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IN RE INTEREST OF HOCHSTETLER, CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. BEVERLY J. (PAT) HOCHSTETLER, APPELLANT.

339 N.W.2d 916

Filed November 4, 1983. No. 83-240.

1. **Juvenile Courts: Appeal and Error.** This court hears appeals of juvenile proceedings de novo upon the record, but accords the findings of fact of the juvenile court great weight because it both heard and observed the parties and witnesses.
2. **Parental Rights.** The right of parents to maintain custody of their children is a natural one, subject only to the paramount interest which the public has in the protection of the rights of a child.

Appeal from the District Court for Greeley County: JOHN M. BROWER, Judge. Reversed and dismissed.

Earl D. Ahlschwede of Ahlschwede & Truell, for appellant.

Charles R. Maser, Greeley County Attorney, for appellee.

Robert E. Wheeler, guardian ad litem.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

The principal issue presented by this appeal is whether, as articulated by the juvenile court judge, the State may interfere in the relationship between a mother and her children by virtue of the former's eccentricity. The courts below have answered affirmatively. We conclude otherwise. We therefore reverse the judgment of the District Court which affirmed placement of custody by the juvenile court in the Nebraska Department of Public Welfare, with physical possession of the children in a foster home, and order the case dismissed.

In its third amended petition the State sought to terminate the parental rights of the appellant, Beverly J. (Pat) Hochstetler, based upon an allegation

that she was mentally ill within the meaning of then Neb. Rev. Stat. § 43-209(5) (Reissue 1978). That statute provided that parental rights may be terminated when such action is found to be in the best interests of the child and it appears that the parents are unable to discharge parental responsibilities because of mental illness or deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged, indeterminate period. The petition also alleged that the three Hochstetler children were within the definitions of then Neb. Rev. Stat. § 43-202(1) and (2)(b), (c), and (e) (Reissue 1978), and, therefore, their custody should be awarded to the Nebraska Department of Public Welfare under then Neb. Rev. Stat. § 43-208 (Reissue 1978). The aforesaid portions of then § 43-202, in pertinent part, provided: "The juvenile court in each county . . . shall have jurisdiction as follows:

"(1) Exclusive original jurisdiction as to any child under the age of eighteen years, who is homeless or destitute, or without proper support through no fault of his parent, guardian, or custodian;

"(2) Exclusive original jurisdiction as to any child under the age of eighteen years . . . (b) who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian; (c) whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such child; . . . or (e) who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such child."

Then § 43-208 provided, among other things, that when a child under the age of 18 shall be adjudged to be one defined in subdivision (1) or (2) of § 43-202, such child may be committed to the care and custody of the Department of Public Welfare.

The courts below determined that although Mrs. Hochstetler did not fit the definition of then

§ 43-209(5), the children fell within the provisions of then § 43-202(2)(c) and (e).

In reviewing this matter we bear in mind that an appeal of a juvenile proceeding to this court is heard de novo upon the record, but that the findings of fact of the juvenile court will be accorded great weight because it both heard and observed the parties and witnesses. *In re Interest of Spradlin*, 214 Neb. 834, 336 N.W.2d 563 (1983); *In re Interest of Fant*, 214 Neb. 692, 335 N.W.2d 314 (1983); *In re Interest of Spradlin*, 210 Neb. 734, 317 N.W.2d 59 (1982).

By such a review we find the relevant facts to be that on May 8, 1981, Mrs. Hochstetler was arrested, charged, and eventually convicted of exercising control over property owned by another.[1] Her conviction was affirmed by this court in *State v. Hochstetler*, 214 Neb. 482, 334 N.W.2d 455 (1983). In connection with her arrest she was held in jail for 20 days. During that time her children were taken into custody by the Department of Public Welfare. When Mrs. Hochstetler was released from jail on May 28, 1981, the Department of Public Welfare prepared to release the children to her. The three children, Jo Hannah (age 15 at the time), Christopher (then age 13), and John (then age 8), were brought from their foster home in Custer County to that county's welfare office. Upon their arrival at that office the two older children expressed their unhappiness at the imminent reunion with their mother. On that basis a caseworker placed a telephone call to the Greeley County Court. The county judge, in his capacity as the juvenile judge, then directed that the children remain in the custody of the Department of Public Welfare. Subsequently, this action was commenced.

Mrs. Hochstetler is, to say the least, a highly eccentric person. Even her heritage is in dispute. She claims to be of Native American extraction of the Kwakiutl Tribe. She has so told her children and encouraged them to take pride in the fact. Her brother

testified that his sister's claim of such heritage is not true. We are not certain whom to believe in this regard.

Mrs. Hochstetler has told her children that she was involved in military intelligence matters, operating as an agent active in foreign espionage. There is evidence that she has at various times claimed to have been imprisoned in the Soviet Union along with Boris Pasternak. At trial she testified that she had been employed with the military but refused to disclose details of that employment. She has told other persons that she owned and was tending a herd of buffalo. Such was not the case.

She has told her children that one Lester Hochstetler was their father and that he was killed in Vietnam. In 1975 or 1976 her two older children discovered that John Kinzie was their true father. They confronted their mother, who then admitted the truth of the matter.

Mrs. Hochstetler has claimed to her children to have some sort of supernatural powers, due to her Indian heritage, which give her the ability to repair television sets, ripple water, and change the color of objects by merely gazing at them.

Mrs. Hochstetler is a prime example of De Tocqueville's characterization of the American people as a litigious one, and apparently is willing to institute legal proceedings against anyone she considers to have infringed upon her legal rights.

While the evidence is overwhelming that Mrs. Hochstetler is strikingly out of the ordinary, it is just as overwhelming that she has consistently attempted to discharge, and for the most part has succeeded in discharging, her duties as a parent to her three children.

Mrs. Hochstetler is permanently disabled and unable to work. She has supported her family on approximately $450 per month received from various governmental agencies, and food stamps. Except for a short time in 1979, after she was evicted, she

has provided her children with a home in which to live.

Testimony was elicited that occasionally, near the end of the month, the supply of food in her household would run short. However, there never was a time she or the children were without food. At their house in Scotia, Nebraska, the heat was turned down at times in order to conserve fuel. On a few occasions her propane tank would run dry.

Physicians have examined the children and found their health to be problem-free except for an ulcer condition suffered by Jo Hannah. Doctors retained by the Department of Public Welfare state that this ulcer condition is a result of stress caused by her mother's conduct. Jo Hannah characterizes the problem with her mother as disputes concerning clothing, makeup, religion, politics, money, and school friends. Mrs. Hochstetler and Jo Hannah both engaged in counseling to alleviate the stress in their relationship and were seeing a counselor regularly up to the time of her arrest. Jo Hannah's ulcer condition was brought under control shortly after its diagnosis.

It is clear that the physical needs of her children were being met by Mrs. Hochstetler. There is no evidence of any physical abuse, although on one occasion Mrs. Hochstetler allegedly slapped her daughter.

Mrs. Hochstetler has been diagnosed as having a paranoid personality disorder, which is characterized by an overwhelming sense of suspicion of the motivations of those around her. The State has alleged that this disorder has contributed to Mrs. Hochstetler's frequent changes of residence, which have resulted in the severing of her family's emotional ties to the community at large. The evidence shows, however, that the children have been well dressed and clean, have attended school regularly but not without absences, and have received above average grades in their courses. The children, es-

pecially Jo Hannah, have been active in extracurricular activities. They are respectful, intelligent, and articulate. They have a good social and moral sense, as illustrated by Christopher's and Jo Hannah's responses to their mother when she committed the acts which form the basis for our opinion in *State v. Hochstetler*, *supra*. They told her that if she got caught and they had to testify, they would tell the truth.

There is also testimony, small wonder, by a social worker that the suspicions of Mrs. Hochstetler have in part been kindled by the State's efforts to take her children from her.

Much is made by the State of letters sent by Mrs. Hochstetler to her children while they have been in the care of the Department of Public Welfare. In her letters Mrs. Hochstetler places the blame for these problems on Jo Hannah. She also tells her children that this custody matter has adversely affected the health of their grandmother, the truth of which is unclear from the evidence.

In summary, the record establishes that Mrs. Hochstetler is an intelligent, haughty, articulate, aggressive, and abrasive woman who has been convicted of a crime. She refuses to document certain aspects of her background, and claims unlikely powers. She appears to delight in confronting and tweaking the bureaucracy which both sustains and torments her. Her outlandish behavior embarrasses her children. The record also establishes, however, that she loves and, given the opportunity, adequately cares for them.

Notwithstanding the deference given to the findings of the juvenile court under the rule stated earlier in this opinion, we cannot, in the words of the question phrased by the juvenile judge, conclude that Mrs. Hochstetler's eccentricity causes such chaos and stress in the family life as to make it harmful to the emotional health of the children.

Parents frequently embarrass their children, just

as children frequently embarrass their parents. There is no support for the conclusion that the embarrassment caused the children has in any material way affected their well-being. Although Mrs. Hochstetler may well be paranoid, there is no showing that such condition endangers the life, health, or morals of her children. The disputes between Mrs. Hochstetler and Jo Hannah are the usual disputes between a mother and a maturing daughter. The shortage of fuel and food toward the end of the month and the lack of a stable residence are the unfortunate but pervasive characteristics of our poor.

The right of parents to maintain custody of their children is a natural one, subject only to the paramount interest which the public has in the protection of the rights of a child. *In re Interest of M.*, *ante* p. 383, 338 N.W.2d 764 (1983).

The record in this case establishes only that Mrs. Hochstetler is a woman who refuses to defer to those with whom she must deal and does not behave like the majority of society. Nowhere is there authority to deprive her of the custody of her children solely on that account.

We conclude the record fails to establish that the children fell within then § 43-202(2)(c) or (e). Accordingly, the juvenile court never acquired jurisdiction over the children such as to permit it to place custody of them in the Department of Public Welfare once Mrs. Hochstetler was released from jail.

The judgment of the District Court affirming the juvenile court must be reversed and the action dismissed.

REVERSED AND DISMISSED.

GRANT, J., dissenting.

I respectfully dissent from the holding of the majority reversing the action of the District Court in this case. I feel a more detailed statement is necessary.

The county attorney of Greeley County, in his

third amended petition, alleged that the three children named in the petition were in the sole custody of their mother, appellant Beverly J. Hochstetler, until May 8, 1981; that after such date the children were, by court order, in the custody of the Nebraska Department of Public Welfare; that the father of such children had been determined in a Hall County District Court adjudication, and that the father had abandoned the children; that said minor children are minors as defined in Neb. Rev. Stat. § 43-202(1), (2)(b), (c), and (e) (Reissue 1978); that appellant was mentally ill and as a result, but through no fault of appellant, the said children were without proper support and should be placed in the custody of the state Department of Public Welfare; that appellant, by reason of her fault, has neglected or refused to provide proper and necessary subsistence and other care necessary for the well-being of the children; and "that she has caused the children to be placed in a situation which is injurious to the health or morals of such children in that the children are deprived of heat in the winter and on occasion food, they are traumatized by stories and threats of the mother and they are deprived of a stable home environment . . . ."

The county attorney prayed that the children be declared to be children as defined in § 43-202(1), (2)(b), (c), and (e); that the children be placed in the custody of the state Department of Public Welfare; that the parental rights of both appellant and the children's father be terminated; and for such other relief as was in the best interests of the children.

Appellant's answer to this petition was a general denial.

The county court thereafter held hearings on July 28, August 12, September 29 and 30, October 1, and November 3, 1981. Pursuant to appellant's motion in limine, all evidence before December 3, 1979 (the date of dismissal of a prior juvenile court case in Merrick County) was excluded. Eight hundred

forty-five pages of testimony were taken and 40 exhibits were submitted.

The county court by journal entry of adjudication hearing on September 29, 1981, found: "By a preponderance of the evidence that [the children] . . . are each within the meaning of 43-202(2)(b) who lack proper parental care by reason of the fault of Beverly J. Hochstetler, (c) whose parent, Beverly J. Hochstetler, neglects and refuses to provide proper or necessary care for the mental health, morals, and well-being of said children, and (e) who are in a situation injurious to the mental health and morals of said children."

The county court further found that the State had failed to prove that appellant was a mentally ill or mentally deficient parent.

The court ordered a home study of appellant's home and ordered appellant to meet with Michael O'Neill, Ph.D., a psychologist and director of the Family/Child Center in Grand Island; ordered Dr. O'Neill to develop a treatment program "structured and designed with the goal of reuniting Beverly J. Hochstetler with her children"; and set a dispositional hearing for November 3, 1981.

The dispositional order placed temporary custody of the children with the state Department of Public Welfare in a designated foster home, and with detailed directions as to the conduct of the children and appellant, until further review set for June 4, 1982, or such earlier date as might be requested.

It is from this order that the appellant appealed to the District Court, where the county court order was affirmed on March 1, 1983.

It should be noted, as to appellant, that there was no termination of parental rights and no permanent deprivation of custody. The parental rights of the father were terminated earlier, in the county court proceeding, and no appeal was taken from that order.

I agree that the findings of fact of the juvenile

court should be accorded great weight by this court, as set out in the majority opinion. I further agree that the physical needs of the children were being met by appellant, i.e., that the children were fed and housed adequately. I do not think that is the issue decided by the juvenile court.

That court specifically held that appellant "refuse[d] to provide proper or necessary care for the *mental* health, morals, and well-being of said children, and [that said children] are in a situation injurious to the *mental* health and morals of said children." (Emphasis supplied.)

I feel there is overwhelming evidence to support those findings. This particular case began when appellant was arrested in May of 1981 for exercising control over property owned by another. At that time the children, of necessity, were placed in the custody of state officials for a period of some 20 days while appellant was jailed. Appellant's conviction of that crime, after jury trial, was affirmed in this court in *State v. Hochstetler*, 214 Neb. 482, 334 N.W.2d 455 (1983). The facts in that case showed that appellant had sold property owned by her landlord, valued at well in excess of $1,000, to another person for $140. It is of interest to note that among the conditions of probation enforced on appellant in that case was one requiring that appellant " 'refrain totally from acting as her own lawyer, and . . . from representing herself as an attorney or a proctor.' " *Id.* at 483, 334 N.W.2d at 456.

Typical of appellant's testimony throughout this case is the following example from the hearing on July 28, 1981: "Q. [By the court] Your husband's name or X-husband's [sic] name--- A. I'm a widow. My husband's name was Jonathan Lester Hochstetler. Q. When did he pass away? A. January 4, 1972. Q. And at the time he passed away you were married to him? A. Yes. Q. And is he the father of the three children? A. Yes. Q. John Hochstetler? A. Yes. Q. Now who are you re-

ceiving child support from? A. As I tried to explain earlier, the only setup that they had in the district court in Grand Island for any payments of any kind is through—is under either alimony or child support. Mr. Moses asked me which one I wanted it to come under and I said neither one because neither one applies so it's alimony. This man had done a great injury to my husband and he was suppose [sic] to pay money to him monthly. Q. But John—This man who's paying this alimony or whatever you call it; was he ever married to you? A. No. Q. And he is not the father of your three children? A. No. Their father is dead." Later examination by the children's guardian ad litem shows: "Q. (by Mr. Wheeler) You stated that John Hochstetler is the father of these children, is that right? A. John Lester Hochstetler. Q. Lester? And you're his widow? A. Yes. Q. He died January 4, 1972? A. He was killed in Viet Nam."

Certified copies of pleadings and orders from the Hall County District Court were then introduced in evidence. These pleadings show that appellant herself filed a sworn complaint naming as the father of the children the same man whose parental rights were terminated in this case. Appellant's petition resulted in a court determination as to the father of the children, and a child support order.

After the documentary proof of the adjudication of paternity and order for child support were marked as exhibits, appellant, still under oath, explained that the support payments were really just payment to her by a man who "had injured both my husband and myself," and that because of that injury appellant was required to go through the support payment procedure to get paid, and that Judge Weaver had told her she might say it was child support. It seems to be clear that appellant does not always function in the world of reality. It should be noted that appellant's confusion between fantasy and

reality is one of the very matters that concerned the examining psychologist.

Later in the trial, Lester Hochstetler testified that he had been married to appellant from September 28, 1956, until their divorce on March 31, 1964, and that he had never been in Vietnam. His appearance indicated he was not dead. Other documentary evidence proved, beyond any doubt, that he was not the father of the children.

Other evidence shows, as recited in the majority opinion, that appellant had told her children that Lester Hochstetler was their father, but admitted otherwise when the children discovered the facts in 1975 or 1976. Such statements were direct lies to her children concerning their parentage and are, in my judgment, deplorable. But when they are repeated, under oath, some 5 or 6 years later, to a judge faced with difficult decisions as to those very children, then such statements attain the rank of patent perjury—and indicate either that appellant is perfectly willing to play fast and loose with the virtue of truth or is so calloused mentally that she does not know the difference between boldfaced lies under oath and the plain truth.

Further examples of similarly untruthful or perjured testimony are scattered throughout appellant's testimony and in exhibits received. As examples, appellant told the landlord where she had arranged to rent a home for these children, during the course of these proceedings, that she was an attorney working on several cases and had recently received a $6000 court settlement. This conduct, of course, is the type of conduct that the court was trying to restrain in defendant's probation in *State v. Hochstetler*, 214 Neb. 482, 334 N.W.2d 455 (1983).

Other examples of appellant's bizarre conduct are set out in the majority opinion. Such conduct, both in court and out, goes far beyond excusable eccentricity and, in my judgment, constitutes suffi-

cient evidence in itself to make a court wary of entrusting these children to her.

Other evidence supports the findings of the juvenile court to an even greater extent. A physician who cared for the oldest child testified that, in his opinion, the ulcer that the child had was stress-related and flared up over visits with appellant. This same physician testified that, in his medical opinion, "From the information that I have and from the examinations of the children, I feel it would not be in their best interests to be returned to the home environment of their mother." This physician also testified that it would be detrimental to the children emotionally as well as physically to be placed back with their mother.

Other testimony from the clinical psychologist, Dr. O'Neill, who evaluated the children on three occasions, and who evaluated appellant, concluded that "it would be destructive for all concerned for them to try to be together at this point." This psychologist recommended treatment for all concerned and later review in 6 months or longer. It should be noted that this same witness thought it would be harmful to the children to terminate appellant's parental rights.

The testimony of the children need not be set out, but it may be said fairly that the children do have some love for their mother but that they dislike the life she requires them to live, and that, as a result, at least the two older children have expressed their desire that they not be required to live with their mother. I believe that the trial court gave appropriate weight to that love. And, of course, it would be perfectly appropriate to love Don Quixote, and yet not be willing to let him rear his own children—at least until he got through his windmill phase.

In summary, I believe that, giving proper weight to the findings of the juvenile court, this court should affirm the findings and order of that court. I think that court and all people involved with appellant

have done a commendable job in dealing with a most difficult problem, in spite of the efforts of appellant to enjoy herself at the expense of all who come in contact with her.

I would hold that § 43-202 (and the statutes that have supplanted it) concerns both mental and physical health and that there can be at least as great mental abuse of a child as physical abuse. Children should be protected against mental abuse as well as physical.

I would state that the result I reach is in no way dependent on the circumstance that appellant is unfortunately not a rich person. I restate that the record does establish that appellant has cared for the physical needs of the children in at least a minimal way.

I would affirm the order of the District Court which affirmed the order of the juvenile court.

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

STATE OF NEBRASKA, APPELLEE, V. JOSE A. BERMUDEZ, APPELLANT.

339 N.W.2d 762

Filed November 4, 1983. No. 83-460.

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

Earl D. Ahlschwede and James H. Truell of Ahlschwede & Truell, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Appellant pled guilty to assault in the second de-

gree, a Class IV felony, and was sentenced by the court to imprisonment for a term of from 2 to 5 years. The appellant appeals, urging that the sentence is excessive since the minimum imposed by the court exceeds one-third the maximum term provided by statute. Neb. Rev. Stat. § 83-1,105 (Reissue 1981). The Attorney General confesses error in this regard, and urges us to modify the sentence to from 20 months to 5 years and affirm as so modified. We agree.

We have reviewed the incident which is the subject of the presentence investigation. The facts disclose a particularly vicious assault with a knife, together with multiple stab wounds inflicted on one of the victims. The sentence is within the range of the statute, and in view of the seriousness of the crime and the possible consequences of the stabbing, it cannot be said to be excessive. We therefore modify the previous sentence to imprisonment for a term of from 20 months to 5 years. The judgment and sentence are affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLANT, V. RANDALL S. WHITMORE, JOHN R. WHITE, and ROXANNA L. HENDERSON, APPELLEES.

340 N.W.2d 134

Filed November 4, 1983. No. 83-476.

1. **Wiretaps.** No order entered under the provisions of Neb. Rev. Stat. § 86-705 (Reissue 1981) to permit the interception of wire communications may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of authorization, nor in any event longer than 30 days.
2. **Wiretaps: Motions to Suppress.** Failure to include minimization language as provided by Neb. Rev. Stat. § 86-705(6) (Reissue 1981) in an order to permit the interception of wire or oral communication when statutory guidelines have been supplied and when there

exists a means of measuring compliance with minimization provisions of the statute is not fatal and does not warrant suppression of evidence.

3. **Motions to Suppress.** No evidence may be suppressed because of technical irregularities not affecting the substantial rights of the accused.
4. **Wiretaps.** For the purposes of a wiretap, minimization is to be judged on a case-by-case analysis of the reasonableness of the government's conduct under the facts and circumstances present.
5. _____. Whether government agents acted reasonably in a wiretap case is affected by a number of factors, including the nature and scope of an alleged conspiracy, the government's reasonable expectations of the character of conversations they will be intercepting, and the extent of ongoing judicial supervision over surveillance.
6. **Wiretaps: Motions to Suppress.** Defendants seeking to suppress evidence obtained pursuant to wiretap because of the failure to comply with minimization requirements must do more than identify individual calls which they contend should not have been intercepted; they must establish a pattern of interception of innocent conversations which developed over the period of the wiretap.
7. **Motions to Suppress: Appeal and Error.** Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong.
8. **Search and Seizure: Motions to Suppress.** One who seeks to suppress evidence seized pursuant to a warrant regular on its face has the burden of establishing that the warrant was invalid.

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

Donald L. Knowles, Douglas County Attorney, and Robert C. Sigler, for appellant.

James Martin Davis, for appellee White.

Ralph A. Smith and Martin J. Kushner, for appellees Whitmore and Henderson.

HASTINGS, J.

The State has appealed, pursuant to the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1979), from an order of the Honorable Paul J. Hickman, a judge of the District Court for Douglas County. That order sustained the motions by the defendants, Randall S. Whitmore, John R. White, and Roxanna L. Hender-

son, to suppress evidence obtained by the interception of telephone conversations.

On October 21, 1981, the Douglas County attorney, in a sworn affidavit, applied to the Douglas County District Court for an electronic surveillance order to intercept the communications for the telephone number of James White. Authorization was granted by District Judge John T. Grant in an order entered the same day. Later, on November 20, 1981, an extension of this original order was sought and granted by Judge James M. Murphy of the same court. On November 6, 1981, electronic surveillance was also sought and received for two other telephone numbers associated with the defendants. On December 1, 1981, all electronic surveillance was terminated by District Judge James M. Murphy. Information arising out of the wiretap led to the arrest of the defendants.

The defendants were charged with violating various provisions of the Nebraska Uniform Controlled Substances Act. Evidentiary hearings on the motions to suppress were held on November 23 and December 20, 1982, in Douglas County. The trial court made three specific findings to support suppression when it stated: "The Court having found that the initial intercept order of October 21, 1981, the order of November 6, 1981, and the order of November 20, 1981, to each be facially insufficient and the Court deceived by the improper inclusion of gambling calls and calls obviously not criminal in nature into the logs and the improper minimization of a number of calls, hereby suppresses the conversations intercepted . . . ."

In its order suppressing the evidence the trial court found the wiretap orders to be facially insufficient because the Douglas County attorney failed to provide, as required by Neb. Rev. Stat. § 86-705(6) (Reissue 1981), that the authorization to intercept "must terminate upon the attainment of the authorized objective." It is noted, though, that the trial

court also stated § 86-705(6) required the order to contain a provision relating to minimization and that the original order did so when it stated that "the interception should be conducted in such a manner as to minimize the communications not relating to this order." Nevertheless, the trial court held that, despite this particular minimization language, the order was still facially insufficient because the order did not state a specific authorized objective to guide enforcement officers to determine when to terminate the wiretap upon the attainment of the authorized objective.

This court will refer to the omission of all the statutory language as "the absence of minimization language." Section 86-705(6) provides in part as follows: "No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. . . . Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable . . . and must terminate upon attainment of the authorized objective, or in any event in thirty days."

The initial orders and the extension order contained identical provisions except for the authorized surveillance period. The relevant language in these orders was as follows: "That there is probable cause to believe that . . . have committed and are about to commit an offense enumerated in Sections [sic] 86-703, Nebraska Revised Statutes, 1943, as amended, to-wit: illegal narcotics. That there is probable cause for the belief that particular communications concerning the offense of illegal narcotics may be obtained if an interception is authorized. . . . That the authorization to intercept said communications should be allowed for a period of thirty (30) days from the date of the actual physical hookup, and should not automatically terminate

when the described communications have first been obtained. . . . IT IS FURTHER ORDERED, that said authorization shall continue for a period of thirty (30) days from the date of the actual physical hookup, and shall not automatically terminate when the described communications have first been obtained."

The State in this appeal argues the trial court overlooked the rule set out by this court in *State v. Kolosseus*, 198 Neb. 404, 408, 253 N.W.2d 157, 160 (1977), where we stated: "Federal law preempts the field in the area of interception of oral or wire communications and prohibits the use of such intercepted communications or any evidence derived therefrom, if the disclosure is in violation of Title 18 U.S.C.A. Federal law authorizes such interceptions and use of such evidence if a state statute permits it and the authorizing state statute meets the minimum requirements of the pertinent provisions of the federal statute. Title 18 U.S.C.A., § 2516. [Citation omitted.]"

The State contends further that the trial court should have followed the reasoning of *United States v. Cafero*, 473 F.2d 489 (3d Cir. 1973), in which the Third Circuit Court of Appeals interpreted 18 U.S.C. § 2518(5) (1970), similar to our § 86-705(6), "as requiring automatic termination upon attainment of the objective of the authorization irrespective of whether a statement to this effect has been included [in the order] by the authorizing judge." *Id.* at 496.

The contention of the State has merit. This court has consistently looked to federal law in interpreting the provisions of Neb. Rev. Stat. §§ 86-701 et seq. (Reissue 1981). See, *State v. DiMauro and Kessler*, 205 Neb. 275, 287 N.W.2d 74 (1980); *State v. Kolosseus*, *supra*. In *Kolosseus* this court specifically said at 412, 253 N.W.2d at 162: "Title 18 U.S.C.A., section 2518, and section 86-705, R.R.S. 1943, are, in all substantive ways and in wording, virtually identical. They describe the information the application

must contain, what the judge entering the order must be able to find, and what the order must contain, as well as certain other matters."

Although there was language contained in *Cafero* to indicate that an authorization order for wiretapping a telephone would not be invalid for the failure to include statutory minimization language, the Third Circuit Court of Appeals did not specifically address that issue. Nevertheless, the Third Circuit Court of Appeals did address the issue in *United States v. Vento*, 533 F.2d 838 (3d Cir. 1976), when it specifically held it was possible to have substantial compliance with the requirements of § 2518 of the Omnibus Crime Control and Safe Streets Act of 1968 although the minimization language had not been included in the order.

In *Vento* the court stated: "Compliance could be proven at a hearing on the basis of testimony, affidavits and the logs of the intercepting agents. A hearing could also show whether the failure to include the minimization language had prejudiced the defendant. Where, despite the want of a provision, minimization procedures were in fact executed, there would be no harm to a defendant. . . .

"Finally, the minimization clause would appear to be a 'less crucial' requirement of Title III. The minimization proviso of section 2518(5) complements the specific requirements of section 2518(4), but it is section 2518(4) that gives 'significant directions to law enforcement officials as to how reasonable interception will be minimized.' The failure to include the minimization phrase when the basic guidelines have been supplied and where there exists a means of measuring compliance with the minimization provisions of the statute cannot be said to be fatal. It was not the intent of Congress to mandate the suppression of evidence for every facial irregularity in a warrant. *See* 1968 U.S.Code Cong. & Admin.News, pp. 2184-85." 533 F.2d at 861 and n.73.

In *Vento* the facts are similar to the present situ-

ation. In *Vento* the wiretap was sufficient, even though the wiretap order did not include the minimization language of 18 U.S.C. § 2518(5) (1976), because the order did comply with § 2518(4), which requires, inter alia, the specification of: "(a) the identity of the person . . . whose communications are to be intercepted; (b) the nature and location of the communications facilities as to which . . . authority to intercept is granted; (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates; . . . [and] (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained." In this case, even though the orders contained abbreviated minimization language not sufficient under the requirements of § 86-705(6), the orders did comply with § 86-705(4), similar to § 2518(4).

Another federal circuit court has also considered the question whether the absence of minimization language in an order for a wiretap constitutes a minor facial insufficiency rather than an insufficient order. In *United States v. Cirillo*, 499 F.2d 872, 879-80 (2d Cir. 1974), *cert. denied* 419 U.S. 1056, 95 S. Ct. 638, 42 L. Ed. 2d 653, the Second Circuit decided the "omission of the 'talismanic minimization language' " does not vitiate an interception order and the absence of minimization language is a mere " 'technical defect' " so long as the monitoring officers were aware of the requirement of minimization and abided by it.

Thus, it is clear the current federal law does not adhere to a standard of strict compliance, but applies a lesser standard of substantial compliance, and the facial insufficiency is a mere technical defect where minimization procedures were executed. In fact, some courts doubt whether any minimization directive is required in the order, under the federal

statute or Constitution. *United States v. Dorfman*, 542 F. Supp. 345 (N.D. Ill. 1982). See, *United States v. Vento*, *supra*; *United States v. Cirillo*, *supra* (interpreting identical New York statute); *United States v. Rizzo*, 492 F.2d 443 (2d Cir. 1974), *cert. denied* 417 U.S. 944, 94 S. Ct. 3069, 41 L. Ed. 2d 665; *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied* 417 U.S. 936, 94 S. Ct. 2651, 41 L. Ed. 2d 240 (1974).

In *State v. Kohout*, 198 Neb. 90, 251 N.W.2d 723 (1977), we held that no evidence should be suppressed because of technical irregularities not affecting the substantial rights of the accused. See application of rule in one-judge opinion by Caporale, J., in *State v. Brennen*, 214 Neb. 734, 336 N.W.2d 79 (1983).

In conclusion, this court believes that since the state provisions in § 86-705 are similar to the provisions of § 2518, and since the federal courts have had occasion to consider the specific issue of facial insufficiency of the order, we should conclude that in a wiretap order it is possible to have substantial compliance with § 86-705 despite the absence of minimization language required by § 86-705(6).

We note that the failure to include the required termination language did not prejudice the defendants. We believe that compliance with the minimization requirements was proven at the hearing on the motion to suppress, on the basis of the testimony, affidavits, and logs of the intercepting agents. In this case the evidence adduced at the suppression hearing indicated the police met their obligation to comply with the minimization requirement. Although the police officers were not given written instructions with respect to minimization, the supervising officer testified that the majority of the officers had worked wiretaps before, in which they had been instructed how to minimize. The monitoring officers testified that they were given copies of or had read the wiretap order. Officer Joseph Nepodal

testified he received verbal instructions on minimization. In reviewing the log summaries certain calls were minimized. It is obvious from the evidence minimization procedures were in effect. The next question to address is whether "minimization" occurred as a matter of fact.

Defendants contend improper minimization occurred. Both parties recognize the appropriate standard set out by the U.S. Supreme Court in *Scott v. United States*, 436 U.S. 128, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978). In *Scott* the Court determined that minimization is to be judged on a case-by-case analysis of the reasonableness of the government's conduct in terminating nonpertinent conversations, and whether the agents have in fact conducted the wiretap in such a manner will depend on the facts and circumstances of each case. In *Scott* the Court went on to say, "The statute does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations." *Id.* at 140.

The courts agree that whether the police acted reasonably in a given case is affected by a number of factors, including the nature and scope of an alleged conspiracy, the government's reasonable expectations of the character of the conversations they will be intercepting, and the extent of ongoing judicial supervision over surveillance. See, *United States v. Hyde*, 574 F.2d 856 (5th Cir. 1978); *United States v. Clerkley*, 556 F.2d 709 (4th Cir. 1977), *cert. denied* 436 U.S. 930, 98 S. Ct. 2830, 56 L. Ed. 2d 775 (1978); *United States v. Vento*, 533 F.2d 838 (3d Cir. 1976); *United States v. Daly*, 535 F.2d 434 (8th Cir. 1976).

The courts also agree that at the early stages of the investigation the police have greater leeway to monitor, especially where all the parties to the alleged conspiracies are not known. *United States v. Hyde*, *supra*; *United States v. Chavez*, 533 F.2d 491

(9th Cir. 1976), *cert. denied* 426 U.S. 911, 96 S. Ct. 2237, 48 L. Ed. 2d 837; *United States v. Quintana*, 508 F.2d 867 (7th Cir. 1975).

In the instant case the police had substantial reason to believe others were involved with the defendants in illegal drug trafficking in the Omaha area and that this was not just a "small-time operation," as the defendants contend.

The second factor to look at is the government's reasonable expectations of the character of the conversations to be intercepted. In this case the phones were located in the residences of the two defendants who were thought to be the top Omaha connections in this drug operation. Also, for the public telephone that was tapped, the police stipulated that officers would not intercept any communications from that telephone unless the officers observed Randall Whitmore or persons identified as agents of Randall Whitmore using the telephone.

The third factor is the extent of judicial supervision. In this case it was suggested that there was some evidence that the issuing court was inattentive in its monitoring of the wiretap progress, since the interim reports were not dated by the county attorney and there was no evidence that the authorizing judge ever reviewed these reports during the initial 30-day maximum.

Nevertheless, the applications and affidavits for the November 6 wiretap order and the November 20 extension order were quite detailed in setting out the relevant conversations connected with the drug operations. These affidavits form a sufficient basis to find that adequate judicial supervision had indeed taken place.

Defendants seeking to suppress evidence obtained pursuant to a wiretap because of the failure of the police to comply with minimization requirements must do more than identify particular calls which they contend should not have been intercepted; they must establish a pattern of interception of innocent

conversations which developed over the period of the wiretap. *United States v. Dorfman*, 542 F. Supp. 345 (N.D. Ill. 1982). The trial court concluded there was improper minimization of a number of calls that were not criminal in nature or were improperly included as criminal when the calls related to gambling.

In reviewing the affidavits and logs in this case, it appears that while many calls, on their face, purport to be personal in nature, there is evidence that the calls are of questionable criminal nature because they relate to a trip to Florida to purchase drugs. The trial court specifically stated many legitimate business calls between principals should have been minimized and were not. In response to the officers' contention that the calls were somehow coded, the trial court believed the officers were waiting for the principals to say something detrimental. The officers' contention does indeed seem reasonable, since the affidavits contained in the application for the wiretap order include two informants' claims that the defendant Randy Whitmore's seafood business was a front for a narcotics operation. It was obvious from the log summaries that the defendants were very cautious in discussing certain matters over the phone.

The trial court also objected to the complete interception of gambling-related calls because the intercepting officers never requested an expansion of the order to include gambling calls. Section 86-704(5) states in part: "When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom may be disclosed or used as provided in subsections (1) and (2) of this section."

As *United States v. Dorfman*, *supra*, held, where

agents are properly monitoring a call which turns to criminal activity not covered by the order, they are permitted to continue the interception so long as the conversation was intercepted before a pattern of interception not authorized by the warrant developed. It is clear from the Nebraska statute the initial interception of the gambling calls was valid. It is less clear whether a pattern of interception not authorized by the warrant developed. In reviewing the logs almost all of the gambling calls were very short in duration, and frequently contained drug-related information. The continued interception of the calls was not improper minimization. The gambling calls may have been misleading when labeled as criminal in nature on the reports, but the interception was not improper.

The defendants next argue the court was deceived by the improper inclusion of gambling-related calls labeled as criminal in nature in the interim reports. The trial court itself made the factual finding that the deceptive reports were one of the grounds to suppress evidence derived from the intercepted communications. However, in scrutinizing the evidence, the trial court also noted that the interim reports were not dated by the county attorney, and there is no evidence that "the authorizing judge ever reviewed these reports during the initial 30-day maximum. If he did, the inclusion of calls relating to gambling would have deceived him into believing that the intercept was more effective than it actually was."

The record in this case contains no evidence to indicate the interim reports were relied on by the issuing court. In the absence of evidence which shows the judges relied on deceptive interim reports, the finding by the trial court that the interim reports were a ground for suppression is rejected. Regardless of the absence of information on whether the interim reports were used, the applications and affi-

davits of November 6 and November 20, 1981, constituted partial progress reports.

Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. A totality of the circumstances test is used. *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983); *State v. Strickland*, 209 Neb. 133, 306 N.W.2d 600 (1981). The record does not support the trial court's conclusion that improper minimization occurred, nor does it reveal that the interim reports were improperly relied on. Again we reiterate the rule that no evidence may be suppressed because of technical irregularities not affecting the substantial rights of the accused.

From the record of the trial court it appears that it suppressed the conversations because it found the orders and extension of one of the orders permitting the interception of telephone communications to be faulty. The court was also disturbed by the possible deception which could occur when handling interim reports.

We strongly recommend the suggestion by the trial court that interim reports be dated by the county attorney; that the judge be asked to date and acknowledge receipt of the reports; that the reports include transcripts of criminal calls, or at least some of them; and that a report be made to the court on how the interception is progressing, which may include the total number of calls, the number of those criminal in nature, the number of nonrelevant calls, and the number of calls that have been minimized. If this is done the court will have better control over the interception of communications because it will be better informed to determine if the interception should continue.

However, it is the rule that one who seeks to suppress evidence seized pursuant to a warrant regular on its face has the burden of establishing that the warrant was invalid. *State v. Brennen*, 214 Neb. 734, 336 N.W.2d 79 (1983); *State v. Kohout*, 198 Neb. 90,

251 N.W.2d 723 (1977). The defendants have failed to meet these burdens.

The order appealed from herein is reversed.

REVERSED.

ROBERT L. HANSEN AND MARILYN S. HANSEN, HUSBAND AND WIFE, APPELLANTS, V. DONALD W. HILL AND GAIL HILL, HUSBAND AND WIFE, APPELLEES.

340 N.W.2d 8

Filed November 10, 1983. No. 82-250.

1. **Summary Judgment.** A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered.
2. **Statute of Frauds.** A memorandum, in order to make enforceable a contract within the statute, may be any document or writing, formal or informal, signed by the party to be charged or by his agent actually or apparently authorized thereunto, which states with reasonable certainty (a) each party to the contract either by his own name or by such a description as will serve to identify him, or by the name or description of his agent, and (b) the land, goods, or other subject matter to which the contract relates, and (c) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made.
3. _____. A telegram may constitute a sufficient memorandum under the statute of frauds.
4. _____. A printed name may constitute a sufficient signing under the statute of frauds, provided that it is recognized by the party sought to be charged.

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

Paul J. LaPuzza, for appellants.

John V. McNamara, for appellees.

BOSLAUGH, WHITE, and HASTINGS, JJ., and BROWER and MCGINN, D. JJ.

BROWER, D.J.

This was originally an action in equity in which

the plaintiffs, Robert and Marilyn Hansen, sought specific performance of an alleged land contract as purchasers. Following a default by the defendants, a decree was entered requiring the defendants to perform the sale agreement and convey the real estate to the plaintiffs.

The defendants filed a motion to vacate this judgment on the ground that they had not been properly served. The decree was vacated and they were given leave to file an answer.

The plaintiffs filed a second amended petition, abandoning their prayer for specific performance and seeking damages for breach of contract. After the defendants' demurrer was overruled they filed a motion for summary judgment, with supporting affidavits. The motion was sustained and the petition was dismissed. Upon denial of their motion for new trial, plaintiffs appeal.

The plaintiffs assign as error the sustaining of the motion for summary judgment and the overruling of the motion for new trial, on the ground that there were material issues of fact which existed, and on the ground that the trial court erred in ruling that the contract between the parties did not satisfy the statute of frauds.

This court, on appeal, must review the allegations of the petition, the supporting documents, and the depositions in accordance with the well-established rule that in considering the motion for summary judgment the court must view the evidence in the light most favorable to the party against whom it is directed.

" 'A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered.' " *Wolf v. Tastee Freez Corp.*, 172 Neb. 430, 437, 109 N.W.2d 733, 738 (1961). See, also, *Fay Smith & Associates, Inc. v. Consumers P.P. Dist.*, 172 Neb. 681, 111 N.W.2d 451 (1961).

Upon reviewing the second amended petition, the depositions, and the documents, we find that there are material issues of fact to be resolved and that the defendants were not entitled to judgment as a matter of law.

The defendants listed certain real estate located at 5016 California Street in Omaha, Nebraska, for sale with Real Estate Associates, Inc., and one of its agents, Mark Abboud. The plaintiffs sought to purchase this real estate and submitted a purchase agreement to the defendants' agent through their own real estate agent, Joseph Fabian.

This purchase offer set out a proposal wherein the plaintiffs agreed to pay $130,000 under certain terms to defendants, with possession on or before December 1, 1980, with the closing the same date. This purchase agreement was on a standard form and bears the date of October 10, 1980, with certain earnest money provisions and a place where an acceptance could be inserted on the reverse side by the seller defendants.

This offer to purchase was delivered by Fabian to the defendants' agent, Mark Abboud, who phoned the defendants to discuss the particulars of the proposal.

The defendants sought Abboud's advice as to the next move to make, and orally expressed a counterproposal. At Abboud's suggestion they sent a telegram to him. Although there were apparently two telegrams sent to Abboud, it appears that the telegram dated October 9, 1980, was never conveyed to the plaintiffs or their agent, Fabian. The only telegram of which the plaintiffs had knowledge was dated October 10, 1980, and read:

> "PMS REAL ESTATE ASSOTIATES [sic]
> MARK ABOUD [sic], DLR
> 3540 SOUTH 84
> OMAHA NE 68124
> THIS IS TO CONFIRM MY ACCEPTANCE
> OF OFFER OF $130,000 TOTAL PRICE ON

5Ø16 CALIFORNIA STREET OMAHA NEBRASKA. $35,ØØØ CASH DOWN PAYMENT. 2Ø YEAR AMORIZATION [sic]. 5 YEAR BALLOON NOTE. INTEREST AT 13.59 PERCENT. DECEMBER 1 198Ø MUST BE NEGOTIABLE. WILL MOVE AS SOON AS POSSIBLE

DONALD W. HILL (5Ø16 CALIFORNIA ST OMAHA NE 68132)"

The plaintiffs' agent picked up a copy of this telegram at Abboud's office and conveyed the information to the plaintiffs. Although there is confusion as to the exact date and time, the plaintiff Marilyn Hansen went to Abboud's office and wrote the following on the reverse side of their original proposal: "We accept telegram. Marilyn S. Hansen 10/10/80."

The defendants would appear to have understood the significance of the October 10 telegram, inasmuch as they attempted to withdraw their "acceptance" by sending a telegram to Abboud on or about October 15, 1980, which read:

"MARK ABOUD [sic] REAL ESTATE ASSOCIATES RPT DLY MGM, DLR
SOUTH 84 ST
OMAHA NE
YOUR VERBAL COMMUNICATION VIA TELEPHONE THAT A PARTY WHO MADE AN OFFER ON MY PROPERTY LOCATED AT 5016 CALIFORNIA STREET WILL ONLY HONOR THEIR OFFER IF THEY CAN HAVE POSSESSION BY DECEMBER 1 1980 IS TOTALLY UNACCEPTABLE TO ME AND IS A CLEAR VIOLATION OF THE REQUIREMENTS OF MY LAST TELEGRAM YOU ARE HEREBY NOTIFIED THAT I AM NO LONGER INTERESTED IN SELLING THE PROPERTY THE AGREEMENT HAS NEVER BEEN CONSUMMATED AND SHOULD THEREFORE BE CONSIDERED VOID I AM NO

LONGER INTERESTED IN ANY COUNTER OFFERS FROM THIS SOURCE
DONALD W HILL
5016 CALIFORNIA ST
OMAHA NE 68132"

Abboud conveyed this information to Fabian, and this suit followed upon defendants' failure to convey the property.

When construed in the light most favorable to the plaintiffs, the facts as set forth indicate that there was a genuine issue of fact as to whether the defendants had accepted the plaintiffs' offer to purchase, and whether the defendants' withdrawal of their offer to sell was timely made, considering the notation which had been made on the reverse side of the purchase agreement. "It is not the purpose of the rule, and it must not be so construed, to deprive a litigant of a formal trial where there is a genuine issue of fact to be determined." *Miller v. Aitken*, 160 Neb. 97, 101, 69 N.W.2d 290, 292 (1955); *Healy v. Metropolitan Utilities Dist.*, 158 Neb. 151, 62 N.W.2d 543 (1954).

Neb. Rev. Stat. § 25-1332 (Reissue 1979) provides two things the movant must show. First, that there is no genuine issue of fact in the case, and second, that he is entitled to a judgment as a matter of law.

We now come to the issue of whether or not the telegram dated October 10, 1980, was a writing which was sufficient to satisfy the statute of frauds.

Neb. Rev. Stat. § 36-105 (Reissue 1978) provides: "Contracts for lease or sale of lands; when void. Every contract for the leasing for a longer period than one year, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made."

To satisfy the Nebraska statute of frauds, the contract itself must be in writing or, in the event the contract is oral, there must be a written memoran-

dum of the contract, signed or authenticated by the vendor against whom it is to be enforced.

In *Ord v. Benson*, 163 Neb. 367, 370, 79 N.W.2d 713, 715 (1956), the court stated that a written memorandum will satisfy the statute of frauds. " 'A memorandum, in order to make enforceable a contract within the Statute, may be any document or writing, formal or informal, signed by the party to be charged or by his agent actually or apparently authorized thereunto, which states with reasonable certainty, (a) each party to the contract either by his own name, or by such a description as will serve to identify him, or by the name or description of his agent, and (b) the land, goods or other subject-matter to which the contract relates, and (c) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made.' "

The purchase agreement delivered by the buyers to the sellers' agent was a memorandum sufficient to satisfy the statute of frauds, and the telegram signed by the seller and party to be charged was sufficient under the statute if it contained reference to the terms of the proposal. *Pitek v. McGuire*, 51 N.M. 364, 184 P.2d 647 (1947).

There is substantial authority that a telegram may constitute a sufficient memorandum under the statute of frauds. *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 173 S.E.2d 496 (1970); 72 Am. Jur. 2d *Statute of Frauds* § 300 (1974); 37 C.J.S. *Frauds, Statute of* §§ 175, 176 (1943).

The defendants have relied upon *Brezina v. Hill*, 195 Neb. 481, 238 N.W.2d 903 (1976), and a line of cases dealing with agency relationships between a broker and a seller where, without separate power of attorney or written authority, the broker has signed the sale contract for the owner and attempted to bind the seller. In the case before us no such type of agency is involved. The use by the sellers of a telegram to inform the purchasers of their accept-

ance was merely a means of conveyance of ideas or decision on the part of the principals. The agency created was for no other purpose.

We come now to the question of whether there was a valid subscription. The telegram to which the seller defendant's name has been affixed may be considered as having been signed by the defendant Donald W. Hill within the meaning of the statute of frauds. "The signing of a paper-writing or instrument is the affixing of one's name thereto, with the purpose or intent to identify the paper or instrument, or to give it effect as one's act." *McCall v. Institute*, 189 N.C. 775, 782, 128 S.E. 349, 353 (1925).

This is usually accomplished when a person affixes his name in his own handwriting; in such case the very fact clearly evidences the intent of the signer. Affixing one's handwritten signature, however, is not the only method by which a paper writing may be considered as being signed within the meaning of the statute of frauds. As long ago as Lord Ellenborough's opinion in *Schneider and Another against Norris*, 2 M. & S. 286, 105 Eng. Rep. 388 (1814), it has been recognized that a printed name may constitute a sufficient signing under the statute of frauds, provided that it is recognized by the party sought to be charged. The courts of this country have generally recognized that principle. *Bishop v. Norell*, 88 Ariz. 148, 353 P.2d 1022 (1960); *City of Gary v. Russell*, 123 Ind. App. 609, 112 N.E.2d 872 (1953); *Cummings v. Landes*, 140 Iowa 80, 117 N.W. 22 (1908); *Radke v. Brenon*, 271 Minn. 35, 134 N.W.2d 887 (1965).

The above view has been adopted in the Restatement of Contracts § 210 (1932), which provides that the signature to a memorandum under the statute may be in writing or printed and need not be subscribed at the foot of the memorandum, but must be made or adopted with the declared or apparent intent of authenticating the memorandum as that of the signer.

In *Heffernan v. Keith*, 127 So. 2d 903 (Fla. App. 1961), the court, in answering the defendant's contention that the telegram was not sufficient under the statute because it was not a signed copy, indicated that the defendant's admissions of having sent the telegram amounted to acquiescence.

In the late case of *Hillstrom v. Gosnay*, ____ Mont. ____, 614 P.2d 466 (1980), the court, on facts nearly identical to those confronting the court in this particular case, ruled that a telegram may constitute sufficient written memorandum to satisfy the requirements of the statute of frauds, and also ruled that a typewritten signature on a telegram is proper subscription within the meaning of the statute of frauds, provided that the necessary intent to authenticate is shown.

In view of the fact that there does appear to be a genuine issue of a material fact, the trial court should not have granted summary judgment. For that reason the judgment of the trial court is reversed and the matter remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

WILLIAM C. BIGGER, APPELLANT, V. FREMONT NATIONAL BANK & TRUST COMPANY, A UNITED STATES CORPORATION, APPELLEE.

340 N.W.2d 142

Filed November 10, 1983. No. 82-265.

