkeys. A former part owner and officer of the corporation testified that from 1960 to 1972 he saw no public travel along the section line.

The land north of the shelterbelt was then all under cultivation. The turkey pens cross the section line to the north. No trail existed at that time.

The present manager of the ranch, who joined the corporation in 1972, testified that he knew nothing about the situation before 1972. As to the period within his knowledge, he testified that just north of the shelterbelt is a trail which is the driveway to the ranch. The turkey pens run through the shelterbelt and across the section line. The shelterbelt shades the birds. When the operators check the pens for dead birds they throw the turkeys across the fence and onto the driveway trail and then pick them up with a truck. During the time he has managed the ranch, from 1972 to the time of trial, the only people he has seen using the road are occasional hunters. In the spring of 1977 he observed machinery in the fields and discovered that the plaintiff Eugene Olson and others were putting a road in. This was the first knowledge he had of a claim of an existing or established road. At that time he had the road barricaded.

The district judge made a personal inspection of the premises here involved.

The evidence, if believed by the district judge, was clearly sufficient for a finding that a public road existed at least to the extent of the trail. However, the plaintiffs and intervenors seek more in this case. They ask for a determination that a public road has been established by adverse use to the full width of a county road established by statute.

The governing principles are these. By continuous adverse use under claim of right for 10 years the public may acquire a highway along a section line. *Brym v. Butler County,* 86 Neb. 841, 126 N.W. 521 (1910). The extent and nature of an easement is determined from the use made of the property during the prescriptive period, and the width of the public highway acquired by prescription must be deter-

mined as a question of fact by the character and extent of the use or the amount dedicated to public use, but it may be more or less than the width of a public highway as prescribed by statute. "Extent," within the term extent of easement claimed in land as right-of-way for a road, means the width. If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path, but the right extends to such width as is reasonably necessary for public travel. *State ex rel. Game, Forestation & Parks Commission v. Hull,* 168 Neb. 805, 97 N.W.2d 535 (1959).

The plaintiffs and intervenors seem to urge that *Plischke v. Jameson,* 180 Neb. 803, 146 N.W.2d 223 (1966), and *State ex rel. Game, Forestation & Parks Commission v. Hull, supra,* stand for the proposition that when a prescriptive right for highway use has been acquired along a section line, the right extends to the full width of a statutorily established road. An examination of these two cases indicates they do not stand for that proposition. There are three opinions in *Plischke v. Jameson:* 180 Neb. 803, 146 N.W.2d 223 (1966); 181 Neb. 887, 152 N.W.2d 119 (1967); and 182 Neb. 153, 153 N.W.2d 359 (1967). In that case there were two roads overlapping, one a statutorily established road of 66 feet, the other a prescriptive road claimed to be 18 feet in width which at points went beyond the 66-foot established road right-of-way. The court held that the establishment of a statutory road did not disturb the prescriptive right as to the portion that extended beyond the statutory road. The court held that the evidence justified a prescriptive road 16 feet in width. In *State ex rel. Game, Forestation & Parks Commission v. Hull, supra,* the court held that the extent of the right is fixed and determined by the use in which it originated.

The plaintiffs argue for a width of 60 feet. Apparently in this connection they rely upon the provisions

of Neb. Rev. Stat. § 39-104 (Reissue 1952) and the case of *Brym v. Butler County, supra.* The statutory limit during the prescriptive period has varied from 66 to 40 feet. In *Brym v. Butler County, supra,* the parties stipulated that if the court found that a prescriptive road existed, it should be 40 feet in width.

The resolution enacted by the board of commissioners in 1882 does not help the plaintiffs and intervenors. A county could not, even under the original statutes, open a section line road without giving notice to the landowners, hearing the landowners' claim for damages, or appointing appraisers and making provisions for payment of the landowners' damages, and if it attempts to do so it is a trespasser. *Scott's Bluff County v. Tri-State Land Co.,* 93 Neb. 805, 142 N.W. 296 (1913); *Henry v. Ward,* 49 Neb. 392, 68 N.W. 518 (1896); *Chicago, B. & Q. R. Co. v. Douglas County,* 1 Neb. (Unoff.) 247, 95 N.W. 339 (1901).

The evidence does not establish that a prescriptive right was acquired to the extent of either 40 feet or 66 feet, and, accordingly, the District Court was justified in refusing the requested relief.

AFFIRMED.

MEISINGER EARTH MOVING, INC., APPELLANT AND CROSS-APPELLEE, V. THE STATE OF NEBRASKA ET AL., APPELLEES AND CROSS-APPELLANTS, NEMAHA NATURAL RESOURCES DISTRICT AND NEMAHA COUNTY, NEBRASKA, INTERVENORS-APPELLEES AND CROSS-APPELLANTS.

324 N.W.2d 387

Filed September 17, 1982. No. 43844.

1. **Contracts: Damages.** Reasonable profits may be allowed as part of an award of damages in a breach of contract action where the

damages are granted as part of the original contract price, but those calculated on the excess damage award are ordinarily barred.

2. _____: _____. In an equitable adjustment case the allowance of profit is not mandatory but is discretionary, and in an appropriate case profit may be denied altogether, even profit computed on the original contract basis.
3. **Damages: Proof.** The plaintiff has the burden to prove the amount of damages with as much certainty as the case permits.

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

Young & White, for appellant.

Paul L. Douglas, Attorney General, and Robert G. Avey, for appellees State et al.

Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee Nemaha NRD.

Charles D. Hahn, Nemaha County Attorney, for appellee Nemaha County.

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

FUHRMAN, D.J.

This is an appeal by Meisinger Earth Moving, Inc., from a judgment of the District Court of Lancaster County entered in its favor in the sum of $17,387 against the appellee State of Nebraska. This action originated as a claim filed against the State with the Director of Administrative Services, which was denied and then appealed to the District Court.

The action arose out of a contract entered into between the state Department of Roads, the county of Nemaha, and the appellant. The contract provided for the construction of a floodwater retarding structure which would also serve as a county road for Nemaha County. The claim is for damages resulting from the failure of the Department of Roads to furnish, as required by the specifications, sufficient and suitable borrow material and a specific alter-

nate borrow area shown on the plans for construction of an earth embankment.

Nemaha County intervened in the action in the District Court because it was a party to the contract. Nemaha Natural Resources District intervened in the action because it has an agreement with Nemaha County and the State which provides for indemnification in certain instances.

Motions for new trial were filed by all parties and were all overruled. Meisinger takes this appeal from the overruling of its motion for new trial and the State, Nemaha County, and Nemaha Natural Resources District cross-appeal. We affirm.

The State and Nemaha County entered into a contract with Meisinger on July 6, 1977, for the construction of a floodwater retarding structure. The structure would also serve as a county road, replacing a county bridge which had previously washed out. The trial court found that the contract was legal and binding. The detailed plans for the project, which were prepared by the U.S. Department of Agriculture Soil Conservation Service, include the provision for an alternate borrow area which is a part of the contract. The trial court found that the contractor relied on the alternate borrow area as designated in the plans at the time it submitted its bid proposal. The alternate borrow area was to be made available to Meisinger within the discretion of the state engineer, and the trial court found that the state engineer on more than one occasion informed Meisinger that the alternate borrow area must be made available to it. The trial court further found that the alternate borrow area was not made available to Meisinger.

The plans call for the excavation and placement of 127,330 cubic yards of compacted Class A fill which Meisinger bid at $.54 per cubic yard. Actually, 134,023 cubic yards of compacted fill were placed in the dam embankment. The alternate borrow area,

if it would have been made available to Meisinger, could yield approximately 24,000 yards of compacted fill.

Meisinger began construction on July 19, 1977, and on November 18, 1977, shut down the operation because of weather conditions. During construction there was an excessive rainfall which affected Meisinger's ability to complete the job. During the spring and summer of 1978 there again was excessive rainfall which prevented Meisinger from resuming work until September of 1978. The wet conditions brought about by the excessive rainfall inhibited the ability of Meisinger to complete the job and ultimately caused it to incur additional cost.

The trial court found that Meisinger was required to incur additional cost from September 25, 1978, until October 27, 1978, because it was not afforded the opportunity to utilize the alternate borrow area and had to remove fill from the conservation pool under adverse conditions. The trial court further found that a written work order, as required by the contract, to incur additional cost by Meisinger was not necessary since the State directed Meisinger to go back into the conservation pool under adverse conditions and remove the fill, thereby waiving any right that the State had to require a written work order.

The trial court found that the State is liable to Meisinger for a portion of the additional cost incurred by Meisinger from September 25, 1978, until October 27, 1978. The trial court further found that the proper measure of damages is the actual cost incurred by Meisinger because of the work it was required to perform from September 25, 1978, until October 27, 1978, less the amount it would have cost Meisinger to remove the fill from the alternate borrow area if it had been made available. The court further found that Meisinger is entitled to a reasonable allowance for overhead, but not for profit. The trial court found, in its discretion, that this

was not an appropriate case for allowance of profit.

Meisinger had claimed that two of its model 860 scrapers were damaged from use under adverse conditions resulting from a breach in the contract and failure to provide the alternate borrow area. The trial court found that Meisinger had not proven damages for excessive overhauls to the two scrapers and that the evidence which Meisinger submitted was speculative. The trial court further found that there was no proof that the repairs to the equipment were the proximate result of the additional work which Meisinger performed in the conservation pool.

The trial court found that if the alternate borrow area would have been made available, 24,000 cubic yards of compacted fill could be removed from the alternate borrow area. The court further found that at the time Meisinger requested the alternate borrow area and the state engineer agreed that it should be made available, there were 37,000 compacted yards of fill needed to complete the structure. The trial court further found that Meisinger was required to remove 13,000 compacted yards of fill from the conservation pool under adverse conditions, even if the alternate borrow area would have been made available.

The trial court found that Meisinger was entitled to recover additional costs incurred as follows:

Labor and maintenance	$ 8,896
Insurance	1,779
Operating expense	11,256
Equipment	22,863
	$44,794
Overhead 10 percent	+4,479
	$49,273

Less 35 percent which represents the 13,000 compacted cubic yards of fill required to be moved from the conservation pool even if the alternate

borrow area was available	-17,246
	$32,027
Less cost of moving 24,000 cubic yards of fill from alternate borrow area if it had been available	-14,640
Total Damages	$17,387

A review of the record indicates that the trial court's factual findings are supported by the record and are not clearly erroneous. They are entitled to affirmance.

Meisinger claims that it should be allowed profit, contrary to the trial court's decision. The trial court held the allowance of profit is discretionary and further found that this case was not an appropriate case for the allowance of profit, in accordance with the principles examined and recognized in *Omaha P.P. Dist. v. Darin & Armstrong, Inc.*, 205 Neb. 484, 288 N.W.2d 467 (1980). The trial court also found that there was authority for disallowing profit in *Roberts Constr. Co. v. State,* 172 Neb. 819, 111 N.W.2d 767 (1961).

Reasonable profits may be allowed as part of an award of damages in a breach of contract action where the damages are granted as part of the original contract price, but those calculated on the excess damage award are ordinarily barred. *Omaha P.P. Dist. v. Darin & Armstrong, Inc., supra.*

In an equitable adjustment case the allowance of profit is not mandatory but is discretionary, and in an appropriate case profit may be denied altogether, even profit computed on the original contract basis. *Omaha P.P. Dist. v. Darin & Armstrong, Inc., supra.*

The trial court made it clear in its memorandum opinion that it was relying on the principles in the *Omaha P.P. Dist.* case.

The trial court also cites the *Roberts Constr. Co.* case only insofar as it was a situation where this court recognized the disallowance of profit. This

court said: "Thus, the trial court allowed as damages an amount equal to approximately one-half of the excess labor cost claimed by Roberts and made no allowance for pay roll taxes and insurance, other expense which Roberts attributed directly to the delay, general overhead expense, or profit." *Roberts Constr. Co. v. State, supra* at 824, 111 N.W.2d at 770.

Meisinger further claims that the trial court erred in holding that it neither proved the proximate cause nor the extent of damages resulting from the operation of its equipment under adverse conditions.

The trial court found that Meisinger worked under adverse conditions. However, the testimony reflects that Meisinger used the equipment on jobs other than this project in both 1977 and 1978. The testimony also reflects that the damage could have been caused by poor maintenance. Errol Meisinger testified that repair work on one of the scrapers' engines could have been caused by low water in the radiator or a defective governor. He admitted that it was not unusual for an engine to get a cracked head and this could cause the problems which necessitated the repairs on the scraper engine. Meisinger's testimony was that he had not personally checked the machines on a day-to-day basis, but that he had people to do that. However, there is no testimony from those individuals that Meisinger claimed performed the day-to-day preventive maintenance.

The evidence shows that there was insufficient proof that the repairs to the equipment were the proximate result of the additional work which the contractor performed in the conservation pool. The evidence shows that the damage to the engines could just as easily have been caused by negligent maintenance, negligent operation, or because of low water in the radiator or a defective governor.

With respect to the award of damages this court has said: "The plaintiff has the burden to prove the amount of damages with as much certainty as the

case permits." *LeRoy Weyant & Sons, Inc. v. Harvey and Classic Lanes, ante* p. 65, 68, 321 N.W.2d 429, 431 (1982). A review of the record indicates that the trial court's findings are supported by the evidence and are not clearly erroneous.

The appellees in their cross-appeal claim that Meisinger cannot recover for additional costs which it incurred because of extra work since no written authorization existed. The contract provides in its last substantive paragraph as follows: "It is further understood and agreed that the party of the second part [Meisinger] shall not do any work or furnish any materials not covered and authorized by this contract, unless ordered in writing by the Engineer."

The trial court found that a written work order to incur additional cost by Meisinger was not necessary since the State directed Meisinger to go back into the conservation pool under adverse conditions and remove the fill, thereby waiving any right that the State had to require a written work order.

In the Standard Specifications for Highway Construction, which is incorporated as part of the contract, "extra work" is defined as "an item of work not provided for in the contract as awarded and found essential to the satisfactory completion of the contract within its intended scope."

Nowhere in the trial court's memorandum and judgment does the phrase "extra work" ever appear. The trial court found that Meisinger was required to incur "additional cost" from September 25, 1978, until October 27, 1978, because it was not afforded the opportunity to utilize the alternate borrow area and had to remove fill from the conservation pool under adverse conditions.

AFFIRMED.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, APPELLEE AND CROSS-APPELLANT, V. J. H. SCHROEDER, APPELLANT AND CROSS-APPELLEE.

324 N.W.2d 391

Filed September 17, 1982. No. 44401.

1. **Constitutional Law: Appeal and Error.** As a court of review, the Nebraska Supreme Court cannot consider constitutional issues not properly before the court below.
2. **Pleadings.** It is the pleadings before the trial court at the time of decision which form the issues.
3. **Motions for New Trial: Pleadings: Constitutional Law.** A new trial is a reexamination in the same court of issues previously decided by it; therefore, constitutional issues not raised by the pleadings may not be raised in the motion for new trial.
4. **Pleadings: Judgments.** A judgment must be supported by the allegations of the pleadings on which it is based.
5. **Constitutional Law: Notice.** Reasonable notice, that is to say, notice which is meet and fair in view of the circumstances and conditions existent at the time and with reference to the matter to be presented, is an element of due process.

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

Richard Gee, for appellant.

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

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

CAPORALE, J.

This appeal (which comes to us in a form and posture bearing little, if any, relationship to our prescribed procedural scheme) seeks to reverse an order directing defendant-appellant, J. H. Schroeder, to produce certain documents pursuant to the Attorney General's civil investigative demand. We reverse and remand.

It appears that after appellant failed to produce the documents sought, the Attorney General filed an amended petition under the provisions of the Ne-

braska Consumer Protection Act, seeking judicial enforcement of his demand. Thereafter, appellant filed an answer which, among other things, denied that appellant was engaged in the activities claimed by the Attorney General, and called attention to the fact that the petition nowhere alleged a belief that appellant was engaged in unlawful conduct. None of the constitutional issues, generally the purported violations of appellant's fourth and fifth amendment constitutional rights, now raised before us were put in issue by appellant's answer. Subsequently, appellant filed a motion to dismiss the action by virtue of the Attorney General's alleged failure to prosecute same. At the scheduled hearing on that motion, together with the motion for summary judgment, the court entered an order overruling each of said motions. At the same time, over appellant's objections that the matter was not scheduled for consideration and that he wished an evidentiary hearing on the merits, the court below entered an order directing appellant to comply with the investigative demand. Appellant then filed a motion for new trial which, for the first time, raised constitutional questions and complained of various other errors, including the impropriety of deciding a matter not noticed for hearing and without evidence. Appellant was then granted leave to file an amended answer which put at issue the constitutionality of the investigative demand.

We do not reach the constitutional issues; they were never properly before the trial court at the time it entered its improvident order directing appellant to comply with the demand. Being a court of review, we cannot consider constitutional issues not properly before the court below. *Hale v. Taylor,* 192 Neb. 298, 220 N.W.2d 378 (1974). Generally, it is the pleadings before the trial court at the time of decision which form the issues. Neb. Rev. Stat. § 25-1101 (Reissue 1979). Because a new trial is a reexamina-

tion in the same court of issues previously decided by it, constitutional issues not raised by the pleadings may not be raised in the motion for new trial. *Hale v. Taylor, supra;* Neb. Rev. Stat. § 25-1142 (Reissue 1979). Although Neb. Rev. Stat. § 25-852 (Reissue 1979) grants broad powers to amend pleadings, even after judgment, in the furtherance of justice, the amended answer filed in this case after the order in question was entered cannot operate to create issues which did not exist at the time of decision. See *Lipp v. Horbach,* 12 Neb. 371, 11 N.W. 431 (1882), and *Domann v. Domann,* 114 Neb. 563, 208 N.W. 669 (1926), holding that a judgment must be supported by the allegations of the pleadings on which it is based. See, also, *Tuch v. Tuch,* 210 Neb. 601, 316 N.W.2d 304 (1982). The sole question before us, then, is the validity of the trial court's order, given the conditions and circumstances under which it was entered. It does not follow that merely because appellant was found not to be entitled to a summary judgment the Attorney General was, in effect, necessarily entitled to one, even if he were to have asked for such, which he did not. See *Hiram Scott College v. Insurance Co. of North America,* 187 Neb. 290, 188 N.W.2d 688 (1971). Having appeared for other purposes, appellant, over objection, was denied an opportunity to present evidence on the merits of the issues at a time reasonably noticed and scheduled for that purpose. Reasonable notice, that is to say, notice which is meet and fair in view of the circumstances and conditions existent at the time and with reference to the matter to be presented, is an element of due process. See, *Fisk v. Thorp,* 51 Neb. 1, 70 N.W. 498 (1897); *Sterling Mfg. Co. v. Hough,* 49 Neb. 618, 68 N.W. 1019 (1896).

Under the conditions and circumstances of this case, the order of the trial court is a nullity. We therefore reverse and remand for further proceed-

ings in accordance with this opinion.

REVERSED AND REMANDED.

CLINTON, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. ROBERT TIFF, APPELLANT.

324 N.W.2d 393

Filed September 17, 1982. No. 81-839.

1. **Post Conviction: Proof.** In a post conviction proceeding the petitioner has the burden of establishing a basis for relief.
2. **Post Conviction: Appeal and Error.** In post conviction proceedings under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979) the District Court is the trier of disputed questions of fact and it is not ordinarily for the Supreme Court to determine questions of credibility.

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

Craig D. Wittstruck of Berry, Anderson, Creager & Wittstruck, for appellant.

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

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

KRIVOSHA, C.J.

Appellant, Robert Tiff, appeals from a judgment entered by the District Court for Lancaster County, Nebraska, denying Tiff relief sought pursuant to the post conviction statutes of the State of Nebraska, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1979). The order denying relief was entered after an evidentiary hearing had been held. The basis of Tiff's request for relief under the Post Conviction Act is his claim that his court-appointed counsel ineffectively represented him in that counsel did not call a

material witness who would have been important in his defense. Court-appointed counsel for Tiff testified at the post conviction hearing and maintained that Tiff had never provided him with the name of the witness, and for that reason counsel was not aware of the existence of such a witness and could not have contacted him.

The trial court concluded, following the hearing, that there was a lack of evidence in all phases of appellant's motion for post conviction relief and that, in fact, Tiff had been adequately and effectively represented. In essence, the trial court found that Tiff's contention that a witness existed who was not called by court-appointed counsel was not true. We have frequently said that in a post conviction proceeding the petitioner has the burden of establishing a basis for relief. See, *State v. Clingerman,* 180 Neb. 344, 142 N.W.2d 765 (1966); *State v. Raue,* 182 Neb. 735, 157 N.W.2d 380 (1968). Moreover, we have said that in post conviction proceedings under §§ 29-3001 et seq. the District Court is the trier of disputed questions of fact and it is not ordinarily for the Supreme Court to determine questions of credibility. *State v. Davis,* 203 Neb. 284, 278 N.W.2d 351 (1979). Our examination of the record in this case discloses that there were disputed questions as to whether the alleged witness did in fact exist at the time of trial and whether his name was given to court-appointed counsel. The trial court found against Tiff on those issues and we believe the record amply supports the action of the trial court. Accordingly, then, the judgment denying relief is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. ELMER DEAN VRCHOTA, ALSO KNOWN AS PABLO VRCHOTA, APPELLANT.

324 N.W.2d 394

Filed September 17, 1982. No. 81-901.

1. **Polygraph Tests.** Generally, any reference to a polygraph test is disapproved.
2. _____. Generally, the mere mention of the word "polygraph," absent more, does not constitute prejudicial error.

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

Vincent M. Powers, for appellant.

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

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

PER CURIAM.

The defendant appeals from a sentence to imprisonment for 1½ to 4 years for theft. The sole assignment of error is the refusal of the trial court to grant a mistrial.

Following a party at his apartment, the victim, Joseph Bell, was beaten, tied up, and robbed of $502. Although the evidence is in conflict as to the defendant's participation in the crime, it is clear from the record that the defendant was present and received a part of the $502 taken from the victim.

Mark Midway, a witness for the State, had been permitted to plead guilty to a misdemeanor in return for his testimony. The following occurred during the direct examination of Midway: "THE COURT: Just say what the defendant said. THE WITNESS: Well, he started crying and I started crying. Q. (By Mr. Glaser) The defendant started crying? A. Yes. Q. And the facts which the defendant related that he was going to say, were those the facts as you believed them to be? A. I did not

know every word he said. All I heard was bits and pieces. Q. And to the extent that you heard what he said, were they — A. No, they didn't. Q. They were not? Were you subsequently released from jail? A. I went for a lie detector test. MR. POWERS: I'd object to that, Your Honor. May I approach the bench? THE COURT: You may. The answer will go out, and the jury is instructed to disregard it. (At this time, an on-the-record discussion was had, in low tones, between Court and counsel:) MR. POWERS: I'd like to move for a mistrial at this time. THE COURT: What grounds? MR. POWERS: Reference to the lie detector test. I think — THE COURT: Is that the only ground? MR. POWERS: Well, I believe that the witness' reference to the lie detector test will prejudice the remainder of the trial. I don't think that's something that should have been mentioned. And I think the jury cannot just disregard it. It would taint the rest of the testimony. THE COURT: It is not the fact that an individual took a lie detector test that is inadmissible. It is the results of the lie detector test. There's no indication here that the lie detector test was given to the defendant. There is no evidence in the record as to the results of the lie detector test in this instance, and the Court has already instructed the jury to disregard the answer. The motion for mistrial is overruled. Proceed. I think we'll take a five-minute recess so you can caution the witness."

The reference to the lie detector test was made in a nonresponsive answer volunteered by the witness. The result of the test was not disclosed and no further reference to the test was made. The defendant argues that the mere reference to the test, when coupled with the State's favorable treatment of Midway in the plea bargain, greatly enhanced Midway's credibility to the prejudice of the defendant.

The defendant relies on *State v. Temple,* 192 Neb. 442, 222 N.W.2d 356 (1974), in which we disapproved

of any reference to a polygraph test. In the *Temple* case, the defendant testified that he had taken a lie detector test. The results were not mentioned. The defense counsel failed to object and did not request a cautionary instruction. We held that the failure to object precluded the defendant from predicating error on the admission of such testimony, but said: "We disapprove any reference to such tests offered in evidence." *Id.* at 443, 222 N.W.2d at 357.

In *State v. Anderson and Hochstein,* 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981), a witness mentioned the word "polygraph" on redirect examination. The witness did not indicate whether he had taken such a test or what the results were. The defense counsel made a timely motion for mistrial. The motion was overruled and the trial judge gave a curative instruction. In holding that the denial of a mistrial was not error, we said: "The mere mention of the word 'polygraph,' absent more, does not constitute prejudicial error. Appellants have failed to disclose how or in what manner the use of the word 'polygraph' was prejudicial under the circumstances . . . ." *Id.* at 67, 296 N.W.2d at 451.

Here the reference to the polygraph test was volunteered by the witness, and the result of the test was not disclosed. Prompt objection was made and the trial court instructed the jury to disregard the reference to the lie detector test. There was no further reference to the test.

The record does not show the defendant was prejudiced by the testimony. The defendant was convicted of the lesser-included charge of theft. The defendant, Midway, and William Brumfield, another participant in the crime, all testified that the defendant received some of the money taken from the victim. It does not appear the jury gave greater credibility to Midway due to his reference to the lie detector test.

We conclude that the ruling on the motion for a mistrial was not erroneous. The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

WILLIAM K. LAKE, APPELLANT, V. PIPER, JAFFRAY AND HOPWOOD INCORPORATED ET AL., APPELLEES.

324 N.W.2d 660

Filed September 17, 1982. No. 82-041.

1. **Final Orders: Appeal and Error.** As a general rule, where a plaintiff is allowed to continue prosecution of the cause of action on behalf of himself, but is denied class action status, no substantial right of the plaintiff has been affected by such denial and that order is not a final order which may be appealed.
2. **Municipal Corporations: Actions.** Ordinarily, a demand upon the responsible officers of the governmental subdivision or municipal corporation that they take action is necessary and a condition precedent to the right of a taxpayer to maintain an action for the recovery of funds on behalf of the governmental entity.
3. _____: _____. Where a taxpayer brings an action against the officers of a governmental subdivision or municipal corporation for the recovery of funds on behalf of such governmental entity without making a prior demand, the resistance to such action by the subdivision or corporation in the nature of a demurrer attacking the legal capacity of the plaintiff to sue because of that deficiency generally does not constitute a waiver of that requirement.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed as to contract action. Appeal dismissed as to public meetings action.

Frank Matthews of Matthews, Cannon & Riedmann, P.C., for appellant.

James P. Fitzgerald of McGrath, North, O'Malley & Kratz, P.C., for appellee Omaha P. P. Dist.

Michael A. Nelsen of Schmid, Ford, Mooney &

Frederick, and Gordon G. Busdicker of Faegre & Benson, for appellee Piper, Jaffray & Hopwood Inc.

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

PER CURIAM.

This is a consolidated appeal involving two class action cases brought by the plaintiff, William K. Lake (Lake), a ratepayer of the Omaha Public Power District (OPPD), against OPPD and its financial advisor, Piper, Jaffray and Hopwood Incorporated (Piper, Jaffray). One of the suits alleged that a March 17, 1977, contract for Piper, Jaffray to act as OPPD's financial advisor was illegal and void in violation of Neb. Rev. Stat. § 70-624.01 (Reissue 1981). The other suit alleged that OPPD violated the public meetings act, Neb. Rev. Stat. §§ 84-1408 et seq. (Reissue 1981), in appointing Piper, Jaffray as financial advisor and agreeing to pay Piper, Jaffray a fixed fee of $184,000 for its services in connection with a bond issue. Both defendants filed demurrers to the petitions.

In the contract action the District Court for Douglas County sustained the defendants' demurrers and dismissed the action. The District Court found that the plaintiff lacked legal capacity to sue, either as an individual or on behalf of a class. It also found that the plaintiff should have made a demand on OPPD prior to bringing the action to set aside the contract.

In the public meetings suit the District Court sustained the demurrers in part and overruled them in part. The court held that the plaintiff could not maintain the action as a class action, but could maintain it individually. The court also held that the plaintiff had stated a cause of action.

The plaintiff appeals and assigns the following errors: (1) With respect to the contract action

(a) the court erred in ruling that the plaintiff lacked legal capacity to sue on behalf of the members of a class consisting of those who purchase electrical service from OPPD, and (b) the court erred in ruling that the plaintiff lacked legal capacity to bring an action in his own name as an individual. (2) With respect to the public meetings suit the court erred in ruling that the plaintiff lacked legal capacity to sue on behalf of the members of a class consisting of those who purchase electrical service from OPPD.

We affirm the judgment in the contract action. As to the public meetings lawsuit, although we do not disagree with the court's reasoning as to plaintiff's capacity to maintain the action as a class action, we dismiss the appeal since the order complained of was not a final order from which an appeal may be prosecuted.

In 1977 OPPD, because of a drop in bond interest rates, was considering two plans to refund previously issued bonds. One plan was submitted by Lazard Freres & Co., a New York investment banking firm, and the other plan was submitted by Piper, Jaffray, an investment banking firm with an office in Omaha, Nebraska.

On January 31, 1977, the OPPD board of directors named Piper, Jaffray as financial advisor to OPPD in addition to Lazard Freres, its financial advisor at that time. On February 1, 1977, OPPD entered into a contract with Piper, Jaffray, which provided that a fee for Piper, Jaffray's development of a refunding/refinancing plan would be determined by agreement between Piper, Jaffray and OPPD's finance committee. At a February 7, 1977, meeting, OPPD approved the Piper, Jaffray refunding/refinancing plan and appointed Piper, Jaffray as OPPD's sole financial advisor. Another meeting was held on February 16, 1977. At this meeting, OPPD's board of directors reconsidered the Piper, Jaffray plan and

contract, and reaffirmed its action taken at the February 7, 1977, meeting. OPPD also agreed to pay Piper, Jaffray a fee of $184,000 for its services for the refunding plan and the issuance of $200 million in bonds. Finally, on March 17, 1977, the OPPD board of directors authorized an agreement with Piper, Jaffray for continuing financial consulting services and assistance in reviewing engineering and operating costs, the development of a financial plan, and assistance with a bond offering. The agreement provided that fees would be based on the size of the bond issue. The agreement was terminable at will by OPPD on 30 days' notice.

Beginning in 1977 the plaintiff filed the first of a series of petitions against the defendants, attacking the same action of OPPD which is the object of the present litigation. The plaintiff's third amended petition, filed on November 15, 1978, was challenged by the demurrers of the defendants. The District Court sustained the demurrers as to the second cause of action and overruled them as to the first cause of action, but ordered the plaintiff to separately state and number the various causes of action alleged therein. The present actions were filed on August 27, 1981, as a result of those procedural steps taken in the previous lawsuit.

We will first discuss the public meetings lawsuit. It has long been the rule in this state that the Supreme Court has jurisdiction only to hear appeals from final orders. Neb. Rev. Stat. § 25-1911 (Reissue 1979). A final order is defined in Neb. Rev. Stat. § 25-1902 (Reissue 1979) as "[a]n order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment . . . ."

In *Anson v. Kruse,* 147 Neb. 989, 990, 25 N.W.2d 896, 897 (1947), this court construed § 25-1902 as follows:

" 'A decree to be final must dispose of the whole merits of the case, and leave nothing for the further consideration of the court. An order is final when it affects a substantial right and determines the action. . . . When no further action of the court is required to dispose of the cause pending, it is final; when the cause is retained for further action, as in this case, it is interlocutory.' "

When a substantial right is undetermined and the cause is retained for further action, the order is not final. *Martin v. Zweygardt,* 199 Neb. 770, 261 N.W.2d 379 (1978).

In this action the District Court sustained that part of the demurrers challenging the class action. However, the court also held that the plaintiff had stated a cause of action and allowed the cause to be continued by the plaintiff individually. The merits of the case have not been disposed of. Therefore, the order sustaining the demurrers as to a class action is interlocutory. No substantial right of the plaintiff has been affected by the denial of class action status since he was allowed to continue the cause on behalf of himself. This case can be distinguished from *Blankenship v. Omaha P. P. Dist.,* 195 Neb. 170, 237 N.W.2d 86 (1976). In *Blankenship* the court granted a motion for summary judgment and dismissed the action. The granting of the motion for summary judgment in *Blankenship* determined the merits of the plaintiff's claim. In the present case the merits have not been determined, nor has the relief sought been affected in any way. *P. R. Halligan Post 163 v. Schultz, ante* p. 329, 322 N.W.2d 657 (1982). Since there is no final order, this court is without jurisdiction. The appeal in the public meetings lawsuit is therefore dismissed.

In the contract action the District Court held: "1. That the plaintiff does not have the legal capacity to bring this action, either individually or as a class action. . . . 2. Plaintiff's petition does not state

facts sufficient to constitute a cause of action inasmuch as no allegation of demand upon defendant OPPD was made prior to the action complained of."

In *Sesemann v. Howell,* 195 Neb. 798, 801, 241 N.W.2d 119, 121 (1976), we held: "Ordinarily a demand upon the responsible officers of the governmental subdivision or municipal corporation that they take action is necessary and a condition precedent to the right of a taxpayer to maintain an action for the recovery of funds on behalf of the governmental entity."

In *Evans v. Metropolitan Utilities Dist.,* 184 Neb. 172, 174-75, 166 N.W.2d 411, 413 (1969), this court made the *Sesemann* rule applicable to public power ratepayers and utilities districts, stating: "The law in this respect is clear. The requirement of a demand to sue and a subsequent refusal or a waiver of demand by an indication on the part of the public corporation of an intent not to sue are conditions precedent to a representative or derivative suit on behalf of public corporations."

The plaintiff filed this action without any prior demand upon OPPD. He alleges that a demand would have been fruitless in this case and argues that the requirement that he make a demand prior to instigating a lawsuit should be waived. In addition to this he argues that his filing of a prior action (also filed prior to demand), and OPPD's opposition to it by way of demurrer, should be sufficient to constitute a prior demand or at least show that a demand would have been futile.

The rule is clear. A prior demand is necessary before an action may be commenced. The plaintiff's previous action stands on the same ground as the present case, since it too was filed prior to a demand upon OPPD. To consider the previous action as a demand would undermine the rule we have adopted. The plaintiff, in his petition, alleged that a demand would have been useless. However, he does

not allege any facts which would support the allegation. " 'Public officers are always presumed, in the absence of any showing to the contrary, to be ready and willing to perform their duty; and until it is made to appear that they have refused to do so, or have neglected to act under circumstances rendering this equivalent to a refusal, there is no occasion for the intervention of the citizen for the protection of himself and others similarly situated.' " *Reiter v. Wallgren,* 28 Wash. 2d 872, 877, 184 P.2d 571, 573 (1947).

We adopt the reasoning of the Washington Supreme Court. In order for the plaintiff to rebut this presumption, he must first allege and prove that OPPD had done something wrong, that it was pointed out to OPPD, and that it would have rejected his demand.

In the case at bar the plaintiff has done exactly what the prior demand rule sought to eliminate. To allow him to maintain this action would abolish the prior demand rule. We agree with the District Court's dismissal of the contract action since no prior demand was made upon OPPD. The District Court's judgment sustaining defendants' demurrers to the contract action is therefore affirmed.

Since this action is affirmed on the grounds that no prior demand was made, it is not necessary that we discuss the denial of class action status, as it will not change the outcome of this appeal.

AFFIRMED AS TO CONTRACT ACTION.
APPEAL DISMISSED AS TO PUBLIC MEETINGS ACTION.

JOHN F. CULLEN, JR., APPELLEE, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

324 N.W.2d 264

Filed September 17, 1982. No. 82-124.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and dismissed.

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

James P. Costello, for appellee.

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

KRIVOSHA, C.J.

The instant case is another in a series of cases appealed to this court by reason of our decision in *Novotny v. City of Omaha,* 207 Neb. 535, 299 N.W.2d 757 (1980). The decision in this case, however, is controlled by our subsequent decisions in *Kohlbeck v. City of Omaha,* 211 Neb. 372, 318 N.W.2d 742 (1982), and *Teague v. City of Omaha,* 211 Neb. 872, 320 N.W.2d 779 (1982), wherein we held that the City of Omaha was not estopped from asserting the defense that the statute of limitations had run and the action was therefore barred.

On the basis of the *Kohlbeck* and *Teague* decisions, the judgment of the Workmen's Compensation Court must be reversed and the action dismissed. The judgment is reversed and the action is dismissed.

REVERSED AND DISMISSED.

CLINTON, J., participating on briefs.

RONA ALBERS, APPELLEE, V. OVERLAND NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, APPELLANT.

324 N.W.2d 396

Filed September 17, 1982. No. 82-146.

1. **Consumer Credit.** The inhibitory provisions of the Nebraska Consumer Credit Act apply to nonlicensees only if the transaction itself is subject to the act.
2. _____. It may be a question of fact as to whether a particular transaction is subject to the act.
3. _____. Neb. Rev. Stat. § 45-183 (Cum. Supp. 1980) is not applicable to loans made in the traditional manner by nonlicensees at conventional rates.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded.

Denzel R. Busick of Luebs, Dowding, Beltzer, Leininger & Smith, for appellant.

John A. Wagoner, for appellee.

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

PER CURIAM.

The plaintiff, Rona Albers, commenced this action to obtain a declaratory judgment that a hypothecation agreement to the defendant, Overland National Bank, was invalid. The hypothecation agreement pledged 250 shares of Triad stock owned by the plaintiff as security for any indebtedness of Oscar G. Mueller, the plaintiff's father, to the bank. Both parties filed motions for summary judgment. The trial court sustained the plaintiff's motion and ordered the bank to return the stock certificate, which was the subject of the pledge, to the plaintiff. The defendant bank has appealed.

On August 31, 1979, the plaintiff signed a security agreement, a hypothecation agreement, and an assignment of certificate No. 13 for 250 shares of stock

in the Triad Fastener Corporation, a closely-held corporation, to the defendant.

The plaintiff signed these papers at the request of her father to supply additional collateral to secure his loan at the bank. The plaintiff did not receive a copy of the loan agreements nor any document informing her of her liability in the event of her father's default. The evidence is in conflict as to whether the bank delivered copies of the loan agreements to Mueller for the plaintiff.

The loan to Mueller, which was approximately $79,000, related to his business ventures. It was to be paid in monthly installments and the note bore interest at the rate of 12 percent per annum.

After Mueller defaulted on the loan, the bank gave notice that it would enforce its rights under the agreements. This action was commenced to determine the rights of the parties in the stock. The trial court found that Neb. Rev. Stat. § 45-183 (Cum. Supp. 1980) applied to the transaction and, because the bank had failed to comply with the statute, the bank had no rights in the stock.

The principal issue upon the appeal is whether § 45-183 applies to the transaction. The section is a part of the Consumer Credit Act, sometimes referred to as the "Installment Loan Act" or "Small Loan Act," and provides as follows: "(1) No natural person, other than the spouse of the borrower, is obligated as a cosigner, comaker, guarantor, endorser, surety, or similar party with respect to a loan, unless before or contemporaneously with signing any separate agreement of loan or any writing setting forth the terms of the borrower's agreement, the person receives a separate written notice that contains a completed identification of the loan he or she may have to pay and reasonably informs him or her of his or her obligation with respect to it.

"(2) Such notice shall be in the form prescribed by the Department of Banking and Finance.

"(3) A person entitled to notice under this section shall also be given a copy of any writing setting forth the terms of the borrower's agreement and of any separate agreement of obligation signed by the person entitled to the notice."

The plaintiff had no personal liability so far as her father's indebtedness was concerned. She was not a cosigner, comaker, guarantor, endorser, or surety on his loan. It would seem that she was not a "similar party" within the meaning of the statute because all of the classifications set out in the statute refer to parties who would be personally liable for the indebtedness.

The more fundamental question is whether the statute has any application to a business loan such as that made to Mueller by the bank.

Section 45-183 was enacted in 1979 as a part of L.B. 87, which revised the Nebraska Consumer Credit Act. The committee statement of intent read as follows: "LB 87 revises the Nebraska Consumer Credit Act as well as adds a number of *consumer protective devices for small loans.* Specific requirements for *notice,* curing default, deficiency judgments and revolving credit are in the bill." (Emphasis supplied.) The legislative history supports the conclusion that § 45-183 is a part of the Consumer Credit Act. See, also, Neb. Rev. Stat. § 45-117 (Cum. Supp. 1980), which makes reference to § 45-183 as one of the terms and conditions under which a licensee pursuant to the act can make loans.

In *Gruenemeier v. Commonwealth Co.,* 178 Neb. 66, 70, 131 N.W.2d 713, 716 (1964), the act's purpose was described as follows: "[T]he Installment Loan Act, sections 45-114 to 45-158, R.R.S. 1943, comprehensively regulates and limits all loans made by such a licensee to small borrowers."

The plaintiff relies on cases such as *State ex rel. Beck v. Associates Discount Corp.,* 168 Neb. 298, 96 N.W.2d 55 (1959), which hold that the inhibitory pro-

visions of the Installment Loan Act apply to all persons whether they are licensees or nonlicensees. The rule, of course, has no application if the loan in question is not subject to the act.

In *Pattavina v. Pignotti,* 177 Neb. 217, 128 N.W.2d 817 (1964), we recognized that the Installment Loan Act had no application to traditional loans made by nonlicensees, although payable in installments. We said at 220-21, 128 N.W.2d at 819: "It was never intended, as we view it, to include within the act persons who were not required to obtain a license, who made loans in the traditional manner at 9 percent per annum or less, such as amortized real estate loans, *bank-term loans,* interfamily loans, and others, simply because they were payable in installments. The general purpose of the act was to provide a means for charging interest in excess of 9 percent per annum, to regulate licensees engaging in the lending business under the act, and to provide penalties for violations of the act. A nonlicensee, by the holding of this court, who made an installment loan in excess of 9 percent per annum, is subjected to the penalties of the act, but not to the regulations imposed on a licensed business. To hold otherwise would place numerous types of amortized and installment loans in jeopardy, although made at interest rates at less than 9 percent per annum. This is not an evil contemplated to be corrected; in fact, it is no evil at all. The problem being dealt with is the permitting of rates of interest in excess of 9 percent per annum, in specified cases, ostensibly where the risk is great and the expense prohibitive. We can come to no other conclusion than that the act was never intended to include the traditional form of making loans by nonlicensees at a rate of interest not exceeding 9 percent per annum." (Emphasis supplied.) The reference to the 9 percent interest ceiling is, of course, no longer applicable in view of

the many changes which have been made in the interest statutes.

In *Seldin v. Northland Mortgage Co.*, 189 Neb. 175, 202 N.W.2d 174 (1972), we noted that it may be a question of fact as to whether a particular transaction is subject to the Installment Loan Act. We said there that the term "every loan contract" in the Installment Loan Act means every installment loan contract within the *meaning* and *purpose* of the act.

The Installment Loan Act contemplates a "small loan" where the risk is great and the expense under conventional interest rates prohibitive. The act was never intended to apply to nonlicensees who make loans in the traditional manner at conventional rates. We think it is clear, as a matter of law, that the defendant bank's loan to Mueller was not a "small loan" or "installment loan" within the meaning and purpose of the Nebraska Consumer Credit Act. Section 45-183 was not applicable to the transaction and the defendant was not required to comply with its requirements.

It is unnecessary to consider the other contentions of the parties.

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

REVERSED AND REMANDED.

JOSEPH GOLDA, APPELLANT, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

324 N.W.2d 264

Filed September 17, 1982. No. 82-222.

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

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.

KRIVOSHA, C.J.

This action arises by reason of an order of dismissal entered by a three-judge Workmen's Compensation Court on a petition for rehearing. The three-judge court found that the statute of limitations had run and that the appellant Golda was thereby precluded from bringing this action. We believe that the instant case is governed by our decisions in *Kohlbeck v. City of Omaha,* 211 Neb. 372, 318 N.W.2d 742 (1982), and *Teague v. City of Omaha,* 211 Neb. 872, 320 N.W.2d 779 (1982), and, accordingly, the motion of the appellee, City of Omaha, requesting summary affirmance pursuant to Rule 20 of the rules of this court should be granted. Summary affirmance is granted and the judgment of the Workmen's Compensation Court is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

DALLAS E. BAKER, APPELLEE, V. CITY OF OMAHA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

324 N.W.2d 265

Filed September 17, 1982. No. 82-271.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and dismissed.

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

Weinberg & Weinberg, P.C., for appellee.

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

KRIVOSHA, C.J.

This matter comes to the court following an award entered by a three-judge Workmen's Compensation

Court on rehearing. The single issue presented to us is whether the statute of limitations in the matter has run, thereby barring Baker's right to commence this action. We believe that our decisions in *Kohlbeck v. City of Omaha,* 211 Neb. 372, 318 N.W.2d 742 (1982), and *Teague v. City of Omaha,* 211 Neb. 872, 320 N.W.2d 779 (1982), are controlling.

Accordingly, we believe that the award entered by the three-judge court must be reversed and the petition dismissed. The judgment is therefore reversed and the petition dismissed.

REVERSED AND DISMISSED.

CLINTON, J., participating on briefs.

CONTACT, INC., A NEBRASKA NONPROFIT CORPORATION, APPELLEE, V. STATE OF NEBRASKA ET AL., APPELLANTS.

324 N.W.2d 804

Filed September 24, 1982. No. 44415.

1. **Lotteries.** The basic elements of a lottery are consideration, prize, and chance.
2. **Statutes.** Generally, statutory language will be given its plain and ordinary meaning.
3. _____. A statute is open to construction only if it is ambiguous.
4. **Lotteries.** A game of chance is one in which the winner is determined by mere luck and not by skill. The predominate nature of the game, i.e., skill or chance, determines its classification.
5. _____. The sale of pickle cards by a nonprofit organization is a permitted form of lottery under Neb. Rev. Stat. § 28-1115 (Reissue 1979). The fact that the winning combinations are predetermined and the scheme is subject to fraudulent manipulation does not prevent pickle cards from being a form of lottery.

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

Paul L. Douglas, Attorney General, Mel Kammerlohr, and Mark D. Starr, for appellants.

Robert R. Gibson and Rosenberg, Gibson & Taute, for appellee.

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

PER CURIAM.

The State appeals from a declaratory judgment holding that the sale of "pickle cards" by CONtact, Inc., was a permissible lottery under Neb. Rev. Stat. §§ 28-1101(6) and 28-1115 (Reissue 1979).

CONtact, Inc., is a nonprofit corporation organized under the laws of Nebraska. As a means of fundraising, CONtact, Inc., sells pickle cards. These cards, purchased for a quarter, have tabs which the purchaser opens. Once opened, the card reveals five configurations of three symbols each. The front of the card specifies winning combinations and the amount which can be claimed as a prize. Thus, for example, if, upon opening the tab, the card reveals one configuration of three oranges, the purchaser, according to the list of winners, can claim $5 as a prize. CONtact, Inc., purchases pickle cards in boxes of 1,632. The cards are dumped into a tub and selected at random by the purchaser. Each box contains 224 winners. Each box's sales are maintained separately. However, when a box is almost sold out, a new box may be added to the tub. Occasionally a box may be dumped if the big winners are drawn early.

On April 6, 1981, the Lancaster County Attorney sent CONtact, Inc., a directive, ordering CONtact, Inc., to discontinue the sale of pickle cards. This directive was based on an Attorney General's opinion which found that such cards were not a permissible gambling device under § 28-1115. CONtact, Inc., then commenced this action to obtain a declaratory judgment determining the validity of the sale of pickle cards. The District Court found that the sale of pickle cards is a permissible lottery under §§ 28-1101(6) and 28-1115. The State has appealed.

The State assigns as error the finding that the sale is lawful. The relevant statutes read as follows: "Lottery shall mean a gambling scheme in which (a) the players pay or agree to pay something of

value for chances, represented and differentiated by numbers or by combinations of numbers or by some other medium, one or more of which chances are to be designated the winning ones, (b) the winning chances are to be determined by a drawing or by some other method based on an element of chance, and (c) the holders of the winning chances are to receive something of value." § 28-1101(6).

"Any nonprofit organization holding a certificate of exemption under the Internal Revenue Code, section 501, or whose major activities, exclusive of conducting lotteries, raffles, or gift enterprises, are conducted for charitable and community betterment purposes, *may conduct lotteries,* raffles, and gift enterprises. The gross proceeds of such activities may be used solely for charitable or community betterment purposes, awarding of prizes to participants, and operating such lottery, raffle, or gift enterprise. Not less than sixty-five per cent of the gross proceeds shall be used for the awarding of prizes and not more than twenty-five per cent of that amount remaining after the awarding of prizes shall be used to pay the expenses of operating such scheme. For the purpose of this section, the expenses of operating a lottery shall include (1) all costs associated with printing or manufacturing any items to be used or distributed to participants such as tickets or other paraphernalia, (2) all office expenses, (3) all promotional expenses, (4) all salaries of persons employed to operate the scheme, (5) any rental or lease expense, and (6) any fee paid to any person associated with the operation of a lottery, raffle, or gift enterprise, except that prizes awarded to participants shall not be included within the twenty-five per cent limitation contained in this section. Each nonprofit organization conducting a lottery shall have its name clearly printed on each lottery ticket used in such lottery. No such ticket shall be sold unless such name is so printed thereon.

Each nonprofit organization conducting a lottery shall keep a record of all locations where its lottery tickets are sold. All tickets must bear a number, which numbers must be in sequence." (Emphasis supplied.) § 28-1115.

The State contends that the sale of pickle cards by nonprofit organizations is illegal because the number of winners is predetermined, the chances for fraudulent manipulation are great, and, thus, the game does not have the requisite element of chance. Further, early payout of winners can reduce the chance of winning in a particular box's sales to zero. The State further contends that the statutes permit only lotteries which have a drawing *after* all of the tickets have been sold and in which the winner is determined by the drawing itself.

The statute defining lottery is a codification of earlier case law. The basic elements required by statute are (1) consideration, (2) prize, and (3) chance. See *State ex rel. Hunter v. Fox Beatrice Theatre Corporation,* 133 Neb. 392, 275 N.W. 605 (1937). The State makes no contention that either of the first two elements is lacking in this scheme. Neither does the State contend that CONtact, Inc., is not qualified to operate a lottery or that the procedural requirements of § 28-1115 are not being followed, i.e., ticket identification and numbering.

The issue for determination is simply one of statutory construction. Generally, statutory language will be given its plain and ordinary meaning and a statute is open to construction only if it is ambiguous. *State v. One 1970 2-Door Sedan Rambler,* 191 Neb. 462, 215 N.W.2d 849 (1974); *O'Neill Production Credit Assn. v. Schnoor,* 208 Neb. 105, 302 N.W.2d 376 (1981).

The statutory language at issue appears to be unambiguous. Section 28-1101(6) requires one or more chances to be designated the winning ones. The statute makes no time reference as to when the

designation is to take place, but merely states that "the winning chances are to be determined by a drawing or by some other method based on an element of chance." The statute requires designation of the winner only by "chance" or by a drawing.

Chance has been defined as "Absence of explainable or controllable causation; accident; fortuity; hazard; result or issue of uncertain and unknown conditions or forces; risk; unexpected, unforeseen, or unintended consequence of an act. The opposite of intention, design, or contrivance." Black's Law Dictionary 210 (5th ed. 1979). A game of chance is one in which the winner is determined by mere luck and not by skill. The predominate nature of the game, i.e., skill or chance, determines its classification. See *Utah State Fair Ass'n et al. v. Green et al.,* 68 Utah 251, 249 P. 1016 (1926). Another definition of chance is that if the game is designed to induce the gambling instinct, it is a game of chance. *O'Brien v. Scott,* 20 N.J. Super. 132, 89 A.2d 280 (1952). See, also, *Boies v. Bartell,* 82 Ariz. 217, 310 P.2d 834 (1957).

In *Boyd v. Piggly Wiggly Southern, Inc.,* 115 Ga. App. 628, 155 S.E.2d 630 (1967), the court discussed whether the predetermination of a winning ticket negates the existence of chance. The court held it did not. "[T]he point which is overlooked is that the record conclusively shows that the recipients of the winning tickets were determined purely by chance. The point is aptly illustrated in defendant's brief, where the following hypothetical question is posed: suppose in a drawing for a prize the names of the presidents of the United States were put on tickets and placed in a hat, the person drawing the name of the first president of the United States to win the prize. Certainly the winner of the prize would be determined by chance even though the fact that George Washington was the first president is more widely known than the winners of the horse races."

Id. at 633-34, 155 S.E.2d at 635.

The *Boyd* case was held controlling in *Winn-Dixie Stores, Inc. v. Boatright,* 115 Ga. App. 645, 155 S.E.2d 642 (1967). In that case a supermarket game was held to be a lottery. Customers were given a ticket consisting of two halves, each half marked "You win $." When the blank was rubbed with bleach a number would appear. If the customer had a right and a left half which matched, the customer would win the amount designated.

Several cases have considered whether a "punchboard" is a lottery. In a punchboard the numbers to be selected by a purchaser are concealed in holes in a card. A purchaser selects a number by "punching" a slip of paper out of the card. The device is similar to a pickle card in that the winning numbers are predetermined. In *Helen Ardelle, Inc. v. Federal Trade Commission,* 101 F.2d 718 (9th Cir. 1939), a punchboard used for candy distribution was held to be a lottery or gambling device. "They also furnish with each assortment a punchboard and, attached to it, a legend or statement explaining its use. Thus, knowingly and purposely, petitioners cause and procure their candy to be sold and distributed to the public by means of a lottery or gambling device." *Id.* at 719.

In *State v. Hudson,* 128 W. Va. 655, 37 S.E.2d 553 (1946), the West Virginia Supreme Court held that a punchboard was a lottery. "This Court has held that a lottery is commonly understood to mean a scheme for the distribution of prizes by chance. *State v. Matthews,* 117 W. Va. 97, 184 S.E. 665. The distinction between a lottery and other forms of gambling has been considered and recognized in several other jurisdictions. In some of those jurisdictions it is declared that the element of chance must dominate before the scheme or the device can be called or designated a lottery. The decided weight of judicial authority supports that view. . . .

A punch board which, for a consideration, distributes merchandise to the holder of a lucky number has been held to be a lottery. *Helen Ardell[e], Inc. v. Federal Trade Commission,* 101 F.2d 718. The vendor of a punch board consisting of a board with holes in which blank slips and slips calling for prizes are inserted and the right to punch one hole is sold to a purchaser who receives either nothing or a determined prize, is concerned with setting up a lottery within the meaning of a statute of the State of Alabama which makes a lottery a criminal offense. *Brewer v. Woodham,* 15 Ala. App. 678, 74 So. 763. In the case of *Callison v. State,* (Tex. Civ. App.), 146 S.W.2d 468, the Court uses this language: 'Obviously, the punch boards are lotteries; purely games of chance or luck. The numbers are hidden from view until punched from the board by players. No skill is exercised in the operation of the game, and the boards can be used for no purpose other than gaming; they were designed for that purpose only.' It is clear that all of the elements of a lottery are present in the case at bar. Those who participated in the operation of the punch board paid for the right to share in the distribution of a prize, and the result of their venture depended entirely upon chance. No skill was required of any person who punched a number from the board, and the prize consisted of money. The punch board described in the evidence is a lottery, and this Court so holds." *Id.* at 664-66, 37 S.E.2d at 558-59.

In *In re Gray,* 23 Ariz. 461, 204 P. 1029 (1922), the Arizona Supreme Court found the use of candy punchboards to be lotteries. "The following definition of a lottery has received approval: Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery. *Hull v. Ruggles,* 56 N.Y. 424; *Wilkinson v. Gill,* 74 N.Y. 63,

30 Am. Rep. 264; *State v. Mercantile Assn., supra.* In *United States v. Olney,* 1 Abb. 275, Fed. Cas. No. 15,918, a 'lottery' is defined to be a sort of gaming contract by which, for a valuable consideration, one may by favor of the lot obtain something in return, of a value superior to that which he risks. See, also, *Fleming v. Bills,* 3 Or. 286-289.

"Perhaps as satisfactory a definition as any is that given by Cyc., volume 25, page 1633:

" 'A lottery is a species of gaming which may be defined as a scheme for the distribution of prizes by chance, among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize.'

"For the purposes of this case, the above definition may be adopted.

. . . .

"Under the definitions quoted, and the examples to be found in the cases cited herein, we have no doubt the scheme adopted by the appellant was a lottery. The elements of consideration, chance, and prize are present. That consideration was paid and prizes given is not questioned. Concerning the element of chance, it is to be noted that the numbers were concealed under the buttons, and that certain of these numbers, when exposed by purchasers, called for redemption in boxes of candy. Discussing this scheme, it is said in the brief for appellant: 'The board decides who gets the candy as premiums.' And—

" 'The buttons are all identical and have nothing whatever to do with indicating whether or not the purchaser shall receive, in addition to his regular purchase, for which it is conceded he receives full value for his money, a box of candy.'

"It is very plain that but for such element of chance and uncertainty the board would not have been set up or played." *Id.* at 466-68, 204 P. at 1031.

Other cases have held that a drawing is not the

only means by which a lottery can be conducted by "chance." In *Forte v. United States,* 83 F.2d 612 (D.C. Cir. 1936), the legality of a numbers game was at issue. "It is further contended that the numbers game is not a lottery because there must be a physical drawing of the certificate or ticket. One of the essential elements of a lottery is the awarding of a prize by chance, but the exact method adopted for the application of chance to the distribution of prizes is immaterial." *Id.* at 615. See, also, *Shelton v. State,* 198 Md. 405, 84 A.2d 76 (1951).

Section 28-1115 does not alter the statutory definition of "lottery."

We conclude that the sale of pickle cards is a lottery and thus permitted by §§ 28-1101(6) and 28-1115. The drawing of the cards from a tub provides the element of "chance" required by statute. The fact that the winning numbers are predetermined does not eliminate "chance."

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

JAMES MCARTOR, APPELLANT, V. MOBIL OIL CORPORATION, A NEW YORK CORPORATION, APPELLEE.

324 N.W.2d 399

Filed September 24, 1982. No. 44416.

Franchises. Prior to the enactment of the Nebraska Franchise Practices Act, the law of Nebraska generally was that any person might do or refuse to do business with whomsoever he desired.

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

Gregory A. Pivovar, for appellant.

Timothy J. Pugh and J. Scott Paul of Boland, Mullin & Walsh, for appellee.

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

CAPORALE, J.

Plaintiff-appellant, James McArtor, appeals from the order of the trial court which sustained defendant's demurrer, dismissed plaintiff's petition, and overruled plaintiff's motion for new trial. We affirm.

Plaintiff's petition alleged that the defendant-appellee, Mobil Oil Corporation, breached its lease and retail dealer contract entered into by and between plaintiff and defendant on or about January 21, 1975, without "good cause," thus contravening public policy. Plaintiff argues that the adoption of the Nebraska Franchise Practices Act, Neb. Rev. Stat. §§ 87-401 et seq. (Reissue 1981), which became effective on July 22, 1978, evidences the prior existence of a public policy allowing franchises to be terminated only upon the existence of "good cause."

We recently had occasion to consider this very argument and rejected it. In *McDonald's Corp. v. Markim, Inc.,* 209 Neb. 49, 306 N.W.2d 158 (1981), we held that prior to the enactment of the Nebraska Franchise Practices Act (which excludes agreements for the sale, distribution, or marketing of petroleum products), the law of Nebraska generally was that any person might do or refuse to do business with whomsoever he desired. Although Chief Justice Krivosha and Judges Brodkey and White dissented in *McDonald's,* they did not quarrel with its rationale relative to the policy prior to the Franchise Practices Act but, rather, disagreed with the interpretation of a particular clause in the contracts in question. See, also, *Barish v. Chrysler Corporation,* 141 Neb. 157, 3 N.W.2d 91 (1942).

The trial court was correct in sustaining defendant's demurrer and in dismissing plaintiff's petition,

and properly denied the plaintiff a new trial.

AFFIRMED.

CLINTON, J., participating on briefs.

ROBERT M. SMITHBERG, APPELLANT, V. THE CITY OF PLATTSMOUTH ET AL., APPELLEES.

324 N.W.2d 400

Filed September 24, 1982. No. 44433.

Injunction. When the circumstances and situation of the parties have changed so that it would be just and equitable to vacate or modify a permanent injunction, the court which granted the injunction may vacate or modify it upon motion.

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

E. Michael Slattery, for appellant.

Herbert J. Elworth of Casey & Elworth, for appellees.

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

BOSLAUGH, J.

The plaintiff, Robert M. Smithberg, owns a 4½-acre tract of land at 18th and Avenue D in Plattsmouth, Nebraska. In 1979 he requested the zoning classification of this property be changed from agricultural open to salvage so that he could operate a salvage business on the property. The requested zoning change was denied by the council upon the recommendation of the planning commission.

This action was commenced in 1980 to enjoin the enforcement of the zoning ordinance against the plaintiff. The answer filed by the defendant city alleged that the operation of a salvage business upon the property was unlawful and that such use should be enjoined. The plaintiff dismissed his petition

without prejudice on May 18, 1981, so the matter was tried on the affirmative allegations of the answer.

The trial court found that the plaintiff was conducting a salvage business on his property in violation of the zoning ordinance of the City of Plattsmouth, and enjoined the plaintiff from continuing the salvage operation. The plaintiff has appealed.

The plaintiff contends the evidence was insufficient to support a finding that his property was situated within the zoning jurisdiction of the city, and that his salvage operation was lawful as a nonconforming use.

Although there were minor conflicts in the evidence, the record establishes that the plaintiff's property is within the zoning jurisdiction of the city and that his salvage operation does not qualify as a lawful nonconforming use.

The request for rezoning filed by the plaintiff, which is in the record, alleged that the property was situated within the city limits. The testimony of the city inspector and the official zoning map which was received in evidence also support a finding that the property was subject to the zoning jurisdiction of the city. The evidence established that the plaintiff did not commence his salvage operation until 1979, approximately 2 years after the property had been zoned agricultural open.

The plaintiff further contends the trial court should not have permanently enjoined the operation of a salvage business upon the property. The judgment enjoins the plaintiff from "continuing a salvage operation" upon the property. The purpose of the judgment is to prevent the plaintiff from continuing an unlawful use of the property. In the event of a change in circumstances the plaintiff may petition the trial court for a modification of the judgment. When the circumstances and situation of the parties have changed so that it would be just and equitable to vacate or modify a permanent injunc-

tion, the court which granted the injunction may vacate or modify it upon motion. *Board of County Commissioners v. Scott,* 178 Neb. 53, 131 N.W.2d 711 (1964); *Lowe v. Prospect Hill Cemetery Ass'n.,* 75 Neb. 85, 106 N.W. 429 (1905), *aff'd on rehearing,* 75 Neb. 100, 108 N.W. 978 (1906); *Wasserburger v. Coffee,* 201 Neb. 416, 267 N.W.2d 760 (1978).

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. PAMELA K. LAST, APPELLANT.

324 N.W.2d 402

Filed September 24, 1982. No. 81-719.

1. **Indictments and Informations.** An information or indictment must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to later prosecution for the same offense.
2. _____. An amendment adding an omitted allegation of a substantive element of the offense sought to be charged does not change the offense.
3. **Miranda Rights.** Once an accused requests the assistance of counsel, the interrogation of that individual must end.
4. **Miranda Rights: Waiver.** The protection afforded accused, once he has asked for the assistance of counsel, may thereafter be waived by the accused if done knowingly, freely, and voluntarily.
5. **Miranda Rights: Confessions.** *Miranda* does not protect an accused, even though he has requested counsel, from a spontaneous admission made under circumstances not induced by the investigating officers or during the conversation not initiated by the officers.
6. **Sentences: Appeal and Error.** In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
7. **Probation and Parole: Appeal and Error.** The granting of probation as opposed to the imposing of a sentence is a matter which is left to the sound discretion of the trial court, and, absent a showing

of abuse, this court will not on appeal disturb the trial court's denial of probation.

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

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

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

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

KRIVOSHA, C.J.

The appellant, Pamela K. Last (Last), appeals from a judgment and conviction finding her guilty of the offense of attempted robbery in violation of Neb. Rev. Stat. §§ 28-324(1) and 28-201(b) (Reissue 1979). Attempted robbery is a Class III felony punishable by imprisonment of not less than 1 year nor more than 20 years, or a fine of not to exceed $25,000, or both a fine and imprisonment. Last was sentenced by the court to imprisonment for a period of 18 months. We affirm.

The charge of attempted robbery filed against Last arose out of the attempted robbery of Thomas Jelsma by Larry Harris in front of Mr. Jelsma's residence in Lincoln, Nebraska, at about 1:30 a.m. on October 11, 1980. During the course of the attempted robbery Harris was fatally wounded by Jelsma. Prior to the attempted robbery a light-colored sedan-type automobile was observed by Jelsma parked in the neighborhood. After Jelsma shot Harris, he observed this vehicle leave the area but he was unable to identify the driver. Subsequently, a 1969 white Dodge four-door vehicle was located parked approximately 2 blocks from the attempted robbery scene. Among the items found in the vehicle was a purse containing identification items belonging to Last. Further investigation re-

vealed that the owner of the vehicle had loaned the vehicle to Last sometime during the month of September 1980. The owner was aware at the time that Last was acquainted with Harris and, further, had personal knowledge that on several occasions Harris had driven the vehicle without Last.

Several employees of the Lincoln Police Department, including Det. Allen F. Soukup, were assigned to investigate Last's possible involvement in the attempted robbery. Soukup had been acquainted with Last for some 10 years.

On October 11, 1980, Soukup had three conversations with Last with respect to her possible involvement in the attempted robbery. The first conversation occurred when Soukup, along with four other officers, went to Last's apartment. Prior to interrogating Last, Soukup advised her of her rights by reading to her the standard *Miranda* card, to which she responded affirmatively to each question. Upon request, Last voluntarily consented to a search of her apartment and a search of her own automobile, which was parked behind her apartment. When questioned by Soukup as to whether she knew Larry Harris, Last responded "yes, he's been living here." When Soukup advised Last that he would have to take her to police headquarters for further questioning, she voluntarily went with the officer.

During the second interrogation, which occurred at police headquarters, Soukup urged Last to tell him the truth concerning what she knew about the attempted robbery. Soukup concedes that he told Last if she was not involved in the attempted robbery she would be free to leave. Last asked to speak to an attorney and Soukup permitted her to do so. Following a call to her attorney no further interrogation between Soukup and Last took place.

Following Last's call to her attorney Soukup and Last went to a room located at police headquarters containing vending machines. Soukup purchased

something for Last to eat. Without any inducement by Soukup, nor in response to any question by Soukup, Last voluntarily said to Soukup, "I didn't panic after the shots were fired, I simply drove away and parked the vehicle a couple blocks away and walked back to see if I could help Larry or if Larry was hurt." Further questions were then asked of Last by Soukup. The trial court suppressed all the answers given by Last in response to questions propounded to her by Soukup following her outburst, and admitted in evidence only the unsolicited voluntary statement of Last. The other statements are not in issue in this appeal.

Last was then charged with the crime of attempted robbery. The complaint in the county court, upon which Last was arraigned, and the information filed in the District Court, upon which trial commenced, provided in material part as follows: "[T]hat Pamela K. Last, on or about the 11th day of October, A.D., 1980 in the County of Lancaster, and the State, aforesaid, then and there being, did contrary to the form of the statutes in such cases made and provided intentionally engage in conduct which, under the circumstances as she believed them to be, constituted a substantial step in a course of conduct intended to culminate in her commission of the crime of *robbery,* to-wit: did attempt forcibly and by violence or by putting in fear to take from the person of Tommy Jelsma money or personal property of any value whatever." (Emphasis supplied.) On May 21, 1981, that being the third day of trial, the State moved, over the objection of Last, to amend the information to add the words "with intent to steal."

Last now assigns as a basis for reversal a number of errors which can be reduced to three categories. The first assignment is that the trial court erred in not quashing the original information on the basis that it failed to include an essential element of the

crime charged. The second assignment of error is that the trial court erred in failing to quash the statement made by Last to Soukup in the vending machine area at police headquarters. The third assignment of error is that the trial court abused its discretion in sentencing Last to 18 months' imprisonment rather than placing her on probation.

Turning first to the contention that the information as originally filed was defective and that it was error to permit the State to amend, we believe the assignment should be overruled.

Last's argument in this regard is based upon her contention that by omitting the words "with intent to steal" from the information, the information failed to allege a crime and therefore was fatally defective. The information, however, did specifically charge Last with the crime of "attempted robbery." There is only one crime of robbery under the Nebraska Criminal Code and it is found at § 28-324. The statute provides as follows: "A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever." Under the Nebraska definition of robbery, "with intent to steal" is indeed a necessary element which the State was obligated to prove. By alleging that Last had attempted to commit the crime of robbery, as defined by statute, the information of necessity included all the elements of the crime of robbery. Under the Nebraska Criminal Code, the use of the word "robbery" in an information by definition includes the element "with intent to steal," and, in effect, the information was sufficient when it charged Last with attempting to commit the crime of "robbery."

The purpose of requiring that the information set out the charge in a particular manner is twofold. As we noted in *State v. Adams,* 181 Neb. 75, 78, 147 N.W.2d 144, 148-49 (1966): "An information or in-

dictment must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to later prosecution for the same offense." See, also, *State v. Buttner,* 180 Neb. 529, 143 N.W.2d 907 (1966). And while it is generally sufficient to allege the crime in the language of the statute, it is not necessary to state the detailed particulars of the crime in the meticulous manner prescribed by the common law. See *Cowan v. State,* 140 Neb. 837, 2 N.W.2d 111 (1942). In the instant case, while the information did not detail all the elements making up the crime of robbery, the statute defined the elements by providing that the word "robbery" meant taking money or personal property of any value from another when the taking was forcible or by violence or by putting in fear and with the intent to steal. While there may be sections of the Nebraska Criminal Code which would require a more definite statement in order to more fully advise the accused of the nature of the crime, robbery is not one of them. By charging Last with attempted robbery, the State obligated itself to prove beyond a reasonable doubt all the necessary elements of § 28-324, including the fact that there was an intent to steal. Adding the words "with intent to steal" did not change the offense from that which had been charged and does not entitle Last to a reversal of her conviction.

In *State v. Gascoigen,* 191 Neb. 15, 19-20, 213 N.W.2d 452, 455 (1973), we noted: "The determinative fact here is that there was no prejudice to the substantial rights of the defendant. The addition of the word 'willful' to the language of the information did not alter the burden of the State to prove beyond a reasonable doubt every essential element of the offense with which the defendant was charged. Neither did it change the nature or identity of the of-

fense charged. 'It has been held in a variety of contexts that an amendment adding an ommitted [sic] allegation of a substantive element of the offense sought to be charged does not "change the offense." ' People v. Crosby, 25 Cal. Rptr. 847, 375 P.2d 839. A fortiori, the addition of a formal or nonessential allegation does not do so either. To treat the addition of the single word 'willful' as a substantive and critical amendment in this case exalts form over substance.

". . . We do not condone such procedure but we remain convinced that no substantial rights of the defendant here were prejudiced. We hold that the District Court, in its discretion, may permit a criminal information to be amended at any time before verdict or findings if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced." We believe what we said in *Gascoigen* is equally applicable in the instant case. The assignment, therefore, must be overruled.

We turn then to Last's second assignment of error. Last maintains that the statement she made to the police officer in the vending area should have been quashed because it was not voluntary and was obtained in violation of her constitutional rights and was made as a result of some improper inducement made by Soukup to her. We believe that, notwithstanding the argument made by Last, the evidence in the case simply will not support the claim. In the first instance, the statement made by Officer Soukup to Last was neither a misstatement of fact or law nor improper. The record reflects that all the officer said to Last was that if she was not involved she would be free to leave. That, of course, is the fact of the matter and would be true even if not said by the officer. Simply articulating what in fact is true cannot be made the basis of an improper inducement. Furthermore, the only statement per-

mitted by the trial court to be introduced in evidence was the first statement made by Last, freely and voluntarily made and not in response to any question submitted to her by Soukup. We have never held that a statement freely and voluntarily made by one in custody may not be offered in evidence simply because the individual, before making the voluntary statement, has requested counsel.

We have said, as has the U.S. Supreme Court, that once an accused requests the assistance of counsel, the interrogation of that individual must end. See, *State v. McNitt,* 207 Neb. 296, 298 N.W.2d 465 (1980); *In re Interest of Durand,* 206 Neb. 415, 293 N.W.2d 383 (1980); *Brewer v. Williams,* 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977); *State v. Bridgeman, ante* p. 469, 323 N.W.2d 102 (1982). The protection afforded accused, once he has asked for the assistance of counsel, may thereafter be waived by the accused if done knowingly, freely, and voluntarily. As we observed in *State v. Pittman,* 210 Neb. 117, 119-20, 313 N.W.2d 252, 255 (1981), quoting from *Edwards v. Arizona,* 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981): " '[A]n accused, such as [petitioner], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges or conversations with the police.*' (Emphasis supplied.) In *United States v. Grant,* 549 F.2d 942, 946 (4th Cir. 1977), the U.S. Court of Appeals for the Fourth Circuit held: '[*Miranda* does not] protect an accused, even though he has requested counsel, from a spontaneous admission made under circumstances not induced by the investigating officers *or during a conversation not initiated by the officers.*' (Emphasis supplied.)"

The evidence in this case establishes without question that the incriminating statement made by Last

to Soukup was not in any manner induced by Soukup or in response to any question put to her by Soukup. Not even an accused is precluded from seeking the emotional benefits of confession if done freely and voluntarily. The trial court was correct in concluding the statement was freely and voluntarily made. The assignment, therefore, must be overruled.

Turning then to the last assignment, that the trial court abused its discretion in sentencing the appellant to imprisonment rather than probation, we must likewise overrule. The sentence was well within the statutory limits. We have frequently held that in the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. *State v. Irwin,* 208 Neb. 123, 302 N.W.2d 386 (1981); *State v. Wredt,* 208 Neb. 184, 302 N.W.2d 701 (1981). The granting of probation as opposed to the imposing of a sentence is a matter which is left to the sound discretion of the trial court, and, absent a showing of abuse, this court will not on appeal disturb the trial court's denial of probation. *State v. Jurgens,* 187 Neb. 557, 192 N.W.2d 741 (1971); *State v. Milligan,* 195 Neb. 493, 238 N.W.2d 906 (1976).

Having determined that there is no error, the judgment and sentence must be affirmed.

AFFIRMED.

WHITE, J., concurs in the result.

CLINTON, J., participating on briefs.

JOYCE FRANKLIN SIMMONS, APPELLANT, V. HAROLD WALTER SIMMONS, APPELLEE.

324 N.W.2d 407

Filed September 24, 1982. No. 81-800.

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

Lenore A. Simon, for appellant.

Gordon R. Hauptman of Westergren, Hauptman & O'Brien, P.C., for appellee.

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

WHITE, J.

The court, having reviewed this marriage dissolution case de novo as it is required to do, agrees with the result reached by the trial court. Therefore, the judgment of the trial court is in all respects affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM M. BRUMFIELD, APPELLANT.

324 N.W.2d 407

Filed September 24, 1982. No. 81-904.

Criminal Law: Penalties. Where a fine has been imposed, together with imprisonment up to the maximum period permissible, a court may not peremptorily direct satisfaction of the fine by crediting pretrial custody time against it. The defendant must be afforded an opportunity to pay the fine in accordance with law.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Reversed and remanded.

Randal B. Brown, for appellant.

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

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

CAPORALE, J.

This appeal challenges the right of a trial court

which has imposed a fine, together with imprisonment up to the maximum period permissible, to peremptorily direct satisfaction of the fine by crediting pretrial custody time against it. We hold a trial court may not so do and remand this case for resentencing of the defendant.

During the late evening hours of May 16, 1981, defendant-appellant, William M. Brumfield, and others met the victim at a Lincoln bar. After some drinking, the victim, the defendant, and the others went to the victim's apartment where they continued to drink and listen to music. During the early morning hours of May 17, 1981, defendant struck the victim with a wooden stick which was approximately 30 inches long and 1 inch in diameter. As a result the victim suffered a painful laceration to the back of his head.

Following a plea of no contest, the defendant was found guilty of second degree assault, a Class IV felony. Defendant was sentenced to serve a term of not less than 20 months nor more than 5 years in an institution under the jurisdiction of the Department of Correctional Services. The court also imposed a $5,000 fine to cover the costs of prosecution. The defendant was given credit for the 182 days he spent in custody prior to sentencing, and said credit was ordered applied to the fine at the rate of $25 per day. A Class IV felony authorizes a maximum penalty of 5 years' imprisonment, a $10,000 fine, or both such imprisonment and fine.

The defendant argues that the trial court erred in applying the time spent in pretrial custody to the partial satisfaction of the fine.

The issue presented is controlled by *State v. Holloway, ante* p. 426, 322 N.W.2d 818 (1982). Where a fine has been imposed as part of a penalty which authorizes imprisonment up to the maximum period permissible, a court may not peremptorily direct that the fine be satisfied by crediting the pretrial

custody time against it. The defendant must be afforded an opportunity to pay the fine in accordance with law.

Accordingly, the cause is remanded to the Nebraska Third Judicial District Court, Lancaster County, for resentencing in accordance with the principles enunciated herein.

In view of the foregoing determination, we do not address defendant's claim that his sentence was excessive.

REVERSED AND REMANDED.

CLINTON, J., participating on briefs.

COLLECTION ASSOCIATES, INC., A NEBRASKA CORPORATION, APPELLANT, V. EMERSON ECKEL ET AL., APPELLEES.

324 N.W.2d 808

Filed October 1, 1982. No. 44364.

Trial: Pleadings. The allowance of an amendment during trial to a pleading which changes the issue to a material fact may be prejudicial error.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed in part, and in part reversed and remanded.

James G. Sharp of Everson, Noble, Wullschleger, Sutter, Sharp & Korslund, for appellant.

C. E. Danley, for appellees.

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

WHITE, J.

Collection Associates, Inc., plaintiff-appellant, appeals from the judgment of the District Court of Gage County, Nebraska, allowing a setoff for crop damages allegedly sustained by Emerson Eckel and

Betty Eckel, defendants-appellees, in 1977. We affirm in part and reverse in part.

Plaintiff is a collection agency in Beatrice, Nebraska, which received an assignment of an open account from Firth Co-operative Co. (Firth Co-op) for goods and services sold to the defendants. It was uncontroverted that the defendants owed $11,553.94 on an open account, and no defense was raised at trial with regard to the amount due on the open account except for the setoff for spraying damages. The defendants requested a setoff for alleged damages to their milo and soybean crops for spraying done by the plaintiff's assignor, Firth Co-op, in 1978. After the plaintiff rested, the defendants amended their cross-petition over the objection of the plaintiff to allege milo damage in 1977 instead of 1978. The District Court found that there was damage to the defendants' milo crop in 1977 and awarded setoff of $3,699.36.

Of the several assignments of error we discuss only whether the trial court erred in permitting the defendants to amend their cross-petition to allege spraying damage to the milo in 1977 instead of 1978, and we will not reach the other assignments.

The right to amend pleadings rests within the sound discretion of the trial court and the allowing of an amendment will not be error unless prejudice resulted. *Foremost Ins. Co. v. Allied Financial Services, Inc.*, 205 Neb. 153, 286 N.W.2d 740 (1980); *Stungis v. Union Packing Co. of Omaha, Inc.*, 196 Neb. 126, 241 N.W.2d 660 (1976).

Neb. Rev. Stat. § 25-852 (Reissue 1979) provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading . . . by inserting other allegations material to the case, or, *when the amendment does not change substantially the claim or defense,* by conforming the pleading or proceeding to the facts proved." (Emphasis supplied.)

The record reveals that the defendants maintained the position that the spraying damage to the milo occurred in 1978, throughout discovery until after the plaintiff had rested. In the past we have not found the time at which an amendment occurred to be dispositive of whether prejudice occurred and have authorized amendments for the first time on appeal. See *Lippire v. Eckel,* 178 Neb. 643, 134 N.W.2d 802 (1965). However, in the instant case the change of the year of crop damage from 1978 to 1977 was a substantial change in the defense of setoff pleaded by the defendants. The plaintiff's discovery had been conducted with regard to damages in the year 1978. The pretrial order specifically allowed amendments relating to details of the claimed damage, but the amendments did not change the year in which the damage to the milo was alleged to have occurred.

Prejudicial error results when a pleading is allowed to be amended where the amendment changes the issues and affects the quantum of proof as to any material fact. See *Folken v. Union P. R. Co.,* 122 Neb. 193, 239 N.W. 831 (1932). Since the amendment here altered the year in issue, it substantially changed the nature of the proof to counter the setoff claimed. Indeed, in an affidavit offered in support of the motion for new trial, the plaintiff asserts that no spraying was supplied to the defendants by Firth Co-op in the year 1977. The plaintiff was clearly prejudiced by the action taken by the trial court. The plaintiff could not have been expected to meet claims of damages in other than the year alleged.

The action of the District Court finding for the plaintiff on the open account is affirmed, and the portion of the judgment allowing the setoff of $3,699.36 is reversed and the cause remanded for a new trial on the issue of the setoff damages for 1977 allegedly sustained by the defendants.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

CLINTON, J., participating on briefs.

SOLVEIG A. SLOSS, APPELLEE, V. PIERCE T. SLOSS, APPELLANT.
324 N.W.2d 663

Filed October 1, 1982. No. 44381.

1. **Modification of Decree: Alimony.** Except for amounts which have accrued prior to a petition to modify, orders for alimony may be modified or revoked for good cause shown. Neb. Rev. Stat. § 42-365 (Reissue 1978).
2. _____: _____. A change in the circumstances of the parties since the entry of the alimony order is a prerequisite to a modification of the alimony decree. Not every change in circumstances will warrant such modification, but only changes of circumstances which are material and substantial.
3. **Modification of Decree: Alimony: Appeal and Error.** In actions for the modification of alimony in a dissolution of marriage proceeding, it is the duty of this court to review de novo the determination of the District Court as to whether a change in circumstances has occurred which justifies the modification of the original decree.

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

John Story and Sam Grimminger, for appellant.

Brian R. Watkins of Watkins, Osborne, Scott & Keist, for appellee.

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

MCCOWN, J.

This is a proceeding to modify the alimony provisions contained in a divorce decree upon the ground of a change of circumstances. The District Court denied the petition to terminate or modify the original decree and this appeal followed.

The parties were married in 1955. They had four children who were, respectively, 17, 16, 13, and 11

years old at the time of the divorce decree in 1974. During the course of the marriage the husband, a pathologist, was actively engaged in the practice of medicine. The wife was a registered nurse and anesthetist but did not actively pursue her profession.

The parties entered into a written agreement in the divorce proceeding, which included a property settlement, custody and control of the minor children, child support, and alimony. The District Court found the agreement to be proper and reasonable in all respects, and that its terms were not unconscionable, and entered its decree approving the terms of the agreement and incorporating the agreement as a part of the decree. No appeal was taken.

The agreement and decree of March 6, 1974, provided that the wife should have custody of the children, subject to reasonable visitation rights of the husband, and that the husband would pay $62.50 per month child support for each of the two boys until each attained the age of 21 years or for a period of 4 academic years following graduation from high school if the sons were enrolled as full-time students in educational institutions. The husband was entitled to claim the sons as dependents for income tax purposes. No child support was set for the two girls, and the agreement provided that the wife could claim them as dependents for income tax purposes.

The agreement and decree also provided that beginning with the year 1974 the husband would pay to the wife as alimony an amount equal to 50 percent of all of his net income subject to federal income tax plus tax-free income, but that in no event should the amount to be paid be less than $1,000 per month until the husband reached 65 years of age. Estimated payments of alimony were to be made each year, with final adjustments following the completion of the year. Alimony ceased upon the death of either the husband or the wife.

The decree also provided for a division of property, real and personal, and noted that the parties had already divided all investments, cash, and securities between them.

The agreement and decree provided that if the husband was unable to make the payments provided for due to inability to work, the payments were to be delayed until his recovery, and also provided: "In the event that Respondent desires the amount of the payments to be changed due to decreased earning ability and the parties are unable to agree upon the amount thereafter to be paid, Respondent may submit the question to this Court and both parties shall be bound by the determination of the Court."

The husband paid all the amounts of alimony and child support required by the decree in accordance with its terms. On October 7, 1980, the husband filed the petition in this proceeding requesting termination or modification of the original decree as to alimony upon the ground of changed circumstances.

Hearing was held in the District Court for Hall County in February 1981. At the time of the hearing the husband was 57 years old and the wife was 52. Neither party has remarried. The evidence at the hearing showed that the four children were 24, 23, 19, and 18 years old at the time of the hearing and that the youngest daughter would become 19 in June 1981. Two of the children were living with the wife in her home in Lincoln, Nebraska.

Since the original decree of 1974 through the calendar year 1980 the husband paid approximately $427,000 in alimony to the wife and child support of $10,500, plus voluntary payments through 1979 of approximately $20,000 for such things as automobiles, insurance, and repairs. The husband's income for division increased each year from $147,000 in 1974 to $257,000 in 1979. The husband owned property at the time of the hearing in 1981 of approximately $300,000,

approximately one-third of which was property awarded to him by the original agreement and decree. The wife's property at the time of hearing was valued at approximately $400,000, approximately three-fourths of which was obtained by her under the original agreement and decree.

Since the decree was entered the wife has worked some months as a nurse, has obtained a real estate license, and has worked some in real estate sales, but quit because she felt her children needed her at home. She is presently contributing to the support of the children beyond their majority, and two of the four children are still living in her home. The husband testified that he suffers from a health condition known as Meniere's syndrome, which is currently stabilized and for which he takes regular medication. He also testified that he understood at the time of the original agreement and decree that the amount of child support was to be lower and the amount of alimony increased because of tax reasons. He therefore felt that when the children reached their majority the amount of alimony should be decreased.

The District Court found that the changes in circumstances with respect to property and investments of the parties were not substantial, taking into consideration the changes in the husband's earnings which occurred during the same time. The court also found that the husband failed to prove that the parties contemplated that the reaching of majority by the children would trigger a change in alimony. The District Court denied the petition to terminate or modify the original decree and also denied the wife's request for attorney fees. The husband has appealed.

The husband contends that circumstances have changed since the time of the decree and that those changed circumstances require that the alimony be terminated or reduced. He argues that the children

are now of age, are not physically or mentally handicapped in any way, and that the wife has therefore been relieved of her responsibility of caring for the children and maintaining a family home and is capable of returning to work at one or more of the several fields of employment for which she is qualified. He also argues that the wife's investments have been profitable while his have not.