1. **Summary Judgment.** Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear.
2. **Uniform Commercial Code: Negotiable Instruments: Liability.** Neb. U.C.C. § 3-409(2) (Reissue 1980) does not in any way affect any liability which may arise apart from the instrument itself. The drawee who fails to accept may be liable to the drawer or to the holder for breach of the terms of a letter of credit or any other agreement by which he is obligated to accept. He may be liable

in tort or upon any other basis because of his representation that he has accepted, or that he intends to accept. The section leaves unaffected any liability of any kind apart from the instrument.

3. **Uniform Commercial Code.** Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

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

Craig A. Knickrehm of Nelson & Harding, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

WHITE, J.

This is an appeal from an order of the District Court for Dodge County, Nebraska, on appellee's motion for summary judgment. The trial court in its order found that there was no genuine issue as to any material fact and that the appellee was entitled to a judgment as a matter of law. We reverse and remand the cause for a trial on the merits.

Appellant, William C. Bigger (Bigger), filed his petition against appellee, Fremont National Bank & Trust Company (Fremont National), seeking to recover the sum of $42,928.56, interest, and costs. At the outset we wish to point out and emphasize that the main theory of recovery by the appellant, as clearly demonstrated by the allegations of his petition, was based upon the doctrine of promissory estoppel, and, although it is true that the action involved a check purportedly drawn upon the account of one of the bank's customers and payable to the appellant, the action itself was not brought upon the instrument itself but, rather, upon an alleged subsequent promise made by the bank to Bigger and his

depository bank in Illinois. We summarize the material facts.

Bigger is a farmer and cattle feeder operating a farm located in Biggsville, Illinois. Since 1972, and approximately four times per year, Bigger purchased cattle from Fremont Cattle Company (Fremont Cattle), which was Bigger's primary source of cattle. The dealings between the parties were not unusual until, on March 4, 1980, the normal course of dealing was reversed, and for the first time Bigger sold Fremont Cattle 101 calves and received a check from Fremont Cattle for $42,928.56. The check was signed by Keith Mumma (Mumma). Apparently because he had been dealing with Mumma for so many years, Bigger took no precautions to make sure the check was good before he released his cattle, nor did he make any investigation into the financial standing of Fremont Cattle. He understood that Mumma was a partner of Vance Willard (Willard), who operated Fremont Cattle and who maintained a business checking account at Fremont National. Bigger testified that Mumma had frequently referred to Willard as "his partner." The fact is, however, that Vance Willard, doing business as Fremont Cattle Company, was a sole proprietorship engaged in the cattle order business.

Upon receiving the check Bigger immediately deposited the check in his account at the Bank of Oquawka, Illinois. The check was returned to the Bank of Oquawka 2 weeks later, on March 18, 1980. On that day Bigger and Kenneth Smith, the head cashier of the Bank of Oquawka, telephoned Fremont National. Bigger and Smith simultaneously participated in this conference. A sticker on the returned check indicated that it had been returned because it bore an unauthorized signature (Mumma's signature). A female employee in the bookkeeping department informed them that that was the reason it had been returned. She also informed them that there were funds in the account sufficient to cover

the check. Then, according to Bigger's testimony, "She said well, I'll tell you what; you send the check back through, and I'll get ahold of Keith or Mr. Willard and we'll get it taken care of and it will be all right." Kenneth Smith supported Bigger's testimony that the Fremont National employee told them to redeposit the check and that the check would be honored. In his deposition Smith testified as follows: "Q So you talked to somebody. And what did you say to them when they got on the phone? A Well, I asked her what the score was, and she assured us to send it back through and it would be taken care of. . . . Q Well, how was the decision arrived at to send the check back? A Well, she assured us to send it back. Q She told you to send it back? A Um-hmm. Q So you did? A (Nods head.) Q And that's all you remember about the call—she told you to send it back? A Yes, and it would be taken care of. Q And that it would be taken care of? A Um-hmm."

As suggested by the bank, Bigger then sent the check through again. The check was returned a second time, approximately 2 weeks later. A note from Fremont National attached to the check indicated that it was returned unpaid for the reason "See-maker-replaced with another ck." Shortly after the return of the check the second time, Bigger was informed that Fremont Cattle was in a Chapter 11 bankruptcy. There is no indication in the record as to when the petition in bankruptcy was filed.

Bigger then filed his petition against Fremont National, the crux of his claim being that the bank's representations to him should have been reasonably expected to and actually did induce forbearance by Bigger as to any legal rights which were available against Willard, doing business as Fremont Cattle Company, prior to the petition in bankruptcy by Willard.

It is not the purpose of a summary judgment proceeding to determine how a case should be decided

but, rather, whether there are any controverted material questions of fact involved which require a trial on the merits. Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear. *Metro. Tech. Community College v. South Omaha Industrial Park*, 207 Neb. 472, 299 N.W.2d 535 (1980).

Our investigation and analysis of this case, therefore, must focus upon the question of whether there were any material fact questions which should have been submitted at trial upon the merits before a jury or the court acting as the trier of facts.

Fremont National's principal defense is based upon the assumption that this action is brought on the check itself. Relying on Neb. U.C.C. §§ 3-409 and 3-410(1) (Reissue 1980), they contend that a check does not of itself operate as an assignment of any part of the funds in the hands of the drawee available for its payment, and the bank is not liable to the holder unless and until it accepts or certifies the check. They further contend that an acceptance must be in writing.

In his brief, appellant acknowledges the correctness of the above rules but points out that there exist a number of separate bases of liability of a bank which arise apart from the instrument itself, including the doctrine of promissory estoppel. Section 3-409(2) provides: "Nothing in this section shall affect any liability in contract, tort or otherwise arising from any letter of credit or other obligation or *representation* which is not an acceptance." (Emphasis supplied.) Comment 2 to § 3-409 of the Uniform Commercial Code provides in part that "[t]he drawee is not liable on the instrument until he accepts; but he remains subject to any other liability to the holder." Comment 3 to this section of the Uniform Commercial Code provides: "Subsection (2) is new. It is intended to make it clear that this section does not in any way affect any liability which

may arise apart from the instrument itself. The drawee who fails to accept may be liable to the drawer or to the holder for breach of the terms of a letter of credit or any other agreement by which he is obligated to accept. He may be liable in tort or upon any other basis because of his representation that he has accepted, *or that he intends to accept.* The section leaves unaffected any liability of any kind apart from the instrument." (Emphasis supplied.)

Neb. U.C.C. § 1-103 (Reissue 1980) provides: "Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principle [sic] and agent, *estoppel, fraud, misrepresentation,* duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." (Emphasis supplied.)

In *Valentine Production Credit Assn. v. Spencer Foods, Inc.*, 196 Neb. 119, 241 N.W.2d 541 (1976), we held that where the pleadings and record present material questions such as payment, estoppel, fraud, and delay, all as contemplated by § 1-103, summary judgment is not available. Also, in *North Valley Bank v. National Bank of Austin*, 437 F. Supp. 70 (N.D. Ill. 1977), the court found that the plaintiff had stated a cause of action where a letter of credit had been issued to the plaintiff, which letter required presentment by a date certain. The plaintiff did make demand for payment pursuant to the letter of credit prior to the expiration date, and plaintiff telephoned defendant to determine if plaintiff's demand had been received and whether or not the draft was in order. Plaintiff stated that defendant advised plaintiff that the correspondence had been received from the plaintiff and that the draft was not technically correct, but that the defendant would honor it. The court held that § 1-103 of the U.C.C. does make the principles of waiver and estoppel ap-

plicable to transactions falling under the U.C.C. Section 1-103 of the Illinois Uniform Commercial Code is identical to § 1-103 of the Nebraska Uniform Commercial Code.

The petition clearly states a cause of action which, if proved to the satisfaction of a trier of fact, would entitle the appellant to relief.

A review of the record reveals that there are numerous disputed questions of fact. Both in its pleadings and by the testimony of its witnesses, Fremont National denies almost every material allegation contained in Bigger's petition.

Since we conclude that a summary judgment should not have been granted, we need not decide whether the pleadings in this case were sufficiently broad to encompass the issue of whether or not Fremont National complied with its midnight deadline as provided in Neb. U.C.C. § 4-302 (Reissue 1980). Suffice it to say, if there are any deficiencies that should be corrected or any other issues which should be explored on a retrial, there will be an opportunity to do so by appropriate amendment to the pleadings.

REVERSED AND REMANDED.

BOSLAUGH, J., dissenting.

To the extent that the opinion of the court implies that the plaintiff may recover against the bank on a theory of contract or promissory estoppel based upon a conversation with an unidentified female employee in the bookkeeping department of the bank, I respectfully dissent.

"The usual assistants in a bank—tellers, bookkeepers, and others—act under special or express authority, and their acts bind their bank only when they are within the line of authority." 9 C.J.S. *Banks and Banking* § 211 at 461 (1938). There is no allegation of special or express authority in the petition, and no facts are alleged which would permit a finding of presumed authority to bind the bank.

I do not agree that the petition filed in this case

clearly stated a cause of action which, if proved, would entitle the plaintiff to relief.

HASTINGS, J., joins in this dissent.

LOIS NIESEN, WIDOW OF DONALD J. NIESEN, DECEASED, APPELLEE, V. LOGAN COUNTY CO-OP OIL ASSOCIATION ET AL., APPELLANTS.

340 N.W.2d 146

Filed November 10, 1983. No. 82-651.

1. **Workmen's Compensation: Evidence.** To recover compensation the evidence must show that the employee died as a result of an accident arising out of and in the course of his employment.
2. **Workmen's Compensation: Proof.** The burden of proof is on one asserting death from other than natural causes to establish such fact by a preponderance of the evidence.
3. _____: _____. When an employee dies suddenly and mysteriously while engaged in his work, the burden of proof that his death resulted from an accident arising out of the employment rests upon the claimant for compensation, and such proof must amount to something more than a mere guess.
4. **Workmen's Compensation: Evidence.** Where the testimony gives rise to conflicting inferences of equal degree of probability such that a choice between them is a matter of conjecture, a workmen's compensation award cannot be sustained.
5. **Expert Witnesses.** The value of the opinion of an expert witness is dependent on, and no stronger than, the facts on which it is predicated. Such an opinion has no probative force if the assumptions upon which it is based are shown not to be true.
6. _____. An expert witness should not be allowed to express an opinion on an inadequate basis so that it amounts to a mere guess or conjecture.
7. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the compensation court will not be set aside on appeal unless clearly wrong. However, where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact do not support the award, this court must modify, reverse, or set aside the award.

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

Stephen Kay of Kay & Kay, for appellants.

Paul D. Merritt, Jr., and William P. Mueller of McGinley, Lane, Mueller, O'Donnell & Merritt, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

This is a proceeding under the Nebraska Workmen's Compensation Act arising out of the death of Donald J. Niesen, an employee of the Logan County Co-op Oil Association. The plaintiff, who is the widow of the deceased employee, recovered an award following the hearing before a single judge of the compensation court and, on rehearing, before a three-judge panel. The defendants have appealed.

The record shows that on September 8, 1979, the deceased was working in one of the service bays of the station. Niesen and a fellow employee had repaired a tire which had been removed from a pickup truck. The wheel on which the tire was to be mounted had a two-piece rim. The tire had been placed on the wheel and the separate rim installed on the wheel so that the tire was ready to be inflated. The manager of the co-op, Lauren Blincow, told Niesen to put the tire into the tire cage and inflate it. As Blincow left the service bay area, he saw Niesen reach for the airhose. Blincow then went to his office to open some mail.

Vernon J. Brosius, a customer of the station, entered the service bay area several minutes later. He saw Niesen lying on his back on the floor near the tire cage. According to Brosius, Niesen's forehead was bleeding from a small laceration, but his color appeared to be normal. Brosius went to the office and notified Blincow that Niesen was lying on his back on the floor in the service area. Blincow ran out to the bay area and found Niesen unconscious, but doing some "strained type moving." Blincow testified that Niesen was breathing at that

time but seemed to be straining for breath. Niesen's color was "bluish," and his face was bloated or puffy. Brosius summoned an ambulance, which arrived within about 15 minutes.

Blincow tipped Niesen's head back so that Niesen's air passages would be loosened, and began to apply pressure to Niesen's chest. Niesen groaned loudly three or four times. Brosius simultaneously gave Niesen mouth-to-mouth resuscitation. Brosius and Blincow then exchanged tasks. Blincow testified that as he blew air into Niesen's mouth, he could see Niesen's chest inflate. Niesen did not commence breathing on his own.

Niesen was taken by ambulance to a hospital at North Platte, Nebraska. When the ambulance personnel arrived, they continued the chest massage begun by Blincow and Brosius. During the trip to North Platte, they administered oxygen. In the emergency room Niesen received cardiopulmonary resuscitation (CPR). All attempts at resuscitation failed and Niesen was pronounced dead.

Blincow testified that in order to assist Niesen he had to kick some tools away from where Niesen was lying. Blincow stated that he noticed that Niesen's glasses were on the floor and had been broken at the right bow. Blincow also testified Niesen had a laceration about "three-quarters of an inch to an inch long" over his right eye, which was oozing blood. Blincow stated that Niesen did not have the cut or the broken glasses when he came to work that morning.

The tire which was in the cage had been inflated to an air pressure of 65 pounds and was perfectly seated on the rim. Later that afternoon, the wheel and tire were installed on the truck and the air pressure was reduced to 60 pounds.

In order for the plaintiff to recover compensation, the evidence must show that Niesen died as a result of an accident arising out of and in the course of his employment. It is undisputed that the deceased was

in the course of his employment when he died. The defendants contend that the evidence does not show that Niesen died as a result of an accident arising out of his employment. The burden of proof is on one asserting death from other than natural causes to establish such fact by a preponderance of the evidence. *Marasco v. Fitzpatrick*, 173 Neb. 272, 113 N.W.2d 112 (1962).

Findings of fact made by the compensation court will not be set aside on appeal unless clearly wrong. However, where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact do not support the award, this court must modify, reverse, or set aside the award. Neb. Rev. Stat. § 48-185 (Reissue 1978); *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981).

The present case involves an unexplained death which occurred while the employee was at work. When an employee dies suddenly and mysteriously while engaged in his work, the burden of proof that his death resulted from an accident arising out of the employment rests upon the claimant for compensation, and such proof must amount to something more than a mere guess. *Shamp v. Landy Clark Co.*, 134 Neb. 73, 277 N.W. 802 (1938), quoting *Mullen v. City of Hastings*, 125 Neb. 172, 249 N.W. 560 (1933). See, also, *Mook v. City of Lincoln*, 143 Neb. 254, 9 N.W.2d 184 (1943); *Marasco v. Fitzpatrick, supra.*

Where the testimony gives rise to conflicting inferences of equal degree of probability such that a choice between them is a matter of conjecture, a workmen's compensation award cannot be sustained. *Scott v. Young Men's Christian Assn.*, 195 Neb. 746, 240 N.W.2d 587 (1976); *Pocevicius v. Armour & Co.*, 185 Neb. 668, 178 N.W.2d 265 (1970); *Husted v. Peter Kiewit & Sons Constr. Co., supra.*

The evidence strongly suggests that Niesen was dead at the time he was removed from the station to be taken to North Platte. The ambulance attend-

ants who administered CPR at the station and oxygen during the trip to North Platte testified that they did not observe Niesen to breathe and could obtain no pulse. It is undisputed that he was dead on arrival at the hospital in North Platte. No autopsy was conducted on Niesen's body.

Niesen was attended by Dr. Cleve Hartman at the emergency room in the hospital at North Platte. Dr. Dwight Larson, who had been Niesen's physician for a number of years, was called into the emergency room but did not examine or treat Niesen because Dr. Hartman was already attempting to resuscitate Niesen. Dr. Hartman had seen Niesen as a patient several times in the year before Niesen's death. Dr. Hartman stated that Niesen smoked a pack of cigarettes a day, and an examination by Dr. Hartman in 1978 revealed that Niesen had emphysema. Dr. Hartman had never conducted an EKG or treadmill test on Niesen. Dr. Hartman stated that upon arrival at the hospital Niesen was very cyanotic and had the small laceration on his face. Dr. Hartman testified over objection that, in his opinion, death was caused when Niesen injured his head and became unconscious. His tongue then fell back and obstructed his airway, leading to death from lack of oxygen. In his deposition, offered by the plaintiff, Dr. Hartman admitted that his opinion was speculative.

Dr. Larson testified from his records that although Niesen's mother was a diabetic and his father had died at age 76 from heart trouble, Niesen did not exhibit symptoms of diabetes or heart disease while under Dr. Larson's care.

Dr. Larson further testified that when Niesen arrived at the hospital, his color was darkly cyanotic. Niesen had a "small, one-inch laceration" over his right eye, and the area around the laceration was puffy and swollen. X-rays of Niesen's skull revealed no bone fracture or the presence of a foreign body. Dr. Larson testified over objection that, in his opin-

ion, Niesen died of an accidental injury to the head. Dr. Larson, who prepared the certificate of death which listed the immediate cause of death as respiratory failure as a result of upper airway obstruction by the tongue due to a cerebral concussion, did not examine Niesen in the emergency room.

Dr. Robert Sidner, an internist, testified as an expert witness for the defense. In response to a hypothetical question he stated that he did not believe that death was caused by an upper respiratory obstruction. Dr. Sidner, based upon the facts set forth in the hypothetical question, ruled out upper respiratory obstruction as a cause, for three reasons. First, Niesen was initially observed by Blincow to be breathing. Secondly, it would have been impossible for Niesen to groan if his airway was obstructed, the passage of air over the vocal cords being necessary to make such sounds. Lastly, Dr. Sidner stated that Niesen's chest would not have inflated if his airway was blocked. Dr. Sidner felt that the death was caused by ventricular fibrillation. This condition causes an immediate loss of consciousness and death within 3 to 5 minutes if not immediately treated. Dr. Sidner stated that coronary artery disease is usually responsible for such an attack, but in 30 percent of the cases no coronary artery disease is found in post mortem examination. He felt that Niesen exhibited several "risk factors" predisposing Niesen to such an attack.

The mortician who prepared Niesen's body for burial testified that Niesen's body did not present the difficulty often present in embalming coronary victims. The mortician stated that it is often necessary to wash out a great number of clots from the vascular system of a coronary victim in order to inject embalming fluid.

Richard Large, an accident reconstruction engineer called as a witness by the plaintiff, testified that a head injury could have been caused by striking an inflated tire with a hammer. The rebound

would cause the injury. He testified that in this case it would be reasonable to assume that the injury occurred in this manner. Two hammers are shown in photographs taken of the bay area on September 10, 1979, 2 days after the accident.

Although it is customary to use a hammer to seat the rim on the wheel preparatory to inflating the tire, there was no testimony that hitting the tire with a hammer is customary when inflating a tire. In fact, Blincow testified that to do so is dangerous, that it is not a customary procedure, and that the employees were instructed not to strike inflated tires with a hammer.

The plaintiff's theory of the case is that the compensation court could find that Niesen died as a result of respiratory failure following an injury to his head. The problem lies in the fact there is no evidence to show what caused the injury to his head, and there was no sufficient foundation for the medical opinions that Niesen died from an obstruction of the airway.

The value of the opinion of an expert witness is dependent on, and no stronger than, the facts on which it is predicated. Such an opinion has no probative force if the assumptions upon which it is based are shown not to be true. *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979); *State v. Johnson*, *ante* p. 391, 338 N.W.2d 769 (1983). An expert witness should not be allowed to express an opinion on an inadequate basis so that it amounts to a mere guess or conjecture.

No one saw the "accident," if one occurred, and there is no direct evidence as to how it may have happened. There is no evidence that Niesen was using a hammer while inflating the tire, and no evidence that it was customary to hit an inflated tire with a hammer. In fact, it is considered dangerous to do so. Although tools were found around the body, and hammers were present in photographs taken 2 days later, this does not give rise to an infer-

ence that, in the few minutes of Blincow's absence, Niesen inflated the tire, picked up a hammer and hit the tire, and was injured by the rebound. So far as the cross-peen hammer used by Large in his reconstruction demonstration is concerned, the evidence is that the particular hammer was not at the station on the day that Niesen died. The fact that the inflated tire was perfectly seated on the rim gives rise to an inference that there was no need, however dangerous, to use a hammer.

Two conflicting medical opinions as to cause of death were given: one that it was caused by a head injury which resulted in an airway obstruction; the other, that it was caused by ventricular fibrillation. Neither opinion was supported by facts making one a more likely cause than the other. Moreover, the opinion advanced by Dr. Hartman and Dr. Larson was not supported by the uncontradicted evidence as to what happened at the station. That evidence directly contradicts the conclusion of these physicians.

The evidence is undisputed that Niesen was breathing when Blincow arrived at the scene. We further note that Blincow cleared Niesen's air passages and heard Niesen groan several times. While administering artificial respiration, Blincow saw Niesen's chest inflate. This evidence indicates that Niesen's airway was not blocked. Moreover, we note that the time interval between the time Niesen was last seen in the bay area and the time when he was found and aid was administered was very short, such that it is extremely doubtful he could have suffocated from an obstruction of the airway. We note also that Niesen was given oxygen by the ambulance attendants.

The plaintiff argues that this case is similar to *Scott v. Young Men's Christian Assn.*, 195 Neb. 746, 240 N.W.2d 587 (1976), in which an award of benefits was affirmed. In that case the compensation court concluded that death was caused by accidental drowning rather than by a heart attack which

caused the decedent to fall into a pool. *Scott* differs from the present case in that there was considerable evidence to suggest that Scott accidentally fell into the pool. In the present case there is no evidence to suggest that Niesen was using a hammer and was accidentally hit by a rebound.

The present case is factually similar to *Marasco v. Fitzpatrick*, 173 Neb. 272, 113 N.W.2d 112 (1962). In that case an electrician who had been installing a new electrical service was found unconscious, with a bloody nose. An autopsy was inconclusive as to the cause of death. The claimant sought benefits, arguing that the decedent was electrocuted when he used a screwdriver to remove a plug from an energized drill. We said: "There is no evidence in this record that the decedent even had a screwdriver with him in the basement. The testimony of Washka [coemployee of decedent] is that his personal tools were outside.

". . . The plaintiff's theory in effect requires a finding, without a scintilla of evidence, that the drill was connected and that the decedent, an electrician, did one or more acts which no reasonably prudent electrician would do while a drill was energized." *Id.* at 280, 113 N.W.2d at 117.

We conclude that the evidence upon which the award was based was speculative and insufficient to sustain a finding that the deceased died as the result of an accident arising out of his employment.

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

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent in the instant case. It appears to me that this case presents purely a question of fact which the three-judge workmen's compensation panel resolved in favor of the appellee. The majority has determined to reject the appellee's experts on the basis that the conclusions reached by Dr. Larson have no basis. In fact, the court substi-

tutes its own "expert testimony" for that of the appellee's experts when it concludes that because Niesen's chest was seen to inflate when Blincow administered artificial respiration, this indicates that the airway was not blocked, such as to have caused Niesen's death. That may be the case, but there is no evidence in this record to support that fact. We should not be substituting our expertise for that of the experts called by the parties.

I would have concluded that, this being a fact question resolved in favor of the appellee, it should be affirmed.

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

BANK OF VALLEY, A CORPORATION, APPELLEE, V. WILMER H. MATTSON, APPELLANT.

339 N.W.2d 923

Filed November 10, 1983. No. 82-673.

1. **Directed Verdict.** A motion for directed verdict is to be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Fraud.** The material elements of a fraudulent misrepresentation are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else was made recklessly; that the representation was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and that such party did, in fact, rely upon the misrepresentation and was induced thereby to act to his injury or damage.
3. _____. One is justified in relying upon a representation made to him as a positive statement of fact, where an investigation would be required to discover its falsity.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded for a new trial.

David J. Lanphier of McGill, Koley, Parsonage & Lanphier, P.C., for appellant.

Richard J. Butler of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

The Bank of Valley, plaintiff below and appellee in this court, sued Wilmer H. Mattson, defendant-appellant, on a promissory note issued to it by Mattson. Mattson counterclaimed, praying, inter alia, that his note be reformed such that it be between the bank and its former president, Peter Heintzelman. Mattson appeals from the order of the trial court which, at the close of defendant's evidence, directed a verdict against him on the bank's petition and dismissed his counterclaim. We reverse and remand for a new trial.

Mattson's single assignment of error is that the trial court improvidently directed a verdict for the bank.

The trial court's actions must be tested in accordance with the rule that a motion for directed verdict is to be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *In re Estate of Thompson*, 214 Neb. 899, 336 N.W.2d 590 (1983).

As presented by the defendant's evidence, the facts are that in the early part of January 1977 Heintzelman approached Duane Shunk, a Valley businessman and longtime customer of the bank, and asked if Shunk could help Heintzelman raise money. Heintzelman told Shunk he needed $75,000 to clear up his personal financial problems and that

he could repay the loan as soon as he received his share of his deceased mother's estate. He represented to Shunk that he was to receive a share of the proceeds of the sale of some farmland which was an asset of the estate. Shunk then approached Don Rogert, another Valley businessman, and Mattson, a onetime Valley businessman, and told them of Heintzelman's difficulty. Eventually, the three of them agreed to help by lending Heintzelman $25,000 each.

On February 22, 1977, Rogert and Shunk went to the bank and executed promissory notes in its favor. Shunk executed a $25,000 note, and Rogert, in his capacity as an officer of Lake Aero, Inc., executed a $50,000 note. They then gave Heintzelman a $25,000 and a $50,000 check, respectively. In return, Heintzelman executed his personal promissory notes to Rogert and Shunk.

The next day, Mattson, who had been out of town on the 22d, went to the bank, signed a $25,000 note in its favor, gave Heintzelman a $25,000 check with the payee designation blank, and received Heintzelman's note for $25,000. Although the payee designation on the check was left blank, the funds were intended to be disbursed to Rogert or Lake Aero, Inc., in order to reduce Rogert's $50,000 debt to $25,000 and thereby leave Shunk, Rogert, and Mattson each in the position of being owed $25,000 by Heintzelman and each owing $25,000 to the bank.

At the time Heintzelman approached Shunk he was indebted in the amount of nearly $350,000. He had, as coexecutor of his mother's estate, mortgaged farmland held by the estate to secure loans to the estate. He had also loaned money to the estate in his role as bank president and borrowed it in his role as coexecutor. These loans were in excess of the bank's legal lending limit, and Heintzelman was under pressure from the bank to reduce that indebtedness. Proceeds from these loans to the estate were transferred to Heintzelman's personal account

and were then used for his personal affairs, in particular to cover margin calls resulting from heavy losses in the commodities market.

On February 23, 1977, after the funds of Shunk, Rogert, and Mattson had been received, Heintzelman transferred approximately $74,000 to the bank in order to reduce the estate's indebtedness to $38,000, well within the bank's legal lending limit. On February 25, 1977, after a meeting with Bob Pease, then vice president of the bank, Kermit Wagner, who was heavily involved in managing the bank's affairs, asked for and received Heintzelman's resignation.

On March 18, 1977, a meeting was held among Pease, who eventually replaced Heintzelman as president of the bank, and the three debtors of the bank, Shunk, Rogert, and Mattson. At that meeting the three debtors were requested to sign a statement absolving the bank of any liability. They refused. At this meeting Mattson, feeling bound to Rogert, instructed that his $25,000 check be completed to reflect Lake Aero, Inc., as payee.

No payment from Heintzelman has been received by Mattson on Heintzelman's $25,000 note to him.

The relevant provision of the Uniform Commercial Code governing recovery in a suit based upon a promissory note is Neb. U.C.C. § 3-307 (Reissue 1980), which provides in pertinent part: "(2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.

"(3) After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course."

It is clear from the record that the bank produced Mattson's note and that the genuineness of Mattson's signature is not at issue. It is similarly clear that the bank is a "holder" as that term is defined by

Neb. U.C.C. § 1-201(20) (Reissue 1980). A "holder" is one "who is in possession of . . . an instrument . . . issued or indorsed to him or to his order or to bearer or in blank." Once the bank has produced the note and established that it is a holder, it is entitled, under § 3-307(2), to recover unless Mattson establishes a defense. If Mattson establishes a defense, then the bank, in order to prevent the success of such defense, has the burden, under § 3-307(3), of establishing that it is a "holder in due course."

Neb. U.C.C. § 3-302 (Reissue 1980) defines a holder in due course as a holder who takes the instrument for value, in good faith, and without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

Neb. U.C.C. § 3-305 (Reissue 1980) provides that a "holder in due course . . . takes the instrument free from . . . all defenses of any party to the instrument with whom the holder has not dealt . . . ."

In *Bank of Valley v. Shunk, ante* p. 25, 337 N.W.2d 118 (1983), a case arising from the same transactions involved herein, this court held that any fraud by the bank's president, Heintzelman, is attributable to the bank. Therefore, assuming, but not deciding, that the bank is a holder in due course, it nonetheless takes Mattson's note subject to any defenses Mattson may have. This is so because, having ratified the actions of its president, the bank is deemed to have dealt with Mattson. The only question left for our review, therefore, is whether Mattson presented enough evidence, if believed, to establish a defense under § 3-307(2).

The material elements of a fraudulent misrepresentation are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else was made recklessly; that the representation was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and that such party did, in fact, rely upon the misrepresentation and

was induced thereby to act to his injury or damage. *Flakus v. Schug*, 213 Neb. 491, 329 N.W.2d 859 (1983); *Gitschel v. Sauer*, 212 Neb. 454, 323 N.W.2d 93 (1982).

Sections 531, 533, and 551 of the Restatement (Second) of Torts (1977) are helpful in the analysis of the situation presented by this case. Section 531 provides at 66: "One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced."

Section 533 provides at 72-73: "The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved."

Section 551 provides at 119: "(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

"(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

"(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

"(b) matters known to him that he knows to be

necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

"(c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

"(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

"(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts."

The jury could well find from Mattson's evidence that the bank's president, Heintzelman, perpetrated a fraud upon Mattson. Heintzelman represented that $75,000 would clear up his financial condition, when he was in fact $350,000 in debt. He represented that the estate of his mother would be settled and include the proceeds of the sale of farmland, which was in fact already subject to a mortgage to the bank. While Heintzelman denied making these representations, evidence that he did make them was presented. As such, a question of fact was created for the jury to resolve.

The bank argues that even if there were fraudulent misrepresentations involved, Mattson's reliance upon them was not justified. It contends that Mattson had a duty to investigate. This duty has been defined as one of ordinary prudence. *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982); *Department of Banking v. Keeley*, 182 Neb. 645, 156 N.W.2d 803 (1968). Contrary to the bank's argument, this court has stated that one is justified in relying upon a representation made to him as a positive statement of fact, where an investigation would be required to discover its falsity. *Fricke v. Hart*,

206 Neb. 590, 294 N.W.2d 737 (1980); *English v. Bruin Engineering, Inc.*, 201 Neb. 791, 272 N.W.2d 753 (1978). Such investigation would have been required here; thus, Mattson was entitled to rely upon the representations made to him by Heintzelman through Shunk.

The bank also argues that Mattson will suffer no damage until Heintzelman fails to repay the note Heintzelman issued to Mattson and that any claim of injury is speculative, since Mattson has not attempted to collect the $25,000 from Heintzelman.

The plain fact of the matter is that if fraud was perpetrated on Mattson and but for the fraud he would not have entered into the transaction, he would not be in the position of owing $25,000 to the bank. This injury is not speculative, but very real. If Mattson prevails in his attempt to avoid liability to the bank, then the consideration for the note from Heintzelman to him has failed, and Mattson's future attempts to collect on that note could be met by a failure of consideration defense. See *Buffalo County v. Richards*, 212 Neb. 826, 326 N.W.2d 179 (1982).

When one considers the facts in a light most favorable to Mattson, it is clear that questions of fact were created, and if the jury believed Mattson's version, he was entitled to prevail on his defense. As such, the trial court's direction of a verdict in the bank's favor was erroneous and must be reversed. The cause is remanded for a new trial.

We next comment on a procedural matter. Following oral argument, counsel for Mattson attempted to augment his presentation by a letter directed to the members of this court. As correctly observed by counsel for the bank, our rules do not provide for such a procedure, and it is hereby disapproved. Accordingly, the letter of Mattson's counsel is quashed.

REVERSED AND REMANDED FOR A NEW TRIAL.

FRANK T. NERUD, APPELLEE, V. HAYBUSTER MANUFACTURING, INC., APPELLANT, AND BRIDGEPORT EQUIPMENT CO., APPELLEE. FRANK T. NERUD, APPELLEE, V. HAYBUSTER MANUFACTURING, INC., AND BRIDGEPORT EQUIPMENT CO., APPELLANTS.

340 N.W.2d 369

Filed November 10, 1983. Nos. 82-716, 82-717.

1. **Appeal and Error.** Errors assigned but not argued will generally not be considered on appeal.
2. _____. This court will not consider generalized and vague assertions of error which do not advise as to the issues submitted for decision.
3. **Judgments: Appeal and Error.** Findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In such a circumstance it is not within our province to resolve conflicts in or to weigh the evidence; if there is a conflict in the evidence, this court will review the judgment rendered and will presume that controverted facts were decided in favor of the successful party.
4. _____: _____. A proper judgment will not be reversed even if the trial court did not give the right reason for its rendition; a trial court's judgment is to be affirmed if the evidence sustains any theory of recovery pled by the plaintiff, irrespective of which theory the trial court relied upon.
5. **Products Liability: Negligence.** In an action for negligent manufacture an inference of negligence arises from proof that a defect existed at the time of manufacture.
6. _____: _____. The plaintiff in a negligence case must, in order to prove that a particular product is defective in its design, show both that the product presented an unreasonable risk of danger and that the manufacturer failed to exercise reasonable care in adopting its design.
7. **Products Liability: Words and Phrases.** A product is "unreasonably dangerous" when it has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics.
8. **Products Liability: Strict Liability.** In a strict liability in tort case, the plaintiff, in order to prove that a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer.
9. **Contracts: Warranty.** A warranty that goods shall be merchant-

able is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Case No. 82-716 reversed and remanded for dismissal. Case No. 82-717 affirmed in part, and in part reversed and remanded for dismissal.

John W. Ballew, Jr., of Raymond, Olsen, Ediger & Ballew, P.C., for appellant Haybuster Manufacturing, Inc.

Wright, Simmons & Selzer, for appellant Bridgeport Equipment Co.

James W. Ellison of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellee.

WHITE and CAPORALE, JJ., and BRODKEY, J., Retired, and BLUE, D.J., and COLWELL, D.J., Retired.

CAPORALE, J.

These consolidated appeals arise from combined bench trials of suits resulting from the destruction by self-generated fires of two haystacking machines. In the first case the trial court entered judgment in favor of the plaintiff purchaser, Frank T. Nerud, against the defendant manufacturer Haybuster Manufacturing, Inc., and in favor of the other defendant, the seller Bridgeport Equipment Co., on its cross-claim against Haybuster. In the second case the trial court entered judgment in favor of Nerud against both Haybuster and Bridgeport and in favor of Bridgeport on its cross-claim against Haybuster. For the reasons hereinafter discussed we reverse and remand and direct dismissal of the first case, and in the second case we reverse the judgment for Nerud against Haybuster and remand and direct dismissal of the action as between the two of them, but affirm the judgment for Nerud against Bridgeport. No appeal was taken by Haybuster of the judgment against it in favor of Bridgeport.

Nerud, a Morrill County farmer, purchased a "Stack-Eze" model 1800B haystacking machine, manufactured by Haybuster, from Bridgeport in November of 1976. The machine was designed to be towed behind a tractor, collect previously cut plantings, and compact them into 5- to 6-ton haystacks.

On September 6, 1979, while Nerud was using the stacker, a fire broke out near the top of the machine's conveyor. Nerud was unable to douse the fire and the machine was destroyed. On the morning of September 8, 1979, Nerud took delivery of an identical model "Stack-Eze" from Bridgeport. This machine had been used previously to gather about 40 stacks and was therefore sold to Nerud as a demonstrator. Nerud immediately put that machine to its intended use, and by the afternoon of the same day of delivery it too was consumed by fire.

On September 11, 1981, Nerud brought two lawsuits against Haybuster and Bridgeport. In each petition Nerud alleges breach of express and implied warranties, negligent design, construction, and dealer preparation, and strict liability for producing and marketing a defective product. The first suit, case No. 82-716 herein, concerns the first fire, involving the machine purchased in 1976. The second, case No. 82-717, is based on the second conflagration.

Bridgeport cross-claimed against Haybuster for indemnification in both cases.

At trial both Nerud and his expert witness, Richard Crawford, testified that the apparent cause of each fire was the overheating of a bearing on the conveyor shaft, which ignited the hay being gathered. The bearings which failed were in identical locations in each machine. Crawford further testified that the overheating was due to undersized conveyor assembly shafts. The design called for a 1.5-inch shaft to turn within a 1.5-inch bearing. Crawford testified that he measured the shafts on both machines and found them both to measure 1.485 inches, .015 inches undersized. According to him,

the use of undersized shafts caused a high degree of shaft deflection, placing a heavy load on the bearings; as a result, the bearings failed prematurely. The failure of the bearings caused the generation of heat in excess of 1,700° Fahrenheit, up to 2,600° Fahrenheit, resulting in the fires. Crawford testified that other than the undersized shafts, he knew of no other improper assembly.

In the courtroom Haybuster's expert witness, Henry Kucera, measured the two shafts with a micrometer and demonstrated that Crawford's measurements were wrong. The in-court measurements were taken at two points on each shaft. The shaft from the first machine was found to measure 1.500 inches at one end and 1.499 inches at the other. Kucera attributed this .001 undersizing at the latter point to the repair efforts of Nerud, who had admitted using a torch to replace a bearing on this end of the shaft. On the shaft from the second machine, he found it to measure 1.501 and 1.500 on each end. All the in-court measurements taken at points on the shafts which were untouched by Nerud's repair efforts indicated that the shafts were not impermissibly undersized, according to the evidence of industry standards for 1.5-inch shafting introduced by both parties.

The remainder of Nerud's evidence of negligence dealt with the design of the machine. Crawford testified that the haystacker was designed by a trial-and-error method and that since there were no "layout drawings," there was, in essence, no design to the machine. He contended that Haybuster just "assembled a bunch of parts." He did not, however, state in what manner, if any, the method of developing the machine proximately caused the fires.

Crawford also opined that the use of four fixed bearings on the conveyor shaft was a design to be avoided because of the strong potential for bearing overload due to misalignment. Again, however, there was no testimony that the use of the fixed

bearings caused the fires. In fact, the trial judge specifically asked Crawford: "Well, isn't it a fact that because combustible material is so close to the bearing it's causing the problem of why we're here in court today?" Crawford retorted: "No. I think it's because of the high heat that's generated." That is, the high heat was thought by Crawford to have been generated because of the allegedly undersized shafts, which were in fact correctly sized.

The only other evidence in connection with the design of the machine related to the placement and adequacy of certain deflectors at the top of a conveyor belt for the purpose of directing the hay toward the center of the belt away from the bearings. In that regard Kucera was asked (or told) by plaintiff's attorney: "And obviously they [the deflectors] weren't good enough because the fires took place. They could have been better." Kucera replied: "Oh, yes. Everything can be better."

On the basis of the foregoing evidence the trial court found that the machines were "negligently designed in positioning the bearings in such a place that hay ignited when the bearings failed."

The court entered judgment in the first case in favor of Nerud against only Haybuster in the sum of $7,400, plus the costs of suit, on the ground Haybuster was negligent. It dismissed Nerud's warranty claims against Bridgeport, on the ground any warranty claim was barred by the period of limitations.

In the second case the trial court entered judgment in favor of Nerud against both Haybuster, on the ground it was negligent, and Bridgeport, on the ground it breached its implied warranty of merchantability, in the sum of $11,200, plus the costs of suit. It also entered judgment in the same amount in favor of Bridgeport against Haybuster.

Haybuster assigns as its sole operative claim of error the trial court's finding that Haybuster negligently designed the machine. It also asserts the

trial court erred in "rendering judgment" and in "assessing damages" against it, but it does not tell us what that language may be intended to add to its other claim of error. The law is well settled that errors assigned but not argued will generally not be considered on appeal. Neb. Rev. Stat. § 25-1919 (Reissue 1979); *State ex rel. Douglas v. Bigelow*, 214 Neb. 464, 334 N.W.2d 444 (1983); Neb. Ct. R. 9D(1)d (Rev. 1982). Moreover, this court will not consider generalized and vague assertions of error which do not advise us of the issues submitted for decision. *Coyle v. Janssen*, 212 Neb. 785, 326 N.W.2d 44 (1982).

Bridgeport assigns as error the trial court's finding that the fires proximately resulted, in both cases, from a design defect and that, in the second case, its implied warranty of merchantability was breached as well.

It is appropriate to remind ourselves that the findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In such a circumstance it is not within our province to resolve conflicts in or to weigh the evidence; if there is a conflict in the evidence, this court will review the judgment rendered and will presume that controverted facts were decided in favor of the successful party. *Gregory v. Davis*, 214 Neb. 408, 334 N.W.2d 1 (1983); *Quinn v. Godfather's Investments*, 213 Neb. 665, 330 N.W.2d 921 (1983).

Further, 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.*, 212 Neb. 533, 324 N.W.2d 252 (1982); *Jacobberger v. Terry*, 211 Neb. 878, 320 N.W.2d 903 (1982), *supp. op.* 212 Neb. 145, 322 N.W.2d 620 (1982). In other words, in the context of these appeals, the trial court's judgments are to be affirmed if the evidence sustains any theory of recovery pled by the plaintiff, irrespective of which theory the trial court relied upon.

Since the trial court resolved the question of the manufacturer's liability on the basis of its alleged negligence, we begin our analysis from that perspective.

Morris v. Chrysler Corp., 208 Neb. 341, 303 N.W.2d 500 (1981), was an action for the negligent manufacture in 1968 of an automobile purchased and used by the plaintiff in 1975. In late 1976 the engine stopped working because the lower half of a main bearing had not been installed when the engine was manufactured. The purchaser's evidence established that Chrysler had manufactured the engine; that the purchaser was a foreseeable plaintiff in a products liability action under a negligence theory; that the engine was defectively manufactured and placed on the market; and that, as a direct result of the defect, the purchaser incurred damages. We stated that although negligence is never presumed, it is a question of fact which may be proved by circumstantial evidence. We then held that because of Chrysler's failure to rebut the inference of negligence arising from the fact a part of the bearing was missing, the purchaser had sustained his burden of proof and was entitled to recover his damages.

Morris, however, is distinguishable from the cases at hand. *Morris* presented a manufacturing defect. These cases do not.

In products liability litigation the notion of a defective product embraces two separate concepts. The first, commonly labeled a manufacturing defect, is one in which the product differs from the specifications and plan of the manufacturer. This concept of defect was relied upon by Nerud at trial. His central effort was to show that Haybuster's specifications required the use of a 1.5-inch shaft, when in fact a smaller one was installed. This claim did not prove to be the fact. Nerud therefore failed to prove a manufacturing defect and consequently does not come within *Morris*.

The second concept of a defective product is one

in which the product meets the specifications of the manufacturer but the product nonetheless poses an unreasonable risk of danger. This condition is generally characterized as a design defect. Restatement (Second) of Torts § 398 at 336 (1965) embodies this second concept of defectiveness. "A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a *safe plan or design.*" (Emphasis supplied.)

While a particular design may pose such an unreasonable risk of danger, liability for this danger differs, depending upon the theory of recovery presented by the plaintiff. In his petition Nerud alleged both manufacturing defects and design defects under both negligence and strict liability theories.

In a strict liability cause of action it is generally proposed that the focus of the court's inquiry should be on the product itself and not the manufacturer. Thus, a finding that the product poses an unreasonable risk of danger is sufficient. (A further discussion follows later in this opinion in our analysis of the strict liability aspects of these cases.) In an action based upon a negligent adoption of a defective design, however, the plaintiff must additionally show that the manufacturer breached its usual duty to act reasonably in adopting a particular design.

The question of whether a design is defective under the negligence theory, then, refines itself into an inquiry aimed at determining whether the machines involved here presented unreasonable risks of danger *and* whether Haybuster failed to exercise reasonable care in adopting its design.

"Proof of nothing more than that a particular injury would not have occurred had the product which caused the injury been designed differently is insuf-

ficient to establish a breach of the manufacturer's or seller's duty as to the design of the product." 2 R. Hursh & H. Bailey, American Law of Products Liability § 9:17 at 301 (1974).

While we have not heretofore specifically adopted a rule requiring the plaintiff in a negligent design case to demonstrate how the defectively designed product could be made safer, and while there is a paucity of precedent on this question in Nebraska, such a requirement is hinted at in *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979), a suit involving both negligence and strict liability theories. We sustained therein a jury verdict in favor of the estate of a truckdriver whose tractor was rendered unsteerable after its bumper was bent into a front wheel as the result of striking a deer. The defendant contended that the plaintiff's evidence failed to show it had not complied with the state of the art in designing the bumper. This court responded: "The question therefore is not whether anyone else was doing more, although that may be considered, but whether the evidence disclosed that anything more could reasonably and economically be done. Northwest Airlines v. Glenn L. Martin Company, 224 F.2d 120 (6th Cir., 1955); Whistle Bottling Co. v. Searson, 207 Ala. 387, 92 So. 657; Restatement, Torts 2d, § 298, p. 68. Plaintiff tendered evidence that there were alternatives which could be used and which, if used, would have prevented the enhanced injury. There was evidence that Paccar was using some of the alternatives itself and that both the material and the knowledge to design a safer alternative existed. That evidence included the use of a shorter bumper, a breakaway bumper, or a stronger bumper, all of which could have been designed in 1969. The jury was not required to accept any of those suggestions. Nevertheless, those were questions of fact which the jury had to resolve." *Id.* at 480, 283 N.W.2d at 35.

In the proper application of a risk versus utility analysis to a negligent design case, one of the fac-

tors which must be weighed is the feasibility of eliminating the risk and the existence of practicable alternative designs. Otherwise, the manufacturer is, in essence, being treated as an insurer of his product's safety. *Friedrich v. Anderson*, 191 Neb. 724, 217 N.W.2d 831 (1974). See, also, *Phillips v. Kimwood Machine Co.*, 269 Or. 485, 525 P.2d 1033 (1974); *Wilson v. Piper Aircraft Corporation*, 282 Or. 61, 577 P.2d 1322 (1978).

We can find, and are directed to, no reference in the record to any alternative design that Haybuster could have adopted, other than Kucera's cryptic remark on cross-examination that the hay deflector, like everything else, could have been designed better. Absent evidence that the risk could have been avoided by adopting a reasonable alternative design, Nerud's case in negligence based upon a defective design must fail. His effort to establish a manufacturing defect by virtue of undersized shafts also must, as we have seen, fail. We therefore conclude the trial court was clearly wrong in finding Haybuster negligent.

We next turn our attention to the strict liability issues presented by these cases.

Following the trial court's judgments herein, we decided *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983). Therein, we denied recovery for the cost of retrofitting cranes manufactured by the purchaser of defective component parts. In doing so we disapproved *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), to the extent it held that strict liability in tort might not be used to recover for physical harm to property only. In *National Crane* we said: "A majority of courts that have considered the applicability of strict liability to recover damages to the defective product itself have permitted use of the doctrine, at least where the damage occurred as a result of a sudden, violent event and not as a result of an inherent defect that reduced the

property's value without inflicting physical harm to the product. [Citation omitted.]" *Id.* at 789, 332 N.W.2d at 43.

Assuming, but not deciding, that Nerud is entitled to proceed under a strict liability in tort theory under the above-cited *National Crane* language, we nonetheless encounter an obstacle to his recovery.

Restatement (Second) of Torts § 402A at 347-48 (1965) in relevant part provides: "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . . ."

This court has defined the term "unreasonably dangerous" to mean that the product has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics. *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979).

We have not, however, had an opportunity to define the term "defective condition." We are mindful that the definition of a design defect is one with which courts and commentators have grappled for years. See, e.g., *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973). Our review of the cases has led us to the conclusion that a plaintiff, in order to prove that a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer. See cases cited in 2 R. Hursh & H. Bailey, American Law of Products Liability § 9:17 at 302 et seq. (1974); *Int'l Harvester Corp. v. Hardin*, 264 Ark. 717, 574 S.W.2d 260 (1978); *Wilson v. Piper Aircraft Corporation*,

supra. As such, Nerud has failed to show that the haystackers in question were defective. Absent such a showing, his recovery under a strict liability theory cannot be successful.

Lastly, we turn to Nerud's warranty contentions. In the trial court Nerud conceded that any warranty claims based on the failure of the first machine were barred by the statute of limitations found in Neb. U.C.C. § 2-725(1) (Reissue 1980).

In the case involving the second machine the trial court found that the implied warranty of merchantability given by Bridgeport had been breached when it tendered delivery of the machine to Nerud.

Neb. U.C.C. § 2-314 (Reissue 1980) provides in relevant part: "(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . . (2) Goods to be merchantable must be at least such as . . . (c) are fit for the ordinary purposes for which such goods are used. . . ." There is no question but that Bridgeport is a merchant; that is, one who deals in goods of the kind involved in the transactions under consideration. Neb. U.C.C. § 2-104 (Reissue 1980). Neither do we find any indication that Bridgeport disclaimed its warranty obligations pursuant to the provisions of Neb. U.C.C. § 2-316 (Reissue 1980). The inquiry, then, is whether the machine in question was merchantable.

In *Christensen v. Eastern Nebraska Equipment Co., Inc.*, 199 Neb. 741, 261 N.W.2d 367 (1978), the plaintiff had purchased a tank in which to store liquid fertilizer. Ten days after filling the tank the plaintiff noticed it was leaking and notified the defendant seller. Although the defendant manufacturer replaced the tank, the plaintiff brought suit for his consequential damages. We found that a leaky tank was not suitable for the purpose of storing fertilizer and that the implied warranty of merchantability contained in § 2-314(2)(c) was breached.

In accord with that case a haystacking machine which will only stack hay for a half day before consuming itself in flames is not suitable for the ordinary purposes for which haystacking machines are sold. As such, Bridgeport breached its implied warranty of merchantability to Nerud.

CASE NO. 82-716 REVERSED AND REMANDED FOR DISMISSAL.

CASE NO. 82-717 AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR DISMISSAL.

STATE OF NEBRASKA, APPELLEE, V. HARRIS A. ESLUER, APPELLANT.

340 N.W.2d 152

Filed November 10, 1983. No. 82-743.

1. **Criminal Law: Rebuttal Evidence.** Proper rebuttal testimony in a criminal prosecution is any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact.
2. **Criminal Law: Rebuttal Evidence: Witnesses.** Rebuttal witnesses need not be endorsed on the information.
3. **Criminal Law: Witnesses: Appeal and Error.** The failure to endorse the names of the State's witnesses on the information is not grounds for reversal in the absence of a showing of prejudice.
4. **Jury Instructions: Appeal and Error.** All 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.
5. **Criminal Law: Verdicts.** A verdict in a criminal prosecution must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

Bennett G. Hornstein and Richard H. Hoch, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

Defendant-appellant, Harris A. Esluer, then sheriff of Otoe County, pursuant to a jury's verdict, was adjudged guilty of intending to deprive the owner of movable property having a value in excess of $1,000 by attempting to take or exercise control over it. The defendant was fined $2,000 and placed on probation for 2 years. In this appeal he claims the trial court erred by (1) receiving evidence improperly characterized as rebuttal in nature; (2) receiving the testimony of a witness not previously identified as required by a discovery agreement; (3) instructing the jury as to a sheriff's statutory duties; and (4) failing to dismiss the information because the evidence was allegedly insufficient to establish guilt. For the reasons discussed hereinafter we find each assignment of error to be without merit, and affirm the judgment of the trial court.

During the course of preparing for trial, a discovery agreement was entered into between defendant's attorney and the Attorney General's office as the prosecutor. The agreement required the State to disclose to defendant's attorney every police report in the State's possession, to make available for interview every witness the State "had any control whatsoever over," and to facilitate any discovery defendant wished.

The State presented evidence in its case in chief to establish, if believed by the jury, that in February of 1982 Karen Neiger was interrogated by Lincoln police after her unsuccessful efforts to sell a strongbox, or vault, containing personal property. The property included watches, jewelry, and silver coins and had a fair market value in excess of $7,000. Neiger initially refused to disclose how she obtained the property, and the Lincoln police took it into their possession. The department inventoried the prop-

erty and notified authorities across the state, including the defendant, in an attempt to locate the owner of the property. These attempts were unsuccessful. Eventually, Neiger confessed to the Lincoln authorities that she had taken the vault from the house of her former roommate, Cheryl Horalek, who lived at Palmyra in Otoe County, Nebraska.

On February 18, 1982, the defendant was asked, in his capacity as Otoe County sheriff, to come to Lincoln to retrieve the property. Defendant drove to Lincoln that night and was informed by Detective Breen of the Lincoln Police Department that Neiger had confessed to taking the property from Horalek. Defendant was given a copy of the police reports, along with the Horalek property. A few days later Neiger called the defendant and asked him whether Horalek was pressing charges. The defendant told Neiger not to worry because she was not in trouble.

On April 12, 1982, Investigator Scott of the Nebraska State Patrol went to Horalek's house to investigate a report that checks drawn on Horalek's account had been forged by Neiger. Scott asked Horalek if she was missing any items Neiger could have taken. Horalek, who was yet unaware of the theft of her vault, thought she might be missing a few items of jewelry. Scott contacted Detective Breen and informed him he might have located the owner of the property recovered from Neiger. After Breen informed Scott that property, along with the substance of Neiger's confession, had been relayed to the defendant, Scott called the Otoe County attorney. Scott was informed by the county attorney that he had never heard of the matter.

Scott then called Horalek and asked if she owned a vault, and to check to see if it was still in her house. Horalek discovered it missing, and Scott advised her to report the matter to the defendant's office. A deputy from defendant's office was dispatched to investigate the matter; he advised Horalek that recovery of the property was not likely. After Horalek

reported these events to Scott, she was told by Scott to report the matter directly to the defendant.

On April 21, 1982, at about 10 p.m., the defendant drove to Horalek's house, asked her to step outside to his car, and then told her that her property had been recovered in a "sting" operation in Lincoln and that she should keep quiet about the matter. As Horalek examined the property returned to her at that time by the defendant, she gave back to him a ring she claimed was not hers. This ring later turned out to be worthless. She also informed the defendant that several rings were missing. The defendant then pulled a ring from under one of the car seats and returned it to her. The next day Scott compared the property against a copy of the Lincoln police inventory and discovered that, while the number of coins returned had been the same as the number inventoried, a valuable diamond ring was missing.

After other investigative efforts failed, State Patrol investigators confronted the defendant with their evidence; the defendant claimed that the property had spilled in his car and that the missing ring must still be there. A search of the car did not uncover it.

On May 15, 1982, Scott was called to the defendant's home. Upon his arrival the defendant's wife, Bernice Esluer, gave Scott the missing ring. She stated that she found it on the floor of her husband's car while she was cleaning it that evening.

After the State rested its case in chief, the defendant testified that when he received the property from Breen, he was told it was from Horalek's home. He also testified that Breen told him he would send a followup report, which defendant never received. The defendant further testified that he had not returned the property to Horalek until she reported the theft, because he thought the property did not rightfully belong to her. On his return to his home after receiving the property from the Lincoln

police, the defendant fell while leaving his car and injured his back. On Friday, the 19th, the defendant went to work, but claimed to have been away from work on Saturday and Sunday. On the following Monday the defendant returned to work and attended a coin club meeting that night. After the meeting he returned to his office and removed the Horalek property from his car and placed it in his desk. A few days later the defendant examined the coins and took the jewelry to a jeweler for an appraisal. On cross-examination defendant denied there were any particularly "rare coins" among the Horalek property he examined. He acknowledged, however, that the "1921 Peace Dollar" is a rare coin. After defendant had examined the Horalek property and had obtained an appraisal of it, he placed it in a safe in his office, not in the evidence locker. He also claimed to have told one of his deputies, Tom Frudiker, about the property in late March or early April.

The defendant also testified that he first became aware of Horalek's theft report on April 21. He denied ever talking to Horalek on the phone, but claimed he gained the knowledge from reading Deputy Phillips' report. After learning of the Horalek theft report defendant drove to Horalek's home on the evening of the 21st. He admitted implying to Horalek that there was a sting operation in which this property was recovered. He claimed that after he gave the evidence bag containing the rings to Horalek, some of them spilled. He stated that the brass ring disclaimed by Horalek was not with the rings he took to have appraised, was not in the package he took to Horalek, and that he had never seen that ring prior to that night. He attributed his inaction on the Horalek case to a heavy workload and the unusual number of serious crimes committed in his jurisdiction.

After the defendant rested, the State elicited testimony from Lincoln police officer Childers, who

originally took the property into evidence, that there was a 1921 peace dollar among the property he inventoried. When he examined the property at the State Patrol office prior to trial, the peace dollar was missing, and a heavily worn silver dollar, which was not among those he had previously inventoried, had been substituted. James LaFevre, another Lincoln police officer and professional coin dealer, placed the value of the peace dollar at $120 to $130. Although the name of Officer Childers had been disclosed to defendant, Officer LaFevre had not been disclosed as a witness.

Defendant first argues that the evidence of his replacing a valuable coin with a less valuable one was evidence which should have been introduced in the State's case in chief. He contends that the evidence was therefore not properly rebuttal in nature, and the trial court erred in receiving it as such.

In *State v. Miller*, 213 Neb. 274, 328 N.W.2d 769 (1983), we defined proper rebuttal testimony in a criminal prosecution as " ' "any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact . . . ." ' " *Id.* at 278, 328 N.W.2d at 772. Therein, we permitted the State to offer the testimony of an accident reconstructionist after the defendant had introduced testimony as to speed in a prosecution for motor vehicle homicide. Here, defendant's testimony that a particular coin was not among those initially delivered to him by the Lincoln police was certainly a fact material to the charge of intentionally attempting to deprive the owner of movable property. The evidence in question was competent, and disputed defendant's claim in regard to that material fact; it was therefore properly received as rebuttal evidence. Defendant's first assignment of error is without merit.

Defendant also argues the trial court erred in permitting Officer LaFevre to testify, in violation of the State's discovery agreement.

Assuming, but not deciding, that the language of the particular discovery agreement involved overrides the general rule that rebuttal witnesses need not be endorsed on the information, *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1977), we confront another rule. The failure to endorse the names of the State's witnesses on the information is not grounds for reversal in the absence of a showing of prejudice. *State v. Journey*, 201 Neb. 607, 271 N.W.2d 320 (1978); *State v. Keith*, 189 Neb. 536, 203 N.W.2d 500 (1973).

Firstly, as will be seen from the discussion which follows in connection with the third and fourth assignments of error, there was more than ample evidence to establish defendant's guilt without the testimony concerning the coin substitution. Secondly, it was Officer Childers who testified to the substitution; his name was revealed to the defendant. Under these circumstances defendant cannot show he was prejudiced by Officer LaFevre's testimony as to the value of the coin. Consequently, defendant fails to sustain his second assignment of error.

Defendant next objects to the court's instruction No. 6, which reads: "The statutes of the State of Nebraska in full force and effect at the time alleged in the Information provide in substance as follows: 'It shall be the duty of the sheriff, by himself or deputy, to ferret out crime, to apprehend and arrest all criminals, and insofar as it is within his power, to secure evidence of all crimes committed in his county and present the same to the county attorney, and to perform all other duties pertaining to the office of sheriff.' " This jury instruction embodies the language of Neb. Rev. Stat. § 23-1710 (Reissue 1977), which outlines the duties of the sheriff.

The defendant rightly contends that he was not on trial for neglecting his duties as sheriff of Otoe County, and argues further that the jury could have convicted him of attempted theft merely because of violation of his statutory duties.

The law governing this issue is found in *State v. Bartholomew*, 212 Neb. 270, 322 N.W.2d 432 (1982), in which we held that all 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. The trial court properly instructed the jury in another instruction of the elements of the crime charged. While it might have been better practice for the trial court to preface instruction No. 6 with a statement that the defendant was not on trial for neglecting his statutory duties, an instruction in regard to his duties was nonetheless relevant to the question of defendant's intent. The crime of attempted theft requires a finding of intent. The delivery of stolen property and information as to the confession of the suspect to a private citizen who later fails to report to the county attorney need not lead to a strong inference that the citizen intended to deprive the true owner of that property. However, the delivery of those items to a sheriff charged with the duty of informing the county attorney of crimes in the sheriff's county, along with stating to the suspect not to worry and to keep quiet, is highly probative of the intent to deprive the true owner of the property delivered to the sheriff. Defendant's third assignment of error is also without substance.

Defendant's fourth assignment of error is equally spurious. His main contention is that the State failed to sustain its burden of proving the value of the property was over $1,000. He bases this contention on the testimony of the State's witness, Fred Wilson, that the missing ring, later found by the defendant's wife, had a replacement value of $1,800 and a fair market value of half that amount. The defendant ignores the testimony of LaFevre concerning the $120 to $130 value of the peace dollar. Moreover, defendant was not specifically charged with the attempted theft of only the ring, or only the ring and coin. The charge dealt generally with

property belonging to Cheryl Horalek. The jury was given uncontradicted evidence that the fair market value of all the jewelry and watches was around half the replacement value of $14,722.97.

The rule of law governing this court's review of the sufficiency of the evidence to support a jury verdict is found in *State v. Evans*, *ante* p. 433, 338 N.W.2d 788 (1983), which states that the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. The issue of the value of the property the defendant was convicted of attempting to steal was for the jury, and there is ample evidence to support its finding.

AFFIRMED.

BENJAMIN W. FRANKLIN, APPELLEE AND CROSS-APPELLANT, V. GEORGE PAWLEY, DOING BUSINESS AS COMMERCIAL ROOFING COMPANY, APPELLANT AND CROSS-APPELLEE, BROWNELL-TALBOT SCHOOL, APPELLEE.

340 N.W.2d 156

Filed November 10, 1983. No. 83-132.

1. **Workmen's Compensation: Employer and Employee.** Factors which have been used by the Supreme Court to determine employee status have been (1) the element of control, including the right of termination, the method of payment, and the availability of equipment, and (2) the nature of the work, including the skill required and the duration of the work.
2. **Workmen's Compensation: Independent Contractors.** The general test of whether work being done by an independent contractor for an owner is within the ambit of Neb. Rev. Stat. § 48-116 (Reissue 1978) is whether the work being done by the independent contractor would ordinarily be done by employees of the owner in view of the owner's past practices and the practices of employers in comparable businesses.
3. **Workmen's Compensation: Employer and Employee.** Factors which help determine if the activity is within the owner's trade or business, so that the employees of the owner would be expected to ordinarily complete the task, may include (1) the nature of the business, (2) the previous activities of the business' employees,

(3) the amount of participation in the job by the business' employees, (4) the company's charter, (5) the duration of the job, (6) the regularity of the activity, (7) the past practices of the business, (8) the employer's size, and (9) the skilled manpower and tools available to complete the task.

4. **Case Disapproved.** To the extent this decision is in conflict with our decision in *Sherlock v. Sherlock*, 112 Neb. 797, 201 N.W. 645 (1924), our opinion in *Sherlock* is disapproved.

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

Barlow, Johnson, DeMars & Flodman, for appellant.

Sidner, Svoboda, Schilke, Wiseman, Thomsen & Holtorf, for appellee Franklin.

Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee Brownell-Talbot.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

This is a workmen's compensation case brought pursuant to the provisions of the Nebraska Workmen's Compensation Act, Neb. Rev. Stat. §§ 48-101 to 48-1,109 (Reissue 1978). The appellee and cross-appellant, Benjamin W. Franklin, brought suit against the appellant, George Pawley, doing business as Commercial Roofing Company, for injuries allegedly sustained by Franklin while in the course of his employment for Pawley. Specifically, Franklin alleged that he was an employee of Pawley's and was injured in an accident that occurred while making some repairs on a roof at the Brownell-Talbot School in Omaha, Nebraska. Brownell-Talbot School was named as a second defendant, on a theory of liability as a statutory employer by virtue of § 48-116.

On hearing to a single judge the Nebraska Workmen's Compensation Court awarded full benefits to Franklin against Pawley, including medical and hos-

pital expenses, temporary total disability, and benefits for rehabilitation. In addition, the court ordered Pawley to pay Franklin a 50-percent penalty and attorney fee pursuant to § 48-125. The single-judge Workmen's Compensation Court dismissed the case against Brownell-Talbot, finding that the school was not a statutory employer. On rehearing the three-judge panel affirmed the award to Franklin; however, the court set aside the penalty and attorney fee, finding that a reasonable controversy did exist as to Pawley's liability to Franklin.

Pawley now appeals to this court. Franklin has cross-appealed on the issue of the 50-percent penalty and attorney fee. On review we believe that the facts in this case conclusively establish that the decision of the three-judge panel as to Pawley's liability was correct and should be affirmed. We believe, however, that no reasonable controversy as contemplated by § 48-125 existed as to Pawley's liability, and we therefore reinstate the one-judge order in that regard.

Pawley denied liability on two grounds. His first ground was that Franklin was an independent contractor and therefore Pawley was not liable. The evidence, however, does not support that claim. Factors which have been used by this court to determine employee status have been (1) the element of control, including the right of termination, the method of payment, and the availability of equipment, and (2) the nature of the work, including the skill required and the duration of the work. See, *Sortino v. Miller*, 214 Neb. 592, 335 N.W.2d 284 (1983); *Voycheske v. Osborn*, 196 Neb. 510, 244 N.W.2d 74 (1976); *Schneider v. Village of Shickley*, 156 Neb. 683, 57 N.W.2d 527 (1953). When we examine the facts in light of those factors, we are able to reach only one conclusion—that Franklin was an employee of Pawley's.

Specifically, in connection with the job which resulted in Franklin's injuries, the record discloses

that Pawley had replaced the roof on one of the buildings at the Brownell-Talbot School during the summer of 1980. While the roof was still under warranty, it had developed several leaks. On June 18, 1981, Franklin was sent by Pawley to Brownell-Talbot to repair a leak in the roof. While completing the repair, using a hot tar process, Franklin's arms and hands were injured. For approximately 2 months prior to the date of the injury which is the basis of this litigation, Franklin had done roofing work for Pawley. He was paid on the basis of $40 per day, and guaranteed $100 a week regardless of work completed. Pawley gave Franklin the day's job location, and visited the jobsites to check on the work and to supply the materials. Franklin drove a company truck that was supplied by Pawley, and the truck was equipped with tar and roofing machinery which belonged to Pawley. Pawley also provided the gasoline for the truck on a daily basis. Franklin shared in none of the profits. Franklin was in every sense of the word a traditional employee and met all of the tests for being an employee under the Nebraska Workmen's Compensation Act, and was entitled to recover under the act without any question.

Secondly, Pawley urges that Brownell-Talbot was a statutory employer within the meaning of § 48-116, and therefore jointly and severally liable with Pawley to Franklin. Likewise, we reject that contention.

Section 48-116 provides in part: "Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this act, shall be included in the term employer, and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this act." Although not relevant to our decision in this case, the

act further provides that notwithstanding these provisions, the act shall not be construed to apply to an owner who lets a contract to a contractor in good faith and requires the contractor to obtain insurance guaranteeing payment to the injured worker.

Pawley maintains that our earlier decision in *Sherlock v. Sherlock*, 112 Neb. 797, 201 N.W. 645 (1924), supports his position in this case. In *Sherlock* this court held that the owner of a building who conducted a drug wholesale operation was liable for injuries to a painter who was painting the exterior of the building under an independent contract. The rationale of our holding in *Sherlock* was to the effect that this was the type of work that an employee of the project owner *could have done*. Relying on *Sherlock*, Pawley argues that Brownell-Talbot could have repaired the leaks in its roof with its own maintenance personnel and therefore is liable as a statutory employer. In reflecting on the rule in *Sherlock* and in keeping with our position recently expressed in *Rogers v. Hansen*, 211 Neb. 132, 317 N.W.2d 905 (1982), we believe that this portion of the *Sherlock* decision was in error. The rule applicable to statutory employers is not whether the work is of the type that the owner "*could do*" but, rather, whether it is of the type which the owner "normally did." Specifically, in *Rogers*, *supra*, we said: "The general test of whether work being done by an independent contractor for an owner is within the ambit of Neb. Rev. Stat. § 48-116 (Reissue 1978) is whether the work being done by the independent contractor would *ordinarily be done by employees of the owner in view of the owner's past practices* and the practices of employers in comparable businesses." (Emphasis supplied.) (Syllabus of the court.) We believe that this is the correct rule in keeping with the better reasoned decisions on that point. As suggested by Professor Larson in his renowned work on workmen's compensation, the test for the application of statutory liability must be a relative one and

cannot be an absolute rule. Specifically, some repair jobs can be extraordinary and nonreoccurring, demanding great effort if a business is small. However, for a large company those same tasks would be routine activity, normally within the company's expectation for its own employees. The fact of that matter will vary from case to case and will depend, to a large extent, upon the evidence. 1C A. Larson, The Law of Workmen's Compensation § 43.10 (1980).

Factors which help determine if the activity is within the owner's trade or business, so that the employees of the owner would be expected to ordinarily complete the task, may include (1) the nature of the business, (2) the previous activities of the business' employees, (3) the amount of participation in the job by the business' employees, (4) the company's charter, (5) the duration of the job, (6) the regularity of the activity, (7) the past practices of the business, (8) the employer's size, and (9) the skilled manpower and tools available to complete the task. For example, in *Williams v. Shell Oil Co.*, 677 F.2d 506 (5th Cir. 1982), the plaintiff was injured while engaged in doing repair work on the oil company's cooling towers. The evidence showed that Shell's own employees usually performed small and medium-sized maintenance jobs, but large-scale repairs were customarily contracted out. Because the project on which the plaintiff was working was a large-scale repair, it was not work that could be characterized as part of Shell's usual and customary business, and therefore the oil company was not held liable as a statutory employer. See, also, *Eckmayer v. Newport*, 267 S.W.2d 379 (Mo. App. 1954); *Tolstonog v. Muller Restaurant Supply*, 430 So. 2d 243 (La. App. 1983); *Dir., Office of Wkrs'. Comp., etc. v. Nat. Van Lines, Inc.*, 613 F.2d 972 (D.C. Cir. 1979); *Frazier v. Kysor*, 43 Colo. App. 287, 607 P.2d 1296 (1979); *Szofran v. Century Electric Co.*, 255 S.W.2d 443 (Mo. App. 1953); *Saale v. Alton Brick Company*, 508 S.W.2d 243 (Mo. App. 1974); *Bassett*

Furniture v. McReynolds, 216 Va. 897, 224 S.E.2d 323 (1976); *Shireman v. Rainen Home Furnishers, Inc.*, 402 S.W.2d 64 (Mo. App. 1966).

Unlike *Rogers*, *supra*, where the evidence failed to disclose whether the employer had used its own employees in the past to move furniture or equipment, the evidence in the present case discloses that Brownell-Talbot never ordinarily repaired or replaced its own roof, nor did it have the necessary equipment to do so. Again, unlike *Rogers*, where no evidence of the business practice was offered, the evidence here disclosed that no small school in the area would ordinarily repair or replace its own roof. Therefore, consistent with our holding in *Rogers* and with the rule which we now clarify, we believe the evidence clearly supported a finding that the work done by Franklin would not ordinarily be done by employees of Brownell-Talbot, nor had it ever been done in the past. For that reason the Workmen's Compensation Court was absolutely correct in holding that Brownell-Talbot was not a statutory employer. To the extent that our holding in this case is contrary to our holding in *Sherlock v. Sherlock*, 112 Neb. 797, 201 N.W. 645 (1924), our holding in *Sherlock* is disapproved.

For these reasons, therefore, the judgment of the three-judge panel of the Workmen's Compensation Court is affirmed, except with regard to the denial of the 50-percent penalty and statutory fees allowed by the trial court. Our review of the record discloses that there was no reasonable controversy as between Pawley and Franklin. Whether Brownell-Talbot was a statutory employer and therefore jointly and severally liable would not in any manner have affected Pawley's independent liability. For that reason we believe that the one-judge compensation court was correct in holding that no reasonable controversy existed and the penalty and attorney fee provisions of § 48-125 should apply. We reinstate that portion of the one-judge opinion which allowed

a 50-percent penalty and attorney fees. Further, we allow Franklin an additional attorney fee in the amount of $750 to apply upon his attorney fees for services in this court.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. THE EMBASSY CORPORATION, APPELLANT.

340 N.W.2d 160

Filed November 10, 1983. No. 83-161.

1. **Constitutional Law.** Neb. Rev. Stat. §§ 28-813(1) and 28-807(9) (Reissue 1979) are not unconstitutionally vague.
2. **Constitutional Law: Obscenity: Statutes: Juries.** The fact that juries may reach different results on similar facts does not render obscenity statutes unconstitutional, nor does it create a right of reliance when other questionable material is exhibited.
3. **Obscenity: Proof.** In a prosecution for exhibiting obscene material the State is not required to prove that the material was obscene, other than by introducing the material itself.
4. **Trial: Obscenity: Evidence.** Expert testimony is not necessary to enable the jury to judge the obscenity of materials which have been placed into evidence.

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

Herbert J. Friedman of Friedman Law Offices, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

The defendant is a corporation which operates the Embassy Theatre in Lincoln, Nebraska. It was charged with exhibiting two obscene films on July 6, 1979, at its theater, in violation of Neb. Rev. Stat. § 28-813(1) (Reissue 1979). The films were entitled "My Sister Eileen" and "Seven Into Snowy."

The jury trial in the county court began on November 4, 1980, and resulted in a guilty verdict on count I. However, the jury was unable to reach a verdict on count II, which involved the film "Seven Into Snowy." At the second trial on count II the jury returned a guilty verdict. Defendant was fined $200 on count I and $500 on count II.

The defendant appealed to the District Court, where the cases were consolidated. The District Court affirmed the verdict and sentences. The cases have been docketed in this court as one appeal.

The defendant has assigned as error the failure of the trial court to determine that § 28-813(1) is unconstitutionally vague; the failure to find as a matter of law and fact that the films were not obscene within the meaning of the statute; and the failure to find that the defendant had been deprived of due process of law in that it had not been warned of the obscene nature of the films.

We have previously determined that the Nebraska obscenity statutes are not unconstitutionally vague and fulfill the requirements set forth in *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). See, e.g., *State v. Tara Enterprises, Inc. and Zachary Productions, Ltd.*, 202 Neb. 260, 274 N.W.2d 875 (1979); *State v. American Theater Corp.*, 194 Neb. 84, 230 N.W.2d 209 (1975). *Miller v. California*, *supra* at 24, set forth the following guidelines for permissible state regulation of obscenity: "As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, [citations omitted], (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

The statutes under which defendant was charged and convicted provide: "Any person who knowingly (a) prints, copies, manufactures, prepares, produces, or reproduces obscene material for purpose of sale or distribution, (b) publishes, circulates, sells, rents, lends, transports in intrastate commerce, or distributes or exhibits any obscene material, (c) has in his possession with intent to sell, rent, lend, transport, or distribute any obscene material, or (d) promotes any obscene material or performance shall be guilty of a Class I misdemeanor." § 28-813(1).

"Obscene shall mean (a) that an average person applying contemporary community standards would find that the work, material, conduct or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity, sex or excretion, (b) the work, material, conduct or live performance depicts or describes in a patently offensive way sexual conduct specifically set out in sections 28-807 to 28-829, and (c) the work, conduct, material or live performance taken as a whole lacks serious literary, artistic, political, or scientific value." Neb. Rev. Stat. § 28-807(9) (Reissue 1979).

The language of the statutes was clearly patterned upon the language of *Miller v. California*, *supra*, quoted above. The Nebraska statutes are within the constitutionally permissible scope in which a state may regulate obscenity.

Defendant next contends that the films were not obscene as a matter of law and fact. The films had little, if any, plot or story line, and consisted of scene after scene of sexual intercourse, lesbianism, homosexuality, cunnilingus, and fellatio. These films were clearly obscene as that term is defined by §§ 28-813(1) and 28-807(9). See, *State v. American Theater Corp.*, 196 Neb. 467, 244 N.W.2d 59 (1976); *State v. American Theater Corp.*, 194 Neb. 84, 230 N.W.2d 209 (1975). The jury verdict is supported by the evidence.

The defendant argues that because it was earlier acquitted of similar charges for showing two allegedly obscene films which, defendant asserts, were similar in content to those involved in the present case, the convictions cannot stand. The defendant argues that the prior determination of community standards created in it the right to rely upon that determination in exhibiting films.

This argument is not persuasive. Initially, we note that in determining an issue of fact each case must be determined on evidence peculiar to it alone and not by comparison to fact determinations made by another jury in a similar case. See *Holmquist v. Volkswagen of America, Inc.*, 261 N.W.2d 516 (Iowa App. 1977). We also note that a prior acquittal cannot act as a bar to a conviction for showing films which were not subjects of the earlier charges. The cases do not present the identity of issues required by any theory of claim preclusion. See *Cedars Corp. v. Sun Valley Development Co.*, 213 Neb. 622, 330 N.W.2d 900 (1983).

The fact that juries may reach different results on similar facts does not render obscenity statutes unconstitutional, nor does it create a right of reliance when other questionable material is exhibited. In *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), the Court said at 26 and at n.9: "In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury

system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.

"The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth v. United States*, 354 U.S., at 492 n. 30 [354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957)], 'it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. *Dunlop v. United States*, 165 U.S. 486, 499-500 [17 S. Ct. 375, 41 L. Ed. 799 (1897)].' "

In *Hamling v. United States*, 418 U.S. 87, 101, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974), the Court said: "It has, of course, long been the rule that consistency in verdicts or judgments of conviction is not required. *United States v. Dotterweich*, 320 U.S. 277, 279 [64 S. Ct. 134, 88 L. Ed. 48] (1943); *Dunn v. United States*, 284 U.S. 390, 393 [52 S. Ct. 189, 76 L. Ed. 356] (1932). 'The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth v. United States*, 354 U.S., at 492 n. 30, " 'it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. *Dunlop v. United States*, 165 U.S. 486, 499-500.' " ' *Miller v. California*, 413 U.S., at 26 n. 9. . . . If consistency in jury verdicts as to the obscenity *vel non* of identical materials is not constitutionally required, *Miller v. California*, *supra*, the same is true *a fortiori* of verdicts as to separate materials, regardless of their similarities."

Defendant's final contention is that its due process rights were violated because the State was not required to prove what the community standards were.

Defendant argues that the lack of proof of such standards resulted in a failure of proof as to that element of the offense.

In *State v. Tara Enterprises, Inc.*, 205 Neb. 516, 520-21, 288 N.W.2d 290, 293 (1980), this court stated: "Defendant next contends that the trial court erred in failing to find that the State had a burden to adduce evidence with reference to community standards on obscenity. The rule in this regard is well established. 'A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law. Stone v. New York, C. & St. L. R. Co., 344 U.S. 407, 409 [97 L. Ed. 441, 73 S. Ct. 358] (1953); Schulz v. Pennsylvania R. Co., 350 U.S. 523, 525-526 [100 L. Ed. 668, 76 S. Ct. 608] (1956).' Hamling v. United States, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974); Smith v. United States, 431 U.S. 291, 97 S. Ct. 1756, 52 L. Ed. 2d 324 (1977)."

In *Hamling v. United States*, *supra* at 100, the Court held that "[e]xpert testimony is not necessary to enable the jury to judge the obscenity of material which, as here, has been placed into evidence."

There being no error, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIE E. TUCKER, APPELLANT.

340 N.W.2d 376

Filed November 18, 1983. No. 82-537.

1. **Confessions.** In a criminal trial a confession of guilt is not competent as evidence unless first shown to have been voluntarily made.
2. _____. Factors to be taken into account in the determination of whether a confession is voluntary are the circumstances of the ar-

rest, the circumstances of continuing custody, the duration of custody, and the pattern of interrogation.

3. **Confessions: Appeal and Error.** A finding of a trial court that statements or confessions were intelligently and voluntarily made will not be set aside on appeal unless the finding is clearly erroneous.

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

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

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

After a trial to a jury appellant, Willie E. Tucker, was found guilty of first degree murder in the commission of a robbery. Tucker was sentenced to imprisonment for life.

Appellant assigns as the only error for consideration that the trial court erred in admitting his confession into evidence. Appellant does not argue that he was not fully informed of his fifth amendment right against self-incrimination and of his sixth amendment right to the assistance of counsel as guaranteed by the U.S. Constitution. Nor does appellant assert he did not voluntarily waive those rights. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Rather, appellant argues that the confession was involuntary when the totality of the circumstances is considered. *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978).

Factors to be taken into account in the determination of whether a confession is the product of a free will (i.e., voluntary) are (1) the circumstances of the arrest, (2) the circumstances of continuing custody, (3) the duration of custody, and (4) the pattern of in-

terrogation. *Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979).

The appeal arises out of an armed robbery at the International House of Pancakes at 29th and Dodge Streets in Omaha, Nebraska, on December 23, 1981. During the course of the robbery, the victim, Lisa Lisko, a waitress and cashier, was shot and killed by one of the two robbers.

The appellant was identified by a witness as being at the scene. After investigation a warrant was issued and the appellant was arrested at his father's home in Omaha at approximately midnight on December 30, 1981.

Viewed most favorably to the State, the evidence received at the motion to suppress discloses that the appellant was allowed to dress and was taken to the Omaha police station. He was escorted to an interrogation room on the fourth floor, handcuffs were removed, and he was advised of his rights per *Miranda v. Arizona*, *supra*. After first being advised that he was under arrest for the murder of Lisa Lisko, the appellant stated that he understood his rights, waived presence of counsel, and consented to speak with the officers.

The interviewing officer testified that the appellant did not appear to be intoxicated or under the influence of drugs. The appellant confirmed the testimony. After the appellant initially denied any knowledge of the homicide, Officer Lanny Lenker informed him that a witness had identified appellant as present at the pancake house on the night of the murder. Appellant responded that he "just felt terrible, that he would just as soon go to the electric chair due to the fact that his entire life had been destroyed." Appellant was thereafter informed that his brother had made a statement. Appellant asked to speak to his father; the police complied. After speaking with his father, appellant was again told of the witness placing him at the scene. Appellant began crying, stating that he "didn't mean to shoot the

girl." He was not threatened, coerced, or promised anything, and told police of his involvement in the crime. At approximately 2:40 a.m., after the oral confession, a taped statement was taken. Again, on the tape, all rights were explained and waived. Toward the end of the statement appellant remarked: "I wanted to get this off my back." His final comment was: "Everything I said, that's the way it came to me." The statement was finished at 3:05 a.m.

The total elapsed time from the beginning of the interrogation to the completion was 2 hours 35 minutes, including the time appellant spoke to his father.

The appellant, at the time of the commission of the crime, was a 21-year-old male recently released from incarceration for another crime. He neither maintained nor was shown to be either mentally or physically susceptible to pressure, nor was any pressure, psychological or physical, shown to have existed. The appellant merely asserts that the passage of 2½ hours from the time of the first interview until the completion of the taped statement in and of itself is coercive, and reason to suppress the statement. He cites no authority, nor have we discovered any that supports his view.

Evidence exists to support the trial court's finding that the confession was voluntary, and since the finding is not clearly erroneous, it will not be set aside on appeal. *State v. Ellefson*, 214 Neb. 747, 336 N.W.2d 88 (1983).

AFFIRMED.

JAMES AUSTIN MACE, APPELLANT, V. JERRI LYNNE HANSON MACE, APPELLEE.

341 N.W.2d 307

Filed November 18, 1983. No. 82-559.

1. **Habeas Corpus: Child Custody: Foreign Judgments.** Habeas corpus proceedings may be used to enforce a foreign judgment regarding child custody.
2. **Foreign Judgments: Child Custody: Jurisdiction.** Neb. Rev. Stat. § 43-1213 (Cum. Supp. 1982) does not require automatic enforcement of a foreign decree or a foreign modification of a decree simply because it is shown to the court that it exists. Rather, the statute requires that the court in which enforcement is sought examine the jurisdictional foundation upon which the foreign court acted.
3. _____: _____: _____. If the foreign court has assumed jurisdiction under statutory provisions substantially in accordance with the Uniform Child Custody Jurisdiction Act or under factual circumstances meeting the UCCJA jurisdictional standards, then the court must recognize and enforce the foreign decree.
4. _____: _____: _____. Primarily, the Uniform Child Custody Jurisdiction Act is concerned with subject-matter jurisdiction and not personal jurisdiction. Submission of a person to the jurisdiction of the court does not alone confer jurisdiction under the act.
5. **Child Custody: Jurisdiction.** Usually the best interests of the children are served by having a determination in the state where the parties both reside and where the facts concerning the custody of the children are more readily available to the court.
6. _____: _____. The home state concept is therefore of the utmost importance in the Uniform Child Custody Jurisdiction Act, requiring the courts, when possible, to choose that forum to adjudicate custody disputes.
7. **Records: Appeal and Error.** Evidence which does not appear in the record cannot be considered on appeal by the Supreme Court.
8. **Child Custody.** The controlling consideration in a child custody determination is the best interests and welfare of the child.
9. _____. Among the factors to be considered in determining the best interests of the children are the moral fitness of the parents, respective environments offered by each parent, emotional relationship between the children and parents, and the age, sex, and health of the children. Sexual misconduct, while not determinative, may be considered.
10. _____. A child's statement of preference of custody may be considered.
11. _____. Other considerations are the effect on the children of continuing or disrupting an existing relationship, attitude and stability

of each parent, and the capacity to furnish physical care, education, and needs of the children.

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

Richard F. Welling of Breeling, Welling, Place & Steier, for appellant.

Rodney W. Smith of Peebles & Smith, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

BOSLAUGH, J.

This is an appeal in a proceeding for a writ of habeas corpus to enforce a Mississippi judgment changing child custody between the parties.

The plaintiff, James Austin Mace, and the defendant, Jerri Lynne Hanson Mace, were married on September 28, 1972, in Elk Point, South Dakota. Two children were born of the marriage: Michelle Lynne, born May 2, 1973, and Adriane Lee, born October 12, 1977. The parties were divorced on September 12, 1980, by a decree of the chancery court of Jones County, Mississippi, the site of the couple's marital home.

The decree awarded custody of Michelle and Adriane to Jerri, subject to the reasonable visitation rights of James. James was ordered to pay child support. The decree did not prohibit Jerri from relocating to another state with the children.

Several members of Jerri's family reside in the Omaha area. Jerri and the two children moved to Omaha, Nebraska, just a few days after the divorce decree was entered. James and his father helped Jerri pack, and the record shows no objection by James to this move. Jerri has resided in Omaha since that time, and Michelle has attended school in Omaha.

In December 1981 the children went to Mississippi to visit their father. Although the parties had agreed that James would return the children to

Omaha, he told Jerri that she would have to come to Mississippi to get them. Shortly after her arrival at James' parents' house to get the children, James arrived with an officer, who served Jerri with a summons to appear in the Jones County Chancery Court in an action to modify the decree. She then returned to Omaha with the children.

At the modification hearing in Mississippi, Jerri appeared through counsel, who objected that the chancery court lacked jurisdiction over Jerri and the children. The Mississippi court held that since Jerri had been served with process, it had jurisdiction to modify its original decree. Jerri presented no evidence. James and his mother testified regarding Jerri's fitness as a custodial parent. The court found a material change in circumstances and awarded custody of the two children to James. Judgment was entered on March 24, 1982. On April 9, 1982, Jerri filed a petition for a rehearing, which is still pending. In correspondence with the Douglas County District Court, the presiding judge in Jones County, Mississippi, stated: "No hearing has been requested by that attorney on that petition. Under our procedure, until the attorney requests a hearing and gives proper notice to opposing counsel, the matter will lie dormant."

On April 9, 1982, James filed a petition for a writ of habeas corpus in Douglas County, demanding that Jerri turn the children over to him pursuant to the March 24, 1982, Mississippi judgment modifying the decree of September 12, 1980. Jerri responded to the writ, requesting that the Nebraska court examine the jurisdiction of the Mississippi court in modifying the decree, and requesting that she be awarded custody.

On April 12, 1982, after an altercation with Jerri's brother and upon showing a copy of the Mississippi decree to school officials, James took Michelle from her school and returned to Mississippi. Adriane remained in Omaha with Jerri.

At the hearing in this case the trial court ordered James to return Michelle to Douglas County, and James complied. The court then heard evidence regarding the fitness of the parents, and interviewed the children. The court dismissed the petition for a writ of habeas corpus and awarded custody of the children to Jerri. James appeals.

Habeas corpus proceedings may be used to enforce a foreign judgment regarding child custody. See *Slidell v. Valentine*, 298 N.W.2d 599 (Iowa 1980). The Uniform Child Custody Jurisdiction Act, 9 U.L.A. 116-70 (1979) (UCCJA), is applicable in the present case.

James argues that the UCCJA, enacted in Nebraska and codified as Neb. Rev. Stat. §§ 43-1201 et seq. (Cum. Supp. 1982), required the District Court to summarily enforce the March 24, 1982, Mississippi modification judgment and precluded the District Court from making a modification decree.

There is some doubt as to whether the 1982 Mississippi judgment modifying the 1980 decree was a final order such that we might be required to enforce under any theory. See 50 C.J.S. *Judgments* § 889(3) (1947). However, neither party has raised an issue regarding its finality, and the plaintiff could not be heard to assert its lack of finality, since he seeks to enforce the judgment. Furthermore, we conclude that the Mississippi court did not exercise jurisdiction substantially in conformity with the act, as required by § 43-1206, and the Mississippi judgment is not enforceable in Nebraska under the terms of our statute.

The general purposes of the UCCJA are set forth in § 43-1201. Of the nine purposes listed the most significant to the present case is set out in subdivision (c): "Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relation-

ships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state."

The UCCJA requires the enforcement of a decree of another state under certain conditions: "The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with sections 43-1201 to 43-1225 or which was made under factual circumstances meeting the jurisdictional standards of the act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of sections 43-1201 to 43-1225." § 43-1213.

The jurisdictional provisions of the UCCJA are set forth in § 43-1203: "(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

"(a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state;

"(b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

"(c) The child is physically present in this state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child be-

cause he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected; or

"(d) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with subdivision (a), (b), or (c) of this section, or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

"(2) Except under subdivisions (c) and (d) of subsection (1) of this section, physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

"(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody."

Section 43-1213 does not require automatic enforcement of a foreign decree or a foreign modification of a decree simply because it is shown to the court that it exists. Rather, the statute requires that the court in which enforcement is sought examine the jurisdictional foundation upon which the foreign court acted. See *In re Marriage of Hopson*, 110 Cal. App. 3d 884, 168 Cal. Rptr. 345 (1980). If the foreign court has assumed jurisdiction under statutory provisions substantially in accordance with the UCCJA or under factual circumstances meeting the UCCJA jurisdictional standards, then the court must recognize and enforce the foreign decree.

Mississippi had not adopted the UCCJA at the time of the modification decree. However, this does not preclude the application of the UCCJA jurisdictional standards to the Mississippi decree. *Bergstrom v. Bergstrom*, 271 N.W.2d 546 (N.D. 1978). In this regard we consider the factual circumstances under which the Mississippi court assumed jurisdiction in light of the UCCJA standards as set forth in § 43-1203.

Primarily, the UCCJA is concerned with subject-matter jurisdiction and not personal jurisdiction. Submission of a person to the jurisdiction of the court does not alone confer jurisdiction under the act. § 43-1203(2). The jurisdictional standards of the act are designed to achieve both certainty and predictability in the enforcement of child custody decrees while assuring that a court which assumes jurisdiction acts in the child's best interests. See, *Slidell v. Valentine*, 298 N.W.2d 599 (Iowa 1980); *Hafer v. Superior Court, County of San Diego*, 126 Cal. App. 3d 856, 179 Cal. Rptr. 132 (1981).

Section 43-1203(1)(a) provides that the court of the "home state" of the child has jurisdiction. Section 43-1202(5) defines "home state" as follows: "Home state shall mean the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period."

The evidence in this case shows that Jerri and the children lived in Omaha for 18 months prior to the commencement of this action. Nebraska, not Mississippi, is therefore the home state of the children. Because the children had not lived in Mississippi within 6 months prior to the commencement of this action, § 43-1203(1)(a)(ii) does not apply.

Section 43-1203(1)(b) provides that a court may assume jurisdiction as in the best interests of the child because the child and one or both of his parents has a significant connection with the state and there is available in that state substantial evidence regarding the child's present or future care, protection, training, and personal relationships. The following statement in *In re Marriage of Hopson, supra*, is relevant: "In commenting on the application of

subdivision (1)(b), the commissioners expressed that 'perhaps more than any other provision of the Act requires that it be interpreted in the spirit of the legislature purposes expressed' in section 5150 (quoted below at footnote 14 on page 353). 'The paragraph was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description. But its purpose is to limit jurisdiction rather than to proliferate it. The first clause of the paragraph is important: jurisdiction exists only if it is in the *child's* interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular state. The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state' (9 U. Laws Ann. Commrs.' Note Foll. § 3, emphasis included). . . .

. . . .

"Analyzing the dilemma created by the application of section 5152, subdivision (1)(b) under the circumstances we note that . . . we are told that the best interest of the child is served if jurisdiction is exercised by the forum with which he has maximum contact and which there is substantial evidence concerning his relationship with others." 110 Cal. App. 3d at 895-96, 168 Cal. Rptr. at 353-54.

James was a resident of Mississippi at the time the action to modify the decree of 1980 was commenced. Evidence regarding the father's ability to care for his children and regarding the father's present and extended families was available in Mississippi.

However, before we could conclude that this was sufficient under § 43-1203(1)(b) to warrant jurisdiction in conformity with the act so that we are required to enforce the Mississippi judgment, we must consider whether the Mississippi court acted in the

best interests of the children when it assumed jurisdiction.

In *Both v. Superior Ct., in & for Cty. of Mohave*, 121 Ariz. 381, 384, 590 P.2d 920, 923 (1979), the court said: "Usually the best interest of the child is served by having a determination in the state where the parties both reside and where the facts concerning the custody of the child are more readily available to the court."

In *Hafer v. Superior Court, County of San Diego*, 126 Cal. App. 3d 856, 866, 179 Cal. Rptr. 132, 138 (1981), the court said: "*In re Marriage of Carney*, 24 Cal.3d 725, 730-731, 157 Cal. Rptr. 383, 598 P.2d 36, strongly emphasizes children's needs for stability and continuity. So also does the Act. The home state concept is therefore of the utmost importance in the Act, requiring the courts, when possible, to choose that forum to adjudicate custody disputes. The children's home is the presumptively correct forum. A showing of need to change custody does not alter the fact the modification process will be less harmful to the children if conducted near their present home."

Although Mississippi had some contacts with the children, it is Nebraska which has the maximum contact. The evidence concerning the children's schooling, their present care, their present relationships, and their extended family is more readily available in Douglas County. Moreover, Omaha, as the children's home state for the entire 18-month period since the divorce, is the "presumptively correct" forum. *Hafer, supra.* We also note that the evidence regarding Jerri's fitness as a mother, the crux of James' allegations that he should be the custodial parent, is more readily available in Douglas County.

The evidence shows no factual basis to support an assumption of jurisdiction by Mississippi under § 43-1203(1)(c) or (d). Its assumption of jurisdiction did not serve the best interests of the children. Ne-

braska has jurisdiction under both the "home state" test and the "best interests" test, and it is now the more appropriate forum for litigation of the child custody issue.

"The Act contemplates concurrent jurisdiction and contains three provisions to assist a court in determining which forum to choose." *In re Marriage of Leonard*, 122 Cal. App. 3d 443, 468, 175 Cal. Rptr. 903, 917 (1981). The only such provision relevant in this appeal is § 43-1207(1), (2), and (3): "(1) A court which has jurisdiction under sections 43-1201 to 43-1225 to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

"(2) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

"(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

"*(a) If another state is or recently was the child's home state;*

"*(b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants;*

"*(c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;*

"*(d) If the parties have agreed on another forum which is no less appropriate; and*

"*(e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 43-1201.*" (Emphasis supplied.)

We believe that if the Mississippi court had analyzed its jurisdictional basis in conformity with the above-quoted section, it would have concluded that its assumption of jurisdiction would defeat the purposes of the act, i.e., that litigation should take place in the forum with maximum contact and that Nebraska is the "more appropriate forum."

We conclude that because Nebraska has jurisdiction under the act and is the more appropriate forum, it may modify the original divorce decree with regard to child custody. § 43-1214.

James assigns as error the denial of his request for pretrial discovery as provided by §§ 43-1218 through 43-1222. The record does not reflect any request for discovery, nor that such a request was denied by the court. Evidence which does not appear in the record cannot be considered on appeal by the Supreme Court. *Weeks v. State Board of Education*, 204 Neb. 659, 284 N.W.2d 843 (1979). The hearing took place over an 8-day period, some 2 weeks after James' petition was filed. It appears from the record that all witnesses germane to his allegations regarding Jerri's fitness appeared and testified.

James' final assignment of error is that it was error to determine that it was in the best interests of the children to award custody to Jerri. The review of a determination of child custody is de novo on the record; however, weight is given to the fact that the trial court observed the witnesses and their manner of testifying and that the court accepted one version of the facts rather than another. *Hicks v. Hicks*, 214 Neb. 588, 334 N.W.2d 807 (1983); *Elsasser v. Elsasser*, 206 Neb. 128, 291 N.W.2d 260 (1980).

The controlling consideration in a child custody determination is the best interests and welfare of the children. *Krueger v. Krueger*, 211 Neb. 568, 319 N.W.2d 445 (1982). Among the factors to be considered in determining the best interests of the children are the moral fitness of the parents, respective environments offered by each parent, emotional re-

lationships between the children and parents, and the age, sex, and health of the children. Sexual misconduct, while not determinative, may be considered. *Koch v. Koch*, 209 Neb. 896, 312 N.W.2d 294 (1981); *Kringel v. Kringel*, 207 Neb. 241, 298 N.W.2d 150 (1980); *Hicks v. Hicks*, *supra*. A child's statement of preference of custody may be considered. *State ex rel. Speal v. Eggers*, 181 Neb. 558, 149 N.W.2d 522 (1967). Other considerations are the effect on the children of continuing or disrupting an existing relationship, attitude and stability of each parent, and the capacity to furnish physical care, education, and needs of the children. *Duff v. Duff*, 203 Neb. 767, 280 N.W.2d 69 (1979).

In the present case the father's main concern was what effect Jerri's former boyfriend, who lived with Jerri and the children for several months in 1980, may have had on the children.

After hearing testimony in this case from the children, the boyfriend, and Jerri, the District Court concluded that the relationship which terminated in December 1980 had no detrimental effect upon the children. The record discloses that the live-in relationship was of but a brief duration, and has now ended. Although Jerri had planned to marry this man, she has since reconsidered those plans. This evidence alone did not establish that Jerri was an unfit parent.

The ages and sex of the children, a 6-year-old girl and a 10-year-old girl, and the long relationship they have had with their mother must be considered. The mother is able to spend more time with the children than is their father, a medical student with several years of residency training ahead of him. The trial court interviewed the children, both of whom indicated a preference to be with their mother and indicated a reluctance to leave their established friendships in Omaha. In granting custody to the mother, Jerri, the trial court said: "[I]n this case it is important to note that the upbringing of the children

has been for the most part the responsibility of the [mother]. In view of the circumstances the [mother] has done a commendable job in raising these children. These children are evidence enough to support the premise that the respondent has and will give the children both the quantity and quality of time necessary for their well-being."

As we view the record, custody was properly awarded to the mother. We find no basis upon which to disturb the order of the trial court in that regard.

The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I regret that I must dissent in this case. I believe that the majority has misread and misapplied the provisions of the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1201 et seq. (Cum. Supp. 1982), and as a result has effectively repealed the act.

As noted by the majority, the act was promulgated by the National Conference of Commissioners on Uniform State Laws. An examination of its notes to the act are extremely helpful in understanding the intent and purpose of the act. (See Uniform Child Custody Jurisdiction Act, Commissioners' Note, 9 U.L.A. 151 (1979).)