Neb. Rev. Stat. § 42-365 (Reissue 1978) provides that except for amounts which have accrued prior to a petition to modify, orders for alimony may be modified or revoked for good cause shown. "Good cause" is defined in Black's Law Dictionary 623 (5th ed. 1979) as: "Substantial reason, one that affords a legal excuse. Legally sufficient ground or reason. Phrase 'good cause' depends upon circumstances of individual case, and finding of its existence lies largely in discretion of officer or court to which decision is committed." A material change in circumstances might constitute good cause for altering alimony provisions in a divorce decree. Not every change in circumstances warrants such modification, but only changes of circumstances which are material and substantial. In *Chamberlin v. Chamberlin,* 206 Neb. 808, 295 N.W.2d 391 (1980), this court stated that the reaching of the age of majority by minor children where there were separate awards of alimony and child support did not constitute a change in circumstances significant enough to warrant modification of the alimony award. It should be noted that in the present case all the provisions of the decree with respect to both alimony and child support were entered by voluntary agreement of the parties, although examined and approved by the court. It is obvious that the parties recognized that the children would reach the age of majority by the mere passage of time and that child support payments would terminate. The fact that they did reach their majority should not be treated as a cir-

cumstance which was not contemplated by the parties at the time the alimony decree was agreed upon and entered.

The evidence indicates that the wife's financial condition has improved since the date of the original decree, but it also indicates that the husband's financial condition has improved since the date of the decree. Although obviously such facts constitute a change in the economic circumstances of each party, the circumstances are predominately improved for both. Such changes are not ordinarily so material and substantial in a relative sense as to justify the termination of alimony or to necessarily constitute "good cause" for modifying the terms of the original agreement and decree.

In actions for the modification of alimony in a dissolution of marriage proceeding, it is the duty of this court to review de novo the determination of the District Court as to whether a change in circumstances has occurred which justifies the modification of the original decree. *Chamberlin v. Chamberlin, supra.*

The evidence in the present case is persuasive that the changes in the circumstances of the parties since the entry of the decree of divorce do not constitute a material and substantial change in circumstances sufficient to constitute good cause for a modification of the alimony provisions contained in the original agreement and decree. The determination of the trial court was correct and is affirmed, including the denial of attorney fees. Each party shall pay his or her own attorney fees in this court.

AFFIRMED.

CLINTON, J., participating on briefs.

LOWELL DEAN HUME, APPELLANT, V. OTOE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

THOMAS HUME, BY HIS FATHER AND NEXT FRIEND, LOWELL DEAN HUME, APPELLANT, V. OTOE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

324 N.W.2d 810

Filed October 1, 1982. No. 44392.

1. **Political Subdivisions: Highways: Liability.** A political subdivision may be liable for damages caused by insufficiency or want of repair of a highway or bridge or other public thoroughfare which the political subdivision is liable to keep in repair.
2. _____: _____: _____. A county is not an insurer, but is obligated only to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence.
3. **Political Subdivisions Tort Claims Act: Appeal and Error.** An action under the Political Subdivisions Tort Claims Act is tried to the court without a jury. Upon appeal to this court the findings of fact by the trial court will not be overturned unless clearly wrong.

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

Richard Dinsmore and Robert Leonard, for appellant.

Michael A. Fortune and Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellee.

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

BOSLAUGH, J.

These cases, brought under the Political Subdivisions Tort Claims Act, arose out of an automobile accident which occurred on January 29, 1977, in Otoe County, Nebraska. Thomas Hume, a passenger in an automobile being operated by James P. Marion, Jr., was severely injured when the Marion automo-

bile struck the side of a semitruck and trailer at the intersection of Seven-Mile Road and U.S. Highway 73-75. An action was brought by Thomas Hume, by his father and next friend, Lowell Dean Hume, to recover damages for his personal injuries. A separate action was brought by Lowell Dean Hume to recover his damages arising out of the injuries to Thomas Hume in the accident. The actions were consolidated for trial in the District Court and have been docketed in this court as one appeal.

The accident occurred when the Marion automobile, which was proceeding in an easterly direction on Seven-Mile Road, failed to stop at the stop sign before entering the intersection. The semitruck and trailer with which the Marion automobile collided was proceeding in a southerly direction on Highway 73-75.

Highway 73-75 is a two-lane paved highway which runs generally in a north-south direction. Seven-Mile Road is a two-lane gravel road which runs generally in an east-west direction. As it approaches the intersection with Highway 73-75 from the west, Seven-Mile Road slopes slightly downhill, the grade being approximately 2 percent.

The accident occurred at about noon on a clear, cold day. There had been a snowfall of approximately 1½ inches several days before. The gravel road had been "bladed" before the accident, but there was packed snow and ice on the surface. The plaintiff alleged that the defendant county was negligent in that it had failed to prevent an accumulation of ice on Seven-Mile Road, had failed to remove the accumulation of ice upon the road, and had failed to warn persons lawfully upon the road of the conditions of the road.

The defendant's answer denied the allegations of the petitions, alleged that the sole proximate cause of the accident was the negligence of the driver Marion, and that any slippery condition of the high-

way was caused by an act of God.

The trial court found generally for the defendant; that the county had exercised ordinary care in the maintenance of the highway; that the accident was caused solely by the negligence of the operator of the Marion automobile; and that the ice on the road was a condition which could have been reasonably anticipated and was not the cause of the plaintiff's damages. The plaintiff has appealed.

Neb. Rev. Stat. § 23-2410 (Reissue 1977) provides that a political subdivision may be liable for damages caused by "insufficiency or want of repair of a highway or bridge or other public thoroughfare, which a political subdivision is liable to keep in repair . . . ." Under this statute a county is not an insurer, but is obligated only to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence. *Christensen v. City of Tekamah,* 201 Neb. 344, 268 N.W.2d 93 (1978); *McKinney v. County of Cass,* 180 Neb. 685, 144 N.W.2d 416 (1966).

An action under the Political Subdivisions Tort Claims Act is tried to the court without a jury. Neb. Rev. Stat. § 23-2406 (Reissue 1977). Upon appeal to this court the findings of fact by the trial court will not be overturned unless clearly wrong. *Lee v. City of Omaha,* 209 Neb. 345, 307 N.W.2d 800 (1981).

Although the evidence in this case was somewhat in conflict, there is sufficient evidence to sustain the finding of the trial court that the county had used ordinary care in the maintenance of the highway. The judgment for the defendant must therefore be affirmed.

The county produced expert testimony that the usual and customary procedure to remove snow from gravel roads is to "blade" the road with a maintainer; that it is not practical or desirable to

sand or salt gravel roads. There was evidence that the condition of the road near the intersection was not substantially or materially different from the condition of all gravel roads in the county at the time the accident happened. The fact that the surface of the road was partially covered with ice or packed snow was open and apparent, and there is no requirement that signs be posted to warn of such conditions.

There was further evidence that the Marion automobile could have been stopped within a relatively short distance if it was traveling at the speed established by the evidence of the plaintiff.

In *Hendrickson v. City of Kearney,* 210 Neb. 8, 12, 312 N.W.2d 677, 679 (1981), we noted that it might be possible for a city to be liable for its failure "to remove snow or to treat its streets for icy conditions, at least where the evidence is undisputed that the city has assumed such responsibilities in the past." The evidence in this case supports the finding that the county used reasonable and ordinary care in its maintenance of the highway.

It is unnecessary to consider the other assignments of error.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

ABLE ELECTRIC CO., APPELLEE, V. VACANTI & RANDAZZO CONSTRUCTION COMPANY, APPELLANT.

324 N.W.2d 667

Filed October 1, 1982. No. 44402.

1. **Contracts.** The question of whether the interpretation of a contract is a matter of law or a question of fact depends upon certain factors. If the contract is to be construed by reference to its terms alone and without reference to extrinsic circumstances, it is for the

court alone to interpret. On the other hand, if the interpretation depends upon extrinsic facts which are in dispute, the resolution of those facts must be submitted to the jury.

2. _____. Time is not generally considered as the essence of a contract unless it is expressly provided or it appears that it was the intention of the parties that it should be of the essence thereof.

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

Frank Meares, for appellant.

Michael J. Mooney and Michael W. Pirtle of McCormack, Cooney, Mooney & Hillman, P.C., for appellee.

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

KRIVOSHA, C.J.

This appeal arises out of a suit filed by the appellee, Able Electric Co., an electrical subcontractor, against the appellant, Vacanti & Randazzo Construction Company, a general contractor. Following trial, a judgment in favor of Able and against Vacanti in the amount of $15,156.40 was returned by a jury. Vacanti has appealed to this court, essentially maintaining that the trial court committed error by reason of certain of the instructions given by the court to the jury. We have examined the record and conclude that the claims of appellant are without merit and that the judgment should be affirmed.

Vacanti, as general contractor, entered into a contract for the construction of a building in Council Bluffs, Iowa. The general contract between the owner and Vacanti contained a clause requiring the project to be completed within 450 days from the issuance of a notice to proceed. Thereafter, Vacanti entered into a subcontract with Able. Able was to perform the electrical work for the project. Able agreed to perform all the work for a price "not to

exceed" $120,000. The subcontract entered into between Vacanti and Able provided in part that Able would "complete all work under the job schedule time period set up by the General Contractor and Owner." Able also agreed to "assume toward the Contractor all the obligations and responsibilities that the Contractor assumes in and by the aforesaid documents toward the Owner, in so far as they are applicable to this particular sub-contract."

The project manual which included the job specifications and was made available to all the contractors and subcontractors in determining their bids further provided in part: "6. To complete the work within 450 calendar days of the notice to proceed." The notice to proceed was issued on November 28, 1977.

The job was admittedly late in starting and by the spring of 1979 was far behind schedule. Able became concerned about this matter and contacted Vacanti. Able's president testified that it relied upon the 450-day completion period contained in the project manual in calculating labor costs, due to the fact that its employees' union contract would expire in June of 1979, thereby affecting Able's cost of labor after June 1979. Able went to Vacanti and requested additional compensation to defray the increased costs. Based upon an expected completion date of mid-August 1979, Able offered to finish the job for an additional $10,500. Vacanti refused the offer. When it became apparent to Able that the project could not possibly be completed before its labor contract expired, Able left the job. The entire project was eventually completed in February or March of 1980, more than 1 year beyond the specified completion date as contained in the contract and the project manual.

As of April 30, 1979, Able had been paid a total of $82,800 for labor and materials valued at $92,000. The difference of $9,200 was withheld by Vacanti un-

der a provision of the subcontract which entitled Vacanti to withhold 10 percent of the amount due to a subcontractor until completion of the project. In addition, Able did not receive payment for labor and materials furnished during May and June of 1979 in the amount of $5,956.40, although payment had been made by the owner to Vacanti.

Vacanti maintains that the verdict of the jury must be set aside because of improper instructions given by the trial court. Vacanti maintains that the trial court erred in giving instruction Nos. 3, 4, and 5, as they "placed undue emphasis upon the claims of the Plaintiff unsupported by the evidence which failed to state a cause of action." We may dispose of that matter quickly. Instruction Nos. 3, 4, and 5 were merely an outline of Vacanti's answer and cross-petition and Able's reply. Instruction No. 5 specifically advised the jury that "The foregoing outline of the contents of the pleadings of the parties are merely their statements and contentions made in this lawsuit; and, except as to any admissions contained therein, are not to be considered by the jury as evidence in the case." Instruction Nos. 3, 4, and 5 merely advised the jury what the appellant's issues were and were entirely proper. *Watson Bros. Transp. Co. v. Jacobson,* 168 Neb. 862, 97 N.W.2d 521 (1959). We are unable to determine how or in what manner Vacanti can find fault with those instructions.

Vacanti's second claimed assignment of error involves whether there was a requirement imposed on Vacanti to complete the contract within 450 days and whether that made time of the essence of the contract. Vacanti maintains that the issue as to whether 450 days was of the essence was a question of law and not a question of fact and, therefore, the trial court was in error in submitting instruction Nos. 7 and 12 to the jury. Again, we believe that Vacanti is in error in this assertion. The question of whether

the interpretation of a contract is a matter of law or a question of fact depends upon certain factors. If the contract is to be construed by reference to its terms alone and without reference to extrinsic circumstances, it is for the court alone to interpret. See, *Oehlrich v. Gateway Realty of Columbus, Inc.*, 209 Neb. 417, 308 N.W.2d 327 (1981); *Westbrook v. Masonic Manor,* 185 Neb. 660, 178 N.W.2d 280 (1970). On the other hand, if the interpretation depends upon extrinsic facts which are in dispute, the resolution of those facts must be submitted to the jury. *Gustav Thieszen Irr. Co., Inc. v. Meinberg,* 202 Neb. 666, 276 N.W.2d 664 (1979); *Ely Constr. Co. v. S & S Corp.,* 184 Neb. 59, 165 N.W.2d 562 (1969). The law in Nebraska as to whether time is of the essence in a contract has long been as expressed in the case of *J. H. Melville Lumber Co. v. Welpton Lumber Co.,* 121 Neb. 370, 371-72, 236 N.W. 438, 439 (1931), wherein we said: "Time is not generally considered as the essence of a contract, unless it is expressly provided or it appears that it was the intention of the parties that it should be of the essence thereof." In the instant case the general contract and the invitations to bid specifically obligated both the contractor and the subcontractor to complete the work within 450 days. The subcontractor was to submit his bid based upon the assumption that the work would be completed within 450 days. The contract documents are not clear as to whether the 450 days was an essential requirement of the contract or merely an unimportant detail. If we believed Vacanti and its witnesses, we would conclude that the parties did not intend that the 450-day time limit be considered as the essence of the contract, even though the contract documents contained provisions which could be understood to make it so. On the other hand, if we believed Able and its witnesses, we must find that time was of the essence. The answer to that question depends upon determining what was the intention of

the parties. To arrive at that determination, resort to extrinsic evidence was required; therefore, the trial court was correct in concluding that the question involved was a question of fact to be submitted to the jury. Instruction Nos. 7 and 12 were in all respects correct and were properly submitted to the jury.

The last assignment of error raised by Vacanti is with regard to instruction No. 11. Instruction No. 11 instructed the jury that the obligation of scheduling and coordinating a construction project is imposed upon the general contractor and that failure of the party charged with scheduling responsibility to properly carry out this function *may* be a substantial breach of its obligation to the other party, thereby entitling the other party to abandon the project and seek damages.

Under the terms of article 4.3.1 of the general conditions of the contract, Vacanti was obligated to schedule and coordinate the work. The provisions provided in part as follows: "He [the contractor] shall be *solely* responsible for . . . coordinating all portions of the Work under the Contract." (Emphasis supplied.) The subcontract between Able and Vacanti obligated Able to "complete all work under the job schedule time period set up by the General Contractor and Owner." Reading these documents together, see, 17A C.J.S. *Contracts* § 299 (1963) and *W. Wright, Inc. v. Korshoj Corp.*, 197 Neb. 692, 250 N.W.2d 894 (1977), Vacanti was solely responsible for coordinating the time schedules established for the project, and his failure to do so could be considered a sufficient breach so as to entitle the subcontractor to sue to recover damages. *W. Wright, Inc. v. Korshoj Corp., supra; Siefford v. Housing Authority,* 192 Neb. 643, 223 N.W.2d 816 (1974); *Parsons Constr. Co. v. State,* 180 Neb. 839, 146 N.W.2d 211 (1966); 13 Am. Jur. 2d *Building, Etc. Contracts* § 45 (1964).

The instruction was correct, although more favor-

able to Vacanti than he might have been entitled. The trial court did not tell the jury that Vacanti had in fact contracted to coordinate the work, but only that there was an implied obligation to do so. Such action by the trial court does not entitle Vacanti to any relief on appeal. *Kennedy v. Woods,* 131 Neb. 217, 267 N.W. 390 (1936); *Sandberg v. Hoogensen,* 201 Neb. 190, 266 N.W.2d 745 (1978).

The instructions as tendered by the trial court to the jury were in all respects correct and the judgment returned by the jury fully supported by the record. We have likewise reviewed the other assignments of error raised by Vacanti and find them to be without merit. The judgment therefore must be affirmed.

AFFIRMED.

CLINTON, J., participating on briefs, concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. MAURICE SCOTT, APPELLANT.

324 N.W.2d 670

Filed October 1, 1982. No. 81-814.

1. **Jurors.** One who cannot subordinate his personal views to what he perceives to be his duty to abide by his oath as a juror and to obey the laws of the state must be excused for cause.
2. **Jury Instructions.** It is the duty of the court upon request of the accused to instruct the jury upon any valid defense which the evidence supports. The court is not required to give instructions where there is not sufficient evidence to prove the facts claimed.

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

Dennis R. Keefe, Lancaster County Public Defender, and James L. Foster, for appellant.

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

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

MCCOWN, J.

The defendant was found guilty of first degree murder by a jury and sentenced to life imprisonment by the District Court. This appeal followed.

The defendant and victim had lived together with their three small children for some time in an apartment complex in Lincoln, Nebraska. On the evening of April 22, 1980, the victim and a female friend of hers left the children at the apartment of a neighbor, intending to be gone for a short time. When they returned to the apartment of the defendant and the victim at approximately 10:30 p.m., they were met at the door by the defendant. He expressed anger at the victim for leaving the children and slapped her. The friend interceded and persuaded the defendant to accompany her in her automobile. They drove around for approximately 25 minutes while she attempted to calm the defendant down before returning to the apartment. At approximately 11 p.m. the defendant was returned to his apartment.

At approximately 3 a.m. on the morning of April 23 the defendant awoke a next door neighbor by pounding on her door, and asked her to call an ambulance. The neighbor did so and then followed the defendant to his apartment, where she observed that the apartment was in disarray. There was some broken furniture and blood on the floor. The victim was lying on a bed. Emergency and police personnel arrived soon afterward and determined that the victim was dead. An autopsy performed later established that the victim had suffered multiple bruises, abrasions, and lacerations, and the lacerations were largely confined to the scalp. Death was attributed to loss of blood and shock resulting from the injuries, particularly those to the head. The de-

fendant at the time appeared frenzied and frantic, and said: "I can't believe it. I murdered my woman." He also said: "Man, I must have flipped out," and "I just went crazy. I didn't mean to do it." The defendant was arrested, charged with first degree murder, and pleaded not guilty. Following trial a jury found him guilty of first degree murder, and a three-judge panel sentenced him to life imprisonment.

On this appeal the defendant first contends that it was error for the trial court to allow the prospective jurors to be questioned as to their scruples regarding the death penalty. The defendant argues that because the jury has nothing to do with setting the punishment for the defendant, such questioning would lead to a conviction-prone jury favoring the prosecution and thus deny the defendant a fair trial and an impartial jury.

In this case, before voir dire, the defense moved that the State be barred from making any inquiries of the jury about their feelings, scruples, or opposition to the death penalty. The motion was denied. During voir dire the court asked all prospective jurors and alternate jurors generally if there was anyone opposed to capital punishment. Those jurors who indicated that they were opposed were then questioned individually by the court. The court asked the individual jurors if they could listen to the evidence and the law and make a determination of guilt or innocence based solely on the evidence and law without considering the fact that capital punishment might be imposed. Only one prospective juror was removed for cause over defendant's objection, and that juror stated that her opposition to the death penalty was so strong that she could not take the oath to decide the case fairly.

The states are prohibited from imposing the death penalty pursuant to the verdict of a jury from which those with conscientious scruples against capital

punishment or who oppose capital punishment were excluded. *Witherspoon v. Illinois,* 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).

In the present case no death penalty is involved, and jurors who opposed capital punishment or had conscientious scruples against it were not automatically excluded for cause. The one juror removed for cause over defendant's objection in the present case stated that her convictions as to the death penalty would prevent her from fairly deciding the guilt or innocence of the defendant based on the facts and the law. Our cases establish that removal for cause in such circumstances is mandatory. See, *State v. Anderson and Hochstein,* 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981); *State v. Kirby,* 185 Neb. 240, 175 N.W.2d 87 (1970). Under the circumstances in the instant case neither the questioning of the jurors as to their convictions regarding capital punishment nor the removal of jurors for cause was in error. See *State v. Rowe,* 210 Neb. 419, 315 N.W.2d 250 (1982).

The defendant also contends that he was denied a fair trial because the trial court refused to instruct the jury as to the defense of insanity or diminished mental capacity. The defendant pleaded not guilty, but no pleading ever asserted the defense of insanity. The psychiatrist appointed by the trial court to examine the defendant testified outside the presence of the jury that he observed the defendant and administered a mental status examination, from which he concluded that at the time of the murder the defendant knew what he was doing and the nature and quality of his acts and could distinguish between right and wrong. The defendant did not present any witnesses or evidence in defense of the charge against him and there was no direct evidence of insanity presented at the trial. The defendant now argues that the evidence of the State alone was

sufficient to support his request for instructions on insanity and diminished mental capacity. We disagree.

The established rule in Nebraska is that a court should instruct the jury upon any valid defense which the evidence supports. The court is not required to give instructions upon a defense where there is no evidence to prove the facts claimed. *State v. Prim,* 201 Neb. 279, 267 N.W.2d 193 (1978); *State v. Stewart,* 197 Neb. 497, 250 N.W.2d 849 (1977). The trial court in the present case carefully reviewed all the evidence touching on the defendant's mental state at the time of the murder and properly concluded that there was no evidence to warrant an instruction on insanity. The record supports that determination.

The judgment of the trial court was correct and is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM F. EBERT, APPELLANT.

324 N.W.2d 812

Filed October 1, 1982. No. 81-917.

1. **Lesser-Included Offenses.** To constitute 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.
2. _____. To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case.
3. **Lesser-Included Offenses: Jury Instructions.** Where a criminal defendant requests a jury instruction on a lesser-included offense and presents evidence which, if believed, would provide a rational basis for acquitting the defendant of the offense charged and convicting him of the lesser offense, the requested instruction must be given.

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

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

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

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

PER CURIAM.

Defendant Ebert was charged under the provisions of Neb. Rev. Stat. § 28-603 (Reissue 1979) with forgery, second degree, found guilty by a jury, and sentenced to a term of not less than 18 months' nor more than 4 years' imprisonment. He has appealed to this court and makes the following assignments of error: (1) The court erred in denying his request for an instruction that he could be found guilty of the lesser-included offense of criminal possession of a forged instrument under the provisions of Neb. Rev. Stat. § 28-604 (Reissue 1979). (2) The sentence is excessive. We affirm.

Section 28-603(1) provides: "Whoever, with intent to deceive or harm, falsely makes, completes, endorses, alters, or utters any written instrument which is or purports to be, or which is calculated to become or to represent if completed, a written instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status, commits forgery in the second degree." The balance of the section defines the crime as a Class III or IV felony or Class I misdemeanor, depending upon the face value of the instrument or the amount of the proceeds.

Section 28-604(1) provides: "Whoever, with knowledge that it is forged and with intent to deceive or harm, possesses any forged instrument covered

by section 28-602 or 28-603 commits criminal possession of a forged instrument."

The State introduced evidence which would permit the jury to find that on March 17, 1981, defendant uttered a forged check in the amount of $155, purportedly made by Clark A. Wilcox and payable to Rick Sipes, by presenting the check to the City Bank & Trust Company of Lincoln for cashing.

The defendant testified that on March 17 he and an acquaintance, Leroy Kilburn, drove together to a branch of the City Bank because Kilburn wanted to cash a check. When the two reached the bank drive-in facility, Kilburn handed defendant the check "folded in half" along with what "felt" to the defendant like instruments of identification. The defendant testified that when he presented the check and identification to the teller, Kilburn was out of sight because he had dropped his cigarette lighter on the floor of the car and was reaching for it. The substance of the defendant's testimony and defense is that he was unaware that the check was forged, that he had not seen it or the instruments of identification, and that in presenting the check for cashing he was the innocent and unwitting agent of Kilburn.

Other evidence indicated that two blank checks had been stolen from Wilcox and that the defendant had had an opportunity to steal them. The court received additional evidence of the defendant's guilt which does not affect the issues assigned as error.

The State first argues that possession of the instrument is not an element of the crime of forgery or uttering a forged instrument and that, therefore, the criminal possession of a forged instrument is not a lesser-included offense of the crime of forgery as defined by § 28-603. To utter a forged instrument is to offer to pass it to another with the intent to deceive or harm by declaring or asserting, directly or indirectly, by words or actions that the instrument is

genuine. *Robeen v. State,* 144 Neb. 910, 15 N.W.2d 69 (1944); *Crawford v. State,* 164 Neb. 231, 82 N.W.2d 1 (1957). It would appear under the foregoing definition that it would be possible to "offer" the forged instrument by words without, at the time, having possession of it. In such a case, criminal possession would not be a lesser-included offense, for we have recently held: " '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.' . . . To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case." *State v. Lovelace, ante* p. 356, 359-60, 322 N.W.2d 673, 675 (1982).

However, we need not in this case decide that abstract proposition. As indicated by our previous summary of the evidence, if the defendant delivered the instrument to the bank with knowledge that the instrument was forged and with intent to deceive or harm, then he was guilty of the crime of forgery in the second degree. If, on the other hand, he was Kilburn's innocent dupe, he was guilty of no crime at all. The applicable principle is: "Where a criminal defendant requests a jury instruction on a lesser-included offense and presents evidence which, if believed, would provide a rational basis for acquitting the defendant of the offense charged and convicting him of the lesser offense, the requested instruction must be given." (Syllabus of the court.) *State v. Hegwood,* 202 Neb. 379, 275 N.W.2d 605 (1979). Under the defendant's version of the facts, no basis existed for convicting him of criminal possession of a forged instrument because, under that version, he had neither the requisite intention nor knowledge. The court did not err in refusing to give the requested instruction, for the evidence offered no

rational basis for convicting defendant of the "lesser-included" offense.

The defendant has one prior felony conviction for burglary for which he was incarcerated. Earlier he served a term of 18 months' probation for receipt of stolen property. He has numerous misdemeanor convictions for such offenses as theft and assault. In light of the defendant's record the sentence is not excessive.

AFFIRMED.

BOSLAUGH and HASTINGS, JJ., concur in the result.
CLINTON, J., participating on briefs.

HAROLD S. BARNES, APPELLANT, V. PEGGY SUE BARNES, APPELLEE.

324 N.W.2d 408

Filed October 1, 1982. No. 82-166.

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

Stanley D. Cohen and Joyce M. Pocras, for appellant.

Alan L. Plessman, for appellee.

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

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record de novo as it is required to do, finds that the decree of the trial court should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM A. WOODRUFF, APPELLANT.

324 N.W.2d 673

Filed October 1, 1982. No. 82-195.

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

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

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

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

PER CURIAM.

Pursuant to a plea of guilty, the defendant was convicted of a February 19, 1981, theft of property in Lancaster County. This is a violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1979) and is a Class IV felony, which authorizes a maximum term of imprisonment of 5 years. The District Court imposed a term of imprisonment of not less than 2 nor more than 3 years.

On appeal the defendant contends, and the State concedes, that where an indeterminate sentence is pronounced, Neb. Rev. Stat. § 83-1,105(1) (Reissue 1981) requires that "the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term . . . ."

The minimum limit imposed by the trial court was more than one-third of the maximum term. The conviction of the defendant is affirmed. The sentence is modified to provide that the defendant shall be confined to an institution under the jurisdiction of the Department of Correctional Services for a term of not less than 1 year 8 months and not more than 3 years.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JEFF PARKS, APPELLANT.

324 N.W.2d 673

Filed October 1, 1982. No. 82-221.

1. **Entrapment.** 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.
2. **Entrapment: Proof.** Entrapment is a defense which is in the nature of an affirmative defense. This being so, the defendant has the initial burden of going forward with evidence of governmental involvement and inducement, following which the ultimate burden, the risk of nonpersuasion, as in all criminal cases, is on the State.
3. _____: _____. When assessing the evidence in an entrapment case, the court must first determine if the defendant has submitted sufficient evidence, more than a scintilla, to give rise to the defense. If the defendant has met that burden, the question of entrapment then becomes one of fact to be decided by the jury.
4. **Appeal and Error.** It is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
5. **Entrapment: Appeal and Error.** Facts constituting entrapment are ordinarily to be determined by the jury or trier of fact in each individual case, and its findings will be disturbed only when the preponderance of evidence against such findings is great and they clearly appear to be wrong.
6. **Entrapment: Evidence.** In finding predisposition, the jury need not look specifically to any particular fact or piece of evidence, but may find such predisposition on the part of the defendant from the totality of the circumstances.
7. **Criminal Law: Evidence.** In criminal cases it is not error to exclude evidence which is not substantive proof of any fact relative to the issue, and evidence which does not tend to establish the guilt or innocence of a defendant of a crime charged is immaterial and should be excluded.
8. **Criminal Law: Witnesses: Jury Instructions.** An accused is not entitled to a cautionary instruction where the witnesses who testify against him are regular public law enforcement officers.
9. **Indictments and Informations.** Where the elements of a crime defined by statute are set out in an information or complaint, it is sufficient; and if words appear in such information or complaint which might be stricken, leaving a crime sufficiently charged, and

such words do not tend to negative any of the essential averments, they may be treated as surplusage and be entirely rejected.

10. **Criminal Law: Pleadings: Waiver.** By demurring or pleading to the general issue without requesting a ruling on a motion to quash an information as to certainty, particularity, or redundancy, the defendant has waived all such defects which were raised by the motion to quash.
11. **Sentences: Appeal and Error.** In the absence of an abuse of discretion by the trial court, we will not disturb on appeal a sentence imposed within the statutory limits.

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

Richard L. Kuhlman, for appellant.

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

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

HASTINGS, J.

The defendant, Jeff Parks, was convicted by a jury of the felony crimes of delivery of lysergic acid diethylamide and delivery of marijuana. Following concurrent sentences of 5 to 10 years and 4 to 8 years, the defendant has appealed to this court. His assignments of error include the jury's rejection of his defense of entrapment, the trial court's sustaining of the State's motions in limine, its failure to give an instruction on the testimony of a paid informer, its overruling of a plea in abatement, and the excessiveness of the sentences.

The basic facts in this case are not in dispute. The defendant was contacted by one James Louden on July 3, 1981. This contact was initiated by Louden to determine if a friend of Louden's, an undercover patrol officer, could buy a quantity of marijuana from Parks. At this time, Parks indicated that such a sale was possible, but not at that precise time. Parks told Louden to contact him later. At all times relevant to this case, James Louden was acting as a

paid cooperating individual with the Nebraska State Patrol.

After Louden's initial contact with Parks, Louden recontacted Parks 8 to 10 times in the following few days. Each of these times Parks stated that he was having trouble making contact with his source and instructed Louden to get in touch with him again later. On July 7, 1981, a buy was set up between undercover officer Charles L. Phillips, Louden, and Parks. Officer Phillips and Louden picked up Parks at his residence located at 903 Pierce Street in Fremont on July 7. Under Parks' direction they all three proceeded to 605 South I Street in Fremont. Upon their arrival, Parks, leaving Louden and Officer Phillips in the vehicle, went into an apartment building located at that address. After some time elapsed, Parks returned to the vehicle and asked, "Would anybody be interested in any acid?" meaning lysergic acid diethylamide (LSD). Officer Phillips agreed to purchase some. Parks then returned to the apartment building and came back with a quarter pound of marijuana and five "hits" of LSD. Officer Phillips paid $125 for the marijuana and $10 for the LSD. Sometime later, Parks was arrested.

The trial court properly instructed the jury on the defense of entrapment. The test to determine when a party has been entrapped is set forth in *Sherman v. United States,* 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958), and has been followed in Nebraska. "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. Lampone,* 205 Neb. 325, 328, 287 N.W.2d 442, 444 (1980). The question to be answered by the court

under the test is whether or not the defendant was predisposed to recommit the offense in question.

Entrapment is a defense "which is in the nature of an affirmative defense . . . ." *State v. Ransburg,* 181 Neb. 352, 354, 148 N.W.2d 324, 326 (1967). This being so, the defendant has the initial burden of going forward with evidence of governmental involvement and inducement. The ultimate burden, however, as in all criminal cases, is on the government. This is the risk of nonpersuasion.

When assessing the evidence in an entrapment case, a two-step process is used. First, the court must determine if the defendant has submitted sufficient evidence to give rise to the defense. This requires only "*more than a scintilla*" of evidence. *United States v. Wolffs,* 594 F.2d 77, 80 (5th Cir. 1979). If the defendant meets this burden, the question of entrapment becomes one of fact to be decided by the jury. See, *United States v. Wolffs, supra; United States v. Rodrigues,* 433 F.2d 760 (1st Cir. 1970).

In the present case the defendant did introduce evidence of governmental involvement, inducement, and lack of predisposition on the part of Parks. This was done mainly by way of Parks' direct testimony. The evidence offered was more than a mere scintilla, making the entrapment question one for the jury to decide. The jury found against defendant Parks on this question, since they found him guilty.

When reviewing questions decided by the trier of fact in a criminal case, this court has stated the standard of review to be a limited one. "It is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evi-

dence to support it." *State v. Woodruff,* 205 Neb. 638, 640-41, 288 N.W.2d 754, 757 (1980). More specifically, when reviewing jury verdicts regarding the defense of entrapment, this court has stated: "Facts constituting entrapment, which is in the nature of an affirmative defense, are ordinarily to be determined by the jury or trier of fact in each individual case, and its findings will be disturbed only when the preponderance of evidence against such findings is great and they clearly appear to be wrong, or when the findings are clearly contrary to law." *State v. Ransburg, supra* at 354-55, 148 N.W.2d at 326. Inasmuch as this is the standard of review, the only inquiry for the court to make in this case is, was there sufficient evidence in the record on which the jury could have based its verdict?

In finding predisposition the jury need not look specifically to any particular fact or piece of evidence. Rather, the jury may find predisposition on the part of the defendant from the totality of the circumstances. This was the conclusion reached by the Court of Appeals in *United States v. Rodrigues, supra.* The facts in *Rodrigues* are similar to those in the present case. In *Rodrigues* the court faced a defendant convicted of selling drugs to a government agent. The defendant Rodrigues raised the question of entrapment, and in response to this defense the government had no direct evidence of predisposition on the defendant's behalf. Specifically, Rodrigues had not been convicted of selling drugs before, as is the situation with Parks in the present case. The defendant was convicted of the sale of drugs, and, reviewing the jury's verdict, the appellate court stated: "A jury can find predisposition beyond a reasonable doubt by looking to the totality of circumstances involved in the particular transactions in question. Otherwise, a first offender, disposed to commit the crime for which he is charged, would find sanctuary in the entrapment defense

merely because the government would be unable to prove prior nonexistent activities. The entrapment defense does not require such a result. The court's denial of the appellant's motion for acquittal was proper." *Id.* at 762.

In the present case the State has offered no direct evidence of the defendant's predisposition to commit these crimes. There is circumstantial evidence in the record, however, upon which the jury might have found predisposition. First, the defendant admitted prior use of and contact with drugs, including weekly use of marijuana; second, Parks indicated readiness and willingness to enter into this illegal transaction when first asked; and third, it was Parks himself who first made the unsolicited offer to sell LSD.

The State's motions in limine prohibited the defendant from questioning the cooperating individual, Louden, relative to other cases upon which he was working and from adducing evidence concerning the contents of a certain written employment agreement existing between the Nebraska State Patrol and Louden. As to the first motion, it was the position of the State that the other cases Louden was working on were ongoing investigations which would be prejudiced by making them public. As to the second motion, the State claimed a privilege under the provisions of Neb. Rev. Stat. § 27-509 (Reissue 1979).

We might point out at the outset that there is no claim by the defendant that the State did not furnish to the defense all information it had relative to the prosecution of the defendant. However, the defendant's main contention, as expressed by his counsel, is that by sustaining the motions in limine the defendant's right of cross-examination was unduly restricted. This, he says, hampered his ability to bring forth impeachment testimony, and particularly with reference to a discrepancy which seemed to exist as to the date that Louden first talked to

Officer Williams. That date, it is claimed, would appear on the face of the written agreement. However, the State offered to stipulate that the date appearing on the agreement was November 7, 1980. Secondly, defense counsel was allowed the opportunity to inspect the agreement in all details. Finally, the State did not call Louden as a witness, so there was no testimony for the defense to impeach. Any evidence which would have been available to the defendant but for the motions in limine would have been irrelevant and collateral to the pending case. "[I]n criminal cases it is not error to exclude evidence which is not substantive proof of any fact relative to the issue, and evidence which does not tend to establish the guilt or innocence of a defendant of a crime charged is immaterial and should be excluded." *Scherer v. State,* 168 Neb. 127, 135, 95 N.W.2d 329, 334 (1959).

The defendant argues also that the trial court erred in not giving a specific instruction cautioning the jury on the testimony of James Louden, the paid cooperating individual. "Where informers, detectives, or other persons employed to hunt up testimony against the accused are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested. The accused is *not entitled to a cautionary instruction where the witnesses against him are regular public law enforcement officers.*" (Emphasis supplied.) *State v. Gurule,* 194 Neb. 618, 622, 234 N.W.2d 603, 607 (1975).

The only witnesses called by the State who testified against the defendant were all regular officers of the Nebraska State Patrol. Louden, the cooperating individual, was not called by the State, but by the defendant. The defendant was not entitled to an instruction as provided for in *Gurule.* The general instruction given by the trial court regarding

the weight and credibility of the witnesses was therefore sufficient.

Defendant's claimed error regarding the plea in abatement is without merit. He was charged by complaint in the county court in the words of Neb. Rev. Stat. § 28-416 (Reissue 1979) that he did "unlawfully . . . manufacture, distribute, deliver or dispense a controlled substance . . . ." He argues that there was no evidence at the preliminary hearing "even suggesting that Defendant manufactured . . . a controlled substance." He does not claim that the evidence was lacking as to delivery.

The words "manufacture" and "dispense" were entirely irrelevant to the crime charged and proved. Where the elements of a crime defined by statute are set out in an information or complaint, it is sufficient; and if words appear in such information or complaint which might be stricken, leaving a crime sufficiently charged, and such words do not tend to negative any of the essential averments, they may be treated as surplusage and be entirely rejected. *State v. Matejka,* 186 Neb. 454, 183 N.W.2d 917 (1971).

Furthermore, any challenge to a complaint or information as to certainty, particularity, or redundancy may be made by a motion to quash. *State v. Abraham,* 189 Neb. 728, 205 N.W.2d 342 (1973). Although such a motion was filed by the defendant, it did not object to the words now under attack, nor did it suggest that the defendant was confused as to the actual crimes with which he was charged. Specifically, the motion recites that the defendant "moves the Court for an order quashing the complaint charging 2 counts of *delivery* of controlled substance" because it did not allege the specific acts constituting misconduct on the part of the defendant. (Emphasis supplied.) The record does not disclose that this motion was ever called for hearing or ruled upon by the court. However, simultaneously with the filing of this motion to quash, the defendant also

filed a demurrer, and later on entered a plea of not guilty by reason of entrapment. By both demurring and pleading to the general issue without requesting a ruling on his motion to quash, the defendant has waived all defects which were or could have been excepted to by a motion to quash. *State v. Abraham, supra; Buthman v. State,* 131 Neb. 385, 268 N.W. 99 (1936).

Finally, the defendant challenges the sentences as excessive. Both crimes of which the defendant was convicted are Class III felonies. Neb. Rev. Stat. §§ 28-416(1)(a) and (2)(b) and 28-405(I)(c)(9) and (10) (Cum. Supp. 1982). A Class III felony is punishable by a maximum term of imprisonment of 20 years or a fine of $25,000, or both, and a minimum term of imprisonment of 1 year. Neb. Rev. Stat. § 28-105 (Reissue 1979). In the absence of an abuse of discretion by the trial court we will not disturb on appeal a sentence imposed within the statutory limits. *State v. Bosak,* 207 Neb. 693, 300 N.W.2d 201 (1981).

According to the presentence investigation report, the defendant has had no prior felony convictions, and, as a matter of fact, all of his official encounters with the law have been as a juvenile. He is 20 years of age, single, completed the 11th grade in high school, and is currently working for his father as a mechanic. He was referred to a community mental health center in 1977. This referral was by the juvenile court, and although the investigation report does not disclose what activity of the defendant prompted the referral, it was to have been for 30 to 60 days. However, according to the director of the service, the defendant made no effort to help himself or participate in the program of treatment and the defendant's father "was obnoxious and denied that there was any problem with Jeffery [sic]." The director concluded that the defendant was unable to make any use of the facilities of the mental health

center, and concluded that he needed a more structured environment, such as the Youth Development Center-Kearney, for a period of 6 months to 1 year. Accordingly, he was discharged in 4 or 5 days. Further, according to the presentence investigation report, it was a generally accepted fact among Dodge County law enforcement officers that if a person wanted any kind of drugs they could be purchased from the defendant.

The defendant testified that he had used marijuana about every week on a Friday and Saturday since he had been in senior high school, but had only used LSD once. He denied that he had ever sold drugs before, but stated that he did so on this occasion because he needed the money.

It is true that the sentences imposed in this case are somewhat above what would be considered minimum sentences. However, if the sale and distribution of drugs is to be discouraged, one of the main factors to consider and eliminate is the profit motive. This seems to have been one of the considerations which was of importance to the trial judge. The presentence report would seem to justify his belief that, contrary to the denial of the defendant, the defendant was in fact involved in more than a single isolated sale.

Under the circumstances, we cannot say that the sentences imposed constituted an abuse of discretion by the trial court. The judgment and sentences of the District Court are affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

IN RE ESTATE OF JOHN WALTERS, SR., DECEASED. JOHN WALTERS, JR., PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN WALTERS, SR., DECEASED, APPELLANT AND CROSS-APPELLEE, V. EDNA L. FRICK, FORMERLY EDNA L. WALTERS, APPELLEE AND CROSS-APPELLANT.

324 N.W.2d 889

Filed October 8, 1982. No. 44048.

Decedents' Estates: Joint Tenancy. Property owned in joint tenancy passes to the surviving joint tenant by virtue of the nature of the tenancy and not under the law of descent and distribution or by virtue of the provisions of the will of the first joint tenant to die.

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

Thomas Blount of Garber & Batt, for appellant.

Sarah Jane Cunningham of Cunningham Law Office, P.C., for appellee.

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

WHITEHEAD, D.J.

On July 12, 1967, and prior to their marriage, John Walters, Sr., and Edna L. Miller entered into an antenuptial agreement. Both individuals had been previously married and both had children by previous marriages. In the antenuptial agreement each party disclaimed any interest in property owned by the other, the apparent purpose being to preserve their respective estates for the benefit of their respective children. The antenuptial agreement stated in part, "It is agreed that, as to the separate property of the parties which is herein described, each of the parties shall be and continue completely independent of the other as regards the enjoyment and disposal of principal in regard to all of the property, notwithstanding the marriage. Income from such property, however, shall be considered as

property accumulated by the parties during the marriage." The parties remained married until the death of John Walters, Sr., in 1977.

A petition for probate was filed in the county court of Red Willow County and the joint will, executed by John Walters with his first wife, Lorene Walters, was entered into probate inasmuch as the decedent, John Walters, Sr., had not altered his joint will or executed a new will prior to passing away on May 8, 1977. At the time of the death of John Walters, Sr., Edna Miller Walters was his surviving spouse and she was not mentioned or provided for in the last will and testament of John Walters, Sr.

After qualifying as personal representative of the estate, John Walters, Jr., the son of the decedent, filed an inventory. In the inventory it was shown that there were certain certificates of deposit which John Walters, Sr., had purchased during his marriage to Edna Walters in his name and that of his son, John Walters, Jr., as joint tenants. Notice to creditors was published and an order barring claims not filed was entered by the court, and no claims were filed during the time provided by law. On January 31, 1978, the personal representative filed a motion to construe the antenuptial agreement. Notice of hearing was sent to the appellee and her attorney. The appellee and her attorney appeared at the hearing and offered evidence. The appellee also at that time filed a notice to take under the statute.

The court held that the appellee had waived all right to the real estate and to take against the will. The appellee moved for an order assigning her distributive share of the inventory pursuant to Neb. Rev. Stat. §§ 30-2302 and 30-2320 (Reissue 1979). The personal representative filed his final account and formal closing petition. The motion for assignment of a distributive share and the formal closing petition for complete settlement came on for hearing, and the court found that Edna Walters was not enti-

tled to elective share provided by Neb. Rev. Stat. § 30-2313 (Reissue 1979) because the petition for elective share was not made within the time limitation provided. The court then continued the hearing, scheduling a further hearing to give the personal representative an opportunity to account for the income from the farm from May 8, 1977, and for the allocation of fees and expenses, together with all remaining matters. On November 29, 1978, the court entered its order for complete settlement, which was reduced to writing and signed by the court on January 31, 1979.

At the final hearing the appellee made an oral motion to have a constructive trust impressed upon the joint tenancy property held by John Walters, Jr., which motion was overruled and from which Edna Walters Frick appealed. The District Court upheld the ruling of the county court and the matter was appealed by the estate and cross-appealed by Edna Walters Frick. The estate dismissed its appeal and the matter proceeds on the cross-appeal of Edna Walters Frick.

It is an elementary principle of law that property owned in joint tenancy passes to the surviving joint tenant by virtue of the nature of the tenancy and not under the law of descent and distribution or by virtue of the provisions of the will of the first joint tenant to die. *Sheldon v. Watkins,* 188 Neb. 599, 198 N.W.2d 455 (1972); 48 C.J.S. *Joint Tenancy* § 1 b. (1947); *Arthur v. Arthur,* 115 Neb. 781, 215 N.W. 117 (1927); *McConnell v. McCook Nat. Bank,* 142 Neb. 451, 6 N.W.2d 599 (1942).

It is also an elementary principle of law that property owned in joint tenancy is not property included in an estate except for the provisions of Neb. Rev. Stat. § 77-2002 (Reissue 1981), which provides that joint tenancy property is included in the estate for inheritance tax purposes only. The appellee moved during the closing proceedings to have a construc-

tive trust placed upon the joint tenancy funds held by the decedent and his son, John Walters, Jr. The county court refused to do so. An examination of the record, as presented to the District Court and subsequently to us, reveals that the action of the county court in the first instance and the District Court on appeal was correct. If appellee had a claim for a constructive trust, it was not properly presented and could not have been considered. See *Boosalis v. Horace Mann Ins. Co.*, 198 Neb. 148, 251 N.W.2d 885 (1977).

The judgment of the District Court is affirmed.

AFFIRMED.

RUDOLPH J. KONICEK, APPELLEE, V. BOARD OF EQUALIZATION OF COLFAX COUNTY, NEBRASKA, APPELLANT.

324 N.W.2d 815

Filed October 8, 1982. No. 44269.

1. **Taxation: Valuation: Constitutional Law.** The Nebraska Constitution requires that taxes be levied by valuation uniformly and proportionately upon all tangible property and franchises.
2. **Taxation: Valuation.** A landowner is entitled to have his property assessed uniformly and proportionately with other property even though the result may be that it is assessed at less than actual value.

Appeal from the District Court for Colfax County: JOHN M. BROWER, Judge. Affirmed.

L. J. Karel, for appellant.

Donn K. Bieber, for appellee.

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

PER CURIAM.

The plaintiff owns the southeast quarter of Section

3-19-3 in Colfax County, Nebraska. In 1978 the plaintiff's property was valued for tax purposes at $98,540 actual value. In 1979 the plaintiff filed a protest before the county board of equalization requesting that the assessed value of his property be reduced because the improvements on his land had not been valued proportionately with other property in the county. The county board increased the value of the plaintiff's property to $104,600. The value was subsequently increased by action of the State Board of Equalization and Assessment to $115,500. The plaintiff appealed from the action of the county board of equalization to the District Court.

The District Court found that improved real estate had been assessed disproportionately with unimproved real estate throughout the county and that the property of the plaintiff should be valued at $80,074 for tax purposes before the increase made by the State Board of Equalization and Assessment. The county has appealed.

The Constitution requires that "Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises . . . ." Neb. Const. art. VIII, § 1.

The record shows that for the purposes of taxation land and improvements were valued separately in Colfax County. Farmland was valued in accordance with the Nebraska Agricultural Land Valuation Manual promulgated by the office of the state Tax Commissioner. Improvements to land were valued in accordance with a separate manual promulgated by the office of the Tax Commissioner. The result was that farmland without improvements was valued at approximately 20 percent of actual value while improvements on farmland were valued at approximately actual value. When these values were combined to arrive at the valuation of improved farm real estate, improved farm real estate was assessed at a higher percentage of actual value

than unimproved farm real estate.

The effect of the system of assessment used to value farm real estate was to create separate classifications of unimproved farmland and improved farmland with no correlation between the classifications. This method of assessment is not permissible under the constitutional requirement that all tangible property be valued uniformly and proportionately. Real property taxes may not be equalized by classifying property and then applying the same values to the same classifications of property. *County of Gage v. State Board of Equalization & Assessment,* 185 Neb. 749, 178 N.W.2d 759 (1970). The discrepancy was not the result of an error of judgment but was a deliberate and intentional discrimination systematically applied throughout the county.

Although the evidence shows that the land of the plaintiff was not assessed in excess of its actual value, that does not prevent the plaintiff from obtaining relief. A landowner is entitled to have his property assessed uniformly and proportionately with other property, even though the result may be that it is assessed at less than actual value.

The principle involved was stated in *Sioux City Bridge v. Dakota County,* 260 U.S. 441, 446, 43 S. Ct. 190, 67 L. Ed. 340 (1923), as follows: "This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I dissent from the majority opinion because the taxpayer has not carried his burden of proving: (1) That the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. *Lexington Building Co., Inc. v. Board of Equalization,* 186 Neb. 821, 187 N.W.2d 94 (1971). (2) That the methods used in the evaluation of real property for tax purposes result in discrimination when compared with other real and tangible property in general throughout the county. *Lincoln Tel. & Tel. Co. v. County Board of Equalization,* 209 Neb. 465, 308 N.W.2d 515 (1981).

In order to arrive at the conclusion that it reaches, the majority, as did the trial court, makes some factual assumptions that are not shown in the record. As the majority opinion shows, its conclusions are based solely upon the statement of the county assessor that improvements on real estate are valued at about market value and rural lands are valued below market value. The assessor also testified that land values are set proportionately to their actual value throughout the county and improvements both on farmland and city are valued proportionately and by the same methods. He also testified that improvements add to the value of farmland and that Mr. Konicek's land is valued in the same manner as any other farmland in the county and his improvements are valued according to the same formula as other like improvements in the county. The majority assumes that these facts without more establish disproportionate valuation generally.

I would reverse and remand with directions to reinstate the valuations set by the board of equalization.

The assessment year here involved is 1979, and the pertinent assessment date is January 1 of that year. Neb. Rev. Stat. § 77-1301 (Reissue 1981). Konicek in-

troduced evidence of the valuations of three properties, his own 160 acres, an adjacent 240 acres in the same section, and an 80-acre tract also in the same section. For that year the county assessor determined the actual value of the Konicek 160 acres to be $98,540, assigning a value of $59,610 to the land and $38,930 to the improvements. Konicek filed a protest with the county board of equalization and at that time the board increased the land valuation to $65,670. Later, apparently as a result of a county-wide increase ordered by the State Board of Equalization, the value of the improvements was increased. That increase is not before us.

Konicek's summary of valuations shows that the assessor fixed the actual land valuation of the adjacent 240-acre tract (hereafter sometimes referred to as the Karel tract) at $72,910 and the improvements thereon at $22,475 for a total value of $95,385 for the real estate. The actual value of the 80-acre tract (hereafter the Faltys tract), having no improvements, was set at $27,075. One hundred ten and 24/100ths acres of the Konicek land are irrigated. Neither of the other two tracts are irrigated. However, this summary does not quite accurately reflect the underlying data. The assessment records indicate that improved tracts and unimproved tracts on the same farm are sometimes separately assessed. Konicek's own evidence indicates this was true as to both the Konicek and Karel farms. The significance of this fact we will develop later.

Konicek's own testimony and that of his expert witnesses indicated that the fair market value of his own tract (including improvements) in 1979 was between $288,000 and $320,000 while the fair market values of the adjoining 240 acres and the 80-acre tract were $432,000 and $140,000, respectively.

Konicek does not complain because his real estate is assessed at more than 35 percent of its actual market value, because it obviously is not. As ap-

pears from the evidence, it is grossly undervalued. In the District Court, as evidenced by his testimony, his complaint was that his buildings should be valued the same as his land. This despite the fact that everyone else's improvements are valued in the same manner as his. In this court, however, he complains because he claims his farm is valued disproportionately higher than other property, and therefore the constitutional provision that taxes be levied by valuation uniformly and proportionately upon all tangible property except as otherwise provided by the Constitution has been violated. Neb. Const. art. VIII, §§ 1, 2. As an illustration he points out that because the actual value of his improvements is higher than the actual value of the improvements on the adjacent 240 acres, his total actual valuation of the real estate as determined by the assessor (and accordingly the assessed value of 35 percent) is greater than the assessed value of the 240 acres. Likewise, he contends the unimproved 80 acres is undervalued in comparison with his own real estate.

No claim is made that the Konicek land and the Karel land (the 160-acre tract) are not proportionately valued. The evidence does not support any other conclusion. No claim is made that the improvements are not proportionately valued. The evidence does support the conclusion that Konicek has established that as between his 160-acre tract and the Karel and Faltys 80-acre tracts, his real estate has been overvalued because it was valued by the combination of methods we have mentioned. However, the taxpayer must meet a more substantial burden. He must establish that the methods used result in discrimination when compared with other real and tangible property *in general throughout the county. Lincoln Tel. & Tel. Co. v. County Board of Equalization,* 209 Neb. 465, 308 N.W.2d 515 (1981).

The logic by which the trial court reached its conclusion is without flaw. The question though is whether the premises or assumptions on which the reasoning is based appear in the record. The trial court's conclusion is obviously based upon the testimony of the assessor that in arriving at the total value of any piece of real estate, land is valued below actual value and the improvements at actual value. However, it is clear that in arriving at his conclusion the judge had to assume that the factual situation as shown by the evidence is typical of the situation in the county generally. There is no evidence in the record to show that such was the case.

Disproportionate valuation would result from the system used only where (1) a significant portion of the farms in the county are unimproved so that improved property bears a significantly higher portion of the tax burden than is its constitutional share, or (2) where the improvements on land are significantly disproportionately higher than the value of the land itself. That these situations are the case in general is not supported by the record. It is supplied by assumptions made. As earlier mentioned the record shows that improved farms are sometimes, if not always, appraised in separate tracts, with the unimproved portion being appraised separately from the improved portions of the tracts. Thus, disproportionate valuation cannot be established merely by the statement that improvements are valued by a standard different from the land itself.

We have consistently said: "A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a higher proportion to its actual value than *some* other property." (Emphasis supplied.) *Newman v. County of Dawson,* 167 Neb. 666, 672, 94 N.W.2d 47, 50 (1959); *Hastings Building Co. v. Board of Equalization,* 190 Neb. 63, 71, 206 N.W.2d 338,

343-44 (1973). We have said very recently: "In the evaluation of real property for tax purposes, where buildings and improvements are taxable as part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or the buildings and improvements by the appraiser." *Bumgarner v. County of Valley,* 208 Neb. 361, 366-67, 303 N.W.2d 307, 310 (1981).

Having set forth the controlling principles, let us return to an examination of the assumptions necessary to the conclusion reached by the trial court and the effect of other possible fact situations. Let us first assume some extremes. If the value of the land on each farm (whether in one or more tracts) and the value of the improvements on each farm in the county are in about the same proportion, then obviously there would be no discrimination, at least as far as farm real estate is concerned. Likewise, if substantially all land is improved and the land is proportionately valued and the improvements are proportionately valued, there is no discrimination. Another extreme assumption would be that there are very few improved farms in the county. In that event the methods of valuation here shown to have been used would clearly result in discriminatory taxation of improved property. The mix more likely is somewhere between the extremes. We have no way of determining from the record what the facts are.

Farm real estate, of course, is not a separate class of property for taxation. Real estate located in cities and villages must also be considered and, for that matter, tangible personal property. All these forms of property, except as authorized by the Constitution, are of the same class for valuation and taxation. *Lincoln Tel. & Tel. Co. v. County Board of Equalization, supra.* Since, in this case, urban property improvements are (and this we think is a

notorious fact) usually a much higher percentage of the value of the real estate than in the case of a farm, the method of valuation here would lead to the conclusion that urban real estate is taxed at a proportionately higher valuation than farm real estate. Likewise, if an owner of farmland has improvements on one tract which is separately assessed, and other land unimproved which is separately assessed, no discrimination is necessarily proved by comparing the value of his improved tract with someone else's unimproved land. We do not know, e.g., whether Karel may not have other unimproved land. In that event, his situation is no different from that of Konicek. Or if a farmer lives not on the land (all of which is unimproved) but has his residence in a city or village, no conclusion can be drawn that he has been discriminated against because, in that case, his improvements (assuming only a residence as in Konicek's case) and his land have been proportionately valued with substantially all others.

It is possible, of course, that the district judge, because of his familiarity with Colfax County and its property, may have personal knowledge which justifies the assumptions made. However, that personal knowledge cannot supply evidence which it is the taxpayer's burden to furnish, nor is it something which this court can review. We cannot assume what the facts would be had the matter been further pursued. I would conclude, after hearing the matter de novo, *Lincoln Tel. & Tel. Co. v. County Board of Equalization, supra,* that the taxpayer has failed in his burden of proof, and that the order of the District Court ought to be reversed and the plaintiff's petition dismissed.

HOUSING AUTHORITY OF THE CITY OF LINCOLN, NEBRASKA, APPELLEE, V. EVELYN SCOTT WOLFE, APPELLANT.

324 N.W.2d 891

Filed October 8, 1982. No. 44406.

Landlords and Tenants. Procedures authorized by the Uniform Residential Landlord and Tenant Act, Neb. Rev. Stat. §§ 76-1401 et seq. (Reissue 1981), provide a public housing tenant with all the required elements of due process prior to eviction or termination of tenancy, and a public housing tenant is not entitled to a prior grievance procedure where the eviction or termination of tenancy is based upon the tenant's creation or maintenance of a threat to the health or safety of other tenants or public housing authority employees.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Robert G. Hays, for appellant.

John R. Doyle and Timothy J. Doyle, for appellee.

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

MCCOWN, J.

This is an action for restitution of premises brought by the plaintiff housing authority against the defendant. The District Court found that defendant's tenancy was duly terminated for good cause, involving threats to health and safety of others, and ordered restitution of the premises. The defendant has appealed.

The plaintiff, Housing Authority of the City of Lincoln, Nebraska, is a federally subsidized housing authority. In August 1977 the defendant, Evelyn Scott Wolfe, entered into a written residential lease agreement with the plaintiff to occupy the south half of a duplex in a housing complex which contained over 400 units operated by the plaintiff. The rental was $17.50 per month under a federally assisted low income housing program known as a "Section 23" pro-

gram. The month-to-month term of the lease was to be automatically renewed each successive month of lawful occupancy.

The lease contained the usual covenants and conditions to be fulfilled by the tenant, including a covenant "to conduct himself and cause other persons who are on the premises with his consent to conduct themselves in a manner which will not disturb his neighbors' peaceful enjoyment of their accommodations and will be conducive to maintaining the project in a decent, safe and sanitary condition; to refrain from illegal or other activity which impairs the physical or social environment of the project."

On November 26, 1980, plaintiff delivered to the defendant a notice to vacate the premises on December 31, 1980. The notice set out 25 separate incidents, which were listed as specific violations of the lease provisions constituting grounds for termination for cause. The defendant requested a grievance hearing, but plaintiff denied the request.

On January 8, 1981, plaintiff filed an action for restitution in the municipal court of the city of Lincoln, but that action was dismissed on January 29, 1981. On the same day plaintiff served a second notice of termination on the defendant, notifying her that the tenancy was terminated for cause based upon listed incidents which involved threats to the health and safety of others, and that she must vacate the premises by March 1, 1981. The January 29 notice set out 32 violations of the lease provisions, including the 25 shown on the first notice of termination. The notice also advised defendant that the housing authority deemed the grievance procedure inapplicable and that any request for grievance procedures would be denied.

The defendant thereafter requested a grievance hearing, which was denied. On March 3, 1981, the defendant sent a money order to the plaintiff for the March 1981 rent, which was returned by plaintiff.

Defendant continued to occupy the premises. On March 13, 1981, this action for forcible detainer and restitution of the premises was filed by the plaintiff in the District Court for Lancaster County, Nebraska, under the provisions of the Uniform Residential Landlord and Tenant Act, Neb. Rev. Stat. §§ 76-1401 et seq. (Reissue 1981).

At the trial in the District Court on March 27 and March 30, 1981, at which the defendant was represented by counsel, the evidence related largely to the 32 specific incidents listed in the notice of termination. All except one in January 1981 occurred during the calendar year 1980. Police department records established that there had been 64 contacts by police officers at the defendant's residence in 1980. The defendant's husband was removed from the premises by the police on many occasions for assault, including assaults on the defendant, her family, police officers, and other persons. At least one person was hospitalized after such an assault.

Numerous neighbors testified as to instances when the defendant's husband assaulted and threatened to beat up neighbors and used violent language and gestures in the presence of children. Various witnesses testified that the defendant's husband and other persons invited or permitted on the premises by defendant were frequently intoxicated, noisy, unruly, and involved in various disturbances. Many neighbors expressed fear of exposing themselves and their children to the persons on the defendant's premises. There was testimony on behalf of the housing authority that it was also concerned for the health and safety of its maintenance personnel because of assaults and abuse. Maintenance personnel had responded to 25 service calls during 1980 at the defendant's residence, mostly because of breakage.

The defendant admitted that there had been drinking on the premises by her husband and other adults

involved in some of the disturbances, and that her neighbors had called the police approximately 35 times. She also testified that her husband had been arrested on the premises on January 17, 1981, for assault and disturbing the peace and that he was incarcerated at the time of trial. Other witnesses for the defendant simply testified that they had never witnessed the defendant's husband strike or threaten any person, although they conceded they had witnessed the police at the defendant's residence on numerous occasions.

The District Court took the matter under advisement, briefs were filed, and on June 5, 1981, the District Court found that the defendant's tenancy was terminated for good cause; that the defendant had created and maintained a threat to the health and safety of other persons by making the leased premises available to her husband and other persons who had demonstrated violent, assaultive behavior and frequent intoxication on the leased premises; and that other persons in close proximity to the defendant's premises also were endangered by the activities. The court also found that the acceptance of rent by the plaintiff for the months of December 1980 and January and February 1981 did not waive its right to terminate defendant's lease on March 1, 1981. The court further found that the defendant was not entitled to a grievance hearing under the lease or applicable regulations and statutes, and that the refusal to grant such a hearing was authorized and proper. The court therefore ordered the leased premises restored to the plaintiff. The defendant has appealed.

The defendant contends that she was entitled to a grievance hearing before the housing authority before any action for eviction could be brought in any court, and argues indirectly that the evidence of the actions and conduct which occurred on the premises leased by the defendant did not constitute a threat to

the health or safety of other persons sufficient to justify the denial of a grievance hearing. We disagree.

Procedures authorized by the Uniform Residential Landlord and Tenant Act, §§ 76-1401 et seq., provide a public housing tenant with all the required elements of due process prior to eviction or termination of tenancy, and a public housing tenant is not entitled to a prior grievance procedure where the eviction or termination of tenancy is based upon the tenant's creation or maintenance of a threat to the health or safety of other tenants or public housing authority employees. See, *Spence v. Reeder,* 416 N.E.2d 914 (Mass. 1981); *Housing Auth. of City of Hartford v. McKenzie,* 36 Conn. Supp. 515, 412 A.2d 1143 (1979); 24 C.F.R. §§ 866.51(a) and 866.53(c) (1982).

In the present case the evidence is overwhelming that the defendant created and maintained a threat to the physical and mental health and safety of other tenants, employees, and persons in the area, and that the defendant was accorded every element of constitutional, statutory, and regulatory due process. The determination of the trial court that the defendant was not entitled to a grievance hearing prior to the filing of this court action for restitution was clearly correct.

The remaining assignments of error by the defendant are groundless and without merit. In an attempt to protect the legal rights of the defendant, counsel has ignored the legal right of other tenants and the plaintiff to be protected against the sort of conduct which is reflected in this record. The appeal is frivolous.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

JAMES R. RENSHAW, APPELLANT, V. MERRIGOL-ADLER BAKERY, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE,
STATE OF NEBRASKA, SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLEE.
325 N.W.2d 46

Filed October 8, 1982. No. 82-107.

1. **Workmen's Compensation: Appeal and Error.** 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.
2. **Workmen's Compensation: Proof.** In a workmen's compensation case the burden of proof is upcn the plaintiff to prove by a preponderance of the evidence that he is suffering from a disability and that such disability is the result of an accident arising out of as well as in the course of his employment.
3. **Workmen's Compensation: Words and Phrases.** The term "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising from and within the scope or sphere of the employee's job.
4. **Workmen's Compensation.** Injuries arising from exposure to a natural phenomenon do not arise out of employment unless the hazard imposed upon the employee by reason of the employment is greater than that to which the public generally in the area of hazard is subjected.

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

Kutak Rock & Huie, for appellant.

Hansen, Engles & Locher, P.C., for appellee Merrigol-Adler.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellee Second Injury Fund.

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

CAPORALE, J.

This appeal seeks to reverse a judgment of the Ne-

braska Workmen's Compensation Court on rehearing denying the plaintiff-appellant benefits under the provisions of the Nebraska Workmen's Compensation Act. Appellant argues that the compensation court's finding that he failed to prove his disability resulted from an accident arising out of and in the course of employment is clearly wrong. We disagree with that contention, and affirm the judgment of the compensation court.

It is axiomatic that 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. *Butler v. Midwest Supply Co., ante* p. 421, 322 N.W.2d 815 (1982); *McGinn v. Douglas County Social Services Admin.,* 211 Neb. 72, 317 N.W.2d 764 (1982). It is equally well established that in a workmen's compensation case the burden of proof is upon the plaintiff to prove by a preponderance of the evidence that he is suffering from a disability and that such disability is the result of an accident arising out of as well as in the course of his employment. *McGinn v. Douglas County Social Services Admin., supra; Union Packing Co. v. Klauschie,* 210 Neb. 331, 314 N.W.2d 25 (1982); *Stoll v. School Dist. (No. 1) of Lincoln,* 207 Neb. 670, 301 N.W.2d 68 (1981). The term "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising from and within the scope or sphere of the employee's job. *McGinn v. Douglas County Social Services Admin., supra; Union Packing Co. v. Klauschie, supra; Stoll v. School Dist. (No. 1) of Lincoln, supra.*

We look at the record in light of the foregoing rules of law. Appellant testified that on or about August 15, 1980, while washing utensils inside the Merrigol-Adler Bakery building, he felt a sudden pain at his nose and, although he did not see any,

concluded that he had been bitten by some insect at that time. He gave this history on various occasions, but also, on at least one occasion, said he did not know where or when he had been bitten. Following a complicated course of medical treatment, during which his life was at risk, appellant now claims to suffer a 100 percent loss of vision of his left eye and a lung disability as a consequence of the subject occurrence, which, when combined with a previous hand injury, renders him totally disabled. The medical evidence ranges from an opinion that the illness in question began as a subcutaneous abscess on the tip of appellant's nose from an undiscerned source to an opinion that, if appellant's history is correct, it is reasonable to believe that the inciting event was the insect bite. The record also contains an expert opinion that because of the various insect control measures in place at the Merrigol-Adler premises, one encountered less risk of being bitten by an insect on those premises than is encountered by the general public.

Even if the compensation court were to have found that appellant indeed had been bitten by an insect on August 15, 1980, as described by him, it could not be said the compensation court was clearly wrong in finding that the accident did not arise out of appellant's employment with defendant Merrigol-Adler Bakery. Injuries arising from exposure to a natural phenomenon do not arise out of employment unless the hazard imposed upon the employee by reason of the employment is greater than that to which the public generally in the area of hazard is subjected. *McGinn v. Douglas County Social Services Admin., supra; Ingram v. Bradley,* 183 Neb. 692, 163 N.W.2d 875 (1969); *Mead v. Missouri Valley Grain, Inc.,* 178 Neb. 553, 134 N.W.2d 243 (1965); *Crow v. The Americana Crop Hail Pool, Inc.,* 176 Neb. 260, 125 N.W.2d 691 (1964); *Goodwin v. Omaha Printing Co.,* 131 Neb. 212, 267 N.W. 419 (1936); *Good v. City of Omaha,* 125

Neb. 307, 250 N.W. 61 (1933); *Gale v. Krug Park Amusement Co.*, 114 Neb. 432, 208 N.W. 739 (1926).

Moreover, the medical evidence falls short of the requisite standard for establishing a causal relationship between the claimed occurrence and the resultant disability. See *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981), holding testimony that it was "more likely" than not that the event in question caused the disability to be inadequate.

It cannot be said that the findings of the compensation court were clearly wrong; its judgment must therefore be affirmed.

AFFIRMED.

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

IN RE ESTATE OF JOHN J. FLOREY, ALSO KNOWN AS JACK FLOREY, DECEASED.
LAURA T. FLOREY, SURVIVING SPOUSE AND PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN J. FLOREY, DECEASED, APPELLANT, V. CARMELLA FLOREY, ADMINISTRATRIX OF THE ESTATE OF FRANK A. FLOREY, DECEASED, ET AL., APPELLEES.

325 N.W.2d 643

Filed October 22, 1982. No. 43812.

1. **Decedents' Estates: Wills.** A patent ambiguity in a will must be removed by interpretation according to legal principles, and the intention of the testator must be found within the will; that intention is the one the testator expressed by the language of the will and not an entertained but unexpressed intention.
2. _____: _____. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
3. _____: _____. A will speaks as of the date of the death of the testator.

4. **Wills.** Where there is a clear provision in a will, that clear provision will not be controlled by a subsequent ambiguous provision.

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

Richard Douglas McClain, for appellant.

A. Loy Todd, Jr., of Bailey, Polsky, Cada & Todd, for appellees.

Heard before WHITE and HASTINGS, JJ., and BROWER and EMPSON, D. JJ.

BROWER, D.J.

The appellant, Laura T. Florey, as surviving spouse and personal representative of the estate of John J. Florey, also known as Jack Florey, deceased, instituted this action in the county court of Lancaster County, Nebraska, to interpret the will of the deceased, John J. Florey, hereinafter referred to as Jack Florey. From a decision by the District Court of Lancaster County affirming the county court, Laura T. Florey has brought this appeal.

The facts as set out herein are not in dispute.

Jack Florey, the decedent, executed his last will and testament on the 27th day of December 1966. At the time said will was prepared and executed, he and Laura T. Florey were husband and wife and each had previously been married. On the date said will was drawn and executed, Jack Florey had no children or issue of any deceased children and both his mother and father were deceased. On that date, however, Laura T. Florey, his wife, had one son by a prior marriage. The will as executed contained the following provisions which give rise to this controversy: "IV. I do give, devise and bequeath to my wife, LAURA FLOREY, upon condition that my said wife shall survive me, a one fourth (¼) part of my estate, that is that portion of my estate which would be equivalent to what the said LAURA FLOREY would be entitled to receive under the laws of de-

scent and inheritance in the absence of a Will. V. All the rest, residue and remainder of my estate, whether real estate, personal or mixed, wherever the same may be located and whenever acquired by me, I do give, devise and bequeath to my brother, FRANK FLOREY of Lincoln, Lancaster County, Nebraska, upon condition that my said brother shall survive me. Should my said brother fail to survive me, then the children of my said brother, FRANK FLOREY, shall take the residue of my estate in equal, undivided shares. Should my said wife, LAURA FLOREY, fail to survive me as provided for in the immediately preceding paragraph, then my entire estate shall descend and be vested in my brother, FRANK FLOREY, or to his children in the event he shall predecease me."

Paragraph VI of the decedent's will contained the provision nominating the brother, Frank Florey, as executor of his will.

Jack Florey died on May 15, 1979, and on that date had no children surviving and left his wife, Laura T. Florey, and his brother, Frank A. Florey, surviving. On June 5, 1979, Laura T. Florey was appointed special administratrix in a formal proceeding held in the county court of Lancaster County, Nebraska, and letters of special administration were issued to her. The last will and testament of Jack Florey was filed with the court on June 14, 1979, and on July 2, 1979, a petition was filed by John James Florey, nephew of the deceased, for formal probate of the will, determination of heirs, and for the appointment of a personal representative. The petition so filed alleged that the personal representative, Frank Florey, named in the will was deceased and the petition made no recommendations as to who should be appointed personal representative.

On July 3, 1979, Laura T. Florey filed objections to the will, admitting that it was the last will of the deceased and alleging that the provisions set out in

paragraph IV required construction by the court, and requested that the court interpret said clause. An order was entered admitting the will to probate thereafter, and the question as to determination of heirs was reserved by the court. The court appointed Laura T. Florey personal representative of the estate of deceased and she has acted as such ever since.

A review of the court record reflects that Jack Florey owned some property in his own name but that the bulk or major portion of his estate consisted of property held in joint tenancy or as tenants in common with his spouse, Laura T. Florey. The inventory in the estate also reflects additional property as being held by the decedent and his nephew, John James Florey.

The law of the State of Nebraska in effect on the date the decedent executed his will provided as follows: "When any person shall die, leaving a husband or wife surviving, all the real estate of which the deceased was seized of an estate of inheritance at any time during the marriage, or in which the deceased was possessed of an interest . . . shall descend . . . in the manner following: . . . (4) one half to the husband or wife, if there be no children . . . ." Neb. Rev. Stat. § 30-101 (Reissue 1964). Those portions of § 30-101 not pertinent to this action have been omitted. Neb. Rev. Stat. §§ 30-102 and 30-103 (Reissue 1964) provided for the distribution of real and personal property held by the decedent at the date of his death and directed that its distribution follow the law of descent and inheritance as set out in § 30-101.

Neb. Rev. Stat. § 30-107 (Reissue 1964) provided the right of election for the surviving spouse and permitted that surviving spouse to elect to receive property that she would receive by inheritance, descent or distribution in lieu of the provisions made for her in the will.

In 1974 the Nebraska Probate Code was adopted

and §§ 30-101, 30-102, 30-103, and 30-107 were repealed. Under the new probate code, Neb. Rev. Stat. § 30-2302 (Reissue 1979), which became effective on January 1, 1977, the intestate share passing to the surviving spouse was defined as follows: "The intestate share of the surviving spouse is: (1) if there is no surviving issue or parent of the decedent, the entire intestate estate . . . ."

With the adoption of the new probate code different provisions were also provided for the resident surviving spouse to elect under Neb. Rev. Stat. § 30-2313 (Reissue 1979). This section provides that the surviving spouse has a right of election to take an elective share of one-third of an augmented estate. The augmented estate is defined in Neb. Rev. Stat. § 30-2314 (Reissue 1979) and involves a formula and calculation which requires that certain properties be added back to the probate estate. The property to be added includes property given by the decedent during his lifetime to others and property held jointly by the decedent and others. The act further provides that certain adjustments and deductions be made. For the purposes of this appeal it is not necessary for the court to go into this complicated formula. It is sufficient to state that the election statute protecting the spouse prior to the adoption of the new code has been completely revamped and no longer refers to the intestacy estate. The surviving spouse is entitled to elect to take that property which is given to her in the will or to receive that property as computed under § 30-2314.

It is apparent that between the date the decedent executed his will and the date of his death the law was substantially changed. At the time the will was drawn the statute of descent provided that the surviving spouse would have received one-half of the probate estate of the deceased, and there does appear on the face of the will an ambiguity or discrepancy between the first part of paragraph IV and

the subsequent portion of said paragraph, or that part of the paragraph following the enumeration. The surviving spouse's interest in the intestate estate was not one-fourth but one-half of the probate property under the statute in effect at the time the will was drawn.

The appellant in this case argues that the clause defining the portion should control and that the surviving spouse should receive one-half of the probate estate, if the law in effect at the time of the execution would apply. She further argues that if the law in effect at the date of the decedent's death controls, the surviving spouse, because of the will's reference to the statute of descent and distribution, should receive all the property under the provisions of § 30-2302.

The county court ruled that the will of the deceased provided that Laura T. Florey should receive one-fourth of the probate estate, that the intention of the deceased must be gleaned from the four corners of the decedent's will, and that the intent was plain and clear when all the clauses of the will were taken together. The District Court affirmed said decision, and appeal was effected to this court. We must affirm.

There are a number of rules of construction our court has adopted where there appears to be a patent ambiguity. A patent ambiguity is an ambiguity appearing on the face of the instrument, whereas a latent ambiguity is one outside the will. " 'A patent ambiguity must be removed by interpretation according to legal principles and the intention of the testator must be found in the will.' " *Gretchen Swanson Family Foundation, Inc. v. Johnson,* 193 Neb. 641, 643, 228 N.W.2d 608, 610 (1975); *McLaughlin v. Heath,* 164 Neb. 511, 82 N.W.2d 533 (1957); *Brandeis v. Brandeis,* 150 Neb. 222, 34 N.W.2d 159 (1948).

This is a patent ambiguity and it therefore becomes a question of law as to the meaning to be

given to the language of the will itself. *Wehrer v. Baker,* 161 Neb. 241, 72 N.W.2d 844 (1955); *Brandeis v. Brandeis, supra.* Where in a will there is such a patent ambiguity resulting from the use of the words and nothing appears within its four corners to resolve or clarify the ambiguity, the words must be given their generally accepted literal and grammatical meaning. *Brandeis v. Brandeis, supra; Wehrer v. Baker, supra; Lacy v. Murdock,* 147 Neb. 242, 22 N.W.2d 713 (1946); *McLaughlin v. Heath, supra.* The fundamental rule, however, as set forth in *McLaughlin v. Heath, supra,* and *Lacy v. Murdock, supra,* provides, in the construction of a will, that the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law.

The appellant in this action sets out but one assignment of error, that is that the District Court erred in interpreting the clause set forth in the decedent's will and that the surviving spouse should be entitled to the property allotted to her under the provisions of § 30-101, which was in effect on the date the will was executed.

Our court has repeatedly held that the will of the deceased speaks as of the date of death of the testator. *Brandeis v. Brandeis, supra; McLaughlin v. Heath, supra; Lacy v. Murdock, supra.* The right of a surviving spouse to elect to receive those benefits provided by law in lieu of those provided by the will also must be determined by the law in effect at the date of the decedent's death. With the adoption of the new probate code, Neb. Rev. Stat. § 30-2901 (Reissue 1979) provides that the new code applies to any wills of decedents dying subsequent to the effective date of the code. The court must therefore look to the law in effect when the decedent died to determine the rights of the electing spouse.

The appellant in this case has not lost her right to

elect. In fact, the record reflects that she has requested and received, under statutory provisions, the right to delay this election until these proceedings have been completed.

The sole question that this court must determine is the intent of the decedent as gleaned from the four corners of the will, after giving the language therein its ordinary and customary meaning. The decedent specifically provided that his wife was to receive one-fourth of his property. There is no question as to the meaning of this clause, or phrase. The additional portion of paragraph IV following adds nothing to that clause when placed in the context and surrounded by the other provisions contained in the will, as set forth in the residuary clause. Had the decedent died prior to the effective date of the new probate code, the surviving spouse would have been at liberty to elect to receive that portion of the estate provided her under the intestacy laws then in effect. The fact that the statute was changed does not affect her right to elect, it merely changes the formula as to how that share is to be computed.

The court notes that in her brief the appellant does not seriously raise the proposition that the surviving spouse would be entitled to all the decedent's probate property because of the adoption of the new probate code. Such a contention completely destroys the intent of the decedent when all the provisions of the will have been scrutinized.

The appellant urges that the court adopt the ruling set forth in the *McLaughlin* case, which provides that where there are two provisions of a will that are irreconcilable, the latter provision will prevail over the earlier, unless the entire will discloses a contrary intent. The will executed by the decedent, however, does, when reviewed in its entirety, disclose a contrary intent. Our court has also repudiated that proposition. See, *Dennis v. Omaha National Bank,* 153 Neb. 865, 46 N.W.2d 606 (1951);

4 Page on Wills § 30.20 (1961). The correct rule appears to be that where there is a clear provision it will not be controlled by a subsequent ambiguous provision. *Merchants Nat. Bank of Cedar Rapids v. United States,* 326 F. Supp. 384 (N.D. Iowa 1971); *Stein v. U.S. National Bank,* 165 Or. 518, 108 P.2d 1016 (1941).

" 'The cardinal rule of testamentary construction is to ascertain the intention of the testator as expressed in the will. * * * In construing a will the court should give effect to the true intention of the testator as shown by the will itself in the light of the attendant circumstances under which it was made, if that intention is consistent with the applicable rules of law. * * * No particular words or conventional forms of expression are necessary to enable one to make an effective testamentary disposition of his property. * * * The intention of the testator is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will.' " *Gretchen Swanson Family Foundation, Inc. v. Johnson,* 193 Neb. 641, 643, 228 N.W.2d 608, 610 (1975).

The court in this case must base its decision upon the literal and grammatical meaning of the words and phrases as they appear in the will itself and take into account all the provisions set forth in the will. It is not the province of the court to redraft or remake the will of the deceased. The intent of the testator to give one-fourth of his probate estate to his wife and the remainder to his brother or his brother's children is clear.

Accordingly, the court finds the construction reached by the county court and affirmed by the District Court of Lancaster County, viewing the will in its entirety, must be sustained. In consequence of this, the judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

IN RE ZOELLNER TRUST.
DOROTHY ANN WILLIAMS ET AL., SOLE BENEFICIARIES UNDER THE TRUST OF CHARLES I. ZOELLNER, DECEASED, APPELLEES, V. NATIONAL BANK OF COMMERCE TRUST AND SAVINGS ASSOCIATION, TRUSTEE, APPELLANT.

325 N.W.2d 138

Filed October 22, 1982. No. 44393.

1. **Trusts.** In order to remove a trustee under the provisions of Neb. Rev. Stat. § 30-2816 (Reissue 1979) to further the efficient administration of a trust, it is necessary that the court find that the principal place of administration has become inappropriate.
2. **Statutes.** In construing a statute we must, if possible, discover the legislative intent from the language of the act and give effect thereto; but if the language is unambiguous, there is no necessity for construction and we have no jurisdiction to change it.
3. **Words and Phrases.** "Inappropriate," as used in Neb. Rev. Stat. § 30-2816 (Reissue 1979), means unsuitable, unfitting, or improper.
4. **Trusts.** A place of administration which may be less efficient, less convenient, or less pleasant than another place is not necessarily inappropriate unless, in combination with other circumstances, it interferes with the proper administration of the trust.
5. **Trusts: Appeal and Error.** Appeals involving the administration of a trust are equity matters and are reviewable in this court de novo on the record.

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

Gary L. Dolan and Knudsen, Berkheimer, Beam, Richardson & Endacott, for appellant.

John F. Wright and Wright & Simmons, for appellees.

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

HASTINGS, J.

The National Bank of Commerce Trust and Savings Association (NBC), a Lincoln, Nebraska, banking institution, had been serving as the trustee under the will of Charles I. Zoellner, deceased. Upon the

application of the beneficiaries, it was removed as such trustee by the county court of Scotts Bluff County, which in turn appointed the Scottsbluff National Bank and Trust Company as successor trustee. Upon appeal to the District Court, that action was affirmed. This appeal followed.

According to appellant's brief, on May 26, 1959, a decree of distribution was entered in the estate of Charles I. Zoellner, deceased, transferring the residue of his estate to The First Trust Company of Lincoln, Nebraska (First Trust), as trustee named in his will. NBC is the successor of First Trust. The deceased was and the principal beneficiary, Dorothy Ann Williams, is a resident of Scotts Bluff County. At the time the will was drawn, and also as of the date of the settlor's death, the Scottsbluff bank, although it had been the settlor's personal bank, was possessed of no trust powers or authority. Such powers were not obtained until 1964.

The beneficiaries of this trust are Dorothy Ann Williams, Ann O'Connor Williams, and Allan Hayes Williams, the daughter and grandchildren of the settlor. They filed their petition in 1980, alleging that NBC is located approximately 400 miles from the principal beneficiary's home in Scottsbluff; that the real estate belonging to the trust is located in Scotts Bluff County; and that the "efficient administration and the best interests of the beneficiaries require that the National Bank of Commerce be removed as the trustee . . . ."

Principally involved in this appeal is the interpretation of Neb. Rev. Stat. § 30-2816 (Reissue 1979), which provides in pertinent part as follows: "A trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management. If the principal place of administration becomes inappropriate for any reason, the court may enter any order furthering efficient administration and the interests

of beneficiaries, including . . . removal of the trustee and appointment of a trustee in another state."

Only Dorothy Ann Williams, Allan Hayes Williams, and an officer of the Scottsbluff bank testified. NBC offered no evidence. The record discloses that the corpus of the trust includes money invested in NBC's fixed income and equity account, as well as real estate. This trust-owned real estate is one of two connected buildings which make up the Zoellner store. This building was purchased by the trustee in 1963. There is also no dispute but that the other building is owned by Dorothy Ann Williams, the sole income beneficiary of the trust; that she leases the trust-owned building from NBC, and, in turn, leases both buildings to a corporation, owned by Allan Hayes Williams, which operates the store. Mrs. Williams collects one rental check from her son, pays the insurance and taxes, keeps that portion of the rental income attributable to her own building, and remits the balance to NBC. She then receives quarterly income payments back from NBC. This arrangement is one of the reasons why she insists that it would be more convenient for her to have a trustee located in Scottsbluff.

Mrs. Williams had several complaints about the way in which NBC managed the trust. She claims to have had difficulty getting reports from NBC for tax purposes, that no one from NBC has contacted her since her husband died in 1977, and that even though she has notified NBC of a change of address, checks are sent by it to her former address, where her son now lives. She also complained that the trustee did not inspect the property, that she has difficulty reaching representatives of the trustee by phone and that they have not been nice to her, and that she has no reason to go the 400 miles to Lincoln other than once a year, whereas the Scottsbluff National Bank and Trust Company was but a half block from the store.

Allan Hayes Williams had some of the same complaints, and particularly felt that the trust officer to whom he was referred was quite rude to him. Later, after learning that this particular officer was then working but part time, he claims to have written a letter in 1977 inquiring as to who would be handling the trust. To this inquiry, he stated that he received no answer. He testified that it was necessary for his mother to manage the real property, including the obtaining of insurance. He also complained that as of October of 1980, the $45,000 invested in the fixed income and equity assets of the trustee were only returning approximately 5 percent, whereas certificates of deposit during the same period of time paid from 9 to 14 or 15 percent. The real estate was paying approximately 6 percent.

The trust officer of the Scottsbluff bank simply testified that his bank was capable of and willing to handle this particular trust, that it would inspect the property at least on an annual basis, and that it would be less costly to do this inspection than having to send someone out 400 miles to do so.