Contrary to the suggestion made by the majority, the "most significant" purpose of the act as applied to the present case is not § 43-1201(1)(c) but, rather, a number of other items, including § 43-1201(1)(b), (f), and (g), which provide as follows: "(b) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child . . . (f) Avoid relitigation of custody decisions of other states in this state when feasible; (g) Facilitate the enforcement of custody decrees of other states." In my view we have chosen to ignore both

the direct language of the act as well as the obvious purpose. See § 43-1201.

The Commissioners' Prefatory Note further explains the purpose of the act, noting at 111, 113-14: "There is growing public concern over the fact that thousands of children are shifted from state to state and from one family to another every year while their parents or other persons battle over their custody in the courts of several states. . . .

. . . .

". . . Generally speaking, there has been a tendency to over-emphasize the need for fluidity and modifiability of custody decrees at the expense of the equal (if not greater) need, from the standpoint of the child, for stability of custody decisions once made. . . .

"Under this state of the law the courts of the various states have acted in isolation and at times in competition with each other; often with disastrous consequences. A court of one state may have awarded custody to the mother while another state decreed simultaneously that the child must go to the father. [Citations omitted.] In situations like this the litigants do not know which court to obey. They may face punishment for contempt of court and perhaps criminal charges for child stealing in one state when complying with the decree of the other. Also, a custody decree made in one state one year is often overturned in another jurisdiction the next year or some years later and the child is handed over to another family, to be repeated as long as the feud continues. [Citations omitted.]

. . . .

"To remedy this intolerable state of affairs where self-help and the rule of 'seize-and-run' prevail rather than the orderly processes of the law, uniform legislation has been urged in recent years to bring about a fair measure of interstate stability in custody awards. . . ."

"The Act is designed to bring some semblance of

order into the existing chaos. . . . It provides for the recognition and enforcement of out-of-state custody decrees in many instances. See Sections 13 and 15. Jurisdiction to modify decrees of other states is limited by giving a jurisdictional preference to the prior court under certain conditions. See Section 14."

Obviously, the real purpose of the act was to avoid the very conflict which the majority opinion in this case has now created. Rather than limiting jurisdiction and reducing chaos, we have increased jurisdiction and enlarged chaos.

As an example, the majority opinion suggests that there is serious doubt as to whether the 1982 Mississippi judgment modifying the 1980 decree was a final order, such that we might be bound to enforce that decree under the act. With that conclusion I agree. I conclude, however, that because the Mississippi judgment was not a final order but, rather, a pending order, under the provisions of § 43-1206 we are required to decline jurisdiction in this case until a final order has been entered. See § 43-1206(1). That is all we should do in this case. By filing a petition for rehearing in Mississippi, Mrs. Mace has chosen to submit her grievance to the Mississippi court. She should not be permitted, on the one hand, to seek relief from the Mississippi court while, on the other hand, contending that the court is without jurisdiction, and its orders ignored.

There is no question that there is presently pending, and was at the time that the District Court for Douglas County, Nebraska, exercised its jurisdiction, a petition proceeding concerning the custody of a child in another state, thereby invoking the provisions of § 43-1206. The Commissioners' Note to § 6 specifically provides that this conflict is to be avoided. It reads at 134-35: "Because of the havoc wreaked by simultaneous and competitive jurisdiction which has been described in the Prefatory Note, this section seeks to avoid jurisdictional conflict with all feasible means, including novel methods.

Courts are expected to take an active part under this section in seeking out information about custody proceedings concerning the same child pending in other states. In a proper case jurisdiction is yielded to the other state either under this section or under section 7. Both sections must be read together.

. . . .

"While jurisdiction need not be yielded under subsection (a) if the other court would not have jurisdiction under the criteria of this Act, the policy against simultaneous custody proceedings is so strong that it might in a particular situation be appropriate to leave the case to the other court even under such circumstances. . . .

"Once a custody decree has been rendered in one state, jurisdiction is determined by sections 8 and 14."

While § 8 is not applicable in this case, § 14 clearly covers the situation. The Commissioners' Note makes that fact abundantly clear. It reads in part at 154: "Courts which render a custody decree normally retain continuing jurisdiction to modify the decree under local law. Courts in other states have in the past often assumed jurisdiction to modify the out-of-state decree themselves without regard to the preexisting jurisdiction of the other state. [Citation omitted.] In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3. The fact that the court had previously considered the case may be one factor favoring its continued jurisdiction. If, however, all the persons involved have moved away or the contact with the state has otherwise become slight, modifi-

cation jurisdiction would shift elsewhere. [Citation omitted.]"

Moreover, the example given in the Commissioners' Note is relevant to this case. The note reads at 154: "For example, if custody was awarded to the father in state 1 where he continued to live with the children for two years and thereafter his wife kept the children in state 2 for 6½ months (3½ months beyond her visitation privileges) with or without permission of the husband, state 1 has preferred jurisdiction to modify the decree despite the fact that state 2 has in the meantime become the 'home state' of the child. If, however, the father also moved away from state 1, that state loses modification jurisdiction interstate, whether or not its jurisdiction continues under local law. . . . Also, if the father in the same case continued to live in state 1, but let his wife keep the children for several years without asserting his custody rights and without visits of the children in state 1, modification jurisdiction of state 1 would cease."

In the instant case, while the mother was awarded custody of the children, she was not authorized to remove the children from the jurisdiction of the Mississippi court. Even if the father consented to the move, a fact which is apparently disputed, the Mississippi court could not be divested of its continuing interest in or jurisdiction over the children. Furthermore, the father did not abandon the children nor fail to exercise his visitation rights. The children continued to return to Mississippi to visit with the father.

In the instant case the evidence discloses that while Nebraska has developed contacts with the children, Mississippi has not lost the contacts. It is in Mississippi where the father lives and where the children regularly visit; it is in Mississippi where the continuing child support judgment rests and from where the children receive at least a portion of their support; it is in Mississippi where the child

support order must be enforced if the father fails to pay; and it is in Mississippi where Mrs. Mace has sought the court to reconsider its actions and grant her relief. To therefore suggest that Mississippi no longer has any significant interest in this matter is to ignore the facts.

The majority suggests that neither § 43-1206 nor § 43-1214 applies because Mississippi had not, at the time this action was commenced, adopted the Uniform Child Custody Jurisdiction Act. But that is not the sole criterion under the act. It must either assume jurisdiction under statutory provisions substantially in accordance with the act or enter its decree under factual circumstances meeting the jurisdictional standards substantially similar to the act. As the Commissioners' Note indicates, this does not require that the initial jurisdiction remain the "home state," but only that it retain sufficient interest in the case.

The Commissioners' Note at 151 to § 13 of the act emphasizes this point.

"This section and sections 14 and 15 are the key provisions which guarantee a great measure of security and stability of environment to the 'interstate child' by discouraging relitigations in other states. [Citations omitted.]

"Although the full faith and credit clause may perhaps not require the recognition of out-of-state custody decrees, the states are free to recognize and enforce them. See Restatement of the Law Second, Conflict of Laws, Proposed Official Draft, section 109 (1967), and see the Prefatory Note, *supra*. This section declares as a matter of state law, that custody decrees of sister states will be recognized and enforced. Recognition and enforcement is mandatory if the state in which the prior decree was rendered 1) has adopted this Act, 2) has statutory jurisdictional requirements substantially like this Act, or 3) would have had jurisdiction under the facts of the

case if this Act had been the law in that state. [Citation omitted.]

" 'Jurisdiction' or 'jurisdictional standards' under this section refers to the requirements of section 3 in the case of initial decrees and to the requirements of sections 3 and 14 in the case of modification decrees."

The "home state" concept of § 43-1203 is relevant only when the initial state has lost jurisdiction by reason of both parties leaving the original state or by reason of some deliberate action taken by one of the parties which relieves the original state of its jurisdiction.

Our decision in this case has brought about exactly all of the things which the adoption of the act sought to eliminate. We now have two decrees in two different jurisdictions involving the custody of the children, neither of which apparently can be enforced outside the jurisdiction in which the decree was entered. Moreover, because the Mississippi court has granted the father custody, it has terminated child support. Nebraska, under this act, cannot impose child support, and now the children must be without child support. Furthermore, should the wife ever go into Mississippi for the purpose of attempting to seek a child support order, she will likely be held in contempt of court and in violation of an existing court decree. How we suggest that all of this is in the best interests of the children is difficult to imagine.

One further aspect of the majority opinion requires comment. The majority states that, before we are required to recognize the Mississippi decree in any event, we must consider whether the Mississippi court acted in the best interests of the child when it assumed jurisdiction. The majority then reasons that Mississippi did not act in the child's best interests when it granted custody to the father, a married medical student with a stable home, and took custody away from the mother, whom the evi-

dence discloses had permitted a male to live with her *and the children during a part of 1980.* How we reach that conclusion in view of our recent decisions in *Hinz v. Hinz*, *ante* p. 335, 338 N.W.2d 442 (1983); *Hicks v. Hicks*, 214 Neb. 588, 334 N.W.2d 807 (1983); and *Krueger v. Krueger*, 211 Neb. 568, 319 N.W.2d 445 (1982), is difficult to follow.

It appears to me that what we have attempted to do in this case is to find justification for placing custody of the children with the mother, notwithstanding the order of a court having jurisdiction over the parties. In order to accomplish that end we have had, therefore, to ignore our own case law and the statutes involved. Apparently, we believe we can determine "best interest" better than the Mississippi court can. Would we wish other jurisdictions to so lightly consider our decrees? I fear that we have created untold difficulty by our action here, and it will not take very long for us to wish we had not reached the conclusion we have reached. The trial court should have required the parties to return to Mississippi where the entire matter could be resolved. I would have so held.

CAPORALE, J., joins in this dissent.

AIRPORT INN, INC., ET AL., APPELLANTS, V. COUNTY BOARD OF EQUALIZATION OF THE COUNTY OF LANCASTER ET AL., APPELLEES.

340 N.W.2d 378

Filed November 18, 1983. Nos. 82-585, 82-586, 82-587.

1. **Taxation: Appeal and Error.** An appeal from a board of equalization is reviewed by this court de novo as an equitable proceeding.
2. _____: _____. In an appeal from a board of equalization the burden is upon the taxpayer to show by clear and convincing evidence that the board's determination as to actual value is incorrect and invalid.
3. **Taxation: Valuation.** Nothing in Neb. Rev. Stat. § 77-112 (Reissue

1981) requires the county assessor or county board to use all of the factors set forth therein. Instead, they may use such factors or a combination thereof which they determine to be applicable in determining actual value under the Constitution of Nebraska.

Appeal from the District Court for Lancaster County: ROBERT T. FINN, Judge. Affirmed.

John F. Akin, for appellants.

Michael G. Heavican, Lancaster County Attorney, and Michael E. Thew, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

In these consolidated appeals plaintiffs-appellants, Airport Inn, Inc., and Prudential Insurance Company of America, take exception to the trial court's determination that the valuations fixed by the defendant-appellee Lancaster County Board of Equalization were not greater than their property's actual values. We affirm.

The real estate and improvements in question, located in Lancaster County, are owned by Prudential and leased by Airport Inn, Inc., which is obligated by its lease agreement to pay the taxes. The actual value for tax purposes for the years 1979 and 1980 was assessed, including an adjustment required by the State Board of Equalization and Assessment, at $1,765,285. These valuations were left undisturbed by the board of equalization and the trial court. The actual value assessed for tax purposes for the year 1981 is not reflected by the record, but was adjusted to $1,617,550 by the trial court pursuant to a stipulation which is likewise not contained in the record.

Plaintiffs claim the trial court erred in determining that their evidence failed to overcome the presumption of regularity in favor of the board, and failed to show that the values fixed by the board were unreasonable.

Although an appeal from a board of equalization is

reviewed by this court de novo as an equitable proceeding, *Beynon Farm Products v. Bd. of Equalization*, 213 Neb. 815, 331 N.W.2d 531 (1983), the burden is upon the taxpayer to show by clear and convincing evidence that the board's determination as to actual value is incorrect and invalid. *Richman Gordman v. Board of Equalization*, *ante* p. 379, 338 N.W.2d 761 (1983).

Obviously, if the evidence sustains the actual values fixed by the board of equalization, it matters not whether, at some point during the trial in the District Court, the presumption of regularity disappeared. We therefore review the evidence from that perspective.

Carol Broman, the assessor, testified that the valuation of plaintiffs' land was reached by a comparative sales analysis. The valuation of the improvements was reached by a cost approach. The assessor estimated the value of the land for 1979 tax purposes to be $222,555 and that of the improvements to be $1,542,730, for a total of $1,765,285.

Plaintiffs' expert witness testified that he had appraised the land by the comparative sales analysis method and reached the conclusion that the 256,825 square feet should be valued at $.80 per square foot, or approximately $205,000.

Plaintiffs' expert also testified he used three different approaches in valuing the property. The cost approach generally consists of determining the replacement or reproduction cost of the improvements; subtracting an amount for physical deterioration and functional and economic obsolescence; and adding the value of the land. His cost approach resulted in the following:

Reproduction Cost	$3,245,748
−20% physical deterioration	649,150
	2,596,598

−50% functional and economic obsolescence	1,298,299
	1,298,299
+land	205,000
	$1,503,299

This expert placed the value by use of the cost approach at $1,500,000.

Plaintiffs' expert next used the market approach, which analyzes recent sales of similar properties. He gave little weight to this approach because of the lack of recent verifiable local sales of motels. Nonetheless, his estimate of the value by this approach was between $1,300,000 and $1,700,000.

The last appraisal approach used by plaintiffs' expert was the income approach, the one he thought should be given major weight. This method determines value by relating the property's net yearly income to a capitalization rate, the return considered necessary to attract capital to an investment. Plaintiffs' expert placed this rate at 14 percent for 1979, and reached a 1979 income approach estimate of value of $1,104,000. When confronted with the fact that his valuation was based upon estimated income figures not derived from Airport Inn's financial statements, he recalculated the valuation, using financial statement data. He had also calculated the value of the land based upon erroneous zoning assumptions. He admitted this error, but contended it would not affect the land valuation portion of his appraisal.

The plaintiffs' expert concluded, after outlining all the approaches he took, that the value of the property as of May 17, 1979, was $1,300,000.

In 1982 the board had the property surveyed by an outside expert, who, like plaintiffs' expert, is a licensed real estate appraiser, to determine its value as of December 31, 1979. His appraisal, considering the actual zoning, resulted in a land value of $1.25 per square foot, or $320,000. His cost approach,

which used a 30-percent obsolescence factor instead of the plaintiffs' 50-percent, resulted in a valuation at $1,790,000.

The board's expert found only one local comparable sale, and reached a valuation of $1,650,000 based upon the market approach.

The income analysis approach employed by the board's expert related the net income from the motel operation to a capitalization rate *and* related the rental income paid to Prudential to the capitalization rate. He used a 12.5-percent rate which was drawn from a national study, and adjusted for the property's past history. This income approach reached a valuation of $1,780,000. The board's expert, like the plaintiffs', gave primary weight to the income approach, and concluded that the market value of the property was $1,780,000.

Neb. Rev. Stat. § 77-201 (Reissue 1981) requires that real estate not expressly exempted be taxed at actual value. Actual value has been held to mean fair market value. *Beynon Farm Products v. Bd. of Equalization*, 213 Neb. 815, 331 N.W.2d 531 (1983). Neb. Rev. Stat. § 77-112 (Reissue 1981) provides the methods to be used in arriving at actual value: "Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; (6) market value in the ordinary course of trade; and (7) existing zoning of the property."

In essence, plaintiffs argue that inasmuch as the assessor did not initially include the income approach in arriving at her valuations, her determinations of actual value cannot stand. This contention has already been addressed and rejected by this court. In *LaGord Assoc. v. County of Cass*, 209 Neb. 99, 101, 306 N.W.2d 578, 579 (1981), we stated: "Noth-

ing in the above statute [§ 77-112] requires the county assessor or county board to use all of the factors set forth therein. Instead, they may use such factors or a combination thereof which they determine to be applicable in determining actual value under the Constitution of Nebraska."

In the final analysis the test is not what factors the assessor considered or failed to consider, but whether the property in question was valued for tax purposes at its actual value.

The evidence in the instant case amply demonstrates the correctness of the valuations arrived at by the assessor for 1979 and 1980. The board's outside expert employed cost, market, and income approaches, and concluded that the 1979 actual value was $1,780,000. Although plaintiffs' expert was of the opinion the actual value of the property was $1,300,000, the board's valuations were within the range of the conflicts in the evidence.

We conclude plaintiffs have failed to show by clear and convincing evidence that the board's determinations as to actual value were incorrect and invalid.

AFFIRMED.

BEULAH C. HUMPHREY, APPELLEE, V. CARL M. HUMPHREY, APPELLANT.

340 N.W.2d 381

Filed November 18, 1983. No. 82-612.

1. **Divorce: Appeal and Error.** In a marriage of less than 2 years' duration, where the trial court has restored the parties to approximately the position each was in before the marriage, such disposition, if supported by the evidence, will be affirmed on review.
2. **Divorce: Trial.** The practice of trial courts in dissolving a marriage but retaining for later disposition the property rights of the parties is disapproved.

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

Sam Grimminger, for appellant.

John R. Hall of Anderson, Vipperman, Hinman, Hall & Kovanda, for appellee.

KRIVOSHA, C.J., HASTINGS, CAPORALE, and GRANT, JJ., and BRODKEY, J., Retired.

PER CURIAM.

This is a dissolution of marriage case. Petitioner-appellee, Beulah C. Humphrey, filed her petition on December 30, 1980, seeking such dissolution and a division of property. Respondent-appellant, Carl M. Humphrey, answered, seeking the same relief.

The case was tried on May 19 and June 11, 1981. At the conclusion of the trial the court made a docket entry, which was announced to the parties, finding that the marriage was irretrievably broken, dissolving the marriage, restoring appellee's former name of Knox, and taking the question of "property division, alimony, fees, etc.," under advisement.

On July 26, 1982, the court made the following docket entry: "Now on this day this cause came on for hearing. Each party is awarded personal property, including cash, in possession except as otherwise stated. Resp. is directed and returned [sic] to petitioner for items listed on Ex 20 or to account for same. Resp. awarded lumber business subject to debt. Petitioner awarded all real estate subject to debt, except resp. to pay PCA loan and hold petitioner harmless. Resp. granted use of 'Ravenna Place' so long as he resides there, pays taxes and keeps improvements insured and reasonably maintained. Petitioner to pay resp. $5,000. Each to pay own fees and costs."

On August 3, 1982, appellant filed his motion for new trial. This motion was overruled by journal entry on August 19, 1982, as follows: "THIS MATTER came on for hearing on this 19th day of August, 1982, on the Motion for New Trial filed by the Respondent. Both counsel were present. Argument was pre-

sented. The Final Decree was amended to award the 1966 Mack Truck to Respondent, on the condition that he remove it from the premises of Knox Construction within 30 days. The balance of the Motion for New Trial is overruled."

On August 30, 1982, appellant filed his notice of appeal and deposited the required docket fee, thus vesting jurisdiction of the case in the Supreme Court.

On September 14, 1982, a decree was signed by the District Court judge. This decree of eight pages purported to dissolve the marriage of the parties and disposed of the property of the parties in detail. The decree concluded with the words, "This decree shall not become final for a period of six (6) months from the date hereof, except for purposes of appeal, during which time the parties shall remain married to each other."

We set out the procedural facts above to show the very real possibilities of confusion that the court has engendered by the procedures used in the case. Aside from the unexplained and wholly improper delay of over 13 months between the time of the entry dissolving the marriage of the parties on June 11, 1981, and the entry briefly disposing of the parties' property on July 26, 1982, the practice of bifurcating a dissolution of marriage case in any manner, and with any timelag, is expressly disapproved by this court. The essence of a dissolution case is the marriage between the parties. From that marriage relationship stem rights to property in each of the marriage partners. It serves no interest of any party to dissolve the marriage itself without simultaneously determining all property rights of the married parties. It is pointless to declare people no longer married but to confine them in a property relationship that knows no legal name. The bills go on, the receipts may flow in, but neither party knows his or her duties to pay, or rights to receive. Is the legal relationship a partnership, a joint venture, two

sole proprietorships, or what? What has actually happened in this case is unknown from the record. Since March 10, 1983, when appellee's brief was filed, there is nothing formal before this court except for oral argument held in October of 1983.

We recognize, of course, that we are now reviewing a situation as of June 11, 1981. The possible problems are legion and apparent to all. Whatever personal convenience a court may confer on parties by granting an immediate dissolution while retaining property jurisdiction cannot be worth the difficulties and problems to which the trial court is exposing the litigants. The litigants deserve better.

Fortunately, in this case so far as we are informed, no question as to the effective date of the dissolution is before us. Apparently, neither of the parties has died—thus avoiding any question as to the effect of a death at one time or another. Even the fact that the decree was signed some 15 days after the District Court lost jurisdiction does not pose a problem in this case. The decree merely recited, in proper detail, the determination of the court on July 26, 1982, as to the property rights of the parties. A proper motion was directed to that order of July 26, 1982, and the case is properly before us after the denial of the motion for new trial.

We turn to the facts of the case. The parties met in the summer of 1976, when appellee apparently answered an advertisement that appellant had placed in a newspaper. The parties occupied the same residence, off and on, from the fall of 1976 up to the date of their marriage on March 19, 1979. There were times when they were separated before the marriage. During at least one of these times, appellant was visited in Grand Island by another woman whom he had met by mail. During the time of the parties' association, appellant testified that from 1 to 25 other women visited him at his residence.

During the time of their association before the marriage, appellant engaged in various ventures:

cattle feeding, raising hogs, farming, etc. Appellee loaned money to appellant for some of those purposes. The testimony is obscure as to profits, losses, payments, loans, or other business transactions. It is apparent that the parties together engaged in various business enterprises before the date of the marriage. The source of the funds for these enterprises is not clear, although it is apparent that moneys flowed from appellee to appellant. As an example, exhibit 35, introduced into evidence and testified to by appellant, shows that appellant, from January 2, 1979, to March 9, 1979, wrote 54 checks, totaling $570,523.47, "for livestock." The source of such sums is never explained. The disposition of the "livestock" is not shown. When this testimony is considered with the fact that appellant had not filed any income tax returns for the years 1975 through 1979, and with the fact that appellee's separate income tax return for 1979 shows no income or loss from the sale of livestock in farming operations, it is clear that the business relations between the parties cannot and should not be considered in this dissolution case. The form of business association between the parties and the details of their transactions are impossible to reconstruct from the evidence before the trial court or before us. Appellee does not claim any amounts due from appellant on account of loans. Accordingly, we leave the parties as we find them with respect to all of their financial transactions before the date of the marriage, with the sole exception of a residence property purchased jointly before the marriage. As to this residence, the evidence shows that appellant contributed $7,612.39 toward its purchase.

When the parties first met, and apparently on the date of the marriage, appellant owned a Mack truck with a $1,250 mortgage on it. Appellee arranged to pay this loan off. Appellant also testified that in 1975 he had $20,000 from the equity in a house he owned in Washington. Later, appellant testified

that he did not sell the Washington land for more than he had in it. It does not appear that appellant had any assets other than the money put into the residence referred to above.

Other evidence shows checks from appellee to appellant in varying amounts, such as $4,800 (described as "farm contract," exhibit 67); $3,500 (for "farm implements," exhibit 68); and many other checks for "repairs." Additionally, on March 13, 1979 (6 days before the marriage), after appellee gave appellant a check for $6,000 appellant gave appellee a check for $6,000. Appellee's check was promptly cashed, but appellant's check was never good and was returned by the bank to appellee.

From all of these financial transactions the court finds that at the time of the marriage appellant had a Mack truck and had invested approximately $7,612.39 in a house. For a marriage of such a short duration as this marriage, it appears that appellant has been treated more than fairly in the decree that the trial court entered, wherein appellant received a lumber business with an inventory of over $14,000, $5,000 in cash, his Mack truck, and the use of certain land.

We hesitate to approve the provisions of a dissolution decree where the parties are tied together in the fashion set out in the court's docket entry of July 26, 1982; i.e., when real property is given to appellee, but appellant is "granted use of 'Ravenna Place' so long as he resides there, pays taxes and keeps improvements insured and reasonably maintained." When appellee asks that the trial court's decision be affirmed, however, we see no need to intervene. The judgment of the trial court is affirmed.

AFFIRMED.

GEORGIA R. NEVOTTI, APPELLANT, V. JOSEPH R. NEVOTTI II, APPELLEE.

339 N.W.2d 928

Filed November 18, 1983. No. 82-629.

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

Alan H. Kirshen, for appellant.

No appearance for appellee.

KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and BRODKEY, J., Retired, and MURPHY, JOHN, D.J.

PER CURIAM.

Having reviewed the record de novo, as we are required to do, we find that the order and judgment of the District Court are correct and are affirmed.

AFFIRMED.

ANDERSON MARKETING ASSOCIATES, INC., A CORPORATION, APPELLEE, V. JOHN ROBERTS, DOING BUSINESS AS ROBERTS PLUMBING AND HEATING, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, KEITH SCHWARZ, DOING BUSINESS AS CENTRAL VAC INTERNATIONAL, THIRD-PARTY DEFENDANT, APPELLEE.

340 N.W.2d 384

Filed November 18, 1983. No. 82-639.

1. **Default Judgments.** Upon compliance with Neb. Rev. Stat. § 24-537 (Reissue 1979), the setting aside of a default judgment is not automatic, but rests in the sound discretion of the trial court. Such discretion is not an arbitrary one and must be exercised reasonably.
2. _____. In addition to the requirements of Neb. Rev. Stat. § 24-537 (Reissue 1979), a party seeking to vacate a default judgment must also tender an answer or other proof disclosing a meritorious defense.
3. **Attorney Fees.** It is the general practice in this state to allow the recovery of attorney fees and expenses only in those cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery.

4. **Default Judgments: Attorney Fees.** Ordinarily, attorney fees will not be allowed in an appeal of a default judgment.

Appeal from the District Court for Harlan County: WILLIAM G. CAMBRIDGE, Judge. Reversed and remanded with directions.

McKelvie & McNally Law Offices, for appellant.

Person, Dier & Person, for appellee Schwarz.

WHITE and CAPORALE, JJ., and BRODKEY, J., Retired, and BLUE, D.J., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from the judgment of the District Court for Harlan County, Nebraska, which affirmed an order of the county court setting aside a default judgment entered in favor of the third-party plaintiff, John Roberts, doing business as Roberts Plumbing and Heating, against Keith Schwarz, doing business as Central Vac International, third-party defendant. Two assignments are urged here. First, that the county court erred in finding that the provisions of Neb. Rev. Stat. § 24-537 (Reissue 1979) provide that upon compliance with the requirements therein set forth the court is required to automatically set aside a default judgment. The second error urged is that, assuming the provisions of the above section do not automatically require the court to set aside a default judgment, the county court abused its discretion in setting aside the default judgment. A discussion of the facts is necessary for an understanding of this case.

On July 3, 1979, Anderson Marketing Associates, Inc., a corporation, the original plaintiff in this action, filed a suit in the county court of Harlan County, Nebraska, on a promissory note. On December 7, 1979, the defendant and third-party plaintiff, John Roberts, filed an answer to the petition and a motion to file a third-party action against Keith Schwarz. The motion was set for hearing on December 20, 1979, and was granted on December 27,

1979. The third-party petition, filed as an exhibit with the motion, alleged that the proceeds of the note sued on by Anderson Marketing Associates, Inc., were used to buy a certain quantity of central vacuum machines which Roberts alleged did not perform according to an express warranty and did not satisfy the implied warranty of merchantability. The first appearance of the third-party defendant, appellee herein, was by special appearance on March 10, 1980. The order overruling the special appearance was filed on March 31, 1980, and Schwarz was ordered to answer or otherwise plead to the petition filed by the third-party plaintiff, Roberts. No time was specified for compliance in the court's order. The next filing was on September 18, 1980, nearly 6 months after the entry of the order overruling the special appearance. On that date Schwarz, by his counsel, filed a motion to make more definite and certain. The motion was noted for hearing on October 24, 1980, and again on November 7, 1980; it was overruled on that latter date. Neither party took any further action on this matter until July 23, 1981, when the third-party plaintiff, John Roberts, filed a motion for default judgment. The motion for default judgment was noticed for hearing on August 6, 1981; a copy was mailed to the third-party defendant, Schwarz, and another copy hand-delivered to third-party defendant's counsel. There was no response or appearance filed, and the court entered a default judgment on August 11, 1981. The motion to set aside the default judgment was filed by Schwarz' counsel that same day. This motion did not comply with § 24-537, in that it did not tender costs. At a hearing the trial court suggested that the third-party defendant file a new motion. On August 21, 1981, a new motion to set aside the default judgment was filed, which tendered costs. On that same day the default judgment was set aside by the county court.

At the hearing on the first motion to set aside the

default judgment, statements and representations by the two counsel were made to the court. The statement of counsel for the third-party defendant, insofar as it relates to the default, is as follows: "MR. HROUDA: . . . The history of this case, it relates back to December 7th, 1979, when a third party petition was filed by the defendant, John Roberts. On March 10th, 1980, Keith Schwarz filed a special appearance and said special appearance was overruled on March 27th, 1980. After that Keith Schwarz again filed a motion to make more definite and certain on September 18th, 1980, and said motion was overruled by this Court on November 7th, 1980. There was no further action then for an extensive period of time taken on this case and there arose in our office, once we became aware that a default judgment was going to be rendered, that there was a concern whether or not we were still representing Keith Schwarz as we had no contact with him during this period of time; therefore, we contacted Keith Schwarz and asked him if he would retain us, and he did not reply to us until July 27, 1981. At that time, we were employed by him to represent him and the fact of the default judgment was then presented to us at that time; however, because of a mistake, I guess, on our firm's part, and the fact that our senior partner, John Person was leaving on a vacation, and we had other legal work, that the default hearing notice was lost in our office and we couldn't find — and wasn't brought to our attention 'til after August 6th, 1981, and that, I guess, myself and my secretary failed to note the time of the default in which we should have — planning to file a demur [sic] or an answer in this case. Therefore, it is our contention that this failure to make an appearance on August 6th, 1981, was not intentional, but was simply a result of an accident and a mistake and that the notice was lost and that the time for the hearing was not noted on my calendar and because of other serious press of legal matters in getting

ready for my senior partner's vacation so there was a simple mistake. It is our contention that Keith Schwarz does have a good and meritorious defense to the cause of action."

The testimony of the counsel for Schwarz was essentially uncontradicted, except for the statement of Roberts' counsel that at the time the notice of the default was hand-delivered to the office of Schwarz' counsel, his attorney indicated that they no longer represented Mr. Schwarz, although admittedly they had entered their appearance in that action more than 1 year previously. Counsel also noted that the court proceedings did not indicate any motion for leave to withdraw filed or granted by the court.

The first assignment of error is easily disposed of. Section 24-537 recites in pertinent part: "When judgment shall have been rendered against a defendant in his absence, the same *may be set aside upon the following conditions*: . . . ." (Emphasis supplied.) It is so elementary that it is beyond argument that the use of the word "may," when addressed to the powers of a court, does not command that on fulfillment of the condition the court absolutely be required to take that action; rather, the fair implication of the word is that the granting or taking of the suggested action is addressed to the sound discretion of the trial court.

We then pass to the more important of the issues involved, whether or not the trial court abused its discretion. In our most recent case involving the vacating of a default judgment, *Lincoln Welding Supply v. Inhalation Plastics*, 213 Neb. 862, 865, 331 N.W.2d 804, 806 (1983), we said, referring to *Vacca v. DeJardine*, 213 Neb. 736, 331 N.W.2d 516 (1983): "[T]he vacating of a default judgment rests in the sound discretion of the trial court, but such discretion is not an arbitrary one and must be exercised reasonably. We held therein that it was an abuse of discretion to grant a default judgment in the absence of a prior order to show cause why such should

not be done because of the failure to serve answers to certain discovery requests. We also held it was an abuse of discretion to set aside a default judgment where no answer had ever been filed, because a party seeking to vacate a default judgment must tender an answer or other proof disclosing a meritorious defense." The record in the instant case discloses no evidence of a meritorious defense offered by Schwarz at the time the motion was filed. In fact, his answer was not filed until August 27, 1981, 6 days after the default judgment was set aside.

While it is the policy of the law to give a litigant full opportunity to present his contentions in court and to give relief for inadvertent or slight omissions, it is also the duty of the court to prevent abuse of process, unnecessary delay in the prosecution of actions, and to guard against the dilatory and frivolous proceeding. *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977); *Beliveau v. Goodrich*, 185 Neb. 98, 173 N.W.2d 877 (1970).

Between April 1, 1980, and August 11, 1981, the third-party defendant, through his counsel, did nothing in this action except file a motion to make more definite and certain, which was promptly heard and overruled. The absence of diligence is apparent. It may be said that perhaps the county court's reluctance or inability to set time frames for prompt pleadings may have contributed to the lethargy of counsel for Schwarz. The record on its face belies the due diligence. The only diligence exercised by counsel for Schwarz in this case was in filing a motion to set aside a default judgment, having, as it were, simply "spaced off" the notice for hearing on the motion to take a default judgment. Applicable here, although admittedly not in the same procedural context, is our recent opinion of *Wilson v. Bryan Memorial Hosp.*, *ante* p. 446, 338 N.W.2d 796 (1983), in which this court expressed its disapproval of unnecessary delays in the progression of cases in the trial courts. In that case we sustained the Dis-

trict Court's dismissal of an action involving unexplained delay in filing pleadings, much as we have in this case. Schwarz' counsel, in his effort to show good cause, supplies the court with information in respect to his activities after the default judgment was entered, but he totally fails to explain the 17 months of delay from the time he entered his appearance until the default judgment was entered, save and except for the filing of two insignificant motions obviously meant only to prolong the case. We find that delay not only unexplained, but find it difficult to imagine a rational explanation of a delay of 17 months in so minor a lawsuit. Counsel for the third-party plaintiff showed remarkable patience in allowing Schwarz' counsel to delay the matter, as did the court. This court's patience is not so easily assuaged. We hold, absent good cause shown, that it was an abuse of discretion for the trial court to set aside the default judgment entered after a 17-month period in which only one minor pleading, largely designed to precipitate delay, was filed.

Appellant's counsel asks for an allowance of an attorney fee, citing the decision in *Beliveau v. Goodrich, supra.* In that case an allowance of an attorney fee was made on the court's finding that it was in the interest of justice that plaintiff receive an attorney fee in the appeal of a default judgment. That case does not indicate a common course of practice in allowance of attorney fees and has not been generally followed as a uniform course of procedure. We conclude that the allowance of an attorney fee is not appropriate in this case. *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983).

The cause is reversed and remanded with directions to reinstate the judgment in favor of the third-party plaintiff, John Roberts, against Keith Schwarz, with costs and interest from the date of such judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

LEE ANN MORRIS, APPELLANT, V. THE LUTHERAN MEDICAL CENTER, A NEBRASKA CORPORATION, APPELLEE.

340 N.W.2d 388

Filed November 18, 1983. No. 82-694.

1. **Termination of Employment.** When the employment is not for a definite term, and there are no contractual or statutory restrictions upon the rights of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability.
2. **Employment Contracts.** Where an employment contract is for an indefinite duration, such indefiniteness by itself does not preclude job security provisions in an employee handbook from becoming part of the employment contract.
3. **Demurrer: Appeal and Error.** In reviewing the sustaining of a demurrer this court must treat the facts alleged in the petition as undisputed.
4. **Pleadings: Appeal and Error.** The court must accept the facts as set forth in the petition and may not notice or consider extrinsic matters in determining whether a pleading states a cause of action.
5. **Demurrer.** A general demurrer admits only such facts as are well pleaded and does not admit mere conclusions of the pleader.

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

John B. Ashford of Bradford, Coenen & Ashford, and Peter C. Bataillon of Sodoro, Daly & Sodoro, for appellant.

Thomas J. Culhane of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellee.

BOSLAUGH, HASTINGS, SHANAHAN, and GRANT, JJ., and CAMBRIDGE, D.J.

HASTINGS, J.

This is an action for breach of an employment contract brought by Lee Ann Morris, plaintiff-appellant, a former employee of the defendant-appellee, The Lutheran Medical Center. The plaintiff asked for recovery of lost wages, both past and future. The District Court sustained the defendant's demurrer

for failure to state a cause of action, and dismissed her amended petition.

According to the pleadings, Morris was hired as a nurse by the defendant on January 9, 1978, under an oral contract of employment for no definite term. On December 31, 1981, Morris was fired for misconduct. She timely appealed to the employee grievance committee, which, after a hearing, recommended that Morris be reinstated. The president of the hospital reversed the grievance committee's decision and terminated the plaintiff's employment.

In her amended petition Morris alleged that portions of the defendant's "Policy and Procedures" became part of the employee's contract, in particular that the grievance procedure should have been followed in terminating her employment. Specifically, she alleged: "One of the written benefits Plaintiff was promised by Defendant was compliance by Defendant with the employee grievance procedure." The plaintiff also alleged that the president failed to follow the grievance procedure in two respects: First, that the president failed to make his decision within 5 working days; and second, that the "President of Defendant hospital, contrary to the rules and procedures of the employee grievance procedure . . . ignored the committee's findings and recommendations and reversed the committee's findings and upheld the action previously taken of termination."

Under Nebraska law it is quite clear that this court consistently follows the rule that "[w]hen the employment is not for a definite term, *and there are no contractual or statutory restrictions upon the right of discharge*, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability." (Emphasis supplied.) *Alford v. Life Savers, Inc.*, 210 Neb. 441, 442, 315 N.W.2d 260, 261 (1982); *Feola v. Valmont Industries, Inc.*, 208 Neb. 527, 304 N.W.2d 377 (1981); *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980).

In *Mau* this court found that a company handbook did not create employment for a definite period. Here, the employee does not claim that she was promised permanent employment. Instead, the plaintiff-employee is claiming that her job termination was wrongful because she had a contractual restriction upon the right of discharge, namely, the grievance procedure.

In the case at bar, the fact that plaintiff did not have a contract of employment for a specific term should not deprive her of the benefits of the grievance procedure. A reasonable inference can be drawn that the defendant intended to draw a benefit in employee relations from the procedure. This can be seen in the introduction to the grievance procedure, which states as follows: "Policy: Lutheran Medical Center recognizes that disagreements or grievances may arise from time to time *over decisions or actions affecting an employee's job* or his relations with other employees, or over claims of discrimination because of sex, race, color, age, religion or national origin. To assure employees of prompt and fair treatment when such circumstances arise, the following procedure is established." (Emphasis supplied.)

The procedure then provided that the "Committee . . . shall discuss the grievance with any persons that it deems to be appropriate, shall consider existing Medical Center policies and regulations . . . and in writing shall make a recommendation to the President of Lutheran Medical Center concerning the appropriate action to be taken about the grievance. . . .

"The Lutheran Medical Center President within five working days shall review the recommendation of the Committee and issue a written decision which shall be binding on both parties. So long as the Committee's recommendation does not conflict with established hospital policy or applicable laws and regulations, the *President shall not substitute his*

judgment for that of the Committee." (Emphasis supplied.)

A similar inference can be drawn that plaintiff expected the grievance procedure to be followed. In fact, when she was terminated, both parties commenced the grievance procedure.

The facts of the *Mau* case are quite distinguishable from the present situation. In *Mau* the handbook cover specifically stated the handbook was not part of the contract, nor was the handbook relied upon at the initial contract stage. In the instant case the "Policy and Procedures" was not so restricted, and it is alleged that compliance with it was promised prior to the oral agreement of employment.

In *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983), the Minnesota Supreme Court held that where an employment contract is for an indefinite duration, such indefiniteness by itself does not preclude job security provisions in an employee handbook from becoming part of the employment contract. In *Pine River State Bank* the Minnesota court stated: "There is no reason why the at-will presumption needs to be construed as a limit on the parties' freedom to contract." *Id.* at 628. Continuing, the Minnesota court said: "The provisions of the handbook section entitled 'Disciplinary Policy' do, however, set out in definite language an offer of a unilateral contract for procedures to be followed in job termination." *Id.* at 630.

The defendant's argument, that because the oral contract specified no duration, the parties did not intend any job termination restrictions to be binding, is without merit. We agree with the reasoning of the Minnesota Supreme Court that this argument enlarges the at-will rule to impose substantive limits on the formation of contracts. See Restatement (Second) of Agency § 442, Comment *a.* (1958) (inference that employment is at-will may be rebutted by specific terms of agreement).

In reviewing the sustaining of a demurrer this court must treat the facts alleged in the petition as undisputed. *Dieter v. Hand*, 214 Neb. 257, 333 N.W.2d 772 (1983). However, it must be the facts set forth in the petition, and we may not consider extrinsic matters in determining whether a pleading states a cause of action. *Heinzman v. County of Hall*, 213 Neb. 268, 328 N.W.2d 764 (1983). Also, 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.*, 212 Neb. 887, 327 N.W.2d 595 (1982).

Plaintiff's amended petition alleges only that the president of the defendant hospital, contrary to the rules and procedures, ignored the committee's findings. To prohibit the president from taking such action according to the "Policy and Procedures," it must appear that those committee findings do "not conflict with established hospital policy or applicable laws and regulations." We believe that it was necessary to allege and prove that allegation before an action could lie in this instance.

The District Court was correct in sustaining the demurrer and in dismissing the action, and its judgment in doing so is affirmed.

AFFIRMED.

HARVEY L. SORENSEN AND MARGOT SORENSEN, APPELLANTS, V. LOWER NIOBRARA NATURAL RESOURCES DISTRICT, APPELLEE.

340 N.W.2d 164

Filed November 18, 1983. No. 82-707.

Eminent Domain: Fees. A condemnee can recover fees and costs under Neb. Rev. Stat. § 76-1203.01 (Reissue 1981) only where the final judgment prevents the agency from acquiring the property by any condemnation proceeding or the agency abandons all attempts to acquire the property by condemnation.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Affirmed.

Frank Roubicek, for appellants.

John M. Peebles of Peebles & Smith, for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and NORTON, D.J., and COLWELL, D.J., Retired.

BOSLAUGH, J.

The Sorensens appeal from the order of the District Court overruling their motion for fees and costs arising from a condemnation proceeding brought by the Lower Niobrara Natural Resources District (Lower Niobrara).

On July 24, 1981, Lower Niobrara filed a petition in the county court seeking the appointment of appraisers to appraise two tracts of land owned by the Sorensens, which the district sought to condemn. The return of the appraisers was filed on September 8, 1981. The Sorensens appealed from the award of the appraisers to the District Court, and filed their petition in the District Court on September 9, 1981, requesting injunctive relief and damages.

Lower Niobrara commenced a second condemnation proceeding on January 6, 1982, to condemn the same two tracts. The award of the appraisers was appealed to the District Court by the Sorensens on January 28, 1982.

The petition filed in the District Court in the second appeal alleged three causes of action, the first two relating to the right of Lower Niobrara to condemn the land. The trial court found for the defendant on the first two causes of action and retained the case for trial on the merits as to the third cause of action. The Sorensens attempted to appeal the judgment on the first two causes of action to this court, but Lower Niobrara's motion for summary dismissal was sustained on November 3, 1982, and that appeal was dismissed.

On March 15, 1982, the Sorensens filed a motion in

the District Court in this case to recover their fees and costs pursuant to Neb. Rev. Stat. § 76-1203.01 (Reissue 1981).

On March 22, 1982, the District Court found that Lower Niobrara had failed to comply with the statutory requirements for notice and hearing concerning the proposed acquisition before commencing the condemnation proceeding, and issued a permanent injunction enjoining Lower Niobrara from entering upon the two tracts under color of authority of the July 24, 1981, condemnation proceeding. The trial court at that time reserved ruling on the plaintiffs' claim for fees and costs. Lower Niobrara did not appeal from the judgment granting a permanent injunction.

On October 7, 1982, the court disallowed the Sorensens' application for fees and costs. The Sorensens appeal from this order.

The Sorensens make their claim for fees and costs pursuant to § 76-1203.01: "The court having jurisdiction of a proceeding, instituted by an agency as defined in section 76-1201, to acquire real property by condemnation shall award the owner of any right, title, or interest in such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees actually incurred because of the condemnation proceedings, if (1) the final judgment is that the agency cannot acquire the real property by condemnation; or (2) the proceeding is abandoned by the agency. If a settlement is effected by an agency, the court may award to the plaintiff reasonable expenses, fees, and costs."

Section 76-1203.01 was enacted in response to the following federal statute: "Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, a State agency under which Federal financial assistance will be avail-

able to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such State agency that—

"(1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651 of this title and the provisions of section 4652 of this title, and

"(2) property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654 of this title." 42 U.S.C. § 4655 (1976).

Section 76-1203.01 is modeled upon 42 U.S.C. § 4654(a) (1976): "The Federal court having jurisdiction of a proceeding instituted by a Federal agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if—

"(1) the final judgment is that the Federal agency cannot acquire the real property by condemnation; or

"(2) the proceeding is abandoned by the United States."

In *United States v. 410.69 Acres of Land, etc.*, 608 F.2d 1073, 1076 (5th Cir. 1979), the court said of § 4654: "Clearly Congress intended to create only a narrow exception to the general rule of nonrecovery for litigation expenses in condemnation cases . . . ."

The Sorensens contend that the present case falls within either of the two classes in which expenses are authorized by the statute. They argue that the permanent injunction issued by the District Court was a "final judgment" and should be given the

same meaning as a final judgment for appeal purposes. This argument is not persuasive.

The statute provides that expenses will be reimbursed if the condemnation culminated in a final judgment that the agency cannot acquire the land by condemnation. In *United States v. 4.18 Acres of Land, etc.*, 542 F.2d 786 (9th Cir. 1976), the court held that "final judgment" as used in § 4654(a) suggests a case in which the agency sought to condemn property without warrant.

In the present case the court issued an order enjoining Lower Niobrara from entering upon the land by virtue of the first condemnation proceeding. The basis for this order was that the condemnation proceeding had a procedural flaw. This order did not preclude a subsequent condemnation of the land and, in fact, Lower Niobrara has acquired the land through the second condemnation proceeding. In *Wieczorek v. Franklin*, 82 Wis. 2d 19, 260 N.W.2d 650 (1978), the court held that a dismissal for a procedural flaw in a condemnation proceeding was not a final judgment when the condemnor had the right to reinstitute the proceedings.

Alternatively, the Sorensens argue that Lower Niobrara abandoned the proceeding because it did not appeal the order granting the injunction. In *United States v. 4.18 Acres of Land, etc.*, *supra* at 789, the court stated: "And it would be contrary to the substance of what occurred in this case to hold that the United States 'abandoned' the proceeding. The suit was not dismissed at the instance of the government, but over the government's opposition on motion by the landowner. It is true that the United States dismissed its appeal. However, the government announced that its purpose was only to avoid delay, and that a new condemnation proceeding would be instituted. Such a proceeding has in fact been filed, within a year of dismissal of the original action. Quite a different situation would be presented if the government had not asserted its in-

tention to file a new complaint and declaration of taking, and had not carried out that intention before this appeal was heard."

"Abandon" is defined as "[t]o relinquish or give up with intent of never again resuming one's right or interest." Black's Law Dictionary 2 (5th ed. 1979).

In the present case Lower Niobrara did not abandon its interest in condemning the property. The failure to appeal does not amount to an abandonment, in light of the fact that Lower Niobrara instituted a second condemnation proceeding. See *Drexel v. Reed*, 65 Neb. 231, 91 N.W. 254 (1902).

Although there are cases to the contrary in other jurisdictions, we believe the correct rule is that a condemnee can recover fees and costs under § 76-1203.01 only where the final judgment prevents the agency from acquiring the property by any condemnation proceeding or the agency abandons all attempts to acquire the property by condemnation.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNEST HARPER, APPELLANT.

340 N.W.2d 391

Filed November 18, 1983. No. 82-713.

1. **Pleadings.** A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury.
2. _____. It is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of evidence.
3. **Evidence: Appeal and Error.** A defendant cannot predicate error on the admission of evidence to which no objection was made at the time the evidence was adduced.

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 Linda L. Willard, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

The appellant, Ernest Harper, was charged in an information with one count of robbery, one count of use of a firearm in commission of a felony, and two counts of first degree sexual assault. Following trial to a jury, Harper was convicted of all of the counts and sentenced to a substantial term in the Nebraska Penal and Correctional Complex. He has appealed his conviction to this court, and assigns as error that the trial court permitted the introduction into evidence of subsequent crimes committed by him. We need not, however, reach that issue on its merits, because the error, as assigned, was not preserved properly by objection at the trial and therefore cannot now be considered by us on direct appeal.

Prior to trial, Harper filed a motion in limine, which the trial court overruled. However, he made no objection to the introduction of testimony concerning the subsequent crimes at the time of trial. Apparently, he relied upon the fact that previously he had filed a motion in limine. That reliance, unfortunately, was misplaced. The overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve the error. The function of a motion in limine and an objection are not the same. As we observed recently in *State v. Tomrdle*, 214 Neb. 580, 585-86, 335 N.W.2d 279, 283 (1983): "A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. [Citation omitted.] . . . '[I]t is not the office of a motion *in limine* to obtain a final ruling upon the ultimate admissibility of evidence . . . but is rather to prevent the proponent of potentially prejudicial matter from displaying it to the

jury, making statements about it before the jury, or presenting the matter to a jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself.' . . . 'It [the motion in limine] serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the court may be called upon to make during the course of trial. . . . It is not a ruling on evidence and should not, except on a clear showing, be used to reject evidence. It adds a procedural step to the offer of evidence.'

. . . .

"When the trial court in this case overruled the motion in limine, it was incumbent upon Tomrdle to make an objection to the particular evidence sought to be adduced or offered by the State. But there was no such objection. A defendant cannot predicate error on the admission of evidence to which no objection was made at the time the evidence was adduced. Cf., *State v. Weiland*, 186 Neb. 325, 183 N.W.2d 244 (1971); *State v. Holloman*, 197 Neb. 139, 248 N.W.2d 15 (1976). Consequently, because there is no objection in the record, there is no question to be examined on appeal to this court. Also, the District Court's ruling, that is, the denial of the motion in limine in this case, is not an appealable order." To quote from a familiar legal phrase, *Tomrdle* is "a cow case" and "on all fours" with the instant case, and dispositive of this appeal.