Prior to the adoption of the Nebraska Probate Code, which includes § 30-2816, a trustee could be removed for one of the following grounds: The existence of a substantial personal disability in the trustee, a failure of the trustee to perform the duties of its position, misconduct in office of the trustee, or hostile relations between the beneficiaries and the trustee of such nature as to interfere with the proper execution of the trust. *Reed v. Ringsby,* 156 Neb. 33, 54 N.W.2d 318 (1952).

However, the beneficiaries assert that under the Nebraska Probate Code a court "may enter any order furthering efficient administration in the interests of the beneficiary including the removal of the trustee." Brief for Appellees at 12. The trial court apparently agreed with this position, because its findings simply were "that in furthering the efficient

administration of the Trust . . . the National Bank of Commerce Trust and Savings Association should be removed as Trustee . . . ." We do not agree.

It is true that under the provisions of § 30-2816 the court may enter any order "furthering efficient administration" of the trust, but first it must find that the "principal place of administration [has become] inappropriate for any reason." We believe this language to be clear and unambiguous. In construing a statute we must, if possible, discover the legislative intent from the language of the act and give effect thereto. However, if the language is unambiguous, there is no necessity for construction and we have no jurisdiction to change it. *State v. Levell,* 181 Neb. 401, 149 N.W.2d 46 (1967).

In construing this section the key word is "inappropriate." Webster's Third New International Dictionary, Unabridged (1968), defines *inappropriate* as "Not appropriate : unbecoming, unsuitable," and The Oxford Dictionary, Vol. V, Part II (1901), offers the definition of "Not appropriate; unsuitable to the particular case; unfitting, improper." A place of administration which may be less efficient, less convenient, or less pleasant is not necessarily improper or unsuitable unless, in combination with other circumstances, it interferes with the proper administration of the trust. *Pavel v. Hotovy,* 131 Neb. 373, 268 N.W. 297 (1936). If the law were otherwise, it would subject a trustee to removal proceedings whenever a new trust institution was created which was more conveniently located to the residence of the beneficiaries. This was not the legislative intent.

Appeals involving the administration of a trust are equity matters and are reviewable in this court de novo on the record. *Scully v. Scully,* 162 Neb. 368, 76 N.W.2d 239 (1956). After conducting such a review, we do not believe that the place of administration has become "inappropriate."

The rate of return on investments had nothing to do with the location of the trustee, nor did the claimed rudeness of one of its employees. Inferentially, at least, the real property was acquired by the trust at the request of the beneficiaries, i.e., it was conveniently and strategically located with reference to the family business in which they were directly connected. The beneficiaries were using this building as if they presently owned it. Their present and future interests and their control and obligations under the leases were such as to render any additional supervision and inspection by the trustee an exercise in redundancy. The place of administration of the trust did not interfere with the proper administration of the same, and therefore was not inappropriate.

The judgment of the District Court is reversed and the cause is remanded with directions to reinstate NBC as trustee.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., participating on briefs.

WHITE, J., dissenting.

The majority holds that an indifferent trustee, who maintains limited, if any, contact with the beneficiary, is separated by hundreds of miles from the place where the trust corpus is located, and achieves an extremely modest return on trust liquid assets is not inappropriate. I do not agree. The District Court decision removing the trustee was correct and its decision should be affirmed.

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

GEORGE H. MOYER, JR., ET AL., APPELLANTS, V. DOUGLAS & LOMASON COMPANY ET AL., APPELLEES.

325 N.W.2d 648

Filed October 22, 1982. No. 44414.

Workmen's Compensation: Jurisdiction: Attorney Fees: Costs. Under Neb. Rev. Stat. § 48-118 (Reissue 1978), where an action is filed before a particular court and prosecuted to a final conclusion, whether by settlement or judgment, that court alone has jurisdiction to resolve any controversy relating to division of fees and expenses.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and dismissed.

George H. Moyer, Jr. of Moyer, Moyer & Egley, Thomas J. Monaghan of Monaghan, Tiedeman, Lynch & Gidel, and C. J. Gatz of Jewell, Otte, Gatz, Collins & Domina, for appellants.

Mark M. Sipple and Luckey, Sipple & Hansen, for appellees.

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

PER CURIAM.

This case involves the allocation of expenses and attorney fees between employer and employee under Neb. Rev. Stat. § 48-118 (Reissue 1978). George H. Moyer, Jr., counsel for the injured employee, appeals from an order of the District Court for Platte County, Nebraska, requiring the repayment of attorney fees and expenses deducted from a portion of a total settlement attributable to the workmen's compensation subrogation claim of the employer. We reverse and dismiss.

Shirley TePoel was injured on September 19, 1974, while operating a machine on the production line for her employer, Douglas & Lomason Company, one of the appellees. The compensation case was settled

and a lump sum payment approved by the District Court for Platte County.

Mrs. TePoel then filed suit against Florida Production Engineering Company, the manufacturer of the machine, in the U.S. District Court for the District of Nebraska. The employer, Douglas & Lomason, was asked to join as plaintiff because of its subrogation interest. On its refusal, the company was joined as defendant. During the jury trial, negotiations on September 7, 1979, produced an offer of a settlement of $50,000. Further negotiations ensued and, at the suggestion of the trial judge, Douglas & Lomason's attorney was asked whether the company and its compensation carrier would reduce the amount of their subrogation interest. An agreement was ultimately reached that reduced the subrogation interest to $7,500. No discussion occurred as to allocation of attorney fees and expenses from this amount. Counsel stipulated that Florida Production Engineering Company would pay the total sum of $50,000 plus costs to Mrs. TePoel and the suit would be dismissed.

On December 17, 1979, Moyer, counsel for Mrs. TePoel, transmitted the subrogation recovery to Douglas & Lomason less an attorney fee of one-third and 15 percent of the expenses.

On December 27, 1979, the order of dismissal was entered in the U.S. District Court. On March 13, 1980, counsel for Douglas & Lomason demanded repayment of the deduction for attorney fees and expenses from Moyer.

On April 9, 1980, Moyer filed a declaratory action in the District Court for Platte County. After a trial, the court found generally for the appellees and specifically that the appellants had not complied with the requirements of § 48-118. The District Court entered judgment on a counterclaim for the appellees in the amount of $3,328.09, with interest and costs. The instant appeal followed.

The appellant Moyer maintains that based upon equitable principles of subrogation as set forth in *Cagle, Inc. v. Sammons,* 198 Neb. 595, 254 N.W.2d 398 (1977), he is entitled to receive an attorney fee from the fund he created which benefited the subrogees. We find it unnecessary to reach this issue, for we hold that the District Court for Platte County did not acquire jurisdiction to resolve the dispute.

Section 48-118 clearly encourages agreement between counsel as to the division of attorney fees in order to avoid disputes of this very nature. *Kitchin v. Burlington Northern, Inc.,* 382 F. Supp. 42 (D. Neb. 1974). In the absence of an agreement, as in this case, the appropriate court has jurisdiction to determine all disputes between the employer and employee, including the setting and allocation of attorney fees and expenses. *Schulz v. General Wholesale Coop. Co., Inc.,* 195 Neb. 410, 238 N.W.2d 463 (1976).

In the instant case Moyer's right to receive an attorney fee from the subrogees of a workmen's compensation award is controlled by § 48-118. The statute sets forth the procedure to be followed: "If either party after the giving of such notice *fails,* by and through his attorney, to join in the making of such claim and the prosecuting of the suit, such party shall waive any and all claims or causes of action for improper prosecution of such suit or inadequacy of a settlement made in accordance herewith, and the party bringing the claim or prosecuting the suit shall be entitled to deduct from any amount recovered the reasonable expenses of making such recovery, including a reasonable sum for attorney's fees, which expenses and attorney's fees shall be prorated to the amounts payable to the employer or his insurer under the above right of subrogation and to the amount in excess of such amount payable to the employer or his insurer under his right of subrogation, *and which expenses and attor-*

ney's fees shall be apportioned by the court between the parties as their interests appear at the time of such recovery. . . .

"If the employee or his personal representative or the employer or his compensation insurer join in the prosecuting of such claim and are represented by counsel, the reasonable expenses and the attorney's fees shall be, unless otherwise agreed upon, divided between such attorneys as directed by the court before which the case is pending and if no action is pending then by the district court in which such action could be brought. . . ." (Emphasis supplied.)

In the present case the trial court ruled that Moyer had not complied with § 48-118 and yet proceeded to exercise jurisdiction. There were two possible reasons for Moyer's noncompliance, and the District Court did not state the basis for its findings.

In viewing the notice requirement of § 48-118, we find that although there was substantial evidence presented that Douglas & Lomason had notice that suit was to be filed, opposed the filing, and declined to cooperate with the attorneys for Mrs. TePoel, it is conceded that literal compliance with the notice provisions was not obtained. However, we note that literal compliance is not jurisdictional and that only substantial compliance, as in this case, was necessary. *Versch v. Tichota,* 192 Neb. 251, 220 N.W.2d 8 (1974).

The only other remaining issue regarding Moyer's compliance is whether the statute placed a mandatory duty upon him to seek an allocation of attorney fees and expenses before the proper court. This court cannot acquire subject matter jurisdiction if it was lacking at the district court level. See *Anania v. City of Omaha,* 170 Neb. 160, 102 N.W.2d 49 (1960).

It is clear under § 48-118 that if there is a joinder by the employer in the prosecution of the case, any dispute, as contended by the appellee Douglas & Lomason, is to be resolved by the court before whom

the action is pending. When there is no joinder by the employer, the statute contemplates two situations: (1) where suit is filed, and (2) where there is a settlement without suit. The statute states further that in both of these situations the fees and expenses "*shall* be prorated . . . and . . . apportioned by the court between the parties as their interests appear *at the time of such recovery.*" (Emphasis supplied.)

In the typical case where the employer joins in the action, the court before which the action is pending is in a better position to allocate fees according to the contributions of each attorney to the case. If the employer fails to join, the court before which the recovery was made would deduct the attorney fee from the employer's subrogation interest without as much of an allocation problem because the employee's counsel made the recovery possible. In most cases these would be in the same court whether the employer joined or not; it becomes more complex, however, when a federal forum is chosen, as in the present case, and it is not entirely clear from the record whether the employer joined or failed to join.

In this case the record reveals that although Douglas & Lomason did retain its own counsel to represent it and also was helpful in a few instances which may have required the allocation of attorney fees, the record indicates that overall the company and its counsel were harmful to the prosecution of Mrs. TePoel's suit against Florida Production Engineering. Douglas & Lomason's president was friendly with the president of Florida Production Engineering, the manufacturer of the machine that injured Mrs. TePoel, and, thus, it was required that court orders and interrogatories be served on them before information was furnished. Douglas & Lomason also moved the machine in question to another state and was very reluctant to let it be viewed or inspected.

In spite of the vigorous assertions to the contrary by Douglas & Lomason, it is clear that the cooperation given Mrs. TePoel's attorney was both grudging and late.

After finding from the record that Douglas & Lomason failed to join, the core question becomes whether § 48-118 provides for an exclusive forum for its resolution, i.e., the U.S. District Court.

" 'In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intent, from a consideration of the entire statute, its nature, its object, and the consequences that would result from construing it one way or the other, or from such statute in connection with other related statutes.' " *State ex rel. Boxberger v. Burns,* 132 Neb. 31, 35, 270 N.W. 656, 659 (1937).

As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *State ex rel. Smith v. Nebraska Liquor Control Commission,* 152 Neb. 676, 42 N.W.2d 297 (1950).

Although § 48-118 is devoid of any relevant legislative history on this matter, it follows from the mandatory language of the statute and this court's previous holdings that the proper court to apportion fees and expenses in this case was not the District Court for Platte County but, rather, the U.S. District Court for the District of Nebraska, which was the forum at the time the settlement was entered into. The U.S. District Court was in a unique position to know the extent of participation in the recovery by both counsel. Any other court attempting to review, evaluate, and apportion the contributions of the respective counsel in hindsight would be faced with an almost impossible task. See *Hammond v. Nebraska Nat. Gas Co.,* 209 Neb. 616, 309 N.W.2d 75 (1981).

We note the fact that the appellee Douglas & Lomason was aware that an attorney fee was being

deducted from its subrogation interest on December 17, 1979. The exclusive jurisdiction of the court in which the action was filed operates equally to bar any recovery of fees retained by Moyer under any theory, save and except in the U.S. District Court. The dispute arose prior to the dismissal of the action and no application was directed to that court.

We therefore hold that under § 48-118, where an action is filed before a particular court and prosecuted to a final conclusion, whether by settlement or judgment, that court alone has jurisdiction to resolve any controversy relating to division of fees and expenses. To hold otherwise would result in unseemly forum shopping. The action, having been prosecuted to a conclusion in the U.S. District Court, it is for that court to resolve the dispute between the parties.

REVERSED AND DISMISSED.

CLINTON, J., participating on briefs.

WHITE and CAPORALE, JJ., not participating.

BOSLAUGH, J., dissenting.

As I understand the record, there was no action between the parties pending at the time this proceeding was commenced. Neb. Rev. Stat. § 48-118 (Reissue 1978) specifically authorizes the District Court to act "if no action is pending."

STATE OF NEBRASKA, APPELLEE, V. FRANK BRITTAIN, APPELLANT.

325 N.W.2d 141

Filed October 22, 1982. No. 44448.

1. **Implied Consent Law: Blood, Breath, and Urine Tests: Appeal and Error.** In determining whether the State has shown that the condition of a driver of a motor vehicle is such as to render him incapable of refusing a blood alcohol test under Neb. Rev. Stat. § 39-669.10 (Reissue 1978) so as to make the test admissible in evi-

dence, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous.

2. _____: _____: _____. A determination that a blood alcohol test was taken and properly performed as provided for in Neb. Rev. Stat. § 39-669.11 (Reissue 1978) so as to be admissible in evidence generally rests within the sound discretion of the trial court and will not be reversed except for a clear abuse of discretion.

3. **Implied Consent Law: Blood, Breath, and Urine Tests: Juries.** The trial court having made that determination, it is not required that the jury reexamine or pass upon the court's ruling on the admissibility of the blood test.

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

HASTINGS, J.

Following a trial to a jury the defendant, Frank Brittain, was convicted of motor vehicle homicide and was sentenced to a term of imprisonment in the Nebraska Penal and Correctional Complex of not less than 1⅔ years and not more than 5 years. On appeal to this court he assigns as error the admission into evidence of a blood alcohol test, and improper jury instructions. We affirm.

The motor vehicle accident out of which this charge arose occurred at 22nd and Dodge Streets in Omaha on the evening of January 18, 1981. The defendant was driving the motor vehicle in which the victim, Jerry Cline, was a passenger. The unlawful act with which the defendant was charged, which it was claimed made this death a motor vehicle homicide, was a violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1978), driving while intoxicated.

Police Officer Donald Stephens, after making a preliminary examination at the scene of the accident, testified that he went on to the Lutheran Medical Center, where the victim and the defendant had been taken, to conduct a further investigation. He said he observed the defendant being treated and that he was bleeding profusely from the head. He went on to say he observed that the defendant would have to be told two or three times by the medical personnel to do certain things to assist them in their treatment of him. After obtaining permission to talk to the defendant, the officer said he attempted to do so and was able to smell a strong odor of alcohol. The officer testified that he then proceeded to read to the defendant the implied consent rights advisory. In that connection the following testimony of the officer is instructive: "Again, I started with question number one, 'You are advised that you are under arrest for suspicion of operating a motor vehicle while under the influence of intoxicating liquor or of any drugs. Do you understand this?' His reply was, 'No, I don't understand. I don't know what you are talking about.' Then question number two, 'You are further advised that you are required by the State of Nebraska to submit to a chemical test of breath, blood or urine as directed by the arresting officer for a determination of alcoholic content. When an officer directed that you may take a blood or urine test, you may choose a blood or urine test. Do you understand this?' He stated, 'No, I don't understand.' Past that as far as verbatim goes, I couldn't say. He kept telling me he had not been involved in a traffic accident and that he didn't own a pickup truck and he wasn't driving and he didn't know what I was talking about and there is nothing wrong with me. I am not hurt. What is all this? Question number three, 'You are advised that if you refuse to submit to this chemical analysis of breath, blood or urine as directed by the arresting officer,

you will be charged with an additional offense of refusing to submit to a test, which provides for a fine or jail and a loss of license if you are convicted. Do you understand this?' I received the same answer, that he didn't know what I was talking about. Question number five deals with the tests available when a person is injured such as this and taken to a hospital, we request a body fluid test, blood or urine. The practicality of administering a breath test becomes impractical at this point because the person cannot be transported to the police station to take this breath test. They are offered the choice of blood or urine. That deals with question number five or statement number five. Number six is, 'Do you wish to submit —' and there is a list of breath, blood or urine. Again, he said, 'I don't want to take any test. There is nothing wrong with me. I was not involved in a traffic accident. I was not hurt.' I received responses such as this the entire time I was attempting to advise him of these rights."

According to Dr. Steven A. Schwid, one of the attending physicians at the hospital, the defendant appeared to be confused and seemed to have amnesia for the events just preceding his arrival, and had an odor of alcohol on his breath. The only other medically related evidence as to the defendant's condition came from the medical technologist, Lynette Molek, who obtained the blood sample from the defendant. She testified that he was "in pretty bad shape," and when she asked the police officer if the defendant knew what she was going to do, she said the police officer told him that this was the lady who was to draw a blood sample. She proceeded to do so, during which time the defendant three times said "I am sorry."

It is the defendant's contention that, having refused to submit to the blood test, it should not have been taken, and, consequently, the results were not admissible. Neb. Rev. Stat. § 39-669.15 (Reissue

1978). However, Neb. Rev. Stat. § 39-669.10 (Reissue 1978) provides that "Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by section 39-669.08 and the test may be given." It is the State's contention that the defendant's condition was such as to render him incapable of refusing the test. The trial court agreed and received the test into evidence.

We have been unable to find any Nebraska cases dealing directly with the admissibility of blood alcohol tests under these circumstances. However, in *Wohlgemuth v. Pearson,* 204 Neb. 687, 285 N.W.2d 102 (1979), we were confronted with the other side of this question. We cited with approval the following language from *Campbell v. Superior Court,* 106 Ariz. 542, 479 P.2d 685 (1971): " '[A] refusal to submit to the test occurs where the conduct of the arrested motorist is such that a reasonable person in the officer's position would be justified in believing that such motorist *was capable of refusal* and manifested an unwillingness to submit to the test.' " (Emphasis supplied.) *Id.* at 691, 285 N.W.2d at 104. We went on to say: "[A]ny other result would force the director and the trial court into a psychological guessing game as to the appellee's state of mind and his degree of capability of comprehension." *Id.* at 691, 285 N.W.2d at 104.

Although affirming the trial court which had suppressed the test, the Montana court in *State v. Mangels,* 166 Mont. 190, 531 P.2d 1313 (1975), laid down the following rule for guidance in this area: "Section 32-2142.1, R.C.M. 1947, limits the officer's discretion to those cases where the subject is incapable of refusing the test. Here, we only require that the incapacity be determined on the basis of the best evidence which is reasonably available to the officer." *Id.* at 194, 531 P.2d at 1315.

In order to offer the blood test in evidence, it was

incumbent upon the State, as a foundational requirement, to demonstrate to the trial court that it was taken at the direction of the officer at a time when the defendant was "incapable of refusal" of the test. This is not unlike the responsibility which the trial judge has in satisfying himself that the *Miranda* warnings have been given as a foundation for the introduction in evidence of a defendant's "in-custody statement." In this regard, relying upon *United States v. Watson,* 469 F.2d 362 (5th Cir. 1972), this court adopted, in *State v. Irwin,* 191 Neb. 169, 214 N.W.2d 595 (1974), syllabus 8, which reads as follows: "In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous and in so doing we will look to the totality of the circumstances." We believe that the record clearly supports the finding which the trial court obviously made in ruling upon the admissibility of the test, i.e., that the blood sample was taken from the defendant at a time when he was incapable of refusing to give the sample. That determination will not be disturbed by us on appeal.

Defendant's other principal attack upon the admissibility of this test concerns the length of time that elapsed from its taking until it was refrigerated at the police station. He cites *State v. Gerber,* 206 Neb. 75, 291 N.W.2d 403 (1980), in which we said that before the State *may offer in evidence* the results of a breath test "the State must prove . . . (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health . . . ." *Id.* at 90-91, 291 N.W.2d at 411-12. He then points out that the regulations of the State of Nebraska Department of Health rules relating to analyses of blood for alcohol content require that "While not in transit to be tested or while

under examination, all blood specimens shall be refrigerated."

Officer Stephens testified that he received the defendant's blood sample at approximately 2:45 in the morning, placed it in his shirt pocket, continued to investigate the accident, and at 8 o'clock in the morning, some 5¼ hours later, he turned it over to the property officer at the police station for refrigerated storage.

The defendant contends that during this 5-hour period the blood was neither in transit to be tested nor was it in the process of being tested. We do not agree. The rules do not require the officer, once he obtains the blood sample, to discontinue all activities and rush the sample to the police property room. We believe that the record adequately supports the trial court's finding that the State had proved that the blood specimen was properly preserved, within the meaning of the regulations of the Nebraska Department of Health previously referred to. Further, the court was justified within the meaning of *State v. Gerber, supra,* in finding that the "test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health" and therefore was *admissible* in evidence. As we stated in *State v. Kerns,* 201 Neb. 617, 621, 271 N.W.2d 48, 51 (1978): "A determination of admissibility of physical evidence generally rests within the sound discretion of the trial court and will not be reversed except for a clear abuse of discretion." There was no abuse of discretion.

The defendant also contends that the test should not have been admitted because, as Neb. Rev. Stat. § 39-669.09 (Reissue 1978) requires that the person tested shall be permitted to have a physician of his choice perform additional tests, the officer must advise the defendant of this right. Such requirement is wholly inapplicable where the test is involuntary.

Also, we held in *Zadina v. Weedlun,* 187 Neb. 361, 190 N.W.2d 857 (1971), that no such requirement is imposed upon the officer by virtue of that statute.

The defendant also insists that there was no proof that the testing device was in proper working order. The answer to that contention is found in the record, which contains sufficient evidence to support a finding that the testing device was in proper working condition.

Finally, the defendant objects to the court having given its own instruction No. 11, and refusing to give the defendant's requested instruction No. 1. These instructions relate to the requirements of *Gerber, supra,* that "before the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with any statutory requirements." *Gerber* at 90-91, 291 N.W.2d at 411-12. The court told the jury that in determining the weight which the evidence relating to the blood test was entitled to have, it should consider whether the four requirements had been met. On the other hand, the defendant's proposed instruction stated that if the jury found from the evidence that "the State has failed to prove any one of these four facts you must totally disregard any testimony or evidence received regarding the blood test itself and the results of the blood test."

In refusing the defendant's offered instruction, the court relied upon *State v. Fox,* 177 Neb. 238, 249, 128 N.W.2d 576, 582 (1964), in which we said: "It is obvious from the record that all the statutory foundational requirements for the admission of the result of the blood analysis have been met, and such evidence was competent and properly admitted. There is nothing in the statutes which, either expressly or inferentially, prohibits the use of an anticoagulant for the purpose of preserving the blood during the interim from withdrawal until the test. Any evidence to the effect that the alcoholic content of the defendant's blood might have been affected by the presence of an improper amount of anticoagulant in the test tube, or by the use of an antiseptic to cleanse the arm before injection with the syringe and needle, would have no effect upon the admissibility of the test, but, rather, such evidence would go only to the weight and credibility of the test."

The defendant insists that *Fox, supra,* is no longer the law in Nebraska, having been overruled by the language of *Gerber, supra,* as set forth earlier in this opinion.

We do not interpret *Gerber* in this fashion. Both cases deal with the reception of evidence, not proof of facts. Both cases impose certain foundational requirements before the test may be admitted. These requirements were satisfied in the case at bar. Neither case required that the jury reexamine the trial court's ruling on the admissibility of the tests. The defendant was not entitled to the proposed instruction and there was no error in refusing to give it.

The judgment of the trial court is affirmed.

AFFIRMED.

WHITE, J., concurs in the result.

CLINTON, J., participating on briefs.

MCCOWN, J., dissenting.

Neb. Rev. Stat. § 39-669.15 (Reissue 1978) provides in part: "If a person arrested pursuant to section

39-669.08 refuses to submit to the chemical test of blood, breath, or urine required by that section, the test shall not be given and the arresting officer shall make a sworn report to the Director of Motor Vehicles." The corollary to the Nebraska implied consent statute is quoted in the majority opinion: "Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by section 39-669.08 and the test may be given." Neb. Rev. Stat. § 39-669.10 (Reissue 1978).

In this case it is undisputed that the defendant, in specific intelligible language, refused to submit to a blood test. The State admits that the defendant refused, but contends that his other comments show that he was confused, irrational, and was therefore in a condition rendering him incapable of refusal. The State therefore argues, and the majority opinion now holds, that because he was irrational and did not know what he was doing, he was incapable of refusing to take the test. His refusal and the statutory command that the test not be taken may therefore be disregarded and the test taken anyway.

It is a contradiction in terms to hold that a person who has just refused to take a test is incapable of refusing. The only explanation for such a contradiction in terms is that, to be capable of refusing, a person must know and understand what he is doing. This court has consistently held directly contrary to that assumption. See *Wohlgemuth v. Pearson,* 204 Neb. 687, 285 N.W.2d 102 (1979). In all cases we have been able to find in which the suspect manifested a refusal to submit to a chemical test by act or by words, and even where the evidence indicated he was injured, intoxicated, confused, or did not understand the import of his refusal, the courts of this country have found the suspect capable of valid refusal. See, *Wohlgemuth v. Pearson, supra; Dolan v. Rust,* 195 Colo. 173, 576 P.2d 560 (1978); *Hoban v.*

Rice, 25 Ohio St. 2d 111, 267 N.E.2d 311 (1971); *State v. Hurbean,* 23 Ohio App. 2d 119, 261 N.E.2d 290 (1970).

We have been unable to find any criminal or civil case in any jurisdiction in which a court found a suspect incapable of refusal where the suspect did, in fact, manifest some sort of oral or physical refusal. Only where the suspect gave no meaningful response whatever, or where there was no understanding of the language, was a suspect found to be in a condition rendering him incapable of refusal. See, *Martinez v. Peterson, ante* p. 168, 322 N.W.2d 386 (1982); *State v. Rumley,* ____ Mont. ____, 634 P.2d 446 (1981).

Nebraska has held that a conditional or qualified refusal to take a test is not sanctioned by the act and that such a refusal is a refusal to submit to the test. Refusal occurs whenever the suspect so conducts himself as to justify a reasonable person in the position of the requesting officer in believing that the suspect understood that he was asked to submit to a test and manifested an unwillingness to take it. See *Wohlgemuth v. Pearson, supra.* In the language of this court in that case: "[A]ny other result would force the director and the trial court into a psychological guessing game as to the appellee's state of mind and his degree of capability of comprehension. . . . The evidence is overwhelming that the appellee understood he was requested to take the test and did, in fact, articulate a refusal. Therefore, the judgment of the trial court that the appellee was mentally 'incapable of refusal' does not satisfy the terms of the statute . . . ." *Id.* at 691-92, 285 N.W.2d at 104.

It is quite clear in all the cases that the defendant's manifestation or state of mind in refusing to take the test is completely irrelevant. In the case at bar the majority opinion relies on some evidence that the defendant might have been suffering from

amnesia to explain his irrational statements and to support the conclusion that he did not know or understand what he was doing when he refused. It is just as logical to assume that his lack of knowledge and understanding, if any, was due to his intoxication. In either event his state of mind is entirely irrelevant.

It is difficult enough for a police officer to determine whether or not a suspect has refused to take a chemical test without also having to decide, after a refusal, as to whether the suspect was capable of refusing. In a great many cases of driving while intoxicated the defendant probably does not know what he is doing, but it would be absurd in view of our previous cases to argue that a defendant in such a condition, who refused to take a test, was incapable of refusal.

As the Ohio court put it: "The subjective state of mind of the licensee cannot control the outcome of the proceedings, and a police officer is not required to know the state of mind of the person arrested and determine whether such person understood he was refusing to submit to the test. To require that would place an impossible burden on the arresting officer. . . . It is possible for a licensee to be in such a state of intoxication that he does not understand what is happening, and, at the same time, by words, acts and general conduct to manifest an unwillingness or outright refusal to take the test." *Hoban v. Rice, supra* at 117, 267 N.E.2d at 315.

Discussing the same issue, the Supreme Court of Colorado said: "Therefore, it is the driver's external minifestations [sic] of unwillingness or his outright refusal to take the test which are relevant, and not the driver's state of mind or his later recollection of events." *Dolan v. Rust, supra* at 175, 576 P.2d at 562.

Under the majority opinion in the present case, whenever there is a specific oral refusal to take a

chemical test, the arresting officer may then interpret the suspect's state of mind, and if the refusal is accompanied by irrational statements or indications that the suspect does not know what he is doing, the officer can administer a chemical test over the suspect's objections. In effect, the police officer is given the broad discretion to determine when a refusal is really not a refusal and to take the test in contravention of the statute. It should be noted in this connection that the present case is a criminal case in which the defendant clearly ought to have the benefit of the specific statute requiring that in the event of refusal the test shall not be taken. There is no logical or practical reason to force police officers to speculate as to whether a particular suspect's refusal to take a test was due to his state of mind or physical condition. Such a result forces police officers and the court into "a psychological guessing game as to the licensee's state of mind and his degree of capability of comprehension."

The statute authorizing a chemical test upon a person who is "incapable of refusal" should not be interpreted to allow the test to be taken where a suspect has, in fact, refused but, in the opinion of a law enforcement officer, the refusal was based on irrational or unintelligible grounds. The trial court's refusal to exclude the blood test in the present case was erroneous.

KRIVOSHA, C.J., and CAPORALE, J., join in this dissent.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOSEPH J. DIVIS, RESPONDENT.

325 N.W.2d 652

Filed October 22, 1982. No. 81-810.

Original action. Judgment of reprimand and probation.

On motion for the court.

PER CURIAM.

The respondent, Joseph J. Divis, was formally charged in this court with a violation of his license to practice law as provided in Neb. Rev. Stat. § 7-104 (Reissue 1977), and with the violation of DR 1-102(A)(1) and DR 6-101(A)(3) of the Code of Professional Responsibility on two counts. A referee was appointed, pleadings filed, and hearing held. The referee's report found that the actions of the respondent on both counts constituted a violation of the statute and disciplinary rules as charged, and recommended a public reprimand and further probationary conditions. No exceptions or objections have been filed to the referee's report.

On count I the record establishes that on July 14, 1976, the respondent, acting as attorney for an estate, filed a will for probate in the Custer County Court. A third party named in the will was appointed and qualified as executor, and after notice to creditors an order barring claims was entered on December 7, 1976. There have been no filings since then. The respondent has been attorney of record throughout. As early as 1978 one of the beneficiaries of the estate complained about the delay in the administration of the estate.

An obligation of the Federal Land Bank matured on July 20, 1978, and the sum of $5,082.46 was deposited by the Nebraska State Bank and Trust Company in Broken Bow, Nebraska, in a checking ac-

count of the decedent in that bank. On February 9, 1979, a beneficiary under the will withdrew the sum of $6,392.97 from the bank account and closed the account. Respondent had failed to determine that the checking account of the decedent had authorized signatures other than the deceased's before using the account as a depository for estate funds.

In June 1982 a petition was filed by the personal representative of the estate in the District Court for Custer County against the bank and the beneficiary to recover the amount withdrawn.

The excuses given by respondent for a delay of over 6 years in administering a relatively small and simple estate are not persuasive.

On count II the evidence shows that on August 22, 1975, respondent filed a will for probate in Lancaster County Court and secured the appointment of an executor on December 17, 1975. Assets of the modest estate consisted entirely of personal property in Lancaster County where the deceased had resided. Complaints as to delay were made to the respondent by attorneys, heirs, and judges of the county court from 1976 through 1981. The original executor died in 1977 but a successor executor was not appointed until May 1980. In 1979 respondent filed an inventory which had been signed and notarized in June 1976. Petition for determination of inheritance tax and approval of final report was not filed until May 1981, and the personal representative was not discharged until July 9, 1982. There is no reasonable excuse for such delay.

The respondent, having violated a disciplinary rule and having failed to act competently by neglecting a matter entrusted to him, is guilty of unprofessional conduct under both counts and is hereby publicly reprimanded for conduct violative of the Code of Professional Responsibility and of his oath as a member of the bar of this court.

In accordance with the recommendation of the

referee the respondent is placed on a probationary status until the further order of this court. The conditions of probation are that the respondent shall forthwith take all actions required or necessary to close the estate pending in Custer County, Nebraska, with the exception of the pending action by the personal representative against the bank and the beneficiary for the withdrawal of the bank account of the decedent.

Counsel for Discipline shall determine whether the conditions of probation have been met and report to this court, which may take such further action as may be appropriate.

JUDGMENT OF REPRIMAND AND PROBATION.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. EUGENE BECK, APPELLANT.

325 N.W.2d 148

Filed October 22, 1982. No. 81-881.

1. **Speedy Trial.** The primary burden is upon the State to bring the accused person to trial within the time provided by law, and if he is not brought to trial within that time, he is entitled to an absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute.
2. _____. The State has the burden of proving that one or more of the excluded periods of time under subsection (4) of Neb. Rev. Stat. § 29-1207 (Reissue 1979) is applicable if the defendant is not tried within 6 months of the commencement of the criminal action.

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

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

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

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

WHITE, J.

The sole question for review in this appeal is whether the trial court erred in its determination that the appellant was brought to trial within 6 months after the filing of a criminal information, excluding "The period of delay resulting from the absence or unavailability of the defendant." Neb. Rev. Stat. § 29-1207(4)(d) (Reissue 1979). We reverse.

The appellant was informed against in the District Court on October 8, 1980, charging him with theft of a hay swather. Neb. Rev. Stat. § 28-511(1) (Reissue 1979).

On November 6, 1980, the appellant's bail was set at $1,500 and appellant was released by posting 10 percent thereof.

On December 11, 1980, an entry appears in the trial notes of the District Court as follows: "12-11-80 Arr 12/16/80 10:00 A M"; and on December 16, 1980, "12-16-80 Df fails to appear for arraignment; Bond revoked, bench warrant to issue"; and on December 22, 1980, "12-22-80 Bench warrant issued."

On August 20, 1981, the appellant appeared before the District Court after arrest pursuant to the bench warrant.

On September 14, 1981, the appellant, through new counsel, moved to dismiss for failure to comply with Neb. Rev. Stat. § 29-1208 (Reissue 1979). Ruling was deferred until after trial. Appellant was tried and convicted of a violation of § 28-511(1) and sentenced to a term of 18 months in the Nebraska Penal Complex. On November 3, 1981, the motion to discharge the appellant was denied.

At the hearing on November 3, 1981, the trial court heard the testimony of the county judge who bound the appellant over for trial, who generally testified

that it was his custom to advise defendants in his court on bindover to remain in contact with their attorneys so as to be advised of the date of their appearance in the District Court. It was the position of the appellant in the District Court and in this court that neither he nor his then-appointed counsel was ever notified to appear for arraignment or trial.

Philip M. Martin, Jr., former counsel, testified that he was notified by the county attorney to appear at a bond review hearing on November 11, 1980. The appellant did not appear, as Mr. Martin claimed not to know how to reach the appellant. We note, however, that on the bond filed on November 6, 1980, in the District Court, the appellant's address appears on the front thereof.

No evidence of any further notice to appear served on either the appellant or counsel was introduced in evidence. Based on this record, the trial court found "by a preponderance of the evidence that the defendant absented himself from the jurisdiction and was, in fact, unavailable for trial for a period of at least from December 16th, 1980, until August 20th, 1981, when he appeared without counsel after having been apprehended on the bench warrant and, accordingly, the motion to dismiss for lack of a speedy trial is now denied."

The record is devoid of proof to support the finding that the appellant left the jurisdiction or, for that matter, that he did not continue to reside at the address in Grand Island noted on the bond form.

Section 29-1207 provides that every person charged with a criminal offense shall be brought to trial within 6 months of the filing of the information. *State v. Bolton,* 210 Neb. 694, 316 N.W.2d 619 (1982). Subsection (4) of § 29-1207 excludes certain periods of time from computation of the 6-month requirement. The relevant portion in this case is: "(d) The period of delay resulting from the absence or unavailability of the defendant."

This court has previously held: "[T]he primary burden is upon the State to bring the accused person to trial within the time provided by law, and if he is not brought to trial within that time, he is entitled to an absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute." *State v. Bolton, supra* at 697, 316 N.W.2d at 621; *State v. Kinstler,* 207 Neb. 386, 299 N.W.2d 182 (1980). The State also has the burden of proving that one or more of the excluded periods of time under subsection (4) of § 29-1207 is applicable if the defendant is not tried within 6 months of the commencement of the criminal action. *State v. Johnson,* 201 Neb. 322, 268 N.W.2d 85 (1978).

The State here asserts that the appellant's contention must fail because no evidence was introduced by appellant to counter the State's evidence of appellant's absence from the jurisdiction. Peculiarly, the State cites no reference to the bill of exceptions establishing the State's so-called proof that the appellant departed the jurisdiction, and after diligently examining the record vainly, we understand the omission but do not condone the assertion.

The obligation of a defendant to appear before the District Court is fixed by Neb. Rev. Stat. § 29-901(3)(b) (Reissue 1979): "to answer the offense wherewith he may be charged, and to appear at such times thereafter as may be ordered by the proper court."

The State has failed to meet its burden under *State v. Bolton, supra.* There can be no serious dispute that a defendant is required to appear at those dates and at those times when ordered and of which he is notified. No evidence appears in the record showing the appellant and/or counsel were ever notified to appear. If there was proof available to support the trial court's findings, it was simply not introduced. We can accord no weight to findings which find no support in the evidence.

The appellant is entitled to be discharged from custody, the conviction set aside, and the information dismissed.

REVERSED.

CLINTON, J., participating on briefs.

BOSLAUGH, J., dissenting.

In holding that the defendant must be discharged because he was not tried within the statutory period prescribed in Neb. Rev. Stat. § 29-1207 (Reissue 1979), the majority opinion establishes a rule that prisoners released on bail have no duty to appear in the absence of further notice.

The defendant in this case was bound over to the District Court on October 6, 1980. Bail, which had been fixed at $2,500 by the county court, was reduced to $1,500 by the District Court on November 6, 1980. The bond which the defendant signed on that date required him to appear "from day to day, and from term to term, until final judgment or as directed by said Court, until finally discharged . . . ."

When the defendant failed to appear for arraignment on December 16, 1980, a bench warrant was issued December 22, 1980. The defendant did not again appear in court until August 20, 1981, after he had been apprehended on the bench warrant.

The record does not show where the defendant was from December 16, 1980, to August 20, 1981. His first counsel testified that he appeared with the defendant on only one occasion. When he was notified to appear with the defendant for a bond review, he attempted to contact the defendant but was unable to do so and had no address or phone number for the defendant at that time. In the absence of any evidence to the contrary, this evidence should be sufficient to support the finding of the District Court that the defendant was unavailable for trial from December 16, 1980, to August 20, 1981.

The general rule is that it is the responsibility of a prisoner, released on bail, to appear in the District

Court in accordance with the terms of his bond without further notice. *Holmes v. State,* 17 Neb. 73, 22 N.W. 232 (1885); *The People v. Sullivan,* 339 Ill. 146, 171 N.E. 122 (1930). As stated in *United States v. Lujan,* 589 F.2d 436 (9th Cir. 1978), a defendant who is released on bail has a general obligation to keep in touch with his attorney and the court, as well as being present at the court proceedings against him. See, also, *Palermo v. United States,* 61 F.2d 138 (8th Cir. 1932); *Caudillo v. State,* 541 S.W.2d 617 (Tex. Crim. App. 1976).

The rule which this case adopts rewards the defendant who, after being released on bail, conceals his whereabouts from the court and his attorney. Such a defendant should not be entitled to a discharge under Neb. Rev. Stat. § 29-1208 (Reissue 1979).

CLINTON, J., joins in this dissent.

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

325 N.W.2d 151

Filed October 22, 1982. No. 82-014.

1. **Judges.** A district judge is not disqualified to hear a case because he previously presided in a proceeding involving one of the parties.
2. **Judges: Appeal and Error.** The overruling of a motion to disqualify a trial judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
3. **Attorney and Client.** An attorney is required to perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and he should conscientiously protect the interests of his client.
4. **Effectiveness of Counsel.** The person challenging the competency of counsel has the burden of proof to establish that incompetence and, further, to demonstrate how the alleged inadequacy was prejudicial.

5. **Constitutional Law: Attorney and Client: Conflict of Interest.** In order to demonstrate a violation of one's sixth amendment rights a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.
6. **Pleas.** A plea of guilty or nolo contendere, freely and voluntarily made, waives every defense to the charge, whether the defense is procedural, statutory, or constitutional.
7. **Post Conviction: Appeal and Error.** 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.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Dennis M. Coll and Raymond, Olsen, Coll & Ediger, P.C., for appellant.

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

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

KRIVOSHA, C.J.

The appellant, John Herren, appeals from an order entered by the District Court for Scotts Bluff County, Nebraska, denying the post conviction relief sought pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). The basis of the post conviction relief sought by Herren, initially before the trial court and now on the appeal in this court, is contained in a series of assignments of error presented by Herren's court-appointed appellate counsel pursuant to Herren's instructions. The assignments of error are as follows: (1) That the presiding judge should have disqualified himself from hearing the post conviction relief proceedings. (2) That Herren was denied effective assistance of counsel for a number of reasons, including (a) original court-appointed counsel did not have the qualifications and experience or training to be involved in a murder case; (b) original court-appointed counsel

had a conflict of interest with one of the key prosecution witnesses; (c) original court-appointed counsel failed to call witnesses or investigate the diminished capacity or intoxication defenses; (d) original court-appointed counsel advised Herren to enter a plea prior to hearing the outcome of a motion to suppress; (e) Herren was pressured by original court-appointed counsel to enter his plea, thereby making it involuntary; (f) original court-appointed counsel placed information in the presentence report which was prejudicial to Herren; and (g) the court failed to allow rebuttal testimony or grant a continuance after the hearing on post conviction relief on December 23, 1981. We have now carefully examined all the assignments of error and determine that they are wholly without merit. The action of the trial court in denying post conviction relief should be affirmed.

In order to fully appreciate how very frivolous the appeal in this case is, it is necessary that we quickly review the facts of the original case. Herren was charged in a two-count information. The first count charged him with murder in the first degree, in violation of Neb. Rev. Stat. § 28-303 (Reissue 1979). This offense may be either a Class I or Class IA felony and punishable by either death or life imprisonment. The second count charged Herren with attempted first degree murder, in violation of Neb. Rev. Stat. § 28-201 (Reissue 1979), a Class II felony. A Class II felony is punishable by imprisonment of not less than 1 nor more than 50 years. There is no factual dispute with regard to the commission of the crimes. The evidence clearly established that on the evening of May 26, 1980, Herren, accompanied by Denise Slater, went to Marilyn Carlson's apartment. He stabbed Carlson once in the shoulder in the presence of Slater. Believing her to be dead, he next went to the home of Darvon Montgomery where

he stabbed Montgomery several times and then slit his throat.

Before trial, court-appointed counsel participated in a *Jackson v. Denno* hearing. While the court's decision in that regard was pending, counsel succeeded in getting the State to file an amended information charging Herren with second degree murder of Montgomery, a Class IB felony, punishable by not less than 10 years nor more than life imprisonment, and assault in the second degree, a Class IV felony, punishable by not more than 5 years' imprisonment or a fine of $10,000, or both fine and imprisonment.

Thereafter, Herren appeared with his court-appointed counsel and, after appropriate interrogation by the trial court, entered a plea of no contest to each of the counts. The court sentenced Herren on count I, second degree murder, to a term of imprisonment of 35 years, and on count II, assault in the second degree, to a term of 20 months to 5 years. To say that Douglas Warner, Herren's original court-appointed counsel, had worked miracles in view of the circumstances would be an understatement. The evidence in the case was more than ample to have likely resulted in a conviction of both charges as originally filed, and could have resulted in Herren being executed or, at the least, sentenced to a term of imprisonment for the remainder of his natural life. We particularly make note of this fact at this point so that it can be apparent that any suggestion that Herren's original court-appointed counsel was incompetent or that Herren had ineffective assistance of counsel is wholly frivolous. Herren's original court-appointed counsel succeeded in obtaining a most generous plea bargain for Herren and, further, a most generous sentence under the circumstances.

Nevertheless, we take a moment and address the specific assignments of error raised. Turning first to the claim that the trial judge should have dis-

qualified himself, we find that Herren's basis for this claim is founded upon some assertion that the trial court was prejudiced because one of the victims was an alcohol counselor who had close ties with the judicial process in Scotts Bluff County, and because the trial judge who heard the post conviction action was the judge in the original action. Herren's claim of error in this regard is summed up in his brief in the following manner: "The familiarity of the Court with the judicial officers, support staff, and the Public Defender's office gave the appearance of unfairness or impropriety which did not lend itself to proper administration of the law, and Judge Hippe should have removed himself from the post-conviction proceeding." The assertion, of course, is without any merit at all. There is no rule of law which automatically disqualifies a judge who has presided at a trial from subsequently considering a post conviction proceeding. In *Liberty Finance Corp. v. Jones,* 184 Neb. 529, 533, 169 N.W.2d 289, 292 (1969), we specifically said: "A district judge is not disqualified to hear a case because he previously presided in a proceeding involving one of the parties." Moreover, it is a well-established rule in this jurisdiction that "The overruling of a motion to disqualify a trial judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law." *State v. Davis,* 198 Neb. 823, 826, 255 N.W.2d 434, 436 (1977). The record is totally devoid of any evidence to support Herren's contention that the trial judge was in any manner prejudiced in this case.

Herren next asserts in a series of ways that he was denied the effective assistance of counsel. His first claim is that his original court-appointed counsel did not have sufficient experience or training in cases of this nature and failed to adequately advise or represent Herren. For reasons which should be obvious

from what we have already described, the assignment is wholly without merit. It is well established that an attorney is required to "perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client." *State v. Leadinghorse,* 192 Neb. 485, 489, 222 N.W.2d 573, 577 (1974). Furthermore, it is clear that the person challenging the competency of counsel has the burden of proof to establish that incompetence and, further, to demonstrate how the alleged inadequacy was prejudicial. See, *State v. Holloman,* 209 Neb. 828, 311 N.W.2d 914 (1981); *State v. Colgrove,* 207 Neb. 496, 299 N.W.2d 753 (1980). The result obtained by court-appointed counsel in this case dispels Herren's claim that his counsel was incompetent, and that assignment is wholly without merit.

Herren's further contention that he was denied effective assistance of counsel because of a conflict in interest is likewise unsupported in the record. The record reflects that court-appointed counsel, who was a member of the public defender's office, had, at an earlier date, represented Denise Slater on a charge of driving while intoxicated. Immediately upon his assignment to the Herren case on May 27, 1980, all communications between his office and Slater ceased and he filed a motion to withdraw from her case. The motion was formally granted on June 9, 1980. There is no evidence in the record to support any claim of a conflict in interest. In order to demonstrate a violation of one's sixth amendment rights a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. See, *Cuyler v. Sullivan,* 446 U.S. 335, 348-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *State v. Pope,* 211 Neb. 425, 318 N.W.2d 883 (1982). Herren fails to produce any evidence to establish this alleged conflict of interest.

As to the balance of Herren's claims, we may

easily dispose of them. An examination of this record, both at the original hearing and on post conviction relief, amply discloses that Herren was fully knowledgeable of all that was taking place and that he freely and voluntarily entered his plea of no contest. We have frequently held that a plea of guilty or nolo contendere, freely and voluntarily made, waives every defense to the charge, whether the defense is procedural, statutory, or constitutional. See *State v. Country,* 202 Neb. 509, 276 N.W.2d 110 (1979). In view of that fact, Herren's claim that counsel failed to call witnesses or failed to raise the defense of diminished capacity, which does not exist in Nebraska, is without merit. Nor does his contention that counsel did not wait for the outcome of the motion to suppress have any merit. Once Herren voluntarily entered his plea of no contest, the court's ruling on the motion to suppress was irrelevant.

Herren's contentions that he was pressured into pleading to the reduced charges and that counsel inadequately represented him by presenting psychiatric reports and medical journal articles to the court are almost ridiculous in view of what Herren otherwise likely faced, absent his taking counsel's advice.

"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." *State v. Paulson,* 211 Neb. 711, 713, 320 N.W.2d 115, 117 (1982). Moreover, in order to maintain a claim of ineffective counsel, the record must affirmatively support the claim. See *State v. Meredith, ante* p. 109, 321 N.W.2d 456 (1982). The record in this case not only fails to support the claim but amply supports a finding that Herren was not only adequately represented but was extremely well represented. The action of

the trial court in denying post conviction relief must be affirmed.

Court-appointed appellate counsel was confronted with an extremely difficult task and effectively carried out that task in spite of extremely difficult obstacles.

The judgment is affirmed.

AFFIRMED.

McCOWN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. NORDELL FRANKLIN GLOVER, APPELLANT.

325 N.W.2d 155

Filed October 22, 1982. No. 82-063.

Statutes. This court will, if possible, give effect to every word, clause, and sentence of a statute.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Thomas DeLay of Mueting, DeLay & Stoffer, for appellant.

Paul L. Douglas, Attorney General, and Martel J. Bundy, for appellee.

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

CAPORALE, J.

The defendant-appellant, Nordell Franklin Glover, appeals from an order overruling his motion for judicial review of the report of the Sentencing Review Committee (Committee), established pursuant to Neb. Rev. Stat. § 29-2916 (Reissue 1979), made after defendant had been committed to the penal complex. We affirm.

Appellant was convicted of first degree sexual as-

sault, found to be a mentally disordered sex offender, and sentenced to 7 to 10 years' confinement. He was thereupon committed to the Lincoln Regional Center; after a review by the Committee, the District Court found that appellant had received the maximum benefit of treatment at the center and committed him to the penal complex. After a subsequent review, the Committee found that appellant had a mental disorder and that the disorder was not treatable. Thereafter, appellant filed the motion which is the subject of his appeal.

Appellant argues he was entitled to a judicial review of the Committee's second report as a matter of right under the provisions of Neb. Rev. Stat. § 29-2918 (Reissue 1979), which states: "(1) The Sentencing Review Committee shall annually or upon motion of the defendant review all records of mentally-disordered sex offenders. (2) Prior to any review the regional center shall prepare and provide to the committee all data, including test results, which are relevant to the issues of whether the defendant still has a mental disorder or whether the defendant has received the maximum benefit of treatment. The committee, before making a final determination, may request from the appropriate regional center any additional information it deems necessary. (3) The committee shall file a written report with the sentencing court on the results of its review. Such reports shall include reasons for the conclusions. The court shall, upon motion of either party, conduct a hearing on defendant's status upon receiving such written report from the Sentencing Review Committee. The court shall conduct such a hearing upon its own motion at least every four years."

A reading of the statute makes it abundantly clear that the annual review therein required is only to occur within the context of a "mentally disordered sex offender" who has been and remains committed to a

regional center for treatment. The Committee's second review was without legal authority. This is demonstrated by the fact that the paragraph requiring annual review, paragraph (1), is followed in paragraph (2) by language dictating preparation of certain data by the regional center which is to be provided to the Committee. No mention is made of any records in the custody of any other entity. Paragraph (3) requires the Committee to make a report to the sentencing court of the results of its review. Additionally, the next section, Neb. Rev. Stat. § 29-2919 (Reissue 1979), speaks in terms of defendant's "return to the sentencing court for further disposition" and specifically sets forth that such further disposition may include sentencing the defendant to the Nebraska Penal and Correctional Complex for the "remainder" of the sentence. Nowhere is there the slightest hint of a statutory mandate for review, annual or otherwise, once commitment to the penal complex has been made.

This analysis is further borne out when the overall structure of article 29 of Chapter 29 of our statutes is noted. The progression is from presentence investigation to evaluation, to confinement to a regional center, to commitment at the penal complex. Section 29-2918 is so placed in the sequential progression, after confinement to a regional center and before commitment to the penal complex, as to make it clear that no review is to be made after commitment to the penal complex. No statutory purpose is served by committee review after commitment to the penal complex.

There is no ambiguity or lack of an independent, clear meaning of the pertinent statute which would require or authorize us to construe the statute, and therefore we need not go beyond the face of the statute, as we did in *North Star Lodge #227 v. City of Lincoln, ante* p. 236, 322 N.W.2d 419 (1982). See, also, *PPG Industries Canada Ltd. v. Kreuscher,* 204

Neb. 220, 281 N.W.2d 762 (1979). However, it is the rule that we will, if possible, give effect to every word, clause, and sentence of a statute. *North Star Lodge #227 v. City of Lincoln, supra; Ulbrick v. City of Nebraska City,* 180 Neb. 229, 141 N.W.2d 849 (1966). To engage in the strained interpretation proffered by appellant would require us to violate this rule by effectively ignoring the clear meaning of paragraphs (2) and (3) of § 29-2918, which clearly place the annual (or other) review within the context of an "offender" who has been committed to a regional center for treatment but has not yet been committed to the penal complex for the duration of his sentence. See, also, *State v. Black,* 195 Neb. 366, 238 N.W.2d 231 (1976).

This appeal is frivolous. The trial court was correct in overruling appellant's motion.

AFFIRMED.

MCCOWN, J., participating on briefs.

LARRY RALPH RODGERS, APPELLANT, V. DALE ADAMS, APPELLEE.

325 N.W.2d 157

Filed October 22, 1982. No. 82-090.

Extradition. Once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state.

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

Stephen K. Yungblut, for appellant.

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

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

BOSLAUGH, J.

The appellant, Larry Ralph Rodgers, is charged with three counts of burglary and three counts of grand theft in Florida. He was arrested November 19, 1981, on a Nebraska Governor's warrant pursuant to extradition proceedings.

On November 30, 1981, Rodgers filed his application for a writ of habeas corpus alleging that his detention was unlawful. After an evidentiary hearing the trial court dismissed the application. Rodgers has appealed.

Rodgers' assignments of error allege the extradition papers fail to show that a neutral judicial officer in Florida made a finding of probable cause that he had committed a crime in Florida and do not state the circumstances surrounding the commission of the crime.

One of the extradition documents is an affidavit of probable cause made by an assistant state attorney of Florida. Attached to the affidavit is a certificate signed by a circuit judge of Florida that "probably [sic] cause" exists. This was sufficient to comply with the requirement that a determination of probable cause has been made by a neutral judicial officer of the demanding state. See *Brown v. Nutsch,* 619 F.2d 758 (8th Cir. 1980).

When a neutral judicial officer of the demanding state has determined that probable cause exists, the court in the asylum state may not review that determination. "We hold that once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state." *Michigan v. Doran,* 439 U.S. 282, 290, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1978). See, also, *Wise v. State,* 197 Neb. 831, 251 N.W.2d 373 (1977).

The affidavit of probable cause made by the assistant state attorney of Florida contained a sum-

mary statement of the circumstances of the crimes with which Rodgers is charged.

The determination by the trial court that all statutory requirements for extradition had been satisfied was correct. The judgment is affirmed.

AFFIRMED.

MCCOWN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. SHIRLEY D. COOK, APPELLANT.

325 N.W.2d 159

Filed October 22, 1982. No. 82-101.

1. **Convictions: Appeal and Error.** This court will not interfere with a conviction based upon evidence unless it is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilty beyond a reasonable doubt.
2. **Sentences: Appeal and Error.** A sentence imposed by the trial court within statutory limits will not be disturbed on appeal unless there has been an abuse of discretion.

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

Philip M. Martin, Jr., of Higgins & Martin, for appellant.

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

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

HASTINGS, J.

The defendant, Shirley D. Cook, was tried to a jury in the county court of Buffalo County and convicted of willful reckless driving, a violation of Neb. Rev. Stat. § 39-669.03 (Reissue 1978). She was sentenced to a term of imprisonment of 28 days in the county jail. Upon appeal to the District Court the judg-

ment of conviction was affirmed, but she was sentenced to a term of but 10 days in the county jail, ordered to pay a fine of $100, and her license to operate a motor vehicle was suspended for a period of 6 months. She has appealed to this court, alleging as errors the insufficiency of the evidence to support her conviction and the excessiveness of the sentence. We affirm.

The defendant was charged as the result of an automobile accident which occurred on January 11, 1981. The defendant was traveling in a westerly direction, and the other party, Robert Cook, was traveling in an easterly direction. These two parties were husband and wife, but were in the process of dissolving their marriage and the proceedings had been something less than pleasant. According to the testimony of Robert Cook and his passenger, immediately before the accident the motor vehicle which the defendant was driving came straight across the road and struck the Robert Cook vehicle, which at that time was within a foot or two of the edge of its side of the road. Both of these witnesses stated that immediately after the impact the defendant got out of her vehicle and came over to Mr. Cook and told him in a loud, angry voice that she would run into him "again and again." The defendant in her testimony denied that there had been any impact between the two vehicles.

It is obvious from the record that the conflicting testimony presented a question of fact for the jury to decide. It decided the case against the defendant. "We will not interfere with a conviction based upon evidence unless it is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilty beyond a reasonable doubt." *State v. Bartholomew, ante* p. 270, 274, 322 N.W.2d 432, 435 (1982). The evidence was not insufficient.

Neb. Rev. Stat. § 39-669.04 (Reissue 1978) provides

that "Every person convicted of willful reckless driving shall be punished *upon a first conviction* by imprisonment for a period of not less than ten days nor more than thirty days, or by a fine of not less than fifty dollars nor more than one hundred dollars, or by both such fine and imprisonment, and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle for any purpose for a period of not less than thirty days nor more than one year . . . ." (Emphasis supplied.) The sentence imposed in this case was within the limits set out by statute. The presentence investigation report indicates that the defendant has a prior conviction for this same offense. In any event, "a sentence imposed by the trial court within statutory limits will not be disturbed on appeal unless there has been an abuse of discretion." *State v. Hortman,* 207 Neb. 393, 399, 299 N.W.2d 187, 190 (1980). No abuse of discretion appears here.

The judgment and sentence of the District Court are affirmed.

AFFIRMED.

McCOWN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. SEBASTIAN FALCONE, APPELLANT.

325 N.W.2d 160

Filed October 22, 1982. No. 82-137.

Pleas. A plea of guilty or nolo contendere waives every defense of the charge, whether the defense is procedural, statutory, or constitutional.

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

Paul E. Watts of Paul E. Watts & Associates, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

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

KRIVOSHA, C.J.

The appellant, Sebastian Falcone, has appealed from an order entered by the District Court of Douglas County, Nebraska, denying Falcone post conviction relief sought pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). The appeal is wholly frivolous and without merit, and the order denying the post conviction relief is affirmed.

Falcone was initially charged with the burglary of an elementary school in Omaha, Nebraska. He entered a plea of no contest, which was accepted by the trial court. Following a presentence investigation, Falcone was sentenced to the Nebraska Penal and Correctional Complex for a term of not less than 3 nor more than 5 years. The offense charged was a violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1979) and a Class III felony. By reason thereof Falcone could have been imprisoned in the Nebraska Penal Complex for not less than 1 year nor more than 20 years or fined not more than $25,000, or could have received both imprisonment and fine. Thereafter, Falcone appealed to this court, maintaining that his sentence was excessive. We disagreed and affirmed the sentence imposed.

Following the filing of his petition in the present action seeking post conviction relief, the court granted Falcone an evidentiary hearing. Following the hearing, the court found that Falcone had freely and voluntarily entered his plea of no contest with full knowledge that he would be found guilty by the court. Falcone's claim for post conviction relief is based upon some vague assertion that if he had known that one of his accomplices, a Michael Brown, had some contact with the police, he would

not have entered a plea of no contest. The argument made by Falcone is, at best, obscure and difficult, if not impossible, to follow. Although his petition alleged entrapment, he abandons that position on appeal, having failed to offer evidence of entrapment to the District Court. Now he maintains that he somehow entered a plea of no contest because he did not know that his accomplice was a police informer. On appeal, he argues the State suppressed evidence, but his petition fails to include any such allegation, as does the record fail to disclose any such evidence.

The evidence presented to the trial court at the time that Falcone entered his plea of no contest was overwhelming. The evidence discloses that on February 18, 1981, Falcone was arrested inside the Sunny Slope Elementary School in Douglas County, Nebraska. Upon arriving on the scene, deputy sheriffs, responding to an intrusion alarm which was triggered at the Sunny Slope Elementary School, were drawn to a building housing the school's air-conditioning units. Inside the building they found Falcone lying on the floor at the end of the air-conditioning unit. Next to him was a portion of a red baseball bat. A further investigation of the scene to determine where entry had been obtained revealed that a window in a back room of the building had been broken. There was shattered glass at that location. A vehicle belonging to Falcone was found at the scene, and inside the vehicle there was another piece of a red baseball bat, which piece was fitted to and matched the piece of the baseball bat found inside the building where Falcone was found. Glass, which appeared to be glass from the broken window, was embedded in a portion of the baseball bat. Falcone made no objection to any statements made at the time of the arraignment, and the District Court accepted the facts and his plea of no contest.

Were we in any way able to understand Falcone's argument relating to the relationship of Michael Brown and the police, we would nevertheless point out that a plea of guilty or nolo contendere waives every defense of the charge, whether the defense is procedural, statutory, or constitutional. *State v. Country,* 202 Neb. 509, 276 N.W.2d 110 (1979). We need, however, not even reach that point. As we indicated at the very outset, an examination of the record in this case and a review of the argument made by Falcone clearly establish that the appeal is wholly frivolous and without merit. Falcone was caught redhanded at the scene of the crime. To suggest that he was somehow "set up" and entered a plea of no contest because he did not know that Brown was somehow involved in all of this matter is impossible to follow. He appears to argue that his lack of knowledge of the alleged relationship between Brown and the police violates his plea. In *State v. Kluge,* 198 Neb. 115, 251 N.W.2d 737 (1977), we rejected such an argument, holding that it is the knowledge of the crime and the consequences of pleading to the charge with which we are concerned and not the defendant's knowledge of whether the State can succeed at trial.

The trial court was correct in concluding that no post conviction relief should be granted. The judgment of the trial court in denying such relief is affirmed.

AFFIRMED.

MCCOWN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. JOHN B. MAYFIELD, APPELLANT.

325 N.W.2d 162

Filed October 22, 1982. No. 82-156.

1. **Expert Witnesses.** Triers of fact are not required to take the opinions of experts as binding upon them.
2. **Mental Health: Appeal and Error.** This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof.

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

Michael T. Rudd and Stephen A. Brunette, for appellant.

Paul L. Douglas, Attorney General, and Linda L. Willard, for appellee.

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

PER CURIAM.

This is an appeal from an order of the District Court for Douglas County under the provisions of Neb. Rev. Stat. §§ 29-3701 et seq. (Cum. Supp. 1982) finding the defendant mentally ill and dangerous to others by reason of his mental illness and ordering him committed. The defendant has appealed.

On August 17, 1976, the defendant was charged with first degree sexual assault and pleaded guilty to the charge. The guilty plea was withdrawn and the defendant was found incompetent to stand trial and sent to the Lincoln Regional Center for psychiatric and medical care and treatment and periodic evaluation of his competency until he became competent to stand trial.

On March 10, 1977, the defendant was transferred from the Lincoln Regional Center to the Douglas County Hospital at the request of the court. On

April 8, 1977, the defendant entered a plea of guilty to a charge of sexual assault in the second degree and was sentenced to 8 months' probation.

On May 18, 1977, the defendant was charged with first degree sexual assault, robbery, and auto theft in Douglas County. The defendant was tried on October 3, 1977, and was found not guilty by reason of insanity and ordered to the Douglas County Hospital. The finding of not guilty by reason of insanity was certified to the Douglas County Board of Mental Health for commitment proceedings. The board found the defendant to be suffering from mental illness and committed him to the Douglas County Hospital on October 31, 1977. Defendant was transferred to the Lincoln Regional Center on November 15, 1977, for care and treatment.

Pursuant to § 29-3705 the District Court for Douglas County asserted jurisdiction over the defendant in July 1981 for the purpose of conducting an evidentiary hearing on the status of the defendant. At the hearing held on January 7, 1982, the psychiatrist in charge of patient care in the unit in which the defendant had been confined testified that because of defendant's schizophrenia, paranoid type, his lack of insight and judgment, and his denial of responsibility for his acts, the defendant continued to be dangerous to others. The psychiatrist also testified that at one time the defendant had been placed in a less restrictive ward, but because of a fight with another patient he had been returned to the more restrictive ward, and that on one occasion staff members had found medication hidden on the defendant's person. The supervision and care recommended by this psychiatrist was ordered by the court. A psychiatrist who testified on behalf of the defendant felt that the symptoms which could lead the defendant to be dangerous were in remission and that the defendant's condition was sufficiently improved so that a less restrictive environment, such as the comprehensive

care unit of the regional center, could be utilized over a period of 6 to 24 months. The psychiatrist for the defendant relied to some extent upon the reports of a staff psychologist which were made before the incidents testified to by the chief of patient care.

Following the evidentiary hearing the District Court found there was "clear and convincing" evidence that the defendant was then mentally ill and dangerous to others by reason of his mental illness and that the defendant would be dangerous to others in the foreseeable future as demonstrated by the overt acts of the sexual assault with physical injury to the victim on August 14, 1976, and the sexual assault and robbery of May 18, 1977.

The court ordered the defendant committed for treatment and returned to the Lincoln Regional Center to be confined to the security service unit and placed in the least restrictive ward of the unit which, in the judgment of the staff, was consistent with the defendant's safety and that of other patients. The court also ordered that the defendant be administered appropriate medication in a form and manner which would assure its consumption by the defendant, and ordered that defendant be allowed to leave the locked facility of the security service unit only under the direct supervision of the staff for necessary medical appointments and treatment. The court also ordered that the next annual review and evidentiary hearing provided for by § 29-3703 be set for January 5, 1983. The defendant has appealed.

On this appeal the defendant apparently takes the position that where there is any disagreement between expert medical witnesses, the evidence cannot be said to be "clear and convincing." We disagree.

Although the expert testimony was, in some respects, contradictory, it was for the District Court, as the finder of fact, to determine the amount of weight to be given to the testimony of each of the ex-

pert witnesses. Triers of fact are not required to take the opinions of experts as binding upon them. *Erving v. Tri-Con Industries,* 210 Neb. 339, 314 N.W.2d 253 (1982); *Swartz v. Hess, Inc.,* 188 Neb. 542, 198 N.W.2d 64 (1972).

The rule in regard to the "clear and convincing" standard in civil mental hearings has been established. This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof. *Hill v. County Board of Mental Health,* 203 Neb. 610, 279 N.W.2d 838 (1979). As a matter of law it cannot be said in the present case that the order of the District Court was not supported by clear and convincing proof.

The remaining assignments of error are without merit. The order of the District Court is affirmed.

AFFIRMED.

MCCOWN, J., participating on briefs.

LORENZ W. OCKEN, APPELLEE, V. CHARLES J. KUNASEK ET AL., APPELLANTS.

325 N.W.2d 48

Filed October 22, 1982. No. 82-162.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

Kent F. Jacobs of Blevens, Blevens & Jacobs, for appellants.

James M. Egr of Egr & Birkel, for appellee.

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

PER CURIAM.

This is an action to foreclose a mechanic's lien on a residence owned by defendants. Defendants counterclaimed for breach of a construction contract. Judgment was entered for the plaintiff for $7,041.48 and against the defendants on their counterclaim. The defendants have appealed.

Apparently by agreement, this foreclosure action was tried before a jury and the judgment entered on the jury verdict. This court has reviewed the record de novo and finds that the judgment should be affirmed.

AFFIRMED.

ST. MARY'S CHURCH OF SCHUYLER, A NEBRASKA NONPROFIT CORPORATION, AND ST. ANTHONY'S CHURCH OF COLUMBUS, A NEBRASKA NONPROFIT CORPORATION, APPELLANTS, V. WILLIAM E. TOMEK ET AL., APPELLEES.

325 N.W.2d 164

Filed October 22, 1982. No. 82-230.

Attorney and Client. A lawyer owes a duty to his client to use reasonable care and skill in the discharge of his duties, but ordinarily this duty does not extend to third parties.

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

Douglas R. Milbourn of Tessendorf, Milbourn, Fehringer & Bothe, P.C., for appellants.

William J. Mueller of Sodoro, Daly & Sodoro, for appellees.

Heard before KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and RIST, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

Plaintiffs-appellants, St. Mary's Church of Schuyler

and St. Anthony's Church of Columbus, seek reversal of the trial court's orders which sustained the demurrers of defendants-appellees, William E. Tomek, John G. Tomek, and Tomek and Tomek, to plaintiffs' amended petition, dismissed same upon plaintiffs' election to stand thereon, and denied plaintiffs' motion for new trial. We affirm.

The operating petition alleges defendants negligently prepared the last will and testament of the decedent, Emil L. Kavan, by failing to accurately express decedent's wishes, as the proximate result of which plaintiffs have been damaged. It is alleged that the decedent instructed defendants to so prepare his will as to distribute the residue of his estate to plaintiffs, share and share alike. The petition also alleges the conclusion that plaintiffs were beneficiaries of the attorney-client relationship entered into between defendants and decedent. Defendants demurred on the grounds the amended petition failed to state a cause of action and that it contained a misjoinder of causes of action, arguing that both tort and contract causes were combined as one.

The will in question included the following provision: "After the payment of all taxes, expenses of administration and proper charges allowed against my estate that have been paid I direct that the rest residue and remainder of the money in my bank account be paid equally among Saint Mary's Church, Schuyler, Nebraska and Saint Anthony's Church, Columbus, Nebraska." Because of a dispute among plaintiffs and decedent's heirs as to the meaning of this language, an action to construe the will was brought in the county court. That court ruled the clause to be ambiguous, found it to not be a general residuary clause, and ordered that the residuary estate (approximately $410,000) pass to the heirs. On appeal, the District Court reversed the judgment of the county court, ruled the language created a residuary clause, and ordered the residuary estate

be paid to plaintiffs in equal shares. Thereafter, the heirs threatened an appeal to this court. Thereupon, plaintiffs negotiated a settlement for the sum of $60,000. They now seek to recover that sum, together with attorney fees and expenses incurred and yet to be incurred.

We have recently held that a lawyer owes a duty to his client to use reasonable care and skill in the discharge of his duties, but ordinarily this duty does not extend to third parties. *Ames Bank v. Hahn,* 205 Neb. 353, 287 N.W.2d 687 (1980). We conclude that rule is applicable to the facts of this case.

In view of the foregoing determination we need not consider defendants' argument that the amended petition contains a misjoinder of causes.

AFFIRMED.

JOHN M. VAN NEWKIRK, APPELLEE AND CROSS-APPELLANT, V. BONNIE K. VAN NEWKIRK, APPELLANT AND CROSS-APPELLEE.

325 N.W.2d 832

Filed October 29, 1982. No. 81-579.

1. **Divorce: Property Division.** The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. The court will consider all pertinent facts in reaching an award that is just and equitable.
2. **Property Division: Alimony.** How property, inherited by a party during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved.
3. **Property Division.** When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property after re-

ceiving it by way of inheritance or gift, or the spouse not receiving the inheritance or gift has significantly cared for the property during the marriage.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed as modified.

Wright, Simmons & Selzer, for appellant.

Robert W. Mullin and Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

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

KRIVOSHA, C.J.

This is an appeal from a decree entered by the District Court for Scotts Bluff County, Nebraska, dissolving the marriage between the appellant, Bonnie K. Van Newkirk, and the appellee, John M. Van Newkirk. The facts are essentially without dispute. The parties were married on December 19, 1959. As a result of the marriage two children were born to the parties, both of whom were, at the time of trial, minors and residing in the family home.

The record indicates that the parties acquired most of their assets during the course of the marriage and both made substantial contributions to the marriage and to the acquisition of that property. There were, however, several items of property included by the trial court in computing the marital estate which are now contested by the wife. Included in this property is a 320-acre wheat farm in Garden County, Nebraska, which was given to the wife by her parents in 1963. The trial court credited to the wife as her sole property the value of the farm in 1963 and credited to the marital estate the increase in value as determined by the court on the date of trial. In addition, the trial court included in the marital estate the value of the unharvested

crops located upon the farm. The wife maintains that this was error.

The court further included as part of the marital estate stock in a mutual fund given to both the husband and wife as a gift by the wife's parents and having a value at the time of trial of $21,988.80. The wife likewise contends that this was error.

A third item in dispute is a loan in the amount of $25,000 from the father of the wife to both parties. At the time of trial the loan was unpaid. The court determined that the loan was not a legitimate obligation of the parties because the father had already delivered possession of the note to the parties prior to these proceedings and was not seeking repayment. The debt, therefore, was not considered in determining the value of the marital estate. The wife likewise contends that this was error.

The husband has filed a cross-appeal, maintaining that alimony allowed by the court to the wife in the amount of $400 per month for a maximum of 121 months and subject to modification in the event of the remarriage of the wife or change of circumstances was an abuse of discretion on the part of the trial court.

We shall consider the errors in the order noted above. In doing so we are required to keep in mind certain basic principles. In *Johnson v. Johnson,* 209 Neb. 317, 321, 307 N.W.2d 783, 787 (1981), we said: "[T]he rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. The court will consider all pertinent facts in reaching an award that is just and equitable." And in *Ragains v. Ragains,* 204 Neb. 50, 55, 281 N.W.2d 516, 519 (1979), we said: "Generally speaking, awards in cases of this kind vary from one-third to one-half of the value of the property involved depending upon the facts and circumstances

of the particular case." Furthermore, we review the record de novo, giving due regard to the trial court which had the opportunity to observe the witnesses. See, also, *Meysenburg v. Meysenburg,* 208 Neb. 456, 303 N.W.2d 783 (1981). And in *Koubek v. Koubek, ante* p. 2, 5, 321 N.W.2d 55, 58 (1982), we said: "How property, inherited by a party during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved." While we have not heretofore said in exact words how property acquired by inheritance or gift during the marriage should be considered, an examination of our previous decisions discloses that when awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. See, *Wenger v. Wenger,* 200 Neb. 446, 263 N.W.2d 855 (1978); *Cozette v. Cozette,* 196 Neb. 780, 246 N.W.2d 473 (1976); *Johnson v. Johnson, supra.* An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage. See *Rhodes v. Rhodes,* 210 Neb. 373, 314 N.W.2d 271 (1982).

While we are ever reluctant to disturb the division of property as ordered by the trial court, an examination of the evidence in this case discloses that the general rule with regard to property acquired by inheritance or gift should be applied with regard to the 320-acre farm. The evidence is clear that the gift was specifically made to the wife. Although the evidence indicates that the husband may have spent

some limited time on the property in connection with the harvests, it is clear from the record that the increase in value is due principally to inflation and not to any significant efforts by the husband. We believe the trial court erred in including the farm's appreciation in the marital estate. It should have been set aside to the wife and disregarded in computing the marital estate.

We reach the same conclusion with regard to the unharvested crops which were a part of the property. Neither party spent much, if any, time in the planting or harvesting of the crops, and it would appear that, having set aside the property to the wife, we should likewise include the crops. We reach a different conclusion with regard to the mutual funds. In that respect the evidence is clear that the gift was to both the husband and wife. We have no way of determining from the record that the wife's father did not intend that the funds be a gift to both parties. For that reason the trial court was correct in including the value of the mutual funds in the marital estate. Likewise, the evidence supports the trial court's conclusion that the debt had, in effect, been canceled by the wife's father when he returned the note and did not at any time seek repayment.

We believe, therefore, that the decree entered by the trial court should be modified to exclude from the marital estate the appreciated value of the 320-acre farm in Garden County and the value of the growing crops, and both should, as ordered by the trial court, be the sole and absolute property of the wife. When that is done, it would appear that the division of property between the husband and wife, under the facts of this case, are disproportionate and not in keeping with our rules as earlier announced. Therefore, the wife should receive some additional property from the marital estate. For that reason, we further modify the decree of the trial court to set

over to the wife as her sole and own property, free of any right, title, or interest of the husband, the Stock Founders Mutual Fund which, at the time of trial, had a value of $21,988.80, and we further set over to the wife as her sole and separate property, free of any right, title, or interest of the husband, the IRA accounts of the parties which, at the time of trial, were in the amount of $1,750.

We have further reviewed the husband's contention that the court should not have awarded alimony in this case. We believe, however, that in view of all the circumstances and in light of our previous decisions the award of alimony in this case was in all respects proper.

For the reasons set out in this opinion, the judgment of the trial court is affirmed except as specifically modified herein, each party to pay his or her own costs, including attorney fees.

AFFIRMED AS MODIFIED.

STEVEN GRUBBS AND MARILYN GRUBBS, APPELLEES, V. E. JAMES KULA, APPELLANT.

325 N.W.2d 835

Filed October 29, 1982. No. 82-121.

1. **Judgments: Appeal and Error.** Where an action in law is tried without a jury, the disposition of the court has the effect of a jury verdict and is not disturbed on appeal unless it is clearly wrong.
2. _____: _____. In a law action tried without a jury, it is not within our province to resolve evidentiary conflicts or to weigh evidence; rather, it is our obligation to review the judgment entered in light of the evidence and to consider the evidence in that light most favorable to the successful party, resolving all conflicts in his favor and granting him the benefit of every inference which is reasonably deducible therefrom.

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

Raymond, Olsen, Coll & Ediger, P.C., for appellant.

Robert G. Pahlke and Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellees.

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

CAPORALE, J.

This is an appeal from a contract action tried without a jury. The defendant-appellant, E. James Kula, appeals from a judgment which awarded the plaintiff-appellee Steven Grubbs the sum of $8,860.40 and dismissed defendant's counterclaim. We affirm.

Defendant contends five errors were made by the trial court: first, in determining the amount of the monthly wage guaranteed to plaintiff; second, in finding the amount of the plaintiff's share of the 1979 calf crop; third, in refusing to admit testimony regarding rent, utilities, and gasoline furnished to plaintiff, which allegedly entitled defendant to a like reduction from the monthly guarantee; fourth, in determining the amount of damages it awarded to plaintiff for the breach; and, fifth, in failing to find that plaintiff had failed to properly maintain defendant's ranch during the 1979 summer season, with the result that the 1979-80 wheat crop yield was reduced, to defendant's damage, in the amount of $8,137.50.

The record indicates that plaintiff and defendant agree they entered into an arrangement under the terms of which plaintiff was to operate defendant's ranch. They also agree that although this action was brought in the names of both Steven Grubbs and his wife Marilyn, the arrangement was only between Mr. Grubbs and defendant. Thereupon, any similarity in the testimony of the parties ceases.

Plaintiff asserts in substance that he and defendant had an oral contract, modified each growing sea-

son, under the terms of which he operated defendant's ranch. For the 1978 season, plaintiff claims he was to be guaranteed the wages which he had theretofore been receiving at Hiner Implement Company, in the amount of $1,100 per month, and also one-third of the wheat crop, if any; he was to incur no personal liability for any expense, regardless of the nature of the item. During the 1978-79 winter season, plaintiff and his wife moved into the house on the ranch in question. Plaintiff asserts that there was to be no rent paid nor offset given therefor, also that defendant agreed to pay the utilities. For the 1979 season, plaintiff asserts the agreement was identical and that he also was to care for about 50 head of cattle, some of which were to have been bred; for this he was to receive one-half of the calf crop. Plaintiff further testified that when the time came for an accounting and settlement of the 1979 season, defendant refused to pay anything, explaining he "couldn't afford any division" that year, since he "hadn't had as good crops" in his other agricultural operations as he had desired.

Defendant asserts in substance that he never made any crop-sharing agreements with plaintiff, that he instead merely took plaintiff on as a hired man on a wage basis. Defendant further asserts he was to be paid, or take as an offset, $200 per month as rental for the house; that he never agreed to give plaintiff any of the calf crop (in fact, the cattle were not even to have been bred); that he had only agreed to pay for propane gas and diesel fuel but not for other utilities; and that he never had the conversation wherein he allegedly refused to pay plaintiff amounts for the 1979 season.

The record is also replete with conflicting testimony concerning, among other items, the crops actually harvested; repair costs; the condition of machinery; the condition of the land at various times regarding the care given it, or lack thereof;

and proper maintenance for defendant's equipment used on and kept at the ranch.

With respect to defendant's first and second contentions of error, there is little in the record other than the parties' own conflicting testimony concerning the monthly amount to be paid: plaintiff asserts it was $1,100, defendant asserts it was $1,000; plaintiff claims he was to have one-half of the calf crop, defendant states there was no such agreement. Where an action in law is tried without a jury, the disposition of the court has the effect of a jury verdict and is not disturbed on appeal unless it is clearly wrong. *Atlas Steel & Wire Corp. v. L & M Constr. Chemicals, Inc., ante* p. 16, 321 N.W.2d 64 (1982); *Smith v. Erftmier,* 210 Neb. 486, 315 N.W.2d 445 (1982). We find nothing in the record to suggest either that the $1,100 amount finding or the finding of a calf-crop sharing agreement was clearly wrong.

The third contention alleges error by the court in refusing to admit testimony concerning rent, utilities, and gasoline allegedly furnished to plaintiff, which supposedly entitled defendant to a like reduction from the monthly guarantee or wage which was to have been paid to plaintiff. A reading of the actual counterclaim indicates that although it does in fact contain the word "accounted," it nonetheless in substance seeks a setoff, so that defendant's argument that the cause related only to an accounting and not to a setoff is without merit. The setoff/accounting counterclaim cause was dismissed earlier in the proceeding. No error is claimed as to that dismissal. It primarily related to a setoff, and the action of the court in excluding evidence concerning it was necessarily correct. In this connection we observe that although the transcript contains copies of a number of useless documents (e.g., a special appearance; a motion for leave to withdraw, and the ruling thereon; and various discovery items, none of which are at issue), the ruling dismissing the

setoff/accounting cause of the counterclaim is absent. Plaintiff refers in his brief to the dismissal by agreement at the pretrial conference and documents the statement only by a reference to counsel's conversations with the trial judge. We do find in the bill of exceptions, as a result of our own search, the trial judge's statement during trial that the pertinent language had been stricken. We refer counsel to the Revised Rules of the Supreme Court of Nebraska (1982), Rules 4A, 9C, and 9D(1)(f). We caution that failure to cause proper preparation of the record or the failure to properly document the brief with appropriate references to the record carries substantial risks and may have grave consequences.

Defendant's fourth contention relates to the propriety of the court's determination of the amount of damages which it awarded to plaintiff. Defendant argues that the damages awarded are not substantiated by the evidence and are not sufficiently certain in nature, but are speculative and contingent. This supposition and the cases which defendant cites in support thereof are not apposite here. The evidence adduced, which ranged from oral testimony to written documentation, including bills and invoices, was sufficiently substantial and certain in nature as to allow the trial court to arrive at a reasonable determination. The amount which it settled upon was not clearly wrong so as to require a reversal in view of the dollar amounts adduced relating to various matters, including the wage equivalency guarantee, the sharing of the calf crop, and the unreimbursed expenditures. Absent such a disparity, the amount will not be disturbed on appeal. *Smith v. Erftmier, supra.*

Finally, defendant contends error in the failure to find that plaintiff had not properly maintained the ranch during the 1979 summer season but, rather, had allowed it to become infested with weeds to the point that the yield of the 1979-80 wheat crop was re-

duced, to defendant's damage, in the amount of $8,137.50. The evidence in the record could support a conclusion either way on this point; it is not so clearly supportive of defendant rather than plaintiff that we may disturb it on appeal. *Smith v. Erftmier, supra.*

In reaching these conclusions, we are mindful that it is not within our province here to resolve evidentiary conflicts or to weigh evidence; rather, it is our obligation to review the judgment entered in light of the evidence and to consider the evidence in that light most favorable to the successful party, resolving all conflicts in his favor and granting him the benefit of every inference which is reasonably deducible therefrom. *Noll v. Valley County Hospital, ante* p. 22, 321 N.W.2d 66 (1982); *Atlas Steel & Wire Corp. v. L & M Constr. Chemicals, Inc., ante* p. 16, 321 N.W.2d 64 (1982); *Cotner College v. Estate of Hester,* 155 Neb. 279, 51 N.W.2d 612 (1952). From this perspective it can in no wise be said that it was reversible error to find against defendant on his counterclaim.

The judgment of the court below is hereby affirmed.

AFFIRMED.

MARY A. JENSEN, APPELLANT, V. FLOAIR, INC., APPELLEE.

326 N.W.2d 19

Filed November 5, 1982. No. 44078.

Workmen's Compensation: Jurisdiction. While one entering into a contract for hire in this state for work to be performed elsewhere, standing alone, may be a statutory employee under the provisions of Neb. Rev. Stat. § 48-115(2)(c) (Reissue 1978), unless the employer, who is a nonresident, is performing work in this state, employing one or more employees in the regular trade, business, profession, or vocation of such employer, it is not a statutory employer

as defined by Neb. Rev. Stat. §§ 48-114 and 48-106(1) (Reissue 1978). Absent a statutory employer, the provisions of Neb. Rev. Stat. § 48-101 (Reissue 1978) have no application.

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

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

Douglas L. Kluender of The Healey Law Office, for appellee.

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

KRIVOSHA, C.J.

This is an appeal from an order entered by the Nebraska Workmen's Compensation Court dismissing appellant Mary A. Jensen's petition. This court previously heard argument in this case and issued an opinion which is found at 211 Neb. 403, 318 N.W.2d 870 (1982). Following the release of our opinion, the appellant filed a motion for rehearing. We granted a rehearing in this case and now determine that although the basis upon which the Nebraska Workmen's Compensation Court dismissed appellant's petition was in error, the result was correct. Accordingly, then, we affirm the judgment of the Nebraska Workmen's Compensation Court in dismissing Jensen's petition. Our previous opinion in *Jensen v. Floair, Inc.*, 211 Neb. 403, 318 N.W.2d 870 (1982), is withdrawn and this opinion substituted in its place.

The relevant facts in this case are not generally in dispute. In 1970, following his retirement from the Navy, Clifford Jensen sought a job as an aircraft pilot. In 1971 Jensen applied in person to the appellee, Floair, Inc., at its offices in Wichita, Kansas, and made test flights. On December 26, 1971, Floair telephoned Jensen at his home in Bellevue, Nebraska, and offered him a position as a pilot. Jensen accepted the offer by telephone, and the next day went

to Wichita, Kansas, and began work for Floair. Thereafter, Jensen continued to work for Floair as a ferry pilot, primarily in connection with international deliveries.

On October 31, 1977, Jensen was assigned to deliver an airplane to Sydney, Australia. Upon his return from Australia, Jensen was a passenger on a commercial flight which was routed through Denver, Colorado. On November 10, 1977, while Jensen was awaiting a flight at Denver's Stapleton Airport, he suffered a fatal heart attack.

Jensen's widow filed this action under the Nebraska workmen's compensation laws on November 9, 1979, alleging that Jensen's heart attack arose out of and in the course of his employment with Floair. In particular, she contends that her husband's heart attack was due to work-related strain while piloting the plane to Australia and on the return trip from that destination.

Floair's answer alleged that the Nebraska Workmen's Compensation Court did not have jurisdiction to determine the dispute, and that the death of Jensen did not arise out of and in the course of his employment with Floair, and requested dismissal of the petition.

It is without dispute that Floair, Inc., is a Kansas corporation which maintains its business offices in Wichita, Kansas, and operates two major divisions, one of ferrying aircraft to various international and domestic destinations and the other of maintaining fixed-base operation activities. It has no business offices, hangars, or other facilities in any state other than Kansas. At the time of Jensen's death, Floair did no business in Nebraska, maintained no agents or agencies in Nebraska, and did not deliver any planes to Nebraska. The president of Floair testified that, in his memory, none of its pilots had ever delivered a plane to Nebraska. Most pilots employed by Floair lived in the area of Wichita, Kan-

sas, but a few lived in other areas. All flight assignments are made in Wichita. The record was clear that except for the telephone call between Floair and Jensen, Floair has had no contacts in the State of Nebraska.

At the initial hearing in the Nebraska Workmen's Compensation Court, the court determined that it had jurisdiction of the case under Neb. Rev. Stat. § 48-115(2)(c) (Reissue 1978) because the initial contract of employment was accepted by telephone in Nebraska in 1971. Section 48-115(2) provides in part as follows: "If an employee subject to this act suffers an injury on account of which he or, in the event of his death, his dependents would otherwise have been entitled to the benefits provided by this act, the employee or, in the event of his death, his dependents shall be entitled to the benefits provided under this act if the injury or injury resulting in death occurred within this state, or if at the time of such injury . . . (c) the contract of hire was made within this state." After determining that it had jurisdiction, however, the court found that Jensen had failed to sustain her burden of proving that her husband's death arose out of and in the course of his employment, and dismissed her petition.

Upon rehearing before a three-judge panel of the court, the court found that the 1973 amendment to § 48-115(2), purportedly extending jurisdiction to any case in which the original contract of hire was made in Nebraska, and cited above, had no retroactive effect. The court then determined that it was without jurisdiction to hear the case, and that it was unnecessary to decide whether Jensen's death arose out of his employment. The court again dismissed appellant's petition, and this appeal followed.

Jensen contends that because the original contract of hire entered into in 1971 was concluded by a telephone acceptance in Nebraska, the provisions of § 48-115(2)(c) apply. We need not, however, reach

that issue in the instant case because the record discloses that even if the contract of hire had been entered into in Nebraska within the meaning of § 48-115(2)(c), Floair is not subject to the provisions of the Nebraska Workmen's Compensation Act.

Except as provided under the Second Injury Fund, Neb. Rev. Stat. § 48-128 (Reissue 1978), a minimum of two parties is generally necessary for the provisions of the Nebraska workmen's compensation law to apply, i.e., a statutory employee and a statutory employer. The definition of a statutory employee under the Nebraska Workmen's Compensation Act is set out in § 48-115 and now does include an individual for whom the contract of hire was made within this state. The definition of a statutory employer is found by reading Neb. Rev. Stat. § 48-114 (Reissue 1978) with Neb. Rev. Stat. § 48-106 (Reissue 1978).

The purpose of amending § 48-115(2) to include subsection (c) is obvious from the legislative history. Prior to the adoption of § 48-115(2)(c), this court had held that the Nebraska Workmen's Compensation Act was not applicable to a nonresident employer and a 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. See *Watts v. Long,* 116 Neb. 656, 218 N.W. 410 (1928). See, also, *Freeman v. Higgins,* 123 Neb. 73, 242 N.W. 271 (1932); *Rigg v. Atlantic, Pacific & Gulf Oil Co.,* 129 Neb. 412, 261 N.W. 900 (1935). What the Legislature was attempting to do in amending § 48-115, and in redefining a statutory employee, was to fill a gap which heretofore existed in the Nebraska workmen's compensation law. Unfortunately, however, its effort in amending § 48-115 was insufficient to accomplish the purpose. The reason is clear.

As we indicated at the outset, in most compensa-

tion cases under the Nebraska act, there must be at least one statutory employee and one statutory employer. The Nebraska Workmen's Compensation Act, except for the Second Injury Fund, is not designed to provide payment from the state, without a responsible employer. Except where the state is the employer, the state is not the party which makes the payment under the Nebraska Workmen's Compensation Act. The statutory employer is the party. Having determined that one is an employee under the act does not end the examination. One must also find a statutory employer. Section 48-114 defines employer as follows: "The following shall constitute employers *subject to the provisions of this act:* (1) The state and every governmental agency created by it; and (2) every person, firm or corporation, including any public service corporation, who is engaged in any trade, occupation, business or profession as described in section 48-106, and who has any person in service under any contract of hire, express or implied, oral or written." (Emphasis supplied.) Section 48-106(1) provides: "The provisions of this act shall apply to the State of Nebraska and every governmental agency created by it, and to every employer in this state, *including nonresident employers performing work in the State of Nebraska,* employing one or more employees, in the regular trade, business, profession, or vocation of such employer, except railroad companies engaged in interstate or foreign commerce." (Emphasis supplied.) Neither § 48-106 nor § 48-114 was amended at the same time that § 48-115 was amended. Therefore, while one entering into a contract of hire in this state for work to be performed elsewhere, standing alone, may be a statutory employee under the provisions of § 48-115(2)(c), unless the employer, who is a nonresident, is performing work in this state, employing one or more employees in the regular trade, business, profession, or vocation of such employer,

it is not a statutory employer as defined by §§ 48-114 and 48-106(1). The effect of that is clear from the act itself. Neb. Rev. Stat. § 48-101 (Reissue 1978) specifically provides: "When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her *employer* if the employee was not willfully negligent at the time of receiving such injury." (Emphasis supplied.) For the purpose of the Nebraska Workmen's Compensation Act, the terms "employer" and "employee" are not words of common understanding but, rather, of statutory definition. Absent a statutory employer, the provisions of § 48-101 have no application.

Both parties suggest that the definition of "employer" was amended by reason of the amendment to Neb. Rev. Stat. § 48-175.01 (Reissue 1978). A reading of that section, however, will not support that position. Section 48-175.01 merely establishes a procedure for serving nonresident employers. It does not, however, in any manner, affect the definition of "employer." While this may not have been the result the Legislature intended to accomplish, the courts are without authority to fill the gaps created by the Legislature's failure to fully perform the action necessary to amend a statute. See, *Bessey v. Board of Educational Lands & Funds,* 185 Neb. 801, 178 N.W.2d 794 (1970); *State ex rel. Belker v. Board of Educational Lands & Funds,* 185 Neb. 270, 175 N.W.2d 63 (1970) (Carter, J., dissenting). Finding, therefore, that there is no statutory employer, we are compelled to find that the provisions of the Nebraska Workmen's Compensation Act have no application in the instant case, and that the action of the Nebraska Workmen's Compensation Court in dismissing the petition was correct.

The judgment of the Nebraska Workmen's Com-

pensation Court is affirmed.

AFFIRMED.

McCOWN, J., concurs in the result.

NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLANT, V. CITY OF YORK, A MUNICIPAL CORPORATION, APPELLEE.

326 N.W.2d 22

Filed November 5, 1982. No. 44362.

1. **Public Utilities: Legislature.** The following provision of Neb. Rev. Stat. § 70-650.01 (Reissue 1981), "In the absence of an agreement between any city or village and the public power district, the city or village may at any time determine what shall be included in the term distribution system by a declaratory judgment in which the public power district or public power and irrigation district owning the distribution system shall be joined," was intended by the Legislature to empower the courts to make a factual determination in each specific case as to whether a facility is operated as part of the electrical transmission system or distribution system.
2. **Constitutional Law: Legislature.** In general, except as restricted by the Constitution, it is the function of the Legislature by the enactment of statutes to declare what the law is.
3. _____: _____. The Legislature may not delegate to the courts legislative power.
4. **Public Utilities: Constitutional Law: Legislature.** Questions of public policy related to the powers of and government of public power districts are, in the first instance, a purely legislative cognizance and may not be referred to the courts for determination.
5. **Constitutional Law: Legislature.** The Legislature may vest in the courts factfinding questions to determine whether or not a law has been complied with.
6. **Constitutional Law: Statutes.** Where a statute is susceptible of two constructions, under one of which the statute is valid, while under the other it is unconstitutional or of doubtful validity, that construction which gives it validity should be adopted.
7. **Public Utilities: Legislature.** The legislatively declared public policy underlying the encouragement of publicly owned electric utilities is to provide power to consumers at reasonable rates at as low overall cost as possible and to avoid duplication of facilities. Neb. Rev. Stat. §§ 70-655, 70-1001 (Reissue 1981).

Appeal from the District Court for York County: ORVILLE L. COADY, Judge. Reversed and remanded with directions.

Barlow, Johnson, DeMars & Flodman, for appellant.

Mattson, Ricketts, Davies, Stewart, Calkins & Duxbury, and Louis Michael Thrasher and Joseph W. Grant, and Wallace W. Angle, for appellee.

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

PER CURIAM.

This is an appeal from a judgment of the District Court for York County, Nebraska, in an action brought by the appellant, Nebraska Public Power District, a public corporation (hereinafter NPPD), against the City of York, appellee, for a declaratory judgment under the provisions of Neb. Rev. Stat. § 70-650.01 (Reissue 1981). The purpose of the action is to determine whether two electrical substations are a part of the "distribution system, as distinguished from its [the utility's] . . . transmission lines" within the City of York and thus required to be conveyed to the City of York without cost as provided by the provisions of § 70-650.01. The District Court found that the substations, except the high voltage buses thereon, were a part of the distribution system within the territorial limits of the City of York, and quieted title in the City of York to the substations, including the real estate on which they sit.

Section 70-650.01 provides in part: "Except as provided in sections 70-1101 to 70-1106, whenever any public power district or public power and irrigation district shall have acquired, by purchase, lease or otherwise, any electric distribution system, or any part or parts thereof, situated within or partly within any city or village, and such district shall have fully

paid and redeemed, or have accumulated reserves sufficient for the redemption of, all of the bonds or other obligations of the district evidencing the indebtedness incurred as the cost of construction or the purchase price of its lines, works and system, then and in that event, whenever any such city or village shall so request, the said district shall convey without cost all of its right, title and interest in and to its electric distribution system, as distinguished from its generating plants and transmission lines, to the said city or village within the territorial limits of which such system is located. . . . In the absence of an agreement between any city or village and the public power district, the city or village may at any time determine what shall be included in the term distribution system by a declaratory judgment in which the public power district or public power and irrigation district owning the distribution system shall be joined."

A recitation of some background facts and statutory history is useful to an understanding of the factual context under which this dispute arises. In 1941 Iowa-Nebraska Light and Power Company owned certain electrical properties within the City of York, including a generation plant, electric transmission lines, and a distribution system. In that year Consumers Public Power District, the predecessor of NPPD, acquired all of these facilities from Iowa-Nebraska. Consumers and NPPD were both public corporations, subdivisions of government created pursuant to legislative authority. Neb. Rev. Stat. § 70-602 (Reissue 1981).

In 1945 the Legislature enacted the statute which is the predecessor of § 70-650.01. 1945 Neb. Laws, Ch. 161, § 2, p. 525. An earlier version of the statute was contained in 1939 Neb. Laws, Ch. 88, § 1, p. 382. It provided that the municipality could acquire the electrical "distribution system" located within the municipality by paying a fair and reasonable price.

If the price could not be agreed upon, sale could be compelled by the exercise of the right of eminent domain under the provisions of Comp. Stat. §§ 19-701 to 19-706 (1929) as then written. The 1945 law provided that when the condemnation board, created by Neb. Rev. Stat. Ch. 19, art. 7, had determined the fair and reasonable price, it should "deduct therefrom and allow as a credit upon such sum an amount that bears the same proportion to such sum as the amount of the bonds that have been paid, redeemed or liquidated, and the reserves established therefor by said district, out of the earnings from the operation of the district while such city or village was within and a part of such district, bears to the total amount of the bonded indebtedness of such district issued to finance the purchase price and the cost of construction of the entire property of such district." 1945 Neb. Laws, Ch. 161, § 1, p. 525. In 1945 the Legislature added the provision requiring conveyance upon request without cost after the district had paid for the bonds or accumulated reserves sufficient to redeem the bonds.

In 1963 the Legislature added to § 70-650.01 the provision providing for a declaratory judgment action to determine what was included in the distribution system if the public power district and the municipality could not agree.

The acquisition of the York electrical system by Consumers was financed by issuance of 30-year revenue bonds which were paid by the end of 1971. The City of York requested transfer to it of the distribution system pursuant to the provisions of the statute. To implement the transfer, NPPD and York entered into a contract denominated "YORK MUNICIPAL DISTRIBUTION SYSTEM AGREEMENT WITH PROPERTY PURCHASE AGREEMENT, DISTRIBUTION SYSTEM LEASE, AND WHOLESALE POWER CONTRACT." This agreement provided for the transfer of the distribution

system to York by bill of sale. To the principal agreement was appended and incorporated a lease and wholesale power contract. By the lease York let to NPPD the distribution system for a period of 15 years, with a provision of automatic extension for an additional 10-year period absent notification by York 180 days before expiration. For the lease York was to receive an annual rental of 10 percent of the adjusted retail revenues. The lease required the district to maintain the system and pay the cost of any additional construction. The wholesale power contract provision of the agreement provided that upon termination of the lease the municipality would purchase wholesale energy from NPPD for a period of 25 years.

The principal agreement provided: "5. The District will prior to January 1, 1977, initiate court action to determine whether stepdown substations such as the 34.5 to 4.16 KV substations in York are included in the term 'Distribution System' as used in said Section 70-650.01. In the event that a final court interpretation determines that such substations are within the term 'Distribution System,' this Agreement shall be altered to conform to said final court interpretation. In the event that a final court interpretation determines that such substations are not within the term 'Distribution System,' the Municipality shall have no obligation during the term of the Distribution System Lease with reference to the use of said substations." The two substations which are involved in this litigation are referred to in the evidence as the Platte Avenue and the Delaware Avenue substations.

Briefly summarized and in somewhat oversimplified form, the arguments of the parties supporting their respective positions are these. NPPD contends that the character of a facility as transmission or distribution ought to be determined by the function which it performs. It points out that it is undis-

puted that the electrical power, until it leaves the transformer at the substation, is at transmission voltages; a substation up to that point serves a function as part of the transmission system rather than the distribution system. It also relies upon a definition of distribution system contained in a publication by The Institute of Electrical and Electronics Engineers, Inc., entitled Standard Definitions in Power Operations Terminology. That definition is as follows: "*distribution system.* That portion of an electric system which delivers electric energy from transformation points on the transmission, or bulk power system to the consumers." (Emphasis supplied.)

York relies upon a definition prescribed by the Federal Power Commission contained in its regulations related to Uniform Systems of Accounts. That definition is as follows: "B. 'Distribution system' means all land, structures, conversion equipment, lines, line transformers, and other facilities employed between the primary source of supply (i.e., generating station, or point of receipt in the case of purchased power) and of *delivery to customers,* which are not includible in transmission system, as defined in paragraph A, *whether or not such land, structures, and facilities are operated as part of a transmission system or as part of a distribution system.*

"*Note*: Stations which change electricity from transmission to distribution voltage shall be classified as distribution stations." (Emphasis supplied.)

Paragraph A referred to in the above definition is as follows: "A. 'Transmission system' means:

"(1) All land, conversion structures, and equipment employed at a primary source of supply (i.e., generating station, or point of receipt in the case of purchased power) to change the voltage or frequency of electricity for the purpose of its more efficient or convenient transmission;

"(2) All land, structures, lines, switching and conversion stations, high tension apparatus, and their control and protective equipment between a generating or receiving point *and the entrance to a distribution center or wholesale point*; and

"(3) All lines and equipment whose primary purpose is to augment, integrate or tie together the sources of power supply." (Emphasis supplied.)

These same regulations also provide: "C. Where poles or towers support both transmission and distribution conductors, the poles, towers, anchors, guys, and rights of way shall be classified as transmission system. The conductors, crossarms, braces, grounds, tiewire, insulators, etc., shall be classified as transmission or distribution facilities, according to the purpose for which used.

"D. Where underground conduit contains both transmission and distribution conductors, the underground conduit and right of way shall be classified as distribution system. The conductors shall be classified as transmission or distribution facilities according to the purpose for which used."

York, of course, relies on the portion of B designated "Note." NPPD in response points out that the Federal Power Commission definitions are for accounting purposes only and, in any event, do not apply to NPPD since it is not subject to the control of the Federal Power Commission.

Each party produced testimony by expert witnesses who, as might be expected, gave their contradictory expert conclusions. NPPD's expert testified that both substations, with the "exception of the low voltage distribution protective equipment[,] would be a part of the transmission" system. His opinion was based on the function of the station and The Institute of Electrical and Electronics Engineers definition previously mentioned. One of York's experts gave his opinion that the substations were required to be classified as "distribution substations." The

basis of the opinion was the Federal Power Commission definitions and his past experience. York's second expert had been retained to make a report for York to assist it in defining the distribution system. In that report he had classified the two substations as distribution substations. His opinion was that the substations had nothing to do with transmission. Part of the basis of his opinion was the classification of substations for accounting purposes.

Apart from these "conclusions" of the experts, no significant conflict exists in the evidence. We can, therefore, attempt to describe in as simple terms as a layman can the nature and function of electrical systems and their respective parts without any consideration of conflicting testimony. A complete electrical system consists of generation facilities, transmission facilities, and distribution facilities. Generation facilities are those related to producing electrical energy. Transmission facilities are those related to moving the electricity at various high voltages from the source of generation to the distribution system, the latter being the part related to delivery to the ultimate consumer. The evidence shows that voltages of 34.5 kV, or 34,500 volts, and higher are considered transmission voltages. Transmission voltages vary, and the purpose for such variations is efficiency in transmission. Substations may be either part of the transmission system or of the distribution system. Substations may be used either to increase voltage or to reduce voltage, or both, depending upon their construction and purpose. Substations which increase voltage are called "stepup" stations; substations which decrease voltage are "stepdown" stations. Both of the substations here involved are now "stepdown" stations. At one time, when a steam and diesel generation plant was located in York, one of the stations, the Platte Avenue substation, was also a "stepup" station which increased the voltage of surplus power

for transmission and sale to other municipalities.

Transmission voltages must be reduced before they can be used by the ultimate consumer. Part of this reduction takes place in the substation. The final reduction to 120 and 240 volts takes place in line transformers located on the distribution lines. The two substations here involved receive the electrical energy at a voltage of 34.5 kV and reduce it to 4.16 kV, or other distribution voltage. These voltage reductions take place in the substation transformers, which are electrical windings located within tank-like containers.

Pictures of the two substations were introduced in evidence and were explained by witnesses. An explanation of some parts of the substations and the function of the parts is useful. They differ somewhat in their construction, but since they are essentially the same, a description of one will suffice. Part of the equipment is mounted on a structure of metal poles and girders. Three 34.5 kV transmission lines (wires) enter the substation at each end. These are connected to a high voltage bus by insulators and switches mounted on the structure. The bus is simply a part of the transmission line and is made of inflexible, or rigid, material (either copper or aluminum), as distinguished from the flexible wire of which ordinary transmission line is constructed. The switches, apparently remotely controlled, permit electrical current to flow in from either end and out the other. However, in normal operations the set of switches at one end will be open and the other closed. Connected to the high voltage bus are other buses which lead down through various protective switches and fuses and enter the transformers. The transformers are not mounted on the superstructure but sit on a concrete base. The electrical current enters the transformer at what is called a high voltage bushing at a voltage of 34.5 kV and leaves at another connection at 4.16 kV.

The purpose of the fuses previously mentioned is to protect the system if there is an internal failure of the transformer. When the current leaves the transformer at 4.16 kV, it enters, by various connections, a device called a low voltage switch gear, which is a protective switch designed to disconnect the distribution lines from the transformer in case of fault in the distribution lines. The portion of the substation above (functionally, not physically) the point where the 34.5 kV current enters the transformer is referred to as the high voltage side. The portion after it leaves the transformers is referred to as the low voltage side.

The trial court, in a memorandum opinion preceding the journalization of its order, stated: "It makes almost perfect sense to define a transmission system according to function and operation, i.e. the system ends when electricity is transformed to distribution voltage. It makes something less than perfect sense, but good sense," to say "transmission ends at a point when electricity is no longer carried to two or more distributors." The court then stated that, in its view, both of the above arguments miss the point, and ventured the opinion that in 1945, when the Legislature decided that municipalities should have the option to acquire distribution systems, "the legislature had reasons for so doing. The 1963 legislature did not change anything by their direction to take definitive arguments to Court [obviously referring to the declaratory judgment provision]. Those 1945 reasons are the exact same reasons that the legislature could not have intended that substations located within York and almost solely serving York should be without the distribution system and excluded from the control of the city."

At this point we must raise a question which the parties have not discussed in their briefs. If the 1963 provision for a declaratory judgment action was intended by the Legislature to give the courts the

power to supply a definition of "distribution system," then the provision would clearly be unconstitutional, for it would be entrusting to the courts a legislative function contrary to the provisions of Neb. Const. art. II, § 1, which provides in part: "[N]o person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

In general, except as restricted by the Constitution, it is the function of the Legislature by the enactment of statutes to declare what the law is. 16 C.J.S. *Constitutional Law* § 106 (1956). If, for example, the Legislature wished to say that stations which change electricity from transmission voltage to distribution voltage shall be part of the distribution system, whether operated as part of the transmission system or not, then it was perfectly free to do so. It could not, however, thrust that legislative function upon the courts. The Legislature may not delegate to the courts legislative power. *Searle v. Yensen,* 118 Neb. 835, 226 N.W. 464 (1929). Questions of public policy related to the powers of and government of public power districts are, in the first instance, a purely legislative cognizance and may not be referred to the courts for determination. *Searle v. Yensen, supra.* The Legislature may, however, vest in the courts factfinding questions to determine whether or not a law has been complied with. *Searle v. Yensen, supra.*

The evidence in this case indicates that substations (even the Federal Power Commission definition we have quoted recognizes that fact) may be operated as either part of the transmission system or as part of the distribution system. The legislative history recognizes that this is the case. The sponsor of the 1963 changes, after talking to representatives of the public power districts, attorneys, the Attorney General, and the bill drafter concerning the term

"distribution system," said: "[T]here is just no way in which you can spell out any plainer what that means. I think they are a collective opinion that the only way you can do it is to inaugurate a court action in the district court for the court to determine with the facts before it, what is the distribution system, and it could differ in each specific community." Floor Debate, Committee on Public Works, L.B. 410, 73d Leg. 1575-76 (May 13, 1963). The Encyclopaedia Britannica notes: "As systems were interconnected, the transmission circuits of the original system became the distribution circuits of the combined system. Thus, the distinction between distribution and transmission circuits has become vague. It may be said, however, that transmission implies larger blocks of power delivered at higher voltages to a few main substations, while distribution implies smaller blocks of power delivered at lower voltages to many smaller substations *or to consumers.*" (Emphasis supplied.) 8 Encyclopaedia Britannica *Electric Power,* at 216 (1968).

If we were to construe the declaratory judgment provision of § 70-650.01 as delegating to the courts the power of selecting either of the definitions we have earlier mentioned, or any other definition, if there are other definitions, then we would necessarily have to declare that provision of the statute void as being unconstitutional. Where a statute is susceptible of two constructions, under one of which the statute is valid while under the other it is unconstitutional or of doubtful validity, that construction which gives it validity should be adopted. *Union Stock Yards Co. v. Nebraska State Railway Commission,* 103 Neb. 224, 170 N.W. 908, 172 N.W. 528 (1919); *Starman v. Shirley,* 162 Neb. 613, 76 N.W.2d 749 (1956).

The evidence shows that stepdown substations such as those here involved may be operated as either part of the transmission system or the distri-

bution system. The legislative history clearly shows that the Legislature recognized that fact. It placed upon the courts the obligation to determine the facts in a particular case, otherwise it could have adopted an arbitrary definition, such as that in the Federal Power Commission's regulations, applicable to all cases.

Thus, the posture of this appeal is that of deciding whether the trial court was clearly wrong in its determination. We observe, first, that the trial court obviously felt that it was deciding a question of law, for it found that it was the intention of the Legislature in 1945 to give the "distribution system" to the municipality. It is, of course, apparent that was its intention. However, the finding of such intent does not resolve the factual issue and really begs the question, i.e., is the substation part of the transmission system or of the distribution system. The same fault may be found in the conclusions of the expert witnesses insofar as they rely upon arbitrary definitions rather than the operation and function of the substation.

It is undisputed that the high voltage bus mounted on the substation superstructure and the switches and productive devices directly attached thereto are part of the transmission system. It is clear that until the current reaches the substation transformer it is at transmission voltage. The purpose of the transformation is to reduce the voltage to a level which may be carried on distribution lines. This occurs only when the electricity leaves the transformer on the low voltage side.

Certain provisions of the wholesale power contract entered into between the parties are significant. Those provisions are:

"ARTICLE III

"CHARACTER OF SERVICE AND POINT OF DELIVERY

"The character of electric service to be furnished

hereunder shall be three phase alternating current at a frequency of approximately 60 hertz and at a nominal voltage of 4160 wye volts.

"The 'Points of Delivery' for said electric service shall be west side of Delaware Avenue between 17th and 18th Streets and west side of Platte Avenue between West 6th and 7th Streets.

"ARTICLE IV

"FACILITIES TO BE PROVIDED

"The District will furnish, install, and maintain, at its own expense, all equipment and facilities necessary for connecting its electric lines and facilities to the Municipality's facilities at the Point of Delivery, including stepdown transformers where service is supplied at the Municipality's distribution voltage.

. . . .

"ARTICLE VII

"METERING

"The amount of electric power and energy delivered to the Municipality hereunder shall be measured at 4160 wye volts at the Point of Delivery or adjusted to the Point of Delivery by suitable metering equipment furnished, installed, maintained, calibrated, and read by the District at its expense."

Under the above provisions of the wholesale power contract, NPPD is required to deliver electricity at distribution voltage, i.e., 4.16 kV, or 4,160 volts. In order to make that delivery, the transmission voltage must be transformed. Meters to measure consumption by the distribution system would have to be placed on the low voltage side of the substation. A stepdown substation, including transformer, is essential to performance of the contract. In sum, if NPPD does not own the parts of the substation necessary to work the transformation, it must either lease or purchase from York the necessary equipment and site or it must acquire another site at the "points of delivery" and construct an additional substation, thus rendering the existing substation use-

less. Neither course would contribute to the public policy underlying Nebraska's encouragement of publicly owned utilities and of providing power to consumers at "as low overall cost as possible" and avoidance of "duplication of facilities." Neb. Rev. Stat. §§ 70-1001 and 70-655 (Reissue 1981); *City of Lincoln v. Nebraska P.P. Dist.*, 191 Neb. 556, 216 N.W.2d 722 (1974).

The City of York itself would benefit financially by a sale or lease of the substation to NPPD, but the statutes authorizing such sale do not require it to use the proceeds of the sale for the benefit of electrical utility customers within the municipality. Neb. Rev. Stat. § 70-504 (Reissue 1981).

We conclude that the trial court was clearly wrong in its determination of the issue. We reverse and remand with directions to enter a judgment finding that all of the equipment of the substations on the low voltage side is the property of York; that the superstructure and all equipment, including transformers on the high voltage side of the substations, are the property of NPPD. The evidence makes it clear that both York and NPPD must have access to each substation for maintenance of its property and to protect its facilities thereon and those other utility properties connected thereto. Accordingly, we direct that title to the sites, i.e., the real estate, be quieted in the Nebraska Public Power District and that the City of York be granted an easement of ingress and egress thereon so long as the sites are used for present purposes. Any practical problems related to the common use of the sites and equipment of the parties connected to the substations will have to be worked out by agreement between the parties.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., participating on briefs.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the result reached by the majority in this case. The majority result is

premised upon a principle with which I agree, but an application which is wrong. I think it is clear from an examination of the applicable statutes that, indeed, the legislatively declared public policy underlying the encouragement of publicly owned electric utilities is to provide power to consumers at reasonable rates and at as low overall cost as possible, and to avoid duplication of facilities. See Neb. Rev. Stat. §§ 70-655, 70-1001 (Reissue 1981). My disagreement arises by reason of my belief that the majority opinion in this case has brought about just the opposite result. By including in the "transmission system" of NPPD the substations involved in this action, the majority opinion has simply increased the overall wholesale rate to *all* communities rather than imposing upon the consumers in York the cost of the stepdown substations used solely and wholly for the purpose of distributing electricity within the municipality involved. That does not appear to me to be in keeping with the legislative intent or with the language of the statutes involved.

The majority opinion suggests that the testimony of NPPD establishes that the substation serves a function as part of the "transmission system" rather than the "distribution system." The statute in question, however, Neb. Rev. Stat. § 70-650.01 (Reissue 1981), does not talk about a "transmission system." It speaks only of a "distribution *system*" and "transmission *lines*." The pertinent portion of § 70-650.01 reads as follows: "[T]he said district shall convey without cost all of its right, title and interest in and to its electric distribution system, as distinguished from its generating plants and transmission *lines,* to the said city or village within the territorial limits of which such system is located." (Emphasis supplied.) It appears from a reading of the applicable statute that the Legislature intended to distinguish the transmission *lines* from the distribution *system,* and not some enlarged transmis-

sion system as suggested by the majority. The use of the words "transmission lines" by the Legislature appears to be consistent with its obvious intent of separating the cost of wholesale power from the cost of retail power, imposing upon all of the communities within the wholesale district the cost of transmission while limiting to the particular municipality the cost of distribution, including the taking of the electricity from the transmission line. That desire would be fully consistent with the Federal Power Commission's definition for accounting purposes of the transmission system and would bring about a result which the Federal Power Commission's definition was designed to accomplish and which is used by investor-owned utilities to segregate the wholesale cost from the retail cost.

While there is testimony which may support a claim that under certain circumstances stepdown substations such as the ones involved herein may be considered a part of a "transmission system," there is no question that they cannot be considered a "transmission line." This explains why, at the time that NPPD, formerly Consumers, took over the York facilities, these substations were carried on the books of Iowa-Nebraska as distribution substations, and why Consumers continued to inventory them in that manner until sometime between 1965 and 1970 when they were changed from distribution to transmission for accounting purposes by NPPD. The record in this case is without dispute that the only purpose of these substations is to distribute power to the service area of the City of York. NPPD acknowledges that the sole transmission function of the substations consists of four line switches at Platte Avenue and one line switch at Delaware Avenue, each of which could be placed separate and apart from the substation structure.

Furthermore, the fact relied upon by the majority that NPPD and York entered into a wholesale con-

tract which requires NPPD to deliver wholesale power at a certain location or at a certain voltage merely begs the question. The decision as to whether a substation is a part of the distribution system or the transmission line is dependent upon what the Legislature and the applicable statutes intended and not what NPPD and the City of York may have agreed to subsequently. The contract may simply be wrong. While I may not agree with the trial court as to the basis of its conclusion, I do agree that these substations are a part of the "distribution system" and not a part of the "transmission line" and therefore, under the provisions of § 70-650.01, should be the property of the City of York. I would have affirmed the judgment of the trial court.

CAPORALE, J., joins in this dissent.

ELIZABETH HAUSNER ET AL., APPELLEES, V. JOHN V. MELIA, INCOMPETENT, AND MABLE MELIA, A WIDOW, ET AL., APPELLEES,

GEORGE R. SCHRAM AND MARILYN C. SCHRAM, RESPONDENTS AND THIRD-PARTY DEFENDANTS, APPELLANTS.

326 N.W.2d 31

Filed November 5, 1982. No. 44382.

1. **Deeds: Judicial Sales.** A deed, executed by a referee following a judicial sale, is to be construed with the judicial proceedings of which it forms a part.
2. _____: _____. A referee's deed conveys all property that is described within such deed, provided that such description is included with the order of the court authorizing the sale.
3. **Judgments: Collateral Attack.** Generally, where a court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.
4. **Partition: Judgments: Collateral Attack.** A confirmation of a partition sale disposes of all the interests of everyone in the proceedings and transfers them to the purchaser. After confirmation there is no title or interest of any party to such proceedings that can be collaterally attacked.

5. **Partition: Judgments.** When all parties interested are before the court in a partition action, the order confirming the sale is final and binding, in the absence of fraud on the face of the proceedings, even though the judgment may be erroneous and would have been reversed on appeal.
6. **Equity: Jurisdiction.** A court of equity which has acquired jurisdiction of a matter for any purpose will retain jurisdiction for the purpose of administering complete relief with respect to the subject matter.
7. **Partition: Judgments: Estoppel.** A final judgment in a partition action determines the rights and interests of the parties in the subject property, and such parties are estopped from raising any claim of interest or title which was or could have been raised in that action.
8. **Boundaries: Acquiescence.** In order to establish a boundary by acquiescence, it is not necessary that the acquiescence should be manifested by a conventional agreement, but recognition and acquiescence must be mutual, and both parties must have knowledge of the existence of a line as a boundary line.
9. _____: _____. The establishment of a boundary line between adjacent lots by recognition and acquiescence involves the idea that the adjacent owner, with knowledge of the line so established and the possession so taken, assents thereto, or that circumstances exist from which assent may be reasonably inferred.
10. **Boundaries: Acquiescence: Presumptions.** Where the owners of adjoining land occupy their respective premises up to a certain line, which they mutually recognize and acquiesce in as the boundary line for a long period of time, there is a presumption in favor of such line being the true one, which can only be overcome by clear proof to the contrary. Where such recognition and acquiescence has continued beyond the 10-year period fixed by the statute of limitations, the presumption becomes conclusive.
11. **Boundaries.** Where the true boundary line between adjoining owners of real property can be ascertained, and the parties by mistake have agreed upon an erroneous line as such boundary, believing it to be the true line, they will not be precluded by such agreement from claiming the true line when discovered, unless the statute of limitations has run or equitable reasons exist for establishing the erroneous line as the true line.

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

Harris, Feldman, Stumpf & Pavel, for appellants.

Swarr, May, Smith, Andersen & Jensen, for appellee Mable Melia.

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

HASTINGS, J.

George R. and Marilyn C. Schram, respondents herein, have appealed from an order of the District Court, the effect of which was to alter the description of certain real property which the respondents had purchased at a partition sale held on September 4, 1974. Although the errors assigned by respondents simply state that the decision of the trial court was not supported by the evidence and was contrary to law, some further amplification is required for an understanding of the problem with which we are presented.

The present litigation originated in a petition filed in 1973 by several of the heirs of Paul Henry Melia, deceased. It asked for a construction of his will and for partition of certain real estate devised by that will. Mable Melia, the present applicant, is the widow of the decedent and was named as a party defendant in that original action. The petition alleged that by the terms of Melia's will, Mable Melia was devised the family home, which was specifically described by metes and bounds.

The remainder of the nearly 80 acres located in the north half of the southwest quarter of Section 15, Township 13 North, Range 10 East of the 6th P.M., Sarpy County, Nebraska, except for that property described as the "family home" devised to Mable Melia, descended by will to certain other of Paul Henry Melia's heirs. Unfortunately, the specific description of the "family home" contained in the will and repeated in the petition was incomplete and ambiguous in that one of the legs of that description did not close. In an effort to correct this deficiency, Mable Melia had an independent survey performed, and in her answer alleged ownership of the "family home" devised to her, using the descrip-

tion furnished by her surveyor. This description was not ambiguous but just plain erroneous, in that it cut off the south 100 feet of her property, which comprised the bluegrass lawn on that side of the house.

As a part of the partition proceedings, the referee reported that partition in kind was not possible and recommended a sale. The court confirmed the report of the referee and directed a sale. The notice of sale was published, the sale accomplished, reported by the referee, and the court entered an order confirming the sale and ordering a deed. The deed was executed and delivered to Schram, the purchaser at the sale. However, throughout the entire proceedings, in the reports, orders, notices, and the deed itself, the land sold was described generally as the northwest quarter of the southwest quarter and Tax Lot 4 in the northeast quarter of the southwest quarter in Section 15, Township 13, Range 10, Sarpy County, except that part devised to Mable Melia by the will of Paul Henry Melia, specifically described, using the erroneous description which had been furnished to the court by Mable Melia herself.

Although the record is sparse on this issue, it is apparent that the Schrams went into possession of the property described in the referee's deed, except for the disputed 100 feet. That particular strip of ground was separated from the remainder of the property described in the referee's deed by a white, three-rail fence. George Schram, in his testimony, would say no more than that the property he intended to buy was that contained in the legal description in the notice of sale. However, he did acknowledge the location of the white fence, which he himself referred to as "Mable Melia's south fence." Although his testimony was extremely evasive, Schram finally did concede that from the date of the sale up until the present time (the time of trial in 1981), he had planted no crops on the disputed 100

feet and that he never entered upon that particular ground for any purpose. He also admitted he knew that the house adjoining the 100 feet of lawn and located within the fence line was Mable Melia's house.

According to the testimony of Mable Melia it was not until sometime in 1977 that she discovered the error in the legal description. At that time Mrs. Schram wanted to plant some trees and had the north line of her property located by a survey. Mrs. Melia then learned of the discrepancy in the description and had her own surveyor recheck his work. According to the testimony of the surveyor, he had accurately located the south boundary line of Mrs. Melia's property with pins which could still be found in the ground alongside the fence. However, the written description which he furnished was erroneous. The record does not reveal any further activity or change in the nature of the possession of either the Schrams or Mable Melia to the present time.

This case presents several issues. The application simply alleged error on the part of the referee in conveying property owned by the applicant, Mable Melia, to George R. Schram, and prayed that the court quiet title in her to the disputed 100 feet. The trial court in its order determined that the issue was whether the true intention of the parties was accurately reflected in the deed, recited that the law of this state permits a court of equity to reform a deed where it fails to express the true intention of the parties, found for the applicant on the issue of reformation, and ordered that the Schrams execute a quitclaim deed to Mable Melia for the "property erroneously included in the deed issued by the Referee." The appellee, Mable Melia, devotes her entire brief to but one argument, i.e., that reformation of a deed for mistake will be granted where the mistake is mutual to both parties.

It is quite apparent that the mistake was not mutual. It was a unilateral mistake on the part of

Mable Melia. Secondly, the rule as to reformation of deeds urged by the appellee and utilized by the trial court does not relate to deeds as a part of a judicial sale. The authorities cited by the appellee in support of the rule and relied upon by the trial court all are concerned with private conveyances.

It is well settled that a partition sale is a judicial sale. *Drake v. Morrow,* 140 Neb. 258, 299 N.W. 545 (1941). A deed executed pursuant to a judicial sale, absent mistake or fraud, conveys only that property that lies within its calls. *Hendrickson v. Glaser,* 204 Neb. 492, 283 N.W.2d 41 (1979). " '*The deed is to be construed with the judicial proceedings of which it forms a part.* It conveys no greater title than the order of sale on which it is based, although absolute in form, and is void in so far as it includes land the decree did not authorize to be sold, the grantee receiving nothing more than color of title thereto. On the other hand, *the deed conveys only that which is described therein;* yet, where through the *mistake of an officer* it does not include that which was intended to be conveyed, *the purchaser may obtain relief* in equity.' (Emphasis supplied.)" (Emphasis supplied.) *Id.* at 497, 283 N.W.2d at 44. The corollary of that rule is that such deed conveys all that is described therein, provided that it is included within the order authorizing the sale.

It would appear, then, that in order to reform the referee's deed it would be necessary to reform or modify the orders of sale and confirmation. These orders were never appealed from and became final 1 month following entry of the order of confirmation on October 25, 1974. A remedy available would have been proceedings to vacate or modify the orders under the provisions of Neb. Rev. Stat. § 25-2001 (Reissue 1979). However, even if the present proceedings could be characterized as having been brought under the provisions of that statute, the record does not support the granting of relief under

any of the nine conditions set forth therein.

Therefore, Mable Melia's application must be considered as either a collateral attack on the prior proceedings or an independent action to quiet title.

"It is well settled that where the court 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, 451, 299 N.W.2d 527, 530 (1980). A confirmation of a partition sale disposes of all the interests of everyone in the suit to the purchaser, and after confirmation there is no title or interest of any party to such proceedings that can be collaterally attacked. *Drake v. Morrow, supra.* When all parties interested are before the court in a partition action, the order confirming the sale is final and binding, in the absence of fraud on the face of the proceedings, even though the judgment may be erroneous and would have been reversed on appeal. *Schleuning v. Tatro,* 122 Neb. 3, 238 N.W. 741 (1931). There is no question but that the court in the partition proceedings had jurisdiction of the subject matter and of the parties, including Mable Melia. Those proceedings cannot now be collaterally attacked.

However, we shall consider the applicant's general claim for relief by way of quiet title. We have previously rejected her contention that she is entitled to this relief because of an error in the description in the deed occasioned by the fault of the referee. However, a court of equity which has acquired jurisdiction of a matter for any purpose will retain jurisdiction for the purpose of administering complete relief with respect to the subject matter. *Parsons Construction Co. v. Gifford,* 129 Neb. 617, 262 N.W. 508 (1935). We will consider this issue de novo on the record, as we are required to do in equity cases.

Two common methods of establishing a boundary line other than by formal conveyance involve ad-

verse possession and acquiescence. However, relief by reason of adverse possession is not available in this case. Mable Melia is not permitted to tack on to her present possession that time of possession which existed prior to the partition action. A final judgment in a partition action determines the rights and interests of the parties in the subject property, and such parties are estopped from raising any claim of interest or title which was or could have been raised in that action. *Bender v. Fuchs,* 179 Neb. 162, 137 N.W.2d 364 (1965). Mable Melia's possession from the date of the judgment in partition to the present time falls short of the required 10 years.

However, the doctrine of acquiescence is another matter. In order to claim a boundary line by acquiescence, it is not necessary that there be an express agreement between the parties. "It has been frequently decided that though there is no express agreement as to the location of the boundary line, adjoining proprietors cannot question a line which they have, for a considerable number of years, recognized as the correct line between their properties." 2 Tiffany, Real Property § 654 at 682-83 (3d ed. 1939). "In order to establish a boundary by acquiescence, it is not necessary that the acquiescence should be manifested by a conventional agreement, but recognition and acquiescence must be mutual, and both parties must have knowledge of the existence of a line as a boundary line." 11 C.J.S. *Boundaries* § 79 at 652 (1938). The establishment of a boundary line between adjacent lots by recognition and acquiescence involves the idea that the adjacent owner, with knowledge of the line so established and the possession so taken, assents thereto, *or that circumstances exist from which assent may be reasonably inferred. Hakanson v. Manders,* 158 Neb. 392, 63 N.W.2d 436 (1954).

"Some of the cases require this acquiescence, *in order to be conclusive,* to have continued for the

length of time fixed by the statute of limitations for the recovery of land, not, apparently, on the view that the case is within the statute, but by way of analogy thereto. Others suggest no such requirement, it being stated merely that the acquiescence in the line must have continued for 'a considerable time,' or equivalent language being used, and no rule as to the number of years being laid down." (Emphasis supplied.) 2 Tiffany, *supra* at 684-85.

In that same treatise, Nebraska is listed as supporting both the rule that acquiescence must continue for a period equal to that fixed by the statute for gaining title by adverse possession, and the opposite rule that no particular number of years is necessary.

Cited in support of the first proposition is the case of *Romine v. West,* 134 Neb. 274, 278 N.W. 490 (1938). "A thorough annotator states: 'The rule has been announced and reiterated that, where the owners of adjoining land occupy their respective premises up to a certain line, which they mutually recognize and acquiesce in as the boundary line for a long period of time,—usually the time prescribed by the statute of limitations,—they and their grantees are precluded from claiming that the boundary line thus recognized and acquiesced in is not the true one, although such line may not be in fact the true line according to the calls of their deeds.' 69 A.L.R. 1491.

"Another competent commentator says: 'It is very generally held, however, that where the recognition and acquiescence have continued beyond the period fixed by the statute of limitations the *presumption becomes conclusive,* irrespective of the correctness of the boundary acquiesced in.' 9 C.J. 245.

. . . .

"The rule long established in this jurisdiction is that where a boundary, supposed to be the true line established by the government survey, is acquiesced

in by the adjoining owners for more than ten years, *it is conclusive of the location.*" (Emphasis supplied.) *Id.* at 276-77, 278 N.W. at 491, citing in support thereof *Clark v. Thornburg,* 66 Neb. 717, 92 N.W. 1056 (1902). In *Clark,* we said: " 'Where a corner supposed to have been established by the government in the surveys of public lands has been acquiesced in by adjoining owners of such land for *nearly ten years,* and improvements made and the land broken up to the line thus established, *there is a presumption* in favor of such corner being the true one, which can only be overcome by clear proof that it was not established by the government.' [Citation omitted.] When a line so established is acquiesced in by the parties for a period equal to that fixed by the statute for gaining title by adverse possession, *it is conclusive* of the location of the boundary line." (Emphasis supplied.) *Id.* at 719-20, 92 N.W. at 1057.

That Schram, by his actions and testimony, acquiesced in the fence line as the true boundary between his property and that of Mable Melia seems to be beyond dispute. It was only when he discovered, quite by accident, that there had been an error in the proceedings by which he unwittingly was able to obtain legal title to property otherwise accepted by everyone as belonging to Mrs. Melia that he ever wavered in his acknowledgment of the established line. Whether the time that the acquiescence existed was sufficient to amount to "nearly ten years" must be determined in each case from the facts and circumstances therein existing. " 'Where the true line can be ascertained, and parties by mistake agree upon an erroneous line as their boundary, believing it to be the true line, they will not be concluded by such agreement from claiming to the true line when discovered, unless the statute of limitations has run, *or equitable reasons exist for establishing an erroneous line.*' " (Emphasis supplied.) *Kimes v. Libby,* 87 Neb. 113, 116, 126 N.W. 869, 870

(1910). Such equitable reasons do exist in this case.

We hold that the applicant, Mable Melia, is entitled to the benefit of the presumption that the fence line acquiesced in by the parties for these several years is the true line, the same not having been overcome by "clear proof" to the contrary on the part of Schram. Title is ordered quieted in Mable Melia as to the property described as: "Referring to the center quarter corner of Section 15, Township 13 North, Range 10 East of the 6th P.M., Sarpy County, Nebraska; thence due South (assumed bearing) along the East line of the Southwest Quarter (SW¼) of said Section 15, a distance of 400.85 feet to the point of beginning; thence due South along the East line of the Southwest Quarter (SW¼) of said Section 15 a distance of 210.15 feet; thence due West 254.48 feet; thence due North 210.15 feet; thence due East 254.48 feet to the point of beginning. The East 33 feet of this tract is reserved for County Roads right-of-way," as alleged in her first amended application.

To the extent thus modified, the judgment of the District Court is affirmed.

AFFIRMED AS MODIFIED.

CLINTON, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. ALAN V. HARDIN, APPELLANT.

326 N.W.2d 38

Filed November 5, 1982. No. 44395.

1. **Homicide.** A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.
2. _____. 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.
3. **Homicide: Intent.** Malice denotes that condition of mind which is

manifested by the intentional doing of a wrongful act without just cause or excuse.

4. **Homicide: Jury Instructions: Lesser-Included Offenses.** Where murder is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. In order for this rule to require an instruction on manslaughter, the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder.
5. _____: _____: _____. Where the evidence shows without dispute that one charged with murder purposely pointed a loaded gun at another and pulled the trigger and there is no evidence of a sudden quarrel or other condition which might permit a finding that there was an absence of malice, then the court is not required to give an instruction which would permit the jury to render a verdict of manslaughter.
6. **Rules of Evidence: Hearsay.** "Subject to the provisions of § 27-403, the following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Neb. Rev. Stat. § 27-803(3) (Reissue 1979).
7. _____: _____. The rule of Neb. Rev. Stat. § 27-803(3) (Reissue 1979) permitting statements concerning inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment is bottomed on the notion that a person seeking medical attention will give a truthful account of the history and current state of his condition in order to ensure proper treatment.
8. _____: _____. Exculpatory statements made by an accused to a psychiatrist for the purpose of diagnosis of a mental condition of the accused, insofar as they may recite what he did or what occurred in connection with the commission of the alleged crime, are not competent evidence of the truth of the contents of the statement.
9. **Evidence.** Evidence which is competent only for one purpose may not be considered for other purposes.
10. **Motions for Mistrial.** When a motion for a mistrial is made on the ground of failure of a party to disclose information pursuant to an order of discovery, the defect may ordinarily be cured by granting a continuation and giving an opportunity to interview witnesses, take depositions, or do whatever is necessary to remedy the failure to comply with the discovery order.

Appeal from the District Court for Douglas County:

JOHN E. CLARK, Judge. Affirmed.

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

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

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

PER CURIAM.

The defendant Hardin was charged with having, on November 1, 1980, purposely and with deliberate and premeditated malice, killed Ruby O. Smith Hardin, his estranged wife. The jury found him guilty of murder in the second degree and the court sentenced him to life imprisonment. On appeal to this court he makes the following claims of error: (1) The District Court erred in denying defendant's motion for mistrial, which motion was founded upon the claim that the State failed, in violation of an earlier order of discovery, to disclose to the defendant statements allegedly made by the defendant to third persons. (2) The court erred in failing to instruct the jury that it might find the defendant guilty of the lesser-included offense of manslaughter. We affirm.

We will discuss the assignments in the reverse order of their listing. The prosecution introduced evidence which would permit the jury to find the following facts. Hardin and his wife were separated and their divorce was pending. The parties' house was located in the 3900 block on Burdette Street in Omaha. At about 1 a.m. on November 1, the defendant deliberately drove his automobile across the lawn of the residence and through the side of the house, into the bedroom where his wife and her 6-year-old daughter were sleeping. The car penetrated the bedroom about two-thirds of the car's length. Ruby was not injured by the collision, al-

though the daughter was. Both fled from the bedroom into other parts of the house. The crash awakened Ruby's 8-year-old son who was sleeping in another part of the house. Hardin crawled out of the car and entered the house. He was armed with a .25-caliber handgun. Ruby's son and daughter witnessed Hardin shoot their mother four times with the gun. Neither child heard any conversation, discussion, or argument between Ruby and Hardin. Ruby died of the gunshot wounds. Two witnesses testified to a confession the defendant made before his apprehension. The general import of the confession was that after the car entered the bedroom, the defendant observed his wife still alive and fleeing. He then got out of the car, pursued, and shot her.

As the basis for the claim that an instruction on the lesser charge of manslaughter should have been given, defendant makes the following recital in his brief: "There is strong evidence that just prior to the homicide, the defendant was under extreme emotional stress. He and his wife had a stormy relation, were in divorce proceedings and he had moved out of the house. On a prior occasion shortly before the crime, he discovered his wife in bed with a knife under her leg and he took a pistol from the dresser drawer for protection. There was testimony that about two weeks before the commission of the crime, the defendant and his wife had an argument about her alleged infidelity and on the night the incident occurred, a friend of the defendant told him that his wife had sold the TV that he had bought for his stepson so that she could buy concert tickets for her and her boyfriend. Immediately prior to the killing, the defendant had gone to his home to pick up his clothes and as he approached, he noticed a car at the house and observed his wife get out and being kissed goodnight by a male companion. There was testimony that his mind 'snapped' and he waited for the man to leave and drove his car into

the side of the house. There is also testimony that he attempted to kill himself immediately after he shot his wife.

"Further, psychiatric testimony established that the defendant had an explosive personality and could not control his emotions under stress and that he had a personality or character disorder in this regard. The defendant was not the type of person to plan ahead and was incapable of premeditation under stress, exploding impulsively instead. One psychiatrist testified that a sudden explosive reaction is fairly typical for the defendant's kind of personality and that the defendant was acting under 'extreme emotional pressure' at the time of the killing." To the above should be added that both of the expert witnesses (a psychologist and a psychiatrist) who testified on the defendant's behalf gave the opinion that the defendant was not insane, that he had a personality or character defect which they classified as "histrionic."

The brief asserts: "Counsel believes that the jury could find that the killing of Mrs. Hardin resulted from a sudden quarrel . . . ." Although not set forth in his recital of the alleged facts, the record shows that the defendant told the expert witnesses who testified on his behalf that immediately before the shooting he and his wife quarreled.

All of the alleged facts upon which the defendant relies, viz, that he had gone to his home to pick up his clothes, that he saw his wife kissing a man, that he waited for the man to leave, that he attempted to kill himself, and that there was a sudden quarrel, were not testified to by any witness observing those alleged facts, but came in as part of the recitals made by Hardin to the expert witnesses during their conversations with him after the event. Hardin did not take the stand in his own behalf.

The following principles govern the question of whether the trial court, in a prosecution for murder,

is required to give an instruction permitting the jury to consider guilt on the lesser-included offense of manslaughter. A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. Neb. Rev. Stat. § 28-304 (Reissue 1979); *State v. Rowe,* 210 Neb. 419, 315 N.W.2d 250 (1982). A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305 (Reissue 1979); *State v. Rowe, supra; State v. Beers,* 201 Neb. 714, 271 N.W.2d 842 (1978). Where murder is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. In order for this rule to require an instruction on manslaughter, the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder. *State v. Rowe, supra; State v. Beers, supra.* Malice denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. *State v. Beers, supra.* Where the evidence shows without dispute that one charged with murder purposely pointed a loaded gun at another and pulled the trigger and there is no evidence of a sudden quarrel or other condition which might permit a finding that there was an absence of malice, then the court is not required to give an instruction which would permit the jury to render a verdict of manslaughter. *State v. Beers, supra.*

The driving of the automobile into the bedroom of the house was clearly an illegal act. If Hardin did that act with the intention of killing his wife and it had that result, the act would have constituted murder in either the first or second degree. If he had no such intention but had killed his wife, then manslaughter would have been a proper charge. However, in this

case Ruby's death was not the result of the illegal act. The evidence indicates that she was the victim of an intentional shooting. In these circumstances an instruction on the lesser-included offense of manslaughter based upon an illegal act is not required. *State v. Beers, supra.*

We must take note of another aspect of the problem which neither the defendant nor the State discusses with specificity. Paradoxically, although the defendant, in supporting his right to a manslaughter instruction, relies upon his out-of-court recitals to the psychiatrist and the psychologist about his purpose in going to the house at 1 o'clock in the morning and his observation of his wife kissing a man good night, he does not specifically rely upon the other portions of his narration to the experts in which he told them a quarrel had occurred between himself and his wife just before the shooting.

It is clear from the record that the court, in ruling on the motion for an instruction on manslaughter, regarded all of the recitals as incompetent evidence of the substantive truth of what occurred and what the defendant did, and viewed them only as foundational evidence for the experts' opinions on their diagnosis of the defendant's state of mind. This situation raises a question which has been on the periphery of at least one earlier case, *State v. Rowe, supra,* and that is the effect of Neb. Rev. Stat. § 27-803(3) (Reissue 1979) insofar as it relates to psychiatric testimony. Should the psychiatrist be permitted to testify as to all the defendant told him about the events in question, thus permitting the defendant's cause to come before the jury without subjecting the defendant to the risks of cross-examination?

Section 27-803, insofar as pertinent, provides: "Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .

(3) Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

In this case, is the defendant's recital to the experts substantive evidence that a quarrel occurred, or is the out-of-court statement available only as "pertinent" to the diagnosis and not for its substantive truth? As has been pointed out in 4 Louiselle and Mueller, Federal Evidence § 444, special problems arise in the application of that statute in the context of statements made to a psychiatrist. It seems to us these special problems arise because of the broad scope which is accorded foundational material for psychiatric opinion. Many prosecutors and defense counsel seem to assume that everything an accused, whose defense is insanity or some special state of mind lessening culpability, tells the physician about the "facts" is admissible under § 27-803(3). The rule permitting statements concerning "inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment," § 27-803(3), "is bottomed on the notion that a person seeking medical attention will give a truthful account of the history and current status of his condition in order to ensure proper treatment." *State of Howard,* 405 A.2d 206, 209 (Me. 1979). The cited opinion refers to Advisory Committee Note, Fed. R. Evid. 803(4) (1982). Nothing in experience or logic suggests there is a circumstantial guarantee of trustworthiness in the exculpatory extrajudicial statements of a person accused of crime relating to what he did or what occurred, even when such statements are made to a psychiatrist or psychologist. Therefore, such statements, while they may sometimes be admissible for purposes of diagnosis (and we do not

here attempt to define the exact limits), ought not to be used as substantive evidence of the truth of what the defendant did or what occurred. The Court of Appeals, Eighth Circuit, has discussed Fed. R. Evid. 703(4) (1982) (§ 27-803(3) in our evidence code) in a somewhat different context in the case of *Aetna Life Ins. Co. v. Quinley,* 87 F.2d 732 (8th Cir. 1937), and pointed out that the statute was not intended to provide a license to employ the services of an expert witness for the purpose of obtaining his summary of out-of-court statements made to him. That case, however, was in a civil action where the other side could call the adverse party for cross-examination. The reasons, of course, which the court advances in the above case apply a fortiori in a criminal case where the accused cannot be called for cross-examination by the prosecution.

We hold that exculpatory statements made by an accused to a psychiatrist for diagnosis of a mental condition of the accused, insofar as they may recite what he did or what occurred in connection with the commission of the alleged crime, are not competent evidence of the truth of the contents of the statement. They are admissible, if at all, only to show "the inception or general character of the cause or external source" of the mental condition and "insofar as reasonably pertinent to diagnosis or treatment" of that mental condition. In civil cases, for example, statements made to a physician which pertain to facts of the accident indicating that the other party was at fault would not be pertinent to diagnosis or treatment. *Brown v. Seaboard Airline Railroad Company,* 434 F.2d 1101 (5th Cir. 1970).

Prosecutors are remiss when they do not either object or secure an ad limine ruling concerning the use of the accused's statements which are not pertinent to diagnosis or treatment. In this case no objection was made nor ad limine ruling procured. However, it is clear that the court admitted the tes-

timony and considered it only for the limited purposes we have been discussing. Evidence which is competent only for one purpose may not be considered for other purposes. *Baxter v. National Mtg. Loan Co.*, 128 Neb. 537, 259 N.W. 630 (1935).

There was no competent evidence in the record from which the jury could conclude that the homicide resulted from a sudden quarrel, and the court did not err in refusing the request for an instruction permitting a finding of manslaughter because the killing was upon a sudden quarrel.

The defendant's contention that the trial court committed reversible error in not declaring a mistrial arises from an occurrence after the second day of trial. The two witnesses to whom the defendant made the confession earlier described had been interviewed by both the prosecution and the defense. Both the prosecutor and defense counsel apparently were aware of the confession, and the defense would, it seems, have already concluded that the testimony of the two witnesses would be used. However, a week or two before trial the prosecutor interviewed the witnesses again and for the first time learned that on some occasion before the killing the defendant had told the two witnesses, apparently in the presence of one or two other people, that Ruby was insisting that title to their house be placed in her name. Hardin and Ruby had quarreled over this. The defendant, in mentioning the matter to the witnesses, had said, in the words of the witnesses, that he would fix the old gal and that he would drive Beular (the defendant's car apparently had a name) through her house if she wanted the house in her name so bad.

After the second day of trial, the prosecutor learned the name of the third party who was present at the above conversation. The prosecutor thereupon called the defense counsel and told him that he was going to ask to endorse on the information the

name of that person as a witness. The next morning defense counsel moved for a mistrial because the prosecutor had not earlier disclosed to him the conversation about Beular. The trial court denied the motion for a mistrial but granted a continuance which allowed defense counsel to take depositions and interview the proposed witness. That was done. The prosecution did not call that witness.

Defendant's counsel claims prejudice because he had, in his opening statement, told the jury that his client would testify in his own defense. He states that he would not have told the jury that if he had had the information about the Beular conversation.

Even if we assume that the discovery order required the disclosure of the Beular conversation, we fail to see that the nondisclosure harmed the defendant. The witness whose identity was learned on the second day of trial was not called as a witness. The statement itself was not a threat to do harm to the victim. It was a threat to damage the home. Even if the information had been disclosed, it ought not reasonably have affected defendant's decision whether to testify or not, or counsel's judgment as to what he would say in his opening statement about the defendant testifying. The defendant and his counsel knew that the confession would be offered and probably received in evidence. That awareness would clearly control the tactical choice as to whether defendant would take the stand to deny the confession and what counsel would say in the opening statement about his client testifying.

The defendant received all the relief to which he was entitled in connection with his motion for mistrial when the continuance was granted and he was given the opportunity to interview witnesses and take depositions. *State v. Rhodes,* 191 Neb. 131, 214 N.W.2d 259 (1974).

AFFIRMED.

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

CLINTON, J., participating on briefs.

ERVIN G. COYLE, APPELLANT, V. R. LEE JANSSEN, APPELLEE.

326 N.W.2d 44

Filed November 5, 1982. No. 44435.

1. **Appeal and Error.** A necessary function of valid assignments of error is to advise as to the issues submitted to the court for decision.
2. _____. Generalized and vague assertions of claimed error do not advise this court of the issues submitted for decision.
3. _____. It is not the duty of a reviewing court to search the record for the purpose of ascertaining whether there is error, and any error alleged must be specifically pointed out.
4. **Contracts.** The making of a contract may be conditioned upon the act or will of a third person.
5. _____. When an obligation to pay money is, by agreement, made to depend upon the action of another party, over whom neither party has control, payment cannot be exacted unless the specific act is performed.
6. _____. Where a contract is executed but its effectiveness is dependent upon the fulfillment of an agreed condition before it can become a binding contract, such contract cannot be enforced unless the condition is performed.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

Bert E. Blackwell, for appellant.

Mousel & Burger, P.C., for appellee.

Heard before KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and DAVIS, D.J., and COLWELL, D.J., Retired.

CAPORALE, J.

Plaintiff-appellant, Ervin G. Coyle, appeals from a judgment entered pursuant to the jury's verdict which dismissed his contract action against the defendant-appellee, R. Lee Janssen. We affirm.

Plaintiff's sole operating assignment of error is the failure of the trial court to instruct the jury in the language of his proposed instructions to the general effect that the acceptance of benefits nullifies both a condition precedent and any unconscionable and unreasonable character of a contract. His other three purported assignments of error in substance merely assert the trial court erred in failing to enter judgment in plaintiff's favor at the close of all the evidence and erred in failing to grant a new trial. Such generalized and vague assertions do not advise this court of the issues submitted for decision. Such advice is a necessary function of valid assignments of error. *Cook v. Lowe,* 180 Neb. 39, 141 N.W.2d 430 (1966). It is not the duty of a reviewing court to search the record for the purpose of ascertaining whether there is error, and any error alleged must be specifically pointed out. See *McClellen v. Dobberstein,* 189 Neb. 669, 204 N.W.2d 559 (1973). We consider, therefore, only plaintiff's single operative assignment of error.

After a period of negotiations, which included discussions about the value of goodwill, the parties, on September 20, 1978, executed two documents for the sale by plaintiff and purchase by defendant of an automobile sales dealership and franchise at McCook, Nebraska. The first document signed was an 18-paragraph typewritten agreement. That agreement dealt in the main with the sale and purchase of inventory, fixtures, and tools, and also the transfer of the instant franchise. According to its terms it could not be changed except by a signed written document. Plaintiff then caused a handwritten document to be prepared, obligating defendant, upon the signing thereof and approval by the manufacturer of the franchise transfer, to pay plaintiff $30,000, reciting that such was "to transfer the rights and privilages [sic]" of the franchise. Defendant signed the same, "subject to approval of buyer ac-

countant." It appears that no demand was made by defendant for financial data, other than an initial comment that such would be needed to assess the value of goodwill, and that no such data was specifically provided by plaintiff to defendant. At trial plaintiff testified that the goodwill was worth $30,000. Other evidence was to the effect there was no goodwill to value. Defendant's accountant did not approve or disapprove the $30,000 payment because he had never reviewed any financial data. The fact that defendant was not going to pay that sum was not communicated to plaintiff until the summer of 1979. In the interim the parties had undertaken many acts which effectively transferred the dealership and franchise to the defendant. Additionally, the parties had entered into, on or about November 3, 1978, a lease whereby defendant rented certain premises from plaintiff in order to operate the dealership.

Upon the refusal of defendant to pay, plaintiff sued. He alleged, among other things, that plaintiff had fulfilled his obligations under the terms of the handwritten document, that the franchise had been transferred, and that defendant had waived the condition requiring approval of his accountant by accepting the benefits of the contract, and prayed for judgment in the amount of $30,000. Defendant asserted, inter alia, that the condition of accountant approval had not been met and that the handwritten document was "unconscionable and unreasonable."

In connection with the second defense we observe that if the doctrine of "unconscionability" exists in this state as a means of voiding common-law contracts, none of the factual requirements for invoking it were either pled or proved. That defense should not have been submitted to the jury. However, no error is assigned on that basis and, in view of our analysis, no prejudicial error occurred by virtue of its submission.

In support of his assignment of error plaintiff asserts that the nonfulfillment of a condition precedent is nullified if the party having the benefit of the condition accepts benefits under the contract. However, none of the Nebraska cases he cites in support of that argument so hold. *Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, 199 Neb. 489, 260 N.W.2d 193 (1977), concerned the acceptance of nonconforming goods under the Uniform Commercial Code; *Duplex Manuf. Co. v. Atlas Leasing Corp.*, 180 Neb. 851, 146 N.W.2d 205 (1966), presented a question as to when repudiation by one party excused performance by the other; *McLeod v. Crawford*, 176 Neb. 513, 126 N.W.2d 663 (1964), held one having actual notice of the expiration date of a patent who had received benefits under the contract for 7 years after the expiration date was estopped from asserting the invalidity of the contract; *Wegner v. West*, 169 Neb. 546, 100 N.W.2d 542 (1960), held a contract could not be rescinded when the party was unable to return payment or account for merchandise and proceeds from the items sold; *Einot, Inc. v. Einot Sales Co., Inc.*, 154 Neb. 760, 49 N.W.2d 625 (1951), involved the acceptance of payment after the contract had been declared null and void; and *Stover v. Hazelbaker*, 42 Neb. 393, 60 N.W. 597 (1894), concerned the acceptance of rent accruing after default. In short, none of those cases involved a condition precedent.

More directly in point are cases holding that the making of a contract may be conditioned upon the act or will of a third person. In *O'Brien v. Fricke*, 148 Neb. 369, 27 N.W.2d 403 (1947), the plaintiff purchaser sought specific performance of a contract for the sale of farmland. The contract had been conditioned upon the ability of the plaintiff to obtain loans from persons over whom none of the parties to the contract had any control. Finding himself unable to obtain the necessary loans, plaintiff sought to change the terms of the contract. This court found

the defendants were not at fault for the plaintiff's failure to perform and observed that in negotiating the contract the parties may impose any condition precedent they might wish. We cited with approval cases stating, " 'When an obligation to pay money is, by agreement, made to depend upon the action of another party, over whom neither party has control, payment cannot be exacted unless the specific act is performed.' " *Id.* at 376, 27 N.W.2d at 408. *Evans v. Platte Valley Public Power and Irrigation District,* 144 Neb. 368, 13 N.W.2d 401 (1944), was an action brought to recover an alleged balance due upon a contract for legal services. The evidence established that the parties entered into a contract for an increase in plaintiff's salary as chief counsel for the defendant upon condition that it would be approved by federal Public Works Administration officials. Those officials refused to do so. We held the plaintiff could not recover, relying on the rationale later restated in *O'Brien, supra.*

It is clear that where a contract is executed but its effectiveness is dependent upon the fulfillment of an agreed condition before it can become a binding contract, such contract cannot be enforced unless the condition is performed. See, *Empfield v. Ainsworth Irr. Dist.,* 204 Neb. 827, 286 N.W.2d 94 (1979); *Metschke v. Marxsen,* 176 Neb. 240, 125 N.W.2d 684 (1964).

It is true that in the instant case the approval was to be obtained from the defendant's accountant; however, there is no evidence but that the accountant properly exercised his own independent professional judgment in concluding that he could neither approve nor disapprove. It is also true that defendant delayed in communicating this status to plaintiff and that in the interim a number of acts were performed by both parties in furtherance of the transfer. However, it is abundantly clear that plaintiff participated fully in those endeavors, even to the

extent of entering into a lease not required by the arrangement between the parties, with full knowledge that the condition of accountant approval had not been met as of that time.

Although it appears defendant exerted no substantial effort to obtain plaintiff's financial data, neither does it appear plaintiff made any substantial effort to collect and provide same to defendant.

Under the circumstances the trial court should have dismissed plaintiff's petition as a matter of law.

AFFIRMED.

MAX VANARSDALE ET AL., APPELLANTS, V. LINCOLN COUNTY ET AL., APPELLEES.

326 N.W.2d 47

Filed November 5, 1982. No. 44472.

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

David T. Schroeder, for appellants.

Leonard P. Vyhnalek, for appellees.

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

WHITE, J.

The appellants commenced this action in the District Court for Lincoln County, Nebraska, challenging the constitutionality of Neb. Rev. Stat. §§ 23-114 to 23-114.05, 23-168 to 23-168.04, 23-172, 23-173, 23-173.01, 23-174, 23-174.02, 23-373, and 23-376 (Reissue 1977) relating to establishment and promulgation of zoning regulations by the county commissioners of Lincoln County. The trial court held the statutes constitutional. We dismiss the appeal.

Appellants failed to notify the Attorney General by

serving a copy of their brief on him within 5 days of the filing of their brief in this court pursuant to Neb. Ct. R. 16A (Rev. 1982) (formerly rule 18). Rule 16A states: "Cases Involving Constitutional Questions. A party presenting a case involving the constitutionality of a statute must file a written notice thereof with the Clerk of this court at the time of filing his brief. If the Attorney General is not already a party to an action where the constitutionality of the statute is in issue, a copy of the brief assigning unconstitutionality must be served on the Attorney General within 5 days of the filing of the brief with the Clerk of this court; proof of such service shall be filed with the Clerk of this court."

The appellants having failed to comply with the rules of this court, the appeal is dismissed.

APPEAL DISMISSED.

CLINTON, J., dissenting.

I respectfully dissent. Compliance with the rule relied upon is certainly not jurisdictional. Even when the rule is complied with, the Attorney General seldom, if ever, files a brief. In my 12 years in this court this is the first time we have used the rule as a basis for dismissal of an appeal. I strongly object to the selective application of the rule in this fashion.

KATHRYN L. KRAMER PHILP ET AL., APPELLANTS, V. FIRST NATIONAL BANK & TRUST COMPANY, PERSONAL REPRESENTATIVE OF THE ESTATE OF IRMA KRAMER, DECEASED, ET AL., APPELLEES.

326 N.W.2d 48

Filed November 5, 1982. No. 44504.

1. **Wills: Contracts: Specific Performance.** Strictly speaking, there cannot be a decree for the specific performance of a contract to make a will. Courts of equity may grant relief in a form that is

usually equivalent to a decree of specific performance of a contract to leave property by will, after the death of the defaulting promisor, by fastening a trust upon an estate in the hands of those taking it with notice of such contract or by devise or descent.

2. **Demurrer: Pleadings.** A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. On reviewing the sustaining of a demurrer, this court must treat as undisputed the facts as alleged in the petition.
3. _____: _____. If the petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action.
4. **Contracts.** In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relation of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and remanded for further proceedings.

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

William G. Line and John F. Kerrigan of Kerrigan, Line & Martin, for appellee Katharine Douglas.

Vance E. Leininger of Albert, Leininger & Grant, for appellee First National.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

MCCOWN, J.

This is an action in equity based upon a written agreement allegedly intended to constitute a succession contract and a contract to make a will. The amended petition alleged the breach of the agreement by the decedent in making a will contrary to the agreement, and prayed for specific performance

of the written agreement by impressing a trust upon the assets in the estate of the decedent, who had executed the agreement. The defendants filed general demurrers, which were sustained. Upon plaintiffs' refusal to plead further, plaintiffs' amended petition was dismissed and this appeal followed.

Plaintiffs, Kathryn L. Kramer Philp and Kristin Kramer Philp, are sisters, the only issue of their father, Frederic Kramer, who died in 1959. Frederic and his sister, the defendant Katharine Kramer Douglas, were the only children of Irma Kramer. Irma Kramer died in 1980. She had been widowed for many years before 1959 and never remarried. Plaintiffs and their aunt, Katharine Douglas, are the sole heirs at law of Irma Kramer and were potentially so in 1962 when the agreement which is the basis for this action was executed. The defendant bank is the personal representative and former conservator of the Irma Kramer estate, the value of which is inventoried in excess of $400,000.

When Frederic Kramer died in 1959 his mother, Irma Kramer, and his sister, Katharine Douglas, filed claims against his estate. Irma Kramer's claims included a $50,000 claim for certain properties previously deeded by her to her son, allegedly subject to recall at will, a $6,600 claim involving an insurance policy on her life held by Frederic, and a $40,000 claim involving corporate stock. Katharine Douglas filed two claims, one for an undivided one-half of the properties included in the $50,000 claim of her mother, and one involving the same $6,600 insurance policy.

Over an extended period of time settlement of the claims was negotiated, including provisions governing future distribution of her property, testamentary or otherwise, by Irma Kramer as between the heirs of Frederic Kramer and Katharine Douglas. Those negotiations culminated in the settlement agreement of August 4, 1962, which is involved here.

The agreement provided that all claims of Katharine Douglas and all claims of Irma Kramer except the $50,000 claim were to be settled by transfers of an insurance policy, corporate stock, or cash by the estate to the claimants. The $50,000 claim of Irma Kramer was to be disallowed.

The final executed version of the agreement was preceded by a prior draft proposal prepared by the attorneys for the estate of Frederic Kramer, which incorporated in paragraphs 10 and 11 provisions which would have required Irma Kramer to execute and deliver her will in a form which would have irrevocably split her entire estate into two portions, identical in size, with the single exception of a prior $50,000 bequest to Katharine Douglas or her issue to equalize and compensate for the properties involved in the $50,000 claim of Irma Kramer in Frederic Kramer's estate. This draft would have prohibited lifetime transfers of property by Irma Kramer for less than fair value and would have obligated her to retain her holdings substantially intact, except for her immediate and necessary living expenses, during the remainder of her natural life. Those proposed provisions of paragraphs 10 and 11 were rejected by Irma Kramer through her attorney who, in turn, drafted and supplied the present language of paragraph 10 as follows: "10. The parties recognize that the amount being allowed on the settlement to third party [Irma Kramer] is less than the amount of her claim but the reduction is being made in the interest of promoting family harmony.

"In this same spirit, the third party agrees that in any last will and testament which she might make or in any distribution of her property, or substantial gifts, she will not discriminate against the issue of Frederic Kramer, deceased.

"However, any distribution, testamentary or otherwise, to fourth party [Katharine K. Douglas], or her heirs, designated to offset the property trans-

ferred to Frederic Kramer which is the subject of this litigation not to exceed $50,000 in value shall not be construed as such discrimination."

A letter by Irma Kramer's attorney to the attorneys for the executrix of the Frederic Kramer estate submitting the revised and final form of the agreement which was later executed stated: "We enclose herewith copy of proposed settlement agreement in connection with the Kramer matter. This is identical with the one submitted by you with the exception that I deleted Paragraphs 10 and 11 of your proposed contract and replaced it with a paragraph which is in line with my telephone conversation of a few days ago.

"Believe me, I had a difficult time getting Mrs. Kramer's approval of the substitute commitment. It is my opinion that this is a binding agreement on her, and I have so advised her. On the other hand, it gives her an opportunity to control her own life. It is my firm conviction that once this matter is settled, that the grandchildren of Mrs. Irma Kramer can resume the normal relationship between grandmother and granddaughters and the grandchildren will benefit both financially and otherwise."

The final form of the settlement agreement dated August 4, 1962, was executed by plaintiffs' mother as the executrix of the estate of Frederic Kramer, by the guardian ad litem of the plaintiffs, and by Irma Kramer and Katharine Douglas.

On May 27, 1971, Irma Kramer executed the will which is presently in process of probate. The will, after provisions which revoked prior wills and directed the payment of debts, claims, and expenses, provided: "THIRD: I give, devise, and bequeath all of my residuary estate, be it real or personal, and wheresoever situated, to my daughter, Katharine Kramer Douglas, if she survives me, the same to be hers absolutely. If my daughter does not survive me, then I give, devise, and bequeath all of my

residuary estate, be it real or personal and wheresoever situated, to her children (of whom there are at this time two, namely, Pamela Douglas and Steele Douglas) who survive me, in equal shares, the same to be theirs absolutely.

"FOURTH: I have intentionally made no provision herein for my other grandchildren, the children of my deceased son Frederic Kramer, for the reason that during his lifetime I transferred substantial assets to him which he used and which enabled him to die leaving a substantial estate for the benefit of his children, and it is now my judgment that the foregoing provisions for the benefit of my daughter or her children will in some measure be comparable to the benefits which my son and his children have received at my hands."

Irma Kramer died in 1980 and the will was admitted to probate in the Platte County Court. The plaintiffs filed claims in the estate based upon the agreement allegedly breached by the will. The claims were disallowed and rejected on November 4, 1980. This proceeding was commenced in the District Court for Platte County on December 8, 1980. The defendants filed general demurrers which were sustained upon the ground that the amended petition, including the exhibits attached, failed to state a cause of action for the reason that the agreement pleaded is too indefinite, ambiguous, and uncertain to entitle plaintiffs to any equitable relief. The plaintiffs elected to stand upon the amended petition, and the petition was dismissed.

Nebraska has long recognized a cause of action based on a contract to make a will. Strictly speaking, there cannot be a decree for the specific performance of a contract to make a will, since such an instrument is, by its nature, revocable by the promisor during his life and cannot be made by him after his death. It has long been recognized that courts of equity may grant relief in a form that is usually

equivalent to a decree of specific performance of a contract to leave property by will, after the death of the defaulting promisor, by fastening a trust upon his estate in the hands of those taking it with notice of such contract or by devise or descent. Jurisdiction in the equity court in such cases does not rest upon any distinction between real estate and personal property, but rather upon the ground of the inadequacy of an action at law. *Pflasterer v. Omaha Nat. Bank,* 201 Neb. 427, 268 N.W.2d 104 (1978); *Cox v. Johnston,* 139 Neb. 223, 296 N.W. 883 (1941).

A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. If the petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action. On reviewing the sustaining of a demurrer, this court must treat as undisputed the facts as alleged in the petition. *Cizek v. Cizek,* 201 Neb. 4, 266 N.W.2d 68 (1978).

In the present case the trial court found that the agreement was too indefinite, ambiguous, and uncertain to be specifically performed. In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relation of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract. *Younker Brothers, Inc. v. Westroads, Inc.,* 196 Neb. 168, 241 N.W.2d 679 (1976).

The amended petition alleges that the family settlement agreement was intended by the parties to address and settle matters pertaining to the succession to Irma Kramer's estate upon her demise be-

tween the lines of Frederic Kramer and Katharine Douglas upon the basis of equal participation in said estate by said two family lines, following a prior distribution of $50,000 to the line of Katharine Douglas as equalization for lifetime gifts received by Frederic Kramer and confirmed to his estate under the settlement agreement. The decedent, Irma Kramer, signed the agreement and all directly interested parties in this lawsuit either signed the agreement or are bound by representative signatures. The general demurrers admit all facts and all reasonable inferences to be drawn from facts properly pleaded.

The action of the District Court in sustaining the general demurrers of the defendants and dismissing plaintiffs' amended petition was erroneous. The judgment of the District Court is reversed and the cause is remanded to the District Court for further proceedings.

REVERSED AND REMANDED
FOR FURTHER PROCEEDINGS.

MARK T. WAKENIGHT, APPELLANT AND CROSS-APPELLEE, V. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT.
326 N.W.2d 52

Filed November 5, 1982. No. 44550.

Tort Claims Act: Appeal and Error. On an appeal to this court of an action under the State Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

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

Paul L. Douglas, Attorney General, and John R. Thompson, for appellee.

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

MCCOWN, J.

This is an appeal from a decision of the District Court dismissing an action brought by the plaintiff against the State of Nebraska under the State Tort Claims Act. The plaintiff has appealed.

At approximately 8:30 p.m., March 12, 1976, the plaintiff was hitchhiking along the south shoulder of Interstate 80 at a point approximately 3 miles west of the Milford interchange. A Nebraska State Patrol trooper stopped, picked up the plaintiff, informed him that hitchhiking was illegal on the Interstate, and gave him a warning ticket. The trooper then drove the plaintiff to the east entrance ramp of the Milford interchange on the south side of a bridge which crosses the Interstate at that point. While driving to the interchange the trooper had informed the plaintiff that he would be let off in a location where it would be legal to hitchhike, and also advised the plaintiff of the availability of motel and restaurant services located on the north side of the bridge. There is some dispute in the testimony as to whether the trooper suggested that the plaintiff stay at a motel north of the bridge or merely advised him of the availability of such services.

After letting the plaintiff out of his car at the Interstate entrance ramp south of the bridge, the trooper drove off and the plaintiff proceeded to walk north across the bridge. The bridge runs north and south and has two lanes of travel with a shoulder 2¾ feet wide on each side, but no sidewalk. There is a railing on both sides of the bridge with a 9-inch curb extending the length of the bridge. There were four high tower lights located so as to illuminate the exit and entrance ramps of the Interstate, and the evidence indicated that at least some of the lights were not operating on the evening of March 12, 1976.

The plaintiff has no memory of the accident itself, but the evidence indicates that the plaintiff, wearing dark clothing, was walking north across the bridge on the east side of the bridge with his back to oncoming northbound traffic. At a point approximately 100 feet from the north end of the bridge the plaintiff was struck by a northbound automobile. The driver of the car testified that her lights were on, she was traveling at 55 miles per hour, and that there was no other traffic at that point. As she came up over the bridge she first saw the plaintiff about 2 to 2½ car lengths ahead of her in the northbound lane of traffic, and he appeared as just a dark figure. As a result of the accident the plaintiff suffered very severe injuries.

Plaintiff filed a claim with the State Claims Board, which was rejected by the board on June 20, 1978, and plaintiff thereafter filed this action in the District Court for Seward County, Nebraska.

The amended petition alleged that the State was negligent (1) in failing to adequately maintain the lights at each end of the bridge; (2) in failing to provide adequate lighting at the bridge; (3) in failing to repair or replace the lights at the bridge when the defendant knew, or should have known, of the defective condition; (4) in failing to place plaintiff in a position of safety when the trooper knew, or should have known, that the bridge at the time of the accident was unsafe for pedestrians; (5) in requiring the plaintiff to walk across the bridge to the motel on the north side; (6) in failing to warn plaintiff of the danger in proceeding across the bridge under the circumstances which existed at the time of the accident; and (7) in placing plaintiff in a position of peril.

At the close of the plaintiff's evidence the State moved to dismiss plaintiff's petition. The trial court sustained the motion as to allegations (4) and (5), but overruled the motion to dismiss as to the other allegations of negligence.

At the close of all the evidence the trial court found that the defendant was negligent in failing to maintain high tower lights positioned at the scene of the accident. The court also found that the plaintiff was negligent in failing to walk along and upon the two-way highway on the correct side of such highway and in failing to keep a proper lookout and in moving from a place of safety to a place of danger. The court also specifically found that, by comparison, plaintiff's negligence was more than slight when compared with that of the defendant, and that by reason thereof plaintiff's negligence was a bar to his recovery. The court therefore dismissed plaintiff's petition and this appeal followed.

Plaintiff first contends that the trial court erred in dismissing the two allegations of negligence at the close of the plaintiff's evidence. Two other allegations of negligence containing essentially the same allegations were retained, and even if the action could be said to be technically incorrect, there was no prejudice to the plaintiff.

Plaintiff also contends that the trial court erred in failing to find at the close of all the evidence that the State was negligent in failing to warn plaintiff of the danger and in placing the plaintiff in a position of peril. It is clear from the lack of specific findings and from the judgment of the court that findings on those issues were against the plaintiff. Under the State Tort Claims Act the trial judge sits without a jury and has exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim under the act. Neb. Rev. Stat. § 81-8,214 (Reissue 1981).

We have consistently held that on an appeal to this court of an action under the State Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong. *Cortes v. State,* 191 Neb. 795, 218 N.W.2d 214 (1974).

We do not pass on the trial court's finding that the

State was negligent in failing to maintain tower lights. There is ample evidence in the present case upon which the trial court could find that the plaintiff was contributorily negligent in any event, and that such negligence was more than slight when compared with the defendant's negligence. The determination of the trial court was not clearly wrong.

AFFIRMED.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, AND STEVEN M. CURRY, MERRICK COUNTY ATTORNEY, APPELLEES, V. MARJORIE BIGELOW, DOING BUSINESS AS NEBRASKA CHRISTIAN LIBERTY ACADEMY, APPELLANT.

325 N.W.2d 838

Filed November 5, 1982. No. 82-377.

Appeal from the District Court for Merrick County: JOHN M. BROWER, Judge. Application for stay of permanent injunction denied. Writ of certiorari denied. Petition to vacate denied without prejudice.

Marjorie Bigelow, pro se.

Paul L. Douglas, Attorney General, and Harold Mosher, and Steven M. Curry, Merrick County Attorney, for appellees.

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

PER CURIAM.

This matter came on upon the appellant's "Application for Stay of Injunction," pending disposition of this appeal, of a permanent injunction issued by the court below following a trial on the merits of this civil action brought by the State of Nebraska, and upon her "Petition to Vacate" and upon her "Writ of Certiorari."

Upon consideration whereof, the constitutional issues presented having been essentially resolved in *State ex rel. Douglas v. Faith Baptist Church,* 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed, Faith Baptist Church of Louisville, Nebraska v. Douglas,* 454 U.S. 803, 102 S. Ct. 75, 70 L. Ed. 2d 72, it is ordered, adjudged, and decreed that the "Application for Stay of Injunction" be, and the same hereby is, overruled and denied. It is further ordered, adjudged, and decreed that the "Writ of Certiorari," no procedure for such existing in this court, be, and the same hereby is, overruled and denied. It is further ordered, adjudged, and decreed that the "Petition to Vacate" be, and the same hereby is, overruled and denied without prejudice to review of the issues presented on appeal.

APPLICATION FOR STAY OF PERMANENT INJUNCTION DENIED.
WRIT OF CERTIORARI DENIED.
PETITION TO VACATE DENIED WITHOUT PREJUDICE.