While our declaration in *Tomrdle* was made after the *Harper* case was tried, it did not declare any new rule of law, but simply articulated what had always been the law in this jurisdiction. For that reason it has application in the instant case, just as it did in *Tomrdle*.

The appellant failed to properly preserve the error by objecting to the introduction of the evidence at the appropriate time. He cannot now be heard to complain about the introduction of the evidence. That being the only error assigned by the appellant,

the judgment and sentence of the trial court are therefore in all respects affirmed.

AFFIRMED.

JUDITH R. JOHNSON, NOW KNOWN AS JUDITH JOHNSON KIRCHHOFF, APPELLANT, V. KENNETH LEE JOHNSON, APPELLEE.

340 N.W.2d 393

Filed November 18, 1983. No. 82-720.

1. **Child Support.** Where an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest child reaches his majority. The proper remedy, if this be deemed unjust, is to seek a modification of the decree in the court which entered it, on the basis of the changed circumstances.
2. _____. A single amount to be paid periodically for the support of more than one child is not subject to an automatic pro rata reduction.
3. **Judgments: Child Support.** The fact that a decree fails to provide what is to happen upon the emancipation of a minor child does not create an ambiguity.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Reversed and remanded with directions.

Thomas Blount of Garber & Batt, for appellant.

David P. Stokes of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

This action was commenced pursuant to Neb. Rev. Stat. §§ 25-1587 to 25-15,104 (Reissue 1979), the Uniform Enforcement of Foreign Judgments Act, by the appellant, Judith R. Johnson, to register a divorce decree which she had obtained in the circuit court of

Champaign County, Illinois, on February 22, 1977. The decree dissolved the marriage of the parties and, in addition to other provisions, provided for the payment of child support. Specifically, the decretal portion read in part as follows: "D. Defendant is ordered to pay to Plaintiff commencing upon the entry of this Judgment and monthly thereafter the sum of Four Hundred ($400.00) Dollars per month as child support." At the time of the entry of the decree, the parties had four minor children, two of whom subsequently reached their majority. As each child reached the age of majority, the appellee, Kenneth Lee Johnson, without first obtaining an order of the court, reduced the child support by $100 per month. The Nebraska trial court (trial court) determined that the child support was to be applied pro rata among the children and, as each child reached his or her majority, should be reduced proportionately. Accordingly, the trial court proportionately reduced the child support to determine the amount due to date and the amount due each month thereafter. Mrs. Johnson has now appealed to this court, maintaining that the trial court erred in reducing the child support contrary to the provisions of the Illinois decree. We agree with Mrs. Johnson and believe that the matter must be reversed and remanded for further action.

Often, in beginning the analysis of a question of this nature, the court must determine which law should apply. In this case the choice is between the law of Illinois, where the judgment was obtained, and the law of Nebraska, where the judgment was sought to be registered. However, in view of the fact that the law in both jurisdictions is the same, we need not address this matter, but may go directly to the principal issue.

As acknowledged by the appellee, the law in Nebraska, consistent with the majority view in the country, is to the effect that the child support should not be reduced automatically as a child reaches his

or her majority, absent a provision in the decree to that effect. This court repeatedly has held: "Where an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest child reaches his majority. The proper remedy, if this be deemed unjust, is to seek a modification of the decree in the court which entered it on the basis of the changed circumstances." *In re Application of Miller*, 139 Neb. 242, 246, 297 N.W. 91, 93 (1941). See, also, *Schrader v. Schrader*, 148 Neb. 162, 26 N.W.2d 617 (1947); *Ferry v. Ferry*, 201 Neb. 595, 271 N.W.2d 450 (1978).

The same rule prevails in Illinois. In the case of *Finley v. Finley*, 81 Ill. 2d 317, 321, 410 N.E.2d 12, 14 (1980), the Illinois court was asked to examine a divorce decree, entered on October 4, 1965, which provided: " 'That the defendant shall pay to the Clerk of this Court who in turn shall pay the plaintiff herein for the use, support and maintainance [sic] of said minor children the sum of Thirty ($30.00) Dollars per week, said payments to start on Friday, October 8, 1965, and continue until further order of this Court.' " The husband in the *Finley* case, as in this case, maintained that the amounts for the children should be proportionately reduced when the children reached their majority. In rejecting that argument, and in holding that the entire amount remained fixed unless and until adjusted by the court, the Illinois court said at 327-29, 410 N.E.2d at 17-18: "The vast majority of courts, however, hold, as did our appellate court in *Storm* and its progeny cited above, that a single amount to be paid periodically for the support of more than one child is not subject to an automatic *pro rata* reduction. These courts require that the entire sum be paid until the yougest [sic] child attains majority, or until the decree is otherwise prospectively modified by a court order. [Citations omitted.] . . .

. . . .

". . . To allow the obligor-parent to equally divide the support among the children would be in dereliction of the legislative guideline set forth for the determination of the proper amount to be paid as child support. . . . Furthermore, the unilateral reduction of child-support payments constitutes a modification of the support order. The modification of such payments is solely a judicial function which is to be administered only by the court and in its discretion. . . . Automatic reduction in support payments in a case such as the one before us constitutes an infringement upon the discretionary powers of the court to modify an award. . . . In view of the foregoing, we hold that the unilateral *pro rata* reduction of lump-sum periodic support payments for the benefit of more than one child upon the emancipation of a child is impermissible under the new act, as well as under the common law."

We are unable to find any authority, either in this jurisdiction or in Illinois, which would support the action taken by the trial court. Moreover, we believe that the rationale of the Illinois court supports the majority view. Court orders should not be subject to nonjudicial modifications, either by the unilateral action of one of the parties or, for that matter, by the mutual agreement of the parties. Only a court should be able to modify an order previously entered by a court.

Mr. Johnson argues that the decree is ambiguous and, therefore, parol evidence should be admitted to explain the intention of the parties. The fact that the decree does not provide for proportional reduction in child support does not make it ambiguous, nor does it authorize the introduction of parol evidence. Mr. Johnson's argument regarding ambiguity was made to the Illinois court in the case of *Potocki v. Potocki*, 98 Ill. App. 3d 501, 424 N.E.2d 714 (1981). The Illinois Appellate Court rejected this argument, stating at 504, 424 N.E.2d at 717: "Nor is

the provision of the agreement rendered ambiguous by not providing specifically for the continuance or diminishment of the payment upon the child's majority. Under section 18 of the prior divorce act the court could, upon application, terminate or modify the allowance of alimony and child support as it appeared reasonable and proper. (Ill. Rev. Stat. 1975, ch. 40, par. 19.) As the agreement of the parties was merged into the decree, that statutory provision became part of the agreement. (*Herrick v. Herrick* (1925), 319 Ill. 146.) Furthermore, section 510(a) of the Illinois Marriage and Dissolution of Marriage Act (Ill. Rev. Stat. 1979, ch. 40, par. 510(a)) in general seems to carry forward the provision of section 18 permitting modification of maintenance, a term which corresponds to what was formerly called alimony, or child support. . . . As a result, this silence did not render the provision ambiguous but merely left for judicial determination the effect, if any, the son's majority would have upon the allotted payment."

The fact that a decree fails to provide what is to happen upon the emancipation of a minor child does not create an ambiguity. As in Illinois, the law in Nebraska imposes upon the trial court the obligation to approve the decree, and grants to the court the continuing jurisdiction to modify child support payments. See, *Dunlap v. Dunlap*, 145 Neb. 735, 18 N.W.2d 51 (1945); Neb. Rev. Stat. § 42-364 (Reissue 1978); *Welke v. Welke*, 205 Neb. 426, 288 N.W.2d 41 (1980); *Wheeler v. Wheeler*, 193 Neb. 615, 228 N.W.2d 594 (1975). Mr. Johnson was free, at any time he chose, to petition the court for modification. Furthermore, the parties could have agreed to what was to take place as each child reached his or her majority and then request that the court approve the agreement. Having failed to do so, Mr. Johnson was not free to unilaterally reduce his payments. For these reasons the case is reversed and the cause remanded to the District Court with directions to re-

compute the amount of the child support due to date in accordance with the Illinois decree and this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V. LARRY RONALD HAMILTON, APPELLEE.

340 N.W.2d 397

Filed November 18, 1983. No. 82-846.

1. **Criminal Law: Constitutional Law.** A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder.
2. **Criminal Law: Statutes: Constitutional Law.** The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose in advance what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things and providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another.
3. _____: _____: _____. A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning, and differ as to its application, violates the first essential element of due process of law.
4. _____: _____: _____. The test to determine whether a statute defining an offense is void for uncertainty is whether the language may apply not only to a particular act about which there can be little or no difference of opinion but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. The dividing line between what is lawful and what is unlawful cannot be left to conjecture.
5. _____: _____: _____. Neb. Rev. Stat. § 28-311 (Reissue 1979) is unconstitutional.

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

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

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

The State comes to this court on a proceeding brought by the Douglas County attorney pursuant to the provisions of Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1982), and seeks to have this court determine that Neb. Rev. Stat. § 28-311 (Reissue 1979) is constitutional. The trial court found the statute in question to be unconstitutionally vague and therefore unenforceable. Our examination of the statute in light of relevant law convinces us that the trial court was correct in its determination, and for that reason the judgment of the trial court in declaring § 28-311 unconstitutional must be affirmed.

The statute in question intends to make it a crime for someone to make terroristic threats, providing as follows: "(1) A person commits terroristic threats if:

"(a) He threatens to commit any crime likely to result in death or serious physical injury to another person or likely to result in substantial property damage to another person . . . ."

In order for any criminal statute to pass constitutional muster, it must satisfy certain basic inherent requirements. Those requirements were set out in *State v. Huffman*, 202 Neb. 434, 435-36, 275 N.W.2d 838, 839-40 (1979), wherein we said: "A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. State v. Nelson, 168 Neb. 394, 95 N.W.2d 678; Heywood v. Brainard, 181 Neb. 294, 147 N.W.2d 772. The dividing line between what is lawful and unlawful cannot be left to conjecture. State v. Adams, *supra*; State v. Nelson, *supra*. The citizen cannot be held to answer

charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose in advance what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things and providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another. State, ex rel. English v. Ruback, 135 Neb. 335, 281 N.W. 607; Connally v. General Construction Co., 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322. A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning, and differ as to its application, violates the first essential element of due process of law. [Citations omitted.]" See, also, *State v. Metzger*, 211 Neb. 593, 319 N.W.2d 459 (1982); *State v. Adkins*, 196 Neb. 76, 241 N.W.2d 655 (1976).

The elements of the crime involved herein appear to be (1) the actor must *threaten* to commit a crime, and (2) the crime must be *likely* to result in death or *serious physical injury* to another person, or (3) the crime must be *likely* to result in *substantial property damage* to another *person*. Setting aside for the moment the obvious difficulty of understanding how one may commit a crime likely to result in substantial property damage to another person, we find that the first two requirements of the act are so vague as to violate the standards previously announced. In *State v. Adkins*, *supra* at 82, 241 N.W.2d at 658-59, we said: " ' '"The test to determine whether a statute defining an offense is void for uncertainty (1) is whether the language may apply not only to a particular act about which there can be little or no difference of opinion, but equally to other acts about which there may be radical differences,

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

As noted by the trial court, the statute in question is vague and uncertain as to what constitutes a threat. The act does not define the term, nor does it describe how or to whom, if anyone, the threat must be made. Must the threat be made in seriousness, or will a simple joke be sufficient? Is it a violation of this act to make the threat if the threat is neither heard nor received by the anticipated victim, or does a violation occur only if there is knowledge and understanding by the party to whom it is directed? That is to say, can one violate this act by calling another and threatening to commit a crime likely to result in serious physical injury, only to discover that he has dialed the wrong number? And is it a violation if the person to whom the threat is made does not consider it to have been made seriously and gives it no heed?

Another difficult problem with the statute is that the crime threatened must be such that it can be established by proof beyond a reasonable doubt that the crime is, in fact, *likely* to cause serious physical injury to another. We have discussed previously the problems inherent in using the word "likely" in a criminal statute. In *State v. Huffman*, *supra* at 437, 275 N.W.2d at 840, we said: "The determination as to whether the particular driving was, in fact, in a manner 'likely' to endanger may in some instances be ascertainable only after the fact. The standard announced in the statute fails to describe a crime and the elements constituting the crime in a clear, prospective manner as required by our criminal law. There appears within the statute no ascertainable standard by which men of common intelligence can determine what is unlawful. Under the provisions of the act as it now stands, no injury need oc-

cur. The test is only to determine if, in fact, one operated an automobile in such a manner 'likely' to endanger. In certain instances that may only be ascertainable after the fact and based upon speculation and conjecture. To permit the doing of an act without violation of the statute if performed by an experienced driver, while making the same act unlawful if performed by a novice driver, is far too vague and indefinite to withstand constitutional attack."

How does one threaten to commit a crime which is likely to (that is to say, may possibly) result in serious physical injury? Is this act violated if one who is but 5 feet 2 inches and weighs 100 pounds threatens to punch another who is 6 feet 7 inches and weighs 350 pounds? Is a criminal statute sufficiently definite if, in order to determine whether the particular act threatened is a violation of the statute, one must consider the physical characteristics of the parties involved, and speculate as to whether the actor could in fact cause serious bodily injury to the proposed victim? We think not.

The State, in its brief, argues that the act in question is modeled after the Model Penal Code and that, while certain words are omitted, the omitted words should nevertheless be read into the statute by the court. We believe this suggestion is without merit. The act in question, while similar in purpose to the Model Penal Code, is a significant departure from the code. Model Penal Code § 211.3 at 539 (1974) provides: "A person is guilty of a felony of the third degree if he threatens to commit any crime of violence *with purpose to terrorize another* . . . ." (Emphasis supplied.) The language of the Model Penal Code is certainly much clearer than that adopted by the Nebraska Legislature. An actor violates the Model Penal Code when he or she threatens to commit any crime of violence, with the intent to terrorize another, regardless of what the outcome of the act will be or of how the victim receives the

threat. The Model Penal Code seems to be fairly definite, and not speculative as is the statute in question.

Likewise, the suggestion that we merely insert missing words is of no benefit. It is not for courts to supply missing words and even sentences in order to make definite that which is indefinite. This is not the role or function of a court. In *Bessey v. Board of Educational Lands & Funds*, 185 Neb. 801, 804, 178 N.W.2d 794, 797 (1970), we said: "A court cannot, under the guise of its powers of construction, rewrite a statute, supply omissions, or make other changes and this is particularly true where it appears, as here, that the matter was intentionally omitted." By rejecting the language of the Model Penal Code and opting instead for the language in question, we must assume the Legislature intended to omit the words that the State now urges us to supply.

The purposes underlying the adoption of § 28-311 are meritorious ones which a society should seek to obtain for its citizens. Undoubtedly, this is why the Model Penal Code was drafted, and in many states adopted. But good intentions cannot be substituted for constitutional requirements. The effort of the Legislature in departing from the Model Penal Code, for whatever reason, resulted in adopting a statute which is simply too vague to be valid. For these reasons we believe that the decision of the trial court finding § 28-311 unconstitutionally vague must be affirmed.

AFFIRMED.

CAROL A. BURGER, APPELLEE, V. ROBERT P. BURGER, APPELLANT.

340 N.W.2d 400

Filed November 18, 1983. No. 82-855.

Property Division: Alimony. The ultimate test for division of marital property and an award of alimony is one of reasonableness.

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

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

Paul E. Galter of Bauer, Galter & Geier, for appellee.

BOSLAUGH, HASTINGS, SHANAHAN, and GRANT, JJ., and CAMBRIDGE, D.J.

PER CURIAM.

This is an appeal in a proceeding for the dissolution of a marriage. The trial court dissolved the marriage; awarded custody of the minor children of the parties to the respondent husband; awarded the residence property of the parties to the petitioner wife, subject to payment of one-half of the equity to the respondent; and awarded alimony to the petitioner in the sum of $605.77 per month for 19 months and $400 per month for 101 months, the alimony to terminate upon remarriage of the wife or the death of either party.

The respondent has appealed, and contends the court erred in failing to make an equitable division of the marital estate, in awarding alimony to the petitioner, and in awarding an attorney fee to the petitioner.

The parties were married in 1962, and have four children, two of whom were minors at the time of trial and still at home: Jon, born December 27, 1964, and J. Robert, born March 22, 1968.

The respondent is employed by the Burlington Northern Railroad as a conductor and brakeman. His earnings in 1979 amounted to $25,000; in 1980, $29,000; and in 1981, over $33,000. At the time of trial his average earnings for the first 8½ months of 1982 on an annual basis would amount to nearly $40,000.

The petitioner, who is 40 years of age, worked during the marriage, and had been employed as a secretary by Hoskins-Western-Sonderegger for approxi-

mately 5 years when she was terminated on August 16, 1982. During the last year of employment, she had earned slightly in excess of $10,000. She has had some health problems, including depression, for which she has been hospitalized a number of times. At trial she testified that she was "all right" and had been released by her physician to return to work.

The ultimate test for division of marital property and an award of alimony is one of reasonableness. *Koubek v. Koubek*, 212 Neb. 2, 321 N.W.2d 55 (1982).

From our review of the record we are satisfied that the division of property and award of alimony made by the trial court, and the award of an attorney fee to the petitioner, were correct. The judgment of the District Court is therefore affirmed.

AFFIRMED.

JOHNNY BOSTON ET AL., APPELLANTS, V. CHARLES BLACK, WARDEN, NEBRASKA STATE PENITENTIARY, ET AL., APPELLEES.

STEVEN G. HURLEY, APPELLANT, V. CHARLES L. BENSON, DIRECTOR, DEPARTMENT OF CORRECTIONAL SERVICES, ET AL., APPELLEES.

340 N.W.2d 401

Filed November 18, 1983. Nos. 83-134, 83-135, 83-136, 83-137, 83-138, 83-186.

1. **Sentences.** An offender's sentence, for the purpose of good time computations, is the sum of all sentences he receives, regardless of when incurred.
2. _____. The date of an offender's initial incarceration is the date on which service of such consolidated sentence is deemed to begin.
3. _____. Absent approval of the Board of Pardons, the good time sentence reduction provisions of 1975 Neb. Laws, L.B. 567, are not applicable to an offender who started to serve his sentence prior to the effective date of L.B. 567.

Appeal from the District Court for Lancaster County: PAUL D. EMPSON, Judge. Affirmed.

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

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

These consolidated appeals question the method of awarding good time credits to committed offenders. They result from the denials of applications for writs of habeas corpus filed by the relators-appellants Johnny Boston, Larry Glouser, and David Moreno; from unfavorable declaratory judgments and denials of writs of habeas corpus to the plaintiffs-appellants Sandy P. Kerns and Michael J. LaFreniere; and from a declaratory judgment unfavorable to plaintiff-appellant Steven G. Hurley. We affirm in all respects.

It seems appropriate to begin this analysis with a historical review.

In 1975 the Eighty-fourth Legislature enacted L.B. 567, which became effective on August 24, 1975. L.B. 567 made changes in Neb. Rev. Stat. §§ 83-1,109 and 83-1,118 (Reissue 1971) and §§ 83-170, 83-1,107, 83-1,108, 83-1,110, and 83-1,111 (Cum. Supp. 1974), and added §§ 83-1,107.01 and 83-1,126.01 (Reissue 1981). The prior provisions of the above-cited amended sections of the statutes were, for the most part, codifications of L.B. 1307 of the Eightieth Legislature. 1969 Neb. Laws, Ch. 817, p. 3071.

L.B. 1307 provided, in relevant part, that a committed offender's term was to be credited 2 months on the first year of the sentence for good behavior and faithful performance of duties, 2 months on the second year, 3 months on the third year, and 4 months for each succeeding year. § 83-1,107 (Cum. Supp. 1974). Hereinafter, we refer to this kind of good time as "regular good time." In addition, dis-

cretionary authority was given to the chief executive officer of the incarcerating facility to credit the offender's sentence by up to 5 days each month for especially meritorious behavior or exceptional performance of duties while incarcerated. *Id.* Hereinafter, we refer to this latter kind of good time as "meritorious good time." The phrase "good time" refers to both regular and meritorious good time. These good time credits were applied to an offender's minimum term to reach a date on which he became eligible for discretionary parole and reduced the maximum sentence to determine a date when his parole became mandatory. *Id.* Under L.B. 1307's scheme, even after release on mandatory parole, the offender was subject to the authority of the Board of Parole until the expiration of his total maximum sentence or earlier release by said board from such obligation. § 83-1,118 (Reissue 1971).

Under the provisions of L.B. 567, regular good time, in the same amounts as indicated previously, is calculated on the basis of the offender's total sentence and credited at the start of his term. The amount of such time to be credited is the same as it was under L.B. 1307. § 83-1,107 (Reissue 1981). In addition, 5 days of meritorious good time for faithful performance of duties is to be credited to the offender's sentence for each month of his sentence. § 83-1,107.01 (Reissue 1981). That is to say, L.B. 567 took away the discretion prison officials had under L.B. 1307 in the potential 5-day award. *Id.* Under L.B. 1307, *up to* 5 days *could* be awarded for exceptional performance or especially good behavior. Under L.B. 567, 5 days *shall* be awarded for faithful performance of duties during the term of the sentence, regardless of whether the offender remains incarcerated during the term. *Id.* L.B. 567 regular good time is to be deducted from the minimum sentence to reach a discretionary parole date, and deducted from the maximum sentence to determine the date on which the offender is to be absolutely

discharged from the state's penal authority. § 83-1,107 (Reissue 1981). L.B. 567 meritorious good time is to be deducted solely from the maximum sentence to determine that absolute discharge date. § 83-1,107.01 (Reissue 1981). In other words, there is no mandatory parole under the scheme of L.B. 567. L.B. 567 does not state whether meritorious good time is to be credited in a lump sum when beginning to serve the sentence, or credited on a monthly basis. *Id.* The Department of Corrections credits the meritorious good time contemplated by L.B. 567 in a lump sum at the beginning of the sentence. It does not so credit the meritorious good time contemplated by L.B. 1307.

In summary, then, any and all good time credited under L.B. 567 serves to shorten an offender's sentence in the sense that when his release from incarceration is mandated, he is no longer subject to the authority of the Department of Correctional Services or the Board of Parole. Any and all good time credited under L.B. 1307 serves only to shorten an offender's period of incarceration in the sense that when his release from incarceration becomes mandatory, he remains subject to the authority of the Board of Parole until the term of his maximum sentence has expired, or he is earlier relieved of that obligation by the Board of Parole. § 83-1,118 (Reissue 1971).

Both L.B. 1307 and L.B. 567 provide for the forfeiture, withdrawal, and restoration of good time. § 83-1,107 (Cum. Supp. 1974 and Reissue 1981) and § 83-1,107.01 (Reissue 1981). Under both schemes any consecutive terms an offender receives while incarcerated are to be consolidated with any other sentence by adding the minimum terms together and adding the maximum terms together. § 83-1,110 (Cum. Supp. 1974 and Reissue 1981).

This court has dealt with the provisions of L.B. 567 on four prior occasions.

In *Johnson & Cunningham v. Exon*, 199 Neb. 154,

256 N.W.2d 869 (1977), this court held that since L.B. 567 reduced the sentence imposed, its good time sentence reduction provisions could constitutionally be applied retroactively only with the approval of the Board of Pardons, in view of the fact that our Constitution lodged the power "to grant respites, reprieves, pardons, or commutations" in said board.

The next case, *Lytle v. Vitek*, 203 Neb. 825, 280 N.W.2d 654 (1979), presented an offender who had been incarcerated before the effective date of L.B. 567 and who was granted a discretionary parole in 1976. His meritorious good time earned under L.B. 1307 was forfeited after his return to prison. He argued that L.B. 1307 meritorious good time earned prior to parole could not be forfeited upon reincarceration. § 83-1,107 (Cum. Supp. 1974). That prohibition against the forfeiture of meritorious good time was repealed by L.B. 567. We held that reliance upon that repealed statutory language was unfounded.

We next considered retroactive application of L.B. 567 in *Gochenour v. Bolin*, 208 Neb. 444, 303 N.W.2d 775 (1981). Gochenour was sentenced, prior to the enactment of L.B. 567, to a 3- to 5-year term. In 1978 he was sentenced to a consecutive 1-year term for escape. In 1979, when he would have reached his mandatory parole date for the first sentence, the Department of Corrections interrupted the initial sentence and he began to serve his 1-year consecutive sentence. This court held that both L.B. 1307 and L.B. 567 required the sentences to be consolidated, and since Board of Pardons approval for retroactive application of L.B. 567 good time sentence reduction provisions had not been sought, pre-L.B. 567 good time crediting provisions should be applied to his total consolidated sentence.

In *Whited v. Bolin*, 210 Neb. 32, 312 N.W.2d 691 (1981), the offender started serving a 10-year sentence in 1967. In 1973 he was given a 3- to 10-year sentence to be served consecutively to the 1967 sen-

tence. The first sentence was terminated in 1973, and the offender then began serving the 1973 sentence. He violated parole in 1978 and was returned to custody. This court held, as in *Gochenour*, that the two sentences should have been consolidated in order to compute the date of mandatory release from the state's penal authority, after accounting for all good time credited or forfeited. If the good time sentence reduction provisions of L.B. 567 had been applied to Whited's sentence, he would have been entitled to discharge from the penal authority of the state at an earlier time than under L.B. 1307; therefore, he needed Board of Pardons approval for the retroactive application of those L.B. 567 provisions.

We divide the offenders involved in the appeals presently before us into two separate groups. The first group is composed of those sentenced prior to the effective date of L.B. 567 who have incurred no additional sentences after that date and have been denied L.B. 567 good time sentence reductions. The second group consists of those sentenced prior to L.B. 567 who have committed crimes and incurred sentences after L.B. 567 became effective.

The first group consists of Boston, Glouser, and Moreno, all of whom seek writs of habeas corpus.

On October 29, 1970, Boston was sentenced to a term of imprisonment of 10 to 15 years. He was placed on parole in 1978, violated the terms of his parole in 1979, and was reincarcerated in 1980.

On February 24, 1975, Glouser was sentenced to imprisonment for a term of 10 years. In July of 1981 he was paroled and was reincarcerated in March of 1982 for violating parole.

On December 27, 1973, Moreno was sentenced to consecutive prison terms of 3 years and 3 to 9 years. The trial court determined his total term to be 6 to 12 years. He was placed on parole in July of 1979 and again in October of 1981. Each time he violated the terms of his parole and was reincarcerated.

Statements in the briefs that Boston is the only one

of the group who has not had a sentence imposed upon him after the effective date of L.B. 567 are not supported by the record. According to the record, Boston, Glouser, and Moreno were all sentenced prior to August 24, 1975, and have not incurred any additional sentences since that date.

The remaining three offenders, all of whom were sentenced to terms of imprisonment both before and after the effective date of L.B. 567, seek a declaration that they are entitled to have their sentences reduced under the good time provisions of L.B. 567. In each instance the trial court found their sentences were controlled by L.B. 1307.

On May 31, 1972, Hurley received a 6- to 8-year sentence; on December 26, 1972, he received a consecutive 1-year sentence; and on February 23, 1977, he received a consecutive 10-year sentence. This 10-year sentence was for a crime worth a penalty of from 1 to 20 years. Under Neb. Rev. Stat. § 83-1,105(2) (Cum. Supp. 1974 and Reissue 1981), it operates as a sentence of from 1 to 10 years. His total consolidated sentence was determined by the trial court to be from 7 to 19 years. It is in fact 8 to 19 years. The Board of Pardons has denied him L.B. 567 good time sentence reductions.

On April 25, 1975, Kerns received concurrent sentences of 10 years and 5 to 10 years. On March 2, 1978, he received a consecutive sentence of 12 to 15 years. The trial court found his consolidated sentence to be 17 to 25 years. He has never been granted a parole. The Board of Pardons has denied him L.B. 567 good time sentence reductions. In addition to seeking a declaration of the law, he seeks a writ of habeas corpus.

On May 14, 1973, LaFreniere received a sentence of from 3 to 9 years. On July 16, 1975, he received a consecutive sentence of 2 years. This sentence is a 1- to 2-year sentence under § 83-1,105(2) (Cum. Supp. 1974 and Reissue 1981). On September 9, 1975, he received a concurrent sentence of 1 year. He was

placed on parole in 1978, giving him the opportunity to commit crimes resulting in two consecutive sentences of 3 to 5 years. The trial court found his total term to be 11 to 22 years. No showing that he has been granted or denied L.B. 567 good time sentence reductions by the Board of Pardons is contained in the record. LaFreniere also seeks a writ of habeas corpus.

The offenders' assignments of error may be summarized into claims that the trial court erred by finding that their sentences were governed by the good time accumulation provisions of L.B. 1307 instead of the good time sentence reductions of L.B. 567 because: (1) The use of a repealed law to determine their good time rights deprives them of liberty without due process of law; and (2) The different treatment of offenders resulting from the application of L.B. 1307 to determine the good time rights of offenders serving terms composed of sentences imposed both before and after the effective date of L.B. 567 and that resulting from the application of L.B. 567 to offenders serving terms composed of sentences imposed solely after the effective date of L.B. 567 embodies a denial of equal protection of the law.

For their due process claim the offenders cite us to *Walker v. Sauvinet*, 92 U.S. 90, 23 L. Ed. 678 (1875), an early civil rights case. Therein, Walker, a licensed keeper of a coffeehouse, had refused to serve Sauvinet, in violation of a Louisiana statute, on the ground the latter was a "man of color." After a jury could not agree to a verdict, Sauvinet moved that the judge decide the case pursuant to a statute providing for such disposition. Walker objected on the ground that the statute was unconstitutional, but did not specify in what particular. In affirming the trial judge's judgment for Sauvinet against Walker, the U.S. Supreme Court held that due process of law is met if the trial had was in accordance with the settled course of judicial proceedings. Since Louisiana had determined that the pro-

ceeding complied with state law, and there being no contrary federal requirement, due process had been accorded. Although the offenders herein cite *Walker* to support their claim that once a law is repealed the use of that law for any purpose is a denial of due process, we frankly fail to see how the case either supports their position or applies to the issues at hand.

In the case of *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), the U.S. Supreme Court decided that the retroactive application of a Florida statute which provided a new good time scheme under which regular good time credits were lessened was constitutionally inapplicable to a prisoner whose crime occurred before the statute's effective date. Justice Rehnquist stated in his concurring opinion at 38-39: "Since the availability of new opportunities for discretionary gain time and the reduction in the amount of automatic gain time can be viewed as a total package, it must be emphasized that nothing in today's decision compels Florida to provide prisoners in petitioner's position with the benefits of the new provisions when this Court has held that Florida may not require such prisoners to pay the price. It is not at all clear that the Florida Legislature would have intended to make available the new discretionary gain time to prisoners earning automatic gain time under the old 5-10-15 formula, when the legislature in fact reduced the 5-10-15 formula when it enacted the new provisions. The question is, of course, one for Florida to resolve."

The specific due process contentions of the second group of offenders are that since they were sentenced to additional time after the enactment of L.B. 567, their terms should be governed by the good time sentence reduction provisions of L.B. 567 automatically, without Board of Pardons approval.

Section 83-1,110 (Cum. Supp. 1974 and Reissue 1981) defines an offender's sentence, for the purpose

of good time computations, to be the sum of all sentences he receives, regardless of when incurred. The date of an offender's initial incarceration is the date on which service of such consolidated sentence is deemed to begin. Consequently, any good time credited toward the consolidated sentence of an offender sentenced prior to the effective date of L.B. 567 which would reduce the period such offender is to remain subject to the penal authority of the state (but for L.B. 567) would result in the commutation of a sentence by legislative action. This is a power denied to the Legislature by this state's Constitution. See *Lytle v. Vitek*, 203 Neb. 825, 280 N.W.2d 654 (1979).

In *Gochenour v. Bolin*, 208 Neb. 444, 449, 303 N.W.2d 775, 778 (1981), we said: "The provisions for consolidation of consecutive sentences were not in any way changed. Those provisions are to be applied whether sentencing was before or after the effective date of L.B. 567. That appears not to have been done in this case. In sum, after the imposition of the 1-year consecutive sentence, its consolidation with the 3- to 5-year indeterminate sentence resulted in a 4- to 6-year consolidated term and should have been so treated. The approval of the Board of Pardons was not sought or received in this case, so the pre-L.B. 567 good time provisions should have been applied." We restated that rule in *Whited v. Bolin*, 210 Neb. 32, 312 N.W.2d 691 (1981).

The offenders state in their brief at 22: "The use of repealed statutes at the subsequent offense convictions of these plaintiffs, for the purpose of determining their good time rights, hardly comports with that idea of due process." The fact of the matter is that application of the law embodied in L.B. 1307 to determine offenders' good time rights took place not at the time they were convicted of the subsequent offenses but at the time they began serving their initial sentences.

As such, the due process claims of all the offenders are without persuasive force.

We next turn to the equal protection claims. While not spelled out in their arguments, all the offenders herein appear to be referring to the fact that they are treated differently than persons sentenced after the effective date of L.B. 567. This equal protection argument has been rejected in numerous other jurisdictions. *Mastracchio v. Superior Court*, 98 R.I. 111, 200 A.2d 10 (1964), *cert. denied* 379 U.S. 852, 85 S. Ct. 96, 13 L. Ed. 2d 55; *Frazier v. Manson*, 176 Conn. 638, 410 A.2d 475 (1979); *In re Stinnette*, 94 Cal. App. 3d 800, 155 Cal. Rptr. 912 (1979). It is clear from those cases and from *McGinnis v. Royster*, 410 U.S. 263, 93 S. Ct. 1055, 35 L. Ed. 2d 282 (1973), a case dealing with the denial of good time credits to certain prisoners for time spent during presentence incarceration in county jails, that the standard of review in equal protection cases involving denial of good time is not that of strict scrutiny, even though the offenders in the present case have framed the issue as one involving a fundamental interest. As stated in *McGinnis* at 269-70: "We note, further, that the distinction of which appellees complain arose in the course of the State's sensitive and difficult effort to encourage for its prisoners constructive future citizenship while avoiding the danger of releasing them prematurely upon society. The determination of an optimal time for parole eligibility elicited multiple legislative classifications and groupings, which the court below rightly concluded require only some rational basis to sustain them. *James v. Strange*, 407 U.S. 128, 140 (1972); *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972); *Schilb v. Kuebel*, 404 U.S. 357 (1971); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). Appellees themselves recognize this to be the appropriate standard. For this Court has observed that '[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscien-

tific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913). We do not wish to inhibit state experimental classifications in a practical and troublesome area, but inquire only whether the challenged distinction rationally furthers some legitimate, articulated state purpose. We conclude that it does."

Certainly, the preservation of the separation of governmental powers embedded in our state Constitution is a legitimate interest rationally promoted by denying retroactive application of the L.B. 567 good time sentence reduction provisions to those serving sentences imposed prior to its effective date.

The second group of offenders also argue that treating those sentenced prior to the effective date of L.B. 567 who receive additional sentences after such effective date differently than those sentenced for the first time after its effective date is constitutionally impermissible as a denial of equal protection of the law.

The question is whether the difference in treatment is based upon some rational justification. As stated previously, due to the consolidation of all sentences required under both L.B. 1307 and L.B. 567, after that consolidation it is not possible to distinguish pre-L.B. 567 terms from post-L.B. 567 terms. Consequently, application of the L.B. 567 good time sentence reduction provisions serves to reduce the term an offender spends subject to the penal authority of the state. Application of those L.B. 567 provisions to offenders first sentenced prior to its effective date is impermissible, under the Constitution of this state, without Board of Pardons approval. *Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977). Preservation of our government's constitutional separation is a rational, if not compelling, reason for the different treatment accorded those first sentenced prior to and those first sentenced subsequent to the effective date of L.B. 567.

We also note that the application of the rule this second group of offenders request, that once an offender commits a crime while subject to the penal authority of the state he is automatically entitled to a more liberating good time scheme, could have the effect of encouraging the commission of crimes in order to receive the desired L.B. 567 good time provisions.

The due process and equal protection claims of Boston, Glouser, and Moreno are without merit. Their cases are governed by *Johnson & Cunningham v. Exon, supra*, wherein we required Board of Pardons approval prior to retroactive application of the L.B. 567 good time sentence reduction provisions, and were correctly decided by the trial court.

The due process and equal protection claims of the second group of offenders, Hurley, Kerns, and LaFreniere, are likewise unpersuasive, and their cases fall within the rule announced in *Gochenour v. Bolin*, 208 Neb. 444, 303 N.W.2d 775 (1981), wherein we held that application of the L.B. 567 good time sentence reduction provisions to the term of an offender similarly situated to these three required prior Board of Pardons approval.

Due process and equal protection issues aside, both groups of offenders also take issue with the Department of Correctional Services' manner of crediting L.B. 567 meritorious good time. As stated earlier, those whose sentences are governed by L.B. 567 good time sentence reduction provisions receive a lump-sum credit for the meritorious good time when they begin serving their sentences. The offenders herein claim that this "banking" of L.B. 567 meritorious good time is improper. Their argument seems to be motivated by dicta in our opinion in *Whited v. Bolin*, 210 Neb. 32, 312 N.W.2d 691 (1981), wherein it was suggested that there may be a situation in which L.B. 567 good time sentence reduction provisions could be applied to offenders who began serving their terms of imprisonment prior to the ef-

fective date of L.B. 567 without first obtaining Board of Pardons approval. Since L.B. 567 good time sentence reduction provisions serve to reduce the time an offender is subject to the penal authority of the state, application of such L.B. 567 good time provisions to any offender serving a term of imprisonment beginning prior to its effective date must be accompanied by Board of Pardons approval.

The offenders' reliance upon the dicta in *Whited v. Bolin*, *supra*, is misplaced. The facts of the cases before us come squarely within the holdings of *Johnson & Cunningham v. Exon*, *supra*, and *Gochenour v. Bolin*, *supra*.

Since the offenders herein are not subject to L.B. 567 meritorious good time sentence reduction provisions, they have no standing to complain about how such time is calculated and credited. *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982); *First Fed. Sav. & Loan Assn. v. Department of Banking*, 187 Neb. 562, 192 N.W.2d 736 (1971).

AFFIRMED.

PEDRO GARZA, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

340 N.W.2d 409

Filed November 18, 1983. No. 83-152.

1. **Words and Phrases.** In the absence of anything to indicate the contrary, words must be given their ordinary meaning.
2. **Administrative Agencies: Appeal and Error.** In error proceedings taken from findings and orders of an administrative agency or body acting in a quasi-judicial capacity, as in the case at bar, only two questions are ordinarily presented for decision. The general rule is that if it appears in such cases that such agency or body has acted within its jurisdiction and that all of the jurisdictional facts essential to uphold its findings and orders are sustained by some competent evidence, such findings and orders will be upheld in error proceedings to the District Court and on appeal to this court.

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

Clyde A. Christian, for appellant.

Herbert M. Fitle, City Attorney, and Kent N. Whinnery, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ.

KRIVOSHA, C.J.

The appellant, Pedro Garza, appeals from an order entered by the District Court for Douglas County, Nebraska, affirming the action of the Board of Trustees of the City of Omaha Employees' Retirement System (Board of Trustees) in denying to Garza a monthly disability pension sought by Garza pursuant to § 22-35 of the Omaha Municipal Code (1980). On review we believe that the trial court was correct and the judgment should be affirmed.

Garza was employed by the City of Omaha since 1975. In 1976 he was promoted to the position of automotive equipment operator (AEO-I), and was employed by the city for a total of 6 years and 10 months. While employed as an AEO-I, he suffered two work-related injuries for which he received workmen's compensation benefits. Both injuries resulted in Garza being temporarily totally disabled, but not permanently totally disabled. However, because of certain physical limitations resulting from these injuries, Garza was relieved of his duties as an AEO-I and assigned to perform the duties of a night watchman. The city maintains that Garza failed to perform these duties adequately, and on March 30, 1982, notified him by mail that he would be suspended effective March 31, 1982, through April 16, 1982, after which time he was to be dismissed. During the period of suspension, Garza filed his application for a work-related disability pension pursuant to the provisions of chapter 22 of the Omaha Municipal Code, which provides in part as follows: "Sec. 22-35.

. . . (a) Any member of the system who has at least five (5) years of service credit and has sustained and/or shall sustain injuries or sickness, which immediately or after a lapse of time *permanently unfit* such member for *active duty*, shall receive a monthly disability pension as long as he or she remains unfit for active duty or until he reaches age sixty-five (65), whichever event occurs first." (Emphasis supplied.) In response to the application a hearing was held by the Board of Trustees. Following the hearing, the Board of Trustees voted to deny the pension.

Garza argued, both to the District Court and to this court, that he is entitled to this permanent disability, even though he was employable by the city as a night watchman, because he no longer performed the duties of an AEO-I. The evidence, scant as it is, appears to establish that while Garza could not, at this time, perform the duties of an AEO-I, he could perform the duties of a night watchman, though he did not like the work.

We believe that Garza has misinterpreted the Omaha Municipal Code. The code does not provide that one may obtain a permanent disability if one is no longer able to perform the duties for which the employee was specifically hired. Rather, it provides that one may receive early disability retirement if, and only if, the injuries result in the employee being "permanently unfit . . . for active duty." The undisputed evidence in this case is that Garza was not unfit for active duty. Garza's counsel conceded before the board that Garza was not disabled from doing the duties of a night watchman and, in fact, could perform those duties. Nevertheless, he argues that Garza is entitled to receive disability because he cannot perform the duties of an AEO-I. There is simply no evidence in the record to establish that Garza is permanently unable to be engaged in active duty. Garza wants us to read a meaning into the ordinance which the plain words do

not provide. This we cannot do. In *County of Douglas v. Board of Regents*, 210 Neb. 573, 577, 316 N.W.2d 62, 65 (1982), we said: " 'In the absence of anything to indicate the contrary, words must be given their ordinary meaning.' " See, also, *State v. One 1970 2-Door Sedan Rambler*, 191 Neb. 462, 215 N.W.2d 849 (1974).

Likewise, we are not permitted to read words into a statute or ordinance which are not there. See *State v. Hamilton*, *ante* p. 694, 340 N.W.2d 397 (1983). The ordinance does not permit one to receive disability payments if the employee is able to perform active duty services for the employer, even though not the same as performed before the injury. It is only where the employee is unable to perform at all that he or she may receive benefits. The record in this case failed to establish that Garza was "permanently unfit" for "active duty."

Often we have said: "In error proceedings taken from findings and orders of an administrative agency or body acting in a quasi-judicial capacity, as in the case at bar, only two questions are ordinarily presented for decision. The general rule is that if it appears in such cases that such agency or body has acted within its jurisdiction and that all of the jurisdictional facts essential to uphold its findings and orders are sustained by some competent evidence, such findings and orders will be upheld in error proceedings to the district court and on appeal to this court." *Lynch v. City of Omaha*, 153 Neb. 147, 150-51, 43 N.W.2d 589, 591-92 (1950). See, also, *Tinsley v. City of Omaha*, 190 Neb. 380, 208 N.W.2d 693 (1973); *Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W.2d 241 (1982). It seems clear to us that what § 22-35 is intended to do is to provide early retirement for an employee who has served for more than 5 years and who is no longer able to engage in employment for the city. The record in this case does not support that position. In fact, Garza accepted the work as night watchman and did not file

for permanent disability until he had been discharged by the city from the job he was then performing. We believe that the judgment of the trial court affirming the action of the Board of Trustees was correct. The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF J.H.L., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. R.L. AND J.L., APPELLANTS.
340 N.W.2d 412

Filed November 18, 1983. Nos. 83-165, 83-304.

Parental Rights. Where a parent is unable to discharge parental responsibilities because of mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, parental rights may be terminated if such action is in the best interests of the child.

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

Robert G. Hays, for appellants.

Michael G. Heavican, Lancaster County Attorney, and Mary L. Thramer, for appellee.

Mark Brown of Muffly, Lott & Oglesby, guardian ad litem.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

The State of Nebraska commenced this action by the filing of a petition in the separate juvenile court of Lancaster County, Nebraska, seeking to have a minor, J.H.L., declared a juvenile under the jurisdiction of the separate juvenile court, pursuant to the provisions of Neb. Rev. Stat. § 43-247 (Cum.

Supp. 1982). Following a hearing, the separate juvenile court determined that it had jurisdiction over the minor child pursuant to the provisions of § 43-247 and that, in particular, the minor child lacked proper parental care "by reason of the fault or habits of his parents." The court did not terminate parental rights. Instead, it ordered that the child be placed in the temporary legal custody of the Lancaster County Division of Public Welfare for placement in an approved foster home. The parents were given reasonable rights of visitation, to be arranged by the Child Protective Services caseworker. The court also ordered the Lancaster County Division of Public Welfare to prepare a "social history" for the court's consideration at a dispositional hearing set by the court. Following that dispositional hearing, the court ordered that the minor child remain in the temporary legal custody of the Lancaster County Division of Public Welfare for placement in an approved foster home and that the parents correct the conditions of neglect which resulted in placing the child in foster care.

The parents have now appealed, assigning three errors. They are: (1) The court erred in finding that the appellants had not acted in the child's best interests; (2) The court erred in finding that the parents are at fault for their shortcomings in parenting skills; and (3) The court erred in finding that the parents had the option of remaining together but chose, instead, to act against the advice of professionals in requesting that their child be placed in long term foster care.

While the parents assign as their first error that the court did not act in the child's best interests, in fact, the record amply supports the court's finding. The evidence, as reflected by the record, discloses that at the time the child was born the parents were living in a supervised apartment made available through the Lancaster Office of Mental Retardation (LOMR). Under this arrangement LOMR clients

maintain their own apartments, with a resident manager available in the complex to help develop independent living skills. The record further discloses that for the first several months of the child's life, he was in a foster home, apparently because of the parents' inability to care for an infant. During that time, LOMR worked with the parents on developing parenting skills.

After the child was returned to his parents, the family continued to reside in the supervised apartment until June of 1981, when they moved into an extended-family home. This move was made primarily because the parents were experiencing increased difficulty with caring for the child's needs. In an extended-family home the parents and the child reside with a person who is available to provide supervision and other assistance as needed, on a continuous basis. The parents and the child resided in the extended-family home for about 18 months. During that time, the parents had difficulty raising the child but were assisted by the individual in whose home they resided. The parents then left the extended-family home and moved back into an independent-living apartment. They moved back because the father wished to leave the restrictive environment of the extended-family home and be more independent. The record was clear that by moving out of the extended-family home and into an independent-living unit the parents were no longer able to care or provide for their child, resulting in the child needing foster care. As we have already indicated, while the parents object to the action taken by the court, they do not seriously argue that it was wrong, and, indeed, examination of the record discloses that it was not.

The parents' principal argument is that the court should not have found that the condition which resulted in their child being placed in foster care was their fault. Rather, they argue the court should have found that the condition was due to their men-

tal deficiencies, and therefore not their fault. Apparently, the parents believe that even though the court has not yet terminated their parental rights, the ability to terminate these rights will be made easier by declaring that the problem is their fault. We believe that such fear is not well founded. Whether the condition is due to the fault of the parents or without the fault of the parents will not significantly affect whether their parental rights are ultimately terminated. Even if the condition is without the fault of the parents, their parental rights may be terminated if their mental condition giving rise to the problem will continue for an extended period of time. Therefore, it is in the child's best interests that the parental rights be terminated and the child be placed for adoption. In the case of *In re Interest of Fant*, 214 Neb. 692, 695, 335 N.W.2d 314, 316 (1983), we recently said: "Where a parent is unable to discharge parental responsibilities because of mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, parental rights may be terminated if such action is in the best interests of the child." To the same effect see *In re Interest of Wanek*, 212 Neb. 394, 322 N.W.2d 803 (1982).

Furthermore, we believe that the trial court's determination that the conditions which existed were due to the fault of the parents was fully supported by the record. The trial court made the following observations during trial: "The parents have a responsibility to make use of whatever services are necessary to care for their child. That situation is no different than it would be for any other parent who perhaps would have a skill for a particular job but didn't want to do any other job, other jobs were available, but a parent cannot say that I will only do it this way and that is the only way I will do it. If there are other ways of doing the job, the parent's primary responsibility is to the child. . . . If a per-

son says I will only do one type of work and nothing else and will not support my family unless I get this type of job and the question would be, is the parent neglectful of the child and I would say that it is clear that the parent would be neglectful to the child. To the same way, Mr. and Mrs. [L.] have a method by which they can care for their child in a type of supervised living situation and they have chosen not to do it that way. The evidence is clear that they need supportive services." Indeed, the record is clear that if the parents would return to the extended-family home their child could be returned to them and would not have to be placed in a foster home. The parents have voluntarily chosen to do otherwise because they have determined that having a particular lifestyle available in an independent-living apartment is of greater value than having their son. Their mental deficiencies may not be their fault, but their choice of where they live is one made freely by the parents. It is that free choice which results in the child being placed in foster care, and their right and ability to exercise a free choice in changing that condition would bring their son out of foster care and back to them. The child's condition, therefore, is their fault. We believe that the court was correct in finding that the condition which required the child to be placed in foster care was the parents' fault.

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

AFFIRMED.

STATE OF NEBRASKA EX REL. HENRY BALES, LUPE RABAGO, ROBERT A. BARTO, SR., LOUIS K. BOKOSKIE, WILLARD TOLLIVER, JR., AND VERNIE BIRDHEAD (VERNON ALLEN BIRD HEAD), APPELLANTS, V. CHARLES BLACK, WARDEN, NEBRASKA STATE PENITENTIARY, ET AL., APPELLEES.

340 N.W.2d 13

Filed November 18, 1983. Nos. 83-201, 83-202, 83-203, 83-205, 83-206, 83-207.

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

Dennis R. Keefe, Lancaster County Public Defender, and Jerry Soucie, for appellants.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

Each of the appellants herein was convicted of the offense of driving while under the influence of alcohol or drugs, third offense, and was sentenced to at least 1 year's confinement. Each has served more than 6 months in jail and seeks habeas corpus relief for reduction of sentence under Neb. Rev. Stat. § 29-2204.01 (Reissue 1979), since Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982) created new penalties for such offenses. The action of the trial court in sustaining appellees' motion to dismiss in each case is affirmed. *State v. Peiffer*, 212 Neb. 864, 326 N.W.2d 844 (1982).