CLINTON, J., dissenting.

I respectfully dissent from the portion of the order of this court denying the appellant's request for a stay of the injunction while the appeal is pending in this court and until there is a final decision on the merits of the case. The State here seeks to enforce compulsory education laws by injunction rather than by prosecution. This is a highly unusual procedure and presents the possibility that the defendant may be twice punished for essentially the same act—once for violation of the injunction and once, or more, for violation of the pertinent criminal statute. The cases of *State ex rel. Meyer v. Weiner,* 190 Neb. 30, 205 N.W.2d 649 (1973), and *State ex rel. Spillman v. Heldt,* 115 Neb. 435, 213 N.W. 578 (1927), indicate that the court should not enjoin the commission of an act for the sole reason that the act may constitute a violation of a criminal statute. The record in this case

indicates no immediate urgency is present. The public health, safety, and welfare of the people of Nebraska generally are in no way threatened by having the education of the appellant's daughter continue at home during further legal process. The record shows that testing of the child indicates that she is learning at a satisfactory rate. It may support a finding that she is learning more quickly and more fully at home than she would in an accredited school.

It should be noted that the appellant asserts a constitutional right in this case, that is, that under the provisions of the first, ninth, and fourteenth amendments to the Constitution of the United States she has the primary right and responsibility to control the education of her own child. I do not believe it can be said, in the light of longstanding opinions of the U.S. Supreme Court, that the claims of the appellant are wholly without merit or frivolous. I would stay the injunction pending final determination on the merits.

IN RE FORMAL COMPLAINT OF NEBCO, INC. NEBCO, INC., A CORPORATION DOING BUSINESS AS READY MIXED CONCRETE COMPANY, APPELLEE, V. BURLINGTON NORTHERN, INC., APPELLANT.

326 N.W.2d 167

Filed November 12, 1982. No. 44400.

Public Service Commission: Railroads. The Nebraska Public Service Commission is not empowered to require that switching charges be absorbed retroactively where the approved rate schedule for such switching did not require absorption.

Appeal from the Nebraska Public Service Commission. Reversed and remanded with directions.

Knudsen, Berkheimer, Beam, Richardson & Endacott, for appellant.

James W. Hewitt, for appellee.

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

PER CURIAM.

This is an appeal from an order of the Nebraska Public Service Commission (NPSC) sustaining a complaint of Nebco, Inc., a Nebraska corporation, doing business as Ready Mixed Concrete Company (Nebco), that Burlington Northern, Inc. (BN), violated the provisions of Neb. Rev. Stat. § 75-126 (Reissue 1981) in discriminating against Nebco by refusing to absorb the switching charges of the Omaha, Lincoln & Beatrice Railway Company (OLB) on carload lots of sand and gravel delivered to Nebco. The NPSC found BN had discriminated and ordered that Nebco not be required to pay BN $10,604.63 in switching charges for services rendered by OLB during 1978.

Section 75-126 provides in part: "(1) Except as otherwise provided in this section, no common carrier shall:

"(a) Charge, demand, collect, or receive from any person a greater or less compensation for any services rendered than it charges, demands, collects, or receives from any other person for doing a like or contemporaneous service;

"(b) Make or give any undue or unreasonable preference or advantage to any particular person;

"(c) Subject any type of traffic to any undue or unreasonable prejudice, delay, or disadvantage in any respect whatsoever; *Provided,* that all types of perishable freight and livestock shall have precedence in shipment;

"(d) Charge or receive any greater compensation in the aggregate for the transportation of a like kind of property or passengers for a shorter than for a longer distance over the same line or route, except as the commission may prescribe in special cases to

prevent manifest injuries; *Provided,* that no manifest injustice shall be imposed upon any person at intermediate points; *and provided further,* that nothing herein shall prevent the commission from making group or emergency rates;

"(e) Demand, charge, or collect, by any device whatsoever, a lesser or greater compensation for any service rendered than that filed with or prescribed by the commission; or

"(f) Change any rate, schedule, or classification in any manner whatsoever before application has been made to the commission and permission granted for that purpose."

BN's principal defenses are that BN's absorption rate of switching charges conforms to previous orders of the NPSC and that the NPSC's order amounted to an order of a rebate of an approved rate which NPSC had no authority to make.

A summary of the facts will assist in understanding the issues. OLB, a small railroad operating in Lincoln, offers switching services to other railroads by delivering railroad cars to customers who have places of business along its tracks. OLB is a wholly owned subsidiary of Nebco. Up until April 3, 1978, OLB's established and approved tariff for switching sand and gravel to points west of 27th Street was $9.79 per car when the same shipper tendered lots of 10 cars or more on the same day; east of 27th Street the tariff was $15.65 per car under the same conditions. Nebco's plant is located west of 27th Street. These switching charges had previously been approved by the NPSC and were included in BN's intrastate tariff, and it required BN to absorb these switching charges. Whether or not a line railroad absorbs switching charges of another line railroad is a voluntary matter between the railroads involved. BN and the Union Pacific absorb switching charges on a reciprocal basis. The record shows that BN absorbed switching charges when it interlined with the

Union Pacific and the latter performed switching services for BN in deliveries of sand and gravel to Capital Concrete Company, Nebco's competitor in Lincoln. The evidence indicated that this gave Capital a competitive advantage of 15 cents per cubic yard in the sale of mixed concrete.

On January 19, 1978, OLB applied to NPSC to increase its switching charges west of 27th Street to $15.65 per car. On March 20, 1978, after a hearing, the NPSC approved the requested increase which was to become effective April 3, 1978. Thereafter, BN absorbed switching charges on shipments to Nebco only to the extent it had previously done, at $9.79 per car, and billed Nebco for the difference. Nebco declined to pay and this action resulted.

In connection with the positions taken by the parties, it is necessary to note some matters regarding the proceeding before the NPSC involving the January 19, 1978, application. Five railroads filed objections to the increase, including BN. The NPSC's opinion and findings in that matter included the following: "After the hearing opened the applicant [OLB] amended the application be [sic] deleting that portion of the original application which could be interpreted to mean that the application included the request that the Nebraska Railroads should increase their absorption to the same as these charges. Shortly after this amendment the attorney for the protestants withdrew their protest and left the room. . . . It was not known why the five Nebraska Railroads would not agree to absorb switching charges to the same extent as they do among themselves, but since a request to raise the absorption figures accordingly was not included in the amended application, the Commission cannot deal with that problem at this point."

Thereafter, pursuant to another application and hearing, NPSC required BN to absorb OLB's switching charges in the amount set in the 1978 order.

The new order became effective February 13, 1979.

Nebco, as we have already indicated, contended that BN's refusal to absorb OLB's switching charges as it does for other railroads is discriminatory and that NPSC has authority to correct the discrimination. As legal authority for this position, it relies upon the language of the statute we have earlier quoted and cases decided thereunder, and, in particular, upon our opinion in *Myers v. Blair Tel. Co.*, 194 Neb. 55, 230 N.W.2d 190 (1975). It further argues that discrimination cannot be determined in advance but can only be done in light of a particular set of facts. It cites the provisions of Neb. Rev. Stat. § 75-118.01 (Reissue 1981) which, among other things, gives the NPSC authority to determine the validity of tariffs.

BN, on the other hand, argues that when the NPSC prescribes a rate scale, it exercises a legislative function and may not repeal or modify it retroactively. BN relies upon *Arizona Grocery v. Atchison Ry.*, 284 U.S. 370, 52 S. Ct. 183, 76 L. Ed. 348 (1932), and *Farmers Union Livestock Commission v. Union P. R. Co.*, 135 Neb. 689, 283 N.W. 498 (1939).

In *Myers,* this court upheld the action of the NPSC reducing retroactively previously approved rates. In so doing we relied upon § 75-126(1)(c), which provides: "(1) Except as otherwise provided in this section, no common carrier shall: . . . (c) Subject any type of traffic to any undue or unreasonable prejudice, delay, or disadvantage in any respect whatsoever . . . ." We also relied upon the authority granted the commission by the Constitution.

In that case the complaint before the NPSC was that the utility was not providing the service for which the previously approved rates had been established. The commission found that the services being furnished were inadequate. We said: "It seems to us to be axiomatic that the commission, as a part of its power and duty to establish rates which

will provide an adequate return and to regulate the services of utilities, must have the authority to compel the utility to render the service for which it induced the commission to fix an adequate rate. We hold that inherent in the power of the commission is its right to force a utility to give the service for which its rates have been fixed. As a corollary to that power must be the right, where the service is woefully inadequate, to require the utility to rebate some portion of the rates set for reasonably adequate service. To hold otherwise would permit a utility to profit by its own intentional or unintentional neglect. The record indicates that the service was so inadequate in this instance that the remedy chosen by the commission was the only one which would keep the company from confiscating the rates paid by the ratepayers for wholly inadequate service." *Myers* at 63, 230 N.W.2d at 196.

The case before us does not involve a question of failure to render adequate service, i.e., the service for which the rate was set. *Myers* is clearly distinguishable from the situation before us, and we believe the controlling principles are set forth in *Farmers Union Livestock Commission v. Union P. R. Co., supra,* and *United Mineral Products Co. v. Nebraska Railroads,* 177 Neb. 898, 131 N.W.2d 604 (1964). At the time we rendered our opinion in *Farmers Union,* a reparation statute existed. Comp. Stat. § 75-510 (1929). It purportedly authorized the railway commission (now NPSC) to make orders requiring any railroad or express company to refund any unjust, unreasonable, or discriminatory rates charged. We held that the statute did not authorize the commission to retroactively condemn as unlawful a rate or charge previously established as lawful by it and subject a carrier, which has conformed thereto, to the payment of reparations measured by what the railway commission "now holds" it should have decided in the earlier proceedings to be

a reasonable and lawful rate, and that such a statute, under the circumstances, violated the due process clauses of the state and federal Constitutions.

In *United Mineral Products Co.* we adhered to the principle enunciated in *Farmers Union,* saying: "The commission's action in finding the amount due under the supersedeas bond had the effect of changing the rates retroactively which it is not authorized to do. Farmers Union Livestock Commission v. Union P. R.R. Co., *supra.*" *United Mineral Products Co.* at 905, 131 N.W.2d at 609.

The distinction between our holding in *Myers* and our holding in the latter two cases is that in *Myers* the utility was not performing the service for which the rate was set. The distinction is significant and basic. In the present case the rate had been lawfully set. The NPSC order did not require absorption of the switching charge by the railroad with which the shipment originated. There exists in this case no question of failure to furnish the service for which the rate was established. As we said in *United Mineral Products Co.,* " 'Rates and charges duly established by the railway commission, until altered or set aside, have the effect of a legislative enactment.' " *Id.* at 902, 131 N.W.2d at 607.

The NPSC exceeded its constitutional and statutory authority in this instance. The order of the NPSC is reversed and the case is remanded with directions to dismiss the complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., participating on briefs.

ALVIN R. SPILINEK AND ELLEN SPILINEK, HUSBAND AND WIFE, APPELLANTS, V. RICHARD SPILINEK AND HILDA SPILINEK, HUSBAND AND WIFE, APPELLEES.

326 N.W.2d 170

Filed November 12, 1982. No. 44434.

1. **Adverse Possession: Easements.** To establish an easement by prescriptive use, such use must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and continuous for the full prescriptive period.
2. **Boundaries: Acquiescence.** Where a common boundary marked by a fence line has been recognized and acquiesced in by the abutting landowners and their grantors for more than 10 consecutive years, such common boundary is then the established boundary between the properties involved.

Appeal from the District Court for Howard County: JOSEPH D. MARTIN, Judge. Affirmed as modified.

Robert E. Wheeler of Stowell & Wheeler, P.C., for appellants.

Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellees.

Heard before KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and RIST, D.J., and COLWELL, D.J., Retired.

RIST, D.J.

This is an action in equity to quiet title to real estate, to determine a boundary line, and to determine whether or not a prescriptive easement for a roadway exists upon plaintiffs' land.

Plaintiffs, Alvin R. Spilinek and Ellen Spilinek, are the record owners of the southwest quarter of Section 2, Township 15 North, Range 11 West of the 6th P.M., Howard County, Nebraska. Defendants, Richard Spilinek and Hilda Spilinek, are the record owners of the south half of the northwest quarter in said Section 2. Plaintiffs' north line and defendants' south line is the common boundary between the tracts and is the boundary in dispute. The pre-

scriptive roadway easement claimed by defendants runs generally parallel to the common boundary and on the north side of plaintiffs' property.

Howard County, Nebraska, was made a third-party defendant on the basis that defendants claimed in part that the roadway in issue existed by virtue of a prescriptive easement to the public. The county has not appeared in this court as either appellant or appellee.

Following trial in the District Court, that court entered its order that no public road had been acquired by prescription, that defendants had a prescriptive easement in their own right over the north 34 feet of plaintiffs' property for ingress and egress to defendants' field for general farming purposes, and that the common boundary line in dispute should be that established by original government survey. From such order plaintiffs have appealed, alleging as error the trial court's failure to establish the boundary in accordance with certain fenceposts shown in the evidence, and in finding a prescriptive easement in favor of defendants.

On appeal to this court the matter is considered de novo, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Pinney v. Hill,* 191 Neb. 844, 218 N.W.2d 212 (1974).

We note at the outset that defendants assert a right to the prescriptive roadway on two bases: first, a prescriptive public right-of-way; and second, a prescriptive easement in their own right. A party may maintain an action for a prescriptive easement on such alternative grounds, but in such event, in order to sustain an easement of the parties in their own right, it must be shown that such right does not depend upon a similar right in others. *Scoville v. Fisher,* 181 Neb. 496, 149 N.W.2d 339 (1967); *Svoboda*

v. Johnson, 204 Neb. 57, 281 N.W.2d 892 (1979).

A de novo review of the record justifies the following findings of fact: Defendants purchased their land in 1948 and from that time until 1979 used the roadway in question in their farming operations without interference. Plaintiffs acquired their land in 1979 and shortly thereafter sought to block defendants' use of the roadway, resulting in this dispute. The roadway has apparently existed since before the turn of the century. There is some evidence it was used in part with respect to a country school once located in the southeast corner of defendants' property, which school was abandoned in the 1920s. Thereafter, the roadway was used by defendants and their predecessors in title incident to their farming operations. The evidence is in dispute as to any public use, and with respect to the use incident to the school, there was evidence it was used only by the tenants of a predecessor in title to plaintiffs' land. Suffice it to say at this juncture, the record is such that the trial court was justified in finding no public prescriptive use, a finding with which we agree.

The evidence further reflects that presently the roadway is well defined with an elevation at various points, particularly near the west end, of several feet above the adjoining fields on each side, and that the width of such roadway is 34 feet. The defendants have used the roadway for farming purposes, particularly in the spring and fall, without interference for over 30 years. Such use was continuous and open and was known by plaintiffs and their predecessors in title. Plaintiffs' evidence suggesting a permissive use falls short of meeting plaintiffs' burden of rebutting the evidence of adverse use by defendants. See *Hopkins v. Hill,* 160 Neb. 29, 68 N.W.2d 678 (1955). We conclude from the evidence that defendants' use of the roadway was adverse and under a claim of right by them for farm use as determined by the trial court, and that the width of

said roadway of 34 feet is appropriate.

The evidence reflects such use by defendants as meets the criteria for a prescriptive easement by adverse user as set forth in many decisions of this court. See *Hopkins v. Hill, supra,* as representative of such holding. However, with respect to the description of the road's location, we modify the trial court's order as hereinafter set forth.

The trial court established the boundary line between the lands of the parties according to the original government survey thereof. The record does not reflect any such survey was ever made. Additionally, the evidence is clear that the parties and their predecessors regarded and acquiesced in a fence line along the north side of the road as marking the common boundary between the tracts, and have so treated this line for more than 30 years. The evidence reflects the parties agree that the fence was established along a line now marked by certain existing fenceposts; one is a corner post at the southeast corner of defendants' land, and two others are midway between such point and the western terminus. The evidence also shows that there now exists near the west end of the boundary line and in the southwest corner of defendants' property a corner post which is the northeasterly post of two posts that are, in turn, north and east of a culvert in the public road running north and south along the west line of both properties, which corner post is located 5 feet north of the line between the properties. Said east corner post, the two midway posts, and the point 5 feet south of the west corner post above described fairly establish the line between the properties of the parties.

Such line having been used and acquiesced in for more than 30 years is, under the evidence, the boundary line between the properties and should be so established. Accordingly, the order of the trial court should be modified to reflect the same and that

such line is the north line of the east-west prescriptive roadway hereinbefore determined and extending 34 feet in width to the south. Said easement should be so described.

We therefore affirm the judgment of the trial court with the modification of the location of the boundary line between the lands of the parties as set forth in this opinion and the location of the prescriptive easement with respect thereto.

The cause is remanded for entry of an order and decree in accordance herewith.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOHN MCARTHUR, RESPONDENT.

326 N.W.2d 173

Filed November 12, 1982. No. 44488.

1. **Disciplinary Proceedings: Appeal and Error.** It is the obligation of this court in disciplinary proceedings to review the evidence de novo to determine if discipline should be imposed, and, if it should, the extent thereof.
2. **Disciplinary Proceedings: Laches.** A lapse of time occurring since acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense.
3. **Disciplinary Proceedings: Presumptions: Proof.** In disciplinary proceedings involving members of the bar, a presumption of innocence applies; culpability of the person charged must be established by a clear preponderance of the evidence so the court is satisfied to a reasonable certainty that the charges are true.
4. **Disciplinary Proceedings.** The oath taken by one admitted to the bar requires him to faithfully discharge his duties and refrain from impeding or obstructing the administration of justice.
5. _____. Upon admission to the bar one assumes the duties of an officer of the court, and in the performance of those duties he must conform to the ethical standards generally recognized by the profession.
6. **Disciplinary Proceedings: Appeal and Error.** To determine whether and to what extent discipline should be imposed, it is nec-

essary that we consider the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law.

Original action. Judgment of suspension.

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

Hyman Polsky of Bailey, Polsky, Cada & Todd, for respondent.

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

PER CURIAM.

This is an original proceeding wherein the Nebraska State Bar Association, relator, filed formal charges against John McArthur, respondent, who was admitted to the practice of law in this state on June 10, 1935.

The charges filed in this court on July 20, 1981, allege, among other things, that respondent violated his oath of office as an attorney. That oath is contained in Neb. Rev. Stat. § 7-104 (Reissue 1977), which provides, as it did on the date of respondent's admission: "You do solemnly swear that you will support the Constitution of the United States, and the Constitution of this state, and that you will faithfully discharge the duties of an attorney and counselor, according to the best of your ability."

The record made before the referee of the Third Judicial District Committee on Inquiry reveals that on or about October 1, 1971, respondent filed a "Final Report and Account and Petition for Discharge" with the county court of Lancaster County in the matter of the estate of Hannah Davis, numbered E 21535 in the records of said court. That document was signed by respondent and verified by the executor of the estate, and read in pertinent part

as follows: "Petitioner further shows that the real estate of which decedent died possessed of an interest consists of the following:

"Lot 17, Block 2, Houtz and Baldwin's Subdivision, Lincoln, Lancaster County, Nebraska	$ 7800
"The South 50 feet of Lot 1, Block 205, Havelock, now Lincoln, Lancaster County, Nebraska	$ 4290

. . . .

"WHEREFORE, Petitioner prays that his final report and account be approved, that upon payment of the balance of the costs, he be discharged as executor, and that the court determine that the real property be assigned in accordance with the will of deceased and that such other relief as is proper be ordered." Thereafter, the county court entered its final decree confirming and approving the final report and account of the executor and "assigned" the real property to the devisees named in the will. In truth and fact, the Houtz and Baldwin's Subdivision parcel had been sold, on or about May 13, 1969, for $7,500, and the other land had been sold, approximately a year later, for $1,000. The final report failed to disclose the sales, accounted for none of the proceeds, and did not explain the application of such funds.

The referee concluded that the "careless and cavalier attitude of the respondent" toward the county court warranted his censure and reprimand by this court, and so recommended. We observe it is our obligation to review the evidence de novo to determine if discipline should be imposed, and, if it should, the extent thereof. *State ex rel. Nebraska State Bar Assn. v. Michaelis,* 210 Neb. 545, 316 N.W.2d 46 (1982); *State ex rel. Nebraska State Bar Assn. v. Jensen,* 171 Neb. 1, 105 N.W.2d 459 (1960); *State ex rel. Nebraska State Bar Assn. v. Fisher,* 170 Neb. 483, 103 N.W.2d 325 (1960). We judge that mis-

leading a court warrants a more severe punishment than mere public censure and reprimand.

We take note of the fact that almost a decade has passed from the time of the acts in question to the filing of the formal charges. However, a lapse of time occurring since acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense. *State ex rel. Nebraska State Bar Assn. v. Jensen, supra; State ex rel. Nebraska State Bar Assn. v. Bates,* 162 Neb. 652, 77 N.W.2d 302 (1956); *State ex rel. Nebraska State Bar Ass'n v. Merten,* 142 Neb. 780, 7 N.W.2d 874 (1943). There is nothing in this case which demonstrates that the delay has worked to respondent's prejudice as regards this issue.

In disciplinary proceedings involving members of the bar, a presumption of innocence applies; culpability of the person charged must be established by a clear preponderance of the evidence so the court is satisfied to a reasonable certainty that the charges are true. *State ex rel. Nebraska State Bar Assn. v. Michaelis, supra.* In the instant matter there is no question but that the respondent misled the county court by concealing the parcel sales and assisting his client in the filing of a report which did not accurately account for the estate's receipts and disbursements.

The oath taken by the respondent requires him to faithfully discharge his duties and refrain from impeding or obstructing the administration of justice. *State ex rel. Nebraska State Bar Assn. v. Rhodes,* 177 Neb. 650, 131 N.W.2d 118 (1964); *State ex rel. Nebraska State Bar Assn. v. Palmer,* 160 Neb. 786, 71 N.W.2d 491 (1955). Upon admission to the bar one assumes the duties of an officer of the court, and in the performance of those duties he must conform to the ethical standards generally recognized by the profession. *State ex rel. Hunter v. Crocker,* 132 Neb. 214, 271 N.W. 444 (1937). The license to prac-

tice law is granted on the implied understanding that the lawyer shall in all things demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. *State ex rel. Nebraska State Bar Assn. v. Palmer, supra.*

There can be no question that concealing material facts from a probate court and presenting a report known by respondent to be less than a true, accurate, and full accounting of the proceeds which came into his client's possession on behalf of the estate served to demean that court of justice and its judicial officer, impeded and obstructed the administration of justice, and brought discredit to respondent, the profession, and the courts.

Respondent's explanation that the report as filed preserved the continuity of title and that anyone who wished more detailed information could ask for it merely describes a lazily slipshod practice; it does not excuse the failure to deal completely and honestly with the facts as they were known to respondent.

To determine whether and to what extent discipline should be imposed, it is necessary that we consider the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. *State ex rel. Nebraska State Bar Assn. v. Michaelis, supra.* The record before us fails to disclose that any specifically delineative injuries or other losses occurred as a consequence of respondent's dereliction. We therefore conclude it is not appropriate to disbar the respondent in this instance. Accordingly, we hereby only suspend the respondent from the practice of law for a period of 1 year.

JUDGMENT OF SUSPENSION.

IDAHO FOREST INDUSTRIES, INC., AN IDAHO CORPORATION, APPELLANT, V. THE MINDEN EXCHANGE BANK & TRUST COMPANY, APPELLEE.

326 N.W.2d 176

Filed November 12, 1982. No. 44508.

Uniform Commercial Code: Banks and Banking. The statutory rule that a payor bank is accountable for a demand item presented to it and not settled for, paid, returned, or a notice of dishonor sent before the midnight deadline may be varied or waived by agreement. Neb. U.C.C. §§ 4-302, 4-103 (Reissue 1980).

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

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

Jerry C. Stirtz and Martin, Stirtz & Martin, for appellee.

William B. Brandt of Brandt & Horan, for amicus curiae Nebraska Bankers Assn.

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

BOSLAUGH, J.

On December 20, 1977, Gemini Housing Corporation issued its check in the amount of $19,756.39 drawn on its account in The Minden Exchange Bank & Trust Company of Minden, Nebraska, the defendant. On December 22, 1977, it issued its check in the amount of $10,620.06 drawn on the same account. Both checks were payable to the plaintiff, Idaho Forest Industries, Inc.

The plaintiff deposited the checks in its account in the Bank of Idaho at Boise, Idaho. The checks were forwarded through normal banking channels to the defendant, which returned them to the Bank of Idaho unpaid with a notation that the checks were drawn on uncollected funds.

On January 12, 1978, the Bank of Idaho notified

the plaintiff that payment had been refused and charged the checks back against the plaintiff's account.

The Bank of Idaho then stamped "FOR COLLECTION ONLY" on the backs of the checks and sent them to the defendant by mail with a transmittal letter which stated: "PLEASE MAKE SEPARATE REMITTANCE OR CREDIT FOR THIS COLLECTION AS INDICATED BELOW, MENTIONING COLLECTION NUMBER." The letter further stated: "Hold 10 days if necessary"; "Deliver documents only on payment"; and "Advise nonpayment by mail."

On February 1, 1978, the Bank of Idaho sent a "TRACER" to the defendant, which requested the defendant to "investigate and report" concerning the "undernoted collections," which were the two Gemini checks. The defendant reported: "Items received. Funds insufficient to cover. Company closed."

On April 20, 1978, the Bank of Idaho sent a second "TRACER" to the defendant, which requested the defendant to "PLEASE PAY OR RETURN CHECKS." The defendant then returned the checks to the Bank of Idaho.

On the above facts, which are undisputed, the plaintiff claims the defendant was strictly liable to the plaintiff for the amount of the checks. The trial court found generally for the defendant. The plaintiff has appealed.

The plaintiff's theory of the case is based upon the "midnight deadline" rule applicable to demand items presented to payor banks. See Neb. U.C.C. § 4-302 (Reissue 1980). The plaintiff argues that absent an agreement that the defendant bank was to hold the checks for collection for a reasonable time until funds became available, the defendant became absolutely liable to the plaintiff for the amount of the checks when it failed to pay, return, or send notice

of dishonor before the "midnight deadline," or within 10 days thereafter.

In *Western Air & Refrigeration v. Metro Bank of Dallas,* 599 F.2d 83 (5th Cir. 1979), a case involving somewhat similar facts, the U.S. Court of Appeals, Fifth Circuit, held that a payor bank was not liable under § 4-302 for a check left with it for collection. In the *Western Air* case the check was dishonored for insufficient funds when presented at the bank by the payee. After discussion with the officers of the bank and of the drawer, the payee left the check at the bank to be paid when sufficient funds were in the account. The court held that under these circumstances the check was not presented as a demand item. The court said: "The discussion in the afternoon, concluded by Furnish's leaving the Boat Harbor check with Metro, did not constitute a demand for payment from the payor bank. The receipt that Furnish received in exchange for the check stated that the check would be held for collection and that Boat Harbor was the payor. The receipt makes clear that both Western Air and Metro were looking to Boat Harbor for the funds to pay the check. This case is similar to *Kirby v. Bergfield,* 186 Neb. 242, 182 N.W.2d 205 (1970). There the holder of a demand item called the payor bank and asked if there were sufficient funds in the drawer's account to cover the check. The payee argued that this constituted a presentment. The court disagreed, concluding that '[t]he telephone call in this case constituted an inquiry as to circumstances which might indicate whether the check would or would not be paid upon future presentment in due course. It was not a presentment and demand for payment envisioned by section 3-504.' *Id.* at 247, 182 N.W.2d at 208. The court required an immediate demand for payment. A step preliminary to that present demand for payment did not constitute a presentment. In this case, leaving the check with Metro was a preliminary

step. The parties knew that until Harbor Boat deposited funds sufficient to cover the check issued to Western Air, Metro would not pay the check. Leaving a check with a bank with this type of understanding is not a present demand for payment and not a presentment within the meaning of § 3-504. . . . The facts which lead us to the conclusion that there was no presentment also lead to a conclusion that the parties agreed under § 4.103 that the midnight deadline of § 4.302 did not apply to the transaction in this case." *Id.* at 88-89.

In *David Graubart, Inc. v. Bank Leumi Trust,* 48 N.Y.2d 554, 399 N.E.2d 930, 423 N.Y.S.2d 899 (1979), a case involving facts much more favorable to the plaintiff, the Court of Appeals of New York held the payor bank was not liable to the payee under § 4-302. In the *Graubart* case the check, which had been dishonored for insufficient funds, was returned to the payor bank with these instructions: "Return immediately if not paid unless otherwise instructed," and "remit cashier's check when paid." The check was not returned to the depositary bank until after 7 banking days had elapsed.

The decision in the *Graubart* case was based upon a finding that an agreement existed to suspend the "midnight deadline" rule between the depositary bank and the payor bank as a result of banking custom and the "advice to customer" slip which accompanied the check and contained the special instruction. The court said: "Further, in this case the reasonableness of the suspension of the midnight deadline is demonstrated by an examination of the underlying purpose of the rule. . . . These concerns, however, are irrelevant to any evaluation of the custom followed under the agreement between the banks here. It creates no provisional credits that must be firmed up, and the payee can only collect when the payor bank remits its cashier's check, thus signifying that the drawer's account received suf-

ficient funds to cover the check. By its nature, the procedure singles out the item as an exceptional one; no transferor will assume it has been paid until specific notice is received.

"Moreover, the concept of a midnight deadline is not compatible with any approach under which the payor bank seeks to wait for the deposit of funds in the drawer's account. The reasonableness of such a banking custom must, therefore, be measured on its own terms. We conclude that this criterion is met when a depositary bank takes a possibly worthless instrument and directs the payor bank to adopt a technique that may provide the only chance for collection.

"There is nothing unfair about this procedure. It is calculated to produce satisfied obligations in many instances where legal recourse, with all its attendant expense, inconvenience and uncertainty, would otherwise be necessary. Furthermore, the payee here cannot claim it was injured by its reliance on the payor bank's silence after receipt of the item; the prior dishonor provided adequate warning of the questionable safety of the instrument. In any event, the payee's right to sue the drawer on the underlying obligation was revived upon the first dishonor, and representment in no way cut short that prerogative (Uniform Commercial Code, § 3-802, subd. [1], par. [b]; § 4-301, subd. [3]; *Blake v. Woodford Bank & Trust Co., supra,* pp. 598-599).

"We therefore hold that the payor bank's adherence to the depositary bank's instructions for processing the drawer's check does not render it liable to the payee under section 4-302. Accordingly, the certified question should be answered in the negative, the order of the Appellate Division reversed, and summary judgment granted in the defendant's favor on the fourth cause of action." *Graubart* at 935-36, 423 N.Y.S.2d at 904-05.

The plaintiff concedes that the effect of the provi-

sions of article 4 may be varied by agreement. See Neb. U.C.C. § 4-103 (Reissue 1980). There is no issue as to negligence, ordinary care, or lack of good faith because there is no contention that there were sufficient funds in the Gemini account at any time after January 12, 1978, from which the checks could have been paid. The plaintiff relies upon strict liability, and only strict liability, under the statute.

We think the facts and circumstances in this case indicate that an agreement or understanding existed between the parties that the checks were to be held for collection by the defendant for a reasonable time until funds became available.

When the checks were returned to the Bank of Idaho the first time, that bank immediately charged them back against the account of the plaintiff and notified the plaintiff that the checks had been dishonored. The Bank of Idaho then returned the checks to the defendant "for collection" with instructions to "hold for 10 days if necessary." This was a clear indication that the Bank of Idaho did not want the checks to be returned unpaid before the midnight deadline.

The "TRACER" sent on February 1, 1978, did not request the defendant to return the checks to the Bank of Idaho. The defendant was requested only to investigate and report concerning the "undernoted collections." Not until April 20, 1978, when the second "TRACER" was sent to the defendant, did the Bank of Idaho request that the checks be returned. Upon receipt of this request the defendant promptly returned the checks to the Bank of Idaho.

The record sustains the finding of the trial court that the defendant was not liable to the plaintiff for failure to return the checks to the Bank of Idaho before the midnight deadline or within 10 days thereafter. The judgment of the District Court is affirmed.

AFFIRMED.

BUFFALO COUNTY, NEBRASKA, APPELLEE, V.
J. RAYMOND RICHARDS ET AL., APPELLEES,
JOHN A. SCHWEITZER, APPELLANT.

326 N.W.2d 179

Filed November 12, 1982. No. 81-580.

1. **Parties: Appeal and Error.** A cross-appeal may not be asserted by one appellee against another appellee.
2. **Negotiable Instruments: Consideration.** A negotiable instrument as between the parties requires a consideration the same as any other contract.
3. **Promissory Notes: Consideration.** Consideration for a promissory note may be furnished by a third party.
4. **Agency.** An agency between husband and wife may be created by slight circumstances.
5. **Promissory Notes.** A valid promissory note may be given as security for a debt already owed by the party giving it, or by a third party.
6. **Mortgages: Consideration.** A preexisting debt is sufficient consideration for a mortgage securing the debt.
7. **Consideration.** A consideration moving to one of several joint makers is good as to all.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Cross-appeal dismissed. Affirmed in part, and in part reversed and remanded with directions.

Richard J. Hove of Hove and O'Neill, for appellant.

Tye, Worlock, Tye, Taylor & Hopkins, for appellee FDIC.

Ross, Schroeder & Fritzler, for appellee Johnson Estate.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

PER CURIAM.

This appeal arises out of a controversy between lienors concerning the distribution of surplus proceeds arising from the sale at tax foreclosure of real estate owned by Ronald E. Bycroft. The property

was sold on March 3, 1981, and the sale confirmed on April 15, 1981. The trial court ordered the proceeds of the sale distributed as follows: Costs $300.68; real estate taxes $988.87; Anna L. Johnson, administratrix, $21,793.24 plus interest; and the balance to Ronald E. Bycroft and Jeannetta M. Bycroft. From this order, John A. Schweitzer has appealed.

Schweitzer claims under a mortgage executed on December 1, 1973, by Ronald E. Bycroft and Jeannetta M. Bycroft and recorded December 12, 1973. Anna L. Johnson, administratrix, claims under a judgment entered in the District Court on April 24, 1974. The trial court found the Schweitzer mortgage was invalid and that Schweitzer was not entitled to any of the proceeds of the sale.

The Federal Deposit Insurance Corporation, receiver of the Elm Creek State Bank, has attempted to assert a cross-appeal. It claims under a judgment which the trial court found was dormant and not a lien on the property. Because the cross-appellant seeks no relief against the appellant, the cross-appeal is without merit and must be dismissed. A cross-appeal may not be asserted by one appellee against another appellee. See *Hansen v. Hasenkamp,* 192 Neb. 530, 223 N.W.2d 44 (1974).

The record shows the following facts and circumstances concerning the Schweitzer mortgage. John A. Schweitzer and Clara M. Schweitzer are the parents of Jeannetta M. Bycroft. On July 1, 1969, Clara M. Schweitzer delivered her check, drawn on the personal account of Clara M. Schweitzer, in the amount of $18,000 to Jeannetta Bycroft. Mrs. Schweitzer testified that the money was intended as a loan to her daughter and son-in-law, Ronald E. Bycroft.

On May 30, 1970, Ronald E. and Jeannetta M. Bycroft executed and delivered their promissory note in the amount of $21,000 to John A. Schweitzer, as payee. John A. Schweitzer testified that the note

was for the amount of the loan plus interest and any additional advances made.

On December 1, 1973, the Bycrofts executed and delivered the mortgage in the amount of $21,000 on the property, naming John A. Schweitzer as payee.

The trial court found that the prior debt of Jeannetta M. Bycroft to Clara M. Schweitzer would be sufficient consideration to support a promissory note to Mrs. Schweitzer but not to Mr. Schweitzer; that the promissory note failed for want of consideration; and that the mortgage was invalid for the same reason. The issue upon the appeal is whether the Schweitzer mortgage was valid.

"[A] negotiable instrument as between the parties requires a consideration the same as any other contract . . . ." *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.*, 156 Neb. 65, 77, 54 N.W.2d 392, 400 (1952). See Neb. U.C.C. § 3-408, Comment 3 (Reissue 1980). In *Chonowski v. Dyke*, 82 Ill. App. 3d 802, 403 N.E.2d 301 (1980), the court stated that consideration for a note can be furnished by a third party. In *Read v. Kipke*, 535 P.2d 1130, 1131 (Colo. App. 1975), the court held that "Consideration need not be given by the payee of a note but may be given by a third party." The Supreme Court of Connecticut in *Fisher v. Lehrer*, 149 Conn. 106, 111, 175 A.2d 707, 709 (1961), said: "A promissory note made to a payee in return for a consideration received by the maker from a third person is binding on the maker." See, also, *Potts v. Levin*, 113 Ga. App. 4, 147 S.E.2d 1 (1966); *Mason v. Blayton*, 119 Ga. App. 203, 166 S.E.2d 601 (1969); *Behrens v. Apessos*, 39 Mich. App. 426, 197 N.W.2d 886 (1972).

The rule is stated at 10 C.J.S. *Bills and Notes* § 148 b. at 602 (1938) in this way: "The consideration or benefit need not necessarily pass or flow to the obligor or promisor, or come from the obligee or promisee. If given at the instance or request of the promisor, there may be a sufficient consideration in

the form of a benefit given to a third person, or a benefit moving from a third person."

We believe the evidence was sufficient to conclude that John A. Schweitzer was named payee in the note and mortgage on behalf of his wife. Clara intended the loan as one from both her and her husband. John knew that Clara was writing the check. Both Clara and John discussed the loan and the taking of the mortgage as security. Their marital relationship is an important factor.

Although the record does not expressly reflect that Clara entered into the transaction as agent for John or that John was payee in a similar capacity for Clara, agency can be implied from the facts and circumstances. In *Mead Co. v. Doerfler,* 148 Neb. 75, 77-78, 26 N.W.2d 393, 395 (1947), this court said: " 'Agency . . . will not be presumed from the marital relation; but the fact that the wife has such knowledge [of husband's activity on her property], in the light of other evidence, may be of strong corroborative value. Owing to the close relationship existing between husband and wife, an agency by the husband may be created by slight circumstances. It is unnecessary that they enter into any formal contract of agency, nor is it necessary that the wife expressly state to her husband that she gives him authority to act. Such an agency may be inferred from things said and acts done.' "

The fact that the note and mortgage were given for an antecedent consideration is of no importance. A valid note may be given as security for a debt already owed by the party giving it, or by a third party. *Newman Grove Creamery Co. v. Deaver,* 208 Neb. 178, 302 N.W.2d 697 (1981); *First Nat. Bank of Omaha v. Kizzier,* 202 Neb. 369, 275 N.W.2d 600 (1979); § 3-408. A preexisting debt is sufficient consideration for a mortgage securing the debt. *O'Neill Production Credit Assn. v. Mitchell,* 209 Neb. 206, 307 N.W.2d 115 (1981).

The note and mortgage do not fail for want of consideration because no consideration flowed directly to Ronald E. Bycroft. " 'A consideration moving to one of several joint makers . . . is good as to all.' " *Stockmens State Bank v. Pollat,* 130 Neb. 244, 248, 264 N.W. 875, 877 (1936).

The statute of limitations was not a defense to foreclosure of the mortgage. The statute was not pleaded and, in any event, the period of limitation had not expired. See *J. I. Case Credit Corp. v. Thompson,* 187 Neb. 626, 193 N.W.2d 283 (1971); *Alexanderson v. Wessmann,* 158 Neb. 614, 64 N.W.2d 306 (1954).

The cross-appeal of the Federal Deposit Insurance Corporation is dismissed.

The judgment of the District Court is in part affirmed and in part reversed, and the cause is remanded with directions to enter a judgment in conformity with this opinion.

CROSS-APPEAL DISMISSED.
AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

SIEBLER HEATING & AIR CONDITIONING, INC., APPELLANT, V. HAROLD R. JENSON, APPELLEE.

326 N.W.2d 182

Filed November 12, 1982. No. 81-611.

1. **Contracts.** No agreement can be implied where there is an express one existing. Thus, an express contract precludes the existence of a contract implied by law or a quasi-contract.
2. **Pleadings: Proof.** It is fundamental that a party cannot plead one cause of action and then introduce proof to establish another.
3. **Contracts: Proof.** A party cannot allege an express agreement and then, over objection, prove and recover on a cause of action of quantum meruit.
4. **Judgments: Appeal and Error.** In reviewing an appeal from the decision of a trial court in a law action, the review is not de novo.

The judgment of the District Court will not be set aside on appeal unless it is clearly wrong and not supported by the evidence.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed.

Glen A. Burbridge and Scott C. Hoyt of Kutak Rock & Huie, for appellant.

James B. Cavanagh of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellee.

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

KRIVOSHA, C.J.

The appellant, Siebler Heating & Air Conditioning, Inc., appeals from a judgment entered by the District Court for Douglas County, Nebraska, dismissing Siebler's action against the appellee, Harold R. Jenson. We affirm.

By its amended petition Siebler alleged the following: Prior to April 8, 1974, Bruce Miller, a general partner of Candlewick Apartments Co. (Candlewick), requested Siebler to submit a bid to E. G. Miller Realty Co., Inc., setting forth the terms and conditions under which Siebler would agree to undertake the completion of certain heating, ventilating, and air-conditioning work in connection with the construction of certain multiapartment premises allegedly owned by Candlewick. In response thereto Siebler did submit its written bid, and on April 12, 1974, the bid was accepted by Candlewick. Siebler performed the work between April and December of 1974 and, at the request of Candlewick, billed Total Concepts, Inc. (which the evidence discloses was a corporation principally owned by Bruce Miller and one in which Harold R. Jenson, the appellee herein, had no interest). On May 2, 1975, Candlewick filed a petition in bankruptcy in the U.S. District Court for the District of Nebraska, and on July 25, 1975, Bruce

Miller also filed a petition in bankruptcy in the same court. The amended petition further alleged that Candlewick's and Miller's assets are insufficient to satisfy the debt owing Siebler and that, at all times material, E. G. Miller Realty Co. and Total Concepts, Inc., were, with respect to Candlewick and its general partners, a sham and mere alter egos of Candlewick. The contract offered in evidence provided that material and labor would be provided on a time-and-material basis. Siebler therefore prayed for judgment against Jenson in the amount of $35,348.27.

While the pleadings are not absolutely clear, apparently the theory upon which suit was brought was that there was an express contract with Candlewick, a partnership, and that because the partnership's assets were insufficient to satisfy the debt, Jenson, as one of the general partners of Candlewick, should be held liable to Siebler for the balance due. The answer of Jenson, filed in response to the original petition, set up a number of affirmative defenses, including the fact that no labor or material was furnished for the benefit or at the request of Candlewick, that an express contract between Siebler and Total Concepts, Inc., existed, and that Jenson had no interest in either E. G. Miller Realty Co. or Total Concepts, Inc. Certain other affirmative defenses were raised but, for purposes of this appeal, need not now be considered.

On appeal in this court Siebler now argues that the decision of the trial court should be reversed and judgment entered for Siebler and against Jenson on the theory that a quasi-contract existed between Siebler and Jenson. In support of that position Siebler argues that quasi-contracts are created by law for reasons of justice. This position is fully supported by the authorities. In 66 Am. Jur. 2d *Restitution and Implied Contracts* § 2 at 943-44 (1973), the author notes: "For a quasi-contract neither prom-

ise nor privity, real or imagined, is necessary. In quasi-contracts the obligation arises, not from consent of the parties as in the case of contracts express or implied in fact, but from the law of natural immutable justice and equity. Where a case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfil that obligation. The duty, which thus forms the foundation of a quasi-contractual obligation, is frequently based on the doctrine of unjust enrichment." The doctrine of quasi-contracts has been supplanted in modern times by the doctrines of "unjust enrichment" and "restitution," but, in essence, is the same. See 66 Am. Jur. 2d, *supra* at 945.

Siebler makes a persuasive argument but for one major hurdle, which he is unable to overcome. The amended petition alleges the existence of an express contract, though there does exist a dispute as to whom the express contract is with. It has universally been held that there cannot be an express and an implied contract for the same thing existing at the same time. In 66 Am. Jur. 2d *Restitution and Implied Contracts* § 6 at 948-49 (1973), the author notes: "It is only when parties do not expressly agree that the law interposes and raises a promise. No agreement can be implied where there is an express one existing. Thus, an express contract precludes the existence of a contract implied by law or a quasi-contract." See, also, *Klebe v. United States,* 263 U.S. 188, 44 S. Ct. 58, 68 L. Ed. 244 (1923); *Snater v. Walters,* 250 Iowa 1189, 98 N.W.2d 302 (1959). Having pled and proved the existence of an express contract to pay a specific amount based upon time and material (though claiming that it was with Candlewick and not with Total Concepts, Inc.), Siebler is precluded from now seeking to have the court, on appeal, create a quasi-contract in lieu of the express contract upon which recovery was originally sought. In *Knoell Constr. Co., Inc. v. Hanson,*

205 Neb. 311, 313-14, 287 N.W.2d 439, 440 (1980), we said: "It is fundamental that a party cannot plead one cause of action and then introduce proof to establish another. A party cannot allege an express agreement and then, over objection, prove and recover on a cause of action of quantum meruit."

We likewise believe that one may not plead an express contract and then, as here, over objection of Jenson, seek to prove at trial or argue on appeal for the creation of a quasi-contract. The evidence discloses that there was no dispute between the parties as to the existence of an express contract. The dispute was simply whether the contract was with Candlewick or Total Concepts, Inc. Siebler maintained that the contract was with Candlewick. Jenson maintained that the contract was with Miller and Total Concepts, Inc. There was sufficient evidence adduced at trial from which the trial court could find that the contract was between Siebler and Miller, acting on behalf of Total Concepts, Inc., and, in any event, was not between Siebler and Candlewick. This, therefore, being a law action to review a suit on an express contract, in which a jury was waived, we believe that we are bound by the principle expressed by us recently in *Crawford v. Ham,* 209 Neb. 802, 803, 311 N.W.2d 896, 897 (1981): "In reviewing an appeal from the decision of a trial court in a law action, the review is not de novo. The judgment of the District Court will not be set aside on appeal unless it is clearly wrong and not supported by the evidence." See, also, *Pawnee Plastics, Inc. v. American Savings Co.,* 210 Neb. 131, 313 N.W.2d 262 (1981). We believe, therefore, that the judgment of the trial court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
NORMA FERRIS, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V.
DANIEL FERRIS, APPELLANT.
326 N.W.2d 185

Filed November 12, 1982. Nos. 82-005, 82-006.

1. **Criminal Law: Due Process: Identification Procedures.** Under due process, when there is a sufficient basis established for a voice identification, there is no essential difference between requiring the defendants to speak and having them stand for purposes of identification.
2. **Rules of Evidence.** By its plain language, Neb. Rev. Stat. § 27-901 (Reissue 1979) is directory rather than mandatory upon the trial court.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Barlow, Johnson, DeMars & Flodman, for appellants.

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

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

WHITE, J.

The defendants, Norma and Daniel Ferris, were found guilty of two counts of assault in the county court for Lancaster County, Nebraska. Each defendant was sentenced to 6 months' imprisonment on count I and to 9 months' imprisonment on count II, with sentences to be served consecutively in the county jail. The defendants appealed to the District Court for Lancaster County, which affirmed the convictions but reduced the sentences to 1 month's imprisonment on count I and to 3 months' imprisonment on count II, to be served consecutively. The defendants appeal to this court, assigning as error (1) that they were denied due process in an in-court voice identification procedure in the county court,

and (2) that the county court erred under Neb. Rev. Stat. § 27-901(2)(e) (Reissue 1979) by not directing the people participating in the in-court voice identification procedure to state something connected with the alleged assaults rather than the defendants' names and addresses and their status of employment. We affirm.

The victim, who is blind, was assaulted in her home where she resided alone. The record reveals that the victim had known Norma since Norma's birth, and Daniel since 1978. On May 27, 1981, the defendants went to the victim's residence, requesting a $125 loan to use as a downpayment on a car. The victim refused to loan the money. Before the defendants left, they told the victim that "We're going to have that car, one way, or another."

On May 30, 1981, the defendants returned to the victim's home and repeated their demands for the $125. The victim refused, whereupon Daniel Ferris grabbed the victim's arm and began to twist it while Norma Ferris slapped her in the face. The victim begged the defendants to stop, which they agreed to do if she would get her purse. Upon doing so, the defendants ordered her to accompany them to a used car lot. The defendants proceeded to purchase the car they wanted on the lot, with the victim providing $125 as a downpayment. The victim was then returned home. Several bruises appeared on her arm a few days later.

On June 17, 1981, the defendants again returned to the victim's home and forced their way in. The defendants knocked the victim down and repeatedly kicked her while she was on the floor. When the victim pleaded with the defendants to quit beating her, they replied: "Well, why did you call your sister, and tell her?" The victim stated that she did not call her sister, but, rather, her sister had called her. The defendants admonished her to say nothing of the incidents or she would receive more of the same

treatment, and next time "wouldn't be able to talk." Shortly after defendants had left, the victim received a telephone call from her sister inquiring if anything was wrong. She informed her sister of the beating. The sister told her to call the police immediately. The police investigated, and the defendants were charged with two counts of assault in the third degree.

At trial in the county court a voice identification was conducted due to the fact that the victim was blind. The court selected six voices, three males and three females, which included the defendants. Each male stated: "My name is Daniel Ferris. I am unemployed. I live at 418 North 27th, Lincoln, Nebraska." Each female stated: "My name is Norma Ferris. I am unemployed. I live at 418 North 27th, Lincoln, Nebraska." The victim picked out the voices of both defendants from among the other voices. The county court then announced from the bench that the victim had identified the defendants.

The defendants contend that the county court violated their due process rights by conducting an in-court voice identification which was unduly suggestive. The specific ground for the defendants' due process argument is that the people whose voices were offered in the identification process for comparison with those of the defendants were markedly different because they were better educated.

A determination as to whether identification procedures were unnecessarily suggestive and conducive to substantial likelihood of irreparable mistaken identification is to be made by consideration of the totality of the circumstances surrounding the procedures. *State v. Harris,* 205 Neb. 844, 290 N.W.2d 645 (1980).

We do not think that the admission of testimony relative to the in-court voice identification of the defendants deprived the defendants of due process of

law or in any way violated their constitutional right to a fair trial. The circumstances under which the defendants' voices were exhibited in court for identification were not unnecessarily suggestive and conducive to irreparable mistaken identification. *State v. Harris, supra.* When there is a sufficient basis established for a voice identification, there is no essential difference between requiring the defendants to speak and having them stand for purposes of identification.

There was sufficient foundation establishing the victim's familiarity with the defendants' voices. The victim knew Norma Ferris since she was born and knew Daniel Ferris for at least 3 years prior to the assaults. The victim had heard each of the defendants speak several times on the days in question. The basis for her identification was challenged on cross-examination. Under the circumstances, we find that her in-court voice identification of the defendants was admissible.

The defendants maintain that merely because other voices were offered for comparison, a lineup was held. However, all that occurred in this case was an in-court identification with additional voices offered for comparison. An in-court identification for a blind person may be conducted without any other voices, just as if the victim was sighted and the proper foundation laid. By analogy we look to previous holdings which state that an identification based upon a complaining witness' independent recollection has an origin independent of any lineups held. See *State v. Franklin,* 185 Neb. 62, 173 N.W.2d 393 (1970). It was more to the defendants' benefit that the other voices were offered for comparison at trial when it was not necessary for the court to do so.

The defendants' second assignment of error is that under § 27-901(2)(e) the county court should have directed the people participating in the in-court voice

identification procedure to say something connected with the alleged assaults rather than the defendants' names and addresses and their status of employment.

The relevant portion of § 27-901 sets forth: "(1) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. (2) *By way of illustration only, and not by way of limitation,* the following are examples of authentication or identification conforming with the requirements of this rule: . . . (e) Identification of a voice, whether heard first-hand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." (Emphasis supplied.)

We note that the plain language of § 27-901 is directory rather than mandatory. The purpose of § 27-901 is to require that "evidence [must be] sufficient to support a finding that the matter in question is what its proponent claims." Making certain that the defendants uttered the exact words used in the assaults was not critical in ensuring that the voices the victim heard when the assaults took place were those of the defendants.

Again, it may have been to the defendants' advantage to use neutral phrases rather than requiring them to repeat certain words which the victim said were used by the persons who assaulted her. This action on the part of the trial court avoided the effect of requiring the defendants to partially reenact the scene.

Finding no error, we affirm.

AFFIRMED.

McCOWN, J., participating on briefs.

CAPORALE, J., concurring.

I concur with the result in these cases but must ex-

press my perturbation at the trial judge's active participation in the prosecutorial function. It was the county *judge*, not the prosecuting attorney, who selected the persons to speak and who conducted the examination for purposes of enabling the victim to identify the defendants. Although the record does not support a finding that defendants were prejudiced by that action in this instance, we must bear in mind that justice is better served when judges remember they are adjudicators, not litigators. The proper administration of the law demands not only that judges refrain from actual bias but also that they avoid all appearance of unfairness or impropriety. See *Franks v. Franks,* 181 Neb. 710, 150 N.W.2d 252 (1967). A judge should never assume the role of prosecutor or advocate; his position is one of neutrality and he should never cross boundaries.

STATE OF NEBRASKA, APPELLEE, V. LEON R. ONDRAK, APPELLANT.

326 N.W.2d 188

Filed November 12, 1982. No. 82-163.

1. **Criminal Law: Prior Convictions.** Where conviction of a previous crime is an essential element of the crime charged, proof of prior convictions is properly made by offering in evidence the complaint or information, judgment rendered on the verdict or plea of guilty, evidence that the judgment has become final, and that the defendant in an earlier conviction is the same person presently before the court.
2. **Pleas: Convictions.** A plea of guilty is the equivalent of a conviction by trial and verdict or a finding of guilt by the court.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and James L. Foster, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

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

WHITE, J.

Appellant, Leon R. Ondrak, was convicted in the District Court for Lancaster County, Nebraska, of operating a motor vehicle while under the influence of alcoholic beverages (DWI). He was sentenced as a third offender to probation for 18 months, 60 days in the county jail, ordered not to drive any vehicle in the State of Nebraska for 6 months, and also had his license revoked for 6 months. The appeal followed, with a single assignment of error that one of the certified copies of his prior convictions was insufficient to prove his habitual offender status because it did not expressly show that the trial court made a finding of guilt. We affirm.

At the hearing to determine whether the appellant had been convicted twice previously of DWI offenses, the State offered two exhibits which were certified copies of court records. The exhibit which was objected to, and the one at issue, states as follows: "CHARGE: 7/24/77, operate or was in actual physical control of a motor vehicle when he/she had .10% or more by weight of alcohol in his/her body fluid as shown by chemical analysis of his/her blood, breath or urine. DISPOSITION: 8/1/77, plead nolo contendere. Fined $100 & costs, ordered not to drive any motor vehicle in Nebraska for any purpose for six months. Neal H. Dusenberry, Judge."

The ground for appellant's objection to the admission of the certified copy into evidence as a prior conviction is that the record failed to show that the Lincoln Municipal Court had rendered judgment on his plea of nolo contendere. The District Court overruled the objection and found that the appellant had

been convicted of two previous offenses as alleged in the information.

Where conviction of a previous crime is an essential element of the crime charged, proof of prior convictions is properly made by offering in evidence the complaint or information, judgment rendered on the verdict or plea of guilty, evidence that the judgment has become final, and that the defendant in an earlier conviction is the same person presently before the court. *State v. Lee,* 195 Neb. 348, 237 N.W.2d 880 (1976); *Danielson v. State,* 155 Neb. 890, 54 N.W.2d 56 (1952).

We recognize that there is a conflict of authority upon this question in other jurisdictions. However, we have adopted what we feel to be the better rule, and that is that making a plea of guilty is "the equivalent of a conviction by trial and verdict or a finding of guilt by the court." *Stewart v. Ress,* 164 Neb. 876, 881, 83 N.W.2d 901, 903 (1957). The appellant concedes that convictions founded upon a plea of nolo contendere are the same as a plea of guilty in that they may be used to support an enhanced sentence. See *State v. Orosco,* 199 Neb. 532, 260 N.W.2d 303 (1977). There is also support for this position in other jurisdictions. "The cases generally hold that a plea of nolo contendere followed by judgment or the pronouncement of sentence upon that plea amounts to a conviction." Annot., 5 A.L.R.2d 1080 at 1103 (1949).

In a case with somewhat similar facts, the Michigan Supreme Court in *People v. Adams,* 95 Mich. 541, 55 N.W. 461 (1893), allowed a prior conviction to be proved by a judgment "which showed that, upon a plea of guilty, respondent had been ordered to pay a fine of $100, and costs in the sum of $25, and, in default of payment of said sums, to be confined in the common jail until such fine and costs were paid." *Id.* at 542, 55 N.W. at 461.

While it appears that the municipal court in this

case did not expressly pronounce the appellant guilty before sentencing, the judgment sentencing the appellant to a fine of $100 and an order not to drive any motor vehicle in Nebraska for any purpose for 6 months sufficiently implied the judgment of guilt. *Ex parte Roberson,* 123 Ala. 103, 26 So. 645 (1898).

Though it would be the better practice for the trial judge to expressly adjudge a defendant guilty before rendering sentence, an implied judgment of guilt results where there appears a valid sentence in proper form by the court after a verdict of guilty by a jury or a plea of guilty or nolo contendere by the defendant. *Ex parte Roberson, supra; Poellnitz v. State,* 48 Ala. App. 144, 262 So. 2d 631 (1972).

The judgment of the trial court is affirmed.

AFFIRMED.

MCCOWN, J., participating on briefs.

JEANNE JONES, APPELLANT, V. CARL P. TRANISI, M.D., APPELLEE.

326 N.W.2d 190

Filed November 12, 1982. No. 82-176.

1. **Rules of Evidence.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Rev. Stat. § 27-402 (Reissue 1979).
2. **Witnesses: Impeachment.** A witness may not be impeached by producing extrinsic evidence of collateral facts to contradict the first witness' assertion about those facts.
3. **Evidence: Impeachment.** A fact is not collateral for purposes of impeachment if it could be independently provable because relevant.
4. **Negligence: Jury Instructions.** A trial court should not submit to the jury as an alleged item of negligence an act or omission which the evidence undisputably shows was not a cause of the plaintiff's injury.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Steven Lefler of Schrempp & Lefler, for appellant.

William M. Lamson, Jr., and Patricia A. Zieg of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

CLINTON, J.

This is a medical malpractice action in which the jury returned a verdict for the defendant Tranisi. On appeal, two assignments of error are made. The trial court erred (1) in refusing to receive the testimony of a rebuttal witness, and (2) in failing to submit to the jury one of the allegations of negligence against the doctor, namely, he failed " 'to pursue adequate post-surgery care and treatment to determine *the cause* of the Plaintiff's hoarseness.' " (Emphasis supplied.)

The basic negligence alleged by plaintiff is that the defendant, in the course of performing a thyroidectomy upon the plaintiff, failed to use the appropriate standard of care during the operation and injured the recurrent laryngeal nerve. This resulted in the impairment of one of the vocal cords and left the plaintiff with permanent hoarseness.

The expert testimony indicates that damage to a laryngeal nerve is one of the risks, although infrequent, of a thyroidectomy. Plaintiff's expert testified that the defendant erred by starting the thyroidectomy and identifying the nerve superiorly rather than inferiorly. The defendant and his expert witness contradicted the claims of negligence.

Plaintiff called as a rebuttal witness Christine Vecchio, a former patient of the defendant Tranisi, upon whom he had performed a thyroidectomy more than 12 years earlier. Defense counsel objected to

the witness' testimony on various grounds, including lack of relevance. The judge sustained the objections and struck the witness' preliminary evidence that did come in, telling the jury to disregard it. The plaintiff made the following offer of proof: "[S]he would testify that she had been operated upon by Dr. Tranisi, that Dr. Tranisi performed a thyroidectomy upon her; that she was never told of the risks involved in the thyroidectomy; that a couple years after the thyroidectomy, she had almost a total loss of speech within a couple years afterwards.

"After that total loss of speech, her voice did recover to the state that it's at now and has never improved in the last 10 years from what it is today.

"And that she made continuous complaints to Dr. Tranisi of the problem, and she was told by him that it would take anywhere from two months to two years to heal." On cross-examination, Tranisi had testified that no patient upon whom he had performed a thyroidectomy complained of a loss of voice or a voice level decrease as a consequence of the operation.

We conclude that the court did not err in excluding the rebuttal testimony of Mrs. Vecchio. The evidence code provides that all relevant evidence (with certain general exceptions) is admissible. Neb. Rev. Stat. § 27-402 (Reissue 1979). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Rev. Stat. § 27-401 (Reissue 1979). Relevance, as used in the code, seemingly embraces the concepts which we formerly referred to as competent or material.

If the plaintiff was offering Mrs. Vecchio's testimony to prove Tranisi's negligence in performing the operation on the plaintiff, it was not relevant for

that purpose. If offered for the purpose of impeaching Tranisi, it was not admissible because it related to a collateral matter.

No expert testimony in the record supports the proposition that hoarseness following a thyroidectomy evidences a negligent cause. A more mundane example will serve to clarify. One cannot prove that one was negligent in causing an accident in 1980 because one was negligent in causing one on some earlier occasion.

"[A] witness may not be impeached by producing extrinsic evidence of 'collateral' facts to 'contradict' the first witness's assertions about those facts." McCormick on Evidence § 47 at 98 (2d ed. 1972). McCormick further says at 98: "What is to be regarded here as within this protean word of art, 'collateral'? The inquiry is best answered by determining what facts are not within the term, and thus finding the escapes from the prohibition against contradicting upon collateral facts. The classical approach is that facts which would have been independently provable regardless of the contradiction are not 'collateral.' " The above is the rule in Nebraska. " 'It is only as to matters relevant to some issue involved in a case that a witness can be contradicted for the purpose of impeachment.' Carpenter v. Lingenfelter, 42 Neb. 728, 60 N.W. 1022, 32 L.R.A. 422.

. . . .

" 'The general rule is that a witness cannot be impeached as to collateral or immaterial matter brought out on cross-examination; * * *.' " *Ambrozi v. Fry,* 158 Neb. 18, 26, 62 N.W.2d 259, 265 (1954).

With reference to the court's refusal to submit the allegation of negligence described in the second assignment of error, an examination of the record fails to show any evidence which would justify the submission of the issue as a "cause" of plaintiff's injury. The record clearly shows that the plaintiff's

harm resulted from damage to the laryngeal nerve. The evidence upon which the plaintiff relies in this connection, as set forth verbatim in her brief, relates to measures that might be taken subsequently to improve the condition. These were exercises and a "Teflon injection." The record establishes that no postoperative evaluation would have prevented injury. No expert opinion stated that defendant was negligent in postoperative care, causing the injury. Had the plaintiff obtained a verdict, she would have been entitled to recover as part of her damages the cost of remedial measures which might reasonably be pursued. However, the jury found against her on the negligence issue.

AFFIRMED.

WHITE, J., concurs in the result.

HASTINGS BUILDING CO., A CORPORATION, ET AL., APPELLEES, V. BOARD OF EQUALIZATION OF ADAMS COUNTY ET AL., APPELLANTS.

326 N.W.2d 670

Filed November 19, 1982. No. 44429.

1. **Taxation: Valuation: Appeal and Error.** In an appeal from property valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.
2. _____: _____: _____. The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding.
3. **Taxation: Valuation: Presumptions.** There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is

competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence.

4. **Taxation: Valuation.** Under Neb. Rev. Stat. § 77-201 (Reissue 1981) all tangible and real property subject to taxation is required to be valued at its actual value. For purposes of taxation the terms actual value, market value, and fair market value mean exactly the same thing.

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

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

William M. Connolly of Conway & Connolly, for appellees.

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

MCCOWN, J.

The plaintiffs, Hastings Building Co. and Hastings Mall, Inc., filed protests with the board of equalization of Adams County complaining that the value of plaintiffs' shopping mall properties for tax purposes as fixed and determined by the county board was in excess of the actual value of the properties for the years 1979 and 1980 and that such assessments were excessive, arbitrary, and unreasonable. The protests were denied by the county board and plaintiffs appealed to the District Court. The cases were consolidated in the District Court. The District Court determined that the property had an actual value of $4,400,000 for each of the years 1979 and 1980 and that the assessment of the property should be reduced to that figure for both years, and directed that the assessment records be corrected accordingly. The defendants have appealed.

The real estate involved here is a retail shopping mall located in the city of Hastings, Nebraska, known as Imperial Mall Shopping Center. Plaintiff Hastings Building Co., a corporation, is the owner

and lessor of the real estate, and the plaintiff Hastings Mall, Inc., a corporation, is the lessee of the real estate and owner of the improvements situated on the real estate.

The property was valued and assessed for the year 1979 at an actual value of $4,715,360. The plaintiffs filed a protest against the assessment on the ground that the value of the assessment was in an amount greater than the actual value of the property. The county board of equalization determined the actual value of the property was $4,715,360 and denied plaintiffs' protest. The plaintiffs appealed to the District Court.

Thereafter, the State Board of Equalization and Assessment ordered an increase of 29 percent on all urban property in Adams County. In accordance with that determination the county assessor increased the valuation and assessment of plaintiffs' property to $6,082,815 for 1980. The board of equalization also denied plaintiffs' protest of the 1980 valuation and assessment, and plaintiffs appealed to the District Court. The cases were consolidated in the District Court for trial.

At the hearing in the District Court the evidence established that in 1977 Western Appraisal Company reappraised all real property in Adams County and appraised plaintiffs' property at $4,715,360. The assessor and the county board relied upon that appraisal for the valuation and assessment of plaintiffs' property for 1979. The assessor and the chairman of the county board admitted that the board relied on the Western appraisal figure but that they had no independent knowledge of how Western reached the valuation figure for plaintiffs' property. No evidence was presented at trial to establish the basis used by Western in appraising plaintiffs' property, and no representative of Western Appraisal Company testified. The Western appraisal of plaintiffs' property was therefore not admitted into evi-

dence. The evidence was undisputed that the basis for the 1980 valuation and assessment was the order of the State Board of Equalization and Assessment directing an increase of 29 percent and the application of that percentage to the Western appraisal figure.

An expert witness and real estate appraiser testifying for the plaintiffs testified that he had used a cost approach, a market data approach, and an income approach, and that after considering all factors, he testified that the fair market value of the property for 1979 was $3,500,000 and that the value remained the same for 1980. He also testified that in his opinion the income approach was the most reliable method for valuing a shopping center.

Another witness for the plaintiffs, who was a tax consultant, testified that, using an income approach, the value of the property was $3,037,717 for 1979 and $2,776,743 for 1980.

An expert witness for the defendants testified that he also used cost, income, and market data approaches and that, in his opinion, the market value of the property for 1979 and 1980 was $5,500,000.

On May 26, 1981, the District Court found that the plaintiffs had rebutted the presumption that the assessed value was correct, and found that the actual market value of the property in the years 1979 and 1980 was $4,400,000 and that the value of plaintiffs' property had been arbitrarily fixed and assessed in an amount greater than its actual value. The court directed that the assessment books be corrected accordingly. The county has appealed.

The only issue on this appeal is whether or not the property involved in this case was valued and assessed for tax purposes at more than its actual value. No issues as to uniformity or proportionate equalization are involved.

This court has consistently held that in an appeal from property valuations set by a board of equalization, the taxpayer has the burden of proving that the

value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, *or* that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. *Riha Farms, Inc. v. County of Sarpy, ante* p. 385, 322 N.W.2d 797 (1982).

The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Such presumption disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence, with the burden of showing such valuation to be unreasonable resting upon the appellant on appeal from the action of the board. *Beaver Lake Assn. v. County Board of Equalization,* 210 Neb. 247, 313 N.W.2d 673 (1981); *Gradoville v. Board of Equalization,* 207 Neb. 615, 301 N.W.2d 62 (1981).

In the present case there is no evidence to support a finding that the actual value of plaintiffs' property for 1980 was even close to the amount shown on the assessment records. The highest valuation placed upon the property by the county's own real estate expert witness was $5,500,000 and the lowest valuation placed on the property by any real estate expert witness was $3,500,000. The District Court, which saw and heard the witnesses and was familiar with the local situation, performed the function of a fact finder and determined that the actual value of the property was $4,400,000 and that the assessed

valuations were excessive, arbitrary, and capricious.

Under Neb. Rev. Stat. § 77-201 (Reissue 1981) all tangible and real property subject to taxation is required to be valued at its actual value. For purposes of taxation the terms actual value, market value, and fair market value mean exactly the same thing. *Riha Farms, Inc. v. County of Sarpy, supra.*

The record in this case clearly rebuts the presumption of the correctness of the assessed valuation and establishes that the valuation of plaintiffs' property for the years 1979 and 1980 was made arbitrarily and capriciously. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

BOSLAUGH, J., concurring.

I concur fully in the opinion of the court, but I think it is important to point out that the judgment of the District Court established the actual value of the property in question for the years 1979 and 1980. Since this was the actual value of the property, it was not subject to the 29 percent increase on all urban property in Adams County imposed by the State Board of Equalization and Assessment for those years.

PAUL NARDUZZO, APPELLANT, V. SUNDERLAND BROS. ET AL., APPELLEES.

326 N.W.2d 673

Filed November 19, 1982. No. 82-119.

1. **Workmen's Compensation: Proof.** The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition.
2. **Workmen's Compensation: Appeal and Error.** 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. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can be reasonably drawn therefrom.

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

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

Richard M. Dustin of Gaines, Otis, Haggart, Mullen & Carta, for appellees Sunderland Bros. and Maryland Casualty Co.

Lyman L. Larsen and William M. Lamson, Jr., of Kennedy, Holland, DeLacy & Svoboda, for appellees Sunderland Bros. and Bituminous Ins. Co.

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

WHITE, J.

The appellant, Paul Narduzzo, appeals from the decision of a three-judge panel of the Workmen's Compensation Court which awarded him 14⅐ weeks' temporary total disability, certain medical payments, and an attorney fee, but the compensation court refused to make an award for a claim of permanent partial disability of 30 percent. It is from the last finding that the employee Narduzzo appeals. We affirm.

On June 8, 1981, appellant, a tile finisher for appellee Sunderland Bros., experienced severe pain in his lower back while lifting a 94-pound bag of cement in the course of his employment duties. He first saw a physician for this particular injury on June 15, 1981, having been absent from work since the day of the incident. The notes of the employee's physician, Dr. Werner P. Jensen, specialist in orthopedic surgery, show that at that time his diagnosis was acute recurrent lumbar disc syndrome. On July 28, 1981, appel-

lant was admitted to a hospital, with a diagnosis of "Low back sprain . . . 1st sacral nerve root irritation, left." After his release from the hospital on August 1, 1981, Dr. Jensen allowed the appellant to return to work, with lifting restrictions, and maintained his previous diagnosis of "Recurrent lumbar disc syndrome, L-5 S-1 (left)."

It appears from the evidence that appellant had suffered previous back injuries in May 1970, August 1977, May 1978, and August 1979. The diagnosis of obesity and lumbar disc syndrome remained the same throughout.

Dr. Jensen testified at rehearing that, from all his previous injuries, appellant suffers a 30 percent permanent partial disability but that he could not allocate the disability among the various incidents.

The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition. *Aguallo v. Western Potato, Inc.*, 208 Neb. 66, 302 N.W.2d 41 (1981). Although the record clearly evidenced a 30 percent permanent partial disability, Dr. Jensen stated that there was "no way" that any portion of the 30 percent disability could be allocated between any of the above-mentioned injuries, not to mention the injury which occurred on June 8, 1981. Further, in the cross-examination of Dr. Jensen the following questions and answers were exchanged: "Q Let me ask you the question this way, Dr. Jensen: How would you compare his condition right now and in September of '78? A I think he is as good now as he has been in a long time, or the last time I saw him, he was very good. Q So he is as good now as he was in September of '78? A Yes, I think so."

Based on the foregoing evidence, the compensation court on rehearing made an affirmative finding

of no permanent partial disability as a result of the June 8, 1981, accident.

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. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can be reasonably drawn therefrom. *Hatting v. Farmers Co-op Assn.*, *ante* p. 242, 322 N.W.2d 423 (1982); *White v. Father Flanagan's Boys' Home,* 207 Neb. 528, 300 N.W.2d 15 (1980). The findings of fact shall have the same force and effect as a jury verdict in a civil case. *Hatting v. Farmers Co-op Assn., supra.*

The findings of the compensation court on rehearing are supported by evidence, therefore we must affirm.

AFFIRMED.

IN RE INTEREST OF SEAN DAVID DITTER AND TISHA LYNNE DITTER, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. GODFREY DITTER AND LORENA DITTER, APPELLEES.

326 N.W.2d 675

Filed November 24, 1982. No. 44457.

Parental Rights. Once parental rights of a child have been terminated as to a natural parent, the natural parents of such parent whose rights have been terminated are not entitled to continue visitation as a matter of right.

Appeal from the District Court for Platte County: FRANCIS J. KNEIFL, Judge. Reversed and remanded with directions.

Paul Schumacher, Platte County Attorney, for appellant.

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

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

PER CURIAM.

The instant appeal presents to the court the very narrow question of whether, as a matter of law, the grandparents of children whose parents' rights to the children have been terminated by court order are entitled to rights of visitation following the termination, or whether, as a matter of law, the best interests of such children require us to hold that such rights of visitation do not exist. Initially, Godfrey Ditter and his wife, Lorena Ditter (Ditters), the paternal grandparents of the two minor children involved in this case, sought to "intervene" in a juvenile proceeding then pending in the county court of Platte County, Nebraska, sitting as a juvenile court. The county court held that the Ditters had no standing and dismissed their petition. On appeal, the District Court reversed the order of the juvenile court and an appeal was taken to this court.

Prior to the appeal to this court the parental rights of the sole surviving parent were terminated pursuant to an adjudication of dependency under former Neb. Rev. Stat. § 43-202(2)(b) (Reissue 1978). On appeal, we affirmed. See *In re Interest of Ditter, ante* p. 279, 322 N.W.2d 642 (1982). The facts involving the termination are set out in detail in *In re Interest of Ditter,* and we need not repeat them here except to note that the natural mother is deceased, having been killed by the natural father who is now serving a sentence of life imprisonment for murder.

While we are unable to find any decision in this jurisdiction having previously addressed the issue presented here and are unable to find any state statute directly applicable, we believe that the general scheme regarding termination compels us to hold

that once the natural parent's rights to a child have been terminated pursuant to the provisions of Neb. Rev. Stat. § 43-292 (Cum. Supp. 1982), formerly § 43-209 (Reissue 1978), the parents of the parent whose rights have been terminated likewise lose any legal right to visitation which might otherwise exist. To hold otherwise would seem to defeat the purpose of terminating parental rights.

Under the provisions of Neb. Rev. Stat. § 43-293 (Cum. Supp. 1982) "An order terminating the parent-juvenile relationship shall divest the parent and juvenile of all legal rights, privileges, duties, and obligations with respect to each other and the parents shall have no rights of inheritance with respect to such juvenile." It appears to us that if we are principally concerned with the best interests of the child (see, *In re Interest of J.L.L.,* 209 Neb. 76, 306 N.W.2d 175 (1981); *State v. A.H.,* 198 Neb. 444, 253 N.W.2d 283 (1977)), and by terminating parental rights we intend to divest any tie between the parent and child so that we may, as quickly as possible, find an adoptive family for the child and permit the child to begin anew, then little purpose would be served in continuing family ties between the grandparents and the child to be adopted. While that view is not unanimous throughout the country, it is the generally accepted view. See, *Matter of Adoption of Gardiner,* 287 N.W.2d 555 (Iowa 1980); *Poe v. Case,* 263 Ark. 488, 565 S.W.2d 612 (1978); *Lee v. Kepler,* 197 So. 2d 570 (Fla. Dist. Ct. App. 1967); *Browning v. Tarwater,* 215 Kan. 501, 524 P.2d 1135 (1974); *Smith v. Trosclair,* 321 So. 2d 514 (La. 1975); *Bikos v. Nobliski,* 88 Mich. App. 157, 276 N.W.2d 541 (1979); *People v. Rado,* 54 Misc. 2d 843, 283 N.Y.S.2d 483 (1967); *Acker v. Barnes,* 33 N.C. App. 750, 236 S.E.2d 715 (1977), *cert. denied* 293 N.C. 360, 238 S.E.2d 149; *Matter of Fox,* 567 P.2d 985 (Okla. 1977); *Deweese v. Crawford,* 520 S.W.2d 522 (Tex. Civ. App. 1975).

In 2 Am. Jur. 2d *Adoption* § 85 at 928-29 (1962), the

author notes: "The purpose and effect of most statutes are to terminate all legal relations between a minor child and its natural parents or formal legal guardian, and to give the adopting parent full rights of custody of the infant, to the exclusion of the child's own parents and all other persons, until some lawful reason for change in the child's custody is made to appear by competent evidence. Public policy demands that an adoption carry with it complete breaking of old ties. Under the new relation thus created, the adoptive parents are as much entitled to the custody of their adopted child as natural parents are to their natural children. The rights of adoptive parents are of the same nature and scope as those of a natural parent, subject to the same restrictions as that of natural parents.

"While the question of the propriety of a provision in an adoption decree, giving the natural parent the right to visit the child or preserving other rights of the natural parent, may be answered by special provisions of the statutes governing adoption procedure, where the adoption statute gives the adopted child the status of a natural child and frees the natural parents of legal obligations toward it, a court in granting an adoption decree is without authority to include in the adoption decree a grant of visitation privileges to the parent or members of the parents' family."

While it is true in the instant case that only termination has occurred and adoption has not yet taken place, we nevertheless believe that if there is good reason to sever the relationship between the natural parent and the child at the earliest possible moment so that the child may become accustomed to a new family, no purpose exists, in promoting the best interests of the child, to delay that severing act during the period after termination and before adoption. Even if one were to reject the common-law view that no right of visitation ever existed in the grand-

parent at any time and accept the more modern view that under proper facts, where the best interests of the child demand it, grandparents may be entitled to seek rights of visitation, we would reach the same result in a case such as this. We believe that even under the "best interests of the child" theory we must conclude as a matter of law that the best interests of a child require us to find that where a natural parent's rights to a child have been terminated, the grandparents should not have a legal right to seek visitation. To hold otherwise would only make the adoption and subsequent adjustment more difficult.

In the case of *In re Johnson,* 210 Kan. 828, 834, 504 P.2d 217, 223 (1972), the Kansas court, in reviewing a case similar to the case at bar, said: "In this regard the instant case presents a situation quite different from a simple custody suit. The disposition of the children here is for adoptive purposes and has the effect of prohibiting appellant from exercising visitation rights as the children, when adopted, will have new parents and new grandparents." The Kansas court therefore held that the grandparents could not visit the children following termination and before adoption. We therefore believe the better rule to be, and now declare, that once parental rights of a child have been terminated as to a natural parent, the natural parents of such parent whose rights have been terminated are not entitled to continue visitation as a matter of right. We should note that our holding is limited to the situation described herein. Had termination not occurred, we would be confronted with a different question which we do not now decide. Having thus concluded, we believe that the grandparents in this case had no standing to maintain this action to seek visitation, and the decision of the county court finding that the Ditters lacked standing should be reinstated. The judgment of the District Court is there-

fore reversed and the cause remanded with instructions to reinstate the decision of the county court.

REVERSED AND REMANDED WITH DIRECTIONS.

MCCOWN, J., concurs in the result.

CLINTON, J., dissenting.

I respectfully disagree with the broad scope of the holding in this case. The rationale of the opinion assumes an adoption of the child. I would agree that where an adoption takes place then the stability of the new family and the best interests of the child would terminate the grandparents' legal interest.

Where an adoption has not taken place and the child is under foster care, the interests of the child may very well be served by granting to grandparents visitation rights. Such interests must be determined on an ad hoc basis. I would grant standing to the grandparents, under the circumstances of this case, to intervene in the best interests of the child.

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

326 N.W.2d 678

Filed November 24, 1982. No. 81-741.

1. **Criminal Law: Petit Larceny.** In the absence of something other than ordinary stealing, petit larceny is not a crimen falsi as contemplated by Neb. Rev. Stat. § 27-609(1)(b) (Reissue 1979).
2. **Criminal Law: Trial: Evidence.** If special circumstances exist, it is incumbent upon the prosecution to bring those circumstances to the court's attention.
3. **Trial: Appeal and Error.** Ordinarily, one may not invite error and then complain of it.
4. **Criminal Law: Impeachment: Prior Convictions.** One may rely upon an opposing party's stated intention to impeach by questioning concerning prior convictions and the trial judge's announcement that he will allow the same.

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

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

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

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

CAPORALE, J.

Defendant-appellant, Daniel L. Williams, was found guilty by a jury of willfully, maliciously, and forcibly breaking and entering into a dwelling with the intent to commit a felony or with the intent to steal property. Pursuant to that verdict he was sentenced to a term of from 3 to 7 years in the Nebraska Penal and Correctional Complex.

In this appeal defendant contends the trial court erred in overruling his motion in limine, which sought to prevent the State from questioning him concerning his prior petit larceny convictions. We agree with the defendant; accordingly, we reverse and remand for a new trial.

The record reflects that at the close of the State's case defense counsel moved for an order directing that defendant's prior misdemeanor petit larceny convictions not be used in impeachment. The record further reflects that defense counsel had discussed the matter with the prosecuting attorney, who had indicated he intended to use the convictions to impeach the defendant. The prosecutor does not dispute that representation of his intent. The trial judge observed it had already been indicated to counsel, in what appears to be an unreported in-chambers conference, that he was of the opinion the petit larceny convictions were dishonest acts within the purview of the evidence code, and overruled defense counsel's in limine motion. The judge further stated, "[T]he State will be permitted to bring the misdemeanor convictions out by way of impeach-

ment on cross examination." Thereafter, defense counsel advised the defendant, on the record, of the risks he took by testifying. During that proceeding the trial judge asked the following of defense counsel: "And have you further advised him that the misdemeanor convictions can also be brought out by way of impeachment so the jury will have knowledge of the fact that he was convicted of petty larceny twice?" Defense counsel replied he had discussed the matter with the defendant that morning. The defendant then stated he still wished to testify.

During the early part of defense counsel's direct examination of defendant, the following questions were asked and answers given: "Q. And have you ever been convicted of another offense or misdemeanor involving dishonesty? A. Not that I know of. Q. Do you recall our earlier conversation? A. Yes. Q. Okay. And have you ever been — had a misdemeanor conviction for an offense that involves — has been ruled to involve dishonesty? A. Yes. Q. And how many times? A. Oh, about two times."

Neb. Rev. Stat. § 27-609(1) (Reissue 1979) provides: "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment."

The first question to be answered is whether a misdemeanor conviction for petit larceny is a crime involving "dishonesty or false statement" as that phrase is used in § 27-609(1)(b). After a review of the comments of the drafters of the federal rule which is the source of our § 27-609, and federal court interpretations, we said that in the absence of some-

thing other than ordinary stealing, petit larceny is not a crimen falsi as contemplated by the phrase in question. We further stated that if such special circumstances exist, it is incumbent upon the prosecution to bring those circumstances to the court's attention. *State v. Ellis,* 208 Neb. 379, 303 N.W.2d 741 (1981). See, also, *State v. Pitts, ante* p. 295, 322 N.W.2d 443 (1982). No special circumstances were brought to the court's attention. The trial court incorrectly concluded that the petit larceny convictions were within the purview of § 27-609(1)(b). It was therefore in error in overruling the motion in limine.

The State argues, in effect, that as it was the defendant himself who testified on direct examination as to the subject convictions, he waived any error. The defendant, on the other hand, argues that in view of the trial court's ruling and statements, he was justified in relying on the State's and court's announced intentions, and in taking the "sting" out of the convictions by first revealing them himself during direct examination. We agree with the defendant.

It is true that ordinarily one may not invite error and then complain of it. See, *State v. Gore, ante* p. 287, 322 N.W.2d 438 (1982); *Davis v. State,* 51 Neb. 301, 70 N.W. 984 (1897). However, in the context of the facts in this case, defendant was fully justified in relying on the State's announced intention to impeach defendant by questioning him concerning the petit larceny convictions and the trial judge's announcement that he would allow the State to do so.

REVERSED AND REMANDED FOR A NEW TRIAL.

IN RE CONTEMPT OF JAMES P. MILLER.
STATE OF NEBRASKA, APPELLEE, V. JAMES P. MILLER, APPELLANT.

326 N.W.2d 680

Filed November 24, 1982. No. 81-853.

Contempt: Attorneys at Law. A finding that an attorney's failure to appear in court at an appointed time was not willful constitutes a finding that the failure to appear was not contempt of court.

Appeal from the Separate Juvenile Court of Sarpy County. Reversed.

Owen A. Giles, for appellant.

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellee.

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

PER CURIAM.

According to our previous definition of contempt advanced by this court in *In re Contempt of Potter,* 207 Neb. 769, 301 N.W.2d 560 (1981), a finding must be made that an attorney's failure to appear at a designated time was willful in order to hold him or her in contempt. In the instant case the trial court found that the failure to appear was not willful behavior on the part of the appellant. Therefore, the trial court was not justified in holding the appellant in contempt of court. The judgment of the trial court is in all respects reversed.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. NICHOLAS R. PEIFFER, APPELLANT.

326 N.W.2d 844

Filed November 24, 1982. No. 82-184.

Statutes: Appeal and Error. In the absence of a clear expression of

legislative intent, this court is not inclined to interpret a statute to apply to matters other than clearly expressed within the statute itself.

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

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

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

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

PER CURIAM.

We now address the question reserved in our earlier opinion found *ante* p. 299, 322 N.W.2d 445 (1982), reexamine the rationale of that opinion, overrule same, and affirm the sentence imposed by the trial court.

At the time of our earlier opinion the issue reserved was thought to be only whether we were to permanently revoke defendant's driving privileges. It develops that the question is broader, namely, whether the penalty for third offense drunken driving, as amended by 1982 Neb. Laws, L.B. 568, should be applied in its entirety to the defendant, whose sentence under the repealed statute was on appeal on the date L.B. 568 became effective (July 17, 1982).

Prior to the enactment of L.B. 568 the maximum punishment was 5 years' imprisonment, a $10,000 fine, or both such imprisonment and fine, together with revocation of the offender's license to drive for a period of 1 year from and after the date of his discharge from prison. Neb. Rev. Stat. § 39-669.07 (Reissue 1978). As noted in our earlier opinion defendant was sentenced thereunder to imprisonment for not less than 1 nor more than 2 years, and his license was revoked for 1 year from and after such confinement. No fine was imposed. L.B. 568 provides for a

minimum of 3 and a maximum of 6 months' imprisonment. Further, the act imposes a $500 fine and requires that the offender's license be permanently revoked and that he be ordered never to drive again.

The essential question in this case is whether L.B. 568 was intended by the Legislature to mitigate the penalty for the offense of driving while intoxicated, third offense.

Viewed in the light of the maximum incarceration time, no serious question could exist that the penalty was reduced and thus mitigated, apparently calling into play the doctrine first enunciated by this court in *State v. Randolph,* 186 Neb. 297, 301-02, 183 N.W.2d 225, 228 (1971), *cert. denied* 403 U.S. 909, 91 S. Ct. 2217, 29 L. Ed. 2d 686, where we said: "[W]e believe the better rule to be and we therefore hold that where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise."

However, viewed in the light of the permanent suspension of driving privileges, the scene becomes cloudy. Whether viewed as a limited property right, or as a privilege, the fact is that the lifetime suspension is a terrible burden (albeit deserved) on the offender.

We note that a law providing an increase in penalty for a crime after judgment, if applied to an offense under the prior law, is generally considered void as an ex post facto law. A serious question exists whether the increase in the penalty of one of the consequences of a criminal act punishable by multiple consequences is thereby rendered non ex post facto by the reduction of one of the consequences.

The judicial doctrine announced in *Randolph, supra,* is bottomed on the premise that the Legislature

intended the new punishment, which it now feels fits the crime, to apply whenever constitutionally possible. *State v. Randolph, supra,* quoting with approval *In Re Estrada,* 63 Cal. 2d 740, 408 P.2d 948, 48 Cal. Rptr. 172 (1965); *People v. Oliver,* 1 N.Y.2d 152, 134 N.E.2d 197, 151 N.Y.S.2d 367 (1956); and *State v. Pardon,* 272 N.C. 72, 157 S.E.2d 698 (1967). See, also, *State v. Crisp,* 195 Neb. 833, 241 N.W.2d 129 (1976); *State v. Trowbridge,* 194 Neb. 582, 234 N.W.2d 598 (1975); *State v. Country,* 194 Neb. 570, 234 N.W.2d 593 (1975).

We have not in the past been called upon to discern legislative intent with respect to the retroactivity of a multipenalty punishment which offsets a reduced period of maximum incarceration against the permanent revocation of driving privileges and the imposition of a fine. We have, however, held that the *Randolph* doctrine does not apply where the new statute does something other than merely lessen the punishment, but instead repeals the old statute and defines new categories of crime. *State v. Crisp, supra.* In the instant matter a new class of misdemeanor was created and the old statute repealed.

We have found no specific statement of intent in the legislative history of L.B. 568, and none has been pointed out to us. On further reflection we find no valid basis upon which we can presume to know the Legislature's intent with regard to the retroactive application of the punishments contained in L.B. 568 for acts committed before its enactment to cases which are awaiting final judgment. Consequently, on further reflection, we must conclude that the *Randolph* doctrine does not apply to the case at hand, and our earlier opinion was, regrettably, erroneous in holding that it did. Our earlier opinion is therefore overruled. We thus avoid the larger question of whether persons whose appeal was pending at the time L.B. 568 was enacted may constitutional-

ly be subjected to lifetime suspension of driving privileges.

The sole error assigned by defendant is that he is entitled to have his sentence reduced to a maximum of 6 months under the authority of Neb. Rev. Stat. § 29-2204.01 (Reissue 1979). That statute provides: "In any criminal proceeding in which a sentence of confinement has been imposed and the particular law under which such sentence was pronounced is thereafter amended to decrease the maximum period of confinement which may be imposed, then any person sentenced under the former law shall be entitled to his discharge from custody when he has served the maximum period of confinement authorized by the new law, notwithstanding the fact that the court may have ordered a longer period of confinement under the authority of the former law."

On first appearance this statute seems to apply, mandating an order reducing the term of imprisonment to 6 months.

We note that not considered in this case, since the matter is on appeal and therefore not final, is the question of whether § 29-2204.01 intrudes on the powers granted to the Board of Parole by article IV, § 13, of the Constitution of Nebraska, so far as final judgments may be involved, or whether, absent an agreement to exercise our discretionary power to reduce sentences, the Legislature has any authority to order a reduction in penalties or a change in a final order of this court.

Limiting ourselves to the question before us, may it be fairly said that the Legislature intended the act to apply when incarceration time is decreased but a weighty and different additional consequence is provided? Nothing in the legislative history of the statute casts light on this determination, or of L.B. 568.

Previously, we have held that § 29-2204.01 did not apply unless the "particular law" under which the

defendant was sentenced was amended, *State v. Fuller,* 203 Neb. 233, 278 N.W.2d 756 (1979), or when only the minimum term has been decreased, but the maximum term remains the same, *State v. Rubek,* 189 Neb. 141, 201 N.W.2d 255 (1972).

In the absence of a clear expression of legislative intent, we are not inclined to interpret the statute to apply to matters other than clearly expressed within the statute itself.

No mandate based upon our earlier opinion has issued; therefore, the matter is before us in the same posture as if upon a motion for rehearing. Having concluded that neither the *Randolph* doctrine nor the provisions of § 29-2204.01 apply, the sentence of the trial court is correct and we hereby affirm it. Should defendant have been released from the custody of the Department of Correctional Services under the language of our earlier opinion, he is to be returned thereto forthwith to complete the sentence imposed by the trial court. He is entitled to no credit for such period of time as he may have been at liberty by virtue of his release pursuant to our earlier opinion. See *Philbrook v. Dunn,* 121 Neb. 421, 237 N.W. 391 (1931).

AFFIRMED.

CLINTON, J., participating on briefs.

MCCOWN, J., concurring in the result.

No branch of government can increase a sentence, or any part of it, once the sentence has become final. Neither the Legislature nor this court can reduce a sentence, or any part of it, once the sentence has become final, because the power of clemency and the power to grant respites, reprieves, pardons, or commutation of sentence is vested solely in the Board of Pardons under the provisions of article IV, § 13, of the Nebraska Constitution. See, also, *Johnson & Cunningham v. Exon,* 199 Neb. 154, 256 N.W.2d 869 (1977).

Any attempt by the Legislature to reduce a sen-

tence which has become final is not only interference with the executive power but is also an interference with the power of the judiciary. It has long been settled that the Legislature is without power to invade the province of the judiciary by setting aside, modifying, or impairing a final judgment rendered by a court of competent jurisdiction. See *McCullough v. Virginia,* 172 U.S. 102, 19 S. Ct. 134, 43 L. Ed. 382 (1898), and a legion of other cases from every jurisdiction. In Nebraska, *City of Wayne v. Adams,* 156 Neb. 297, 56 N.W.2d 117 (1952).

Neb. Rev. Stat. § 29-2204.01 (Reissue 1979) provides: "In any criminal proceeding in which a sentence of confinement has been imposed and the particular law under which such sentence was pronounced is thereafter amended to decrease the maximum period of confinement which may be imposed, then any person sentenced under the former law shall be entitled to his discharge from custody when he has served the maximum period of confinement authorized by the new law, notwithstanding the fact that the court may have ordered a longer period of confinement under the authority of the former law."

Insofar as that section purports to apply to any sentence which has become final, the section is clearly an invasion of the powers of the executive and judicial branches of government and is unconstitutional.

In the case at bar the sentence reviewed on this appeal, and now affirmed by a majority of this court, was a lawful sentence in all respects at the time it was pronounced by the trial court. It had also been placed in execution.

The power to reduce that sentence, or any part of it, rests in the judicial discretion of this court until the sentence becomes final. In exercising that judicial power this court will attempt to ascertain the intent of the Legislature as to amendments relating to punishment, in accordance with *State v. Ran-*

dolph, 186 Neb. 297, 183 N.W.2d 225 (1971).

This court has no power to increase a sentence, or any part of it, but even if we had the power, a sentence could not be increased beyond the maximum allowed by law at the time of the commission of the crime. Any attempt by this court, or by the Legislature, to increase a sentence, or any part of it, by retroactive action of that sort would be clearly ex post facto.

CAPORALE, J., dissenting.

I respectfully dissent. In my view the *Randolph* doctrine is applicable; consequently, I would remand the cause to the Third Judicial District Court, Lancaster County, for resentencing in accordance with 1982 Neb. Laws, L.B. 568.

The majority is correct in pointing out that a constitutional issue must be resolved before such a determination can be made.

U.S. Const. art. I, § 10, cl. 1, provides that no state shall pass any ex post facto law. Neb. Const. art. I, § 16, also provides that no ex post facto law be passed. An ex post facto law includes one which applies to events occurring prior to enactment of the law and which disadvantages the offender affected by it. *Weaver v. Graham,* 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); *Lindsey v. Washington,* 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937); *Marion v. State,* 16 Neb. 349, 20 N.W. 289 (1884). See, also, *State v. Steemer,* 175 Neb. 342, 121 N.W.2d 813 (1963).

The question, therefore, becomes whether application of the sanctions imposed by L.B. 568 to the defendant-appellant would invoke the elements of ex post facto legislation. Since the application would relate to an event which occurred prior to the law's enactment, the element of retroactivity obviously would be present. The sole ex post facto issue then becomes whether such application would be to the defendant's disadvantage.

Defendant relies upon *State v. Holloway, ante*

p. 426, 322 N.W.2d 818 (1982); *Olson v. State,* 160 Neb. 604, 71 N.W.2d 124 (1955); and *Kroger v. State,* 158 Neb. 73, 62 N.W.2d 312 (1954), to argue that where parts of a sentence are divisible, each part is to be viewed separately. The cases cited by him do not so hold. *Holloway* held that a court may not peremptorily direct that a fine be satisfied by crediting pretrial jail time against it without granting defendant an opportunity to pay the fine in accordance with law. That holding has no bearing at all on the issue at hand. *Olson* ruled that where the complaint charged an offense which did not authorize license suspension as part of the punishment, it was error to order such; consequently, that portion of the sentence was stricken. *Kroger* held that license suspension was authorized by each offense therein charged, and affirmed revocation. It is true that both *Olson* and *Kroger* state that where a part of a sentence is illegal an appellate court may, if the sentence is divisible, modify it by striking out the illegal part. That only says that if a sentence is legal in part and illegal in part, we may affirm that which is legal and strike that which is illegal. Neither *Olson* nor *Kroger* answers the instant question of whether, in determining if a punishment has been impermissibly enhanced, we must compare each separate part of the present multiconsequence punishment to each similar part of the former multiconsequence punishment, or whether the in toto effect of the present punishment is to be compared to the in toto effect of the former punishment.

Weaver v. Graham, supra, declared unconstitutional a state statute reducing the amount of "gain time" which accrued merely by virtue of the avoidance of disciplinary violations. The fact that other provisions were enacted whereby a prisoner might earn extra gain time at the discretion of correctional authorities based upon the prisoner's behavior did not keep the new act from being more onerous than

the repealed act. Without so stating in exact language, it is obvious the U.S. Supreme Court compared the in toto effect of the repealed statute with the in toto effect of the new statute. The Court then concluded the prisoner was disadvantaged by loss of the opportunity to automatically accrue as much gain time under the new act as he could have by the same passive conduct under the repealed statute. This in toto comparison is clarified in Justice Rehnquist's concurrence. The requirement of an in toto comparison is also established in *Dobbert v. Florida,* 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977), *rehearing denied* 434 U.S. 882, 98 S. Ct. 246, 54 L. Ed. 2d 166. Under the statute pertinent at the time of the crime the death penalty was "presumed" unless the jury, in its unbridled discretion, made a recommendation of mercy. Under the statute in effect at the time of trial the jury rendered an advisory opinion following an evidentiary hearing on mitigating and aggravating circumstances, but the trial court made the final determination, which was then subject to review. The Supreme Court stated that the two statutory procedures must be compared in toto to determine if the new one might fairly be characterized as more onerous. The Court concluded that the new statute was, in fact, ameliorative and thus not ex post facto.

Although it is true that neither *Weaver* nor *Dobbert* applies the "in toto" concept to multiconsequence punishments, they do nonetheless establish the principle that for purposes of determining whether the constitutional prohibition against ex post facto laws has been violated, the proper method is to consider the total effect of the old punishment as compared to the total effect of the new punishment.

The new statute in this case trades off the possibility of a fine of up to $10,000 for a fine certain of $500. It trades off imprisonment of up to 5 years for

a period of no more than 6 months. In exchange for the fine in a sum certain and a reduced period of imprisonment, it trades off a 1-year license revocation for a lifetime revocation.

The in toto effect of L.B. 568 upon defendant would be to restore to him 18 months of liberty in exchange for the payment of $500 and the permanent loss of the privilege to drive. I find the in toto effect of L.B. 568 upon defendant to be less onerous than the sentence imposed under the former provisions of Neb. Rev. Stat. § 39-669.07 (Reissue 1978). Liberty is the most fundamental of human rights. It is guaranteed by the fifth and fourteenth amendments to the Constitution of our nation and by article I, § 3, of the Constitution of this sovereign state. In the course of human history blood has been shed to secure it. Indeed, it was our concern that defendant not be deprived of his liberty for a moment longer than the Legislature intended, which prompted us to consider this case in phases in the first instance. The license to operate a motor vehicle is, however, only a privilege granted with the understanding that such license may be revoked for cause by the state. *Durfee v. Ress,* 163 Neb. 768, 81 N.W.2d 148 (1957). I cannot conclude that the benefits of restoring 18 months of liberty do not substantially outweigh the detriment of having to part with $500 and of not being able to ever again personally drive himself about.

Nor is this a case such as presented in *State v. Crisp,* 195 Neb. 833, 241 N.W.2d 129 (1976), wherein we refused to apply the *Randolph* doctrine. In *Crisp* the former statutes dealing with rape had been repealed, new sexual assault offenses of various degrees created, and new penalties assigned to those new offenses. The situation presented here is one in which the designation of the offense was merely changed from a felony to a misdemeanor and the punishment modified.

Once it is determined the operation of L.B. 568 upon defendant is ameliorative, the applicability of the *Randolph* doctrine is inescapable because the intent of the Legislature may fairly be presumed to be that the punishment it now considers to fit the crime is to be applied retroactively to all constitutionally permissible cases. This is such a case.

KRIVOSHA, C.J., and BOSLAUGH, J., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. ALFRED K. PHILLIPS, APPELLANT.

326 N.W.2d 849

Filed November 24, 1982. No. 82-065.

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

Ronald S. DePue of McDermott, DePue, McDermott & McDermott, for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

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

PER CURIAM.

This case is controlled by our opinion in *State v. Peiffer, ante* p. 864, 326 N.W.2d 844 (1982). Therefore, should defendant have been released from the custody of the Department of Correctional Services under the language of our earlier opinion herein, *ante* p. 303, 322 N.W.2d 447 (1982), he is to be returned thereto forthwith to complete the sentence imposed by the Third Judicial District Court, Lancaster County. He is entitled to no credit for such period of time as he may have been at liberty by

virtue of his release pursuant to our earlier opinion.

Our earlier opinion, *ante* p. 303, 322 N.W.2d 447 (1982), is overruled.

AFFIRMED.

McCOWN, J., concurring in the result.

I concur in the result for the reasons stated in my concurring opinion in *State v. Peiffer, ante* p. 864, 326 N.W.2d 844 (1982).

CAPORALE, J., dissenting.

I respectfully dissent for the reasons set forth in the dissent in *State v. Peiffer, ante* p. 864, 326 N.W.2d 844 (1982).

KRIVOSHA, C.J., and BOSLAUGH, J., join in this dissent.

MARY D. NEGRETE, APPELLANT, V. WESTERN ELECTRIC COMPANY, INC., APPELLEE.

326 N.W.2d 681

Filed November 24, 1982. No. 82-245.

1. **Workmen's Compensation: Appeal and Error.** 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; the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in his favor, and he shall have the benefit of every inference which may reasonably be drawn therefrom.
2. **Workmen's Compensation: Proof.** In a workmen's compensation case the burden is upon the employee to prove by a preponderance of the evidence all the issues involved.
3. _____: _____. An employee has the burden of proving he is suffering from a disability and that such disability is the result of an accident or occupational disease arising out of and in the course of employment, and was not the result of the normal progression of a preexisting condition.

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

James R. Coe of Carpenter, Fitzgerald & Coe, P.C., for appellant.

James L. Quinlan of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

CAPORALE, J.

The employee, plaintiff-appellant Mary D. Negrete, seeks to reverse the judgment of a three-judge panel of the Nebraska Workmen's Compensation Court on rehearing in favor of the employer, defendant-appellee Western Electric Company, Inc.

Plaintiff alleges her employment was terminated because of the effects of the occupational diseases of epicondylitis and carpal tunnel syndrome and is therefore entitled to benefits under the provisions of the Nebraska Workmen's Compensation Act. The compensation court concluded plaintiff failed to sustain her burden of proving that she suffered an injury by reason of an accident or occupational disease arising out of and in the course of her employment, and therefore dismissed her amended petition. We affirm.

We review the case in light of the postulate that 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; the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in his favor, and he shall have the benefit of every inference which may reasonably be drawn therefrom. *Narduzzo v. Sunderland Bros., ante* p. 852, 326 N.W.2d 673 (1982); *Renshaw v. Merrigol-Adler Bakery, ante* p. 662, 325 N.W.2d 46 (1982);

Hatting v. Farmers Co-op Assn., *ante* p. 242, 322 N.W.2d 423 (1982).

This divorced 46-year-old woman who has raised four children has been employed since her 14th birthday. She married while a freshman in high school and did not complete the ninth grade. She began working as a dishwasher and later obtained employment as a turkey and chicken boner at Swanson Foods. She did the same type of work at Blue Star Foods. She also labored as a packinghouse worker at Swift & Company. In 1961 she began working for the defendant and performed a variety of jobs during this employment which ended in February 1980. From 1961 to 1968 she assembled small parts as a relay assembler; from 1968 to the early 1970s she hung wires and emptied pans of parts as a layout operator, and during this period she also lifted and adjusted frames weighing up to 40 pounds; from the early 1970s on she worked in the sheet metal shop, lifting large sheets of metal weighing up to 40 pounds, and operated machinery which required the pressing of buttons with her hands.

She had a hysterectomy and other related surgery; sometime prior to 1979 she began experiencing low back pains. In March of 1979 she began missing work because her arms were going numb. She was seen by Dr. Michael Morrison in April of that year, at which time she complained of pains located in her upper back and left elbow. Examination and X-rays revealed a mild scoliosis of her upper spine and an inflammation of the lateral epicondyle of her left elbow, commonly called tennis elbow. Treatment resulted in complete relief of her elbow symptoms by May 4, 1979. While in the hospital for an assortment of problems in June of 1979, she complained of tingling and numbness in her right hand. At one time she attributed numbness and tingling of her hands and heaviness in her shoulders to striking her head against the top of a car as the result of a 1975

automobile accident. Examination revealed she had a compression of the nerve at the wrist level. A carpal tunnel release of the right wrist was performed at that time. While recovering from that surgery, she fell; during the course of that fall she applied pressure to the right hand. This event prolonged her recovery but she did return to work. Thereafter, in October of 1979, and as a result of the fall, a neurolysis of the median nerve of the right wrist was performed. During that same month she again had a recurrence of the tennis elbow. In January of 1980 she complained of pain in both elbows, and in September of 1980 she complained of pain in both shoulders. Dr. Morrison last saw plaintiff in November of 1980, at which time no complaints were made nor treatment given for either the elbows or right hand.

The only medical opinion on the issue of causation is Dr. Morrison's testimony that neither the right hand nor elbow problems were caused by plaintiff's employment with defendant, but that the employment did aggravate the chronic epicondylitis of both elbows. Dr. Morrison agreed with plaintiff's claim that she could not work at Western Electric Company because it was unable to find jobs for her which did not require frequent and repetitive strain to the elbows. He testified, however, that she was not totally disabled. There is no competent evidence as to any lesser degree of disability, or that she is unemployable elsewhere. Neither is there competent evidence that the chronic epicondylitis is not the result of the natural progression of a preexisting condition.

In a workmen's compensation case the burden is upon the employee to prove by a preponderance of the evidence all the issues involved. In this case the burden was upon the plaintiff to prove that she is suffering from a disability and that such disability is the result of an occupational disease arising out of

and in the course of her employment, and was not the result of the normal progression of a preexisting condition. *Narduzzo v. Sunderland Bros., supra*; *Aguallo v. Western Potato, Inc.*, 208 Neb. 66, 302 N.W.2d 41 (1981); *Inserra v. Village Inn Pancake House,* 197 Neb. 168, 247 N.W.2d 625 (1976).

It cannot be said the compensation court's conclusion that plaintiff failed to sustain her burden of proof is clearly wrong. Its judgment must therefore be affirmed.

AFFIRMED.

EVERETT SILEVEN, APPELLANT, V. FRED TESCH, APPELLEE.

326 N.W.2d 850

Filed November 24, 1982. No. 82-668.

1. **Judgments: Collateral Attack.** Where a judgment is attacked in a way other than a proceeding in the original action to have it vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement, the attack is a collateral attack.
2. _____: _____. Only a void judgment is subject to collateral attack.
3. **Habeas Corpus.** Habeas corpus is a collateral proceeding and as such cannot be used as a substitute for an appeal or proceedings in error.
4. **Habeas Corpus: Sentences.** To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose, unless the sentence has been fully served and the prisoner is being illegally held.
5. **Judgments: Contempt: Habeas Corpus.** Judgments of contempt are subject to review by habeas corpus only on the limited question of the trial court's jurisdiction, power, or authority to adjudicate the contempt.

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

Charles E. Craze of Gibbs & Craze Co., and David Kimble of Souchek & Kimble, for appellant.

Paul L. Douglas, Attorney General, Harold Mosher, and Ronald D. Moravec, Cass County Attorney, for appellee.

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

KRIVOSHA, C.J.

This is an appeal from an order by the District Court for Cass County, Nebraska, denying appellant Everett Sileven's request to be released from incarceration, sought pursuant to a writ of habeas corpus. For reasons more particularly set out in this opinion, we affirm the judgment of the trial court.

The State of Nebraska brought suit against Faith Baptist Church and Sileven, seeking to enjoin the operation of an elementary and secondary school because there had not been compliance with the school laws of the State of Nebraska. Following trial to the court, the trial court granted the injunction sought by the state and an appeal was taken to this court. On appeal this court affirmed that decision. *State ex rel. Douglas v. Faith Baptist Church,* 207 Neb. 802, 301 N.W.2d 571 (1981). The appellants in that case then appealed to the U.S. Supreme Court, which dismissed the case for want of a substantial federal question. *Faith Baptist Church of Louisville, Nebraska v. Douglas,* 454 U.S. 803, 102 S. Ct. 75, 70 L. Ed. 2d 72 (1981).

Even though such an injunction had been entered, Sileven and the Faith Baptist Church continued to operate the school. It was by reason of this willful disregard of the court's order that Sileven was found to be in contempt of court on May 6, 1981. The trial court ordered that Sileven could purge himself by closing the school after completion of the term, no

later than May 30, 1981, or by complying with state law.

On September 11, 1981, Sileven was once again found to be in contempt of court, and the school and church were ordered locked except when used for church services. Sileven filed a notice of appeal from that order to this court. However, because no briefs were filed, the appeal was dismissed on March 11, 1982, pursuant to the rules of this court. *State ex rel. Douglas v. Faith Baptist Church,* No. 81-726.

Notwithstanding the fact that Sileven had twice been found in contempt of court and ordered to discontinue the operation of the school, he disregarded the court's order and continued to operate the school. On February 18, 1982, the District Court again found that Sileven was in contempt of court and ordered that he be confined in the Cass County jail for a period of 4 months unless the school was closed or the school complied with the necessary school laws of the State of Nebraska. Sileven did not appeal from that order, and the order of the court finding him in contempt of court and sentencing him to jail for a period of 4 months became final and binding. Sileven was then incarcerated in the Cass County jail and served 13 days. He thereafter filed an affidavit under oath, claiming to have "severed all connections, duties and responsibilities in the operation of the Faith Baptist School . . . ." It therefore appearing to the trial court that Sileven was no longer involved with the school, he was released from jail.

Despite Sileven's sworn statement, however, he was shortly thereafter reelected administrator of the school, and he reopened the school on April 19, 1982. Following a hearing held on May 5, 1982, the District Court for Cass County, Nebraska, found Sileven in contempt of court for failing to comply with an order of the court dated September 11, 1979, which en-

joined Sileven and other named defendants from operating the Faith Baptist Church school until such time as they had complied with state laws governing the operation of the school. The court ordered Sileven confined to the Cass County jail for a period of 3 months and 17 days, the sentence to begin on September 1, 1982. Sileven once again did not appeal from that judgment, and the order finding him in contempt of court and directing him to be incarcerated, again, became final and binding. On September 3, 1982, Sileven was incarcerated pursuant to the order.

On September 17, 1982, Sileven filed a petition in the District Court for Cass County, Nebraska, seeking the issuance of a writ of habeas corpus, alleging that his incarceration was unlawful in that he was "ordered to complete the jail term without opportunity to purge himself of the contempt." The District Court denied the petition and an appeal to this court was taken. It is this appeal which is now before us.

This appeal must be dismissed because Sileven's attempt to use the writ of habeas corpus to cause a review of his incarceration is not proper. Sileven is attempting to collaterally attack the judgment by seeking a writ of habeas corpus. In *Schilke v. School Dist. No. 107,* 207 Neb. 448, 451, 299 N.W.2d 527, 529-30 (1980), we said: "Where a judgment is attacked in a way other than a proceeding in the original action to have it vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement, the attack is a 'collateral attack.' *County of Douglas v. Feenan,* 146 Neb. 156, 18 N.W.2d 740 (1945); *State ex rel. Southeast Rural Fire P. Dist. v. Grossman,* 188 Neb. 424, 197 N.W.2d 398 (1972). Only a *void* judgment is subject to collateral attack. *Stanton v. Stanton,* 146 Neb. 71, 18 N.W.2d 654 (1945); *Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276,* 204 Neb. 316, 282 N.W.2d 576 (1979).

"It is well settled that where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. *State ex rel. Southeast Rural Fire P. Dist., supra.* . . .

"We have recognized the distinction between want of jurisdiction and error in the exercise of jurisdiction. ' "Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked." ' " (Emphasis supplied.)

It has long been the rule in this jurisdiction that habeas corpus is a collateral proceeding and as such cannot be used as a substitute for an appeal or proceedings in error. *Schleuter v. McCuiston,* 203 Neb. 101, 277 N.W.2d 667 (1979); *State ex rel. Casselman v. Macken,* 194 Neb. 806, 235 N.W.2d 867 (1975); *Case v. State,* 177 Neb. 404, 129 N.W.2d 107 (1964); *Rhodes v. Sigler,* 172 Neb. 439, 109 N.W.2d 731 (1961), *cert. denied* 369 U.S. 848, 82 S. Ct. 931, 8 L. Ed. 2d 8 (1962); Annot., 33 A.L.R.3d 448 (1970).

Furthermore, in *Piercy v. Parratt,* 202 Neb. 102, 105-06, 273 N.W.2d 689, 691 (1979), we said: "We have consistently held that to release a person from a sentence of imprisonment by habeas corpus it must appear that the sentence was absolutely void. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose, unless the sentence has been fully served and the prisoner is being illegally held. Jackson v. Olson, 146 Neb. 885, 22 N.W.2d 124; Gamron v. Parratt, 199 Neb. 163, 256 N.W.2d 867."

Unless, therefore, it can be said that the trial court

in this case did not have either jurisdiction of the offense or jurisdiction over the person of the defendant, and the sentence was within the power of the court to impose, the writ of habeas corpus is not available to Sileven. It is for that reason that we have previously held that judgments of contempt are subject to review by habeas corpus only on the limited question of the trial court's jurisdiction, power, or authority to adjudicate the contempt. *Rhodes v. Sigler, supra; Umphenour v. Van Hoosen,* 121 Neb. 870, 236 N.W. 762 (1931); *In re Havlik,* 45 Neb. 747, 64 N.W. 234 (1895); Annot., 33 A.L.R.3d 589 (1970).

Sileven does not question that the court had jurisdiction over either the subject matter of this action or over the person. His argument is not that the judgment was void, but only that it was erroneous. Because Sileven twice failed to appeal to this court from the trial court's judgment and order finding him in contempt and ordering him incarcerated, thereby waiving his right of review, he is not now permitted to seek review of those matters by this writ of habeas corpus.

Though the argument is not entirely clear as made by Sileven, it appears that he continues to argue to us that his first amendment rights have been violated. Although Sileven acknowledges that he has previously been before this court and a decision was rendered in the case of *State ex rel. Douglas v. Faith Baptist Church,* 207 Neb. 802, 301 N.W.2d 571 (1981), Sileven argues that the constitutional issue was not there decided. We are totally at a loss to understand how he may reach that conclusion. Our decision in the *Faith Baptist* case specifically provides in part as follows at 809, 301 N.W.2d at 576: "Defendants' [Sileven et al.] contention as to violation of their first and ninth amendment rights will be considered together, because the question involved in both is the extent to which the State can, if at all,

restrict these rights in the interest of assuring all children a quality basic education." After announcing that we were considering Sileven's contention that his first and ninth amendment rights were violated, our opinion in *Faith Baptist* found that his first and ninth amendment rights were not being violated. That issue, insofar as it affects Sileven and the Faith Baptist Church, is no longer an open question in this jurisdiction, and our decision in *Faith Baptist* has declared the law in this jurisdiction, no matter what anyone may argue to the contrary. Our decision is final and binding. We have already found that Sileven and the Faith Baptist Church do not have a first amendment right to ignore the state's school laws. It is Sileven's choice to continue violating the lawful orders of the court which has resulted in his being held in contempt of court. We specifically found that the state's right to regulate schools, including the Faith Baptist Church school, was a reasonable regulation and did not impose an unreasonable burden upon Sileven's religious beliefs, nor violate his first or ninth amendment rights. Sileven is simply wrong if he believes that he may consistently and continually flout the law by merely declaring that it is contrary to his religious beliefs, no matter how sincerely held. The extent to which the state must set aside its laws in order to accommodate religious beliefs is not to be determined, under our form of government, by the individual but, rather, by the court; and once this is determined by the court, as it has been in this matter, it may not be ignored or rejected by the individual without subjecting the individual to appropriate penalties. That is simply not the way in which a legal system in a democracy must, of necessity, operate. Those tactics are better suited for those who would promote anarchy.

A writ of habeas corpus not being available to Sileven in this case, the trial court was correct in

rejecting the request. The judgment is therefore affirmed.

AFFIRMED.

CLINTON, J., concurring in the result.

I concur in the result and with the opinion except the next to the last paragraph. Habeas corpus is not a substitute for an appeal, nor is it a permissible form of collateral attack except on a judgment that is wholly void. The opinion in *State ex rel. Douglas v. Faith Baptist Church,* 207 Neb. 802, 301 N.W.2d 571 (1981), may well have been erroneous, but it is not void.

HAROLD HALL, APPELLANT AND CROSS-APPELLEE, V. COX CABLE OF OMAHA, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

327 N.W.2d 595

Filed December 3, 1982. No. 44417.

1. **Demurrer.** A general demurrer admits only such facts as are well pleaded and does not admit mere conclusions of the pleader.
2. **Statutes.** Special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict.
3. _____. Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication.
4. **Municipal Corporations.** 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 statewide concern, the state law takes precedence over any municipal action taken under the home rule charter.
5. **Legislature: Municipal Corporations.** 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.
6. **Public Utilities: Municipal Corporations: Standing.** A ratepayer

does not have legal standing to attack a rate established by a legislative body, absent a showing of discrimination or a violation of statute, and solely on the basis that the ratepayer thinks the service should be provided more cheaply.

7. **Standing.** Before any party can invoke the jurisdiction of the court he must have standing to sue. He must have some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.
8. **Municipal Corporations: Actions.** A person seeking to restrain the act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.
9. _____: _____. Ordinarily, a demand upon the responsible officers of the governmental subdivision or municipal corporation that they take action is necessary and a condition precedent to the right of a taxpayer to maintain an action for the recovery of funds on behalf of the governmental entity.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Larry W. Myers, J. Patrick Green, Wallace Rudolph, and Robert C. Guinan of Guinan & Kolenda, for appellant.

Herbert M. Fitle, City Attorney, and Timothy M. Kenny, for appellee City of Omaha.

Abrahams, Kaslow & Cassman, and Dow, Lohnes & Albertson, for appellee Cox Cable.

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

KRIVOSHA, C.J.

The appellant, Harold Hall, commenced this action in the District Court for Douglas County, Nebraska, seeking declaratory relief pursuant to Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1979). The appellees, Cox Cable of Omaha, Inc. (Cox Cable), a Nebraska corporation granted a cable franchise by the City of Omaha, the City of Omaha, its mayor, and certain members of its city council, each filed a demurrer to Hall's second amended pe-

tition (petition). Appellees Green and Hassett, members of the Omaha City Council, filed separate answers, generally admitting all of the allegations of Hall's petition.

On May 28, 1981, the trial court sustained the demurrers of the appellees Cox Cable and the City of Omaha and dismissed the petition. Having now reviewed the files in this case, we are of the opinion that the trial court was correct in sustaining the demurrers and dismissing the petition and, accordingly, affirm the judgment of the trial court.

Because this case was disposed of by the trial court on demurrers there is, of course, no evidence before this court. All that we have before us is the 22-page petition filed by Hall and the demurrers filed by Cox Cable and the City of Omaha.

We recognize that because the case below was decided on a demurrer we are required, in reviewing this case, to consider all proper allegations of *fact* as true. *Paasch v. Brown,* 193 Neb. 368, 227 N.W.2d 402 (1975); *Hester v. Young,* 154 Neb. 227, 47 N.W.2d 515 (1951). By the same token, however, only allegations of *fact* are to be so considered and the mere *conclusions* of the pleader are insufficient and are not admitted by the demurrer. A general demurrer admits only such facts as are well pleaded and does not admit mere conclusions of the pleader. See, *Retail Section of Chamber of Commerce of Plattsmouth v. Kieck,* 128 Neb. 13, 257 N.W. 493 (1934); *Salsbury v. City of Lincoln,* 117 Neb. 465, 220 N.W. 827 (1928). As we noted in *Timmerman v. Hertz,* 195 Neb. 237, 244-45, 238 N.W.2d 220, 225 (1976): "The pleading of legal conclusions is insufficient to raise an issue of fact."

Much of the 22 pages of Hall's petition is nothing more than unsupported conclusions and only tends to confuse the issues presented. The petition alleges as follows: Hall is a resident of the City of Omaha, the owner of a television set, desirous of obtaining

the services of cable television, and a legally qualified elector of the City of Omaha entitled to vote in any municipal election in Omaha. After then alleging that this is a proper class action under Neb. Rev. Stat. § 25-319 (Reissue 1979) and is an action brought pursuant to the Uniform Declaratory Judgments Act, §§ 25-21,149 to 25-21,164, Hall identifies the various appellees, who are the City of Omaha, its mayor, and the members of the city council, as well as a private corporation duly organized under the laws of the State of Nebraska with its principal place of business in Omaha, Nebraska. The petition then alleges that Cox Cable is comprised of 80 percent ownership by Cox Cable Communications, Inc., of Atlanta, Georgia, and 20 percent divided among various residents of the Omaha area.

Further, the petition alleges facts concerning a contact made by one of the present stockholders of Cox Cable with Cox Cable of Atlanta. The petition alleges that the purpose of the contact was to interest Cox Cable of Atlanta in seeking a cable franchise in the City of Omaha; that as a result of the contact a preincorporation agreement for Cox Cable was executed by the Atlanta parent corporation and seven of the local shareholders. A copy of the agreement is attached to the petition and generally provides, among other matters, that after a period of 5 years from the City of Omaha's award of a cable franchise to Cox Cable, each of the local shareholders has the right to sell his or her shares of stock to Cox Cable of Atlanta in accordance with certain formulas set out in the agreement. The petition then, through a series of conclusions, alleges that the stockholders are not suited to be stockholders of a cable television corporation and have been obtained solely for the purpose of influencing the city council in granting the franchise. It is significant to note at this point that there are no allegations of *fact* in the petition of

any wrongdoing by either the City of Omaha or any of its officials.

The petition then alleges, by way of conclusion, that Neb. Rev. Stat. § 18-2202 (Reissue 1977), concerning community antenna television service (CATV), was amended in 1979 to eliminate the requirement of local voter approval for the granting of a CATV franchise, and substituted in place of voter approval the right of the city council and the mayor to approve such franchise. The petition then details the action taken by the city council in seeking bids by interested cable television concerns pursuant to a cable ordinance previously adopted by the city council, a copy of which was attached to the petition. The petition further alleges that contrary to a "no lobby rule" adopted by the city council in connection with the cable franchise, certain city council members "did in fact receive direct and indirect contacts, favors and services from representatives of Cox Cable of Omaha; that the receipt by said Council members of such contacts, favors and services rendered it impossible for them to make an impartial decision on the merits regarding the award of a CATV franchise for Omaha." The petition alleges no facts regarding which members of the council were so affected, whether any of them responded to the contacts, or whether any acted in reliance of the contacts. This is but a sample of the manner in which the petition is generally conclusory in nature and therefore defective.

The petition further alleges that in violation of specific requirements in the city's request for proposals for CATV, the proposal of Cox Cable failed to attach certain documents and failed to fully disclose certain requested information, principally concerning the preincorporation agreement earlier executed by Cox Cable of Atlanta and the Omaha resident stockholders. The petition further alleges that Cox Cable made representations to the city with regard to the

existence of a system which it calls "Indax" when in fact the system did not exist in any community in operable form. The petition then alleges that on August 19, 1980, the city council of Omaha passed and adopted ordinance No. 29254 granting to Cox Cable a nonexclusive CATV franchise which was thereafter signed by the mayor on behalf of the city. Under the ordinance, pursuant to Neb. Rev. Stat. § 18-2204 (Reissue 1977), the city is to receive a franchise fee of 5 percent of the revenues collected by Cox Cable.

The petition then, in conclusory form, alleges that ratepayers have a constitutional right to rates which are just and reasonable and that the franchise award process and resulting agreement used by the City of Omaha in awarding the franchise to Cox Cable was totally invalid in violation of those constitutional rights. The petition further alleges that the awarding of the franchise was invalid because the voters of the City of Omaha were not permitted to pass on the franchise, notwithstanding the fact that both a state statute and a provision of the charter require a public vote, and for the further reason that the rates approved by the city council in the initial franchise agreement contained improper factors which should not be included in a rate base.

The prayer of the petition then asks that the court find and determine that the entire franchise award process and resulting agreement is void because of the "inherent conflict of interest of the City of Omaha," or, in the alternative, the City of Omaha's 5 percent franchise fee awarded under the agreement and provided for by statute be held invalid and unenforceable. Further, the prayer asks the court to permanently enjoin the City of Omaha from collecting any moneys under the fee provision and that the initial rates set forth in the franchise agreement be reduced by at least 5 percent to reflect the "invalidity of the City of Omaha's franchise fee." The prayer further asks the court to order that the initial

rates of Cox Cable be reduced by at least 20 percent "to purge them of the effect of the unlawful transaction and the unlawful consideration paid to the Local Shareholders which is reflected in the rate base," or, in the alternative, "that the Court order that such rates be recomputed in a manner that assures that the level of such rates will in no manner be based upon or impacted by the existence of such shares of stock, and that Cox Cable of Omaha be enjoined in the future from charging any rate which is based upon or reflects the existence of such outstanding shares or payment of the unlawful consideration to the Local Shareholders."

At the outset we are presented with determining whether Hall has standing to bring this action as either (1) "a resident," (2) "the owner of a television set," or (3) "an elector." Hall does not allege that he is a ratepayer, although throughout his brief he relies upon the rights of a ratepayer. We do not believe that a prospective ratepayer is the same as a ratepayer in this type of case.

Hall's claim of standing as an elector is based upon his claim that Neb. Rev. Stat. §§ 18-2201 et seq. (Reissue 1977), and in particular § 18-2202, are invalid in that cable television is not a matter of statewide concern, and both the Omaha city charter, providing that a franchise may not be awarded until voted upon by the voters of the City of Omaha (see § 11 of the home rule charter of the City of Omaha), and Neb. Rev. Stat. § 14-811 (Reissue 1977), which provides in part that a new franchise may not be granted or an existing franchise extended unless an annuity or royalty be provided and reserved to the city and then only after the same has been submitted to a vote and approved by the electors in a general city election or special election called for that purpose, take precedence over the provisions of §§ 18-2201 et seq. Hall's contention in this regard fails for at least two reasons. It is clear that § 18-2204

is a special statute concerning an occupation tax to be collected by the City of Omaha in connection with CATV service only, while § 14-811 is a general statute regarding franchises and the levying of an annuity or royalty generally. That is to say, § 18-2204 is a special statute while § 14-811 is a general statute. The effect of that difference is significant. In *Kibbon v. School Dist. of Omaha,* 196 Neb. 293, 298-99, 242 N.W.2d 634, 637 (1976), we repeated the oft-cited rule regarding special statutes and general statutes, saying: "It is a well-established rule that special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict. Houser v. School Dist. of South Sioux City, 189 Neb. 323, 202 N.W.2d 621. Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication. Bass v. County of Saline, 171 Neb. 538, 106 N.W.2d 860." Section 14-811 must yield to the provisions of § 18-2204 regarding CATV, and the city's failure to submit the matter under the provisions of § 14-811 to a vote of the electors of the City of Omaha was not a defect in that such submission was not required.

Further, the rules concerning matters of statewide concern enacted by statute, when in conflict with provisions of home rule charters, are likewise clear and applicable to this case. In the recent case of *Jacobberger v. Terry,* 211 Neb. 878, 881, 320 N.W.2d 903, 905 (1982), we said: " '[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)." In the *Jacobberger* case we further noted: " '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.' . . . '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.' " *Id.* at 883, 320 N.W.2d at 906. While each case therefore must be examined on its own facts, the cases heretofore decided by this court compel us to find that matters involving CATV service, which by its very nature is engaged in both intercommunity and interstate commerce and is in part regulated by the Federal Communications Commission because of the interstate nature of the business (see 47 C.F.R. pt. 76 (1981)), must be of statewide concern. It would be difficult, if not impossible, to perceive how a parking garage located in the City of Omaha would be of statewide concern because of its connection with highways leading throughout the state (see *Omaha Parking Authority v. City of Omaha,* 163 Neb. 97, 77 N.W.2d 862 (1956)) and not find that television signals, having the ability to travel throughout the state and into other states from Omaha and vice versa, could be held to be of purely local concern. We believe that the Legislature was perfectly within its authority in determining that the regulation of CATV was a matter of statewide concern, and the adoption of §§ 18-2201 et seq. takes precedence over any home rule charter of the City of Omaha to the contrary.

Having determined therefore that there was nothing which was required to be submitted to a vote of the electors of the City of Omaha, we must, of ne-

cessity, find that Hall does not have standing to bring this case as a qualified elector. He has not alleged any facts showing he has suffered a legal injury by reason of his being denied the right to vote on this matter.

We turn then to Hall's claim that he has a right to institute this proceeding by reason of his being the owner of a television set and desirous of obtaining the services of cable television for himself and other residents, provided the service is of high quality and at reasonable rates. There is no question that § 18-2201 imposes upon the mayor and city council the responsibility to prescribe reasonable quality standards for service and to regulate and fix reasonable and compensatory rents or rates for such service. If, indeed, a ratepayer filed a proper petition setting out facts from which it could be concluded that the rates approved by the mayor and city council were not reasonable and compensatory, a suit in the District Court of the appropriate county could be maintained. That is not, however, the case presented to us here. In the first instance, Hall's allegations that the rates are not reasonable are based not upon any facts but upon mere conclusions derived from Hall's objection to the preincorporation agreement entered into between Cox Cable of Atlanta and the various individual stockholders. The fact that Cox Cable has guaranteed its stockholders a certain value to their stock, payable in the future, without more, does not allege facts showing that the rate approved is not reasonable. This is particularly true where, as here, the city received six responses to its invitation to bid and, after examination, selected Cox Cable. While one might question the effect of such an arrangement, we find no allegations of fact in this petition which raise a valid issue of fact concerning the rates established by the city council in this matter. Hall simply fails to allege any facts showing how he is legally in-

jured by what has taken place.

In the case of *Nebraska Telephone Co. v. State,* 55 Neb. 627, 76 N.W. 171 (1898), this court was presented with a somewhat similar situation. The plaintiff, Yeiser, a citizen of the city of Omaha, desired a telephone placed in his law office for his own use. He requested the telephone company to furnish him an instrument properly connected and afford him telephone service. The telephone company refused to comply with this request unless Yeiser would pay it for such instrument and service the sum of $5 per month in advance. Yeiser claimed that the sum was an unreasonable and exorbitant charge and refused to pay the same, but tendered the telephone company $9 as compensation for the service required of it for 3 months and demanded that it supply him with the telephone and telephone service for that length of time. In rejecting Yeiser's claim, this court said in part at 635-37, 76 N.W. at 73-74: "Where the legislature has fixed the compensation which a public service corporation may exact for the performance of a service, then the reasonableness of the compensation so fixed by the legislature—that is, whether the limiting of the corporation to the compensation fixed by the statute would result in a confiscation of the corporation's property—is a judicial question. [Citation omitted.] But the power—the jurisdiction—to determine what compensation a public service corporation may exact for service to be rendered by it we understand to be a legislative and not a judicial function. . . .

. . . .

"The relator must address himself for relief from the grievances of which he complains to the legislative power of the state—to the legislature itself, to the board of transportation, to the mayor and council of the city of Omaha. If the compensation now charged and exacted by the telephone companies of the state is exorbitant and unreasonable, we must

presume that the board of transportation, the mayor and council of the city of Omaha, and the legislature of the state, one and all of them, will investigate the matter and prescribe a scale of reasonable charges."

An examination of cases from both this jurisdiction and others as well discloses that a ratepayer does not have legal standing to attack a rate established by a legislative body, absent a showing of discrimination or a violation of statute, and solely on the basis that the ratepayer thinks the service should be provided more cheaply. *Western Union Telegraph Co. v. Call Publishing Co.*, 44 Neb. 326, 62 N.W. 506 (1895); *Reimer v. City of O'Neill*, 189 Neb. 151, 201 N.W.2d 706 (1972); *Rutherford v. City of Omaha*, 183 Neb. 398, 160 N.W.2d 223 (1968); *St. Paul Book & S. Co. v. St. Paul Gaslight Co.*, 130 Minn. 71, 153 N.W. 262 (1915); *Ga. Power Co. v. Allied Chemical Corp.*, 233 Ga. 558, 212 S.E.2d 628 (1975); *City of Houston v. Public Utility Com'n*, 599 S.W.2d 687 (Tex. Civ. App. 1980); *Patton v. Chattanooga*, 108 Tenn. 197, 65 S.W. 414 (1901).

It is clear from the law that not everyone is entitled to sue anyone for whatever reason he or she may choose. One must have some legal interest in the outcome of the litigation in order to maintain suit. See Green, *The Public Plaintiff Comes to Nebraska: An Essay on the Limits of State Judicial Power*, 13 Creighton L. Rev. 31 (1979). In the recent case of *Stahmer v. Marsh*, 202 Neb. 281, 284, 275 N.W.2d 64, 66 (1979), we said: "Before any party can invoke the jurisdiction of the court he must have standing to sue. He must have some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. See 59 Am. Jur. 2d, Parties, § 26, p. 374. A plaintiff must have some remedial interest which the law of the forum can recognize and enforce. Dafoe v. Dafoe, 160 Neb. 145, 69 N.W.2d 700; Davies v. De Lair, 148 Neb. 395, 27 N.W.2d 628. In order to

maintain an action to enforce private rights the plaintiff must show that he will be benefited by the relief to be granted."

And in *West Fort Residents Assn. v. Housing Auth. of City of Omaha,* 205 Neb. 397, 399, 288 N.W.2d 27, 29 (1980), we said: "A person seeking to restrain the act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation." In the instant case Hall has failed to allege any facts which, as an "owner of a television set," would entitle him to maintain this action.

Hall has neither sought the service and become a ratepayer nor made any demand upon the City of Omaha to review the rates. While his letter of September 8, 1980, set out as one of his grounds "excessive rates," he did not ask that the rates be adjusted but only that the franchise be declared void. This, of course, was not the appropriate relief to be requested by a ratepayer, let alone a prospective ratepayer. If the rate is unreasonable, as contemplated by § 18-2201, the ratepayer must first petition the city council and then, and only then, bring a lawsuit if he can allege sufficient facts to state a cause of action.

Hall's claim that certain information was withheld from the City of Omaha, thereby causing the council to approve a rate higher than it would otherwise have approved, does not entitle him to maintain this action. If, indeed, information was withheld from the city which would have caused it to disapprove the rate, or amounts to a fraud upon the city, the city, in the first instance, must make that determination and that demand. As we noted recently in *Lake v. Piper, Jaffray & Hopwood Inc., ante* p. 570, 575, 324 N.W.2d 660, 662 (1982): " 'Ordinarily a demand upon the responsible officers of the govern-

mental subdivision or municipal corporation that they take action is necessary and a condition precedent to the right of a taxpayer to maintain an action for the recovery of funds on behalf of the governmental entity.' " See, also, *Evans v. Metropolitan Utilities Dist.*, 184 Neb. 172, 166 N.W.2d 411 (1969); *Sesemann v. Howell,* 195 Neb. 798, 241 N.W.2d 119 (1976). We further said in the *Lake* case, *supra* at 575, 324 N.W.2d at 663: "The rule is clear. A prior demand is necessary before an action may be commenced." There is no allegation from which it may be concluded herein that Hall has met that requirement or made that demand. Even if an inappropriate rate was established, a fact we do not determine, seeking to void the entire franchise would, under these facts, be beyond the authority of a court.

His last claim for standing is that he is a resident of the City of Omaha. That gives him even less right than a taxpayer to maintain this suit. Having therefore failed to show how or in what manner he has standing, the trial court was correct in sustaining the demurrers.

At the outset we noted that the appellees Green and Hassett had filed answers as members of the city council. In view of the fact that we have determined that Hall has no standing to maintain this suit, their answers are mere nullities and the trial court was correct in disregarding them when dismissing the suit. Having thus decided the case, we need not consider Hall's other assignments of error or appellees' cross-appeal. The judgment of the trial court is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

CELESTER C. WHITE, APPELLANT, V. MEDICO LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE.

327 N.W.2d 606

Filed December 3, 1982. No. 81-569.

1. **Actions: Pleadings.** Whether the nature of an action is legal or equitable is to be determined from its main object, as disclosed by the averments of the pleadings and relief sought.
2. _____: _____. Although a defendant may present any defense, legal or equitable, interposing an equitable defense does not convert an action otherwise at law into one in equity.
3. **Judgments: Appeal and Error.** The findings of the trial court in an action at law tried without a jury have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong; the evidence must be considered in the light most favorable to the successful party, conflicts must be resolved in its favor, and it is entitled to the benefit of every inference which can reasonably be deduced from the evidence.
4. **Insurance: Statutes.** Neb. Rev. Stat. § 44-710.14 (Reissue 1978) must be read in pari materia with Neb. Rev. Stat. § 44-358 (Reissue 1978).
5. **Insurance: Pleadings: Proof.** In order for misrepresentations in an application for insurance to constitute a defense to an action on the contract, the insurer must plead and prove, among other things, that the misrepresentations were made knowingly with intent to deceive, that the insurer relied and acted upon such statements, and that the insurer was deceived to its injury.
6. **Insurance.** Where the question in the application calls for an answer peculiarly within the knowledge of the applicant, an untrue answer relating to a matter material to the risk and relied upon by the insurer will void the policy.
7. _____. When an applicant makes an untrue statement with respect to a material fact peculiarly within his knowledge, the finder of fact may, from the mere occurrence of the false statement, conclude it was made knowingly with intent to deceive.
8. **Evidence.** An ultimate fact fairly and reasonably inferable from the facts and circumstances proved is to be taken as established.
9. **Judgments.** In the absence of a request for specific findings, the trial court need only make its findings generally for the prevailing party.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Daniel W. Ryberg, for appellant.

Lyle E. Strom of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee.

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

CAPORALE, J.

This appeal results from the dismissal by the trial court of appellant's petition and the overruling of his motion for new trial. We affirm.

Plaintiff-appellant, Celester C. White, sought recovery from defendant-appellee, Medico Life Insurance Company (Medico). His first two causes were based on two insurance policies issued to White by Medico; the third purported cause alleged a concerted effort by Medico and its parent company, Mutual Protective Insurance Company (Mutual), to influence White to settle an allegedly undisputed claim in alleged violation of Neb. Rev. Stat. § 44-1525(9)(m) (Reissue 1978). Medico answered the first two causes by asserting White's failure to disclose fully his prior relevant medical history and by alleging that upon learning of the misrepresentations it had rescinded the policies. Medico answered the third cause by alleging it failed to state a cause of action and by incorporating the failure to disclose and rescission contained in its answer to the other causes.

White pled a breach of contract action, together with a statutory action, and sought money damages. Medico's answers asserted, in part, an equitable defense, i.e., that it had rescinded the policies in question. Whether the nature of an action is legal or equitable is to be determined from its main object, as disclosed by the averments of the pleadings and relief sought. *Hein v. M & N Feed Yards, Inc.,* 205 Neb. 691, 289 N.W.2d 756 (1980); *Roy v. Bladen School Dist. No. R-31,* 165 Neb. 170, 84 N.W.2d 119 (1957). Although a defendant may present any defense, legal or equitable, *Wischmann v. Raikes,* 168

Neb. 728, 97 N.W.2d 551 (1959), *Kelly v. Kannarr,* 118 Neb. 472, 225 N.W. 230 (1929), interposing an equitable defense does not convert an action otherwise at law into one in equity. 1 Am. Jur. 2d *Actions* § 7 (1962). This case, therefore, although the parties have briefed it as one in equity, presents actions at law tried without a jury. As such, the findings of the trial court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong; the evidence must be considered in the light most favorable to the successful party, conflicts must be resolved in its favor, and it is entitled to the benefit of every inference which can reasonably be deduced from the evidence. *England v. Leithoff, ante* p. 462, 323 N.W.2d 98 (1982); *Hemenway v. MFA Ins. Co.,* 211 Neb. 193, 318 N.W.2d 70 (1982).

White's operative assignments of error are the trial court's findings that he misrepresented his past medical history to Medico, with the intent that Medico rely thereon; that those misrepresentations were material; that Medico did in fact rely upon them; that Medico was not in fact aware of past medical history to an extent that it would be estopped from relying upon them; that he, White, did not have a private cause of action under § 44-1525(9)(m); that there was no evidence Medico had conducted itself contrary to § 44-1525(9)(m) with such "frequency" as to constitute a violation thereof; the failure to find that any misrepresentation White may have made was knowingly false; and that the burden of proof was improperly shifted to White.

The record supports findings that Mutual, the related company of Medico, sold insurance to White in 1975 through its agent, Gerald Yeck. Yeck had previously sold White insurance while he was an agent with certain other insurance companies. The completed Mutual application which Yeck received in 1975 failed to disclose various relevant prior medical

history, including hospitalizations for heart and vascular disease and for back and lung problems. In truth and fact, the only prior medical history disclosed on the application for the policy was a truck accident which occurred in Ogallala, Nebraska. This was contrary to the information requested by the application form, which asked for various information regarding treatment which might have occurred during the preceding 5 years. The record also indicates that White failed to modify any of this submitted information, although he had the opportunity to do so when the insurer sent him a routine follow-up letter which requested the transmittal of such additional or modified information.

White obtained a disability benefit policy which Medico issued on September 26, 1976. The application for this policy also failed to reveal any of the prior relevant medical history other than the Ogallala truck accident.

White purchased a hospital confinement policy issued by Medico on January 8, 1977. The application for this policy again failed to reveal all of the relevant and material prior medical history, other than the Ogallala truck accident.

In 1977 and 1978 White received various hospital treatments for which he made claims under the September 1976 and January 1977 policies. Medico denied these claims after discovering White's prior medical history and elected to rescind both policies and to refund appellant the premiums he had paid.

There was conflicting testimony regarding the conversations between White and Medico's agents, and the contents thereof. In substance, White's evidence suggests that Medico knew about some or all of White's prior relevant medical history beyond the already disclosed Ogallala truck accident, while Medico's evidence suggests that it knew about nothing of significance other than the Ogallala truck accident.

Neb. Rev. Stat. § 44-710.14 (Reissue 1978) provides that the falsity of any statement in an application for insurance, such as those here in question, may not bar the right to recovery thereunder unless such false statement materially affected either the acceptance of the risk or the hazard assumed by the insurer. In *Zimmerman v. Continental Cas. Co.,* 181 Neb. 654, 150 N.W.2d 268 (1967), we held that that provision must be read in pari materia with Neb. Rev. Stat. § 44-358 (Reissue 1978), which provides: "No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." We then concluded that in order for misrepresentations in an application for insurance to constitute a defense to an action on the contract, the insurer must plead and prove, among other things, that the misrepresentations were made knowingly with intent to deceive, that the insurer relied and acted upon such statements, and that the insurer was deceived to its injury. In that case we reversed the judgment in favor of the insured's beneficiary pursuant to the jury's verdict because of an error in the instructions. In *Gillan v. Equitable Life Assurance Society,* 143 Neb. 647, 656, 10 N.W.2d 693, 698 (1943), we quoted with approval language in an earlier case, *Muhlbach v. Illinois Bankers Life Ass'n.,* 108 Neb. 146, 187 N.W. 787 (1922): " 'Where the question in the application calls for an answer peculiarly within the knowledge of the applicant, an untrue answer re-

lating to a matter material to the risk and relied upon by the insurer will avoid the policy.' " Therefore, when an applicant makes an untrue statement with respect to a material fact peculiarly within his knowledge, the finder of fact may, from the mere occurrence of the false statement, conclude it was made knowingly with intent to deceive. The trial judge, sitting as the finder of fact, found that White, in applying for and obtaining the two policies in question, "misrepresented to the defendant that he did not have certain prior physical disorders, which he in fact did have." Contrary to appellant's argument, that language, in the face of this record, constitutes a finding that appellant made the misrepresentations "knowingly." An ultimate fact fairly and reasonably inferable from the facts and circumstances proved is to be taken as established. *Kirkpatrick v. Chocolate Sales Corporation,* 127 Neb. 604, 256 N.W. 89 (1934); *Struve v. City of Fremont,* 125 Neb. 463, 250 N.W. 663 (1933). Moreover, we find no request for specific findings; in the absence of such, the trial court need only have made its findings generally for the appellee. Neb. Rev. Stat. § 25-1127 (Reissue 1979); *Lindgren v. City of Gering,* 206 Neb. 360, 292 N.W.2d 921 (1980); *Burgess v. Curly Olney's, Inc.,* 198 Neb. 153, 251 N.W.2d 888 (1977).

The trial court further found the misrepresentations to be material in nature. Ample evidence was adduced to substantiate this finding, namely, the testimony of the underwriter that had the true facts been disclosed they would have triggered further investigation by the company and would have ultimately resulted in nonissuance of the policies herein. This evidence also established the element of reasonable reliance by the insurer upon appellant's misrepresentations.

Appellant asserts that Medico had sufficient information such that it had a duty of further inquiry and should be estopped from reliance upon the misrep-

resentations. The only information of substance which Medico had was that concerning the Ogallala truck accident, and possible knowledge of a stabbing incident in 1971. However, the Ogallala hospital report gave no realistic hint of appellant's other health history, and the stabbing incident was more than 5 years old at the time that Medico's agent allegedly learned of it. The trial court was correct in concluding Medico was not estopped from denying coverage.

Appellant argues further that the court below erred by placing the burden of proof on him rather than on appellee. The record fails to reveal that such was the case. In any event, the record establishes that Medico offered ample evidence, as we have noted, to demonstrate that the representations made by White were false, that they were made knowingly with intent to deceive, that they were material, and that they were reasonably relied upon by Medico to its damage.

Finally, appellant urges that the trial court erred in two respects concerning the Nebraska Unfair Competition and Trade Practices Act, specifically, § 44-1525, which provides in pertinent part: "The following shall be unfair methods of competition and unfair or deceptive acts or practices in the business of insurance: . . . (9) Committing or performing with such frequency as to indicate a general business practice any act which: . . . (m) Fails to promptly settle claims, when liability has become clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage." He argues, firstly, the trial court should have held White has a private cause of action thereunder, and, secondly, it should have held Medico violated that section with such frequency as to constitute a general business practice.

These contentions are predicated on the allegation

that Medico and Mutual acted in concert to deprive White of benefits allegedly due him on the original Mutual policy in order to pressure him into compromising his claims under all of the policies.

White argues that enactment of the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1978), subsequent to the events involved in *Allied Financial Services, Inc. v. Foremost Ins. Co.*, 418 F. Supp. 157 (D. Neb. 1976), makes the late Judge Denney's holding, even if correct at the time, that the Nebraska Unfair Competition and Trade Practices Act, Neb. Rev. Stat. §§ 44-1522 et seq. (Reissue 1978), does not contemplate private suits but instead only vests powers and duties in the state Director of Insurance, who is empowered to enjoin and penalize certain prohibited acts, inapplicable here.

Section 59-1602 declares unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce to be unlawful. Section 59-1609 provides, among other things, that one injured in his business or property by violation of § 59-1602 may bring a civil action to, in addition to certain other items, recover his actual damages. From these two provisions White argues that irrespective of what the law may have been before the 1974 enactment of the Nebraska Consumer Protection Act, that act, together with the Nebraska Unfair Competition and Trade Practices Act, now provides a private cause of action for a violation of § 44-1525(9)(m).

Whether that is so need not be, and therefore is not, decided at this time. White's evidence in this regard establishes only that, prior to trial, the parties reached an agreement whereby White could cash the "refund of premium" checks for the two Medico policies without any prejudice to his claims, and that Medico's payment of any amount allegedly due on the Mutual policy would not affect any de-

fenses it might have. A pretrial agreement of this sort, coupled with the inferences White seeks to draw from the fact that payment under the Mutual policy was not made until after that agreement was reached, falls far short of establishing a violation of § 44-1525(9)(m), even if a private action were to exist and even if the statutory language were to fit the circumstances alleged.

The judgment of the trial court dismissing White's causes of action was correct.

AFFIRMED.

CLARENCE H. BARRY ET AL., APPELLANTS, V. STEVEN K. WITTMERSEHOUSE ET AL., APPELLEES.

327 N.W.2d 33

Filed December 3, 1982. No. 81-576.

1. **Equity: Appeal and Error.** In an action in equity we review the matter de novo without reference to the findings of fact made by the trial court but, where the testimony or evidence is in irreconcilable conflict, take into consideration that the trial court observed the witnesses.
2. **Waters.** In order to constitute an exception to the general rule that surface water may be repelled, at least some of the distinctive attributes of a watercourse must be demonstrated.
3. **Waters: Words and Phrases.** Bodies of water, even though of considerable size, which collect only in times of heavy rain, flood, or melting snow, and which soon dry up, are not lakes within the meaning of that term as here defined.

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

Charles H. Wagner of Edstrom, Bromm, Lindahl & Wagner, for appellants.

Keith I. Frederick and Richard W. Ratz of Schmid, Ford, Mooney & Frederick, for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

WHITE, J.

This is an action in equity to enjoin the defendants from maintaining a dike which interferes with the flow of water from the plaintiffs' land. After trial on the issue the trial court inspected the premises and entered judgment for the defendants. Plaintiffs' assignments have been consolidated for purposes of this review. Plaintiffs maintain that the lower court erred in failing to apply the rule that surface water from higher lands may not be dammed, repelled, or diverted if it is flowing into a natural watercourse or into a natural body of water. The plaintiffs also assigned as error that the trial court failed to find that a permanent pond or natural body of water existed on the defendants' land, both as a matter of fact and as a matter of law. We affirm.

Since this is an action in equity we review the matter de novo without reference to the findings of fact made by the trial court but, where the testimony or evidence is in irreconcilable conflict, take into consideration that the trial court observed the witnesses. *Jameson v. Nelson,* 211 Neb. 259, 318 N.W.2d 259 (1982); *Peters v. Langrehr,* 188 Neb. 480, 197 N.W.2d 698 (1972). We also take into consideration the fact that the trial court did view the premises, and we will give appropriate weight thereto. *Jameson v. Nelson, supra; Delp v. Laier,* 205 Neb. 417, 288 N.W.2d 265 (1980).

In view of the foregoing rules we have examined the record, which revealed the following facts: The plaintiffs are owners of the south half of the northwest quarter of Section 27, Township 16 North, Range 7 East of the 6th P.M., Saunders County. The defendants constructed an earthen dike approximately 2 to 2½ feet in height along a portion of the north line of the southwest quarter of Section 27. The purpose of the dike was to prevent waters from draining from the plaintiffs' land in the north to de-

fendants' land in the south. As a result of the installation, surface water was repelled and collected on plaintiffs' southern border in a 2.4-acre depression next to the dike. All of the plaintiffs' bean crop in the 2.4-acre area was destroyed. Just south of the dike there is a low-lying area in the defendants' land that holds water after a heavy rain or melting snow. Part of the low spot was dug out 20 years ago to accommodate water year round.

The plaintiffs' testimony at trial was that their land had continual water problems with several low-lying areas. The low-lying areas left the land wet after rain or snow and created alkaline spots, over which the plaintiffs could not easily move their farm machinery. To remedy the situation, in 1964 plaintiffs commenced extensive land-leveling operations. Approximately 10 low areas appear in an exhibit previous to 1964 and only one low area after the land leveling was complete.

There was additional evidence that the land leveling increased the flow of surface water onto defendants' land, along with a trench or "dead furrow" that the plaintiffs plowed a few years later. However, we note that the flow of surface water may be increased and diverted upon the land of another, if it is done through a natural watercourse which already existed and is done in a reasonable and careful manner without negligence. *Nichol v. Yocum,* 173 Neb. 298, 113 N.W.2d 195 (1962).

Therefore, the issue remains as to whether a natural watercourse existed on plaintiffs' property which drained onto defendants' property. The land at issue is basically flat and level, with the exception of the above-mentioned depression which is less than 1 foot in depth at its lowest point. Though it was disputed, it appears from the evidence and testimony offered that the natural flow of surface water drainage has been from the middle portion of plaintiffs' land to defendants' land in the south, both before

and after the land leveling had occurred. However, there is no converging of the surface water into a well-defined course. The testimony of plaintiffs' expert surveyor, including the plats prepared by him, negate any notion of a natural drain or watercourse. The plats offered merely illustrate that surface waters from 40 acres of an 80-acre tract collect in a wide, slightly depressed area. A 1949 aerial photograph indicates several low areas, but it is not helpful in determining the direction of the flow of surface water or where the draw or depression begins. The 1969 geological topographical survey map of a 1:24,000 scale fails to show any depression at all in the area in question. The photographs offered also failed to show a well-defined channel or course cut in the soil by the action of the water. In order to constitute an exception to the general rule that surface water may be repelled, at least some of the distinctive attributes of a watercourse must be demonstrated. *Muhleisen v. Krueger,* 120 Neb. 380, 232 N.W. 735 (1930).

A watercourse is defined by statute as "Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse." Neb. Rev. Stat. § 31-202 (Reissue 1978).

The flow of surface water in any well-defined course, whether it be a ditch, swale, or draw in its primitive condition, and whether or not it is 2 feet below the surrounding land, cannot be arrested or interfered with to the injury of neighboring proprietors. *Town of Everett v. Teigeler,* 162 Neb. 769, 77 N.W.2d 467 (1956).

" 'To constitute a water course, it must appear that the water usually flows in a particular direction; and by a regular channel, having a bed with banks and sides; and (usually) discharging itself into some other body or stream of water. It may sometimes be dry. It need not flow continuously;

but it must have a well defined and substantial existence. * * * there is a broad distinction between a stream and brook, constituting a water course, and occasional and temporary outbursts of water occasioned by unusual rains or the melting of snows, flowing over the entire face of a tract of land, and filling up low and marshy places, and running over adjoining lands, and into hollows and ravines which are in ordinary seasons destitute of water and dry.' " *Mader v. Mettenbrink,* 159 Neb. 118, 127, 65 N.W.2d 334, 342 (1954).

In the instant case the de novo review of the record shows that occasionally surface water, caused by heavy rains or snows, collected in the low areas on the plaintiffs' land and flowed toward the defendants' land. When the overflow would reach the defendants' land, it would spread out and fill up the low area thereon. We do not think the overflow from these low areas ever reached the stage where it could be called a watercourse rather than merely diffused surface water.

Surface water is a common enemy and the proprietor may by enbankment or dike or otherwise defend himself against its encroachment, and he will not be liable in damages which may result from the deflection and repulsion defended against, provided that the proprietor in making defense on his own land himself exercises ordinary care, and provided he so uses his own property as not to unnecessarily and negligently injure another. *County of Scotts Bluff v. Hartwig,* 160 Neb. 823, 71 N.W.2d 507 (1955).

Plaintiffs' second assignment of error relies on *Block v. Franzen,* 163 Neb. 270, 79 N.W.2d 446 (1956), for the proposition that the owner of a lake or pond which accumulates surface water from the surrounding area may not discharge water by ditch or dike upon the land of his neighbor without his consent. The plaintiffs maintain that the trial court was in error in finding that the low spot on defend-

ants' land did not constitute a permanent pond or lake. We do not agree.

In *Block, supra,* a permanent pond was in between both the litigants' lands. The defendants had two-thirds of a 50-acre pond on their land, with the remaining one-third on the plaintiffs' land. The defendants built a dike along the north side of their property, which prevented surface waters from reaching their lands and caused ponding to occur exclusively on the plaintiffs' property. In the instant case we do not have the plaintiffs bearing the full burden for defendants' portion of a permanent pond, nor do we have the defendants discharging water that naturally ponded on their land. In considering all the evidence in this case, what we do have is merely a low area which collects water temporarily only in times of heavy rain and melting snow. The only portion which remains permanent is the small portion that has been artificially deepened by the defendants. The low area is also exclusively on the defendants' land.

The *Block* court, *supra* at 277, 79 N.W.2d at 450, went to great lengths to distinguish between a temporary and permanent body of water. Citing the Restatement of Torts § 842 (1939), the court stated: " 'To constitute a lake, a body of water must have a reasonably permanent existence. Many lakes have a permanent body of water. But the body of water need not be permanent in order to constitute a lake. Thus a body of water which occasionally dries up in periods of drought is still a lake. On the other hand bodies of water, even though of considerable size, which collect only in times of heavy rain, flood or melting snow, and which soon dry up, are not lakes within the meaning of that term as here defined.' "

We conclude from the evidence presented that neither a natural watercourse exists on the plaintiffs' land nor a natural, permanent pond on the defendants' land. We hold, therefore, that the plain-

tiffs are not entitled to have the dike removed. The judgment of the trial court is hereby affirmed.

AFFIRMED.

MARY KAY GREEN AND JERRY HASSETT, APPELLANTS, V. COX CABLE OF OMAHA, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

327 N.W.2d 603

Filed December 3, 1982. No. 81-707.

1. **Municipal Corporations: Standing.** Absent a showing of special legal injury, city council members have no right to litigate the validity of a city ordinance solely on the basis of being members of a council whose position has been rejected.
2. **Municipal Corporations: Actions.** A person seeking to restrain the acts of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Edward F. Fogarty of Fogarty, Lund & Gross, for appellants.

Herbert M. Fitle, City Attorney, Timothy M. Kenney, and Denise A. Hill, for appellee City of Omaha.

Abrahams, Kaslow & Cassman, and Dow, Lohnes & Albertson, for appellee Cox Cable.

Lyle E. Strom and C. L. Robinson of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellees Greenberg et al.

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

KRIVOSHA, C.J.

The instant appeal grows out of the same facts which gave rise to the case of *Hall v. Cox Cable of*

Omaha, Inc., ante p. 887, 327 N.W.2d 595 (1982), decided this day. In the instant case the appellants Green and Hassett filed a petition in the District Court for Douglas County, Nebraska, alleging that they were duly elected members of the city council of the City of Omaha; that they were qualified electors entitled to vote in general and special elections conducted under the home rule charter of the City of Omaha; and that they were taxpayers of the City of Omaha. Their claims for relief set out in their petition were essentially identical with the claims set out in the *Hall* case, though the allegations of facts and conclusions were set out in only five pages. Green and Hassett alleged that in an effort to obtain the exclusive rights to develop and market a cable television system (CATV) for Omaha, Nebraska, the defendant Cox Cable of Atlanta and eight individual defendants formed Cox Cable of Omaha, Inc. (Cox Cable); that the eight individual defendants entered into an agreement with Cox Cable of Atlanta, the purpose of which agreement was to lend their names, their connections, and their lobbying efforts to Cox Cable in dealing with the Omaha City Council. The petition alleged that the franchise awarded by the City of Omaha to Cox Cable was invalid because (a) it was issued in violation of § 11 of the home rule charter of the City of Omaha, (b) it was the result of favoritism, collusion, and undue influence, (c) it constituted constructive fraud upon the public and the costs of the unconscionable premium or commission Cox Cable of Atlanta was paying the individuals must be borne by the cable television user, (d) it was a breach of the city's fiduciary duty to prospective users, (e) the award came about after Cox Cable and the eight individuals violated the "no lobby rule" adopted by the city council, (f) no valid legal rate could be assessed under it, (g) it was in violation of public policy, and (h) it resulted in unjust enrichment to the individual defendants. The peti-

tion prayed that the contract be declared null and void or, in the alternative, that the court reform the contract by excising from it all unlawful and unfair aspects as shown by the evidence and impose a constructive trust upon the shares of stock representing a 20 percent ownership of Cox Cable by the individual defendants. Each and all of the defendants filed demurrers to the petition. On August 31, 1981, the trial court sustained the demurrers and dismissed the plaintiffs' petition.

As we noted in *Hall, supra,* because this case was decided by the trial court on a demurrer, we must, when reviewing this case, consider all proper allegations of fact as true. *Paasch v. Brown,* 193 Neb. 368, 227 N.W.2d 402 (1975); *Hester v. Young,* 154 Neb. 227, 47 N.W.2d 515 (1951). We are not, however, to consider mere conclusions or bald assertions not reasonably reached from proper facts alleged. See, *Retail Section of Chamber of Commerce of Plattsmouth v. Kieck,* 128 Neb. 13, 257 N.W. 493 (1934); *Timmerman v. Hertz,* 195 Neb. 237, 238 N.W.2d 220 (1976).

As we indicated in the *Hall* case, the first question we must determine is whether the appellants Green and Hassett have standing to maintain this action. Most of the issues raised in this case are controlled by our decision in the *Hall* case. Green and Hassett first maintain that they are members of the city council of the City of Omaha. That gives them no standing to bring this action because, as members of the city council, neither Green nor Hassett have suffered any special injury peculiar to themselves aside from and independent of the general injury to the public if in fact any injury exists. See *West Fort Residents Assn. v. Housing Auth. of City of Omaha,* 205 Neb. 397, 288 N.W.2d 27 (1980). Green and Hassett have no greater standing to sue generally as members of a city council than Hall had standing to sue as a resident. See *Hall, supra.* Absent such

special legal injury, city council members have no right to litigate the validity of a city ordinance solely on the basis of being members of a council whose position has been rejected. See, *Warden v. Hart,* 162 Wis. 495, 156 N.W. 466 (1916); *Cablevision of Chicago v. Colby Cable Corp.,* ____ Ind. App. ____, 417 N.E.2d 348 (1981).

As to their claim that they are electors entitled to vote in general and special elections and therefore entitled to maintain this action, our decision in *Hall* today disposes of that claim, and we need not repeat it again here.

That leaves only their claim that they are taxpayers of the City of Omaha. The law in this jurisdiction is quite clear that a taxpayer may not maintain an independent suit against a municipality unless certain conditions exist. As we noted in *West Fort Residents Assn.,* a person seeking to restrain the acts of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless "it involves an illegal expenditure of public funds or an increase in the burden of taxation." *Id.* at 399, 288 N.W.2d at 29. See, also, *Stahmer v. Marsh,* 202 Neb. 281, 275 N.W.2d 64 (1979). There is no allegation of fact in this case that there has been either an illegal *expenditure* of funds or an *increase* in the burden of taxation. Appellants make no claim that tax funds were in any manner expended by the city as a result of the allegedly illegal granting of the franchise to Cox Cable. Merely alleging in a conclusory manner that the awarding of this nonexclusive franchise "exposes" the city to liabilities that the taxpayers would be responsible for, without also alleging facts showing that such liabilities, if any, were illegal or would result in an increase in the burden of taxation, is insufficient to state a cause of action entitling a taxpayer to maintain an action to declare the acts of a governmental subdivision void. *Kirby v. Omaha*

Bridge Commission, 127 Neb. 382, 255 N.W. 776 (1934); *Holland v. Brownville Grain Co.,* 174 Neb. 742, 119 N.W.2d 304 (1963). Having failed to make such allegation, the taxpayers here have no standing to sue.

Green and Hassett urge us to permit them to maintain this action because it is "of great public concern and may elsewise go unchallenged unless the taxpayer's suit is permitted," and in support of that position cite to us our recent decision in *Cunningham v. Exon,* 202 Neb. 563, 276 N.W.2d 213 (1979). Their reliance on *Cunningham* in this case is misplaced. *Cunningham* involved a question as to whether a portion of the Nebraska Constitution had not inadvertently been omitted when the Secretary of State printed the Constitution following an election of the people to amend the Constitution. As important as television may have become to the modern American way of life, it has not yet reached the level of the Constitution. The issue involved herein is not of the great public concern involved in *Cunningham,* a unique and limited situation.

The trial court was therefore correct in sustaining the demurrers. The judgment of the trial court is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

IN RE INTEREST OF REBECCA ROMAN, A MINOR CHILD. STATE OF NEBRASKA, APPELLANT, V. ANGELITA ROMAN, APPELLEE.

327 N.W.2d 36

Filed December 3, 1982. No. 81-879.

1. **Parental Rights: Appeal and Error.** An appeal from an order terminating parental rights is reviewable de novo in this court.
2. **Parental Rights.** A person's parental rights may be terminated

under the provisions of Neb. Rev. Stat. § 43-209 (Reissue 1978) only upon proof by clear and convincing evidence.

3. **Courts: Final Orders: Appeal and Error.** On appeal from the county court sitting as a juvenile court, an order of the District Court remanding the case to the county court for a further dispositional hearing is a final order appealable to this court under the provisions of Neb. Rev. Stat. §§ 25-1902 and 25-1315.03 (Reissue 1979).

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded with directions.

Gary L. Schacht, Deputy Hall County Attorney, and William A. Francis, guardian ad litem, for appellant.

James H. Truell of Ahlschwede and Truell, for appellee.

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

PER CURIAM.

This appeal arises from an action for the termination of the parental rights of Angelita Roman in her infant daughter, Rebecca. The county court of Hall County, Nebraska, found that parental rights should be terminated. Termination was based on a finding that the child had been adjudicated a neglected and dependent child through the fault of its parents and "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination." Neb. Rev. Stat. § 43-209(6) (Reissue 1978). Angelita appealed to the District Court, which affirmed the order of termination. Upon a motion for new trial the District Court granted a new trial and reheard the case, receiving into evidence the record of the previous proceedings in the county court and additional evidence. The District Court then reversed the order of the county court and remanded the cause to the county court for further "dispositional hearings." The District Court

did not reverse the county court's adjudication made on November 1, 1979, finding that Rebecca was a neglected and dependent child under the provisions of Neb. Rev. Stat. § 43-202 (Reissue 1978). The State has appealed from the order remanding the cause to the county court for dispositional hearings.

The State makes the following assignments of error: (1) The District Court erred in reversing the county court's order terminating parental rights. (2) The District Court erred in receiving, over objection, testimony concerning an alleged change in circumstances which occurred after the court's order terminating parental rights. Angelita, of course, takes the contrary position and, in addition, urges that the order of the District Court remanding for further hearings is not a final and appealable order within the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1979).

Our review of the matter is governed by the following principles. The action of the District Court is reviewable de novo in this court. If, however, the evidence is so conflicting as to be irreconcilable, we consider the opportunity of the trial court to have observed the witnesses and judged their credibility. *Grant v. Doeschot,* 189 Neb. 121, 201 N.W.2d 252 (1972); *State v. Worrell,* 198 Neb. 507, 253 N.W.2d 843 (1977). Under § 43-209 a person's parental rights may be terminated only upon proof by clear and convincing evidence. *In re Interest of Kimsey,* 208 Neb. 193, 302 N.W.2d 707 (1981).

We first deal with Angelita's contention that the order of the District Court remanding the cause to the county court for further dispositional hearing is not a final and appealable order under § 25-1902. That statute provides: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in

an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter." To support her contention Angelita cites *Martin v. Zweygardt,* 199 Neb. 770, 261 N.W.2d 379 (1978). The cited case was an action for damages for breach of warranty in the sale of a tractor. The county court held the evidence was insufficient to support the petition and dismissed the action. On appeal, the District Court determined otherwise and remanded for a new trial. In discussing the applicability of the statute, we said at 771, 261 N.W.2d at 380: "An order which affects a substantial right in an action and in effect determines the action is a final order. § 25-1902, R.R.S. 1943. When the substantial rights of the parties in the action remain undetermined and the cause is retained for further action, the order is not final. Barry v. Wolf, 148 Neb. 27, 26 N.W.2d 303. Prior to the enactment of section 25-1315.03 in 1947, an order of the District Court granting a new trial in that court was not an appealable order. Egan v. Standard Oil Co., 132 Neb. 518, 272 N.W. 327.

"The order in question here vacated the judgment of the county court and remanded the cause for a new trial in the county court. The general rule is that a judgment of reversal with a remand for further proceedings is not final for the purposes of appeal. See, 4 Am. Jur. 2d, Appeal and Error, § 59, p. 580; 4 C.J.S., Appeal and Error, § 152(i), p. 506." We there held that the order remanding to the county court for a new trial was not a final and appealable order under § 25-1902. Implicit in our holding was the conclusion that Neb. Rev. Stat. § 25-1315.03 (Reissue 1979), which, among other things, makes an order granting a new trial an appealable order, does not apply where the District Court remands to the county court for that new trial.

After considering the purpose of our previous holding in *Martin v. Zweygardt, supra,* and examining

various statutes (including those already mentioned) which are in pari materia, i.e., they all relate to appeals from the District Court or separate juvenile court to this court, we conclude that our holding in *Martin v. Zweygardt, supra,* is not applicable to the present situation.

First, we observe that there is no separate statute governing appeals from the county court sitting as a juvenile court to the District Court. Neb. Rev. Stat. § 43-202.03 (Reissue 1978) provides that such appeal shall be made in the manner "as in civil cases." Neb. Rev. Stat. § 24-541 (Reissue 1979) provides in part: "In all cases not otherwise specifically provided for, either party may appeal from the final judgment of the county or municipal court to the district court of the county where the judgment was rendered. All such appeals shall be de novo on the record except . . . [matters described in Neb. Rev. Stat. § 30-1606 (Reissue 1979)]. In matters appealed de novo on the record, the district court may, in its discretion, receive additional evidence if the court determines that such evidence is reasonably necessary to determine the issues, make findings of fact and render judgment thereon. The district court may affirm, modify, or vacate the judgment, or may remand the case to the county or municipal court for a new trial."

Appeals from the separate juvenile court are governed by Neb. Rev. Stat. § 43-238 (Reissue 1978). It provides: "Any final order or judgment entered by a separate juvenile court may be reviewed by the Supreme Court of Nebraska within the same time and in the same manner prescribed by law for review of an order or judgment of the district court; *Provided,* that when appeal is taken from a finding by the juvenile court severing parental rights, the cause shall be advanced for argument before the Supreme Court, and the Supreme Court shall, in order to expedite the preferred disposition of the case

and the child, render the judgment and write an opinion as speedily as possible."

It should be noted that §§ 43-202.03 and 24-541 contain comparable procedural provisions. If § 43-202.03 is read with absolute literalness, there could never be any appeal to the Supreme Court until the judgments of the county court sitting as a juvenile court and the District Court are in agreement, for the statute says: "Upon determination of the appeal, the district court shall remand the case to the county court for further proceedings consistent with the determination of the district court." On the other hand, the provisions for appeal from the separate juvenile court to the Supreme Court cannot be read to provide for such circular proceedings. It would be anomalous to treat identical orders of the two juvenile courts differently, i.e., if the separate juvenile court enters an order granting a new trial it is final and appealable, and if the District Court on an appeal from the county court sitting as a juvenile court grants a new trial (as it did in this case—with no appeal being taken), the order is appealable, but if it remands to the county court then the order is not appealable. We point out that §§ 43-202.03, 43-238, and 24-541 are not concerned with defining final or appealable orders. Having examined the related and pertinent statutes, we conclude that the order of the District Court remanding to the county court is a final and appealable order under the provisions of § 25-1902. *Martin v. Zweygardt,* 199 Neb. 770, 261 N.W.2d 379 (1978), insofar as it might be applied to appeals in juvenile matters, is distinguished.

We note in passing that some of the statutes pertinent in this case have since been repealed, amended, or the number changed. Section 24-541 has been repealed. 1981 Neb. Laws, L.B. 42. Neb. Rev. Stat. § 24-541.02(2) (Cum. Supp. 1982) provides: "Satisfaction of the requirements of subsection (1) of this

section shall perfect the appeal and give the district court jurisdiction of the matter appealed, except that in appeals from the county court sitting as a juvenile court the county court may act in accordance with section 43-202.03." Section 43-238 is now § 43-2,126 (Cum. Supp. 1982). A separate juvenile code has been adopted, Neb. Rev. Stat. §§ 43-245 et seq. (Cum. Supp. 1982). That code applies both to the separate juvenile court and the county court sitting as a juvenile court. § 43-245(4).

We now examine the record de novo to determine whether the evidence supports the order of termination by clear and convincing evidence. There is little conflicting evidence in the record. The record indicates that Rebecca was born on August 14, 1979, to Angelita, age 19, an unwed mother. On September 13, 1979, pursuant to an order of the county court, Rebecca was placed in the custody of the Hall County Department of Public Welfare. The circumstances leading to this order were that Angelita and her baby were found about September 5, 1979, living in a shed adjacent to the home of Angelita's parents. The shed had no lights, heat, water, or sanitary facilities. Its only furnishing was a bassinet for the baby. Angelita's testimony was that her parents had ordered her out of their home, a two-bedroom residence in which nine other people were living. By the order of September 13, the physical custody of the child was placed with Mrs. Le Anderson, who the record shows is an experienced and capable foster parent. Arrangements were also made for Angelita to live with Mrs. Anderson. Apparently Angelita, with her baby, had been in the Anderson home from September 6 through 8 and on September 11. Angelita left voluntarily and thereafter did not take advantage of the arrangements to live with her child.