AFFIRMED.

IN RE INTEREST OF R.D.J. AND K.S.J., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. O.J. ET AL., APPELLANTS.

340 N.W.2d 415

Filed November 18, 1983. No. 83-272.

1. **Juvenile Courts: Appeal and Error.** An appeal of a juvenile proceeding to this court is heard de novo upon the record, but the findings of fact by the juvenile court will be accorded great weight because it both heard and observed the parties and witnesses.
2. **Parental Rights.** An order of the juvenile court terminating parental rights must be based on clear and convincing evidence.
3. _____. Where parents are unable to discharge parental responsibilities because of mental deficiencies, and there are reasonable grounds to believe that such conditions will continue for a prolonged and indeterminate period, parental rights may be terminated if such action is in the best interests of the children.
4. _____. When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the children require that a final disposition be made without delay.

Appeal from the District Court for Hamilton County: BRYCE BARTU, Judge. Affirmed.

Gerald D. Warren of Whitney, Newman, Mersch & Otto, for appellants.

Michael J. Owens, Hamilton County Attorney, for appellee.

Michael Powell, guardian ad litem.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

On November 6, 1980, the county attorney of Hamilton County, Nebraska, acting on behalf of and in the name of the State of Nebraska, filed petitions in the juvenile division of the county court, Hamilton County, involving R.D.J. and K.S.J. The petitions as amended by stipulation allege that K.S.J. is a female child born April 9, 1979, that R.D.J. is a male

child born October 27, 1976, and that both children either lacked proper parental care by reason of the fault of their parents or they were children whose parents neglected or refused to provide proper or necessary care. Neb. Rev. Stat. § 43-202(2)(b) and (c) (Reissue 1978). Both subsections (2)(b) and (c) of the above statute were repealed by 1981 Neb. Laws, L.B. 346, but the identical language relating to the subsections is now incorporated within Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982). After an adjudicatory hearing on December 16, 1980, the county court declared the children to be within the meaning of § 43-202(2)(c). Temporary legal custody was placed in the Hamilton County Division of Public Welfare, with physical custody remaining with the parents. The county welfare division was ordered to provide the parents with intensive homemaking services and supervision, and budgetary and nutritional training.

In June 1979 K.S.J. was hospitalized for a period of 12 days. Initial diagnosis was "failure to thrive" syndrome. Upon further observation the child was found to be seriously underweight, dehydrated, possessed of what is characterized as a very severe diaper rash, and to have a distended stomach. During the hospital stay, the child immediately gained weight and seemed to improve in all appearances. The diaper rash was eliminated.

At the request of the treating physician, a nurse was asked to periodically visit the parents' home, in which the two children resided. It was on these visits, coupled with the county welfare department visits that began in April 1978, that the conditions giving rise to the filing of the petitions were discovered. As is common with a number of cases recently brought before this court, the home conditions could best be described as atrocious, not merely disordered and cluttered. The house was described as filled with filth, dog and cat feces, clutter, and garbage. K.S.J. and R.D.J. were soaked with urine and

feces; the house stank; inadequate food and further evidence of total and complete disregard for the most elementary rules of sanitation and child care were observed.

It is not necessary to recite in detail the heroic efforts made by the various welfare departments in attempting to educate the parents and upgrade their standard of housekeeping to even a minimal level. Over the period of time until the date of termination in August 1982, approximately 400 home visits were made by various state agencies. Extended instructions were given to the parents in such elementary subjects as bathing children, washing clothes, and sweeping and vacuuming floors; for each temporary gain there would be a setback which brought the home situation back to an identical condition or worse than was first encountered by the visiting agencies. Appellants' counsel suggests, based on some rather loose testimony and a few statements in an enormous record, that the parents were, in fact, feeding their children; the evidence is clear and convincing, however, that substantial difficulty was encountered in seeing that a reasonable diet was given the children, even during the time of the extraordinary home visitations by the welfare services.

The county court conducted periodic review hearings, and in April 1981 K.S.J. was removed from the home. She has been in foster care since that time. R.D.J. remained in the home under constant supervision of the welfare agency, except for a short period of time in 1982 when the child was placed in foster care. Extensive psychological evaluations were made of both the parents and the children. Significant is the fact that in addition to the intellectual capabilities of the parents, ranging from borderline mentally retarded to low-average intellectual ability, is the finding of the psychologist that the emotional difficulties suffered by the parents, involving rigidity, result in a failure to change lifetime patterns and a stubborn return to previous habits, in

spite of extended instructions and urgings. Significant also were the psychological evaluations introduced at the hearing on motion to terminate in August 1982, comparing the progress of K.S.J. and R.D.J. K.S.J., who was removed from the home in April 1981, was shown by all batteries of tests to have advanced significantly in verbal and motor skills during the period of her foster care, while R.D.J., who had remained, except for a short time, in the home of the parents, actually regressed considering the increase in age.

There is no dispute in the evidence, or really any hope from the record, that the parents are now or will ever be capable of managing children of any age. The most that could be hoped for if they were to regain custody would be that the children would survive until such time as they could fend for themselves.

A more difficult issue presents itself in the comments of this court in the recent case of *In re Interest of Spradlin*, 214 Neb. 834, 841, 336 N.W.2d 563, 567 (1983), which are pertinent here. "[T]he juvenile court patiently delayed its decision regarding termination for a relatively lengthy period of time in order to allow the appellants to attempt to effectuate their plan. Such plan proved to be an utter failure, and the court accordingly proceeded to enforce its prior determination, which resulted in termination of appellants' parental rights.

"The evidence clearly and convincingly establishes that appellants herein are simply incapable of caring for the child, even in the best of settings, wherein they were provided live-in household assistance. It is indeed unfortunate that appellants do not have the ability to function adequately as parents; but, as much as one's sympathies may rest with appellants by virtue of that unfortunate reality, the State cannot stand idly by oblivious to the welfare of an infant or heedless of the fact that its failure to intervene, should the child survive, would likely result

in producing yet another individual incapable of coping with life."

We are conscious in reviewing these matters that we proceed to hear them de novo on the record and that the decision to terminate parental rights must be supported by clear and convincing evidence. *In re Interest of Fant*, 214 Neb. 692, 335 N.W.2d 314 (1983); *In re Interest of Biesecker*, 214 Neb. 425, 333 N.W.2d 923 (1983); *In re Interest of Levey*, 211 Neb. 66, 317 N.W.2d 760 (1982).

Unlike a number of the cases in which deliberate parental misconduct has been present, this is not such a case. We are convinced, as asserted by appellants' counsel, that the parents do indeed love their children. We are indeed convinced, as counsel has suggested, that given adequate parental supervision the children might survive, but we are also convinced that the psychological damage to the children due to the emotionally deprived situation of the parents' home would be utterly devastating. As we said in *State v. Souza-Spittler*, 204 Neb. 503, 511, 283 N.W.2d 48, 52 (1979): " '[W]e will not gamble with the child's future; she cannot be made to await uncertain parental maturity.' "

The judgment of the District Court, which affirmed the decision of the county court terminating the parental rights of the parents to R.D.J. and K.S.J., is hereby affirmed.

AFFIRMED.

DAVE COLE, APPELLANT, V. THOMAS F. HICKEY ET AL., APPELLEES.

340 N.W.2d 418

Filed November 18, 1983. No. 83-337.

1. **Specific Performance: Appeal and Error.** An action for specific performance is triable de novo on appeal to this court.
2. **Contracts: Parol Agreement.** 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 the written executory contract may be changed by a subsequent parol agreement before a breach thereof.

3. **Contracts: Time.** An unqualified renunciation of an executory contract before time for performance by one party excuses tender of performance by the other party at the time set for performance.

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

Forrest F. Peetz of Peetz and Peetz, for appellant.

No appearance for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an appeal from an action for specific performance of a contract to sell a tavern, and for damages incident to the failure to convey.

In a bifurcated trial, the trial court found that the appellant, Dave Cole, had failed to tender payment before November 1, 1982, the date specified in the contract, that time was of the essence, and that therefore appellant was not entitled to relief. This appeal followed.

Two errors are assigned. The trial court erred in (1) holding that the contract required the closing to be held on or before November 1, 1982, and (2) failing to find that the contract was orally modified before breach, thereby extending the time for closing until November 9, 1982. We reverse and remand for further proceedings not inconsistent with this opinion.

In view of our holding we will discuss only the second assignment of error.

An agreement for sale of the Elbow Room Bar in O'Neill, Nebraska, was executed September 18, 1982. A postdated check for a $500 downpayment was tendered by Cole, the buyer, and accepted by the

appellees-sellers, Shirley and Thomas Hickey. Interestingly, the check was dated November 15, 1982, well beyond the claimed closing date. Pursuant to the contract, Cole negotiated a lease with the owners of the real estate on which the tavern was located, the lease period to run from November 1, 1982, to November 1, 1983. On September 20, 1982, Cole purchased a money order to send with his liquor license application. On September 21, 1982, the Nebraska Liquor Control Commission acknowledged receipt of the application. On October 7, 1982, the O'Neill City Council, at its regular meeting, recommended to the commission that the license be issued. Thereafter, Cole, in anticipation of the purchase and with the permission of the Hickeys, made various improvements to the tavern.

On October 25, 1982, Cole was informed by the commission that the application would be considered at the next regular meeting of the commission on November 4, 1982, and that he could expect to receive the license on November 9, 1982. Cole spoke to Thomas Hickey on October 27, 1982, and confirmed an earlier conversation as to the procedure in the event the license was not received prior to November 1, 1982. Mr. Hickey stated that he would prefer to keep the tavern open from November 1, 1982, to November 9, 1982, as business was good at that time. To compensate the Hickeys for the $750 expense of a liquor license for only 9 days, Cole agreed to pay the entire November rent and also to make good the postdated $500 downpayment check so that the Hickeys would have money available to pay for the license. Mr. Hickey later inquired of the city clerk about the possibility of acquiring a liquor license, the cost of which could be prorated to November 9, 1982. He was told this was not possible. Cole paid the rent of $225 due November 1, 1982, and deposited $500 to his account to cover the downpayment check. On November 8, 1982, Cole picked up

bar stools from the tavern and transported them to Yankton, South Dakota, for repair.

On November 9, 1982, Cole's liquor license was received by the city clerk of O'Neill. In order for Cole to receive the license it was necessary to surrender the Hickey license and pay a $750 license fee.

At approximately 10 a.m. on November 9, 1982, Cole spoke to Shirley Hickey. She told Cole she was not going along with the contract. That afternoon Cole met with both Shirley and Thomas Hickey. Cole offered to write a check for the balance of the purchase price if the Hickeys would close the transaction. Mr. Hickey refused. Thereafter, on November 10, 1982, Hickey tendered back a check for the November rent of $225 and the uncashed downpayment check. Cole formally tendered, through his attorney, the balance due on the contract of sale.

We review equitable matters de novo in this court. *Spilinek v. Spilinek*, 215 Neb. 35, 337 N.W.2d 122 (1983).

Thomas Hickey's deposition, which Cole introduced in part as evidence at trial, confirmed the October 27, 1982, discussion with Cole; admitted that the contract closing was extended, but only until November 8, 1982; and admitted the conversation with the city clerk, requesting a liquor license for the first 9 days in November. Thomas Hickey had knowledge and acquiesced to the work performed by Cole at the tavern before and after November 1, 1982. Mr. Hickey, on cross-examination, admitted his failure to tender back the downpayment check or to refund the rent until November 10, 1982.

It is obvious from the record that the delay in closing was due entirely to the administrative process of securing the liquor license itself and that Cole was diligent in attempting to secure the license. It is further obvious that the parties agreed, as Cole urges, that the closing would be postponed until the new license was issued. Inferable from the record

is the conclusion that Shirley Hickey simply changed her mind about selling the tavern.

We held in *Pearce v. ELIC Corp.*, 213 Neb. 193, 201, 329 N.W.2d 74, 79 (1982), that "[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."

Because of the Hickeys' unqualified renunciation on November 9, 1982, of the executory contract, before Cole's time for performance, we need not decide the issue of whether Cole's offer to close was sufficient tender. See *Friehe Farms, Inc. v. Haberman*, 191 Neb. 292, 214 N.W.2d 916 (1974).

Appellant Cole was clearly entitled to a decree of specific performance and to a hearing on any damages caused by the failure of appellees, Thomas and Shirley Hickey, to convey.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS AND CROSS-APPELLEES, V. ALLEN SOUKUP, APPELLEE AND CROSS-APPELLANT.

340 N.W.2d 420

Filed November 18, 1983. No. 83-492.

1. **Administrative Law: Ordinances: Statutes: Words and Phrases.** As a general rule, the words "final and binding," when used in ordinances or statutes to refer to the decision of an administrative official or agency, mean that it is the definitive act of that official or agency and is binding until and unless it is set aside by judicial review.
2. **Administrative Law: Appeal and Error.** One cannot be denied the right of review in the appellate courts.
3. **Administrative Law: Contracts: Appeal and Error.** A contract to compel parties to arbitrate future disputes and thus to oust the

courts of jurisdiction to settle such disputes is against the public policy of this state and is void.

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

William F. Austin, City Attorney, for appellants.

Ronald Rosenberg of Rosenberg & Taute, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The defendant, Allen Soukup, filed a grievance with the personnel board of the City of Lincoln against the city and several of its officers and employees, the plaintiffs herein. The grievance was upheld, and the plaintiffs appealed to the District Court. That court, on motion of the defendant, ordered the appeal dismissed. We reverse and remand.

The defendant is a lieutenant in the Lincoln Police Department. His grievance was filed with the chief of police on June 29, 1982. This was denied by the chief on July 8, 1982. The defendant then requested a formal hearing before the personnel board by letter dated July 9, 1982. A hearing was held by that board on September 16, 1982, and on the same date a motion was passed upholding the defendant's grievance. The order also directed that his salary be advanced a minimum of 5 percent as requested. The plaintiffs' petition on appeal was filed in the District Court on November 2, 1982.

It is contended by the defendant that the action of the District Court should be affirmed because of the following language found at § 2.58.390(d)(3) of the Lincoln Municipal Code (1981): "The decision of the personnel board shall be final and binding upon the appointing authority," and in the collective bargaining agreement between the City of Lincoln and

the International Brotherhood of Police Officers Local No. 544: "The decision of the Personnel Board shall be final and binding upon the City." The trial court agreed with the defendant and based its decision on that language.

We have no problem with the language "final and binding." An order by the personnel board, like the order of any intermediate court or administrative agency, is final and binding unless appealed. In *Aurora v. Hood*, 194 Colo. 80, 570 P.2d 246 (1977), the Colorado court was faced with a similar problem. It said: "Bearing these principles in mind and not choosing to lightly infer an intent on the part of the legislature and the City of Aurora to create an unconstitutional result, we think the words 'final and conclusive' merely determine the point of administrative finality, leaving to the courts the ultimate decision on the validity of the 'final' administrative orders." *Id.* at 82, 570 P.2d at 247. See, also, *Dahlberg v. Pittsburgh & L. E. R. Co.*, 138 F.2d 121, 122 (3d Cir. 1943), in which the court said in part: "We think that the general plan of the statute clearly discloses an intention to use the words [final and binding] in the sense that the award is the definitive act of a mediative agency, binding until and unless it is set aside in the manner prescribed, and that it was intended that the Court should exercise broader powers than merely directing coercive process to issue if satisfied that the proceeding was authorized by law."

Neb. Rev. Stat. § 15-1201 (Reissue 1977) reads as follows: "Any person or persons, jointly or severally aggrieved by any final administrative or judicial order or decision of the board of zoning appeals, the board of equalization, the city council, or any officer or department or board of a city of the primary class, shall, except as provided for claims in sections 15-840 to 15-842.01, appeal from such order or decision to the district court in the manner herein prescribed."

In *Rohrer v. Ford*, ____ R.I. ____, 425 A.2d 529 (1981), the Rhode Island court was concerned with a statute that provided that the decision of the personnel appeal review board shall be final and binding upon all parties concerned. It concluded that the "final and binding" mandate was so much meaningless rhetoric which did not exempt such board from the operation of the Administrative Procedures Act provisions relating to judicial review.

This court, in *Richardson v. Board of Education*, 206 Neb. 18, 290 N.W.2d 803 (1980), had occasion to construe what was then Neb. Rev. Stat. § 79-1103.05 (Reissue 1976), which provided in part as follows: "(2) Any parent or guardian of such student who is aggrieved by a decision of the board of education may appeal such decision to the State Board of Education whose decision shall be *binding* when the school attended is outside the State of Nebraska." (Emphasis supplied.)

One of the questions presented to us in that case, which did involve a school outside the state, was whether a party, in a suit brought in the District Court to enforce the decision of the State Board of Education, could launch a collateral attack against such decision. We held that it could not. We said: "[W]e view the proceeding as simply a suit to recover money claimed to be due and owing by virtue of an order of the State Board. . . . We therefore hold that the State Board of Education hearing appeals as provided for in § 79-1103.05(2) acts in a quasi-judicial capacity and, therefore, either party has the right to appeal to the District Court any such order made . . . . It is clear that the School District took no steps to prosecute an appeal of any nature within 30 days of entry of the State Board's order, as required by Neb. Rev. Stat. §§ 25-1931 (Reissue 1975) and 84-917(2) (Reissue 1976). Rather, it attempted to collaterally attack an order of the State Board which had long before become final." *Id.* at 22-23, 25-26, 290 N.W.2d at 807-08.

We hold that the words "final and binding," when used in ordinances or statutes to refer to the decision of an administrative official or agency, mean that it is the definitive act of that official or agency and is binding until and unless it is set aside by judicial review. One cannot be denied the right of review in the appellate courts. *Richardson v. Board of Education, supra.*

However, the defendant insists that such a holding violates his contract rights under a binding arbitration agreement between the City of Lincoln and the union, and he cites authority from other jurisdictions upholding the enforceability of such agreements. The answer to that contention is found in *Heisner v. Jones*, 184 Neb. 602, 169 N.W.2d 606 (1969), in which we reiterated the longstanding rule in Nebraska that a contract to compel parties to arbitrate future disputes and thus to oust the courts of jurisdiction to settle such disputes is against public policy and is void.

The District Court was in error in dismissing the plaintiffs' petition on appeal, and its judgment is reversed and the cause is remanded for further proceedings.

The defendant had cross-appealed, seeking an award of attorney fees. In view of our holding on the principal appeal, the cross-appeal is dismissed.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MELVIN C. ELLIS, APPELLEE, V. FAR-MAR-CO, INC., A KANSAS CORPORATION, APPELLANT, AND THE HOME INSURANCE COMPANY, A CORPORATION, APPELLEE.

340 N.W.2d 423

Filed November 28, 1983. No. 82-289.

1. **Invitor-Invitee: Agents.** Although an invitee on the premises of

another may very well be aware of the dangers inherent in the premises, he may not necessarily be aware of the dangers inherent in the actions of the agents of the possessor of the premises.

2. _____: _____. Where an invitee on the premises of another must of necessity knowingly place himself in a position of danger so as to accomplish his job, he is nevertheless entitled to a warning from the agents of the possessor of such premises before the latter cause a change in circumstances likely to cause injury to the invitee.
3. **Jury Instructions.** Instructions must be taken as a whole and construed together, and when instructions cover the issues and fairly submit the case to the jury, the jury's verdict will not be disturbed unless it is clearly erroneous.
4. **Juror Misconduct.** It is well established that charges of juror misconduct must be substantiated by competent evidence on the motion for new trial, the misconduct complained of must relate to a matter in dispute relevant to the issues in the case, and the misconduct must have influenced the jurors in arriving at a verdict.
5. _____. Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that his conduct was of such character that prejudice may be presumed.
6. **Motions for New Trial: Juror Misconduct: Appeal and Error.** When a new trial is sought for juror misconduct, the finding of the trial court will not be set aside unless the evidence of misconduct is clear and convincing.

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

Scott J. Norby of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellee Ellis.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

This is an action for damages for personal injuries sustained by the plaintiff while he was a business invitee on the premises of the defendant. The jury returned a verdict of $67,000 in favor of the plaintiff, and the defendant has appealed.

The plaintiff, Melvin C. Ellis, is an experienced, licensed grain sampler employed by The Lincoln Inspection Service. On February 22, 1980, the plaintiff

was sampling grain at the defendant Far-Mar-Co's grain elevator in Lincoln, Nebraska. He was working with three employees of the defendant, known as the track crew, who were loading grain hopper railroad cars in the track shed loading area at the defendant's elevator.

The track crew consists of a loader, a brakeman, and a flagman. The railroad cars are brought into the loading area, which is on a downhill grade, and stopped so the compartment opening on the top of the first car is positioned directly under the load-out chute, which comes down from the elevator and fills the car from the top. Grain hopper cars have either three or four compartments. The loader stands on top of the car that is being loaded and operates the controls for the load-out chute, and raises and lowers the chute in and out of the compartment openings. He also signals the flagman, who stands on the ground next to the car, to direct the starting or stopping of the flow of grain. When a compartment is loaded, the grain chute must be lifted out of the compartment opening in order for the car to be moved. When lifted, the bottom of the spout clears the top of the car by approximately 18 to 24 inches.

After the loading chute is raised the loader or the flagman signals the brakeman to release the brake to permit the car to roll forward to the next compartment opening. The brakeman is situated at the end of the car and takes directions from the loader or flagman, since he cannot see the top of the car. When a car is filled with grain, the brake is released and the car rolls out of the loading area. The grain sampler works with the loading process to obtain samples of grain from each car as it is loaded.

On the date of the accident the plaintiff was working with the track crew of the defendant when the cars were being loaded. When a car was full and the plaintiff had completed his sampling, another car would be moved in and the plaintiff would move his samples and equipment to the next car, or if

there was no next car, to a platform located alongside the top of the railroad cars. At the time of the accident the plaintiff had just finished probing the last compartment of the last car in a string of eight cars.

There is a direct conflict in the testimony regarding the events surrounding the loading and sampling of the last car. The plaintiff testified that he was standing on top of the car, waiting to close the last compartment, with the load-out chute to his back, when the car suddenly began to move forward, away from the platform. He testified that he slid his tools and equipment onto the platform, but before he was able to leave the car himself, the load-out chute bumped him on the back. To avoid being pushed off the car by the chute, the plaintiff jumped off the edge of the car and injured himself on the track below.

The plaintiff offered the testimony of Far-Mar-Co's loader that he saw the plaintiff gather his tools and step off the top of the car onto the platform alongside the car. He said that he then told the brakeman to release the brake, looked again, and saw that the plaintiff was still on the platform. The loader then climbed off the car and the brake was released. Obviously, the jury disbelieved this testimony, as it had a right to do.

No witnesses saw the plaintiff fall. The general manager of the elevator was the first to reach the plaintiff lying on the tracks, and he testified the plaintiff told him that the chute knocked him off the car. The plaintiff sustained a compression fracture of the lateral talus and a fracture of the tibia.

The defendant's primary contention on this appeal is that instruction No. 14, given over the objection of the defendant, was erroneous and prejudicial. The critical paragraph of that instruction is: "If an employee or employees of a grain elevator know or should know that a grain inspector is working on top of [a] railroad grain car, such employee or employ-

ees have a duty to warn the grain inspector that the grain car is about to be moved and give the inspector a reasonable time in which to protect himself from injury before the rail grain car is moved."

Defendant contends that the above paragraph included in instruction No. 14 is an incorrect statement of the law because it instructed the jury that the defendant had a duty to warn the plaintiff of the danger, regardless of whether the plaintiff also had knowledge of the danger. In other words, the defendant contends the instruction took away a factual consideration from the jury, the question whether a possessor of land had an affirmative duty to warn.

The defendant, citing NJI 8.22 and Restatement (Second) of Torts §§ 341A and 343 (1965), insists that there is no duty on the part of a possessor of land to warn an invitee unless such possessor should expect that the invitee did not know of or would not discover the danger and would fail to protect himself.

The plaintiff contends that this is not a case of pure premises liability, but rather it involved active negligence on the part of defendant's loading crew.

We agree with the position taken by the plaintiff. This accident did not arise out of a defect or condition of the premises. Rather, as determined by the jury, it was due to a failure on the part of those employees charged with the responsibility for moving the grain cars to do so in a reasonable manner.

Crotty, Aplnt. v. Reading Industries, 237 Pa. Super. 1, 345 A.2d 259 (1975), involved an accidental injury suffered by the plaintiff while on the defendant's premises as an independent contractor. He was there for the purpose of adjusting a machine which utilized a large carousel-type conveyor system. The plaintiff pushed a "stop" button which shut off the power to the system, although he was aware of the fact that there were two other controls which acted as a master switch. While working on the machine, an employee of the defendant started

up the machine, unaware of the plaintiff's presence, and as a result the injuries were sustained.

The Pennsylvania court agreed with the defendant that the law is well settled that there is no duty to warn or guard a business visitor against a danger that is known or obvious, citing the Restatement (Second) of Torts §§ 341A and 343A (1965). However, it went on to say at 11, 345 A.2d at 264: "We find the appeal of these arguments more superficial than substantial. In the instant case the appellant [plaintiff] was an acknowledged expert in the operation of the industrial device which was the instrument of his injuries. However, it was not a malfunction or a defect in the machine which caused his injuries; it was a failure on the part of the operator of that machine to look before he began his enterprise. Appellant was well aware of the dangers inherent in the instrumentality, but not necessarily aware of the dangers inherent in its agent."

The same is true in the instant case. The plaintiff was well aware of the dangers inherent in his job generally. However, he would not be expected to know that the defendant's agents would cause the grain car to be moved, without warning, while he was in a position of danger required in the exercise of his duties. We believe, under the circumstances of this case, that it was reasonable to impose on the defendant the duty to warn a grain inspector working on the top of a grain car before the car is moved.

Even though we reject defendant's contention that the rules found in §§ 341A and 343 are applicable to this case, we would suggest that Comment *f.* to § 343A is relevant. Comment *f.* at 220 states: "There are, however, cases in which the possessor of land can and should anticipate that the dangerous conditions will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn

the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

"Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that invitee's attention may be distracted, so that he will . . . fail to protect himself against it. . . ."

One of the defendant's own employees testified that there was a company rule that a car cannot be moved when there is a sampler on top of it. In this case the danger to the plaintiff was obvious. The defendant's crew controlled the movement and time of movement of the grain cars. This is a case in which the defendant's employees should have anticipated that the movement of the car could cause physical harm to the plaintiff. Under such circumstances, reasonable prudence would dictate that a warning be given. This is true even though it would be obvious to the plaintiff that at some time during the testing procedure the car could possibly be moved. Plaintiff, by the very nature of his job, was required to be where he was, and he could not satisfactorily perform that job while laboring under the constant threat of a movement of the car without warning. "[C]ourts will find a duty where, in general, reasonable men would recognize it and agree that it exists." W. Prosser, Handbook of the Law of Torts, *Limited Duty* § 53 at 327 (4th ed. 1971). Instruction No. 14 was correct.

The issues of plaintiff's knowledge of existing dangers and his duty to protect himself are covered by other instructions on proximate cause, assumption of risk, and contributory negligence. Instructions must be taken as a whole and construed together, and when instructions cover the issues and fairly submit the case to the jury, the jury's verdict will not be disturbed unless it is clearly erroneous. *Lane*

v. State Farm Mut. Automobile Ins. Co., 209 Neb. 396, 308 N.W.2d 503 (1981).

The second assignment of error on appeal is that the trial court erred in overruling the defendant's motion for new trial on grounds of juror misconduct.

After the first of 2 days of jury deliberations, one juror identified himself as a journalist or a juror and called one of the witnesses who testified in the case to ask him whether there was an ownership relation between The Lincoln Inspection Service and the defendant. Both counsel joined in a motion to reconvene the jury. The juror admitted making the telephone call, but stated he did not discuss the substance of the call with the other jurors and that he was the one juror voting against the plaintiff in the 11-to-1 verdict. All 11 other jurors supported the juror's testimony that he did not mention he had made the telephone call. The trial court found that none of the 11 jurors who agreed to the verdict were prejudiced or influenced in any manner by the telephone call, and that if the call was prejudicial it would have been against the plaintiff rather than the defendant.

This court has not wavered in the interpretation of the law in juror misconduct situations. It is well established that charges of juror misconduct must be substantiated by competent evidence on the motion for new trial, the misconduct complained of must relate to a matter in dispute relevant to the issues in the case, and the misconduct must have influenced the jurors in arriving at a verdict. *Schwank v. County of Platte*, 152 Neb. 273, 40 N.W.2d 863 (1950). Proof of mere indiscretion in the conduct of a juror is not suffucient to avoid a verdict unless the proof establishes that his conduct was of such character that prejudice may be presumed. *Schwank, supra*; *Wessel v. Bishop*, 76 Neb. 74, 107 N.W. 220 (1906).

The evidence before the trial court on the juror misconduct issue was that although there had been misconduct by one juror, the other 11 were un-

involved, did not know of it, and decided the case only on the evidence presented at trial. We cannot accept the defendant's contention that the juror's misconduct irrebuttably presumes prejudice. Furthermore, Neb. Rev. Stat. § 27-606(2) (Reissue 1979) specifically provides for inquiry into the validity of a verdict when extraneous prejudicial information may have been improperly brought to the jury's attention.

When a new trial is sought for juror misconduct, the finding of the trial court will not be set aside unless the evidence of misconduct is clear and convincing. *Winston v. Davis*, 187 Neb. 522, 192 N.W.2d 413 (1971). We conclude that there is no showing of prejudice to the defendant, and the trial court properly rejected the motion for new trial.

For the reasons above stated the judgment of the trial court should be affirmed.

AFFIRMED.

JOHN J. MATTHEWS ET AL., APPELLEES, V. PETER P. MATTHEWS ET AL., APPELLANTS.

341 N.W.2d 584

November 28, 1983. No. 82-615.

1. **Equity: Contracts: Specific Performance: Decedents' Estates: Appeal and Error.** An action to compel the specific performance of an oral contract to devise real property by will is equitable in nature and is reviewed de novo on the record on appeal to this court.
2. **Equity: Appeal and Error.** In equity cases, where the evidence is in conflict, we give weight to the fact the trial judge had the opportunity to view and hear the witnesses and observed their demeanor while testifying.
3. **Contracts: Decedents' Estates: Appeal and Error.** The court regards with grave suspicion any claim of an oral contract to devise property by will, and must, in its de novo review of the record, discover clear, satisfactory, and unequivocal evidence of the existence of the alleged oral contract and its terms.
4. **Contracts: Statute of Frauds: Decedents' Estates.** In order to remove from the operation of the statute of frauds an oral contract to devise property, there must be performance referable solely to

the contract sought to be enforced such that nonperformance by the other party would constitute a fraud upon the claimant.

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

Daniel D. Jewell and Dennis W. Collins of Jewell, Otte, Gatz & Collins, for appellants.

Vince Kirby, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

This case presents an appeal from the decree of the District Court which, after a bench trial, granted the plaintiffs-appellees, John and Dorothy Matthews, husband and wife, and their son James, specific performance of an alleged oral contract between them and John's deceased uncle, Tom Matthews. That court impressed a trust upon certain Holt County farmland and ordered that a deed be executed by the clerk of the District Court to John and Dorothy. Defendants-appellants, the personal representative and devisees under Tom Matthews' will, a document which makes no provision for the plaintiffs, appeal from that decree. We reverse and dismiss.

The defendants assign a number of errors; however, due to the approach we take, we need consider only one of them. That operative assignment is that the District Court erred because the evidence was insufficient to support its decree.

An action to compel the specific performance of an oral contract to devise real property by will is equitable in nature and is reviewed de novo on the record on appeal to this court. *Yates v. Grosh*, 213 Neb. 164, 328 N.W.2d 200 (1982); *In re Estate of Layton*, 212 Neb. 518, 323 N.W.2d 817 (1982). We also bear in mind that the trial judge, who decided this matter without benefit of a jury, had the opportunity to view and hear the witnesses as they testified, and,

accordingly, we give weight to his determinations of their credibility. *Spilinek v. Spilinek*, *ante* p. 35, 337 N.W.2d 122 (1983).

More importantly, we are required to regard with grave suspicion any claim of an oral contract to devise property by will, and must, in our de novo review of the record, discover clear, satisfactory, and unequivocal evidence of the existence of the alleged oral contract and its terms. *Yates v. Grosh*, *supra*; *Rudolph v. Hartung*, 202 Neb. 678, 277 N.W.2d 60 (1979).

The facts in this case are, for the most part, not in dispute. Tom and Leo Matthews, brothers, were born and raised on a farm near O'Neill, Nebraska, in Holt County. Each took up farming as his occupation, and eventually married. Tom fathered two children. Unfortunately, they, along with his wife, predeceased him. Leo and his wife, who both predeceased Tom as well, are survived by six children. Those children, nieces and nephews of Tom, include the plaintiff John Matthews and the defendants Peter Matthews, Catherine Kazda, and Cecelia Campbell. Two of Leo's other children, Gene Matthews and Leo (Fritz) Matthews, are not parties to this action.

John, Fritz, Gene, and Peter helped both their father and their uncle farm the land in Holt County. Tom rarely paid his nephews for their help, but on numerous occasions, beginning in the early 1950s, informed his nephews that they would receive some of his farmland when he died. Fritz gave up farming in 1955, and thereafter only occasionally helped Tom. He now lives in Bellevue, Nebraska. Gene quit working for Tom in 1966 when he married and moved out of Holt County. Peter and John, at the time of trial, lived in the O'Neill area and operated farms in Holt County.

In the early 1950s John and his wife, Dorothy, moved into a house on one of Tom's quarter sections and began to farm that quarter section on a share-

crop basis. By the early 1960s John was farming five quarter sections of Tom's land on such a basis. In 1962, or thereabout, John and Dorothy tired of living in the house on Tom's property and Tom moved a different house onto the land. This house was given to Dorothy by her father. However, Tom paid the moving expenses and also paid to have the basement and foundation constructed for the house. Dorothy and John allege that at this time Tom renewed an earlier promise to leave to them, by his will, the quarter section upon which the house stood. However, this is not the promise sued upon.

In 1966 or 1967 Tom moved into his brother Leo's home, who was then a widower. In 1969 or 1970 Leo requested that Tom leave his home because Tom refused to contribute to the household expenses. At that time Tom moved into John and Dorothy's home.

Tom stayed with John and Dorothy for 9 years. During his stay, Tom suffered periodic bouts of incontinency and general failing health, not uncommon phenomena for a man approaching 90 years of age. John, Dorothy, and their children tended to Tom's needs by cooking his meals, cleaning up after him, and transporting him on his errands. In 1979 John overheard a conversation between Tom and John's sister, in which Tom expressed his intent of moving from John and Dorothy's home. John called his brother, Fritz, in Bellevue and expressed his concerns about Tom's ability to care for himself. Fritz initiated conservatorship proceedings in the Holt County Court, and John was named special conservator pending a hearing. The conservatorship petition was dismissed when the county court determined that Tom was able to handle his own affairs.

Tom moved from John and Dorothy's home shortly after the conservatorship petition was filed. He stayed for a short time with his niece Catherine Kazda, and subsequently moved to his nephew Peter's home, where he resided until his death in 1980. In 1979, after he had moved from the plain-

tiffs' home, Tom requested that John and Dorothy either pay rent to him for their use of the house or move. They moved prior to Tom's death.

Tom Matthews executed several testamentary documents over his lifetime. In 1970, shortly after he took up residence with John and Dorothy, Tom executed a will, leaving three quarter sections and a half section of farmland to John. The remainder of his farmland was devised to Tom's other nephews, Peter, Fritz, and Gene. In 1972 Tom executed another will, leaving only two quarter sections and a half section of his farmland to John, and the rest to Fritz and Peter. In 1978 Tom again changed his will, this time leaving two quarter sections to John, one quarter section to John's son James, and the rest of his estate to his sister, Mary Williams, his nephew Peter, and his niece Cecelia Campbell and her husband. In 1979 Tom executed a codicil to his will, revoking the 1978 dispositions to John and James. In 1980, shortly before his death, Tom executed a will under which the defendants in this action are the devisees. The 1980 will makes no provision for the plaintiffs.

After the 1980 will was admitted to probate, the plaintiffs commenced this action. In their final amended petition they alleged that prior to 1968 Tom promised John, Dorothy, and James that if they would agree to render certain personal services to him, he would agree to make a devise to them of certain of his real property. They further alleged that they undertook to render those personal services in 1969 by taking him into their home and that, thereafter, Tom and the plaintiffs entered into an oral contract whereby Tom would devise to them three quarter sections and a half section of Holt County farmland in return for the plaintiffs' looking after his needs, supplying him with a home, and taking care of his livestock for as long as Tom requested or required such.

In support of their allegations of the existence of

such a contract, plaintiffs direct our attention to the provisions of the revoked 1970 will in which John is devised three quarter sections and a half section of land. John contends that this will was executed shortly after the lifetime care agreement was reached. The 1970 will makes no mention of the agreement, and the attorney who drafted this will testified at trial that Tom never mentioned an agreement with John when the will was prepared. It is apparent that by as early as 1972, when Tom revoked the 1970 will, he obviously did not consider himself bound by an agreement to the plaintiffs even though he was still enjoying their hospitality.

The plaintiffs can direct us to no written evidence of or document memorializing the agreement. The only evidence of the existence of such a contract and its terms is the testimony of the plaintiffs. Their testimony is not corroborated by that of any other witness. Even accepting the fact that the trial judge obviously placed credence in their testimony and, thus, accepted it as true, we do not find that testimony sufficient to support their claims.

Both John and Dorothy testified that when they initially took Tom into their home, there was no agreement between them. They both testified that the agreement arose only after they commenced looking to Tom's needs. As such, their testimony contradicts the allegations in their petition, wherein they contend that an agreement was reached prior to Tom's taking up residence with them.

As to the agreement which allegedly arose after John and Dorothy commenced caring for Tom, our review of the record reveals many equivocal and contradictory statements which leave us uncertain that one even existed, let alone what the terms of such an alleged agreement might have been.

In response to a question about the agreement, Dorothy stated in a deposition taken in connection with the case: "A Yes, and he had come to live with us, he said, and we wouldn't have to worry

about anything. He would leave us the place and stuff, for, you know, being there. Q Okay, did he say that to you before he moved into your house? A No, afterward. He always talked about it. We didn't have to worry, that he was going to leave us his land because we was good to him. Q Did he ever say to you, 'You have to take care of me'? A No, he had never ever said we had to take care of him. Q Did he every say — strike that. Was his promise to give you this land the same promise he had made roughly since 1951 when you were married? A Yes, pretty well the same. Q The number of acres or quarters was the only change? A Yes, I suppose."

And, further, in her deposition Dorothy offered this testimony while being questioned by her attorney: "Q Well, there again Mrs. Matthews, you expected that he would give you the property if you looked after him, is that correct? A Well, I suppose. I didn't figure he would really have to give me anything to look after him because I, you know, I am that kind of person. I took care of him anyhow, but I just hoped some day that he would leave us something for being good to him, but not because I took care of him. I didn't expect anything. Q Then again, isn't it a fact that he says, 'If you will look after me', when he came down from Pete's, he said, isn't it true, 'If you will look after me I will give you this land'? A I guess so. I get kind of confused."

John's testimony is riddled with similar contradictions. We also note that John was living rent free in a house on Tom's land. After Tom went to live with John and Dorothy, Tom gave John $4,000 to buy some land. The $4,000 was never repaid. John paid no rent for the use of Tom's cattle pasture.

In re Estate of Layton, 212 Neb. 518, 323 N.W.2d 817 (1982), a case involving an oral contract to devise property by will, reiterated our long-standing rule that in order to remove such a contract from the operation of the statute of frauds, there must be

performance referable solely to the contract sought to be enforced such that nonperformance by the other party would constitute a fraud upon the claimant. In doing so, we quoted from *O'Neal v. First Trust Co.*, 160 Neb. 469, 70 N.W.2d 466 (1955): " ' "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." ' " 212 Neb. at 524, 323 N.W.2d at 821.

As we found earlier, Tom had been making statements of his intentions to give land to his family since at least the early 1950s. There were reiterations of these intentions when Tom moved the house onto the quarter section which served as John and Dorothy's home. The plaintiffs testify to so many agreements between Tom and themselves that we cannot conclude that taking care of Tom was solely referable to the one alleged in their amended petition. Furthermore, the evidence demonstrates it is just as likely that the care and home the plaintiffs bestowed on Tom was the result of feelings of kinship and not that of a contractual obligation. The evidence is uncontradicted that John and Dorothy initially took Tom into their home prior to entering into any contract for his care. In John's deposition we find these statements: "Q Now, you told Vince the only reason you took him in was because he promised to give you the land. A Yes, he promised me. Q There are no other reasons that you took him in besides that? A What other reasons do you mean? Q You didn't take him in because he was your uncle? A I took him in some, sure, blood you would. Q So that isn't the only reason, is it? A What? Q The fact you were going to get some property from him when he died? A What do you

mean by that? Q The only reason you took him in, it wasn't — there isn't just one reason you took him in, is there? A I took him in because I liked the man. Q He was your uncle and he was your blood relation, isn't that right? A He was an uncle. Q And is not blood relation? A He is blood relation. Q And weren't those some of the reasons that you took him in? A Well, not necessarily. I wouldn't say it was. Q You say you like him and that was one of the reasons you took him in? A I got along with him 28 years I worked there."

Not only is the evidence unclear and equivocal that a contract existed between Tom and the plaintiffs, it appears that the performance shown to make that oral contract enforceable could be attributed to other agreements or simply to family affection.

The one fact which is clear from the evidence is that Tom's vague expressions of intent and constant changes in his plans for the disposition of his estate allowed him to manipulate his nieces and nephews. The evidence, however, falls far short of clearly, satisfactorily, and unequivocally establishing the contract alleged by the plaintiffs.

REVERSED AND DISMISSED.

VIVIAN E. HOEGERL AND MARY H. HOEGERL, APPELLEES, V. DONALD C. BURT, APPELLANT.

340 N.W.2d 428

Filed November 28, 1983. No. 82-674.

1. **Trial: Evidence: Appeal and Error.** Application for a physical examination of an injured party should be made before the commencement of the trial of a cause, and if not made until after the trial has commenced, a sufficient reason should be assigned why such request was not made before the commencement of the trial. Where such request is made during the progress of the trial, it rests within the sound discretion of the court whether such request be granted, and the ruling of the court thereon will not be disturbed, unless from all the circumstances an abuse of discretion appears.

2. **Witnesses.** A witness should not be allowed to express an opinion on an inadequate basis.
3. **Verdicts: Appeal and Error.** A verdict will not be set aside unless it is against the weight of the evidence, or appears to have been the result of passion, prejudice, mistake, or disregard of the rules of evidence or the law.

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

Jeffrey A. Silver, for appellant.

Duane J. Dowd and Thomas R. Wolff, for appellees.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Plaintiffs, Vivian E. and Mary H. Hoegerl, husband and wife, sued the defendant, Donald C. Burt, for damages resulting from a January 19, 1979, car-pickup collision in Omaha, Nebraska. Jury verdicts were entered in favor of plaintiffs on three joined causes of action: (1) $21,312 in favor of Mary for personal injury, pain and suffering, and loss of wages and earning power; (2) $738 in favor of Vivian; and (3) $14,000 for Vivian for Mary's medical expenses and loss of consortium. Defendant admits his negligence was the proximate cause of the accident. Defendant appeals. We affirm.

Plaintiffs, residents of Omaha, Nebraska, had been married for 34 years. Vivian was parts manager for John Markel Ford in Omaha; Mary, age 60 years, had been a registered nurse since 1948. At the time of the accident Mary was thrown against the windshield, injuring her neck, legs, and knees; Vivian had minor injuries. The plaintiffs were examined at a hospital and released.

The first two assigned errors are considered together: (1) abuse of discretion in allowing the interruption of a medical expert's testimony to permit his

physical examination of Mary, and (2) allowing the same medical expert to change his testimony.

R. D. Glover, M.D., Omaha, Nebraska, was a general practitioner who was Mary's family and treating doctor; she had worked for him in prior years. He testified concerning Mary's medical history and records, examinations, and treatments. Trial began on August 30, 1982. Prior to the trial, he last examined Mary on September 24, 1980. During direct examination, Dr. Glover was asked to give an opinion concerning the permanency of Mary's injuries as of that time. Defendant's objection to foundation was sustained. In open court, plaintiff moved the court to continue the doctor's testimony to the next day in order to permit the doctor to examine Mary. The reason assigned for the motion is not shown. A conference of counsel and the judge in chambers followed, and was not reported in the record; however, the briefs indicate that the conference related to the motion, and defendant was given an opportunity to take Dr. Glover's deposition before he resumed his testimony, which was done. The motion was granted. Plaintiffs continued the evidence with other witnesses. The next day, over objection, Dr. Glover testified that he had reexamined Mary and that it was his opinion her condition was a chronic cervical strain and a fibrous reaction in the gastrocnemius muscles, which was permanent.

Defendant argues that this procedure was a continuance requiring a written motion supported by affidavit. Neb. Rev. Stat. § 25-1148 (Reissue 1979). We do not agree. The applicable rule is stated in *Ziskovsky v. Miller*, 120 Neb. 255, 260-61, 231 N.W. 809, 812 (1930): "Application for a physical examination of an injured party should be made before the commencement of the trial of a cause, and if not made until after the trial has commenced a sufficient reason should be assigned why such request was not made before the commencement of the trial. Where such request is made during the progress of

the trial, it rests within the sound discretion of the court whether such request be granted, and the ruling of the court thereon will not be disturbed, unless from all the circumstances an abuse of discretion appears." This rule is now supported in Neb. Rev. Stat. § 27-611 (Reissue 1979): "The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth . . . ."

Although this delay was contrary to orderly trial practices, indicating a lack of preparation, the record here shows that there was neither prejudice to the defendant nor an abuse of discretion by the trial judge.

There is no merit to the claim that Dr. Glover changed his testimony without explanation to meet the exigencies of the lawsuit.

Next, defendant claims as error that there was no reasonable basis for the expert opinion of Keith K. Turner, Ph.D., associate professor of economics, UN-O, Omaha, Nebraska, that Mary had an economic loss of $144,377 because of lost wages, loss of earning power, and inability to perform household chores. The argument is narrowed to his objection that there was no foundation for Turner's assumptions that Mary would return to full-time nursing in 1979 and that she would work until age 65. The qualifications of the witness and the technical nature of the subject matter are not issues.

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Neb. Rev. Stat. § 27-703 (Reissue 1979).

"Expert testimony should not be received if it appears the witness is not in possession of such facts

as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. The witness should not be allowed to express an opinion on an inadequate basis . . . ." *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 804, 277 N.W.2d 236, 241 (1979).

The record shows that in 1978 and early 1979 Mary was caring for her brother. She testified: "Q. After you were through taking care of your brother, had you planned on returning to work? A. Yes, I did."

Turner testified fully concerning the data and basis for his opinion, and his 14-page supporting report with wage scales, graphs, and charts was a part of the evidence. Defendant cross-examined Turner concerning his opinion, the report, and other bases; and Turner was asked, "Do you assume that she was going to work to age 65 because Mr. Wolff [plaintiffs' attorney] told you that?" to which he replied, "That's right." Defendant made no motion to strike Turner's opinion.

His opinion was relevant to the issues, and the bases "may be those perceived by or made known to him at or before the hearing." § 27-703. From the record presented to the jury there was an adequate basis for a reasonably accurate conclusion.

It was for the jury to judge the weight and credibility of Turner's testimony, *State v. Journey*, 201 Neb. 607, 271 N.W.2d 320 (1978); *Taenzler v. Burlington Northern*, 608 F.2d 796 (8th Cir. 1979), which it apparently did, considering the verdict it returned.

Last, defendant claims the $14,000 judgment on the third cause of action for Mary's medical expenses and Vivian's loss of consortium was excessive.

"The rule in Nebraska is that a verdict will not be set aside unless it is against the weight of the evidence, or appears to have been the result of passion, prejudice, mistake, or disregard of the rules of evidence or the law." *Maricle v. Spiegel*, 213 Neb. 223, 232, 329 N.W.2d 80, 87 (1983).

The jury could find from the evidence that Mary's life expectancy was 16.12 years; that she had $387.05 medical expenses; that she suffered pain and impairment of her body, making it impossible to perform many usual household duties, and heavy cleaning in particular; that it was necessary to hire domestic help for about 6 hours a week; and that plaintiffs' social life together and with friends and relatives was curtailed. We cannot say that this verdict was excessive.

AFFIRMED.

STATE OF NEBRASKA EX REL. DENISE BAUERSACHS, APPELLEE, V. DAVID WILLIAMS, APPELLANT.
340 N.W.2d 431

Filed November 28, 1983. No. 82-834.

Jurisdiction: Venue: Waiver. Jurisdiction is the authority or power to decide a case. Venue is the site where the power to adjudicate is to be exercised. In the absence of statutory provisions to the contrary, an objection to venue can be waived.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Thomas J. Garvey of Hascall, Jungers & Garvey, for appellant.

Michael J. Pace, Deputy Sarpy County Attorney, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

Denise Bauersachs (Denise) commenced filiation proceedings against David Williams (Williams) pursuant to Neb. Rev. Stat. §§ 13-101 et seq. (Reissue 1977). From a judgment of paternity and an order

for support of the child, Williams appeals. We affirm in part, and in part reverse and remand for further proceedings.

Denise filed her petition in the District Court for Sarpy County, Nebraska, and alleged that Williams was the father of her child born on October 13, 1980, as defined by §§ 13-101 et seq. Williams entered a "voluntary appearance" in the proceedings. In his amended answer Williams denied the allegations of Denise's petition.

At trial Denise testified that from December 1979 to February 1980 she had dated only Williams and had intercourse with none but Williams during that time. A witness corroborated that Denise had dated only Williams. In her testimony Denise expressed an opinion that Williams was the father of the child and, further, stated that no other person could be the father of the child. When Denise informed Williams that she was pregnant, Williams offered her $300 and told her to get an abortion. A report received regarding results of paternity testing contained: "99.73% of the male population has been excluded by this testing. Mr. Williams has odds of 273 to one in favor of being the biological father [of the child]. This is a probability of paternity of 99.63%."

At commencement of the proceedings Denise and her child resided in Douglas County, Nebraska, in "subsidized housing." Denise was receiving assistance, namely, "ADC," from Sarpy County, Nebraska.

After Denise concluded her evidence, Williams rested his case.

Williams moved for dismissal of the proceedings "for lack of venue," and directed the court's attention to § 13-111, "A civil proceeding to establish the paternity of a child may be instituted in any district court of the district where the child is domiciled or found . . . ."

The court overruled Williams' motion to dismiss, entered judgment of paternity regarding Williams

and the child, and ordered Williams to pay $100 per month as support for the child.

Williams assigns three errors, namely, (1) the trial court did not have jurisdiction to enter any judgment in the proceedings, (2) the evidence was insufficient to establish paternity, and (3) there should have been an evidentiary hearing on the amount of support for the child.

" 'Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong; the power to deal with the general subject involved in the action; and means not simply jurisdiction of the particular case then occupying the attention of the court but jurisdiction of the class of cases to which the particular case belongs, the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to determine.' " *Lewin v. Lewin*, 174 Neb. 596, 599-600, 119 N.W.2d 96, 99 (1962), citing 21 C.J.S. *Courts* § 23 (1940).

Jurisdiction is the inherent power or authority to decide a case; venue is the place of trial of an action —the site where the power to adjudicate is to be exercised. See, *Iselin v. La Coste*, 147 F.2d 791 (5th Cir. 1945); *Arganbright v. Good*, 46 Cal. App. 2d 877, 116 P.2d 186 (1941); *Stanton Trust & Savings Bk. v. Johnson*, 104 Mont. 235, 65 P.2d 1188 (1937).

Williams' question concerning the proceedings relates to venue and not to jurisdiction in the strict sense of the term. District Courts in Nebraska have general jurisdiction regarding filiation proceedings under the provisions of §§ 13-101 et seq. The trial court had jurisdiction to adjudicate Williams' paternity of Denise's child. After commencement of the action in Sarpy County, Williams did not request transfer of the proceedings as provided by Neb. Rev. Stat. § 25-409 (Reissue 1979). Williams did not object to venue until conclusion of the evidence at trial. Unless prohibited by a venue statute, a defendant

can waive the personal privilege to be sued in a particular county. See 92 C.J.S. *Venue* § 77 (1955). In the absence of the appropriate objection to venue or the timely motion to transfer the proceedings, Williams cannot now question venue of the proceedings in Sarpy County.

Williams claims that his paternity of the child is not supported by the evidence. There is ample evidence about Denise's association and intercourse with Williams. The results of the testing for paternity and the information contained in the laboratory report also support the finding of paternity. Only a preponderance of evidence was necessary to sustain the finding and judgment that Williams is the father of Denise's child. See, *Gregory v. Davis*, 214 Neb. 408, 334 N.W.2d 1 (1983); *Snay v. Snarr*, 195 Neb. 375, 238 N.W.2d 234 (1976). Such evidence is present in this case.

An award of child support will not be disturbed unless a trial court has abused discretion regarding the amount ordered. See *Race v. Mrsny*, 155 Neb. 679, 53 N.W.2d 88 (1952). After an adjudication establishing paternity the trial court should take evidence concerning the health, condition, property, and ability of the father to earn money; the health, condition, and means of the mother of the child; and all other pertinent facts bearing upon suitable support for the child. See *Race v. Mrsny, supra.* In this case, when the evidence concerning paternity had been concluded, the trial court proceeded to enter judgments regarding paternity *and* child support. The record in this case contains no evidence concerning the factors which bear upon an appropriate amount of child support to be ordered in conjunction with filiation proceedings. Under the circumstances the trial court abused discretion in its order pertaining to child support. We note that the proceedings were under the auspices of Sarpy County, in view of the county's assistance to Denise. Although Sarpy County was apparently satisfied with the child sup-

port ordered, we remind the county that the amount of child support is not necessarily determined in reference to the assistance being supplied by the county, but must be an amount of support which "under all the circumstances is fair and just." See *Race v. Mrsny*, *supra* at 681, 53 N.W.2d at 90.

For the reasons expressed the judgment of the District Court regarding Williams' paternity of the child is affirmed. The judgment of the District Court regarding child support is reversed, and this matter is remanded to the District Court for further proceedings to determine the appropriate amount of child support to be paid by Williams for his child whose paternity has been established in these proceedings.

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

STATE OF NEBRASKA, APPELLEE, V. JAMES E. BIRGE, APPELLANT.

340 N.W.2d 434

Filed November 28, 1983. No. 83-095.

1. **Photographs: Appeal and Error.** The determination of the admissibility of a photograph is within the discretion of the trial court. The decision of the trial court will not be reversed in the absence of a clear abuse of discretion.
2. _____: _____. A proper objection, stating the specific grounds therefor, and an adverse ruling thereon must appear on the record to preserve the issue for consideration on appeal.
3. **Photographs.** Caution must be exercised when introducing police file photographs so that defendant is not prejudiced by evidence of a prior contact with the police.
4. **Criminal Law: Appeal and Error.** In determining whether the rights of a defendant have been prejudiced such that a reversal of a conviction is warranted, the claim of prejudice must be evaluated in the context of the entire record.

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

Thomas M. Kenney, Douglas County Public Defender, and Victor Gutman, for appellant.

Paul L. Douglas, Attorney General, and Dale A. Comer, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

The defendant was convicted of burglary and sentenced to a prison term of 5 to 15 years. On appeal he contends the trial court erred when "mug shots" of the defendant were admitted into evidence without proper foundation, and because the photographs were prejudicial.

On May 27, 1982, a tenant at the Pleasant View West apartment complex heard hammering noises coming from one of the lower floors. The noise continued for some time and the tenant became concerned. When the tenant looked out the window of his apartment, he saw two men standing outside the laundry room at the ground floor level. The tenant said he had seen the men move a large object into the laundry room. The tenant described the men as black, one wearing light clothing and the other wearing dark clothing. The tenant then called the police.

Shortly thereafter, when the police arrived, the men ran in different directions. Officer Sklenar chased the man in the light-colored clothing, and Officer Marion chased the other man. Both men were apprehended.

Sklenar testified that when he arrested the defendant, the defendant was dressed in light tan-colored clothing and had a screwdriver on his person. Sklenar also testified that the defendant was within Sklenar's sight during the entire chase except for a fraction of a second. Shortly after the arrest, the tenant identified the defendant as one of the men he had seen from his window.

Other witnesses testified that a television set had

been unbolted from the floor of the recreation room and moved to the laundry room. A clock and a set of rabbit ears which had been on the TV had also been removed from the recreation room. Pieces of a screwdriver handle were found on the floor.

On redirect examination of Sklenar a "mug shot" of defendant was received in evidence. The photograph shows front and side views of the defendant dressed in a light tan-colored shirt. A display board in the photograph has the following markings on it: "2 9 82" and "AHA NE - POLICE." Officer Sklenar testified with regard to the photograph as follows: "Q. Showing you what has been marked by the Court Reporter as states [sic] Exhibit 13, would you look at that exhibit and tell me if you recognize that photograph? A. It's a picture of Mr. James Birge. Q. Okay. Is Mr. Birge clad in a shirt in that photograph? A. Yes. Q. What color is that shirt? A. Tan. Q. Is that the same shirt that he was wearing the night that he was arrested? A. Yes. Q. Does that photograph accurately show how Mr. Birge looked on the night in question in the early morning hours? A. Yes. Q. Shows his upper torso? A. Yes. Q. Hair and beard and that? A. Yes. MR. McKENNEY: I would offer Exhibit 13 into evidence. MR. CRAMER: May I ask foundation questions, your Honor? THE COURT: You may. (FOUNDATIONAL EXAMINATION BY MR. CRAMER) Q. Mr. Sklenar, do you know who took that photograph? A. No. Q. Prior to this photograph being handed to you, do you know who had custody of this photograph? A. No. Q. Do you know what the date of this photograph is? A. Date? Q. Yes. A. No. MR. CRAMER: Objection to lack of foundation. THE COURT: Overruled."

The defendant argues that the State failed to lay a proper foundation for the admission of the photograph. The determination of the admissibility of a photograph is within the discretion of the trial court. The decision of the trial court will not be reversed in

the absence of a clear abuse of discretion. *State v. Brittain*, 212 Neb. 686, 325 N.W.2d 141 (1982); *State v. Brown*, 201 Neb. 536, 270 N.W.2d 318 (1978).

In the present case the defendant argues that because there was no proof that the photograph was a true and correct representation of the subject at the time pertinent to the inquiry, it was not relevant to any issue in the case. The defendant argues, in essence, that to be admissible as proof of how the defendant looked on May 27, 1982, it must be shown that the photo was taken on that date. This argument is not persuasive.

In *State v. Ortiz*, 187 Neb. 515, 192 N.W.2d 151 (1971), this court held that photographs taken after a body had been removed from the murder scene were relevant and properly admitted to show peculiarities which facilitated identification.

In *State v. Blackwell*, 184 Neb. 121, 165 N.W.2d 730 (1969), we held that photographs of the defendant taken at the police station after his arrest were relevant to issues of defendant's ability to commit the crime and to a claim that the victim had assaulted defendant, and were properly admitted.

In *Lawrence v. State*, ____ Ind. ____, 412 N.E.2d 236 (1980), a photograph taken 2 months prior to the rape with which defendant was charged was held admissible. The photograph showed defendant with a goatee which he had shaved off before the time of trial. The victim had identified her assailant as having a goatee, and the defendant questioned her identification on cross-examination. The photograph was held to be relevant to the issue of identification and therefore admissible.

In *People v. Laguer*, 58 A.D.2d 610, 395 N.Y.S.2d 226 (1977), the court held that a "mug shot" taken of the defendant 8 days after his arrest was relevant to the issue of identification because the defendant had grown a beard since the crime.

The photograph in the present case shows defendant dressed in a light tan-colored shirt. The tenant

initially made an identification of defendant through a description of his clothing. The proper inquiry with regard to the relevancy of the photograph is not whether the picture was taken on the evening in question but, rather, whether this was the shirt in which defendant was dressed at that time. Sklenar testified that the shirt in the picture was the same shirt the defendant was wearing at the time of his arrest. This constituted sufficient foundation for admission of the photograph. It was relevant to the issue of identification of the defendant and was properly admitted.

The defendant now argues that the "mug shot" prejudiced him in that it was an attempt to show that he had a past criminal record and that it would influence the jury to conclude that he had a tendency to commit crime. Defendant argues that the State was thus permitted to put on evidence of bad character even though the defendant had not first put his character in issue.

We note that at the time the exhibit was introduced defendant's only objection was that the proper foundation was lacking. No objection was made at that time regarding a prejudicial effect of the photograph. A proper objection, stating the specific grounds therefor, and an adverse ruling thereon must appear on the record to preserve the issue for consideration on appeal. See *Haines v. State*, 170 Neb. 304, 102 N.W.2d 609 (1960). The defendant did not preserve this issue by a proper objection at the time the exhibit was offered. However, an objection was made at a later time, and we discuss the issue, as it is an important one.

"A police photograph is admissible to show the reasonableness of a witness' identification that the offender and the person depicted are the same. It is not admissible simply to prejudice the jurors by suggesting to them that the defendant has a prior criminal record." *People v. Byrd*, 43 Ill. App. 3d 735, 741, 357 N.E.2d 174, 178 (1976).

"If the State proves that the [police file] photograph in question is not unduly prejudicial and that it has substantial evidential value independent of other evidence, it is admissible." *Lawrence v. State*, *supra* at ____, 412 N.E.2d at 238.

As noted earlier, the photograph in the present case was probative on the issue of identification. It was not admitted simply to suggest that defendant had a prior criminal record. However, caution must be exercised when introducing police file photographs so that defendant is not prejudiced by evidence of a prior contact with the police. In *Commonwealth v. Cobb*, 374 Mass. 514, 522-23, 373 N.E.2d 1145, 1150-51 (1978), the court stated: "[U]se in evidence of police file photographs . . . creates a risk that the jury will assume that the defendant has a prior criminal record. In order to avoid such a prejudicial effect where the fact of a prior criminal record is not properly before the jury, we noted that 'prosecuting counsel usually should avoid (a) use of such pictures in a form in which they may be identified as police pictures and (b) references in testimony to the files from which they were obtained.' [Citations omitted.]

". . . There is nothing in the testimony of either witness which is offensive to [this] directive . . . that references to the source of identification photographs in police files be avoided. However, the manner of presentation of the photographs themselves in evidence may have created in the minds of the jury an implication that the photographs were police 'mug shots.' It appears from the transcript that objections and other interchanges among the attorneys and the judge served to focus the jury's attention on the fact that certain markings on the photographs were to be obscured by tape to avoid prejudice to the defendant. However, it should be noted that counsel for the defendant failed to take advantage of the opportunity at a bench conference just prior to introduction of the photographs to have

the photographs 'sanitized' to the extent possible before the jury were made aware of them. . . . Such preventive action would have been desirable and would not have called on the defendant's counsel to exercise extraordinary powers of foresight. The admission of the photographs themselves in evidence did not constitute error."

In the present case the State properly did not elicit any testimony regarding the circumstances under which the photograph was taken. The defendant objected to the admission of the photograph for lack of foundation. The defendant made no objection that the exhibit's prejudicial effect outweighed its probative value.

The defendant has argued that the failure to elicit the purpose for which the photograph was taken was a foundational defect precluding admissibility. Such inquiry would only have served to put the jury on notice of defendant's prior record, and would violate the rule set out above. There is no error when no prejudice is caused to defendant. See *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983).

We further note that, in any event, any error resulting from the admission of the photograph was harmless error.

The defendant testified on direct examination that he had been convicted of two prior felonies. Thus, the jury was informed of the defendant's prior criminal record by his own testimony.

The evidence clearly establishes defendant's guilt. Defendant was observed by the tenant carrying a TV which had been unbolted from the floor. There was some testimony to the effect that the defendant's palm print was on the top of the television set. The tenant described defendant's attire and watched him until he ran from the police. But for a brief second, defendant remained in the sight of the officer who gave chase. The officer then arrested defendant, who was out of breath from the chase. The tenant immediately thereafter identified defendant as the

man he had seen by the laundry room. A screwdriver was found on his person. In determining whether the rights of a defendant have been prejudiced such that a reversal of a conviction is warranted, the claim of prejudice must be evaluated in the context of the entire record. *State v. Dandridge*, 209 Neb. 885, 312 N.W.2d 286 (1981).

The evidence supports a finding of guilty beyond a reasonable doubt, such that the photograph could not be said to have prejudiced the jury. See *State v. Dandridge, supra*.

The judgment is affirmed.

AFFIRMED.

GRANT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. LUTHERN P. WATERMAN, APPELLANT.

340 N.W.2d 438

Filed November 28, 1983. No. 83-233.

1. **Post Conviction.** In ruling on an application for post conviction relief, if the trial court finds from an examination of the files and records in the case that the proceeding is without foundation, an evidentiary hearing may properly be denied.
2. **Post Conviction: Appeal and Error.** One seeking post conviction relief has the burden of establishing the 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.
3. **Criminal Law: Pleas.** In responding to questions from the court, a defendant who is mentally competent can no more assume one posture at the time of arraignment and change positions afterwards to meet the exigencies of the situation than he can withhold facts from his attorney, and thereby experiment with one defense, and when that fails him, invoke the aid of the law to experiment with another which was fully known to him at the time.
4. **Post Conviction.** An evidentiary hearing must be granted on a petition for post conviction relief when the facts alleged would justify relief, if true, or when a factual dispute arises as to whether a constitutional right is being denied.
5. _____. Although an evidentiary hearing is not always necessary

on an application for post conviction relief, such a hearing is usually advisable to avoid protracted litigation.

Appeal from the District Court for Cuming County: RICHARD P. GARDEN, Judge. Reversed and remanded.

Christie Dibbern, for appellant, and, on brief, Waterman pro se.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

This is an appeal from an order of the District Court denying the defendant's motion for post conviction relief without holding a hearing.

On September 3, 1981, while represented by counsel, the defendant, Luthern P. Waterman, entered a plea to and was found guilty of the May 22, 1981, Class III felony offense of second degree sexual assault, a violation of Neb. Rev. Stat. § 28-320 (Reissue 1979). The plea was entered as a part of a plea bargain which substituted this charge for the original charge of first degree sexual assault, a Class II felony.

Following a presentence investigation, the defendant was ordered committed to the Department of Correctional Services for a 90-day evaluation under the provisions of Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981). After receipt of that evaluation the District Court directed that the defendant undergo an evaluation under Neb. Rev. Stat. § 29-2912 (Reissue 1979) to determine whether he was a mentally-disordered sex offender.

A hearing was then held, at which the reports of the clinical psychologist and psychiatrist who had been appointed by the court to examine the defendant were received in evidence. The court made the finding that the defendant was not a mentally-

disordered sex offender, and after a rather extensive sentencing hearing ordered that the defendant be confined in an institution under the control of the Nebraska Department of Correctional Services for a term of 3 to 5 years, with credit for 205 days of jail time.

Defendant's motion to vacate sentence contained a number of allegations, including: That the arresting officers did not advise him of his *Miranda* rights; that the county authorities denied him the right to make telephone calls; that he was denied the right by county authorities to contact an attorney for at least 14 days; that he was physically abused by the sheriff's deputies upon his arrest and initial incarceration; that the conditions in the jail in which he was kept awaiting trial were bad; that, although an attorney was appointed to represent him and he was subjected to three mental examinations, his appointed attorney made no attempt to converse with him; that the evidence was insufficient to convict him; that at the time he entered a plea of guilty he had suffered a complete nervous breakdown and was not aware of what was going on; and that in some way he was forced by his attorney and the county attorney to plead guilty, because he was told that if he did not plead guilty he would be sentenced to a term of 15 years, but that if he did plead guilty he would receive probation.

On March 16, 1983, the trial court entered an order stating in effect that after a review of the motions, files, and records in the case, the motion to vacate sentence was without merit and should be overruled. As a part of the journal entry denying the motion, the court found that the defendant was adequately advised of his rights, that the defendant specifically denied that he had any complaints against law enforcement officers, that he thought his attorney had done everything for him he could do, and that whatever complaints the defendant had concerning his treatment by any officials of the county in which he

was first arrested may form the basis for a civil rights action, but they afforded no basis for setting aside the conviction and sentence in this case.

Although the defendant filed his brief pro se, counsel appeared and argued in his behalf in this court. In that brief, defendant assigns as error the overruling of his motion to vacate sentence without an evidentiary hearing, but argues only the improper inducement affecting his plea and his incompetency to enter a plea.

In deciding this appeal we are governed by two basic principles. In ruling on an application for post conviction relief, if the trial court finds from an examination of the files and records in the case that the proceeding is without foundation, an evidentiary hearing may properly be denied. *State v. Leadinghorse*, 192 Neb. 485, 222 N.W.2d 573 (1974). One seeking post conviction relief has the burden of establishing the 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. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982).

The arraignment proceedings were comprehensive, fair, and readily intelligible. The trial court fully informed the defendant of all his rights and of the fact that by pleading guilty he was waiving those rights. As to the two factors argued in defendant's brief, the record discloses that he told the court he had had sufficient time to confer with his attorney, that no "physical force, threats or third degree" were used to make him plead guilty, that no promises were made other than the agreement to reduce the charge from first to second degree, and that no promises were made as to what the court would do by way of sentencing.

The defendant recited the facts constituting the crime, which agreed with those disclosed by the prosecution. Other than saying that while in jail he was threatened "to [be] put in deadlock" because the authorities thought he needed mental help, he

had no complaint against the sheriff. He agreed that the threat to be put in deadlock had nothing to do with his entering of the plea of guilty. He also said he was satisfied with the assistance of counsel, that counsel had done everything for him that counsel could do, and that the county attorney had treated him fairly.

Defendant's trial counsel, who was not the same attorney appearing in this court for the defendant, advised the court that the defendant felt he needed psychiatric and psychological counseling; that he previously had been a patient at the Norfolk Regional Center and had received a report that he was not suffering from any psychosis or neurosis but did suffer from severe emotional stress, but was not prevented from assisting in his defense. Counsel gave as his opinion that the defendant knew what he was doing at the time he entered his plea and that the plea was voluntary.

Included within the files and records available to the district judge was the presentence investigation report, which included a report of an examination and observation of the defendant by R. A. Cutshall, M.D., of the Norfolk Regional Center, made during July of 1981; a classification study of defendant, performed by the Department of Correctional Services; and independent evaluations done in December of 1981 by Dr. Cutshall and William J. Price, Ph.D., clinical psychologist at the Norfolk Regional Center.

According to the presentence investigator, "Mr. Waterman has been visually nervous, shakey [sic], slobbering, etc. during court appearances." The report of that investigator also discloses that the defendant went to the Pender, Nebraska, hospital for 10 days, commencing September 9, 1981, "reportedly with a nervous breakdown." The July 23, 1981, report of Dr. Cutshall, included within the presentence report, indicates that the defendant was admitted to the Norfolk Regional Center on July 9, 1981, as a voluntary admission, at the recommendation of his

attorney, since he had a previous history of mental illness.

Dr. Cutshall refers to reports from a September 1980 hospitalization in Cherokee, Iowa, following an attempt at suicide. However, those reports disclosed no depression per se justifying antidepressant medication. Dr. Cutshall could find no evidence of schizophrenia, only some paranoid "ideation," but not of pathological amounts. He found that the defendant expressed a great deal of anxiety and depression, and diagnosed him as avoidant personality disorder, but could find no reason why he should not be returned to the community, with possibly some psychological support as an outpatient.

The classification study done by the Department of Correctional Services indicated that defendant functioned within the dull-normal range of intellectual functioning. It was suggested that he displays rather typical symptoms of hypochondria, and is described as one who "appears to be a rather passive, dependant [sic] individual who expresses anxiety and depression a good share of the time."

Dr. Cutshall's December report and evaluation, in concluding that the defendant did not fulfill the criteria for a mentally-disordered sex offender, expresses the opinion that he does not suffer from a mental disorder per se, except for the possibility of his alcohol abuse, which the defendant had given as an excuse for the commission of the crime.

Finally, Dr. Price, the clinical psychologist, pointed out that the most striking aspect of the defendant's clinical presentation was his rather obvious anxiety related to a sense of uncertainty over how the court might act with regard to sentencing. However, it was his opinion that this distress did not interfere with his ability to relate rationally with the examiner. Dr. Price concluded that the defendant was not judged to be pathological in a psychological sense, in that he was not psychotic, neurotic, or

functioning under the influence of an organic brain syndrome.

If the defendant's only claim was that he was forced to plead guilty because of threats or inducements made or held out to him by his own attorney or the county attorney, we would have little trouble affirming the action of the District Court. The defendant was thoroughly questioned by the trial judge on this very subject, and denied that any threats or inducements were made, or that he was told what sentence might be imposed upon him.

A defendant who is mentally competent can no more assume one posture at the time of arraignment and then change positions afterwards to meet the exigencies of the situation than he can withhold facts from his attorney, and thereby experiment with one defense, and when that fails him, invoke the aid of the law to experiment with another which was fully known to him at the time. *State v. Hurley*, 207 Neb. 321, 299 N.W.2d 152 (1980).

However, defendant's claim that his plea was involuntary because he was incompetent at the time due to a nervous breakdown presents a different problem. This contention finds some support in the record as detailed above, and, we believe, at least presents a factual dispute. "An evidentiary hearing must be granted on a petition for post conviction relief when the facts alleged would justify relief, if true, or when a factual dispute arises as to whether a constitutional right is being denied." *State v. Paulson*, 211 Neb. 711, 714, 320 N.W.2d 115, 118 (1982).

Especially appropriate here is that language from *State v. Leadinghorse*, 192 Neb. 485, 486, 222 N.W.2d 573, 575 (1974), which states that although an evidentiary hearing is not always necessary on an application for post conviction relief, "such a hearing is usually advisable to avoid protracted litigation."

The judgment of the District Court is reversed,

and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CYNTHIA K. VOICHOSKIE, APPELLEE, V. DONALD R. VOICHOSKIE, APPELLANT.

340 N.W.2d 442

Filed November 28, 1983. No. 83-260.

1. **Equity: Words and Phrases.** Conduct which forms a basis for a finding that a party has "unclean hands" must be willful in nature.
2. **Modification of Decree: Child Support.** Where a party owes past due alimony or child support, the failure to pay must be found to be a willful failure in spite of an ability to pay before a request for modification of a decree may be dismissed on the basis of "unclean hands."

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Reversed and remanded.

Richard E. Mueting of Mueting, Delay & Stoffer, for appellant.

No appearance for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

The respondent, Donald R. Voichoskie, appeals from an order dismissing his application to modify a decree of dissolution dated December 31, 1981.

The decree awarded the custody of the four minor children of the parties to the petitioner, Cynthia K. Voichoskie, and ordered the respondent to pay child support at the rate of $500 per month until the further order of the court or until the children reached the age of majority, became emancipated, married, or deceased.

On January 11, 1983, the respondent filed an appli-

cation to modify the decree. The application further alleged that the respondent was unemployed, having been fired in September 1982 from the employment which he had at the time of the decree; that he had obtained other employment in October 1982 but had been laid off in December; and that his only income was $106 per week unemployment compensation. The application further alleged that his monthly expenses amounted to $425; that his only assets consisted of a 1973 Plymouth automobile, a 1974 Honda motorcycle, and his clothes; that he owed back rent in the amount of $430; and that he had filed a petition in bankruptcy in June 1982. The application also alleged that the petitioner, who was not employed at the time of the decree, was now employed and earning $170 per week net take-home pay.

The application alleged that on December 31, 1982, delinquent child support payments amounted to $1,915.98 and that on May 3, 1982, the respondent was delinquent in the amount of $1,100 and the respondent's employer was ordered to withhold $275 each pay period to be applied to child support.

On February 9, 1983, the petitioner filed a motion to dismiss the application on the ground that the respondent had not complied with the decree.

On March 7, 1983, the trial court found that the delinquent child support payments amounted to $3,230.98 and that the failure to pay the delinquent payments before bringing the application to modify the decree was a failure to do equity. The application was dismissed, and it is from that order that the respondent has appealed.

The order dismissing the application was based upon the equitable principles that "He who seeks equity must do equity," and that a party seeking equitable relief must come into court with "clean hands." In *Shelby v. Platte Valley Public Power and Irrigation District*, 134 Neb. 354, 369, 278 N.W. 568, 575 (1938), we described the principle as follows: "This court in *Blondel v. Bolander*, 80 Neb.

531, 114 N.W. 574, approved the following rule of law laid down in 1 Pomeroy, Equity Jurisprudence (3d ed.) sec. 397: 'Whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.' "

The conduct which forms a basis for a finding that a party has "unclean hands" must be willful in nature. "The maxim refers to willful misconduct rather than merely negligent misconduct. The improper conduct which falls within the maxim must involve intention as opposed to an inadvertent act or a misapprehension of legal rights." 30 C.J.S. *Equity* § 95 at 1021-22 (1965). "If the party seeking the relief has been *guilty of any conduct offensive to the conscience*, the remedy may, of course, be denied, under the familiar maxims of equity." (Emphasis supplied.) *Bauer v. Bauer*, 136 Neb. 329, 331, 285 N.W. 565, 567 (1939). "That status [unclean hands] is acquired by 'willful conduct which is fraudulent, illegal or unconscionable.' " *Seal v. Seal*, 212 Kan. 55, 62, 510 P.2d 167, 173 (1973).

In cases in which a party owes past due alimony or child support, the courts have generally held that the failure to pay must be found to be a willful failure in spite of an ability to pay before a request for modification of a decree may be dismissed on the basis of "unclean hands." In *Filler v. Filler*, 219 N.W.2d 96, 98 (N.D. 1974), the court said: "The equitable doctrine that he who seeks equity must do equity and the Clean Hands doctrine are not absolute bars to action by the court at the behest of a party who is delinquent in a divorce case. . . . [T]he court, in its discretion, may set aside a judgment although a delinquency exists."

In *Thompson and Thompson*, 25 Or. App. 421, 549

P.2d 683, 684-85 (1976), the court stated: "We believe that the more desirable rule, as well as the majority rule, is that a court should not be precluded from entertaining an application to modify a decree where the applicant is in arrears. . . .

". . . A parent who is in arrears but is otherwise entitled to a modification of monthly support payments should not be denied relief under the 'clean hands' doctrine if the court is satisfied that he has a valid excuse for not meeting his required payments in full, e.g., financial inability to pay." In that case, the father's salary had been reduced and the court accordingly modified his monthly child support obligation.

In *Martin v. Martin*, 256 So. 2d 553, 554 (Fla. App. 1972), the court stated: "The mere fact that a husband is in arrears under an alimony order does not, ipso facto, deprive him of standing in a court of equity to seek a modification of such alimony order. Clearly, if the husband has the ability to pay such arrearage and does not do so, whether wilfully or neglectfully, he is not in court with clean hands and in such case his petition should not be considered on the merits until he has complied with the former order by payment of the sums due thereunder. . . . Contrarywise [sic], where the husband can show that the arrearage is due to an inability to pay for reasons not within his control or of his making, he should not be deprived of access to a court of equity to be heard on the merits of his petition. . . . Otherwise, an impecunious husband, once in arrears, would likely find himself ever increasingly so by the burden placed upon him while paradoxically increasingly less likely to ever have access to the court for appropriate relief."

Where the evidence discloses that a party is in fact able to pay past due support, such that he could be or has been found in contempt for the failure to pay, he will be barred by the clean hands doctrine from requesting a modification of the decree. *Mayer v.*

Mayer, 373 So. 2d 931 (Fla. App. 1979); *Pearson v. Fortner*, 386 So. 2d 205 (Miss. 1980); *Adams v. Adams*, 368 So. 2d 552 (Ala. Civ. App. 1979).

In the present case the application was erroneously dismissed upon the showing that a delinquency existed. Where, as in the present case, the application alleges an inability to make the payments ordered and alleges a change in circumstances since the time of the original order, the application should be heard on its merits. If the evidence shows that the petitioner is able to pay the arrearage or is unable to pay through some intentional conduct on his part, the doctrine of clean hands may be invoked to bar his claim for relief. *Martin v. Martin*, *supra*.

The court may not forgive or modify past due child support, but may modify the amount of child support becoming due in the future. See *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980).

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

REVERSED AND REMANDED.

HARMON CARE CENTERS, INC., A NEBRASKA CORPORATION, APPELLANT, V. JOHN KNIGHT, FORMER DIRECTOR OF THE DEPARTMENT OF PUBLIC WELFARE, ET AL., APPELLEES.

HARMON CARE CENTERS, INC., A NEBRASKA CORPORATION, APPELLANT, V. ELDIN J. EHRLICH, FORMER DIRECTOR OF THE DEPARTMENT OF PUBLIC WELFARE, ET AL., APPELLEES.

340 N.W.2d 872

Filed November 28, 1983. Nos. 83-268, 83-269.

1. **Administrative Law: Liability.** Where the law imposes upon a state officer the performance of a ministerial duty in which a private individual has a special, direct, and distinctive interest, the officer is liable to such individual for any injury which he may proximately sustain in consequence of the failure to perform the duty at all, or to perform it properly.

2. **Judgments: Demurrer: Appeal and Error.** An order or decree sustaining a demurrer will be affirmed if any one ground of the demurrer is well taken, irrespective of whether the ruling is based on an erroneous ground.
3. **Pleadings.** In testing whether a petition states a cause of action, we must accept as true all facts well pleaded, but we do not accept as true conclusions of law or of the pleader.
4. **Accounting.** An action for an accounting can either be one in law or one in equity, depending upon the circumstances in which it is brought.
5. _____. An accounting action at law is based upon a contract, express or implied.
6. _____. Generally, an action for a legal accounting does not lie unless it appears that defendant has received property or money, not belonging to him, which he is bound to account for to plaintiff, and that plaintiff is the owner of such property or money.
7. _____. Generally, an action for an accounting in equity does not lie unless it appears that a fiduciary, trust, or confidential relationship exists, or that there is a complicated series of accounts, or that a remedy at law is inadequate.
8. _____. An action for an accounting must generally allege that the plaintiff demanded and the defendant refused to render an accounting.

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

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

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellees Ehrlich and Knight.

Patrick W. Healey of Healey, Brown, Wieland, Kluender, Atwood & Jacobs, for appellee State Farm.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

Plaintiff-appellant, Harmon Care Centers, Inc., challenges the District Court's dismissal of its petitions following the sustaining of demurrers filed by the defendants-appellees, two former directors of the Nebraska Department of Public Welfare and their sureties. These two cases involve claims that

the directors required Harmon to reimburse certain sums to the Department of Public Welfare under invalid rules and regulations. Harmon requests an accounting and repayment. The two cases have been consolidated on appeal, as the issues involved in each are identical. We affirm.

In case No. 83-268 Harmon brings suit against John Knight and his surety, State Farm Fire and Casualty Company. The suit in No. 83-269 is against Eldin J. Ehrlich and his sureties, Ohio Farmers Insurance Company and State Farm Fire and Casualty Company.

Each suit purports to be on behalf of Harmon and "all other nursing care facilities similarly situated, located and licensed in the State of Nebraska." In summary, the suits allege that the Department of Public Welfare, under the direction of the individual director defendants, required Harmon and other licensed nursing homes to provide the department with cost reimbursement projections under which the department advanced and, after audit, adjusted payments made to Harmon and such others. The refunds made to the department by Harmon and the others in excess of actual costs were made under rules and regulations claimed to be invalid because they had not been properly filed with the Revisor of Regulations of the State of Nebraska, as required by law. By enforcing said invalid rules and regulations, the directors, according to Harmon, breached their duty to administer the department "as provided by law," for which breach the directors and their sureties become liable to Harmon and the other members of the class for the loss of the use of their money. There is no allegation the adjustments were incorrect in amount or that an accounting was demanded from and refused by the directors.

The defendants demurred on the grounds that the trial court lacked jurisdiction because the State had not waived its sovereign immunity to be sued in the form presented by the petitions; that Harmon has no

capacity to sue; that there is a defect of parties plaintiff and defendant; and that each of the petitions fails to state a cause of action.

The trial court sustained the demurrers on the ground that it lacked jurisdiction.

Harmon assigns as its operative claim of error that a suit against a former director of the Department of Public Welfare and his sureties is not a suit against the State of Nebraska and, thus, is not subject to sovereign immunity considerations.

The first attack made by defendants upon Harmon's petitions, and the one which the court below accepted as valid, is that a suit against a former state official is, in essence, a suit against the State itself and, thus, is subject to sovereign immunity considerations.

In support of this position defendants cite language from *Burke v. City of South Omaha*, 79 Neb. 793, 113 N.W. 241 (1907), a case involving a suit by a city employee who was injured while repairing a city street. That case states: "The state cannot, without its consent expressed through legislation, be sued for injuries resulting from an act done in the exercise of its lawful governmental powers and pertaining to the administration of government. When this power is exercised, as it must be, through an agent, the agent cannot be sued for injuries resulting from a strict performance of the agency. In such case the act is regarded as the act of the state, and not of the agent, who is the mere instrument of the state, and nothing more . . . ." *Id.* at 794-95, 113 N.W. at 241.

This language is inapposite to the present case. In its petitions Harmon is complaining that the acts taken by the former state employees were not within the State's lawful exercise of its governmental powers. Harmon further contends that the State's agents acted outside the scope of the authority granted to them by the State, in that the State required that rules and regulations be filed with the Revisor of Regulations.

At common law, "[W]here the duty imposed on a public official is not of a discretionary character, but ministerial, the official will be held liable to third persons for the negligent performance of his duties, and in this respect, a public official's duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion. More specifically, where the law imposes on the officer the performance of ministerial duties in which a private individual has a special, direct, and distinctive interest, the officer is liable to such individual for any injury which he may proximately sustain in consequence of the failure to perform the duty at all, or to perform it properly." 67 C.J.S. *Officers* § 208 c. at 686 (1978).

The cases cited to us by the defendants for the proposition that a state officer is cloaked in the State's immunity when exercising his powers all involve an officer who negligently or otherwise performed a discretionary duty. Those cases are not applicable to the claims made here by Harmon, as the duty claimed is ministerial in nature.

Defendants refer us to no statute in derogation of the common-law rule, a rule which we have specifically embraced in *Larson v. Marsh*, 144 Neb. 644, 14 N.W.2d 189 (1944). The facts of *Larson* are highly analogous to the present case. Therein, this court found that a cause of action was stated in a petition filed by a candidate for railway commissioner against the Secretary of State, his deputy, and their respective bonding companies, when it was alleged that the Secretary of State had failed to place the candidate's address on the ballot during an election as required by statute.

Even though we conclude that the reasoning used by the District Court to sustain the defendants' demurrers is incorrect, we are bound by the rule that

an order or decree sustaining a demurrer will be affirmed if any one ground of the demurrer is well taken, irrespective of whether the ruling is based on an erroneous ground. *Morse v. Mayberry*, 183 Neb. 89, 157 N.W.2d 881 (1968). We therefore proceed to a consideration of the other grounds urged upon the trial court.

The first of these remaining grounds is the claim that Harmon lacks the capacity to sue. No arguments are presented to us on this issue, and the only problem we can discern in this connection is whether Harmon may bring this suit as a class action. However, even if Harmon cannot maintain class actions, the question as to whether the suit might proceed on Harmon's own individual behalf would remain. *Roadrunner Development v. Sims*, 213 Neb. 649, 330 N.W.2d 915 (1983); *Blankenship v. Omaha P. P. Dist.*, 195 Neb. 170, 237 N.W.2d 86 (1976). Therefore, we neither consider nor decide the class action issue.

Defendants have also asserted that there is a defect of parties, but have not presented any argument on this issue. We note, however, that Harmon's allegation is that the reimbursements were made to the Department of Public Welfare, not to the directors.

In *Toop v. Palmer*, 108 Neb. 850, 189 N.W. 394 (1922), the landowners brought an action for a settlement of accounts with the grantees named in a deed which was later cancelled. It was held that a corporation organized and controlled by the grantees, and which had taken legal title to the land, borrowed money thereon, collected rents, and paid taxes, interest, and part of the mortgage debt, was a necessary party to the action. So, too, it appears to us, an accounting in this case cannot be had in the absence of the party which received the reimbursements. Whether the State is in fact immune from such suit, thereby limiting Harmon's remedies, is a question

not presented by these cases, as the State is not named as a party.

The last reason offered by the defendants in support of their demurrers is that Harmon does not state facts sufficient to constitute a cause of action.

In testing this ground we must accept as true all facts well pleaded, but we do not accept as true conclusions of law or of the pleader. *Roadrunner Development v. Sims, supra*; *Shelton v. Board of Regents*, 211 Neb. 820, 320 N.W.2d 748 (1982).

This is an action for an accounting. Such an action can either be one in law or one in equity, depending upon the circumstances in which it is brought. *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982). It does appear that there may be circumstances wherein the pleading of a balance due the plaintiff is not essential, such as where an accounting is necessary to show how money advanced by a plaintiff in a business venture has been disposed of. See *Walters-Southland Institute v. Walker, Trustee*, 217 Ark. 602, 232 S.W.2d 448 (1950). Nonetheless, each of Harmon's petitions fails to state a cause of action in other respects.

An accounting action at law is based upon a contract, express or implied. 1 C.J.S. *Accounting* § 2 (1936). Harmon's petitions in the present cases make no allegations that there was or is a contractual relationship between itself and the former directors of the Department of Public Welfare. Furthermore, for an action for a legal accounting to lie, it must appear that "defendant has received property or money, not belonging to him, which he is bound to account for to plaintiff, and that plaintiff is the owner of such property or money." *Id.* § 4 at 639.

As noted previously, Harmon alleges that the Department of Public Welfare, not its directors or their sureties, received the reimbursements. Thus, an action for an accounting at law has not been stated.

To determine whether Harmon has pled a cause

for an accounting in equity, we turn to our recent decision in *Trump, Inc. v. Sapp Bros. Ford Center, Inc.*, 210 Neb. 824, 827-28, 317 N.W.2d 372, 374 (1982), wherein we said: "The petition contains no allegation of a fiduciary or trust or confidential relationship, a complicated series of accounts, nor the inadequacy of a remedy at law. Normally, one or more of these allegations is necessary to plead a cause of action in accounting. In *Dickerson v. Surety National Farm Loan Ass'n*, 127 Neb. 67, 71, 254 N.W. 679, 681 (1934), we said: 'Originally, the basis of equity jurisdiction over matters of accounting was necessity for a discovery, but later authorities have added two other grounds, viz.: The complicated character of the accounts and the existence of a fiduciary or trust relation. 1 C.J. 613. We think the real basic reason for equitable jurisdiction is inadequacy of remedy at law.' See, also, *Corn Belt Products Co. v. Mullins*, 172 Neb. 561, 110 N.W.2d 845 (1961); *Schmidt v. Henderson*, 148 Neb. 343, 27 N.W.2d 396 (1947).

"However, Sapp neither demurred to the petition nor objected in its answer to the claim for equitable relief. ' " 'Where the party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded.' " ' *Linville v. Kowalski*, 149 Neb. 402, 407, 31 N.W.2d 281, 284 (1948). 'It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation.' *Kuhlman v. Cargile*, 200 Neb. 150, 156, 262 N.W.2d 454, 458 (1978)."

Harmon's petitions contain no allegations which would support conclusions that any fiduciary, trust, or confidential relationship existed between it and the directors, nor can we conclude that there exists

a complicated series of accounts or that a remedy at law would be inadequate. Accordingly, we must conclude that Harmon's petitions fail to state facts sufficient to support an action for an accounting in equity.

Moreover, an action for an accounting must generally allege the plaintiff demanded and the defendant refused to render an accounting. 1 Am. Jur. 2d *Accounts and Accounting* § 60 (1962). See, also, *State v. Taylor*, 58 Wash. 2d 252, 362 P.2d 247 (1961). No such allegation exists here.

Furthermore, the gravamen of Harmon's complaint is that the reimbursements made under the allegedly invalid rules deprived it of the use of its money. Presumably, although not expressly pled, the notion is that these reimbursements were required and made earlier than would otherwise have been the case. Even if one could imply from those circumstances that Harmon suffered a loss, such loss would be in the nature of the interest one loses prior to reducing an unliquidated claim to judgment. We have said that where a reasonable controversy exists as to a plaintiff's right to recover or as to the amount of such a recovery, the claim is considered to be unliquidated, and prejudgment interest is not allowed. *Land Paving Co. v. D. A. Constr. Co.*, *ante* p. 406, 338 N.W.2d 779 (1983); *Langel Chevrolet-Cadillac v. Midwest Bridge*, 213 Neb. 283, 329 N.W.2d 97 (1983). By the same logic, any loss occasioned by the unavailability of the money claimed by Harmon to have been prematurely reimbursed to the State would not be recoverable if either Harmon's right to withhold the reimbursement or the amount thereof were in reasonable controversy.

The District Court was correct in sustaining the defendants' demurrers and dismissing Harmon's petitions.

AFFIRMED.

CHARLES E. BURTON AND IDA BURTON, HUSBAND AND WIFE, APPELLANTS, V. THOMAS G. ANNETT, LINDA ANN WITT, AND WILLIAM A. ALDERMAN, COUNTY COMMISSIONERS OF SHERIDAN COUNTY, NEBRASKA; COUNTY OF SHERIDAN, NEBRASKA, A GOVERNMENTAL SUBDIVISION; AND JOHN BURTON, APPELLEES.

341 N.W.2d 318

Filed December 2, 1983. No. 82-272.

Injunction: Appeal and Error. An equitable action for an injunction is reviewed 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.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed.

Reddish, Curtiss, Moravek and Danehey, for appellants.

Quigley, Dill & Quigley, for appellees.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

Charles E. Burton and Ida Burton (Charles and Ida) sought an injunction to prohibit the county commissioners of Sheridan County, Nebraska, namely, Thomas G. Annett, Linda Ann Witt, and William A. Alderman, from laying out a public road across Charles and Ida's real estate to the land of John Burton (John) pursuant to Neb. Rev. Stat. §§ 39-1713 and 39-1714 (Reissue 1978). The District Court for Sheridan County denied the injunction. We affirm.

John wanted a road for access from his ranch home to a public road. Although the record does not disclose the kinship, if any, between John and Charles, the background reflects that John and Charles had more than casual contact with each other before 1980. In 1976 a criminal complaint was filed charging John with trespass of Charles' real es-

tate. That same year John was responsible for a criminal complaint alleging an assault by Charles. Both complaints were dismissed. In 1978 John unsuccessfully sought judgment in the District Court for declaration of a prescriptive right-of-way across the land of Charles and Ida.

During the decade preceding 1980, John sent several letters to the attorney for Charles and Ida and proposed an exchange of land to obtain a road site for John. Those proposals were rejected. Throughout this period, John also talked to Charles about a trade of land for such road. The talks were unproductive relative to establishing a road.

In June 1980 John and his mother, Aileen Burton, each filed an affidavit with the county board. At the time of these affidavits John leased land owned by Aileen. After the affidavits were filed Aileen died and John succeeded to Aileen's interest in the real estate. The affidavits by Aileen and John contained statements regarding ownership of the land, the land's inaccessibility because it was surrounded by real estate belonging to others, inability to purchase a right-of-way across the surrounding land, and an existing private road less than 2 rods in width serving the landlocked real estate. See §§ 39-1713, 39-1714. The county board held a public hearing on July 29, 1980, regarding the requested road. On August 5 the county board determined that the requirements of §§ 39-1713 and 39-1714 had been satisfied and that the most practicable route for access to John's real estate was a road across Charles and Ida's land. On November 18, 1980, Charles and Ida commenced proceedings for an injunction to prevent construction of the road. On November 25, 1980, a restraining order was entered barring implementation of the county board's decision made on August 5. In December 1981 John undertook negotiations with Charles and Ida for an exchange of land for the road site, but the proposed exchange of land was rejected. Charles and Ida deny there have been any

negotiations relative to the road after 1978, except the negotiations of December 1981.

Charles and Ida appeal and claim that the conditions for a public road pursuant to the designated statutes have not been satisfied and that the injunction should have been issued.

This is an equitable action for an injunction, and as such it is reviewed in this court de novo, subject to the rule that where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. See, *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 560 (1983); *Spilinek v. Spilinek*, 212 Neb. 811, 326 N.W.2d 170 (1982). The uncontradicted evidence establishes satisfaction of the statutory requirements concerning ownership of the subject real estate and a private road less than 2 rods in width serving John's land. The claim of Charles and Ida concerning the insufficiency of proof focuses on § 39-1713(3) regarding John's inability to purchase a right-of-way for access to his real estate. There is no subtle point of law or esoteric principle involved in this case. The question is simply one of fact. John said he has negotiated for a road. Charles and Ida said he has not. From the facts and features found in this case, John's account of the situation is more credible. The trial court accepted the evidence regarding John's negotiations and his attempt to purchase a right-of-way. So do we. There is no showing that the county board acted contrary to or outside the statutes permitting establishment of a public road for access to isolated real estate. Establishment of a public road upon satisfaction of statutory requirements is a ministerial duty within the power of the county board. See *Singleton v. Kimball County Board of Commissioners*, 203 Neb. 429, 279 N.W.2d 112 (1979). An injunction to prohibit the county board's execution of its ministerial duty is properly denied under the circumstances.

The judgment of the District Court is affirmed.

AFFIRMED.

SCHOOL DISTRICT NO. 39 OF SARPY COUNTY, NEBRASKA, ET AL., APPELLANTS, V. RAYMOND FARBER, SUPERINTENDENT, APPELLEE.

341 N.W.2d 320

Filed December 2, 1983. No. 82-611.

1. **Actions: Records: Appeal and Error.** The requirement that a transcript of the proceedings in the lower tribunal be filed with a petition in error is mandatory and jurisdictional.
2. _____: _____: _____. In a proceeding in error additional evidence may not be received, and the issues must be determined solely from the transcript filed with the petition.
3. **Schools and School Districts: Statutes.** If the conditions set out in Neb. Rev. Stat. § 79-420 (Reissue 1981) exist, it is the mandatory duty of the county superintendent to proceed.

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

James T. Gleason of Swarr, May, Smith, Andersen & Jensen, for appellants.

Patrick Kelly, Sarpy County Attorney, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This action was commenced by Robert Bundy and School District No. 39 of Sarpy County, Nebraska, as a suit to enjoin the defendant superintendent of schools of Sarpy County, Nebraska, from dissolving school district No. 39 and attaching the territory in district No. 39 to the Gretna School District. Since no question was raised as to the standing of either plaintiff to bring the action, for the purpose of this opinion we assume standing.

In an order on August 24, 1982, the trial court stated that the plaintiffs' first amended petition would be considered "a petition in error." At the hearing on the merits on August 31, 1982, the trial court found generally for the defendant and dissolved the temporary restraining order that had been entered on August 19, 1982. The plaintiffs have appealed from that order.

The proceeding involved in this case was under Neb. Rev. Stat. § 79-420 (Reissue 1981). That section requires the county superintendent to dissolve a school district and attach its territory to one or more neighboring districts when, for one school term, the district fails to maintain a public elementary school within the district in which are enrolled and in regular attendance for at least 175 days one or more pupils of school age residing in the district, or it does not contract for the tuition and transportation of pupils of the district and have pupils attending school regularly under such a contract for at least 175 days.

In 1982 the defendant determined that district No. 39 had failed to meet the requirements of the statute and gave notice of a public hearing to be held on August 16, 1982, as required by the statute. The plaintiffs do not contend that the defendant's factual determination was incorrect. The petition alleged that from June of 1980 until sometime in April 1982 no pupils attended school in its schoolhouse.

At the conclusion of the public hearing held on August 16, 1982, the defendant announced that he would enter an order dissolving district No. 39 and attach it to the Gretna School District. Such an order was in fact made and signed by the defendant.

Although the trial court announced that the plaintiffs' petition would be considered as a petition in error, the transcript filed in this court shows that the plaintiffs failed to comply with the statutory jurisdictional requirements to commence a proceeding in error. See Neb. Rev. Stat. § 25-1905 (Reissue 1979).