On November 1, after a hearing, Rebecca was adjudged by the county court to be a child who lacked proper parental care by reason of the fault or habits

of the parents. At the hearing on November 1 the testimony showed that after Angelita left the Anderson home she lived at a motel with one Steve James (not the father of the child). The evidence also showed that Angelita did not have the knowledge necessary to properly care for the infant. She did not know how to properly feed, cleanse, diaper, bathe, or medicate the child. Specifically, she did not know how much food the child needed and lacked the patience to feed the child the necessary amounts. According to Mrs. Anderson, the child was difficult to feed and it took special effort to see that the child was sufficiently fed. Mrs. Anderson testified that Angelita was absolutely not capable of caring for Rebecca. She could, however, be taught to care for the child, as she had the necessary intelligence. The clear inference to be drawn from the evidence is that, except for the State's intervention, serious damage to the health of the child would have resulted. Angelita, during most of the time here involved, had regular employment but no means for caring for the child while at work.

At the conclusion of the hearing of November 1 the court ordered that legal custody of the child remain with the Hall County Department of Public Welfare.

On January 30, 1980, a dispositional hearing was held. Following this hearing the court continued legal and physical custody in the Hall County Department of Public Welfare; directed that Angelita attend parenting classes for a period of 6 weeks beginning January 31, 1980; "that the mother of the minor child spend a minimum of one morning per week in the home of Mrs. Le Anderson for the purpose of learning to feed, bathe and care for her child"; and "That upon the expiration of forty-five (45) days from this date, the temporary physical custody of the minor child be placed with her mother, Angelita Roman, without further order of the Court."

On March 17, 1980, Angelita received custody of the child and had custody for 2 days. During that time she was employed at a restaurant and was still living with Steve James. During the short time she had custody she reported to fellow workers that Steve James was physically abusing the child. This led to the removal of the child from her custody and to the filing of another petition which alleged that James was physically abusing the mother and placing the child in physical danger, and that the mother refused to remove the child from the dangerous situation. Angelita generally denied that petition.

A hearing was held on the petition on April 10, 1980. The State introduced evidence of Angelita's statements to disinterested third parties that James was abusing the child. The abuse consisted of sticking his fingers in the child's nose to keep the child from crying and picking up the playpen and dumping the child on the floor. Le Anderson also testified. She stated that Angelita was to have the child returned to her on March 15, but called on that day and said Steve was drunk and she was afraid to take the baby on that day. Consequently, Angelita did not pick up the baby until the 17th. During the period from January 30 to March 17 Angelita saw the child only five times and on only two of those occasions did she participate in the care of the child. James testified and denied abusing the child, stating that on the occasion of the alleged nose and finger abuse he was merely playing with the baby. He further explained the playpen incident by stating it was an accident and that Angelita had exaggerated and made up the other version because she was jealous about his talking to some of his ex-girl friends. He stated that he and Angelita had plans to get married. Angelita denied that James came home drunk, and she related a version of the other incidents which coincided with James' version, and essentially claimed she lied in what she told the disin-

terested witnesses. Rebecca was returned to Mrs. Anderson's care on March 19, 1980. At that time James and Angelita were still living together. Following this hearing the court continued in effect the temporary orders that had been made and directed that efforts between the welfare department and Angelita continue.

On April 24, 1980, the State filed the motion to terminate the parental rights of Angelita and Michael Anders, the alleged father of Rebecca. The grounds alleged for termination of Angelita's rights were repeated and continued neglect after the adjudication hearing; failure to provide financial support and parental protection; and, as described in the first paragraph of this opinion, that the minor child, Rebecca, had been adjudicated a child described in § 43-202, and reasonable efforts, under direction of the court, had failed to correct the conditions leading to such determination. It further alleged that no efforts have been or are being made by Angelita Roman to correct the existing conditions or to become capable of and accept the care of Rebecca.

After a continuance at Angelita's request the matter was heard on June 1, 1981. Trial was on the record made in the county court. In addition, Angelita testified, as did a young man (not James) with whom she had been living the past 5 months.

Angelita testified that she had separated from James in October 1980. She was currently employed at Monfort packing, earning $6.20 per hour. She acknowledged that she had not accepted the advice of the persons directing her in the care of Rebecca because she wanted to do it her own way. She stated she had had experience in caring for children, her younger sisters, when she was 19 and the youngest sister was 13 or 14. She stated that during the 3 days she had Rebecca in her custody she had "fed her good and bathe[d] her, changed her whenever she needed to." She testified that too many people

had been advising her and this confused her. Her testimony, however, contained no details as to what the contradictory advice was. She testified that she did not make the specified visitations at Mrs. Anderson's because she was working from 3 p.m. until 11 p.m. and was too tired to get up in the morning.

Other evidence indicated Angelita had been working regularly since May 8, 1980. She had separated from James, at first because he had been confined in a treatment center for alcoholics. After his return from the center he then moved out because of the upcoming termination hearing. The evidence also showed that from April 1980 through September 1980 Angelita had made 15 of 20 scheduled visits to the child at the welfare office and that she had attended two of the six parenting classes she was required to attend. Mrs. Anderson was still caring for the child at the time of the termination hearing. Angelita had participated in the care of the child only to a very limited degree and her visits to the Anderson home to see the child before April were usually evening visits of very limited duration. The young man with whom Angelita was currently living testified that he and Angelita had met at Monfort's where they both worked; that if Angelita got the child back and Angelita thought it better that he move out, he would do so; that he gave no financial support to Angelita, only moral support; and that he knew Angelita wanted her daughter back.

The new trial before the district judge took place on August 25, 1981. At this new trial a psychologist and Mrs. Anderson testified. The former stated that she had seen Angelita the day before she testified, twice in August, and once in the months of May, June, and July; that Angelita's personality disorder, described as passive aggressive and which prevented her from asserting herself to protect her child from abuse, still existed, but that her environment had changed. Apparently, the psychologist

was referring to the departure of Steve James and that this minimized the possibility of abuse and neglect.

Mrs. Anderson testified that since she had first seen Angelita her appearance and attitude had changed. She felt Angelita was capable of performing as a mother but would require continuing supervision. She stated that if she had testified at the termination hearing she would not have recommended that parental rights be terminated. Neither Angelita nor her male living companion testified at the new trial.

Rebecca had been removed from Mrs. Anderson's care in November 1980, following the county court's termination of Angelita's parental rights. Since that time, including the period of the new trial, Rebecca has been in another foster home where it is possible for her to remain, if necessary, until she reaches the age of majority.

We point out that the foregoing recital of the proceedings and evidence shows: (1) After approximately 16 months of effort Angelita is not capable of caring for the child without supervision. It is true that Angelita's conclusions are contrary to that evidence, but it is clear that she has made no substantial, practical demonstration of such capability. She was extremely uncooperative in the efforts of others, especially those of Mrs. Anderson, to aid her. (2) Following the end of Angelita's living arrangements with James, she shortly thereafter entered into another such living arrangement with the man who testified on her behalf at the appeal. Nothing is known about this individual except his age, 22, that he is employed, and that he has expressed a willingness to give Angelita his "moral" support. (3) Angelita has not advanced any plan or suggested any method by which Rebecca will be cared for while Angelita works, if the child should be returned to her custody and care.

Against the foregoing stands Angelita's testimony supported by Mrs. Anderson's opinion that the mother does genuinely love the child. A social worker testified the mother's visits to the child up until the time of termination did not have an adverse emotional effect upon Rebecca.

The District Court, in its order of remand to the county court, gave no reasons nor made any findings.

On review de novo we find that the evidence is clear and convincing that, following the determination that Rebecca was a child described in § 43-202(2), reasonable efforts under the direction of the court failed to correct the conditions leading to the determination and, therefore, the judgment of the county court was correct. The judgment of the District Court is reversed and the cause is remanded with directions to reinstate the judgment of the county court.

The above determination makes it unnecessary to consider the State's second assignment of error.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., participating on briefs.

BOSLAUGH, J., concurring.

While I concur in the judgment of the court, I disagree with the analysis concerning the issue of whether the order of the District Court was an appealable order.

In *State v. Belding,* 190 Neb. 646, 211 N.W.2d 715 (1973), we held that a dispositive order in a juvenile proceeding is a final order for the purposes of appeal. The order of the District Court in this case would have determined the action if it had been other than a juvenile proceeding. A juvenile proceeding in this circumstance is of necessity of a continuing nature.

CAPORALE, J., dissenting.

I respectfully dissent. There is no question but that Angelita Roman has been demonstrated to have

been a confused and rebellious child-mother whose living arrangements jeopardized the welfare of her own child. There is also no question, on the other hand, that Ms. Roman has matured a great deal and shows signs of being capable of maturing even more and of becoming an adult able to properly rear her daughter.

She has terminated her relationship with the abusive boyfriend, she has obtained and retained gainful employment, she has begun to have frequent visits with her daughter, and she has an emotional tie with the child. It seems to me that under such circumstances it cannot be said that it has been "clearly and convincingly" shown that Ms. Roman has forfeited her right to raise and nurture her daughter. *In re Interest of McKinzie, ante* p. 399, 323 N.W.2d 78 (1982); *Santosky v. Kramer,* 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). I recognize that generally it is in the best interests of a child to make a final determination with respect to terminating parental rights as soon as possible. *In re Interest of Hastings,* 211 Neb. 209, 318 N.W.2d 80 (1982); *In re Interest of Levey,* 211 Neb. 66, 317 N.W.2d 760 (1982). Yet we must not rush to do so until we are satisfied that reasonable efforts have failed to produce a capable parent. Neb. Rev. Stat. § 43-209(6) (Reissue 1978).

The evidence in this case establishes that although Ms. Roman is not yet a fully capable parent, she is making progress in becoming one. We ought not terminate the parental relationship at this time. There is, after all, nothing either in this record or in human experience which teaches that all children removed from an imperfect but reasonably capable and loving parent fare better under the nurturing of the state, or are ultimately adopted by stable, loving parents. I would affirm the holding of the District Court remanding the cause to the county court to

continue the present arrangement for further evaluation of Ms. Roman's progress.

KRIVOSHA, C.J., and WHITE, J., join in this dissent.

C. WAYNE ZEIGER, APPELLANT, V. FARMERS CO-OP ASSOCIATION OF YORK ET AL., APPELLEES.

327 N.W.2d 43

Filed December 3, 1982. No. 82-340.

1. **Motor Vehicles: Negligence.** A left-hand turn across a public highway between intersections is a dangerous movement and no person shall turn a vehicle from the direct course upon a highway unless it can be accomplished with reasonable care and safety and then only after giving the statutorily required turn signal.
2. _____: _____. When the driver of a motor vehicle looks to the rear when he is 250 to 300 feet from making a turn and then does not look again until after the turn is started and too late to avoid a collision, he is negligent as a matter of law.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Reversed and remanded for a new trial.

Knudsen, Berkheimer, Richardson & Endacott, for appellant.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees.

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

WHITE, J.

The plaintiff, C. Wayne Zeiger, brought suit in the District Court for Otoe County, Nebraska, for property damage, medical expense, and personal injury incurred as the result of a collision between plaintiff's van and defendant Farmers Co-op Association's (Co-op) semitruck driven by its employee, Keith W. Sanmann. The trial court submitted the

cause to a jury on the negligence of defendant's driver and contributory negligence of the plaintiff. The jury returned a general verdict for the defendants. Plaintiff appeals. We reverse and remand.

Two assignments of error are urged: (1) The trial court erred in failing to direct a verdict for the plaintiff on the issue of defendants' liability and in failing to instruct the jury that defendants were liable to the plaintiff as a matter of law, and (2) In the alternative the court erred in failing to direct a verdict for the plaintiff on the issue of defendants' negligence and in failing to instruct the jury that defendants were negligent as a matter of law. We sustain the second assignment, but we overrule the first.

The plaintiff was, on the accident date, May 20, 1978, employed as plant manager of the American Cyanamid Company plant near Weeping Water, Nebraska. Mr. Zeiger left the plant at approximately 11 a.m. via a county road and thence right onto Highway 50 in a southerly direction. The Co-op truck was in front of the Zeiger van and also traveling south. The Co-op driver was enroute from a corn delivery to the Hopper quarries whose private drive (the site of the accident) is on the east side of Highway 50 and approximately 2,200 feet from the point where Zeiger entered the highway.

According to the testimony of the Co-op driver he passed the Weeping Water turnoff at about 40 to 45 miles per hour. Highway 50 immediately south of the turnoff is level for approximately 800 feet, ascends a small hill for approximately 1,000 feet and levels off about 400 feet from the accident site. From a point 1,400 feet from the site, there is a no passing zone for southbound traffic marked by a solid yellow line. The solid yellow line extends to approximately 400 feet from the private drive. A second lane for southbound traffic begins approximately at the point where the no passing zone be-

gins, and the lane extends to approximately 600 feet beyond the private drive.

The Co-op driver at all times drove in the easternmost of the two southbound lanes. When his truck reached the point about 400 feet north of the drive, his speed was 40 miles per hour. He checked his mirrors, left and right, and saw no southbound traffic behind him. He testified the distance was 300 to 350 feet from the drive. He engaged his left-turn signals on the tractor and the trailer. At about 250 to 300 feet from the drive he again looked in his rearview mirrors, saw no one, and down-shifted to begin slowing for the turn. His brakes were never applied. When he was 25 feet from the driveway he commenced his left turn, to the extent that his left front wheel was 2 to 3 feet across the centerline. At that time he looked in his left-hand mirror and saw plaintiff's van for the first time, an estimated 80 feet behind his trailer and partially in the northbound lane, apparently in the act of passing defendant's truck. At the same time that he saw plaintiff he heard squealing of tires and saw plaintiff begin to turn back into the southbound lane. Plaintiff's van struck the right rear of the truck with the left front of the van. The point of impact was approximately 4 feet 7 inches west from the line dividing the north and southbound lanes.

No evidence was introduced which would have required the trial court to hold as a matter of law that plaintiff was contributorily negligent, nor does defendant Co-op contend otherwise in this court.

Did the trial court err in failing to find as a matter of law that the Co-op driver was negligent? We are convinced that it was.

We have uniformly held that "The most dangerous movement on public streets or highways is the left-hand turn. While the left-hand turn at intersections is within the purview of this statement, the left-hand turn across a favored public highway between inter-

sections is a particularly dangerous one. Legislatures have seen fit to regulate such movements and courts have required a degree of care commensurate with the danger. The language of our statute states that no person shall turn a vehicle from the direct course upon a highway unless such movement can be made with reasonable safety, and then only after giving the statutory signal. In other words, the giving of the statutory signal is not enough, one must exercise reasonable care under all the circumstances. He cannot rely on holding out his arm and trust that all may see it. He must take reasonable precautions for his own safety and the safety of others before he undertakes a left turn between intersections where such movements are not anticipated." *Petersen v. Schneider,* 153 Neb. 815, 819, 46 N.W.2d 355, 358 (1951); *Rowedder v. Rose,* 188 Neb. 664, 199 N.W.2d 18 (1972).

In the case before us the defendant's driver looked to the rear when he was 250 to 300 feet from the drive, and then did not look again until after the turn was started and it was too late to avoid a collision. "The requirement that one must look to the front and rear before making a left turn between intersections is not met by looking at a point 200 feet distant from the place of the intended left turn. One must look at a time when possible danger could be observed. The observations must be made immediately before the impending movement; otherwise, as in this case, the observation would be completely ineffective for the accomplishment of the purpose intended." *Petersen v. Schneider, supra* at 820, 46 N.W.2d at 358-59.

The failure to look at a time when looking would have been effective was negligence as a matter of law, and the court was in error in not so holding and instructing the jury.

At the same time we are not convinced that plaintiff was entitled to a directed verdict of liability.

The driver of the Co-op truck testified that the left-turn signal was on 350 feet from the driveway. Plaintiff had an available lane to pass to the right of the defendant's truck. There was evidence from which a finder of fact could hold that plaintiff himself was contributorily negligent. Indeed, the jury may have so found, but we cannot discern this from a general verdict.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

INDEX

Acquiescence.

1. The establishment of a real estate boundary line by acquiescence involves more than a mere establishment of a line by one party and the taking of possession by such party. It involves the idea that the landlord, with knowledge of the line so established and the possession taken, assents thereto, and this may be shown by conduct, by words, or even by the silence of the landlord. However, there must be something in the record to show that the party charged with acquiescence consented to the act of the other in establishing the line and assuming possession. Bender v. James 77
2. Acquiescence involves the idea of notice or knowledge of conditions, and the evidence must disclose that, with such notice and knowledge, the one charged with acquiescence did something that indicated an assent to such conditions and an acquiescence therein. Bender v. James 77
3. In order to establish a boundary by acquiescence, it is not necessary that the acquiescence should be manifested by a conventional agreement, but recognition and acquiescence must be mutual, and both parties must have knowledge of the existence of a line as a boundary line. Hausner v. Melia 764
4. The establishment of a boundary line between adjacent lots by recognition and acquiescence involves the idea that the adjacent owner, with knowledge of the line so established and the possession so taken, assents thereto, or that circumstances exist from which assent may be reasonably inferred. Hausner v. Melia 764
5. Where the owners of adjoining land occupy their respective premises up to a certain line, which they mutually recognize and acquiesce in as the boundary line for a long period of time, there is a presumption in favor of such line being the true one, which can only be overcome by clear proof to the contrary. Where such recognition and acquiescence has continued beyond the 10-year period fixed by the statute of limitations, the presumption becomes conclusive. Hausner v. Melia .. 764
6. Where a common boundary marked by a fence line has been recognized and acquiesced in by the abutting landowners and their grantors for more than 10 consecutive years, such common boundary is then the established boundary between the properties involved. Spilinek v. Spilinek 811

Actions.

1. All pending actions and proceedings to recover a penalty which have not been prosecuted to a final judgment are defeated by the repeal of the statute. Therefore, the repeal of a statute which imposes a penalty will prevent any prosecution, trial, or judgment for penalties accruing while such statute was in force, unless the contrary is provided in the repealing statute or some other existing statute. Farmland Enterprises, Inc. v. Schueman 342
2. The benefits afforded a borrower under the usury laws of the State of Nebraska do not constitute an independent cause of action but only a defense to a cause of action. Farmland Enterprises, Inc. v. Schueman 342
3. A mere penalty never vests, but remains executory; the repeal of a statute before a penalty is enforced is not a deprivation of vested rights. The unqualified repeal of a statute imposing a penalty operates the same way as the repeal of a strictly criminal statute. It abrogates all rights of action which have not been reduced to judgments. Farmland Enterprises, Inc. v. Schueman 342
4. Generally, a suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover taxes alleged to have been illegally assessed, but each taxpayer must bring action on his own behalf. Riha Farms, Inc. v. County of Sarpy 385
5. The right of a party to sue as representative of a class may be determined on motion for summary judgment. Sarratt v. Lincoln Benefit Life Co. 436
6. A party having an interest adverse to the interests of the parties sought to be represented may not sue as representative of a class under the provisions of Neb. Rev. Stat. § 25-319 (Reissue 1979). Sarratt v. Lincoln Benefit Life Co. 436
7. Potentially conflicting interests within the class are incompatible with the maintenance of a true class action. Sarratt v. Lincoln Benefit Life Co. 436
8. Where the record demonstrates the potentiality of conflict, either within the class or between the person who seeks to represent the class and the class, it is appropriate to dispose of the class aspect of the case upon motion for summary judgment. Sarratt v. Lincoln Benefit Life Co. 436
9. Both legal and equitable principles may be enforced in the same action according to the facts. The essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the com-

plaint, determine whether a particular action is one at law or in equity, unaffected by the conclusions of the pleader or what the pleader calls it, or the prayer for relief. Nebraska Engineering Co. v. Gerstner 440

10. Ordinarily, a demand upon the responsible officers of the governmental subdivision or municipal corporation that they take action is necessary and a condition precedent to the right of a taxpayer to maintain an action for the recovery of funds on behalf of the governmental entity. Lake v. Piper, Jaffray & Hopwood Inc. 570
Hall v. Cox Cable of Omaha, Inc. 887

11. Where a taxpayer brings an action against the officers of a governmental subdivision or municipal corporation for the recovery of funds on behalf of such governmental entity without making a prior demand, the resistance to such action by the subdivision or corporation in the nature of a demurrer attacking the legal capacity of the plaintiff to sue because of that deficiency generally does not constitute a waiver of that requirement. Lake v. Piper, Jaffray & Hopwood Inc. 570

12. A person seeking to restrain the acts of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation. Hall v. Cox Cable of Omaha, Inc. 887
Green v. Cox Cable of Omaha, Inc. 915

13. Whether the nature of an action is legal or equitable is to be determined from its main object, as disclosed by the averments of the pleadings and relief sought. White v. Medico Life Ins. Co. 901

14. Although a defendant may present any defense, legal or equitable, interposing an equitable defense does not convert an action otherwise at law into one in equity. White v. Medico Life Ins. Co. 901

Administrative Hearings.

That which is relevant, admissible, and tends to establish the facts in issue is competent evidence in the context of administrative hearings. Beasley v. City of Omaha 153

Administrative Law.

1. Where an administrative body has acted within its jurisdiction and there is some competent evidence to support its findings and order, the order will be affirmed. Beasley v. City of Omaha 153

2. The investigation conducted by an administrative body

is not intended to be carried out in observance of the technical rules adopted by courts of law. Beasley v. City of Omaha 153

Adverse Possession.

1. If possession of real estate is entered upon by one as a tenant under an agreement with the owner, the occupant cannot assert ownership by adverse possession until he first surrenders possession, or the tenant, by some unequivocal act, notifies the landlord that he no longer holds under the agreement made. Bender v. James 77
2. By continuous adverse use under claim of right for 10 years the public may acquire a highway along a section line. Olson v. Bonham 548
3. The extent and nature of an easement is determined from the use made of the property during the prescriptive period, and the width of the public highway acquired by prescription must be determined as a question of fact by the character and extent of the use or the amount dedicated to public use, but it may be more or less than the width of a public highway as prescribed by statute. Olson v. Bonham 548
4. If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path, but the right extends to such width as is reasonably necessary for public travel. Olson v. Bonham 548
5. Where a prescriptive right for highway use has been acquired along a section line, the right extends to the beaten path and such width as is reasonably necessary for public travel. It does not extend to the statutory width unless that width has been established by the use. Olson v. Bonham 548
6. To establish an easement by prescriptive use, such use must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and continuous for the full prescriptive period. Spilinek v. Spilinek 811

Agency.

An agency between husband and wife may be created by slight circumstances. Buffalo County v. Richards 826

Alimony.

1. How property, inherited by a party during the marriage, will be considered in determining division of property or award of alimony must depend upon the

facts of the particular case and the equities involved. Koubek v. Koubek 2
Van Newkirk v. Van Newkirk 730
2. The division of property and the issue of alimony are to be determined upon the consideration of all the facts and circumstances. Koubek v. Koubek 2
3. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Pyke v. Pyke 114
4. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in Neb. Rev. Stat. § 42-365 (Cum. Supp. 1980) make it appropriate. Pyke v. Pyke 114
5. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion under the statute, as well as under the former decisions of this court, is one of reasonableness. The relevant considerations will vary from case to case. Pyke v. Pyke 114
6. Where the situation of the parties and the contingencies are such that the amount of alimony cannot be placed in a lump sum without danger that such allowance may prove unjust or inequitable to one or the other of the parties, it is therefore proper for the courts to provide for the payment of a stated sum at fixed times over an indefinite period. Pyke v. Pyke 114
7. A trial court, in determining what, if any, alimony should be awarded a spouse, may recognize that the spouse ordered to pay the alimony may have, by way of income for his own maintenance and support, a military pension or may have the proceeds of a military pension from which he may be able to make alimony payments, although the court cannot award an interest in the pension to the nonmilitary spouse. Pyke v. Pyke 114
8. One of the elements to be considered in the allowance of alimony is the earning capacity of the husband. Carruth v. Carruth 124
9. Except for amounts which have accrued prior to a peti-

tion to modify, orders for alimony may be modified or revoked for good cause shown. Neb. Rev. Stat. § 42-365 (Reissue 1978). Sloss v. Sloss 610

10. A change in the circumstances of the parties since the entry of the alimony order is a prerequisite to a modification of the alimony decree. Not every change in circumstances will warrant such modification, but only changes of circumstances which are material and substantial. Sloss v. Sloss 610

11. In actions for the modification of alimony in a dissolution of marriage proceeding, it is the duty of this court to review de novo the determination of the District Court as to whether a change in circumstances has occurred which justifies the modification of the original decree. Sloss v. Sloss 610

Appeal and Error.

1. The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong. Atlas Steel & Wire Corp. v. L & M Constr. Chemicals, Inc. 16
   Noll v. Valley County Hospital 22
   England v. Leithoff 462
   Grubbs v. Kula 735
   White v. Medico Life Ins. Co. 901

2. On appeal from the small claims court to the District Court, there is no requirement for the filing of a new petition, nor provision for taking of a default for failure to answer a new petition absent an order from the District Court directing the filing of a new petition and answer thereto. Hodson v. Johnson 19

3. An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale. Nebraska Federal Savings & Loan Assn. v. Patterson 29

4. 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. The test of mental capacity to plead or stand trial is the same. State v. Beans 31

5. A person seeking post conviction relief has the burden of establishing a basis for such relief, and the findings of the District Court in denying relief will not be dis-

turbed on appeal unless they are clearly erroneous.
State v. Beans 31
State v. Otey 103
State v. Stranghoener 203
State v. Herren 706

6. In equity actions, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court. Truman v. Martin .. 52
City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc. 137
Brommer v. City of Hastings 367
Barry v. Wittmersehouse 909

7. On an appeal from a judgment in equity, when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Truman v. Martin 52
City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc. 137
Barry v. Wittmersehouse 909

8. An appeal from a county board of equalization is heard as in equity and is tried de novo in this court. Arneson v. Cedar County 62

9. The presumption that a board of equalization has faithfully performed its official duties disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, unaided by presumption. Arneson v. Cedar County 62

10. 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. Havelock Bank of Lincoln v. Bargen 70

11. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Havelock Bank of Lincoln v. Bargen 70

12. Where an administrative body has acted within its jurisdiction and there is some competent evidence to support its findings and order, the order will be affirmed. Beasley v. City of Omaha 153

13. Where there is irreconcilable conflict in the evidence on a material issue, the reviewing court will, in determining the weight of the evidence of the witnesses, consider the fact that the trial court observed them and their manner of testifying and must have accepted one

version of the facts rather than the other. Martinez v. Peterson 168
14. On appeal from the revocation of a motor vehicle operator's license under our implied consent statute, the Nebraska Supreme Court reviews the findings of the trial court de novo. Bauer v. Peterson 174
15. Although we review such cases de novo, where there is a conflict in the evidence, great weight is given the fact that the trial court had the opportunity to see, hear, and observe the witnesses and the presentation of evidence firsthand in deciding which body of evidence deserved the greater credibility. Bauer v. Peterson 174
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. Pollard v. Wright's Tree Service, Inc. 187
17. The findings of fact made by the Workmen's Compensation Court after rehearing have the force and effect of a jury verdict and will not be set aside on appeal unless clearly wrong. Pollard v. Wright's Tree Service, Inc. 187
Hatting v. Farmers Co-op Assn. 242
Renshaw v. Merrigol-Adler Bakery 662
Negrete v. Western Electric Co., Inc. 876
18. The determination of the feasibility of a general benefit project by the board of directors of a natural resources district, and the adoption and implementation of such a project, is a legislative function and is not within the scope of judicial review where the specific statutory requirements for such action have been met. Fisher & Trouble Creek v. Lower Platte No. Nat. Resources Dist. 196
19. 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. Stranghoener 203
20. An appeal of a juvenile proceeding to this court is heard de novo upon the record; and the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses. In re Interest of Reed 208
In re Interest of Ditter 279
In re Interest of McKinzie 399
21. The admission into evidence of a confession constitutes an independent determination by the trial court that the confession was voluntarily made. Such determina-

tion will not be set aside on appeal unless such finding is "clearly erroneous." State v. Hunt 214
State v. Hunt 304
22. An order terminating parental rights to children is reviewed de novo upon the record in this court. In re Interest of Hollenbeck 253
In re Interest of Wanek 394
In re Interest of Roman 919
23. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Bartholomew 270
24. Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant. State v. Bartholomew 270
25. The mere statement of a defendant that the giving of an instruction was prejudicial, without proof of such prejudice, does not constitute sufficient grounds for the reversal of a conviction. State v. Bartholomew 270
26. This court will not entertain objection to the admission of evidence when no objection thereto has been made in a proper and timely fashion at the trial level. State v. Gore 287
27. This court will not set aside a conviction unless the defendant meets his burden of showing that the error claimed created not merely a possibility of prejudice but, rather, that it worked to his actual prejudice. State v. Gore 287
28. When the object of the cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge and, unless abused, its exercise is not reversible error. State v. Pitts 295
29. An order dismissing one cause of action while a second cause of action arising out of the same factual circumstances and involving the same parties but asserting a different legal theory of recovery remains pending for trial does not constitute a final appealable order. P. R. Halligan Post 163 v. Schultz 329
30. Equity actions on appeal to this court are triable de novo on the record and we are required to reach an independent conclusion without reference to the findings of the District Court, subject to the condition that when the evidence on material questions of fact is in irreconcilable conflict, we will, in determining the weight of

the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Kleager v. Schaneman 333

31. Where error in a trial exists only as to the issue of damages and the judgment is in other respects free from error, and it is clear that no injustice will result from doing so, this court may, when remanding a cause for a new trial, limit the new trial to such issue. O'Neil v. Behrendt 372

32. In an appeal from property valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Riha Farms, Inc. v. County of Sarpy 385
Hastings Building Co. v. Board of Equalization 847

33. Findings of fact made by the Nebraska Workmen's Compensation Court following rehearing have the same force and effect as a jury verdict in a civil case, and will not be set aside unless the evidence is insufficient to warrant the making of the award or the findings of fact do not support the award. Butler v. Midwest Supply Co. 421

34. An appellate court cannot acquire jurisdiction of a cause if the court from which the appeal was taken had no jurisdiction of the subject matter. Bd. of Ed. of Keya Paha County v. State Board of Education 448

35. The parties cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent. Bd. of Ed. of Keya Paha County v. State Board of Education 448

36. Proceedings for review under the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-917 et seq. (Reissue 1981), shall be instituted by filing a petition in the District Court of the county where the action is taken. In a proceeding authorized by Neb. Rev. Stat. § 79-1103.05 (Reissue 1981), the action is taken in the county where the State Board of Education conducts its hearing. Bd. of Ed. of Keya Paha County v. State Board of Education 448

37. The right of appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the

subject matter of the action. Bd. of Ed. of Keya Paha County v. State Board of Education 448
38. It is not within the province of this court in a law action to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court will review the judgment rendered, will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed on appeal unless clearly wrong. England v. Leithoff 462
39. Notice of appeal from a decision on rehearing in the Nebraska Workmen's Compensation Court must be filed within 1 month of the judgment or within 1 month of the order denying the motion for a new trial. Battiato v. Falstaff Brewing Corp. 474
40. A party's motion to withdraw a rest for the purpose of offering additional evidence is not a motion for a new trial and does not extend the time for appeal from a final judgment. Battiato v. Falstaff Brewing Corp. ... 474
41. 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 substantial legal right. State v. Evans 476
42. The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence in a jury trial will generally not be reviewed by this court, unless it is clearly or plainly shown that the trial court abused its discretion. In re Estate of Camin 490
43. The receipt or rejection of collateral evidence is largely within the discretion of the trial judge, and his rulings in that regard will rarely be disturbed. In re Estate of Camin 490
44. Where the trial court has ordered a reduction of the verdict as a condition of denying a new trial, such order will not ordinarily be reversed unless an abuse of discretion is shown. Barbour v. Jenson Commercial Distributing Co. 512
45. On appeal to this court of an equitable action to compel specific performance of a promise made to make a will, we must hear and determine the matter de novo and reach an independent conclusion without being influenced by the findings of the trial court. In re Estate of Layton 518
46. A proper judgment will not be reversed even if the trial court did not give the right reason for its rendition. Leo A. Daly Co. v. Omaha-Douglas Public Bldg. Comm. 533
47. As a court of review, the Nebraska Supreme Court cannot consider constitutional issues not properly before the court below. State ex rel. Douglas v. Schroeder ... 562

48. In post conviction proceedings under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979) the District Court is the trier of disputed questions of fact and it is not ordinarily for the Supreme Court to determine questions of credibility. State v. Tiff 565
49. As a general rule, where a plaintiff is allowed to continue prosecution of the cause of action on behalf of himself, but is denied class action status, no substantial right of the plaintiff has been affected by such denial and that order is not a final order which may be appealed. Lake v. Piper, Jaffray & Hopwood Inc. 570
50. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. State v. Last 596
State v. Parks 635
State v. Cook 718
51. The granting of probation as opposed to the imposing of a sentence is a matter which is left to the sound discretion of the trial court, and, absent a showing of abuse, this court will not on appeal disturb the trial court's denial of probation. State v. Last 596
52. In actions for the modification of alimony in a dissolution of marriage proceeding, it is the duty of this court to review de novo the determination of the District Court as to whether a change in circumstances has occurred which justifies the modification of the original decree. Sloss v. Sloss 610
53. An action under the Political Subdivisions Tort Claims Act is tried to the court without a jury. Upon appeal to this court the findings of fact by the trial court will not be overturned unless clearly wrong. Hume v. Otoe County 616
Wakenight v. State 798
54. It is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. State v. Parks 635
55. Facts constituting entrapment are ordinarily to be determined by the jury or trier of fact in each individual case, and its findings will be disturbed only when the preponderance of evidence against such findings is great and they clearly appear to be wrong. State v. Parks 635
56. Appeals involving the administration of a trust are equity matters and are reviewable in this court de novo on the record. In re Zoellner Trust 674
57. In determining whether the State has shown that the condition of a driver of a motor vehicle is such as to

render him incapable of refusing a blood alcohol test under Neb. Rev. Stat. § 39-669.10 (Reissue 1978) so as to make the test admissible in evidence, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous. State v. Brittain 686

58. A determination that a blood alcohol test was taken and properly performed as provided for in Neb. Rev. Stat. § 39-669.11 (Reissue 1978) so as to be admissible in evidence generally rests within the sound discretion of the trial court and will not be reversed except for a clear abuse of discretion. State v. Brittain 686

59. The overruling of a motion to disqualify a trial judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. State v. Herren 706

60. This court will not interfere with a conviction based upon evidence unless it is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Cook 718

61. This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof. State v. Mayfield 724

62. In a law action tried without a jury, it is not within our province to resolve evidentiary conflicts or to weigh evidence; rather, it is our obligation to review the judgment entered in light of the evidence and to consider the evidence in that light most favorable to the successful party, resolving all conflicts in his favor and granting him the benefit of every inference which is reasonably deducible therefrom. Grubbs v. Kula 735
White v. Medico Life Ins. Co. 901

63. A necessary function of valid assignments of error is to advise as to the issues submitted to the court for decision. Coyle v. Janssen 785

64. Generalized and vague assertions of claimed error do not advise this court of the issues submitted for decision. Coyle v. Janssen 785

65. It is not the duty of a reviewing court to search the record for the purpose of ascertaining whether there is error, and any error alleged must be specifically pointed out. Coyle v. Janssen 785

66. It is the obligation of this court in disciplinary proceedings to review the evidence de novo to determine if discipline should be imposed, and, if it should, the extent

thereof. State ex rel. Nebraska State Bar Assn. v. McArthur 815
67. To determine whether and to what extent discipline should be imposed, it is necessary that we consider the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. State ex rel. Nebraska State Bar Assn. v. McArthur 815
68. A cross-appeal may not be asserted by one appellee against another appellee. Buffalo County v. Richards 826
69. In reviewing an appeal from the decision of a trial court in a law action, the review is not de novo. The judgment of the District Court will not be set aside on appeal unless it is clearly wrong and not supported by the evidence. Siebler Heating & Air Conditioning v. Jenson 830
70. The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding. Hastings Building Co. v. Board of Equalization 847
71. 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. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can be reasonably drawn therefrom. Narduzzo v. Sunderland Bros. 852
Negrete v. Western Electric Co., Inc. 876
72. Ordinarily, one may not invite error and then complain of it. State v. Williams 860
73. In the absence of a clear expression of legislative intent, this court is not inclined to interpret a statute to apply to matters other than clearly expressed within the statute itself. State v. Peiffer 864
74. On appeal from the county court sitting as a juvenile court, an order of the District Court remanding the case to the county court for a further dispositional hearing is a final order appealable to this court under the provisions of Neb. Rev. Stat. §§ 25-1902 and 25-1315.03 (Reissue 1979). In re Interest of Roman 919

Arrests.

1. Probable cause for an arrest exists if the officer has

reasonable cause to believe that the person arrested has committed a felony. State v. Hack and Callans ... 406
2. Probable cause does not require that the officer see the commission of a felony and does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction. State v. Hack and Callans 406
3. If the facts available to the officer at the time of the arrest would warrant a man of reasonable caution in the belief the action was appropriate, then probable cause exists. State v. Hack and Callans 406

Assault.

First degree assault is not a lesser-included offense of attempted murder in the second degree. State v. Lovelace 356

Attorney and Client.

1. An attorney must not while representing a client do anything knowingly that is inconsistent with the terms of his employment or contrary to the best interests of his client. City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc. 137
2. Notice to, or knowledge of, facts by an attorney is notice to, or knowledge of, his client. City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc. 137
3. An attorney cannot purchase or negotiate for an interest in land in which his own client is interested. City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc. 137
4. An attorney is required to perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and he should conscientiously protect the interests of his client. State v. Herren 706
5. In order to demonstrate a violation of one's sixth amendment rights a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. State v. Herren 706
6. A lawyer owes a duty to his client to use reasonable care and skill in the discharge of his duties, but ordinarily this duty does not extend to third parties. St. Mary's Church v. Tomek 728

Attorney Fees.

1. In an action for dissolution of marriage, the award of attorney fees is discretionary with the trial court and depends on a variety of factors, including all the circumstances, such as the amount of the division of property and alimony awarded, the earning capacity of the

parties, and the general equities of the situation. Koubek v. Koubek 2
2. Within the meaning of Neb. Rev. Stat. § 48-125 (Reissue 1978) the Nebraska Second Injury Fund is an "employer," and if, on appeal to the Supreme Court, the fund fails to obtain any reduction in the amount of the award of the Workmen's Compensation Court on rehearing, the employee is entitled to a reasonable sum as attorney fees in this court, to be assessed against the Second Injury Fund. Pollard v. Wright's Tree Service, Inc. 187
3. Where, upon rehearing in a workmen's compensation case, an employer has obtained a termination of a previous running award for temporary total disability, it cannot be said that the employer has failed to obtain any reduction in the amount of such award so as to be liable for statutory attorney fees. Butler v. Midwest Supply Co. 421
4. Under Neb. Rev. Stat. § 48-118 (Reissue 1978), where an action is filed before a particular court and prosecuted to a final conclusion, whether by settlement or judgment, that court alone has jurisdiction to resolve any controversy relating to division of fees and expenses. Moyer v. Douglas & Lomason Co. 680

Attorneys at Law.

A finding that an attorney's failure to appear in court at an appointed time was not willful constitutes a finding that the failure to appear was not contempt of court. In re Contempt of Miller 864

Attorneys' Liens.

1. The proper method for enforcing an attorney's charging lien is by resort to equity, because such a lien is equitable in nature. Kleager v. Schaneman 333
2. An attorney has a lien for a general balance of compensation upon money in the hands of the adverse party, in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party. Kleager v. Schaneman 333
3. Although an attorney's lien upon money in the hands of an adverse party is not perfected until notice has been given to the party in possession of the fund, the notice need not be in writing or in any specific form. Any notice of the existence of the claim against a fund, and that it will be asserted, is sufficient. Kleager v. Schaneman 333
4. A charging lien for attorney fees may arise out of an

agreement between a client and his attorney that he is to receive a portion of the judgment recovered or of the proceeds thereof, provided it appears to be the intention of the parties that such judgment or proceeds will be looked to for security. Kleager v. Schaneman 333

5. An attorney's charging lien is confined to fees and costs due for services rendered in the particular action in which the judgment or settlement proceeds were obtained. However, payment of a sum of money in a proceeding which exceeds the amount due and owing therein, which immediately gives rise to a dismissal of another action between the same parties, may be considered as to the excess proceeds arising out of the second case. Kleager v. Schaneman 333

Banks and Banking.

The statutory rule that a payor bank is accountable for a demand item presented to it and not settled for, paid, returned, or a notice of dishonor sent before the midnight deadline may be varied or waived by agreement. Neb. U.C.C. §§ 4-302, 4-103 (Reissue 1980). Idaho Forest Industries, Inc. v. Minden Exch. Bank & Trust Co. 820

Blood, Breath, and Urine Tests.

1. In determining whether the State has shown that the condition of a driver of a motor vehicle is such as to render him incapable of refusing a blood alcohol test under Neb. Rev. Stat. § 39-669.10 (Reissue 1978) so as to make the test admissible in evidence, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous. State v. Brittain 686
2. A determination that a blood alcohol test was taken and properly performed as provided for in Neb. Rev. Stat. § 39-669.11 (Reissue 1978) so as to be admissible in evidence generally rests within the sound discretion of the trial court and will not be reversed except for a clear abuse of discretion. State v. Brittain 686
3. The trial court having made that determination, it is not required that the jury reexamine or pass upon the court's ruling on the admissibility of the blood test. State v. Brittain 686

Boundaries.

1. In order to establish a boundary by acquiescence, it is not necessary that the acquiescence should be manifested by a conventional agreement, but recognition and acquiescence must be mutual, and both parties

must have knowledge of the existence of a line as a boundary line. Hausner v. Melia 764
2. The establishment of a boundary line between adjacent lots by recognition and acquiescence involves the idea that the adjacent owner, with knowledge of the line so established and the possession so taken, assents thereto, or that circumstances exist from which assent may be reasonably inferred. Hausner v. Melia 764
3. Where the owners of adjoining land occupy their respective premises up to a certain line, which they mutually recognize and acquiesce in as the boundary line for a long period of time, there is a presumption in favor of such line being the true one, which can only be overcome by clear proof to the contrary. Where such recognition and acquiescence has continued beyond the 10-year period fixed by the statute of limitations, the presumption becomes conclusive. Hausner v. Melia .. 764
4. Where the true boundary line between adjoining owners of real property can be ascertained, and the parties by mistake have agreed upon an erroneous line as such boundary, believing it to be the true line, they will not be precluded by such agreement from claiming the true line when discovered, unless the statute of limitations has run or equitable reasons exist for establishing the erroneous line as the true line. Hausner v. Melia 764
5. Where a common boundary marked by a fence line has been recognized and acquiesced in by the abutting landowners and their grantors for more than 10 consecutive years, such common boundary is then the established boundary between the properties involved. Spilinek v. Spilinek 811

Brain Death.

Where a homicide victim has suffered brain death, removal of life support systems is not an efficient intervening cause of death. State v. Meints 410

Case Overruled.

To the extent that *Hunt v. Chicago, B. & Q. R.R. Co.*, 180 Neb. 375, 143 N.W.2d 263 (1966), is to the contrary, it is overruled. "L" Investments, Ltd. v. Lynch 319

Circumstantial Evidence.

Where circumstantial evidence is utilized to prove an essential element of a crime, it is not required that the State disprove every hypothesis but that of guilt. State v. Bartholomew 270

Collateral Attack.

1. A claim that property is assessed too high for taxation purposes cannot be made in the first instance by collateral attack in law or equity in the event of failure to bring the matter before the county board of equalization. Riha Farms, Inc. v. Dvorak 391
   Tyro Farms, Inc. v. Herrington 446
2. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment, or some part thereof, is wholly void. Riha Farms, Inc. v. Dvorak 391
   Tyro Farms, Inc. v. Herrington 446
3. Generally, where a court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. Hausner v. Melia 764
4. A confirmation of a partition sale disposes of all the interests of everyone in the proceedings and transfers them to the purchaser. After confirmation there is no title or interest of any party to such proceedings that can be collaterally attacked. Hausner v. Melia 764
5. Where a judgment is attacked in a way other than a proceeding in the original action to have it vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement, the attack is a collateral attack. Sileven v. Tesch 880
6. Only a void judgment is subject to collateral attack. Sileven v. Tesch 880

Collateral Evidence.

The receipt or rejection of collateral evidence is largely within the discretion of the trial judge, and his rulings in that regard will rarely be disturbed. In re Estate of Camin 490

Confessions.

1. In order for a confession to be admissible, it must have been freely and voluntarily given and must not have been obtained by threat or promise. State v. Hunt 214
   State v. Hunt 304
2. The admission into evidence of a confession constitutes an independent determination by the trial court that the confession was voluntarily made. Such determination will not be set aside on appeal unless such finding is "clearly erroneous." State v. Hunt 214
   State v. Hunt 304
3. *Miranda* does not protect an accused, even though he has requested counsel, from a spontaneous admission made under circumstances not induced by the investi-

gating officers or during the conversation not initiated by the officers. State v. Last 596

Conflict of Interest.

In order to demonstrate a violation of one's sixth amendment rights a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. State v. Herren 706

Consideration.

1. A negotiable instrument as between the parties requires a consideration the same as any other contract. Buffalo County v. Richards 826
2. Consideration for a promissory note may be furnished by a third party. Buffalo County v. Richards 826
3. A preexisting debt is sufficient consideration for a mortgage securing the debt. Buffalo County v. Richards ... 826
4. A consideration moving to one of several joint makers is good as to all. Buffalo County v. Richards 826

Constitutional Law.

1. The requirement of Neb. Const. art. I, § 13, that all courts be open and every person have a remedy by due process of law for any injury to his person, does not mean that limits may not be imposed upon the time within which one must ask courts to act. Colton v. Dewey 126
2. The Constitution of the State of Nebraska, art. VIII, § 6, requires that real property, when specially assessed, be assessed according to the benefits received. North Star Lodge #227 v. City of Lincoln 236
3. Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the double jeopardy clause. State v. Munn 265
4. As a court of review, the Nebraska Supreme Court cannot consider constitutional issues not properly before the court below. State ex rel. Douglas v. Schroeder ... 562
5. A new trial is a reexamination in the same court of issues previously decided by it; therefore, constitutional issues not raised by the pleadings may not be raised in the motion for new trial. State ex rel. Douglas v. Schroeder 562
6. Reasonable notice, that is to say, notice which is meet and fair in view of the circumstances and conditions existent at the time and with reference to the matter to

be presented, is an element of due process. State ex rel. Douglas v. Schroeder 562
7. The Nebraska Constitution requires that taxes be levied by valuation uniformly and proportionately upon all tangible property and franchises. Konicek v. Board of Equalization 648
8. In order to demonstrate a violation of one's sixth amendment rights a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. State v. Herren 706
9. In general, except as restricted by the Constitution, it is the function of the Legislature by the enactment of statutes to declare what the law is. Nebraska P.P. Dist. v. City of York 747
10. The Legislature may not delegate to the courts legislative power. Nebraska P.P. Dist. v. City of York 747
11. Questions of public policy related to the powers of and government of public power districts are, in the first instance, a purely legislative cognizance and may not be referred to the courts for determination. Nebraska P.P. Dist. v. City of York 747
12. The Legislature may vest in the courts factfinding questions to determine whether or not a law has been complied with. Nebraska P.P. Dist. v. City of York ... 747
13. Where a statute is susceptible of two constructions, under one of which the statute is valid, while under the other it is unconstitutional or of doubtful validity, that construction which gives it validity should be adopted. Nebraska P.P. Dist. v. City of York 747

Consumer Credit.

1. The inhibitory provisions of the Nebraska Consumer Credit Act apply to nonlicensees only if the transaction itself is subject to the act. Albers v. Overland Nat. Bank 578
2. It may be a question of fact as to whether a particular transaction is subject to the act. Albers v. Overland Nat. Bank 578
3. Neb. Rev. Stat. § 45-183 (Cum. Supp. 1980) is not applicable to loans made in the traditional manner by nonlicensees at conventional rates. Albers v. Overland Nat. Bank 578

Contempt.

1. A finding that an attorney's failure to appear in court at an appointed time was not willful constitutes a finding that the failure to appear was not contempt of court. In re Contempt of Miller 864

2. Judgments of contempt are subject to review by habeas corpus only on the limited question of the trial court's jurisdiction, power, or authority to adjudicate the contempt. Sileven v. Tesch 880

Contracts.

1. The cancellation, abandonment, or rescission of a written contract may not only be written but it may also be oral. Moreover, an implied agreement to rescind a contract may be given effect, and the assent of the parties to rescission may be shown by their acts or conduct, and the surrounding circumstances. Accordingly, in determining whether a rescission took place, the courts look not only to the language of the parties but to all the circumstances. Truman v. Martin 52
2. The validity of a contract, the obligations thereof, and the capacity of the parties thereto are to be determined by the lex loci contractus unless there is something in the contract which is prohibited by express statute or infringes upon some positive rule of public policy. First Mid America Inc. v. MCI Communications Corp. 57
3. Damages are recoverable for losses caused by breach of contract only to the extent that the evidence affords a sufficient basis of ascertaining their amount in money with reasonable certainty. LeRoy Weyant & Sons, Inc. v. Harvey and Classic Lanes 65
4. A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration, and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. Havelock Bank of Lincoln v. Bargen 70
5. The modification of a contract which substantially changes the liability of the parties ordinarily requires mutual assent to be effective. Havelock Bank of Lincoln v. Bargen 70
6. The right to specific performance may be lost by abandonment of the contract and by conduct inconsistent with the right to relief. Reifschneider v. Nebraska Methodist Hospital 91
7. An abandonment of a contract may be effected by acts of one of the parties thereto, which are inconsistent with its existence, and acquiesced in by the other party. Reifschneider v. Nebraska Methodist Hospital 91
8. Where the wronged party has elected to abandon a settlement agreement, he cannot thereafter maintain a

suit for specific performance of it. Reifschneider v. Nebraska Methodist Hospital 91
9. A party who has been induced to enter a contract by fraud has, upon its discovery, an election of remedies, and he may either affirm the contract and sue for damages or disaffirm it and be reinstated to the position he was in before it was consummated. Gitschel v. Sauer 454
10. A provision in a contract for the purchase of real estate, to the effect that vendee agrees that he has made personal inspection of the property covered by the contract and is buying it solely on his own investigation and not on any representations made by anyone else as to any material matter affecting such property or his purchase thereof, will not relieve the vendor or his agent from responsibility for fraudulent representations made concerning the subject matter of the contract. Gitschel v. Sauer 454
11. The material elements of a cause of action for fraudulent representation are that the representation was made, that the representation was false, that when the representation was made it was known to be false or made recklessly without knowledge of its truth and as a positive assertion, that it was made with the intention that the plaintiff would rely upon it, that the plaintiff did rely upon it, and that he suffered damage as a result. Gitschel v. Sauer 454
12. A suit to enforce an alleged oral contract to make a will is a suit in equity to be tried to the court. If a jury is called in the trial of such a case, its functions are advisory only. In re Estate of Layton 518
13. A county court does have jurisdiction to hear actions on oral contracts to make a will, even though they are equitable in nature, under its general authority to hear all matters relating to a decedent's estate. In re Estate of Layton 518
14. Where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory, and unequivocal. In re Estate of Layton 518
15. 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. In re Estate of Layton 518
16. The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract. In re Estate of Layton 518

17. The burden is upon the claimant in a suit on an oral contract to make a will to prove both the existence of the contract and its terms and the acts constituting performance such as were referable solely to the contract sought to be enforced. In re Estate of Layton 518
18. Evidence of declarations of a deceased person concerning a parol contract does not amount to direct proof of the facts claimed to have been admitted by those declarations, and such evidence, when not supported by other evidence, is generally entitled to but little weight. In re Estate of Layton 518
19. It is the general rule under Nebraska law that the proper construction of a written contract is a matter of law to be determined by the court. Leo A. Daly Co. v. Omaha-Douglas Public Bldg. Comm. 533
20. An integrated agreement is a writing or writings constituting the final or complete expression of an agreement. Whether there is an integrated agreement is to be determined by the court. Leo A. Daly Co. v. Omaha-Douglas Public Bldg. Comm. 533
21. Reasonable profits may be allowed as part of an award of damages in a breach of contract action where the damages are granted as part of the original contract price, but those calculated on the excess damage award are ordinarily barred. Meisinger Earth Moving, Inc. v. State 554
22. In an equitable adjustment case the allowance of profit is not mandatory but is discretionary, and in an appropriate case profit may be denied altogether, even profit computed on the original contract basis. Meisinger Earth Moving, Inc. v. State 554
23. The question of whether the interpretation of a contract is a matter of law or a question of fact depends upon certain factors. If the contract is to be construed by reference to its terms alone and without reference to extrinsic circumstances, it is for the court alone to interpret. On the other hand, if the interpretation depends upon extrinsic facts which are in dispute, the resolution of those facts must be submitted to the jury. Able Electric Co. v. Vacanti & Randazzo Constr. Co. 619
24. Time is not generally considered as the essence of a contract unless it is expressly provided or it appears that it was the intention of the parties that it should be of the essence thereof. Able Electric Co. v. Vacanti & Randazzo Constr. Co. 619
25. The making of a contract may be conditioned upon the act or will of a third person. Coyle v. Janssen 785
26. When an obligation to pay money is, by agreement,

made to depend upon the action of another party, over whom neither party has control, payment cannot be exacted unless the specific act is performed. Coyle v. Janssen 785

27. Where a contract is executed but its effectiveness is dependent upon the fulfillment of an agreed condition before it can become a binding contract, such contract cannot be enforced unless the condition is performed. Coyle v. Janssen 785

28. Strictly speaking, there cannot be a decree for the specific performance of a contract to make a will. Courts of equity may grant relief in a form that is usually equivalent to a decree of specific performance of a contract to leave property by will, after the death of the defaulting promisor, by fastening a trust upon an estate in the hands of those taking it with notice of such contract or by devise or descent. Philp v. First Nat. Bank & Trust Co. 791

29. In interpreting a written contract, the meaning of which is in doubt and dispute, the court, in order to determine its meaning, will consider all the facts and circumstances leading up to and attending its execution, and will consider the relation of the parties, the nature and situation of the subject matter, and the apparent purpose of making the contract. Philp v. First Nat. Bank & Trust Co. 791

30. No agreement can be implied where there is an express one existing. Thus, an express contract precludes the existence of a contract implied by law or a quasi-contract. Siebler Heating & Air Conditioning v. Jenson 830

31. A party cannot allege an express agreement and then, over objection, prove and recover on a cause of action of quantum meruit. Siebler Heating & Air Conditioning v. Jenson 830

Convictions.

1. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilty beyond a reasonable doubt. State v. Bartholomew 270
State v. Cook 718

2. This court will not set aside a conviction unless the defendant meets his burden of showing that the error claimed created not merely a possibility of prejudice but, rather, that it worked to his actual prejudice. State v. Gore 287

3. A plea of guilty is the equivalent of a conviction by trial

and verdict or a finding of guilt by the court. State v. Ondrak 840

Corporations.

1. Where a corporation has in fact been dissolved and no longer exists as a legal entity, the rule of its incapacity to sue or be sued applies regardless of the mode of dissolution whether by judicial decree or otherwise. Farmers Union Co-op Assn. v. Mid-States Constr. Co. 147
2. In equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice. Nebraska Engineering Co. v. Gerstner 440
3. Some of the factors which are relevant in determining whether to disregard the corporate entity are (1) grossly inadequate capitalization, (2) insolvency of the debtor corporation at the time the debt is incurred, (3) diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses, and (4) the fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard for the corporate entity. Nebraska Engineering Co. v. Gerstner 440

Costs.

Under Neb. Rev. Stat. § 48-118 (Reissue 1978), where an action is filed before a particular court and prosecuted to a final conclusion, whether by settlement or judgment, that court alone has jurisdiction to resolve any controversy relating to division of fees and expenses. Moyer v. Douglas & Lomason Co. 680

Courts.

1. The municipal courts are courts of record, and transcripts of their records, duly certified, are evidence of the facts contained therein. State v. Kelly 45
2. Such certified records may be used to prove a judgment of conviction. State v. Kelly 45
3. Ordinarily such a certified record imports absolute verity absent proof that the same is incorrect. State v. Kelly 45
4. On appeal from the county court sitting as a juvenile court, an order of the District Court remanding the case to the county court for a further dispositional hearing is a final order appealable to this court under

the provisions of Neb. Rev. Stat. §§ 25-1902 and 25-1315.03 (Reissue 1979). In re Interest of Roman 919

Criminal Law.

1. When a defendant in a criminal case testifies in his own behalf, he is subject to the same rules of cross-examination as any other witness and may be required to testify on his cross-examination as to any matter brought out or suggested by him on his direct examination. State v. Pitts 295
2. When an amendment which mitigates the punishment for a crime is enacted after commission of the crime but before final judgment, the punishment shall be that contained in the amendatory act unless the Legislature specifically indicates otherwise. State v. Peiffer 299
3. Where a fine has been imposed as part of the penalty for conviction of a crime, the court may not, under the provisions of Neb. Rev. Stat. §§ 29-2206(1) and 29-2412 (Reissue 1979), peremptorily direct that the fine be satisfied by crediting jail time against the fine. The defendant must be afforded an opportunity to pay the fine in the manner provided by these statutes or to make proof of indigency. State v. Holloway 426
State v. Brumfield 605
4. As a general proposition, in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible. State v. Evans 476
5. 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 substantial legal right. State v. Evans 476
6. Although generally a verdict of acquittal in a former trial is not to be considered as determining the collateral question of the presence of a general plan or scheme or necessary intent for the purpose of a subsequent trial for a distinct offense, when so much of the evidence of the former trial is placed before the jury in the subsequent trial, justice requires that the evidence of the former verdict should be allowed in evidence. State v. Evans 476
7. In criminal cases it is not error to exclude evidence which is not substantive proof of any fact relative to the issue, and evidence which does not tend to establish the guilt or innocence of a defendant of a crime charged is immaterial and should be excluded. State v. Parks 635
8. An accused is not entitled to a cautionary instruction

where the witnesses who testify against him are regular public law enforcement officers. State v. Parks 635
9. By demurring or pleading to the general issue without requesting a ruling on a motion to quash an information as to certainty, particularity, or redundancy, the defendant has waived all such defects which were raised by the motion to quash. State v. Parks 635
10. Under due process, when there is a sufficient basis established for a voice identification, there is no essential difference between requiring the defendants to speak and having them stand for purposes of identification. State v. Ferris 835
11. Where conviction of a previous crime is an essential element of the crime charged, proof of prior convictions is properly made by offering in evidence the complaint or information, judgment rendered on the verdict or plea of guilty, evidence that the judgment has become final, and that the defendant in an earlier conviction is the same person presently before the court. State v. Ondrak 840
12. In the absence of something other than ordinary stealing, petit larceny is not a crimen falsi as contemplated by Neb. Rev. Stat. § 27-609(1)(b) (Reissue 1979). State v. Williams 860
13. If special circumstances exist, it is incumbent upon the prosecution to bring those circumstances to the court's attention. State v. Williams 860
14. One may rely upon an opposing party's stated intention to impeach by questioning concerning prior convictions and the trial judge's announcement that he will allow the same. State v. Williams 860

Damages.

1. Damages are recoverable for losses caused by breach of contract only to the extent that the evidence affords a sufficient basis of ascertaining their amount in money with reasonable certainty. LeRoy Weyant & Sons, Inc. v. Harvey and Classic Lanes 65
2. The plaintiff has the burden to prove the amount of damages with as much certainty as the case permits. LeRoy Weyant & Sons, Inc. v. Harvey and Classic Lanes 65
Meisinger Earth Moving, Inc. v. State 554
3. Where there is a delay in delivering possession to the vendee and the vendee has not elected to rescind, the vendee may be entitled to an abatement of the purchase price for damages resulting from the failure of the vendor to deliver possession in accordance with the

contract. Union Pacific Land Resources Corp. v. Park Towne, Ltd. 83

4. The basic principle of the law of damages is that such compensation in money shall be allowed for the loss sustained as will restore the loser to the same value of property status as he occupied just preceding the loss. "L" Investments, Ltd. v. Lynch 319

5. Except as otherwise hereinafter limited, where an improvement upon realty is damaged without damage to the realty itself and where the nature of the thing damaged is such that it is capable of being repaired or restored and the cost of doing so is capable of reasonable ascertainment, the measure of damages for its negligent damage is the reasonable cost of repairing or restoring the property in like kind and quality. This would be in addition to any other consequential damages which the injured party may establish by proper proof. If, in fact, the cost of repair or restoration exceeds the market value of the property just before the injury, then the proper measure of damages is the market value of the property just before the damages were incurred, less any salvage. "L" Investments, Ltd. v. Lynch 319

6. The burden of establishing the cost of repair shall be upon the party seeking recovery. If the party against whom recovery is sought believes that the cost of repair exceeds the market value of the property just before damage, then the burden shall be upon such party to introduce evidence to establish that fact, and it will then be up to the trier of fact to determine which of the two measures of damages should be employed. Absent evidence that the cost of repair or restoration exceeds the market value of the property just before damage, it will be presumed that the cost of repair or restoration does not exceed the market value of the property just before damage. "L" Investments, Ltd. v. Lynch 319

7. Where the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict. O'Neil v. Behrendt 372

8. Where error in a trial exists only as to the issue of damages and the judgment is in other respects free from error, and it is clear that no injustice will result from doing so, this court may, when remanding a cause for a new trial, limit the new trial to such issue. O'Neil v. Behrendt 372

9. Reasonable profits may be allowed as part of an award of damages in a breach of contract action where the

damages are granted as part of the original contract price, but those calculated on the excess damage award are ordinarily barred. Meisinger Earth Moving, Inc. v. State 554
10. In an equitable adjustment case the allowance of profit is not mandatory but is discretionary, and in an appropriate case profit may be denied altogether, even profit computed on the original contract basis. Meisinger Earth Moving, Inc. v. State 554

Decedents' Estates.
1. A suit to enforce an alleged oral contract to make a will is a suit in equity to be tried to the court. If a jury is called in the trial of such a case, its functions are advisory only. In re Estate of Layton 518
2. A county court does have jurisdiction to hear actions on oral contracts to make a will, even though they are equitable in nature, under its general authority to hear all matters relating to a decedent's estate. In re Estate of Layton 518
3. On appeal to this court of an equitable action to compel specific performance of a promise made to make a will, we must hear and determine the matter de novo and reach an independent conclusion without being influenced by the findings of the trial court. In re Estate of Layton 518
4. Where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory, and unequivocal. In re Estate of Layton 518
5. 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. In re Estate of Layton 518
6. The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract. In re Estate of Layton ... 518
7. The burden is upon the claimant in a suit on an oral contract to make a will to prove both the existence of the contract and its terms and the acts constituting performance such as were referable solely to the contract sought to be enforced. In re Estate of Layton 518
8. Evidence of declarations of a deceased person concerning a parol contract does not amount to direct proof of the facts claimed to have been admitted by those declarations, and such evidence, when not supported by

other evidence, is generally entitled to but little weight. In re Estate of Layton 518

9. Property owned in joint tenancy passes to the surviving joint tenant by virtue of the nature of the tenancy and not under the law of descent and distribution or by virtue of the provisions of the will of the first joint tenant to die. In re Estate of Walters 645

10. A patent ambiguity in a will must be removed by interpretation according to legal principles, and the intention of the testator must be found within the will; that intention is the one the testator expressed by the language of the will and not an entertained but unexpressed intention. In re Estate of Florey 665

11. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. In re Estate of Florey 665

12. A will speaks as of the date of the death of the testator. In re Estate of Florey 665

Declaratory Judgments.

Where an exclusive remedy is provided, the Uniform Declaratory Judgments Act does not provide an additional remedy. A declaratory judgment action can afford no relief to one who has failed to pursue a full, adequate, and exclusive statutory remedy. Eriksen v. Ray 8

Deeds.

1. Generally, upon the execution, delivery, and acceptance of an unambiguous deed, such being the final acts of the parties expressing the terms of their agreement with reference to the subject matter, all prior negotiations and agreements are deemed merged therein, in the absence of a preponderance of evidence clear and convincing in character establishing some recognized exception such as fraud or mistake of fact, and the deed will be held to truly express the intentions of the parties. Union Pacific Land Resources Corp. v. Park Towne, Ltd. 83

2. A deed, executed by a referee following a judicial sale, is to be construed with the judicial proceedings of which it forms a part. Hausner v. Melia 764

3. A referee's deed conveys all property that is described within such deed, provided that such description is in-

cluded with the order of the court authorizing the sale. Hausner v. Melia 764

Demurrer.

1. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. On reviewing the sustaining of a demurrer, this court must treat as undisputed the facts as alleged in the petition. Philp v. First Nat. Bank & Trust Co. 791
2. If the petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action. Philp v. First Nat. Bank & Trust Co. 791
3. A general demurrer admits only such facts as are well pleaded and does not admit mere conclusions of the pleader. Hall v. Cox Cable of Omaha, Inc. 887

Disciplinary Proceedings.

1. Generally, a judgment of conviction of a felony or misdemeanor involving moral turpitude rendered upon a plea of nolo contendere is conclusive upon a respondent lawyer in a disciplinary proceeding, and is sufficient to authorize the court to impose discipline. State ex rel. Nebraska State Bar Assn. v. Leonard 379
2. It is the conviction of a crime involving moral turpitude, and not the plea to the charged offense, that warrants disciplinary action. State ex rel. Nebraska State Bar Assn. v. Leonard 379
3. An attorney may be subjected to disciplinary action for conduct outside the practice of law for which no criminal prosecution has been instituted or conviction had. State ex rel. Nebraska State Bar Assn. v. Leonard 379
4. Although only those matters which are specifically charged in the complaint in a disbarment proceeding can be considered, a disciplinary proceeding is not a lawsuit with formalities of pleading, nor can technicalities be invoked to defeat the charges where undisputed facts show conduct which is ethically wrong. State ex rel. Nebraska State Bar Assn. v. Leonard 379
5. The restitution of funds wrongfully converted by a lawyer, after he is faced with legal accountability, is not an exoneration of his professional misconduct. State ex rel. Nebraska State Bar Assn. v. Hays 432
6. It is the obligation of this court in disciplinary proceedings to review the evidence de novo to determine if dis-

cipline should be imposed, and, if it should, the extent thereof. State ex rel. Nebraska State Bar Assn. v. McArthur 815
7. A lapse of time occurring since acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense. State ex rel. Nebraska State Bar Assn. v. McArthur 815
8. In disciplinary proceedings involving members of the bar, a presumption of innocence applies; culpability of the person charged must be established by a clear preponderance of the evidence so the court is satisfied to a reasonable certainty that the charges are true. State ex rel. Nebraska State Bar Assn. v. McArthur 815
9. The oath taken by one admitted to the bar requires him to faithfully discharge his duties and refrain from impeding or obstructing the administration of justice. State ex rel. Nebraska State Bar Assn. v. McArthur ... 815
10. Upon admission to the bar one assumes the duties of an officer of the court, and in the performance of those duties he must conform to the ethical standards generally recognized by the profession. State ex rel. Nebraska State Bar Assn. v. McArthur 815
11. To determine whether and to what extent discipline should be imposed, it is necessary that we consider the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. State ex rel. Nebraska State Bar Assn. v. McArthur 815

Divorce.

1. The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. The court will consider all pertinent facts in reaching an award that is just and equitable. Koubek v. Koubek 2
Van Newkirk v. Van Newkirk 730
2. Generally speaking, awards in cases of this kind vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so when the marriage is of long duration and the parties are the parents of all the children involved. Koubek v. Koubek 2
3. In an action for dissolution of marriage, the award of attorney fees is discretionary with the trial court and

depends on a variety of factors, including all the circumstances, such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. Koubek v. Koubek 2
4. Federal law precludes a state court from awarding a nonmilitary spouse a portion of a military spouse's government pension. Pyke v. Pyke 114
5. A trial court, in determining what, if any, alimony should be awarded a spouse, may recognize that the spouse ordered to pay the alimony may have, by way of income for his own maintenance and support, a military pension or may have the proceeds of a military pension from which he may be able to make alimony payments, although the court cannot award an interest in the pension to the nonmilitary spouse. Pyke v. Pyke 114

Due Process.

1. Due process does not demand an awareness of a right of action before a period of limitations may run against it. Colton v. Dewey 126
2. Under due process, when there is a sufficient basis established for a voice identification, there is no essential difference between requiring the defendants to speak and having them stand for purposes of identification. State v. Ferris 835

Easements.

1. The extent and nature of an easement is determined from the use made of the property during the prescriptive period, and the width of the public highway acquired by prescription must be determined as a question of fact by the character and extent of the use or the amount dedicated to public use, but it may be more or less than the width of a public highway as prescribed by statute. Olson v. Bonham 548
2. "Extent," within the term extent of easement claimed in land as right-of-way for a road, means the width. Olson v. Bonham 548
3. To establish an easement by prescriptive use, such use must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and continuous for the full prescriptive period. Spilinek v. Spilinek 811

Effectiveness of Counsel.

1. The present test of the effective assistance of counsel is that counsel perform at least as well as a lawyer with

ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client. State v. Beans 31
State v. Otey 103
State v. Hunt 214
State v. Hunt 304
2. Prejudice is an essential element of a claim of ineffective assistance of counsel and a defendant must show that he was prejudiced in the defense of the case by the actions or inactions of his counsel. State v. Beans 31
State v. Otey 103
3. In post conviction relief cases the person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence. State v. Landers 48
State v. Stranghoener 203
4. Where one maintains that counsel was inadequate, one must likewise show how or in what manner the alleged inadequacy prejudiced one. State v. Landers 48
State v. Stranghoener 203
5. In order for one to maintain a claim of ineffective counsel, the record must affirmatively support the claim. State v. Otey 103
6. A claim of prejudice based upon an alleged failure to call witnesses is not sustained in the absence of evidence as to what the witnesses' expected testimony would be. State v. Otey 103
7. The party challenging the adequacy of criminal trial representation has the burden of proof in showing incompetence, if any, therein. He must also show that such incompetence prejudiced his defense. State v. Hunt 214
State v. Hunt 304
State v. Herren 706

Employment Contracts.

1. An oral contract of employment for a term of 18 months is within the statute of frauds. McBride v. City of McCook 112
2. A written memorandum sufficient to satisfy the statute of frauds must contain the essential terms of the contract. McBride v. City of McCook 112

Employment Security Law.

1. Under the Nebraska Employment Security Law at Neb. Rev. Stat. § 48-628 (Reissue 1978), a discharged employee is totally disqualified for unemployment benefits if such employee was guilty of misconduct connected

with the working relationship which was gross, flagrant, and willful. Snyder Industries, Inc. v. Otto 40
2. Misconduct under the Nebraska Employment Security Law requires a deliberate, willful, or wanton disregard of an employer's interest or of the standards of behavior which the employer has a right to expect of employees. Snyder Industries, Inc. v. Otto 40
3. In order for the violation of an employment rule laid down by the employer to constitute misconduct under the Nebraska Employment Security Law, such rule must be a reasonable one, which means that it must bear a reasonable relationship to the employer's interest. Snyder Industries, Inc. v. Otto 40

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. Parks 635
2. Entrapment is a defense which is in the nature of an affirmative defense. This being so, the defendant has the initial burden of going forward with evidence of governmental involvement and inducement, following which the ultimate burden, the risk of nonpersuasion, as in all criminal cases, is on the State. State v. Parks 635
3. When assessing the evidence in an entrapment case, the court must first determine if the defendant has submitted sufficient evidence, more than a scintilla, to give rise to the defense. If the defendant has met that burden, the question of entrapment then becomes one of fact to be decided by the jury. State v. Parks 635
4. Facts constituting entrapment are ordinarily to be determined by the jury or trier of fact in each individual case, and its findings will be disturbed only when the preponderance of evidence against such findings is great and they clearly appear to be wrong. State v. Parks 635
5. In finding predisposition, the jury need not look specifically to any particular fact or piece of evidence, but may find such predisposition on the part of the defendant from the totality of the circumstances. State v. Parks 635

Equity.

1. In equity actions, it is the duty of the Supreme Court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the District Court. Truman v. Martin 52
2. On an appeal from a judgment in equity, when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Truman v. Martin 52
3. Appeal of an equitable action is reviewable de novo by this court, bearing in mind that the trial court had the opportunity to observe the witnesses and their manner of testifying and therefore was in a better position to determine the credibility of the evidence and the weight to be accredited thereto. City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc. 137
Kleager v. Schaneman 333
Brommer v. City of Hastings 367
Barry v. Wittmersehouse 909
4. A suit to enforce an alleged oral contract to make a will is a suit in equity to be tried to the court. If a jury is called in the trial of such a case, its functions are advisory only. In re Estate of Layton 518
5. On appeal to this court of an equitable action to compel specific performance of a promise made to make a will, we must hear and determine the matter de novo and reach an independent conclusion without being influenced by the findings of the trial court. In re Estate of Layton 518
6. A court of equity which has acquired jurisdiction of a matter for any purpose will retain jurisdiction for the purpose of administering complete relief with respect to the subject matter. Hausner v. Melia 764

Estoppel.

1. A tenant cannot, while occupying the premises, deny his landlord's title. Bender v. James 77
2. A final judgment in a partition action determines the rights and interests of the parties in the subject property, and such parties are estopped from raising any claim of interest of title which was or could have been raised in that action. Hausner v. Melia 764

Evidence.

1. In determining whether the evidence supports the findings of the trial court in an action at law where a jury

has been waived, the evidence must be considered in the light most favorable to the successful party, all conflicts must be resolved in his favor, and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. Atlas Steel & Wire Corp. v. L & M Constr. Chemicals, Inc. 16

2. That which is relevant, admissible, and tends to establish the facts in issue is competent evidence in the context of administrative hearings. Beasley v. City of Omaha 153

3. Where different minds may reasonably draw different conclusions from the adduced evidence or if there is a conflict in the evidence as to whether or not they establish negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to a jury. Schutz v. Hunt 228

4. This court will not entertain objection to the admission of evidence when no objection thereto has been made in a proper and timely fashion at the trial level. State v. Gore 287

5. The admission of testimony wrongfully received in a case tried to a jury is prejudicial error where it may have influenced the verdict. State v. Thunder Hawk .. 350

6. In a workmen's compensation case the burden of proof is upon the plaintiff to prove by a preponderance of the evidence that he is suffering from a disability and that such disability is the result of an accident arising out of his employment. Butler v. Midwest Supply Co. 421

7. The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence in a jury trial will generally not be reviewed by this court, unless it is clearly or plainly shown that the trial court abused its discretion. In re Estate of Camin 490

8. Evidence of declarations of a deceased person concerning a parol contract does not amount to direct proof of the facts claimed to have been admitted by those declarations, and such evidence, when not supported by other evidence, is generally entitled to but little weight. In re Estate of Layton 518

9. In finding predisposition, the jury need not look specifically to any particular fact or piece of evidence, but may find such predisposition on the part of the defendant from the totality of the circumstances. State v. Parks 635

10. In criminal cases it is not error to exclude evidence which is not substantive proof of any fact relative to the issue, and evidence which does not tend to establish the

guilt or innocence of a defendant of a crime charged is immaterial and should be excluded. State v. Parks ... 635
11. Evidence which is competent only for one purpose may not be considered for other purposes. State v. Hardin 774
12. A fact is not collateral for purposes of impeachment if it could be independently provable because relevant. Jones v. Tranisi 843
13. If special circumstances exist, it is incumbent upon the prosecution to bring those circumstances to the court's attention. State v. Williams 860
14. An ultimate fact fairly and reasonably inferable from the facts and circumstances proved is to be taken as established. White v. Medico Life Ins. Co. 901

Expert Witnesses.

1. The cause of an injury or disability not objective in character requires proof by expert testimony or other appropriate scientific means. Coco v. Austin Co. 95
2. Where medical evidence is relied upon in a workmen's compensation case to show the nature and extent of the disability and that there is a causal connection between the alleged injury, the employment, and the disability, the triers of fact are not required to take the opinions of such experts as binding upon them. Butler v. Midwest Supply Co. 421
3. Triers of fact are not required to take the opinions of experts as binding upon them. State v. Mayfield 724

Extradition.

Once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state. Rodgers v. Adams 716

Final Orders.

1. An order dismissing one cause of action while a second cause of action arising out of the same factual circumstances and involving the same parties but asserting a different legal theory of recovery remains pending for trial does not constitute a final appealable order. P. R. Halligan Post 163 v. Schultz 329
2. As a general rule, where a plaintiff is allowed to continue prosecution of the cause of action on behalf of himself, but is denied class action status, no substantial right of the plaintiff has been affected by such denial and that order is not a final order which may be appealed. Lake v. Piper, Jaffray & Hopwood Inc. 570

3. On appeal from the county court sitting as a juvenile court, an order of the District Court remanding the case to the county court for a further dispositional hearing is a final order appealable to this court under the provisions of Neb. Rev. Stat. §§ 25-1902 and 25-1315.03 (Reissue 1979). In re Interest of Roman 919

Forbearance.

The distinction between a loan and a forbearance is that a loan is a contemporaneous transaction evidencing the creation of a debt to be repaid, while a forbearance is a subsequent agreement entered into between a debtor and creditor to secure the repayment of a debt previously created and matured. Farmland Enterprises, Inc. v. Schueman 342

Franchises.

Prior to the enactment of the Nebraska Franchise Practices Act, the law of Nebraska generally was that any person might do or refuse to do business with whomsoever he desired. McArtor v. Mobil Oil Corp. 592

Fraud.

1. Generally, a vendor of real property is not guilty of fraud for a failure to disclose material, latent defects which are unknown to him, but where the evidence shows he was aware of circumstances from which a reasonable inference could be drawn that he either knew or should have been aware of the fact that latent, defective conditions existed, he is liable to the purchaser. Hauck v. Samus 25
2. A party who has been induced to enter a contract by fraud has, upon its discovery, an election of remedies, and he may either affirm the contract and sue for damages or disaffirm it and be reinstated to the position he was in before it was consummated. Gitschel v. Sauer 454
3. A provision in a contract for the purchase of real estate, to the effect that vendee agrees that he has made personal inspection of the property covered by the contract and is buying it solely on his own investigation and not on any representations made by anyone else as to any material matter affecting such property or his purchase thereof, will not relieve the vendor or his agent from responsibility for fraudulent representations made concerning the subject matter of the contract. Gitschel v. Sauer 454
4. The material elements of a cause of action for fraudulent representation are that the representation was

made, that the representation was false, that when the representation was made it was known to be false or made recklessly without knowledge of its truth and as a positive assertion, that it was made with the intention that the plaintiff would rely upon it, that the plaintiff did rely upon it, and that he suffered damage as a result. Gitschel v. Sauer 454

Habeas Corpus.

1. Habeas corpus is a collateral proceeding and as such cannot be used as a substitute for an appeal or proceedings in error. Sileven v. Tesch 880
2. To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose, unless the sentence has been fully served and the prisoner is being illegally held. Sileven v. Tesch 880
3. Judgments of contempt are subject to review by habeas corpus only on the limited question of the trial court's jurisdiction, power, or authority to adjudicate the contempt. Sileven v. Tesch 880

Hearsay.

1. "Subject to the provisions of § 27-403, the following are not excluded by the hearsay rule, even though the declarant is available as a witness: ... Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Neb. Rev. Stat. § 27-803(3) (Reissue 1979). State v. Hardin 774
2. The rule of Neb. Rev. Stat. § 27-803(3) (Reissue 1979) permitting statements concerning inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment is bottomed on the notion that a person seeking medical attention will give a truthful account of the history and current state of his condition in order to ensure proper treatment. State v. Hardin 774
3. Exculpatory statements made by an accused to a psychiatrist for the purpose of diagnosis of a mental condition of the accused, insofar as they may recite what he

did or what occurred in connection with the commission of the alleged crime, are not competent evidence of the truth of the contents of the statement. State v. Hardin 774

Highways.

1. By continuous adverse use under claim of right for 10 years the public may acquire a highway along a section line. Olson v. Bonham 548
2. The extent and nature of an easement is determined from the use made of the property during the prescriptive period, and the width of the public highway acquired by prescription must be determined as a question of fact by the character and extent of the use or the amount dedicated to public use, but it may be more or less than the width of a public highway as prescribed by statute. Olson v. Bonham 548
3. If the public has acquired the right to a highway by prescription, it is not limited in width to the actual beaten path, but the right extends to such width as is reasonably necessary for public travel. Olson v. Bonham 548
4. A county cannot, even under the applicable statutes, open a section line road without giving notice to the landowners, hearing the landowners' claim for damages, or appointing appraisers and making provisions for payment of the landowners' damages, and if it attempts to do so it is a trespasser. Olson v. Bonham ... 548
5. Where a prescriptive right for highway use has been acquired along a section line, the right extends to the beaten path and such width as is reasonably necessary for public travel. It does not extend to the statutory width unless that width has been established by the use. Olson v. Bonham 548
6. A political subdivision may be liable for damages caused by insufficiency or want of repair of a highway or bridge or other public thoroughfare which the political subdivision is liable to keep in repair. Hume v. Otoe County 616
7. A county is not an insurer, but is obligated only to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence. Hume v. Otoe County 616

Homicide.

1. In a homicide case the State is required to prove that

an act of the defendant caused the death of the victim. State v. Meints 410

2. The act of the accused must be a proximate cause of death but need not be the direct, immediate cause. It is sufficient if the direct cause resulted naturally from the act of the accused, as where the direct cause is a disease or infection resulting from the injury inflicted by the accused. State v. Meints 410

3. It is not a defense that improper treatment on the part of physicians, nurses, or the victim may also have contributed thereto. But where death results solely from erroneous treatment by another, the one who inflicted the injury is not responsible for homicide. State v. Meints 410

4. For purposes of the law of homicide, proof of the death of the victim may be established by proof of the irreversible cessation of the victim's total brain functions. State v. Meints 410

5. Where a homicide victim has suffered brain death, removal of life support systems is not an efficient intervening cause of death. State v. Meints 410

6. A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation. State v. Hardin 774

7. 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. State v. Hardin 774

8. Malice denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. State v. Hardin 774

9. Where murder is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. In order for this rule to require an instruction on manslaughter, the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder. State v. Hardin 774

10. Where the evidence shows without dispute that one charged with murder purposely pointed a loaded gun at another and pulled the trigger and there is no evidence of a sudden quarrel or other condition which might permit a finding that there was an absence of malice, then the court is not required to give an instruction which would permit the jury to render a verdict of manslaughter. State v. Hardin 774

Identification Procedures.

1. The determination as to whether identification procedures were unnecessarily suggestive and conducive to a substantial likelihood of irreparably mistaken identification is to be made by a consideration of the totality of the circumstances surrounding the procedures used. State v. Hunt 214
   State v. Hunt 304
2. An in-court identification may be received when it is independent of and untainted by impermissible pretrial identification procedures. State v. Hunt 304
3. Under due process, when there is a sufficient basis established for a voice identification, there is no essential difference between requiring the defendants to speak and having them stand for purposes of identification. State v. Ferris 835

Impeachment.

1. A witness may not be impeached by producing extrinsic evidence of collateral facts to contradict the first witness' assertion about those facts. Jones v. Tranisi 843
2. A fact is not collateral for purposes of impeachment if it could be independently provable because relevant. Jones v. Tranisi 843
3. One may rely upon an opposing party's stated intention to impeach by questioning concerning prior convictions and the trial judge's announcement that he will allow the same. State v. Williams 860

Implied Consent Law.

1. A licensee who did not understand that he was being asked to submit to a chemical test because he cannot read, speak, or understand the English language cannot be said to have refused to take the test under our implied consent law. Martinez v. Peterson 168
2. On appeal from the revocation of a motor vehicle operator's license under our implied consent statute, the Nebraska Supreme Court reviews the findings of the trial court de novo. Bauer v. Peterson 174
3. In such a proceeding, the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for reversal. Bauer v. Peterson 174
4. A refusal to submit to a test for purposes of the implied consent law occurs when the licensee, upon being asked to take the test, conducts himself in a way which would justify a reasonable person in the officer's position in believing that the licensee understood that he had been

asked to take a test and that he had manifested an unwillingness to take it. Bauer v. Peterson 174

5. Although we review such cases de novo, where there is a conflict in the evidence, great weight is given the fact that the trial court had the opportunity to see, hear, and observe the witnesses and the presentation of evidence firsthand in deciding which body of evidence deserved the greater credibility. Bauer v. Peterson 174
6. In determining whether the State has shown that the condition of a driver of a motor vehicle is such as to render him incapable of refusing a blood alcohol test under Neb. Rev. Stat. § 39-669.10 (Reissue 1978) so as to make the test admissible in evidence, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous. State v. Brittain 686
7. A determination that a blood alcohol test was taken and properly performed as provided for in Neb. Rev. Stat. § 39-669.11 (Reissue 1978) so as to be admissible in evidence generally rests within the sound discretion of the trial court and will not be reversed except for a clear abuse of discretion. State v. Brittain 686
8. The trial court having made that determination, it is not required that the jury reexamine or pass upon the court's ruling on the admissibility of the blood test. State v. Brittain 686

Indictments and Informations.

1. An information or indictment must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to later prosecution for the same offense. State v. Last 596
2. An amendment adding an omitted allegation of a substantive element of the offense sought to be charged does not change the offense. State v. Last 596
3. Where the elements of a crime defined by statute are set out in an information or complaint, it is sufficient; and if words appear in such information or complaint which might be stricken, leaving a crime sufficiently charged, and such words do not tend to negative any of the essential averments, they may be treated as surplusage and be entirely rejected. State v. Parks ... 635

Injunction.

When the circumstances and situation of the parties have changed so that it would be just and equitable to vacate

or modify a permanent injunction, the court which granted the injunction may vacate or modify it upon motion. Smithberg v. City of Plattsmouth 594

Insurance.

1. Neb. Rev. Stat. § 44-710.14 (Reissue 1978) must be read in pari materia with Neb. Rev. Stat. § 44-358 (Reissue 1978). White v. Medico Life Ins. Co. 901
2. In order for misrepresentations in an application for insurance to constitute a defense to an action on the contract, the insurer must plead and prove, among other things, that the misrepresentations were made knowingly with intent to deceive, that the insurer relied and acted upon such statements, and that the insurer was deceived to its injury. White v. Medico Life Ins. Co. .. 901
3. Where the question in the application calls for an answer peculiarly within the knowledge of the applicant, an untrue answer relating to a matter material to the risk and relied upon by the insurer will void the policy. White v. Medico Life Ins. Co. 901
4. When an applicant makes an untrue statement with respect to a material fact peculiarly within his knowledge, the finder of fact may, from the mere occurrence of the false statement, conclude it was made knowingly with intent to deceive. White v. Medico Life Ins. Co. .. 901

Intent.

1. When the language used in a statute is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of the lawmakers. North Star Lodge #227 v. City of Lincoln 236
2. Where intent is an element of the crime charged, it is permissible to admit evidence of the defendant's prior crimes, wrongs, or acts in order to prove that the defendant possessed the requisite intent to be convicted on a charge of attempted first degree sexual assault. State v. Evans 476
3. Malice denotes that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. State v. Hardin 774

Invitor-Invitee.

1. Even though a dangerous condition on land may be open and obvious or known by an invitee, the possessor of the land may owe a duty of reasonable care to the invitee if the circumstances are such that he should ex-

pect that the invitee will fail to protect himself against the hazard. Tichenor v. Lohaus 218
2. Generally, an invitee, who has knowledge of a dangerous condition on the premises or where the dangerous condition is obvious, is negligent as a matter of law if he fails to use reasonable care to avoid injury. However, to constitute negligence as a matter of law the intentional exposure must be unreasonable. Tichenor v. Lohaus 218
3. If the defendant possessor of land has made the invitee's exercise of a right or privilege impossible unless he exposes himself to risk of bodily harm, the invitee is not guilty of contributory negligence in so doing unless he acts unreasonably. Tichenor v. Lohaus 218
4. Among the matters which must be considered in determining whether the invitee is guilty of negligence is the effect of distracting events or circumstances. Tichenor v. Lohaus 218

Joint Tenancy.

Property owned in joint tenancy passes to the surviving joint tenant by virtue of the nature of the tenancy and not under the law of descent and distribution or by virtue of the provisions of the will of the first joint tenant to die. In re Estate of Walters 645

Judges.

1. A district judge is not disqualified to hear a case because he previously presided in a proceeding involving one of the parties. State v. Herren 706
2. The overruling of a motion to disqualify a trial judge on the ground of his bias and prejudice will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. State v. Herren 706

Judicial Notice.

The Nebraska Supreme Court may examine and take judicial notice of its own proceedings and judgment where certain aspects of the controversy have been previously considered and determined, in cases which are interwoven and interdependent. State v. Hunt 304

Judicial Sales.

1. An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between value and the sale price, and where there is no satisfactory

evidence that a higher bid could be obtained in the event of another sale. Nebraska Federal Savings & Loan Assn. v. Patterson 29
2. A deed, executed by a referee following a judicial sale, is to be construed with the judicial proceedings of which it forms a part. Hausner v. Melia 764
3. A referee's deed conveys all property that is described within such deed, provided that such description is included with the order of the court authorizing the sale. Hausner v. Melia 764

Judgments.

1. The judgment of a trial court in an action at law where a jury has been waived has the effect of a jury verdict and it will not be set aside on appeal unless clearly wrong. Atlas Steel & Wire Corp. v. L & M Constr. Chemicals, Inc. 16
Noll v. Valley County Hospital 22
England v. Leithoff 462
Grubbs v. Kula 735
White v. Medico Life Ins. Co. 901
2. Where trial is to the court, a general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts. Atlas Steel & Wire Corp. v. L & M Constr. Chemicals, Inc. 16
3. 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. Atlas Steel & Wire Corp. v. L & M Constr. Chemicals, Inc. 16
Grubbs v. Kula 735
White v. Medico Life Ins. Co. 901
4. It is not within the province of this court in a law action to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court will review the judgment rendered, will presume the controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed on appeal unless clearly wrong. England v. Leithoff 462
5. A party's motion to withdraw a rest for the purpose of offering additional evidence is not a motion for a new trial and does not extend the time for appeal from a final judgment. Battiato v. Falstaff Brewing Corp. ... 474
6. A proper judgment will not be reversed even if the trial

court did not give the right reason for its rendition. Leo A. Daly Co. v. Omaha-Douglas Public Bldg. Comm. ... 533
7. A judgment must be supported by the allegations of the pleadings on which it is based. State ex rel. Douglas v. Schroeder 562
8. Generally, where a court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. Hausner v. Melia 764
9. A confirmation of a partition sale disposes of all the interests of everyone in the proceedings and transfers them to the purchaser. After confirmation there is no title or interest of any party to such proceedings that can be collaterally attacked. Hausner v. Melia 764
10. When all parties interested are before the court in a partition action, the order confirming the sale is final and binding, in the absence of fraud on the face of the proceedings, even though the judgment may be erroneous and would have been reversed on appeal. Hausner v. Melia 764
11. A final judgment in a partition action determines the rights and interests of the parties in the subject property, and such parties are estopped from raising any claim of interest or title which was or could have been raised in that action. Hausner v. Melia 764
12. In reviewing an appeal from the decision of a trial court in a law action, the review is not de novo. The judgment of the District Court will not be set aside on appeal unless it is clearly wrong and not supported by the evidence. Siebler Heating & Air Conditioning v. Jenson 830
13. Where a judgment is attacked in a way other than a proceeding in the original action to have it vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement, the attack is a collateral attack. Sileven v. Tesch 880
14. Only a void judgment is subject to collateral attack. Sileven v. Tesch 880
15. Judgments of contempt are subject to review by habeas corpus only on the limited question of the trial court's jurisdiction, power, or authority to adjudicate the contempt. Sileven v. Tesch 880
16. In the absence of a request for specific findings, the trial court need only make its findings generally for the prevailing party. White v. Medico Life Ins. Co. 901

Juries.

1. Where different minds may reasonably draw different conclusions or inferences from the evidence adduced

concerning the issues of negligence or contributory negligence and the degree thereof when one is compared with the other, such issues must be submitted to the jury. Tichenor v. Lohaus 218
Schutz v. Hunt 228
2. The trial court having made that determination, it is not required that the jury reexamine or pass upon the court's ruling on the admissibility of the blood test. State v. Brittain 686

Jurisdiction.
1. An appellate court cannot acquire jurisdiction of a cause if the court from which the appeal was taken had no jurisdiction of the subject matter. Bd. of Ed. of Keya Paha County v. State Board of Education 448
2. The parties cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent. Bd. of Ed. of Keya Paha County v. State Board of Education 448
3. Proceedings for review under the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-917 et seq. (Reissue 1981), shall be instituted by filing a petition in the District Court of the county where the action is taken. In a proceeding authorized by Neb. Rev. Stat. § 79-1103.05 (Reissue 1981), the action is taken in the county where the State Board of Education conducts its hearing. Bd. of Ed. of Keya Paha County v. State Board of Education 448
4. The right of appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action. Bd. of Ed. of Keya Paha County v. State Board of Education 448
5. A county court does have jurisdiction to hear actions on oral contracts to make a will, even though they are equitable in nature, under its general authority to hear all matters relating to a decedent's estate. In re Estate of Layton 518
6. Under Neb. Rev. Stat. § 48-118 (Reissue 1978), where an action is filed before a particular court and prosecuted to a final conclusion, whether by settlement or judgment, that court alone has jurisdiction to resolve any controversy relating to division of fees and expenses. Moyer v. Douglas & Lomason Co. 680
7. While one entering into a contract for hire in this state for work to be performed elsewhere, standing alone, may be a statutory employee under the provisions of Neb. Rev. Stat. § 48-115(2)(c) (Reissue 1978), unless the

employer, who is a nonresident, is performing work in this state, employing one or more employees in the regular trade, business, profession, or vocation of such employer, it is not a statutory employer as defined by Neb. Rev. Stat. §§ 48-114 and 48-106(1) (Reissue 1978). Absent a statutory employer, the provisions of Neb. Rev. Stat. § 48-101 (Reissue 1978) have no application. Jensen v. Floair, Inc. 740

Jurors.

One who cannot subordinate his personal views to what he perceives to be his duty to abide by his oath as a juror and to obey the laws of the state must be excused for cause. State v. Scott 625

Jury Instructions.

1. Jury instructions are to be read as a whole, and if they fairly submit the case they are not erroneous. A trial court is not required to give a requested instruction which unduly emphasizes a part of the evidence in the case. Havelock Bank of Lincoln v. Bargen 70
2. All of the instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error. State v. Bartholomew ... 270
3. Whenever a Nebraska Jury Instruction is applicable in a particular case and, from a consideration of the facts and prevailing law, the trial court determines that the jury should be instructed on the particular subject, the Nebraska Jury Instruction shall be used. State v. Bartholomew 270
4. Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant. State v. Bartholomew 270
5. The mere statement of a defendant that the giving of an instruction was prejudicial, without proof of such prejudice, does not constitute sufficient grounds for the reversal of a conviction. State v. Bartholomew 270
6. If instructions given the jury, considered and construed together, are not sufficiently specific in some respects and counsel offers a requested instruction that is a proper statement of the law and which will supply the omission, it is reversible error for the trial court to refuse to give such instruction. O'Neil v. Behrendt..... 372
7. Where the court's instructions impose a greater burden of proof on the proponents of a will than is required by

law, it cannot be said that the opponents were thereby prejudiced. In re Estate of Camin 490
8. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and the evidence. In re Estate of Camin 490
9. An instruction to the jury that a disposition under a will need not be reasonable, conventional, or judicious is not erroneous so long as the testator has the requisite mental capacity to execute a will and has not been subjected to undue influence. In re Estate of Camin 490
10. It is the duty of the court upon request of the accused to instruct the jury upon any valid defense which the evidence supports. The court is not required to give instructions where there is not sufficient evidence to prove the facts claimed. State v. Scott 625
11. Where a criminal defendant requests a jury instruction on a lesser-included offense and presents evidence which, if believed, would provide a rational basis for acquitting the defendant of the offense charged and convicting him of the lesser offense, the requested instruction must be given. State v. Ebert 629
12. An accused is not entitled to a cautionary instruction where the witnesses who testify against him are regular public law enforcement officers. State v. Parks ... 635
13. Where murder is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. In order for this rule to require an instruction on manslaughter, the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder. State v. Hardin 774
14. Where the evidence shows without dispute that one charged with murder purposely pointed a loaded gun at another and pulled the trigger and there is no evidence of a sudden quarrel or other condition which might permit a finding that there was an absence of malice, then the court is not required to give an instruction which would permit the jury to render a verdict of manslaughter. State v. Hardin 774
15. A trial court should not submit to the jury as an alleged item of negligence an act or omission which the evidence undisputably shows was not a cause of the plaintiff's injury. Jones v. Tranisi 843

Juvenile Courts.

An appeal of a juvenile proceeding to this court is heard de novo upon the record; and the findings of fact by the trial court will be accorded great weight because the

trial court heard and observed the parties and witnesses. In re Interest of Reed 208
In re Interest of Ditter 279
In re Interest of McKinzie 399

Laches.

A lapse of time occurring since acts on which a disciplinary proceeding is based is generally not available to the respondent as a defense. State ex rel. Nebraska State Bar Assn. v. McArthur 815

Landlords and Tenants.

1. A tenant cannot, while occupying the premises, deny his landlord's title. Bender v. James 77
2. If possession of real estate is entered upon by one as a tenant under an agreement with the owner, the occupant cannot assert ownership by adverse possession until he first surrenders possession, or the tenant, by some unequivocal act, notifies the landlord that he no longer holds under the agreement made. Bender v. James 77
3. The establishment of a real estate boundary line by acquiescence involves more than a mere establishment of a line by one party and the taking of possession by such party. It involves the idea that the landlord, with knowledge of the line so established and the possession taken, assents thereto, and this may be shown by conduct, by words, or even by the silence of the landlord. However, there must be something in the record to show that the party charged with acquiescence consented to the act of the other in establishing the line and assuming possession. Bender v. James 77
4. Acquiescence involves the idea of notice or knowledge of conditions, and the evidence must disclose that, with such notice and knowledge, the one charged with acquiescence did something that indicated an assent to such conditions and an acquiescence therein. Bender v. James 77
5. Procedures authorized by the Uniform Residential Landlord and Tenant Act, Neb. Rev. Stat. §§ 76-1401 et seq. (Reissue 1981), provide a public housing tenant with all the required elements of due process prior to eviction or termination of tenancy, and a public housing tenant is not entitled to a prior grievance procedure where the eviction or termination of tenancy is based upon the tenant's creation or maintenance of a threat to the health or safety of other tenants or public

housing authority employees. Housing Auth. of City of Lincoln v. Wolfe 657

Legislature.

1. The Legislature may make a reasonable classification of persons for purposes of legislation concerning them, but the classification must rest upon real differences of situation and circumstances surrounding the members of the class, relative to the subject of legislation, which render the enactment appropriate. Colton v. Dewey .. 126
2. The legislature is free to create and abolish rights so long as no vested right is disturbed. Colton v. Dewey . 126
3. The adoption and implementation of a general benefit project by a natural resources district is an exercise of a power which is legislative in nature, and the requirements of due process that apply to judicial or quasi-judicial proceedings are not applicable. Fisher & Trouble Creek v. Lower Platte No. Nat. Resources Dist. 196
4. The following provision of Neb. Rev. Stat. § 70-650.01 (Reissue 1981), "In the absence of an agreement between any city or village and the public power district, the city or village may at any time determine what shall be included in the term distribution system by a declaratory judgment in which the public power district or public power and irrigation district owning the distribution system shall be joined," was intended by the Legislature to empower the courts to make a factual determination in each specific case as to whether a facility is operated as part of the electrical transmission system or distribution system. Nebraska P.P. Dist. v. City of York 747
5. In general, except as restricted by the Constitution, it is the function of the Legislature by the enactment of statutes to declare what the law is. Nebraska P.P. Dist. v. City of York 747
6. The Legislature may not delegate to the courts legislative power. Nebraska P.P. Dist. v. City of York 747
7. Questions of public policy related to the powers of and government of public power districts are, in the first instance, a purely legislative cognizance and may not be referred to the courts for determination. Nebraska P.P. Dist. v. City of York 747
8. The Legislature may vest in the courts factfinding questions to determine whether or not a law has been complied with. Nebraska P.P. Dist. v. City of York ... 747
9. The legislatively declared public policy underlying the encouragement of publicly owned electric utilities is to

provide power to consumers at reasonable rates at as low overall cost as possible and to avoid duplication of facilities. Neb. Rev. Stat. §§ 70-655, 70-1001 (Reissue 1981). Nebraska P.P. Dist. v. City of York 747
10. 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. Hall v. Cox Cable of Omaha, Inc. 887

Lesser-Included Offenses.
1. 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. State v. Lovelace 356
State v. Ebert 629
2. To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case. State v. Lovelace 356
State v. Ebert 629
3. First degree assault is not a lesser-included offense of attempted murder in the second degree. State v. Lovelace 356
4. Where a criminal defendant requests a jury instruction on a lesser-included offense and presents evidence which, if believed, would provide a rational basis for acquitting the defendant of the offense charged and convicting him of the lesser offense, the requested instruction must be given. State v. Ebert 629
5. Where murder is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. In order for this rule to require an instruction on manslaughter, the record must contain some evidence which would tend to show that the crime was manslaughter rather than murder. State v. Hardin 774
6. Where the evidence shows without dispute that one charged with murder purposely pointed a loaded gun at another and pulled the trigger and there is no evidence of a sudden quarrel or other condition which might permit a finding that there was an absence of malice, then the court is not required to give an instruction which would permit the jury to render a verdict of manslaughter. State v. Hardin 774

Liability.
1. A political subdivision may be liable for damages caused by insufficiency or want of repair of a highway

or bridge or other public thoroughfare which the political subdivision is liable to keep in repair. Hume v. Otoe County 616
2. A county is not an insurer, but is obligated only to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence. Hume v. Otoe County 616

Limitations of Actions.

1. The 10-year period of repose contained in the professional negligence statute of limitations, Neb. Rev. Stat. § 25-222 (Reissue 1979), rests upon a valid distinction between professional and other activities. Colton v. Dewey 126
2. A statute of limitations is a statute of repose designed to prevent recovery on stale demands. Colton v. Dewey 126
3. Due process does not demand an awareness of a right of action before a period of limitations may run against it. Colton v. Dewey 126
4. The requirement of Neb. Const. art. I, § 13, that all courts be open and every person have a remedy by due process of law for any injury to his person, does not mean that limits may not be imposed upon the time within which one must ask courts to act. Colton v. Dewey 126
5. Where a corporation has in fact been dissolved and no longer exists as a legal entity, the rule of its incapacity to sue or be sued applies regardless of the mode of dissolution whether by judicial decree or otherwise. Farmers Union Co-op Assn. v. Mid-States Constr. Co. 147

Livestock.

Oral representations of the origin of livestock made in the course of the sale of livestock are express warranties relating to the livestock. England v. Leithoff 462

Loans.

The distinction between a loan and a forbearance is that a loan is a contemporaneous transaction evidencing the creation of a debt to be repaid, while a forbearance is a subsequent agreement entered into between a debtor and creditor to secure the repayment of a debt previously created and matured. Farmland Enterprises, Inc. v. Schueman 342

Lotteries.

1. The basic elements of a lottery are consideration, prize, and chance. CONtact, Inc. v. State 584
2. A game of chance is one in which the winner is determined by mere luck and not by skill. The predominate nature of the game, i.e., skill or chance, determines its classification. CONtact, Inc. v. State 584
3. The sale of pickle cards by a nonprofit organization is a permitted form of lottery under Neb. Rev. Stat. § 28-1115 (Reissue 1979). The fact that the winning combinations are predetermined and the scheme is subject to fraudulent manipulation does not prevent pickle cards from being a form of lottery. CONtact, Inc. v. State 584

Mandamus.

A writ of mandamus is a proper remedy to compel an official to act only when the duty to act is imposed upon the official by law, when the duty continues to exist at the time the writ is applied for, and when the duty is clearly expressed in the law. State ex rel. Jakes v. Nebraska Board of Parole 181

Medical Malpractice.

The 10-year period of repose contained in the professional negligence statute of limitations, Neb. Rev. Stat. § 25-222 (Reissue 1979), rests upon a valid distinction between professional and other activities. Colton v. Dewey 126

Mental Competency.

1. The question of whether or not a defendant is competent to stand trial or to enter a plea is one of fact to be determined by the trial court, and the means employed in resolving the question are discretionary with the trial court. State v. Beans 31
2. 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. The test of mental capacity to plead or stand trial is the same. State v. Beans 31

Mental Health.

This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof. State v. Mayfield 724

Miranda Rights.

1. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. State v. Thunder Hawk 350
2. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. State v. Thunder Hawk 350
3. The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. State v. Thunder Hawk 350
   State v. Bridgeman 469
4. Once *Miranda* warnings have been given the subsequent procedure is clear. If the individual indicates in any manner at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease. State v. Bridgeman 469
5. Once an accused requests the assistance of counsel, the interrogation of that individual must end. State v. Last 596
6. The protection afforded accused, once he has asked for the assistance of counsel, may thereafter be waived by the accused if done knowingly, freely, and voluntarily. State v. Last 596
7. *Miranda* does not protect an accused, even though he has requested counsel, from a spontaneous admission made under circumstances not induced by the investigating officers or during the conversation not initiated by the officers. State v. Last 596

Modification of Decree.

1. Except for amounts which have accrued prior to a petition to modify, orders for alimony may be modified or revoked for good cause shown. Neb. Rev. Stat. § 42-365 (Reissue 1978). Sloss v. Sloss 610
2. A change in the circumstances of the parties since the entry of the alimony order is a prerequisite to a modification of the alimony decree. Not every change in circumstances will warrant such modification, but only changes of circumstances which are material and substantial. Sloss v. Sloss 610
3. In actions for the modification of alimony in a dissolution of marriage proceeding, it is the duty of this court to review de novo the determination of the

District Court as to whether a change in circumstances has occurred which justifies the modification of the original decree. Sloss v. Sloss 610

Mortgages.

A preexisting debt is sufficient consideration for a mortgage securing the debt. Buffalo County v. Richards 826

Motions for Mistrial.

When a motion for a mistrial is made on the ground of failure of a party to disclose information pursuant to an order of discovery, the defect may ordinarily be cured by granting a continuation and giving an opportunity to interview witnesses, take depositions, or do whatever is necessary to remedy the failure to comply with the discovery order. State v. Hardin 774

Motions for New Trial.

1. Evidence of facts occurring after a trial ordinarily cannot be made the basis for a motion for new trial on the ground of newly discovered evidence. Martinez v. Peterson 168
2. A new trial is a reexamination in the same court of issues previously decided by it; therefore, constitutional issues not raised by the pleadings may not be raised in the motion for new trial. State ex rel. Douglas v. Schroeder 562

Motions to Dismiss.

A party against whom a motion to dismiss is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be drawn from the evidence, and if there is any evidence which will sustain a finding for the plaintiff, it may not be disregarded and the case decided as a matter of law. Schutz v. Hunt 228

Motor Vehicles.

1. A left-hand turn across a public highway between intersections is a dangerous movement and no person shall turn a vehicle from the direct course upon a highway unless it can be accomplished with reasonable care and safety and then only after giving the statutorily required turn signal. Zeiger v. Farmers Co-op Assn. 933
2. When the driver of a motor vehicle looks to the rear when he is 250 to 300 feet from making a turn and then does not look again until after the turn is started and

too late to avoid a collision, he is negligent as a matter of law. Zeiger v. Farmers Co-op Assn. 933

Municipal Corporations.

1. Ordinarily, a demand upon the responsible officers of the governmental subdivision or municipal corporation that they take action is necessary and a condition precedent to the right of a taxpayer to maintain an action for the recovery of funds on behalf of the governmental entity. Lake v. Piper, Jaffray & Hopwood Inc. 570
   Hall v. Cox Cable of Omaha, Inc. 887
2. Where a taxpayer brings an action against the officers of a governmental subdivision or municipal corporation for the recovery of funds on behalf of such governmental entity without making a prior demand, the resistance to such action by the subdivision or corporation in the nature of a demurrer attacking the legal capacity of the plaintiff to sue because of that deficiency generally does not constitute a waiver of that requirement. Lake v. Piper, Jaffray & Hopwood Inc. 570
3. 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 statewide concern, the state law takes precedence over any municipal action taken under the home rule charter. Hall v. Cox Cable of Omaha, Inc. 887
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. Hall v. Cox Cable of Omaha, Inc. 887
5. A ratepayer does not have legal standing to attack a rate established by a legislative body, absent a showing of discrimination or a violation of statute, and solely on the basis that the ratepayer thinks the service should be provided more cheaply. Hall v. Cox Cable of Omaha, Inc. 887
6. A person seeking to restrain the act of a municipal body must show some special injury peculiar to himself aside from and independent of the general injury to the public unless it involves an illegal expenditure of public funds or an increase in the burden of taxation. Hall v. Cox Cable of Omaha, Inc. 887
   Green v. Cox Cable of Omaha, Inc. 915
7. Absent a showing of special legal injury, city council members have no right to litigate the validity of a city ordinance solely on the basis of being members of a

council whose position has been rejected. Green v. Cox Cable of Omaha, Inc. 915

Natural Resources Districts.

1. The determination of the feasibility of a general benefit project by the board of directors of a natural resources district, and the adoption and implementation of such a project, is a legislative function and is not within the scope of judicial review where the specific statutory requirements for such action have been met. Fisher & Trouble Creek v. Lower Platte No. Nat. Resources Dist. 196
2. The adoption and implementation of a general benefit project by a natural resources district is an exercise of a power which is legislative in nature, and the requirements of due process that apply to judicial or quasi-judicial proceedings are not applicable. Fisher & Trouble Creek v. Lower Platte No. Nat. Resources Dist. 196

Negligence.

1. Even though a dangerous condition on land may be open and obvious or known by an invitee, the possessor of the land may owe a duty of reasonable care to the invitee if the circumstances are such that he should expect that the invitee will fail to protect himself against the hazard. Tichenor v. Lohaus 218
2. Generally, an invitee, who has knowledge of a dangerous condition on the premises or where the dangerous condition is obvious, is negligent as a matter of law if he fails to use reasonable care to avoid injury. However, to constitute negligence as a matter of law the intentional exposure must be unreasonable. Tichenor v. Lohaus 218
3. If the defendant possessor of land has made the invitee's exercise of a right or privilege impossible unless he exposes himself to risk of bodily harm, the invitee is not guilty of contributory negligence in so doing unless he acts unreasonably. Tichenor v. Lohaus 218
4. Among the matters which must be considered in determining whether the invitee is guilty of negligence is the effect of distracting events or circumstances. Tichenor v. Lohaus 218
5. Where different minds may reasonably draw different conclusions or inferences from the evidence adduced concerning the issues of negligence or contributory negligence and the degree thereof when one is com-

pared with the other, such issues must be submitted to the jury. Tichenor v. Lohaus 218
6. The violation of a statute or an ordinance regulating traffic does not constitute negligence as a matter of law, but is evidence of negligence to be considered by the jury in connection with other circumstances in evidence. Schutz v. Hunt 228
7. A trial court should not submit to the jury as an alleged item of negligence an act or omission which the evidence undisputably shows was not a cause of the plaintiff's injury. Jones v. Tranisi 843
8. A left-hand turn across a public highway between intersections is a dangerous movement and no person shall turn a vehicle from the direct course upon a highway unless it can be accomplished with reasonable care and safety and then only after giving the statutorily required turn signal. Zeiger v. Farmers Co-op Assn. 933
9. When the driver of a motor vehicle looks to the rear when he is 250 to 300 feet from making a turn and then does not look again until after the turn is started and too late to avoid a collision, he is negligent as a matter of law. Zeiger v. Farmers Co-op Assn. 933

Negotiable Instruments.

A negotiable instrument as between the parties requires a consideration the same as any other contract. Buffalo County v. Richards 826

New Trial.

Where error in a trial exists only as to the issue of damages and the judgment is in other respects free from error, and it is clear that no injustice will result from doing so, this court may, when remanding a cause for a new trial, limit the new trial to such issue. O'Neil v. Behrendt 372

Notice.

Reasonable notice, that is to say, notice which is meet and fair in view of the circumstances and conditions existent at the time and with reference to the matter to be presented, is an element of due process. State ex rel. Douglas v. Schroeder 562

Parental Rights.

1. In considering cases of child neglect, the best interests of the child are paramount and parental rights may be forfeited by substantial, continuous, and repeated ne-

glect of a child and a failure to discharge the duties of parental care and protection. In re Interest of Reed .. 208
In re Interest of Hollenbeck 253
2. Although parental rights may not be terminated solely because a parent has been incarcerated for the commission of a crime, the fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated. In re Interest of Reed 208
In re Interest of Ditter 279
3. A parent's moral conduct is a valid consideration in a determination of parental fitness. In re Interest of Reed 208
4. An order terminating parental rights to children is reviewed de novo upon the record in this court. In re Interest of Hollenbeck 253
In re Interest of Wanek 394
In re Interest of Roman 919
5. An order terminating parental rights to children must be supported by clear and convincing evidence. In re Interest of Hollenbeck 253
In re Interest of Wanek 394
In re Interest of McKinzie 399
In re Interest of Roman 919
6. A parent's inability to perform his parental obligations because of imprisonment and the nature of the crime committed, as well as the person against whom the criminal act was perpetrated, are all relevant to the issue of parental fitness and child welfare, as is the parent's conduct prior to imprisonment and during the period of incarceration. In re Interest of Ditter 279
7. The right of a parent to maintain the custody of his or her child is a natural right, but it is not an inalienable right, and the public has a paramount interest in the protection of the rights of a child. In re Interest of Ditter 279
In re Interest of McKinzie 399
8. There is no requirement that the court must implement a rehabilitation plan for the parent of a child found to be dependent and neglected. In re Interest of Wanek 394
9. The right of a parent to custody and control of his or her children is not an inalienable right. In re Interest of Wanek 394
10. The public has a paramount interest in the protection of children from abuse and neglect. In re Interest of Wanek 394
11. Where a parent is unable to discharge parental responsibilities because of mental deficiency, and where there

are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, parental rights may be terminated when such action is found to be in the best interests of the child or children. In re Interest of Wanek 394

12. 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 McKinzie 399

13. Once parental rights of a child have been terminated as to a natural parent, the natural parents of such parent whose rights have been terminated are not entitled to continue visitation as a matter of right. In re Interest of Ditter 855

Parol Evidence.

The use of parol evidence is limited to the purpose of connecting the written memoranda and showing the party to be charged assented to the unsigned documents. First Mid America Inc. v. MCI Communications Corp. 57

Parties.

1. A party having an interest adverse to the interests of the parties sought to be represented may not sue as representative of a class under the provisions of Neb. Rev. Stat. § 25-319 (Reissue 1979). Sarratt v. Lincoln Benefit Life Co. 436

2. Potentially conflicting interests within the class are incompatible with the maintenance of a true class action. Sarratt v. Lincoln Benefit Life Co. 436

3. Where the record demonstrates the potentiality of conflict, either within the class or between the person who seeks to represent the class and the class, it is appropriate to dispose of the class aspect of the case upon motion for summary judgment. Sarratt v. Lincoln Benefit Life Co. 436

4. A cross-appeal may not be asserted by one appellee against another appellee. Buffalo County v. Richards 826

Partition.

1. A confirmation of a partition sale disposes of all the interests of everyone in the proceedings and transfers them to the purchaser. After confirmation there is no title or interest of any party to such proceedings that can be collaterally attacked. Hausner v. Melia 764

2. When all parties interested are before the court in a partition action, the order confirming the sale is final

and binding, in the absence of fraud on the face of the proceedings, even though the judgment may be erroneous and would have been reversed on appeal. Hausner v. Melia 764

3. A final judgment in a partition action determines the rights and interests of the parties in the subject property, and such parties are estopped from raising any claim of interest or title which was or could have been raised in that action. Hausner v. Melia 764

Penalties.

1. All pending actions and proceedings to recover a penalty which have not been prosecuted to a final judgment are defeated by the repeal of the statute. Therefore, the repeal of a statute which imposes a penalty will prevent any prosecution, trial, or judgment for penalties accruing while such statute was in force, unless the contrary is provided in the repealing statute or some other existing statute. Farmland Enterprises, Inc. v. Schueman 342

2. A mere penalty never vests, but remains executory; the repeal of a statute before a penalty is enforced is not a deprivation of vested rights. The unqualified repeal of a statute imposing a penalty operates the same way as the repeal of a strictly criminal statute. It abrogates all rights of action which have not been reduced to judgments. Farmland Enterprises, Inc. v. Schueman 342

3. Where a fine has been imposed as part of the penalty for conviction of a crime, the court may not, under the provisions of Neb. Rev. Stat. §§ 29-2206(1) and 29-2412 (Reissue 1979), peremptorily direct that the fine be satisfied by crediting jail time against the fine. The defendant must be afforded an opportunity to pay the fine in the manner provided by these statutes or to make proof of indigency. State v. Holloway 426
State v. Brumfield 605

Pensions.

1. Federal law precludes a state court from awarding a nonmilitary spouse a portion of a military spouse's government pension. Pyke v. Pyke 114

2. A trial court, in determining what, if any, alimony should be awarded a spouse, may recognize that the spouse ordered to pay the alimony may have, by way of income for his own maintenance and support, a military pension or may have the proceeds of a military pension from which he may be able to make alimony

payments, although the court cannot award an interest in the pension to the nonmilitary spouse. Pyke v. Pyke 114

Petit Larceny.

In the absence of something other than ordinary stealing, petit larceny is not a crimen falsi as contemplated by Neb. Rev. Stat. § 27-609(1)(b) (Reissue 1979). State v. Williams 860

Pleadings.

1. Both legal and equitable principles may be enforced in the same action according to the facts. The essential character of the cause of action and the remedy or relief it seeks, as shown by the allegations of the complaint, determine whether a particular action is one at law or in equity, unaffected by the conclusions of the pleader or what the pleader calls it, or the prayer for relief. Nebraska Engineering Co. v. Gerstner 440
2. It is the pleadings before the trial court at the time of decision which form the issues. State ex rel. Douglas v. Schroeder 562
3. A new trial is a reexamination in the same court of issues previously decided by it; therefore, constitutional issues not raised by the pleadings may not be raised in the motion for new trial. State ex rel. Douglas v. Schroeder 562
4. A judgment must be supported by the allegations of the pleadings on which it is based. State ex rel. Douglas v. Schroeder 562
5. The allowance of an amendment during trial to a pleading which changes the issue to a material fact may be prejudicial error. Collection Associates, Inc. v. Eckel 607
6. By demurring or pleading to the general issue without requesting a ruling on a motion to quash an information as to certainty, particularity, or redundancy, the defendant has waived all such defects which were raised by the motion to quash. State v. Parks 635
7. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. On reviewing the sustaining of a demurrer, this court must treat as undisputed the facts as alleged in the petition. Philp v. First Nat. Bank & Trust Co. 791
8. If the petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to

constitute a cause of action. Philp v. First Nat. Bank & Trust Co. 791
9. It is fundamental that a party cannot plead one cause of action and then introduce proof to establish another. Siebler Heating & Air Conditioning v. Jenson 830
10. Whether the nature of an action is legal or equitable is to be determined from its main object, as disclosed by the averments of the pleadings and relief sought. White v. Medico Life Ins. Co. 901
11. Although a defendant may present any defense, legal or equitable, interposing an equitable defense does not convert an action otherwise at law into one in equity. White v. Medico Life Ins. Co. 901
12. In order for misrepresentations in an application for insurance to constitute a defense to an action on the contract, the insurer must plead and prove, among other things, that the misrepresentations were made knowingly with intent to deceive, that the insurer relied and acted upon such statements, and that the insurer was deceived to its injury. White v. Medico Life Ins. Co. 901

Pleas.

1. The question of whether or not a defendant is competent to stand trial or to enter a plea is one of fact to be determined by the trial court, and the means employed in resolving the question are discretionary with the trial court. State v. Beans 31
2. The standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. State v. Beans 31
3. A voluntary guilty plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional. State v. Stranghoener 203
4. A plea of guilty or nolo contendere, freely and voluntarily made, waives every defense to the charge, whether the defense is procedural, statutory, or constitutional. State v. Herren 706
State v. Falcone 720
5. A plea of guilty is the equivalent of a conviction by trial and verdict or a finding of guilt by the court. State v. Ondrak 840

Political Subdivisions.

1. A county cannot, even under the applicable statutes, open a section line road without giving notice to the landowners, hearing the landowners' claim for damages, or appointing appraisers and making provisions

for payment of the landowners' damages, and if it attempts to do so it is a trespasser. Olson v. Bonham ... 548
2. A political subdivision may be liable for damages caused by insufficiency or want of repair of a highway or bridge or other thoroughfare which the political subdivision is liable to keep in repair. Hume v. Otoe County 616
3. A county is not an insurer, but is obligated only to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence. Hume v. Otoe County .. 616

Political Subdivisions Tort Claims Act.
1. An action under the Political Subdivisions Tort Claims Act is similar to a law action in which a jury has been waived and is governed by the same rules. Noll v. Valley County Hospital 22
2. An action under the Political Subdivisions Tort Claims Act is tried to the court without a jury. Upon appeal to this court the findings of fact by the trial court will not be overturned unless clearly wrong. Hume v. Otoe County 616

Polygraph Tests.
1. Generally, any reference to a polygraph test is disapproved. State v. Vrchota 567
2. Generally, the mere mention of the word "polygraph," absent more, does not constitute prejudicial error. State v. Vrchota 567

Post Conviction.
1. A person seeking post conviction relief has the burden of establishing a basis for such relief, and the findings of the District Court in denying relief will not be disturbed on appeal unless they are clearly erroneous.
State v. Beans 31
State v. Landers 48
State v. Otey 103
State v. Stranghoener 203
State v. Tiff 565
State v. Herren 706
2. The history of post conviction relief in this state has now made it amply clear that one is not entitled to post conviction relief merely on his own bald assertions or because he believes that he did not enjoy a perfect trial. State v. Landers 48
3. In post conviction relief cases the person challenging

the competency of counsel has the burden of proof to establish the counsel's incompetence. State v. Landers 48
4. An evidentiary hearing in a post conviction proceeding is not required where the files and records in the case show that the prisoner is entitled to no relief. State v. Glasenapp 99
5. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States. State v. Glasenapp 99
6. In order to state a cause of action for post conviction relief, the prisoner must allege facts which, if proved, constitute an infringement of his constitutional rights. Allegations which are mere conclusions are insufficient. State v. Glasenapp 99
7. A motion for post conviction relief may be heard without requiring the production of the prisoner. State v. Otey 103
8. A court may properly deny an evidentiary hearing upon a motion to vacate a conviction filed under Neb. Rev. Stat. § 29-3001 (Reissue 1979) upon a determination after an examination of the files and records of the case that the petitioner is entitled to no relief. State v. Meredith 109
9. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Meredith 109
10. 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. Stranghoener 203
11. Matters relating to sentences imposed within statutory limits or matters already litigated in the direct appeal are not a basis for post conviction relief. State v. Freeman 278
12. In post conviction proceedings under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979) the District Court is the trier of disputed questions of fact and it is not ordinarily for the Supreme Court to determine questions of credibility. State v. Tiff 565

Presumptions.

1. Where the owners of adjoining land occupy their respective premises up to a certain line, which they mu-

tually recognize and acquiesce in as the boundary line for a long period of time, there is a presumption in favor of such line being the true one, which can only be overcome by clear proof to the contrary. Where such recognition and acquiescence has continued beyond the 10-year period fixed by the statute of limitations, the presumption becomes conclusive. Hausner v. Melia .. 764

2. In disciplinary proceedings involving members of the bar, a presumption of innocence applies; culpability of the person charged must be established by a clear preponderance of the evidence so the court is satisfied to a reasonable certainty that the charges are true. State ex rel. Nebraska State Bar Assn. v. McArthur 815

3. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence. Hastings Building Co. v. Board of Equalization 847

Principal and Surety.

A surety cannot be held beyond the precise terms of its contract. Any intention on the part of the surety to assume a further and continued liability must be found in the words of the contract made. It is not a matter of inference, but of express statement. The liability of a surety, therefore, is measured by, and will not be extended beyond, the strict terms of its contract. Farmers Union Co-op Assn. v. Mid-States Constr. Co. 147

Prior Acquittal.

Although generally a verdict of acquittal in a former trial is not to be considered as determining the collateral question of the presence of a general plan or scheme or necessary intent for the purpose of a subsequent trial for a distinct offense, when so much of the evidence of the former trial is placed before the jury in the subsequent trial, justice requires that the evidence of the former verdict should be allowed in evidence. State v. Evans 476

Prior Acts.

1. As a general proposition, in a criminal prosecution evidence of crimes committed by the accused, other than

that with which he is charged, is not admissible. State v. Evans 476
2. Where intent is an element of the crime charged, it is permissible to admit evidence of the defendant's prior crimes, wrongs, or acts in order to prove that the defendant possessed the requisite intent to be convicted on a charge of attempted first degree sexual assault. State v. Evans 476

Prior Convictions.
1. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto. State v. Kelly 45
2. The validity of former misdemeanor convictions cannot be collaterally attacked in a proceeding for additional punishment under the repeater statute on a subsequent conviction, for the reason that the former convictions are valid until reversed. State v. Kelly 45
3. The Nebraska Supreme Court may examine and take judicial notice of its own proceedings and judgment where certain aspects of the controversy have been previously considered and determined, in cases which are interwoven and interdependent. State v. Hunt 304
4. Where conviction of a previous crime is an essential element of the crime charged, proof of prior convictions is properly made by offering in evidence the complaint or information, judgment rendered on the verdict or plea of guilty, evidence that the judgment has become final, and that the defendant in an earlier conviction is the same person presently before the court. State v. Ondrak 840
5. One may rely upon an opposing party's stated intention to impeach by questioning concerning prior convictions and the trial judge's announcement that he will allow the same. State v. Williams 860

Probable Cause.
1. Probable cause for an arrest exists if the officer has reasonable cause to believe that the person arrested has committed a felony. State v. Hack and Callans ... 406
2. Probable cause does not require that the officer see the commission of a felony and does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction. State v. Hack and Callans 406

3. If the facts available to the officer at the time of the arrest would warrant a man of reasonable caution in the belief the action was appropriate, then probable cause exists. State v. Hack and Callans 406

Probation and Parole.

1. At a preliminary hearing to determine whether or not probable cause exists to detain a probationer on a charge of probation violation, a probationer is entitled to notice of the alleged violations of probation, an opportunity to appear and to present evidence in his own behalf, the conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing. State v. Calder 248
2. Although the formal notice of alleged probation violations is deficient, if it can be determined from the record that the probationer did in fact have sufficient actual notice of the violations charged against him so as to enable him to prepare a defense, the requirements of due process have been satisfied. State v. Calder 248
3. The requirement of an impartial and independent hearing officer is satisfied if such officer is someone not directly involved in making recommendations concerning the initial arrest of the accused on the revocation charge or in making the report of the probation violations. State v. Calder 248
4. There is no requirement that such hearing officer be a judicial officer. State v. Calder 248
5. The preliminary hearing need only be held reasonably near the place of the arrest or alleged violations so as to enable the probationer to obtain and present evidence in his own behalf. State v. Calder 248
6. In order to contest the location of the preliminary hearing, it is necessary that the probationer allege and prove some demonstrative prejudice. State v. Calder 248
7. The granting of probation as opposed to the imposing of a sentence is a matter which is left to the sound discretion of the trial court, and, absent a showing of abuse, this court will not on appeal disturb the trial court's denial of probation. State v. Last 596

Promissory Notes.

1. Consideration for a promissory note may be furnished by a third party. Buffalo County v. Richards 826
2. A valid promissory note may be given as security for a debt already owed by the party giving it, or by a third party. Buffalo County v. Richards 826

Proof.

1. In a post conviction relief proceeding the burden of proof is upon the movant to establish a basis for the relief, and where such a burden is not met a denial of that requested relief is required. State v. Landers 48
2. In post conviction relief cases the person challenging the competency of counsel has the burden of proof to establish the counsel's incompetence. State v. Landers 48
State v. Otey 103
3. Where one maintains that counsel was inadequate, one must likewise show how or in what manner the alleged inadequacy prejudiced one. State v. Landers 48
State v. Otey 103
4. The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Arneson v. Cedar County 62
5. The plaintiff has the burden to prove the amount of damages with as much certainty as the case permits. LeRoy Weyant & Sons, Inc. v. Harvey and Classic Lanes 65
6. Under the Nebraska workmen's compensation law, the claimant seeking compensation has the burden of proving by a preponderance of the evidence that an injury received arising out of and in the course of his employment was the proximate cause of the disability for which benefits are sought. Coco v. Austin Co. 95
Butler v. Midwest Supply Co. 421
Renshaw v. Merrigol-Adler Bakery 662
7. In such a proceeding, the burden of proof is on the licensee to establish by a preponderance of the evidence the grounds for reversal. Bauer v. Peterson 174
8. An award for permanent disability cannot be based on mere possibilities. Hatting v. Farmers Co-op Assn. 242
9. The burden of establishing the cost of repair shall be upon the party seeking recovery. If the party against whom recovery is sought believes that the cost of repair exceeds the market value of the property just before damage, then the burden shall be upon such party to introduce evidence to establish that fact, and it will then be up to the trier of fact to determine which of the two measures of damages should be employed. Absent evidence that the cost of repair or restoration exceeds the market value of the property just before damage, it will be presumed that the cost of repair or restoration does not exceed the market value of the property just before damage. "L" Investments, Ltd. v. Lynch 319

10. Where the court's instructions impose a greater burden of proof on the proponents of a will than is required by law, it cannot be said that the opponents were thereby prejudiced. In re Estate of Camin 490
11. Where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory, and unequivocal. In re Estate of Layton 518
12. The burden is upon the claimant in a suit on an oral contract to make a will to prove both the existence of the contract and its terms and the acts constituting performance such as were referable solely to the contract sought to be enforced. In re Estate of Layton 518
13. The plaintiff has the burden to prove the amount of damages with as much certainty as the case permits. Meisinger Earth Moving, Inc. v. State 554
14. In a post conviction proceeding the petitioner has the burden of establishing a basis for relief. State v. Tiff 565
15. Entrapment is a defense which is in the nature of an affirmative defense. This being so, the defendant has the initial burden of going forward with evidence of governmental involvement and inducement, following which the ultimate burden, the risk of nonpersuasion, as in all criminal cases, is on the State. State v. Parks 635
16. When assessing the evidence in an entrapment case, the court must first determine if the defendant has submitted sufficient evidence, more than a scintilla, to give rise to the defense. If the defendant has met that burden, the question of entrapment then becomes one of fact to be decided by the jury. State v. Parks 635
17. In disciplinary proceedings involving members of the bar, a presumption of innocence applies; culpability of the person charged must be established by a clear preponderance of the evidence so the court is satisfied to a reasonable certainty that the charges are true. State ex rel. Nebraska State Bar Assn. v. McArthur 815
18. It is fundamental that a party cannot plead one cause of action and then introduce proof to establish another. Siebler Heating & Air Conditioning v. Jenson 830
19. A party cannot allege an express agreement and then, over objection, prove and recover on a cause of action of quantum meruit. Siebler Heating & Air Conditioning v. Jenson 830
20. The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was

not the result of the normal progression of plaintiff's preexisting condition. Narduzzo v. Sunderland Bros. .. 852
Negrete v. Western Electric Co., Inc. 876

21. In a workmen's compensation case the burden is upon the employee to prove by a preponderance of the evidence all the issues involved. Negrete v. Western Electric Co., Inc. 876

22. In order for misrepresentations in an application for insurance to constitute a defense to an action on the contract, the insurer must plead and prove, among other things, that the misrepresentations were made knowingly with intent to deceive, that the insurer relied and acted upon such statements, and that the insurer was deceived to its injury. White v. Medico Life Ins. Co. 901

Proof of Death.

For purposes of the law of homicide, proof of the death of the victim may be established by proof of the irreversible cessation of the victim's total brain functions. State v. Meints 410

Property.

1. The basic principle of the law of damages is that such compensation in money shall be allowed for the loss sustained as will restore the loser to the same value of property status as he occupied just preceding the loss. "L" Investments, Ltd. v. Lynch 319

2. Except as otherwise hereinafter limited, where an improvement upon realty is damaged without damage to the realty itself and where the nature of the thing damaged is such that it is capable of being repaired or restored and the cost of doing so is capable of reasonable ascertainment, the measure of damages for its negligent damage is the reasonable cost of repairing or restoring the property in like kind and quality. This would be in addition to any other consequential damages which the injured party may establish by proper proof. If, in fact, the cost of repair or restoration exceeds the market value of the property just before the injury, then the proper measure of damages is the market value of the property just before the damages were incurred, less any salvage. "L" Investments, Ltd. v. Lynch 319

3. The burden of establishing the cost of repair shall be upon the party seeking recovery. If the party against whom recovery is sought believes that the cost of repair exceeds the market value of the property just before damage, then the burden shall be upon such party

to introduce evidence to establish that fact, and it will then be up to the trier of fact to determine which of the two measures of damages should be employed. Absent evidence that the cost of repair or restoration exceeds the market value of the property just before damage, it will be presumed that the cost of repair or restoration does not exceed the market value of the property just before damage. "L" Investments, Ltd. v. Lynch 319

Property Division.

1. The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. The court will consider all pertinent facts in reaching an award that is just and equitable. Koubek v. Koubek 2
   Van Newkirk v. Van Newkirk 730
2. Generally speaking, awards in cases of this kind vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so when the marriage is of long duration and the parties are the parents of all the children involved. Koubek v. Koubek 2
3. How property, inherited by a party during the marriage, will be considered in determining division of property or award of alimony must depend upon the facts of the particular case and the equities involved. Koubek v. Koubek 2
   Van Newkirk v. Van Newkirk 730
4. The division of property and the issue of alimony are to be determined upon the consideration of all the facts and circumstances. Koubek v. Koubek 2
5. When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Pyke v. Pyke 114
6. When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual re-

ceiving the inheritance or gift and is not considered a part of the marital estate. An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property after receiving it by way of inheritance or gift, or the spouse not receiving the inheritance or gift has significantly cared for the property during the marriage. Van Newkirk v. Van Newkirk 730

Prosecutorial Misconduct.

Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the double jeopardy clause. State v. Munn 265

Proximate Cause.

1. The act of the accused must be a proximate cause of death but need not be the direct, immediate cause. It is sufficient if the direct cause resulted naturally from the act of the accused, as where the direct cause is a disease or infection resulting from the injury inflicted by the accused. State v. Meints 410
2. It is not a defense that improper treatment on the part of physicians, nurses, or the victim may also have contributed thereto. But where death results solely from erroneous treatment by another, the one who inflicted the injury is not responsible for homicide. State v. Meints 410
3. Where a homicide victim has suffered brain death, removal of life support systems is not an efficient intervening cause of death. State v. Meints 410

Public Service Commission.

The Nebraska Public Service Commission is not empowered to require that switching charges be absorbed retroactively where the approved rate schedule for such switching did not require absorption. In re Formal Complaint of Nebco, Inc. 804

Public Utilities.

1. The following provision of Neb. Rev. Stat. § 70-650.01 (Reissue 1981), "In the absence of an agreement between any city or village and the public power district, the city or village may at any time determine what shall be included in the term distribution system by a declaratory judgment in which the public power dis-

trict or public power and irrigation district owning the distribution system shall be joined," was intended by the Legislature to empower the courts to make a factual determination in each specific case as to whether a facility is operated as part of the electrical transmission system or distribution system. Nebraska P.P. Dist. v. City of York 747

2. Questions of public policy related to the powers of and government of public power districts are, in the first instance, a purely legislative cognizance and may not be referred to the courts for determination. Nebraska P.P. Dist. v. City of York 747
3. The legislatively declared public policy underlying the encouragement of publicly owned electric utilities is to provide power to consumers at reasonable rates at as low overall cost as possible and to avoid duplication of facilities. Neb. Rev. Stat. §§ 70-655, 70-1001 (Reissue 1981). Nebraska P.P. Dist. v. City of York 747
4. A ratepayer does not have legal standing to attack a rate established by a legislative body, absent a showing of discrimination or a violation of statute, and solely on the basis that the ratepayer thinks the service should be provided more cheaply. Hall v. Cox Cable of Omaha, Inc. 887

Railroads.

The Nebraska Public Service Commission is not empowered to require that switching charges be absorbed retroactively where the approved rate schedule for such switching did not require absorption. In re Formal Complaint of Nebco, Inc. 804

Records.

1. The municipal courts are courts of record, and transcripts of their records, duly certified, are evidence of the facts contained therein. State v. Kelly 45
2. Such certified records may be used to prove a judgment of conviction. State v. Kelly 45
3. Ordinarily such a certified record imports absolute verity absent proof that the same is incorrect. State v. Kelly 45
4. An authenticated record establishing a prior conviction of a defendant with the same name is prima facie sufficient to establish identity and, in the absence of any denial or contradictory evidence, is sufficient to support a finding by the court that the accused has been convicted prior thereto. State v. Kelly 45

Remittitur.

1. Where a verdict is excessive, but not so much as to indicate passion or prejudice on the party of the jury, the error may be corrected by remittitur, if the excess can be estimated with reasonable certainty. Barbour v. Jenson Commercial Distributing Co. 512
2. Where the trial court has ordered a reduction of the verdict as a condition of denying a new trial, such order will not ordinarily be reversed unless an abuse of discretion is shown. Barbour v. Jenson Commercial Distributing Co. 512

Rescission.

The cancellation, abandonment, or rescission of a written contract may not only be written but it may also be oral. Moreover, an implied agreement to rescind a contract may be given effect, and the assent of the parties to rescission may be shown by their acts or conduct, and the surrounding circumstances. Accordingly, in determining whether a rescission took place, the courts look not only to the language of the parties but to all the circumstances. Truman v. Martin 52

Res Judicata.

1. The scope of the res judicata bar encompasses not only issues actually litigated in the first suit but also those issues which could have been raised in that suit. Brommer v. City of Hastings 367
2. Any right, fact, or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies, whether the claim or demand, purpose, or subject matter of the two suits is the same or not. Brommer v. City of Hastings 367

Rules of Evidence.

1. The investigation conducted by an administrative body is not intended to be carried out in observance of the technical rules adopted by courts of law. Beasley v. City of Omaha 153
2. Neb. Rev. Stat. § 27-902 (Reissue 1979) governs the admissibility of a court decree from another state. State v. Munn 265
3. "Subject to the provisions of § 27-403, the following are not excluded by the hearsay rule, even though the

declarant is available as a witness: . . . Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Neb. Rev. Stat. § 27-803(3) (Reissue 1979). State v. Hardin 774

4. The rule of Neb. Rev. Stat. § 27-803(3) (Reissue 1979) permitting statements concerning inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment is bottomed on the notion that a person seeking medical attention will give a truthful account of the history and current state of his condition in order to ensure proper treatment. State v. Hardin 774
5. Exculpatory statements made by an accused to a psychiatrist for the purpose of diagnosis of a mental condition of the accused, insofar as they may recite what he did or what occurred in connection with the commission of the alleged crime, are not competent evidence of the truth of the contents of the statement. State v. Hardin 774
6. By its plain language, Neb. Rev. Stat. § 27-901 (Reissue 1979) is directory rather than mandatory upon the trial court. State v. Ferris 835
7. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Rev. Stat. § 27-402 (Reissue 1979). Jones v. Tranisi 843

Sales.

1. A bona fide purchaser exists where the purchaser takes without knowledge or notice of any suspicious circumstances which would put a prudent man upon inquiry. City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc. 137
2. Where graphite electrodes are used in the manufacture of steel for the dual purpose of providing essential carbon for the steel manufacturing process and for the conduction of electricity which provides heat for the process, and where a substantial part of the graphite electrodes enters into and becomes an essential ingredient or component part of the finished steel and the remainder is consumed in the manufacturing and refining process, the use of such graphite electrodes in the manufacturing and processing of steel for ultimate

sale at retail is not subject to taxation under the provisions of Neb. Rev. Stat. §§ 77-2702 and 77-2703 (Reissue 1981). Nucor Steel v. Herrington 310
3. It is the general rule of law that a warranty is express when the seller makes an affirmation with respect to the article to be sold, pending the agreement of sale, upon which it is intended that the buyer shall rely in making the purchase. England v. Leithoff 462
4. Oral representations of the origin of livestock made in the course of the sale of livestock are express warranties relating to the livestock. England v. Leithoff 462

Schools and School Districts.
1. While the requirements concerning the giving of notice or the holding of a hearing preliminary to the special election conducted in connection with a school reorganization by the election method will be strictly enforced in a direct action instituted before an election, once the election is held, absent a showing of fraud or evidence that electors were prevented from giving a full and free expression of their will at the election, they are merely directory. Eriksen v. Ray 8
2. Where legal voters of a school district involved in a school reorganization by the election method wish to contest the reorganization, after the special election has been held, it must be done by an election contest pursuant to Neb. Rev. Stat. §§ 32-1001 et seq. (Reissue 1978). This is the exclusive method by which such actions must be taken. Eriksen v. Ray 8
3. Proceedings for review under the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-917 et seq. (Reissue 1981), shall be instituted by filing a petition in the District Court of the county where the action is taken. In a proceeding authorized by Neb. Rev. Stat. § 79-1103.05 (Reissue 1981), the action is taken in the county where the State Board of Education conducts its hearing. Bd. of Ed. of Keya Paha County v. State Board of Education 448

Second Injury Fund.
1. In a workmen's compensation case the State and the Second Injury Fund may be impleaded as parties after the initial hearing in the Workmen's Compensation Court and prior to the de novo rehearing, in the absence of proof of prejudice. Pollard v. Wright's Tree Service, Inc. 187
2. Within the meaning of Neb. Rev. Stat. § 48-125 (Reissue 1978) the Nebraska Second Injury Fund is an "em-

ployer," and if, on appeal to the Supreme Court, the fund fails to obtain any reduction in the amount of the award of the Workmen's Compensation Court on rehearing, the employee is entitled to a reasonable sum as attorney fees in this court, to be assessed against the Second Injury Fund. Pollard v. Wright's Tree Service, Inc. 187

Self-Incrimination.

The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. State v. Thunder Hawk 350

Sentences.

1. Matters relating to sentences imposed within statutory limits or matters already litigated in the direct appeal are not a basis for post conviction relief. State v. Freeman 278
2. When an amendment which mitigates the punishment for a crime is enacted after commission of the crime but before final judgment, the punishment shall be that contained in the amendatory act unless the Legislature specifically indicates otherwise. State v. Peiffer 299
3. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. State v. Last 596
   State v. Parks 635
   State v. Cook 718
4. To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void. Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose, unless the sentence has been fully served and the prisoner is being illegally held. Sileven v. Tesch 880

Sexual Assault.

1. Testimony of the prosecutrix alone, uncorroborated by any other evidence, is not sufficient to sustain a conviction for sexual assault. State v. Evans 476
2. In a prosecution for sexual assault, the prosecutrix may testify in chief on direct examination, if within a reasonable time under all the circumstances after the

act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details, and others may likewise testify in chief to such fact and nature of the complaint, but not as to its details. State v. Evans 476

3. One to whom the complaining witness has complained may testify to the fact and nature of the complaint, if the complaint was made voluntarily and without unreasonable or inconsistent delay. State v. Evans 476
4. Although such complaint must be timely made, the effect of a delay in making such complaint may be alleviated by proof of a sufficient reason for the delay, such as intimidation or threats, or lack of opportunity. State v. Evans 476
5. Where intent is an element of the crime charged, it is permissible to admit evidence of the defendant's prior crimes, wrongs, or acts in order to prove that the defendant possessed the requisite intent to be convicted on a charge of attempted first degree sexual assault. State v. Evans 476

Small Claims Court.

On appeal from the small claims court to the District Court, there is no requirement for the filing of a new petition, nor provision for taking of a default for failure to answer a new petition absent an order from the District Court directing the filing of a new petition and answer thereto. Hodson v. Johnson 19

Special Assessments.

1. The Constitution of the State of Nebraska, art. VIII, § 6, requires that real property, when specially assessed, be assessed according to the benefits received. North Star Lodge #227 v. City of Lincoln 236
2. The phrase "assessable unit" as used in Neb. Rev. Stat. § 19-4027 (Cum. Supp. 1980) does not mean "front foot," but rather means "lot or parcel." North Star Lodge #227 v. City of Lincoln 236

Specific Performance.

1. A party seeking specific performance must show his right to the relief sought, including proof that he is ready, able, and willing to perform his obligations under the contract. Reifschneider v. Nebraska Methodist Hospital 91
2. The right to specific performance may be lost by abandonment of the contract and by conduct inconsistent

with the right to relief. Reifschneider v. Nebraska Methodist Hospital 91
3. Where the wronged party has elected to abandon a settlement agreement, he cannot thereafter maintain a suit for specific performance of it. Reifschneider v. Nebraska Methodist Hospital 91
4. Specific performance is not generally demandable as a matter of absolute legal right but is addressed to the sound legal discretion of the court. It will not be granted where enforcement of the contract would be unjust. Wallroff v. Dougherty 178
5. A party seeking specific performance must show that he has substantially complied with the terms of the contract, including proof that he is ready, able, and willing to perform his obligations under the contract. Wallroff v. Dougherty 178
6. On appeal to this court of an equitable action to compel specific performance of a promise made to make a will, we must hear and determine the matter de novo and reach an independent conclusion without being influenced by the findings of the trial court. In re Estate of Layton 518
7. Strictly speaking, there cannot be a decree for the specific performance of a contract to make a will. Courts of equity may grant relief in a form that is usually equivalent to a decree of specific performance of a contract to leave property by will, after the death of the defaulting promisor, by fastening a trust upon an estate in the hands of those taking it with notice of such contract or by devise or descent. Philp v. First Nat. Bank & Trust Co. 791

Speedy Trial.

1. The primary burden is upon the State to bring the accused person to trial within the time provided by law, and if he is not brought to trial within that time, he is entitled to an absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute. State v. Beck 701
2. The State has the burden of proving that one or more of the excluded periods of time under subsection (4) of Neb. Rev. Stat. § 29-1207 (Reissue 1979) is applicable if the defendant is not tried within 6 months of the commencement of the criminal action. State v. Beck 701

Standing.

1. A ratepayer does not have legal standing to attack a rate established by a legislative body, absent a showing

of discrimination or a violation of statute, and solely on the basis that the ratepayer thinks the service should be provided more cheaply. Hall v. Cox Cable of Omaha, Inc. 887

2. Before any party can invoke the jurisdiction of the court he must have standing to sue. He must have some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. Hall v. Cox Cable of Omaha, Inc. 887
3. Absent a showing of special legal injury, city council members have no right to litigate the validity of a city ordinance solely on the basis of being members of a council whose position has been rejected. Green v. Cox Cable of Omaha, Inc. 915

Statute of Frauds.

1. An oral contract of employment for a term of 18 months is within the statute of frauds. McBride v. City of McCook 112
2. A written memorandum sufficient to satisfy the statute of frauds must contain the essential terms of the contract. McBride v. City of McCook 112
3. 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. In re Estate of Layton 518

Statutes.

1. When the language used in a statute is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of the lawmakers. North Star Lodge #227 v. City of Lincoln 236
2. It is a basic rule of construction that effect is to be given, if possible, to every word, clause, and sentence of a statute. North Star Lodge #227 v. City of Lincoln 236
State v. Glover 713
3. When an amendment which mitigates the punishment for a crime is enacted after commission of the crime but before final judgment, the punishment shall be that contained in the amendatory act unless the Legislature specifically indicates otherwise. State v. Peiffer 299
4. All pending actions and proceedings to recover a penalty which have not been prosecuted to a final judgment are defeated by the repeal of the statute. Therefore, the repeal of a statute which imposes a penalty will prevent any prosecution, trial, or judgment for

penalties accruing while such statute was in force, unless the contrary is provided in the repealing statute or some other existing statute. Farmland Enterprises, Inc. v. Schueman 342

5. A mere penalty never vests, but remains executory; the repeal of a statute before a penalty is enforced is not a deprivation of vested rights. The unqualified repeal of a statute imposing a penalty operates the same way as the repeal of a strictly criminal statute. It abrogates all rights of action which have not been reduced to judgments. Farmland Enterprises, Inc. v. Schueman 342
6. Generally, statutory language will be given its plain and ordinary meaning. CONtact, Inc. v. State 584
7. A statute is open to construction only if it is ambiguous. CONtact, Inc. v. State 584
8. In construing a statute we must, if possible, discover the legislative intent from the language of the act and give effect thereto; but if the language is unambiguous, there is no necessity for construction and we have no jurisdiction to change it. In re Zoellner Trust 674
9. Where a statute is susceptible of two constructions, under one of which the statute is valid, while under the other it is unconstitutional or of doubtful validity, that construction which gives it validity should be adopted. Nebraska P.P. Dist. v. City of York 747
10. In the absence of a clear expression of legislative intent, this court is not inclined to interpret a statute to apply to matters other than clearly expressed within the statute itself. State v. Peiffer 864
11. Special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict. Hall v. Cox Cable of Omaha, Inc. 887
12. Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication. Hall v. Cox Cable of Omaha, Inc. 887
13. Neb. Rev. Stat. § 44-710.14 (Reissue 1978) must be read in pari materia with Neb. Rev. Stat. § 44-358 (Reissue 1978). White v. Medico Life Ins. Co. 901

Subrogation.

1. The doctrine of subrogation includes every instance in which one person pays a debt for which another is primarily liable, and which in equity and good conscience

should have been discharged by the latter, so long as the payment was made under compulsion or for the protection of some interest of the one making the payment and in discharge of an existing liability. Rawson v. City of Omaha 159

2. The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract and no general rule can be laid down which will afford a test for its application in all cases. The facts and circumstances of each case determine whether the doctrine is applicable. Rawson v. City of Omaha 159
3. One is not a volunteer when he has an interest of his own to protect. And a payment is not voluntary when made under compulsion, as where one is forced to pay the debt or claim for which another is primarily liable. Rawson v. City of Omaha 159
4. A person who has paid the debt of another in response to the threat of civil proceedings by a third person, whether or not the third person is acting in good faith, is entitled to restitution from the other if the payor acted to avoid trouble and expense. Rawson v. City of Omaha 159
5. Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lienholder. Rawson v. City of Omaha 159
6. One who is sued for alleged negligence and who, in an effort to save his property, including the expenditure of attorney fees, enters into a reasonable settlement is not a volunteer and is entitled to seek reimbursement under the doctrine of equitable subrogation. Rawson v. City of Omaha 159

Summary Judgment.

1. Judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show 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. First Mid America Inc. v. MCI Communications Corp. 57
   Reifschneider v. Nebraska Methodist Hospital 91
2. 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. Bender v. James 77
3. The right of a party to sue as representative of a class may be determined on motion for summary judgment. Sarratt v. Lincoln Benefit Life Co. 436
4. Where the record demonstrates the potentiality of conflict, either within the class or between the person who seeks to represent the class and the class, it is appropriate to dispose of the class aspect of the case upon motion for summary judgment. Sarratt v. Lincoln Benefit Life Co. 436
5. Before a summary judgment may be granted, the moving party must establish that there exists no genuine issue as to any material fact in the case, and that under the facts he is entitled to a judgment as a matter of law. Gitschel v. Sauer 454
6. The burden is upon the party moving for the summary judgment to show that no issue of fact exists, and unless he can conclusively do so, the motion must be overruled. Gitschel v. Sauer 454
7. 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. Gitschel v. Sauer 454
8. 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 reasonably be drawn therefrom. Gitschel v. Sauer 454
9. A motion for a summary judgment is not a substitute for a demurrer or a motion for a directed verdict. Gitschel v. Sauer 454

Taxation.

1. An appeal from a county board of equalization is heard as in equity and is tried de novo in this court. Arneson v. Cedar County 62
2. The presumption that a board of equalization has faithfully performed its official duties disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, unaided by presumption. Arneson v. Cedar County 62
3. The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other

property, resulting in a discriminatory, unjust, and unfair assessment. Arneson v. Cedar County 62

4. Where graphite electrodes are used in the manufacture of steel for the dual purpose of providing essential carbon for the steel manufacturing process and for the conduction of electricity which provides heat for the process, and where a substantial part of the graphite electrodes enters into and becomes an essential ingredient or component part of the finished steel and the remainder is consumed in the manufacturing and refining process, the use of such graphite electrodes in the manufacturing and processing of steel for ultimate sale at retail is not subject to taxation under the provisions of Neb. Rev. Stat. §§ 77-2702 and 77-2703 (Reissue 1981). Nucor Steel v. Herrington 310
5. Generally, a suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover taxes alleged to have been illegally assessed, but each taxpayer must bring action on his own behalf. Riha Farms, Inc. v. County of Sarpy 385
6. For purposes of taxation the terms actual value, market value, and fair market value mean exactly the same thing. Riha Farms, Inc. v. County of Sarpy 385
7. In an appeal from property valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Riha Farms, Inc. v. County of Sarpy 385
8. Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the question is whether the method used ultimately attains a reasonable degree of uniformity in value. Riha Farms, Inc. v. County of Sarpy 385
9. An approximation of value and uniformity of taxation is all that can be accomplished, and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the Constitution is all that is required. Riha Farms, Inc. v. County of Sarpy 385
10. The claim that property is assessed too high for taxation purposes cannot be made in the first instance by a collateral attack in law or equity in the event of failure to bring the matter before the county board of equalization. Riha Farms, Inc. v. Dvorak 391
Tyro Farms, Inc. v. Herrington 446

11. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment, or some part thereof, is wholly void. Riha Farms, Inc. v. Dvorak 391
Tyro Farms, Inc. v. Herrington 446
12. The Nebraska Constitution requires that taxes be levied by valuation uniformly and proportionately upon all tangible property and franchises. Konicek v. Board of Equalization 648
13. A landowner is entitled to have his property assessed uniformly and proportionately with other property even though the result may be that it is assessed at less than actual value. Konicek v. Board of Equalization 648
14. In an appeal from property valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Hastings Building Co. v. Board of Equalization 847
15. The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding. Hastings Building Co. v. Board of Equalization 847
16. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence. Hastings Building Co. v. Board of Equalization 847
17. Under Neb. Rev. Stat. § 77-201 (Reissue 1981) all tangible and real property subject to taxation is required to be valued at its actual value. For purposes of taxation the terms actual value, market value, and fair market value mean exactly the same thing. Hastings Building Co. v. Board of Equalization 847

Testimony.

1. A claim of prejudice based upon an alleged failure to call witnesses is not sustained in the absence of evi-

dence as to what the witnesses' expected testimony would be. State v. Otey 103
2. When a defendant in a criminal case testifies in his own behalf, he is subject to the same rules of cross-examination as any other witness and may be required to testify on his cross-examination as to any matter brought out or suggested by him on his direct examination. State v. Pitts 295
3. When the object of the cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge and, unless abused, its exercise is not reversible error. State v. Pitts 295
4. As a general rule, identification testimony by one who has actually observed a crime is admissible and it is for the trier of fact to determine whether the testimony is worthy of credence. State v. Hunt 304
5. A witness may testify to facts and circumstances on which the identification is based as a foundation for that identification. State v. Hunt 304

Tort Claims Act.

On an appeal to this court of an action under the State Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong. Wakenight v. State 798

Trial.

1. The admission of testimony wrongfully received in a case tried to a jury is prejudicial error where it may have influenced the verdict. State v. Thunder Hawk .. 350
2. The allowance of an amendment during trial to a pleading which changes the issue to a material fact may be prejudicial error. Collection Associates, Inc. v. Eckel 607
3. If special circumstances exist, it is incumbent upon the prosecution to bring those circumstances to the court's attention. State v. Williams 860
4. Ordinarily, one may not invite error and then complain of it. State v. Williams 860

Trusts.

1. A constructive trust will be imposed against those who knowingly aid or participate in a breach of trust. City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc. 137
2. In order to remove a trustee under the provisions of Neb. Rev. Stat. § 30-2816 (Reissue 1979) to further the efficient administration of a trust, it is necessary that

the court find that the principal place of administration has become inappropriate. In re Zoellner Trust 674
3. A place of administration which may be less efficient, less convenient, or less pleasant than another place is not necessarily inappropriate unless, in combination with other circumstances, it interferes with the proper administration of the trust. In re Zoellner Trust 674
4. Appeals involving the administration of a trust are equity matters and are reviewable in this court de novo on the record. In re Zoellner Trust 674

Uniform Commercial Code.

The statutory rule that a payor bank is accountable for a demand item presented to it and not settled for, paid, returned, or a notice of dishonor sent before the midnight deadline may be varied or waived by agreement. Neb. U.C.C. §§ 4-302, 4-103 (Reissue 1980). Idaho Forest Industries, Inc. v. Minden Exch. Bank & Trust Co. 820

Usury.

1. All pending actions and proceedings to recover a penalty which have not been prosecuted to a final judgment are defeated by the repeal of the statute. Therefore, the repeal of a statute which imposes a penalty will prevent any prosecution, trial, or judgment for penalties accruing while such statute was in force, unless the contrary is provided in the repealing statute or some other existing statute. Farmland Enterprises, Inc. v. Schueman 342
2. The benefits afforded a borrower under the usury laws of the State of Nebraska do not constitute an independent cause of action but only a defense to a cause of action. Farmland Enterprises, Inc. v. Schueman 342
3. A mere penalty never vests, but remains executory; the repeal of a statute before a penalty is enforced is not a deprivation of vested rights. The unqualified repeal of a statute imposing a penalty operates the same way as the repeal of a strictly criminal statute. It abrogates all rights of action which have not been reduced to judgments. Farmland Enterprises, Inc. v. Schueman 342
4. The distinction between a loan and a forbearance is that a loan is a contemporaneous transaction evidencing the creation of a debt to be repaid, while a forbearance is a subsequent agreement entered into between a debtor and creditor to secure the repayment of

a debt previously created and matured. Farmland Enterprises, Inc. v. Schueman 342

Valuation.

1. The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Arneson v. Cedar County 62
2. Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the question is whether the method used ultimately attains a reasonable degree of uniformity in value. Riha Farms, Inc. v. County of Sarpy 385
3. An approximation of value and uniformity of taxation is all that can be accomplished, and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the Constitution is all that is required. Riha Farms, Inc. v. County of Sarpy 385
4. The Nebraska Constitution requires that taxes be levied by valuation uniformly and proportionately upon all tangible property and franchises. Konicek v. Board of Equalization 648
5. A landowner is entitled to have his property assessed uniformly and proportionately with other property even though the result may be that it is assessed at less than actual value. Konicek v. Board of Equalization 648
6. In an appeal from property valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. Hastings Building Co. v. Board of Equalization 847
7. The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding. Hastings Building Co. v. Board of Equalization 847
8. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of

the valuation fixed by the board of equalization becomes one of fact based upon the evidence. Hastings Building Co. v. Board of Equalization 847
9. Under Neb. Rev. Stat. § 77-201 (Reissue 1981) all tangible and real property subject to taxation is required to be valued at its actual value. For purposes of taxation the terms actual value, market value, and fair market value mean exactly the same thing. Hastings Building Co. v. Board of Equalization 847

Vendor and Vendee.

1. Generally, a vendor of real property is not guilty of fraud for a failure to disclose material, latent defects which are unknown to him, but where the evidence shows he was aware of circumstances from which a reasonable inference could be drawn that he either knew or should have been aware of the fact that latent, defective conditions existed, he is liable to the purchaser. Hauck v. Samus 25
2. Where there is a delay in delivering possession to the vendee and the vendee has not elected to rescind, the vendee may be entitled to an abatement of the purchase price for damages resulting from the failure of the vendor to deliver possession in accordance with the contract. Union Pacific Land Resources Corp. v. Park Towne, Ltd. 83
3. A bona fide purchaser exists where the purchaser takes without knowledge or notice of any suspicious circumstances which would put a prudent man upon inquiry. City of Hastings v. Jerry Spady Pontiac-Cadillac, Inc. 137

Verdicts.

1. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. Havelock Bank of Lincoln v. Bargen 70
2. Where the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict. O'Neil v. Behrendt 372
3. Where a verdict is excessive, but not so much as to indicate passion or prejudice on the part of the jury, the error may be corrected by remittitur, if the excess can be estimated with reasonable certainty. Barbour v. Jenson Commercial Distributing Co. 512
4. Where the trial court has ordered a reduction of the verdict as a condition of denying a new trial, such order will not ordinarily be reversed unless an abuse of dis-

cretion is shown. Barbour v. Jenson Commercial Distributing Co. 512

Waiver.

1. A voluntary guilty plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional. State v. Stranghoener 203
2. The protection afforded accused, once he has asked for the assistance of counsel, may thereafter be waived by the accused if done knowingly, freely, and voluntarily. State v. Last 596
3. By demurring or pleading to the general issue without requesting a ruling on a motion to quash an information as to certainty, particularity, or redundancy, the defendant has waived all such defects which were raised by the motion to quash. State v. Parks 635

Warranty.

1. It is the general rule of law that a warranty is express when the seller makes an affirmation with respect to the article to be sold, pending the agreement of sale, upon which it is intended that the buyer shall rely in making the purchase. England v. Leithoff 462
2. Oral representations of the origin of livestock made in the course of the sale of livestock are express warranties relating to the livestock. England v. Leithoff 462

Waters.

1. In order to constitute an exception to the general rule that surface water may be repelled, at least some of the distinctive attributes of a watercourse must be demonstrated. Barry v. Wittmersehouse 909
2. Bodies of water, even though of considerable size, which collect only in times of heavy rain, flood, or melting snow, and which soon dry up, are not lakes within the meaning of that term as here defined. Barry v. Wittmersehouse 909

Wills.

1. The burden is upon the proponent of a will, both in the county court and in the District Court on appeal, to prove by a preponderance of the evidence not only the lawful execution of the will but also the testamentary capacity of the testator at the time when the will was made. However, if the proponent makes a prima facie case in chief as to both, then it devolves upon a contestant to proceed and to adduce sufficient competent evidence to overcome the presumption arising there-

from, after which the burden of going ahead and proving the issues of lawful execution and testamentary capacity by a preponderance of the evidence devolves upon the proponent. In re Estate of Camin 490

2. Under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-1601 et seq. (Reissue 1979), prima facie proof of the testator's testamentary capacity is established by the introduction of a self-proved will without the presentation of the testimony of *all* of the attesting witnesses. Such prima facie proof is rebuttable with competent evidence to the contrary, although in the final analysis the burden of persuasion remains with the proponent of the will at all times. In re Estate of Camin 490

3. Although it may be good form in some instances for a witness to a will to explore with the testator the latter's testamentary capacity, the nature of the document, and its voluntary character, a failure to do so in and of itself will not disqualify that person from serving as an attesting witness under the provisions of Neb. Rev. Stat. § 30-2327 (Reissue 1979). In re Estate of Camin .. 490

4. A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to the results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testator had a constant and abiding scheme for the distribution of his property. In re Estate of Camin 490

5. 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, such testator is mentally competent to make a will. In re Estate of Camin 490

6. Where the court's instructions impose a greater burden of proof on the proponents of a will than is required by law, it cannot be said that the opponents were thereby prejudiced. In re Estate of Camin 490

7. An instruction to the jury that a disposition under a will need not be reasonable, conventional, or judicious is not erroneous so long as the testator has the requisite mental capacity to execute a will and has not been subjected to undue influence. In re Estate of Camin 490

8. A patent ambiguity in a will must be removed by interpretation according to legal principles, and the intention of the testator must be found within the will; that

intention is the one the testator expressed by the language of the will and not an entertained but unexpressed intention. In re Estate of Florey 665

9. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. In re Estate of Florey 665
10. A will speaks as of the date of the death of the testator. In re Estate of Florey 665
11. Where there is a clear provision in a will, that clear provision will not be controlled by a subsequent ambiguous provision. In re Estate of Florey 665
12. Strictly speaking, there cannot be a decree for the specific performance of a contract to make a will. Courts of equity may grant relief in a form that is usually equivalent to a decree of specific performance of a contract to leave property by will, after the death of the defaulting promisor, by fastening a trust upon an estate in the hands of those taking it with notice of such contract or by devise or descent. Philp v. First Nat. Bank & Trust Co. 791

Witnesses.

1. A claim of prejudice based upon an alleged failure to call witnesses is not sustained in the absence of evidence as to what the witnesses' expected testimony would be. State v. Otey 103
2. When a defendant in a criminal case testifies in his own behalf, he is subject to the same rules of cross-examination as any other witness and may be required to testify on his cross-examination as to any matter brought out or suggested by him on his direct examination. State v. Pitts 295
3. When the object of the cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge and, unless abused, its exercise is not reversible error. State v. Pitts 295
4. As a general rule, identification testimony by one who has actually observed a crime is admissible and it is for the trier of fact to determine whether the testimony is worthy of credence. State v. Hunt 304
5. A witness may testify to facts and circumstances on which the identification is based as a foundation for that identification. State v. Hunt 304

6. Testimony of the prosecutrix alone, uncorroborated by any other evidence, is not sufficient to sustain a conviction for sexual assault. State v. Evans 476
7. In a prosecution for sexual assault, the prosecutrix may testify in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details, and others may likewise testify in chief to such fact and nature of the complaint, but not as to its details. State v. Evans 476
8. One to whom the complaining witness has complained may testify to the fact and nature of the complaint, if the complaint was made voluntarily and without unreasonable or inconsistent delay. State v. Evans 476
9. Although such complaint must be timely made, the effect of a delay in making such complaint may be alleviated by proof of a sufficient reason for the delay, such as intimidation or threats, or lack of opportunity. State v. Evans 476
10. In order to offer in evidence the testimony of a witness at a former trial, the proponent of such evidence must show that the declarant is now unavailable as a witness. State v. Evans 476
11. As a general rule, a party should not be permitted to cross-examine a witness as to matters foreign to the scope of the direct examination, particularly where it relates to matters that are collateral to the issues in the case. In re Estate of Camin 490
12. An accused is not entitled to a cautionary instruction where the witnesses who testify against him are regular public law enforcement officers. State v. Parks ... 635
13. A witness may not be impeached by producing extrinsic evidence of collateral facts to contradict the first witness' assertion about those facts. Jones v. Tranisi 843

Words and Phrases.

1. The phrase "assessable unit" as used in Neb. Rev. Stat. § 19-4027 (Cum. Supp. 1980) does not mean "front foot," but rather means "lot or parcel." North Star Lodge #227 v. City of Lincoln 236
2. The phrase "before final judgment" includes cases on appeal. State v. Peiffer 299
3. "Extent," within the term extent of easement claimed in land as right-of-way for a road, means the width. Olson v. Bonham 548
4. The term "arising out of" describes the accident and

its origin, cause, and character, i.e., whether it resulted from the risks arising from and within the scope or sphere of the employee's job. Renshaw v. Merrigol-Adler Bakery 662

5. "Inappropriate," as used in Neb. Rev. Stat. § 30-2816 (Reissue 1979), means unsuitable, unfitting, or improper. In re Zoellner Trust 674
6. Bodies of water, even though of considerable size, which collect only in times of heavy rain, flood, or melting snow, and which soon dry up, are not lakes within the meaning of that term as here defined. Barry v. Wittmersehouse 909

Workmen's Compensation.

1. Under the Nebraska workmen's compensation law, the claimant seeking compensation has the burden of proving by a preponderance of the evidence that an injury received arising out of and in the course of his employment was the proximate cause of the disability for which benefits are sought. Coco v. Austin Co. 95
   Renshaw v. Merrigol-Adler Bakery 662
2. The cause of an injury or disability not objective in character requires proof by expert testimony or other appropriate scientific means. Coco v. Austin Co. 95
3. The following provision of Neb. Rev. Stat. § 48-120 (Reissue 1978), "Whenever the court deems it necessary, in order to assist it in resolving any issue of medical fact or opinion, it shall cause the employee to be examined by a physician or physicians selected by the court and obtain from such physician or physicians a report upon the condition or matter which is the subject of inquiry. The court may charge the cost of such examination to the carrier," confers a discretionary power upon the Workmen's Compensation Court which is to be exercised when medical questions arise relevant to the matters to which § 48-120 relates. Coco v. Austin Co. 95
4. 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. Pollard v. Wright's Tree Service, Inc. 187
5. The findings of fact made by the Workmen's Compensation Court after rehearing have the force and effect of a jury verdict and will not be set aside on appeal unless clearly wrong. Pollard v. Wright's Tree Service, Inc. 187
   Hatting v. Farmers Co-op Assn. 242
   Negrete v. Western Electric Co., Inc. 876

6. In a workmen's compensation case the State and the Second Injury Fund may be impleaded as parties after the initial hearing in the Workmen's Compensation Court and prior to the de novo rehearing, in the absence of proof of prejudice. Pollard v. Wright's Tree Service, Inc. 187
7. Under the Workmen's Compensation Act an award which is payable periodically for 6 months or more is subject to modification on the ground of increase or decrease of incapacity due solely to the injury. Pollard v. Wright's Tree Service, Inc. 187
8. In a modification proceeding in a workmen's compensation case, the whole question of the employee's physical condition can again be inquired into as of that time. Pollard v. Wright's Tree Service, Inc. 187
9. Within the meaning of Neb. Rev. Stat. § 48-125 (Reissue 1978) the Nebraska Second Injury Fund is an "employer," and if, on appeal to the Supreme Court, the fund fails to obtain any reduction in the amount of the award of the Workmen's Compensation Court on rehearing, the employee is entitled to a reasonable sum as attorney fees in this court, to be assessed against the Second Injury Fund. Pollard v. Wright's Tree Service, Inc. 187
10. In testing the sufficiency of 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. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom. Hatting v. Farmers Co-op Assn. 242
Narduzzo v. Sunderland Bros. 852
Negrete v. Western Electric Co., Inc. 876
11. An award for permanent disability cannot be based on mere possibilities. Hatting v. Farmers Co-op Assn. ... 242
12. Findings of fact made by the Nebraska Workmen's Compensation Court following rehearing have the same force and effect as a jury verdict in a civil case, and will not be set aside unless the evidence is insufficient to warrant the making of the award or the findings of fact do not support the award. Butler v. Midwest Supply Co. 421
Renshaw v. Merrigol-Adler Bakery 662
13. In a workmen's compensation case the burden of proof is upon the plaintiff to prove by a preponderance of the evidence that he is suffering from a disability and that

such disability is the result of an accident arising out of his employment. Butler v. Midwest Supply Co. 421

14. Where medical evidence is relied upon in a workmen's compensation case to show the nature and extent of the disability and that there is a causal connection between the alleged injury, the employment, and the disability, the triers of fact are not required to take the opinions of such experts as binding upon them. Butler v. Midwest Supply Co. 421

15. Where, upon rehearing in a workmen's compensation case, an employer has obtained a termination of a previous running award for temporary total disability, it cannot be said that the employer has failed to obtain any reduction in the amount of such award so as to be liable for statutory attorney fees. Butler v. Midwest Supply Co. 421

16. Notice of appeal from a decision on rehearing in the Nebraska Workmen's Compensation Court must be filed within 1 month of the judgment or within 1 month of the order denying the motion for a new trial. Battiato v. Falstaff Brewing Corp. 474

17. The term "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising from and within the scope or sphere of the employee's job. Renshaw v. Merrigol-Adler Bakery 662

18. Injuries arising from exposure to a natural phenomenon do not arise out of employment unless the hazard imposed upon the employee by reason of the employment is greater than that to which the public generally in the area of hazard is subjected. Renshaw v. Merrigol-Adler Bakery 662

19. Under Neb. Rev. Stat. § 48-118 (Reissue 1978), where an action is filed before a particular court and prosecuted to a final conclusion, whether by settlement or judgment, that court alone has jurisdiction to resolve any controversy relating to division of fees and expenses. Moyer v. Douglas & Lomason Co. 680

20. While one entering into a contract for hire in this state for work to be performed elsewhere, standing alone, may be a statutory employee under the provisions of Neb. Rev. Stat. § 48-115(2)(c) (Reissue 1978), unless the employer, who is a nonresident, is performing work in this state, employing one or more employees in the regular trade, business, profession, or vocation of such employer, it is not a statutory employer as defined by Neb. Rev. Stat. §§ 48-114 and 48-106(1) (Reissue 1978). Absent a statutory employer, the provisions of Neb.

Rev. Stat. § 48-101 (Reissue 1978) have no application. Jensen v. Floair, Inc. 740
21. The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the disability sustained was caused by or related to the accident and was not the result of the normal progression of plaintiff's preexisting condition. Narduzzo v. Sunderland Bros. .. 852
Negrete v. Western Electric Co., Inc. 876
22. In a workmen's compensation case the burden is upon the employee to prove by a preponderance of the evidence all the issues involved. Negrete v. Western Electric Co., Inc. 876