The requirement that a transcript of the proceedings in the lower tribunal be filed with the petition is mandatory and jurisdictional. *Downer v. Ihms*, 192 Neb. 594, 223 N.W.2d 148 (1974). In a proceeding in error additional evidence may not be received, and the issues must be determined solely from the transcript filed with the petition. *Andrews v. City of Fremont*, 213 Neb. 148, 328 N.W.2d 194 (1982).

The petition filed in this case was a collateral attack upon the order of the superintendent in the form of a suit in equity to enjoin the defendant from dissolving district No. 39 and attaching its territory to the Gretna School District.

One of the grounds for relief alleged in the petition was that the dissolution was governed by Neb. Rev. Stat. §§ 79-601 et seq. (Reissue 1981). The sections referred to contain provisions regarding the dissolution of Class I districts under certain conditions, but they have no application here.

The petition further alleged the plaintiffs were denied due process in that the hearing was not before a fair and impartial hearing officer because the defendant announced at the hearing he had already concluded that district No. 39 should be dissolved.

Section 79-420, by its terms, necessarily contemplates that the county superintendent inform himself of the facts before fixing a time for the required public hearing. If the conditions set out in § 79-420 exist, it is the mandatory duty of the county superintendent to proceed. *Chappell v. Carr*, 185 Neb. 158, 174 N.W.2d 208 (1970). Unless the superintendent has reached at least a preliminary conclusion that he is required to dissolve the district, there would be no basis for proceeding further under the statute. The contention of the plaintiffs is without merit.

The judgment of the District Court is affirmed.

AFFIRMED.

DAVID IRWIN, APPELLANT, V. THE BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 25 OF HOLT COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

340 N.W.2d 877

Filed December 2, 1983. No. 82-647.

1. **Schools and School Districts: Teacher Contracts: Constitutional Law.** In accordance with Neb. Rev. Stat. § 79-1254 (Reissue 1981), teachers having taught more than 2 years in a Class I, II, III, or VI school district have a property interest in their employment and as a consequence are entitled to procedural and substantive due process before termination of such employment is permitted.
2. _____: _____: _____. Within the matrix of the particular circumstances present when a teacher who is to be terminated for cause opposes his termination, minimum procedural due process requires that he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist; he be advised of the names and the nature of the testimony of witnesses against him; at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense; and that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.
3. _____: _____: _____. A teacher termination proceeding not in compliance with minimum procedural due process requirements is a nullity, and that teacher is not lawfully discharged.
4. **Schools and School Districts: Contracts: Statutes.** A contract to coach is not a contract subject to the procedural and substantive requirements of Neb. Rev. Stat. § 79-1254 (Reissue 1981).

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

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

John Recknor of Barlow, Johnson, DeMars & Flodman, for appellee.

KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and BRODKEY, J., Retired, and MURPHY, JOHN, D.J.

WHITE, J.

This is an appeal from an action taken by appel-

lee, the Board of Education of School District No. 25 of Holt County, Nebraska, which terminated the teaching and coaching contract of appellant, David Irwin. The District Court of Holt County affirmed the decision of the board of education. We reverse and remand.

In the first of two assignments of error, appellant contends the board of education deprived him of due process of law in that he was not advised, before the hearing, of specific allegations of unsatisfactory performance, nor was he provided the names of the persons who would testify against him. In the second assignment appellant contends that there was not sufficient evidence presented to justify his termination.

In light of our decision we discuss only the first assignment of error.

David Irwin taught science in school district No. 25 for 5 continuous years. He was also head boys basketball coach for West Holt High School. On March 5, 1982, Irwin received a letter that the board of education was considering terminating his teaching-coaching contract. As reasons for the action of the board of education, the letter stated "neglect of duty, insubordination, and conduct which interferes substantially with the continued performance of your duties." The day after receiving the letter Irwin requested a hearing and asked that the board of education set forth the alleged conditions of unsatisfactory performance which would be the basis of the board's consideration, as well as the names of persons whose comments or reports would be used as the basis for the testimony of any witness. Irwin further requested that he be allowed to examine and copy any documents or materials which would be used to support the allegations. The board's only response to the request was to set a hearing date and allow Irwin access to the materials in his personnel file. Two days before the scheduled hearing, Irwin's attorney telephoned the attorney

representing the board of education. Irwin's attorney was told that the principal and superintendent of West Holt High School would appear as witnesses on behalf of the board of education. A hearing was held on March 22, 1982, at which time Irwin moved for a continuance for the reasons that no list of specific charges had been given to him nor a witness list provided. The motion was overruled and the hearing proceeded under continuing objection. Irwin also objected when a party, other than the ones disclosed in the conversation 2 days before the hearing, testified adversely to Irwin. This objection was also overruled. At the close of the hearing the board of education voted to terminate Irwin's teaching-coaching contract. The District Court affirmed the decision.

It is undisputed that at the time of Irwin's termination he was entitled to notice and hearing as provided by Neb. Rev. Stat. § 79-1254 (Reissue 1981). We are aware that the above statute has subsequently been repealed and replaced pursuant to 1982 Neb. Laws, L.B. 259, which became operative on September 1, 1982. Because the proceedings in question were held before the operative date of L.B. 259, we proceed to review this case under the old statute.

Being entitled to a notice and hearing, and the procedural due process requirements that these trigger, the question then becomes whether or not Irwin was afforded the minimal requirements of procedural due process. See *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). We answer this question in the negative.

In *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970), the court stated: "Within the matrix of the particular circumstances present when a teacher who is to be terminated for cause opposes his termination, minimum procedural due process requires that: (a) he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist, (b) he be ad-

vised of the names and the nature of the testimony of witnesses against him, (c) at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense, (d) that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges." See, also, *Brouillette v. Board of Dir. of Merged Area IX, etc.*, 519 F.2d 126 (8th Cir. 1975).

In a case dealing with the adequacy of notice in an attorney disbarment proceeding, the U.S. Supreme Court held that the "absence of fair notice as to the reach of the grievance procedure and the precise notice of the charges deprived petitioner of procedural due process." *In re Ruffalo*, 390 U.S. 544, 552, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968).

Irwin's sole notice of the charges against him was the vague and conclusory letter that he received from the board of education. Absent Irwin being advised of the charges in sufficient detail to fairly enable him to prepare an adequate defense and to show any error that might exist, the subsequent hearing on the termination of his contract was rendered meaningless. The fact that Irwin was advised of an incomplete witness list 2 days before the hearing only compounded the problem of deficient procedural due process.

Appellee contends that Irwin was on "constructive notice" of the specific allegations against him in that he was given access to his personnel file. Because Irwin's personnel file was never made a part of the record, we cannot speculate on whether the contents of the file met the minimum requirements for adequate notice. We are, however, of the belief that in proceedings of this type, where the possible ramifications of the decision of the board of education are severe, it is not an undue burden upon the board of education to attach to the letter of notice, or otherwise divulge, the allegations underlying its ac-

tion in sufficient detail, as to afford the accused party a reasonable opportunity to prepare a defense.

Since coaching is not teaching and therefore not within the confines of § 79-1254, the board of education did not err in terminating Irwin's coaching position. See *Neal v. School Dist. of York*, 205 Neb. 558, 288 N.W.2d 725 (1980).

Since the notice given Irwin did not fairly comport with due process, the termination proceeding was a nullity. The appellant was not lawfully discharged as a teacher of School District No. 25 of Holt County.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KRIVOSHA, C.J., concurring.

For the reasons more particularly set out in my concurring opinion in *Neal v. School Dist. of York*, 205 Neb. 558, 288 N.W.2d 725 (1980), regarding the issue of whether coaching is teaching, I concur in the result reached by the majority in this case.

KERRY-RAND AND ASSOCIATES, APPELLEE, V. TOM PEDDICORD, APPELLANT.

340 N.W.2d 880

Filed December 2, 1983. No. 82-697.

1. **Summary Judgment: Pleadings.** When the allegations of the pleadings have been pierced by a movant for summary judgment and resistance to the motion fails to show that a genuine issue of fact exists, summary judgment should be granted.
2. **Contracts: Consideration.** There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee.
3. **Brokers: Contracts.** Generally, a broker is entitled to a commission on a sale by the principal, where, in addition to language indicating an exclusive agency, there is a special contractual provision giving a right to a commission on a sale by the owner.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed.

Michael V. Smith of Smith, King & Waite, for appellant.

John H. Cotton of Gaines, Otis, Haggart, Mullen & Carta, for appellee.

WHITE, and CAPORALE, JJ., and BRODKEY, J., Retired, and BLUE, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a suit by Kerry-Rand and Associates, plaintiff, to recover a real estate broker's commission from Tom Peddicord, defendant. Summary judgment was entered in favor of plaintiff for $99,925.73. Defendant appeals. We affirm.

The petition alleges the parties executed an exclusive "Farm Listing Contract" (Listing) on April 23, 1981, for the sale of a ranch and that defendant sold the ranch himself during the term of the Listing, which obligated him to pay a broker's commission under the express "fees" terms of the Listing. Defendant answered by general denial, and denied that plaintiff either found a buyer or expended any reasonable effort to find a buyer, or that defendant sold the ranch to anyone due to plaintiff's efforts. After discovery was completed both parties filed motions for summary judgment. Defendant did not appear at the hearing. Both parties submitted their motions upon the record made by plaintiff, including depositions of material witnesses.

Peddicord was the owner of Cross Five Ranch located in Cherry County, Nebraska, and Bennett County, South Dakota. About 8,000 Nebraska acres are involved here. Plaintiff is a Nebraska corporation wholly owned by Randy Wobig, a Nebraska licensed real estate broker, Norfolk, Nebraska. Suit is brought under Neb. Rev. Stat. § 81-885.06 (Reissue 1981).

There is no real dispute of these facts. On April 23, 1981, plaintiff and defendant executed a printed

form farm listing contract. The first two paragraphs are material here:

"IN CONSIDERATION of your agreement to list, and to offer for sale the property hereinafter described and to use your efforts to find a purchaser, I (we) hereby give you the sole and exclusive right until November 1, 1981, to sell . . .

"See Attached Addendum 9,954 acres more or less . . . for the sum of Two Million Four Hundred Eighty Eight Thousand Five Hundred & no/100 ($2,488,500.00) dollars . . . ."

"I (We) agree to pay you for professional services a cash fee of 5% of the gross sale price, or $ _____ , said fee to be payable on the happening of any one or more of the following events, to wit:

"*If a sale is made, or a purchaser found, who is ready, willing and able to purchase the property before the expiration of this listing, by you, myself, or any other person, at the above price and terms I (we) may agree to accept*, or if this agreement is revoked or violated by me, you, myself, or any other person, at the above price and terms I (we) may agree to accept . . . or if within 30 days after the expiration of this listing, unless relisted by another agent, I (we) make a sale of said premises to anyone due to your efforts or advertising done under this listing." (Emphasis supplied.)

In early 1981 both Marvin Metzger, a neighboring rancher, and Richard Satterlee, a real estate broker in Martin, South Dakota, discussed the sale of the ranch with defendant. In June 1981 Metzger, acting through Satterlee, made an offer to buy, which was refused by defendant. A second offer was accepted and a written contract executed on July 21, 1981, providing for defendant's sale of the ranch to Cross Heart Ranch Company and Robert A. Metzger for $2,194,000; vendees made a $100,000 downpayment; possession was to be given about July 26, 1981; final settlement was to be November 15, 1981. The con-

tract provided that a $75,000 commission was to be paid by seller to Richard Satterlee, listing broker, and Thomas Metzger, selling broker; their Nebraska licensing qualifications are not shown. Vendee Robert Metzger, son of Marvin Metzger, later assigned his interest to Cross Heart Ranch Company. The contract was performed on November 27, 1981, when defendant conveyed the Nebraska land for $1,998,514.06. The $75,000 commission was paid.

During the period from April 23 to November 1, 1981, no agent of plaintiff brought a prospective purchaser to the ranch. Upon execution of the Listing, plaintiff included the ranch in its inventory of land for sale available to its agents; advertising data was prepared, followed by advertising in newspapers, professional publications, and other shoppers' media. The first advertising was on May 4, 1981; the next began October 2, 1981. Agents of plaintiff also circulated brochures at seminars attended in four major cities.

First, defendant claims as error that the Listing agreement alone entitled plaintiff to a commission as a matter of law; he argues, as indicated in his answer, that plaintiff was required to make some reasonable effort to find a buyer.

In *Chapman Co. v. Western Neb. Broadcasting*, 213 Neb. 322, 327, 329 N.W.2d 107, 110 (1983), we said: "[B]efore a broker may be entitled to a commission, the broker must ordinarily be able to establish at least some causal connection between the broker's actions and efforts in regard to the listed property and the ultimate sale made to the purchaser under an extension contract of the type involved herein." That case is distinguishable. There, a sale was made after the listing expired, and the issue was the application of an "extension clause" and the question whether the broker "solicited" the buyer. Here, the issue relates to a special provision in the Listing purporting to obligate the owner to pay a broker's

commission if the owner sells the land during the Listing term.

" 'There is a sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee.' " *Omaha Nat. Bank v. Goddard Realty, Inc.*, 210 Neb. 604, 609, 316 N.W.2d 306, 310 (1982). Defendant received the benefit of the exclusive services of a licensed broker, and plaintiff promised to use its best efforts to find a buyer. In addition, plaintiff commenced performance by preparing advertising and brochures, and it published at least one ad prior to the alleged sale. There was mutuality of consideration for the Listing. Next, is the "fees" agreement in the Listing enforceable?

The general rule is stated in 12 C.J.S. *Brokers* § 175 at 556 (1980): "A broker is entitled to a commission on a sale by the principal, where, in addition to language indicating an exclusive agency, there is a special contractual provision giving a right to a commission on a sale by the owner." See, also, 12 Am. Jur. 2d *Brokers* § 227 (1964); Annot., 88 A.L.R.2d 936, 966 (1963); *American Property Services v. Barringer*, 256 N.W.2d 887 (S.D. 1977). In *Dial Realty, Inc. v. Cudahy Co.*, 198 Neb. 641, 643, 254 N.W.2d 421, 423 (1977), we considered a similar "fees" provision, and we said that "even if the defendant had not admitted its liability, under the plain and unambiguous terms of the listing agreement, the defendant was clearly liable to the plaintiff. . . ."

"A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used." *Bishop Cafeteria Co. v. Ford*, 177 Neb. 600, 616-17, 129 N.W.2d 581, 592 (1964). Defendant does not claim ambiguity in the contract, and we find none. The "fees" provision in the Listing obligated defendant to pay plaintiff a commission if he sold the ranch during the Listing term.

Defendant next assigns as error that summary

judgment was improper because there was a genuine issue of fact on the question, Was there a sale of the ranch during the broker's Listing? Particularly, defendant claims that he made no sale contemplated in the Listing "fees" agreement because vendees' performance of the July 21 contract was conditioned upon the provision, "CONDITIONS PRECEDENT.

"This agrement [sic] is subject to the following conditions . . . b. The BUYERS obtaining financing." Defendant does not show any fact question concerning this provision.

"The term 'sale' ordinarily means a transmutation of property from one man to another in consideration of some price or recompense in value." *Dial Realty, Inc. v. Cudahy Co.*, *supra* at 644, 254 N.W.2d at 423.

"The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity of expense and delay of trial, those cases where there is no genuine claim or defense. . . .

"When the allegations of the pleadings have been pierced by a movant for summary judgment and resistance to the motion fails to show that a genuine issue of fact exists, summary judgment should be granted. . . ." *Page v. Andreasen*, 200 Neb. 641, 646, 264 N.W.2d 682, 686 (1978); Neb. Rev. Stat. § 25-1332 (Reissue 1979).

From the record there was no question of material fact on the sale issue; however, there is the question of whether plaintiff was entitled to a favorable finding that a sale was made on July 21, 1981, as a matter of law. Presented is the mutuality of a written contract between defendant-vendor and nonparty vendees which was routinely and fully performed without regard to the financing condition.

"A condition in a contract which follows liability upon the contract and operates to defeat or annul such liability upon the subsequent failure of either

party to comply with the condition, is a condition subsequent." 17 Am. Jur. 2d *Contracts* § 323 at 756 (1964).

O'Brien v. Fricke, 148 Neb. 369, 27 N.W.2d 403 (1947), involved a vendee-financing condition found to be a condition precedent. That case is clearly distinguishable. It was a suit for specific performance of a contract which expressly limited vendee's obligation to perform, " 'subject on the further condition that after acceptance by mortgaging said land I can borrow $7,312.50 unconditionally from the Federal Land Bank and $2,925.00 unconditionally from the Land Bank Commissioner,' purchase to be closed 'upon completion of the above loans.' " *Id.* at 371-72, 27 N.W.2d at 406.

The July 21 contract contained all of the usual terms of a land sale. The only evidence concerning the vendees' financing being a condition is the lone recitation in the contract, and those words do not condition the buyers' obligation to perform upon obtaining financing. The condition did not void the mutuality of the contract. At most, there was a condition subsequent available to the buyers upon a good faith showing. See, *Pease v. Brown*, 186 Cal. App. 2d 425, 8 Cal. Rptr. 917 (1960); *Clover Realty Company v. McLeod*, 124 Ga. App. 160, 183 S.E.2d 33 (1971); *O'Halloran v. Oechslie*, 402 A.2d 67 (Me. 1979). Plaintiff was entitled to a finding that defendant sold the ranch himself on July 21, 1981, during the Listing term.

Defendant also claims as error that there were questions of fact concerning revocation of the Listing and whether plaintiff made reasonable efforts of sale. Neither was an issue under the pleadings and plaintiff's theory of recovery.

Plaintiff met its burden of proof by a prima facie showing that there was no genuine issue as to any material fact and that it was entitled to judgment as a matter of law, which defendant failed to contro-

vert by any evidence. See *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982).

AFFIRMED.

WILLIAM HAMER, APPELLANT, V. TRAVIE HENRY, DOING BUSINESS AS SCOTIA WELDING, APPELLEE.
341 N.W.2d 322

Filed December 2, 1983. No. 83-112.

1. **Workmen's Compensation: Proof.** The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment.
2. **Workmen's Compensation: Proximate Cause.** The mere fact that one may become ill or experience pain during employment does not in and of itself prove that the employee is disabled as a result of an "accident" arising out of and in the course of employment, entitling the individual to compensation under the Nebraska Workmen's Compensation Act.
3. **Workmen's Compensation: Evidence: Proof.** Unless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony.
4. **Expert Witnesses.** Triers of fact are not required to take the opinions of experts as binding on them.
5. **Workmen's Compensation: Appeal and Error.** As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the compensation court.
6. _____: _____. In reviewing workmen's compensation cases this court is not free to weigh the facts anew. Our standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case, and they will not be set aside unless clearly wrong.
7. _____: _____. In testing the sufficiency of the evidence to support the findings of the compensation court, every controverted fact must be resolved in favor of the successful party, and such party should have the benefit of every inference that can be drawn therefrom.

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

Charles R. Maser of Connors & Maser, P.C., for appellant.

Walter E. Zink II of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

This is an appeal from the Nebraska Workmen's Compensation Court which dismissed the plaintiff's petition because he failed to prove by a preponderance of the evidence that his disability resulted from an accident arising out of and in the course of employment, as defined by the Nebraska workmen's compensation law.

The plaintiff, William Hamer, filed this action seeking an award for injuries sustained to his neck while he was working at Scotia Welding for the defendant, Travie Henry. A single-judge court determined that his injuries were compensable for temporary total disability through June 14, 1982, and to continue so long as the plaintiff remained temporarily totally disabled. Following an application for rehearing filed by the defendant, the three-judge panel entered its order dismissing the petition.

On September 18, 1981, while working under a truck hoist, Hamer first experienced problems when he felt a catch in his neck while walking away from the equipment he was working on. In the petition Hamer alleged the injury was sustained while he was driving bolts with a sledge hammer and lifting a heavy shaft. At the first workmen's compensation hearing Hamer testified he felt the catch when he turned away to get some tools, while at the second hearing, or rehearing, Hamer told the court the injury occurred while he was pushing on a hydraulic cylinder.

After the "catch" or "popping" on Friday afternoon, Hamer finished work for the day and returned

to his home. When the pain did not leave by the following Monday, September 21, 1981, the plaintiff sought medical attention from Dr. Timothy Dunagan, a chiropractor in Grand Island. Dr. Dunagan diagnosed the injury as a cervical sprain with radiating brachial neuralgia of the extension of the C-7 dermatome, but also noted Hamer had previously experienced occasional episodes of neck soreness and stiffness, and that X-rays indicated an abnormal lordosis or curve of the spine, which Dunagan thought was a substantial and material contributing factor of Hamer's problem.

Besides the chiropractic examination, the plaintiff's condition was also evaluated by several physicians. The depositions of those doctors were received in evidence at the rehearing. Similar to the discrepancy of the testimony at the workmen's compensation hearings, the plaintiff's explanation of the injury varies with the recorded medical histories documented by the various physicians.

Dr. Otis Miller, the family physician, examined the plaintiff on October 8, 1981, and found a tenderness on the seventh cervical spine and pain in the neck and shoulder area. Later the injury was diagnosed as a fracture of the seventh spinous process and a chronic sprain, and Dr. Miller expected the plaintiff's problems to be resolved within 2 to 3 months. After treatment with Dr. Dunagan until December 1981, Hamer continued treatment with Dr. Miller until April of 1982, when he was referred to Dr. Gordon Bainbridge, a Grand Island orthopedic surgeon.

Dr. Bainbridge examined the plaintiff on April 20, 1982. After undergoing a standard orthopedic examination, the plaintiff was referred to Dr. Balachandran Wariyar, a neurologist in Grand Island, and to Dr. Louis Gogela, a neurosurgeon in Lincoln. Based upon his examinations, and consultations with Drs. Gogela and Wariyar, Dr. Bainbridge diagnosed the injury as a cervical sprain.

Dr. Wariyar examined the plaintiff on two separate occasions, July 20 and October 8, 1982, and after the second examination he did not find any objective neurological reasons for the plaintiff's complaint.

Dr. Gogela, who also examined the plaintiff in October 1982, said he could not provide a neurological anatomic explanation for the plaintiff's complaints.

On March 12, 1982, Dr. William Fulcher examined the plaintiff and opined that the plaintiff did not have permanent impairment and could return to work without limitation.

Other evidence reveals that during the summer of 1982, plaintiff engaged in two separate motor vehicle trips, one to Minnesota and one to Iowa. In August of 1982 Hamer was seen moving large, round bales of hay which required the plaintiff, as operator of the tractor, to turn around and watch the baler loader located directly behind the tractor. The plaintiff was also observed playing games at a church picnic.

Under the Nebraska Workmen's Compensation Act the claimant has the burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There is no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment. Neb. Rev. Stat. § 48-151(2) (Reissue 1978).

This court in *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 369, 307 N.W.2d 814, 815-16 (1981), said: "The mere fact that one may become ill or experience pain during employment does not in and of itself prove that the employee is disabled as a result of an 'accident' arising out of and in the course of employment, entitling the individual to compensation under the act. In order to receive that compensation it is necessary that the employee establish that the difficulties which the employee is experienc-

ing were caused by an 'accident' as defined by the Workmen's Compensation Act.''

In the present case Hamer contends the causal connection between the injury and disability shown by the testimony of Dr. Dunagan, the chiropractor, Dr. Miller, and Dr. Bainbridge would indicate that Hamer had a cervical sprain. Hamer disregards the testimony of Dr. Fulcher, Dr. Wariyar, and Dr. Gogela. These doctors all agreed that from an organic, objective, neurological standpoint there were no reasons for the complaints and no reason not to return to work. In considering the disability Dr. Bainbridge agreed that a cervical sprain is based in large part on subjective evidence.

In *Mack* we reaffirmed the principles of law that unless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony; and that where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony the causal connection between the alleged injury, the employment, and the disability.

Although Hamer is able to produce some medical testimony connecting his injuries to his employment, there is sufficient contradictory evidence to support the finding of the three-judge panel of the Workmen's Compensation Court on rehearing. The rule in this jurisdiction is that triers of fact are not required to take the opinions of experts as binding on them. *Novotny v. Electric Hose & Rubber Co.*, 214 Neb. 216, 333 N.W.2d 406 (1983). In *Davis v. Western Electric*, 210 Neb. 771, 779, 317 N.W.2d 68, 73 (1982), when this court was presented with conflict-

ing medical testimony, we said that " '[a]s a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workmen's Compensation Court.' "

In a proceeding to review an appeal from a three-judge panel of the Workmen's Compensation Court, this court is limited by the standard of review. In reviewing workmen's compensation cases the Supreme Court is not free to weigh the facts anew. Our standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case, and after a rehearing they will not be set aside unless clearly wrong. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Davis v. Western Electric*, *supra*.

Issues of causation are for determination by the fact finder. There is ample evidence in the record to sustain the findings of the Nebraska Workmen's Compensation Court. The plaintiff failed to meet his burden proving the neck injury arose out of and in the course of his employment. The determination of the Workmen's Compensation Court was not clearly wrong, and as such is affirmed.

AFFIRMED.

GENE P. SPENCE, RICHARD P. JEFFRIES, AND MARY ALICE RACE, APPELLANTS, V. LEE TERRY, ELECTION COMMISSIONER OF DOUGLAS COUNTY, NEBRASKA, APPELLEE.

340 N.W.2d 884

Filed December 2, 1983. No. 83-708.

Public Officers and Employees: Recall Petitions. An original petition for recall of an elected official must purport to have been

signed by signatories in a number determined by the formula found in Neb. Rev. Stat. § 23-2010 (Cum. Supp. 1982). Absent such minimum number of signatures on the original petition, a supplementary recall petition is not permitted.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded with directions.

Soren S. Jensen and Thomas J. Culhane of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellants.

Donald L. Knowles, Douglas County Attorney, H. L. Wendt and Rockford G. Meyer, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

Gene P. Spence, Richard P. Jeffries, and Mary Alice Race, directors of the Omaha Public Power District, sought an injunction to prohibit Lee Terry, election commissioner of Douglas County, Nebraska, from certifying and submitting to the county board a recall petition under the provisions of Neb. Rev. Stat. §§ 23-2010 to 23-2010.10 (Cum. Supp. 1982). The District Court for Douglas County denied the injunction and dismissed the directors' petition. Upon appeal by the directors we reverse and remand this matter to the District Court.

In the spring of 1983 some citizens, concerned about the actions of the appellants-directors in approving salary increases to be paid by the district, formed Ratepayers Coalition, a nonprofit corporation, which sponsored a movement to recall Spence, Jeffries, and Race from their respective offices as directors of the Omaha Public Power District.

Under the auspices of Ratepayers Coalition, an affidavit pursuant to § 23-2010.01 was filed on July 11, 1983, in the office of the Douglas County election commissioner. In response to such affidavit a "re-

call petition'' was issued by Terry's office. The original recall petition consisted of 9,840 sheets issued by the election commissioner's office.

On August 9, 6,450 sheets, that is, the original recall petition, were returned to Terry's office and were timely filed within 30 days after the affidavit of July 11. See § 23-2010.03.

In view of the total number of votes cast in the district for the last gubernatorial election preceding the filed petition for recall, the number equivalent to ''twenty-five per cent of the total number of votes'' cast in such gubernatorial election was 27,696. See § 23-2010(2).

On August 9, when the original recall petition for each director was delivered to the election commissioner, Terry determined that no petition regarding any director had 27,696 signatures. Between August 9 and August 16, Terry's office proceeded to ''validate'' the signatures regarding each petition. This validation process included vertification that each signatory was in fact a registered voter at the date when the petition was signed, an inspection to avoid duplication of signatures, a random selection for a comparison of signatures, that is, a comparison between the signature on the petition and the signature on the voter registration card, and an inspection regarding other formalities prescribed regarding a recall petition.

As a result of such validation process, Terry concluded that an insufficient number of registered voters had signed the petition. After the validation process there were 22,733 signatories regarding the Spence petition; 22,842 regarding the Jeffries petition; and 22,830 signatories regarding the Race petition. On August 16 Terry informed Ratepayers Coalition that an insufficient number of registered voters had signed the petition for recall. An ''amended recall petition'' was issued by Terry on August 16.

On August 19 the directors requested a restraining

order and permanent injunction which would prohibit Terry from certifying the amended recall petition and submitting any recall petition to the county board of Douglas County.

On August 26 the amended or supplementary petition for recall which had been obtained on August 16 was returned and filed in Terry's office. With the additional signatures on the amended or supplementary petition, the signatures on the recall petition regarding each of the directors exceeded 31,000.

The District Court on August 29 entered a restraining order, but, after a hearing, the restraining order was dissolved on September 14 and the directors' petition was dismissed on September 15.

The directors contend that the statutes governing a recall petition require that the number of signatories on the original recall petition be equal to at least 25 percent of the number of votes cast in the district for the most recent gubernatorial election, that is, 27,696 signatories in this case, so that an insufficiency of that number of signatories precludes any further action on a recall petition. Terry suggests that the provisions for amendment under § 25-2010.04 allow a petition signed by less than 27,696 to be supplemented within 10 days by additional signatories of such supplementary petition.

In order to discuss the problem we must first place the statutes in question in their respective historical and legislative perspectives.

Before amendment, Neb. Rev. Stat. § 23-2010 (Reissue 1977) in reference to a recall petition contained the following: "A petition signed by the electors . . . equal in number to at least twenty-five per cent of the total number of votes cast . . . for the office of Governor . . . shall be filed with the county clerk. . . . Within fifteen days from the date of the filing of such petition, the county clerk shall compare the petition signatures with the voters' registration to ascertain whether such signatures are valid. . . . If the clerk's certificate to such petition shows that it is

insufficient because of lack of signatures, it may be supplemented within fifteen days from the date of filing the original petition by the filing of a supplemental petition stating all the facts as in the case of the original petition. The county clerk shall within ten days from the filing of such supplemental petition make a like examination of such supplemental petition signatures, and if the certificate shall show that the petition, together with any supplement thereto which may be filed, contains the requisite number of signatures, the clerk shall submit the petition . . . to the county board."

In 1980, § 23-2010 was amended to include § 23-2010.04, as follows: "Within ten days after the filing of the petition, the county clerk or election commissioner shall ascertain whether or not the petition is signed by the requisite number of registered voters, and shall attach thereto his or her certificates showing the result of such examination. If the petition be insufficient, he or she shall forthwith notify the person filing the petition that the petition may be amended at any time within ten days after the giving of such notice by the filing of a supplementary petition upon additional petition papers issued, signed, and filed as provided for the original petition. . . ."

Must the original recall petition have signatories in number equal to 25 percent of the total number of votes cast in the district for the last gubernatorial election? The provisions of § 23-2010.04 are susceptible of multiple interpretations and possible meanings as a result of the somewhat less than lucid language regarding an original petition's insufficiency which permits a supplementary petition. In short, there is ambiguity concerning the statutes governing a recall petition. One of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give effect to that intent. *Mitchell v. County of Douglas*, 213 Neb. 355, 329 N.W.2d 112 (1983). To ascertain the intent of the

Legislature, a court may examine the legislative history of the act in question. See, *Wang v. Board of Education*, 199 Neb. 564, 260 N.W.2d 475 (1977); *North Star Lodge #227 v. City of Lincoln*, 212 Neb. 236, 322 N.W.2d 419 (1982). Legislative history includes the record of a floor explanation or debate, which is an extrinsic, secondary source in statutory interpretation. See *State ex rel. Bouc v. School Dist. of City of Lincoln*, 211 Neb. 731, 320 N.W.2d 472 (1982).

Although counsel for the parties have indicated that the legislative history of the statutes in question would not be helpful, we find that legislative history both informative and enlightening in our quest for the legislative intent behind the 1980 amendments of statutes governing a recall petition. The amendments by the Eighty-sixth Legislature are found in 1980 Neb. Laws, L.B. 601, introduced by Senator Martin F. Kahle. After the hearing on L.B. 601 the committee issued the following committee statement on February 6, 1980, which included the statement of "intent," namely, "The bill would also eliminate the fifteen day supplemental period if the county clerk finds that the petition does not contain the required amount of signatures . . . ." Later, on February 26, 1980, there was debate on the floor of the Legislature concerning L.B. 601 and the proposed statutory amendments regarding a recall petition. In that debate Senator Kahle further explained the amendments at 7457: "If, after 30 days the petition circulators come in and the county clerk finds that there are not sufficient signatures, the petition is lost."

The contents of the legislative history make abundantly clear that the Legislature intended a minimum number of signatures to be required on the original recall petition before any verification of signatures is required or a supplementary petition is permissible. The original recall petition, according to the legislative intent, must purport to have been

signed by signatories in a number determined by the formula set forth in § 23-2010. We will not speculate on the motivation behind the amendments which imposed more stringent requirements for recall of an elected official. Such speculation is not a function of this court. Reasons underlying valid legislation are left first to the Legislature and ultimately to the electorate. For example, when construction of the Tellico Dam threatened the snail darter with extinction, the U.S. Supreme Court concluded that the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 et seq. (1976), could bar completion of the dam, and stated: "Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." *TVA v. Hill*, 437 U.S. 153, 194, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978).

The people of Nebraska, acting through their elected representatives, have determined and dictated that recall of an elected official is a part of this state's democratic process. Lawful formulation of a system to achieve that objective derivatively belongs in the Legislature expressing the will of the people. As expressed by Justice Felix Frankfurter, "Courts ought not to enter this political thicket." *Colegrove v. Green*, 328 U.S. 549, 556, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946).

Therefore, the judgment of the District Court is reversed and these proceedings are remanded to the District Court with directions to enter a permanent injunction restraining the election commissioner of Douglas County, Nebraska, from certifying and submitting to the county board of Douglas County, Nebraska, the petitions for recall of the appellants-directors Spence, Jeffries, and Race.

REVERSED AND REMANDED WITH DIRECTIONS.

CAPORALE, J., not participating.

Cite as 215 Neb. 817

JOSEPH J. SACCHI, APPELLANT, V. JOHN L. BLODIG ET AL., APPELLEES.

341 N.W.2d 326

Filed December 9, 1983. No. 82-301.

1. **Medical Malpractice: Limitations of Actions.** In cases of professional negligence the discovery rule governs accrual of a cause of action, i.e., a cause of action accrues when the malpractice is discovered or in the exercise of due diligence should have been discovered.
2. ____: ____. Neb. Rev. Stat. § 25-222 (Reissue 1979) is a codification of the discovery rule and the time limits for discovery of professional negligence.
3. **Limitations of Actions: Insanity: Words and Phrases.** In Neb. Rev. Stat. § 25-213 (Reissue 1979) *insanity* means such condition of mental derangement which actually prevents the sufferer from understanding and protecting his or her legal rights.
4. **Medical Malpractice: Limitations of Actions.** Under the discovery rule one suffering a legal disability can, upon removal of such disability, commence an action for professional negligence as provided under Nebraska law.

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

Richard J. Dinsmore, and Breeling, Welling and Place, for appellant.

Lyman L. Larsen and William M. Lamson, Jr., of Kennedy, Holland, DeLacy & Svoboda, for appellee Blodig.

Bren L. Buckley of Cline, Williams, Wright, Johnson & Oldfather, for appellee Hospital.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Joseph J. Sacchi appeals from a summary judgment granted to the defendant physician, John L. Blodig, and the defendant hospital, Creighton Memorial St. Joseph's Hospital, Inc. (Hospital). Summary judgment was granted upon the allegations

contained in the pleadings. We reverse and remand for further proceedings.

Upon a motion for summary judgment a court examines the evidence to discover if any real issue of fact exists, takes that view of the evidence most favorable to the party against whom the motion is directed, and gives to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. *Bank of Valley v. Shunk*, 208 Neb. 200, 302 N.W.2d 711 (1981).

On September 6, 1967, Sacchi engaged the professional services of Blodig, a doctor of psychiatric medicine, for treatment of severe depression. Sacchi was admitted to the Hospital on October 31, and on November 4 Blodig diagnosed Sacchi's condition as "acute psychotic paranoid reaction." Blodig's treatment of Sacchi included 11 episodes of "electroshock therapy" from November 4 to November 24. On January 9, 1968, Sacchi was dismissed from the Hospital but remained under the care of Blodig until September 13, 1968, when Blodig readmitted Sacchi to the Hospital. Blodig's diagnosis on this readmission was "schizophrenic reaction, paranoid type." Blodig kept Sacchi in the Hospital until November 10, when Sacchi was discharged from Blodig's care and was dismissed from the Hospital. There was no service rendered by Blodig or the Hospital after November 10, 1968. Sacchi's "mental illness resulting in mental incompetency" was removed September 30, 1979. Sacchi filed his petition on September 17, 1980, which alleged that Blodig and the Hospital collaborated in a negligent diagnosis that Sacchi's condition was a psychosis, whereas Sacchi's true condition was mental incompetence attributable to a physical problem and not a mental disorder as diagnosed. Blodig and the Hospital filed separate motions for summary judgment, and each claimed that Sacchi's cause of action was barred by the statute of limitations under Neb. Rev. Stat. § 25-222 (Reissue 1979). The trial court sustained

the motions for summary judgment, and Sacchi appeals from that ruling. Sacchi claims that, as a result of Neb. Rev. Stat. § 25-213 (Reissue 1979), his insanity tolled the statute of limitations and that § 25-222 permitted him to file his petition within 1 year from the removal of his disability. Blodig and the Hospital counter that Sacchi's cause of action is barred by § 25-222 because the petition was not filed within 10 years from the date of the last service rendered on November 10, 1968.

The issues involve interpretations of two statutes, namely, (1) whether the legal disability of insanity (§ 25-213) tolls the statute of limitations prescribed by § 25-222 and (2) whether § 25-222 is a statute of unconditional repose so that any cause of action based on professional negligence is absolutely barred at the expiration of 10 years from the rendition of or failure to render the service which is the basis of the action.

Nebraska adopted the "discovery rule" by *Spath v. Morrow*, 174 Neb. 38, 43, 115 N.W.2d 581, 585 (1962): "[T]he cause of action . . . did not accrue until the plaintiff discovered, or in the exercise of reasonable diligence should have discovered [the malpractice] . . ." and no time limit was specified for such discovery. Seven years later the "discovery rule" was reiterated in *Acker v. Sorensen*, 183 Neb. 866, 872, 165 N.W.2d 74, 77 (1969): "This court is already committed to the discovery rule" (citing *Spath v. Morrow, supra*), but there still was no specified time during which discovery must be made.

With that background, § 25-222 was enacted in 1972, namely: "Professional negligence; limitation of action. Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services

providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action."

A decade after enactment of § 25-222, this court reaffirmed the discovery rule in *Colton v. Dewey*, 212 Neb. 126, 130, 321 N.W.2d 913, 916 (1982), when, after referring to *Spath v. Morrow*, *supra*, we stated: "[A]n action for malpractice did not accrue until a patient discovered, or in the exercise of reasonable diligence should have discovered, the malpractice. Thereafter, the Legislature limited that period of discovery to 10 years."

An examination of the statute discloses that § 25-222 consists of one sentence with three distinct but interrelated parts in reference to knowledge affecting a cause of action under our discovery rule. First, there is that knowledge at the time of the occurrence. Such knowledge imposes the basic time limit of 2 years for commencement of the action. Second, there is the situation involving unknown malpractice which is later discovered or discoverable, that is, which becomes known or is knowable at some point in the future following the malpractice. In that situation the "discovery rule" applies and the 1-year period for filing the action is triggered (*Spath* and *Acker*). Third, there is the period during which a claimant shall have acquired knowledge within 10 years after the malpractice and shall have acted or the claimant will suffer the con-

sequence that the cause of action is barred (*Colton*). In this manner § 25-222 is a codification of the judicially developed "discovery rule," with a legislated limit of a previously unspecified time for discovering a cause of action.

Throughout this judicial and legislative development of the discovery rule, § 25-213 has existed in the following form: "Actions by infants, persons insane or imprisoned; by or against nonresidents; exception comprehensive curative act. Except as provided in sections 76-288 to 76-298, if a person entitled to bring any action mentioned in this chapter, Chapter 23, article 24, and sections 81-8,209 to 81-8,239, except for a penalty or forfeiture, or for the recovery of the title or possession of lands, tenements or hereditaments, or for the foreclosure of mortgages thereon, be, at the time the cause of action accrued, within the age of twenty years, insane or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter after such disability shall be removed . . . ."

Before examining the effect of a legal disability upon the time limits found in § 25-222, we must first reach the meaning of *insane* used in § 25-213. In 54 C.J.S. *Limitations of Actions* § 242 at 269 (1948), there is the statement: "The term 'insane' . . . has been given a generic, rather than a technical, meaning, and has been held to mean such a condition of mental derangement as actually to bar the sufferer from comprehending rights which he is otherwise bound to know . . . ." See, also, *Gottesman v. Simon*, 169 Cal. App. 2d 494, 337 P.2d 906 (1959); *Hornig v. Hornig*, 6 Mass. App. 109, 374 N.E.2d 289 (1978); *Mtr. of Hurd v. County of Allegany*, 39 A.D.2d 499, 336 N.Y.S.2d 952 (1972). For the purpose of § 25-213 the word *insane* means such condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or instituting legal action. See *Kyle v. Green Acres*

at Verona, Inc., 44 N.J. 100, 207 A.2d 513 (1965). Insanity within § 25-213 results in an incapacity which disqualifies one from acting for the protection of one's rights. See, *Wescott v. Upham*, 127 Wis. 590, 107 N.W. 2 (1906); *Western Coal & Min. Co. v. Hilvert*, 63 Ariz. 171, 160 P.2d 331 (1945); *Terre Haute, etc., Traction Co. v. Reeves*, 58 Ind. App. 326, 108 N.E. 275 (1915).

Discovery, as used in our "discovery rule," means that an individual acquires knowledge of a fact which existed but which was previously unknown to the discoverer. See, *Myers v. Stratmann*, 245 Iowa 1060, 65 N.W.2d 356 (1954); *In re Mangan's Will*, 83 N.Y.S.2d 393 (Broome Co. Sur. Ct. 1948).

According to the allegations in the pleadings, Blodig diagnosed Sacchi's condition as an acute psychotic paranoid reaction and schizophrenic reaction, paranoid type, and treated Sacchi from October 1967 to November 1968. Some of the treatment included 11 "electroshock" episodes and 130 days of confinement in the Hospital. Sacchi's condition persisted until November 1979. From such alleged circumstances it is a reasonable inference that Sacchi's condition may have come within the insanity provisions of § 25-213. It would be a legal paradox to state that the insane are required to learn and comprehend facts which would put persons of ordinary intelligence and prudence on inquiry for discovery of malpractice. Clearly, the purpose of § 25-213 is to lift the burden of severe time restrictions or limitations from those under legal disability, that is, from those who do not have the ability and capacity to protect their rights existing under our laws. Therefore, in keeping with our discovery rule to prevent manifest injustice, a person under a legal disability described in § 25-213 is exempted from the provisions of § 25-222 until the legal disability is removed. In the case at hand, if Sacchi is such a person within § 25-213, then the action was commenced within 1 year after removal of his legal disability. Such de-

termination of fact must be made, and for this reason further proceedings are required in the District Court.

Assuming that the contention of Blodig and the Hospital were correct and that the time limit in § 25-222 is a statute of repose rather than a codification of the discovery rule, the fact remains that a cause of action for professional negligence exists at common law. We note that § 25-213 has been amended twice in recent years—once in 1972, which is the same year § 25-222 was enacted, and again in 1974. None of those amendments excluded professional negligence from the operation and effect of § 25-213, although such statute regarding persons under legal disability does exclude certain situations from the effect of § 25-213. By omitting professional negligence from those excluded situations mentioned in § 25-213, the Legislature has dictated that the time limits for commencing an action based on malpractice shall not apply to persons under legal disability. Persons suffering mental derangement cannot be expected to evaluate and communicate information so that their rights can be protected and enforced. Nebraska has a long-standing policy of protection extended to those under legal disability who are, therefore, unable to help themselves. Were the limitation urged by Blodig and the Hospital accepted, such drastic and draconian definitude for commencement of an action would effectively eliminate a cause of action of one unable to protect himself or herself. See, *Braden v. Yoder*, 592 S.W.2d 896 (Tenn. App. 1979); *Parlato v. Howe*, 470 F. Supp. 996 (E.D. Tenn. 1979); *Chaffin v. Nicosia*, 261 Ind. 698, 310 N.E.2d 867 (1974). Any repose effectuated by expiration of 10 years from rendition of or failure to render service, as stated in § 25-222, is neither absolute nor unconditional, for a person suffering a legal disability, as described in § 25-213, upon removal of the legal disability can commence an action for professional negligence as provided under Nebraska law.

It was error to enter a summary judgment that Sacchi's cause of action was barred by the statute of limitations. For this reason the judgment of the District Court is reversed and the cause is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

KRIVOSHA, C.J., concurring.

I concur in the result reached by the majority in this opinion. I write separately, however, because I believe that, for the reasons noted by the majority, *any* effort by the Legislature to bar a cause of action before it has been discovered, or in the exercise of reasonable diligence could be discovered, would be to deny a class of persons both equal protection of the law and due process in violation of both their state and federal constitutional rights. In *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 682, 50 S. Ct. 451, 74 L. Ed. 1107 (1930), the U.S. Supreme Court said: "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some *real* opportunity to protect it." (Emphasis supplied.) See, also, *Moore v. Jackson Park Hosp.*, 95 Ill. 2d 223, 447 N.E.2d 408 (1983). What greater action can be taken by a Legislature to deny an individual a real opportunity to protect a right than to bar the institution of such an action even before the injured party knows or, with the exercise of reasonable diligence, could know that such a right exists.

Whenever the Legislature has adopted a new statute of limitations, courts have required that the injured person be afforded a reasonable period of time in which to seek redress. See, *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974); *Horbach v. Miller*, 4 Neb. 31 (1875); *Central Missouri Tel. Co. v. Conwell*, 170 F.2d 641 (8th Cir. 1948). Logic therefore would seem

to tell us that if one knowing of the existence of a cause of action must be given a reasonable period of time to file suit, one cannot have that right legislatively extinguished before the individual either knows of the right or, with the exercise of reasonable diligence, could know of such right.

BOSLAUGH, J., dissenting.

The majority opinion concludes that Neb. Rev. Stat. § 25-222 (Reissue 1979) codifies the discovery rule and therefore permits the legal disabilities of insanity and infancy when applicable to toll the running of § 25-222 such that an action may be brought even after 10 years has passed from the date of the alleged negligent act or omission. See Neb. Rev. Stat. § 25-213 (Reissue 1979). This is an incorrect interpretation of § 25-222, which is a statute of ultimate repose requiring all actions based upon a claim of professional negligence to be brought within 10 years.

Section 25-222 provides: "Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that *in no event* may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action." (Emphasis supplied.)

The legislative history of 1972 Neb. Laws, L.B. 1132, codified as § 25-222, reveals that the Legislature clearly intended to create an absolute limit of 10 years within which an action for professional negligence must be brought. All such actions will be barred if brought after that time, despite the presence of any applicable infancy or insanity.

The committee statement, Committee on Judiciary, L.B. 1132, 82d Leg., 2d Sess. (Jan. 31, 1972), states: "This bill would place an overall limitation of 6 years [later amended to 10 years] in which an action is to be brought or it would be barred. . . . [N]o action could be brought *in any case* after 6 years had passed." (Emphasis supplied.) In the floor debate on February 25, 1972, Senator Carstens, who introduced the bill, explained the purpose of L.B. 1132 as follows at 4573-74: "At the present time, there is no upper amendment [sic] or outside limit of time in which action may be brought. It can be brought ten years or fifteen years after the alledged [sic] act of negligence has occurred. And this bill would limit . . . It places an *overall limitation* . . . on the statute of limitation." (Emphasis supplied.)

Throughout the legislative history, the legislative concern with prevention of stale claims, particularly those involving medical malpractice, is apparent. In the introducer's statement of purpose the following appears: "Physicians and surgeons need some type protection to prevent actions being brought long after the incident of alleged malpractice took place, when the incident is so remote that it is difficult for the physician or surgeon to protect himself, and defend himself, from the charges because the evidence has been lost, the witnesses who would know are gone, no defense is available because the defenses which existed have been erased by the passage of time."

From this history it can be concluded that the Legislature intended that § 25-222 bar all suits if not

brought within the 10-year time limit. The statute therefore limits to 10 years the time during which the infancy and insanity provisions of the earlier enacted § 25-213 would permit an action to be brought. See *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982).

In *O'Connor v. Abraham Altus*, 67 N.J. 106, 335 A.2d 545 (1975), the court reached the same conclusion in determining the application of the tolling statute for infancy and insanity to a statute which required that certain actions against architects be brought within 10 years. "From this it follows that in our view the legislature did not intend the ten-year period after construction to be 'expanded' by reason of one's infancy. This is not to say that the tolling statute is to be disregarded entirely. Rather, it seems reasonable — and serves the salutary purpose of harmonizing the statutes under examination — to conclude that the tolling statute will safeguard a remedy for a cause of action of the type affected by *N.J.S.A.* 2A:14-1.1 accruing during infancy, but only to the extent that the period within which suit must be brought against one included in the favored class does not extend beyond ten years after completion of construction." *Id.* at 123, 335 A.2d at 554. See, also, *DeLay v. Marathon LeTourneau Sales*, 48 Or. App. 811, 618 P.2d 11 (1980), *aff'd* 291 Or. 310, 630 P.2d 836 (1981); *Hill v. Forrest & Cotton, Inc.*, 555 S.W.2d 145 (Tex. Civ. App. 1977).

Application of the rules of statutory construction and interpretation warrant a conclusion that the enactment of § 25-222 did not incorporate the provisions of § 25-213 as an exception to the 10-year limit expressed in § 25-222. Rather, the Legislature intended to modify the provisions of § 25-213 as applied to professional malpractice cases. When a legislative act is complete in itself but is repugnant to or in conflict with a prior statute not referred to in the act, the earlier statute is repealed or modified by implication by the later act, to the extent of the

repugnancy or conflict. *Ferry v. Ferry*, 201 Neb. 595, 271 N.W.2d 450 (1978); *Connor v. City of Omaha*, 185 Neb. 146, 174 N.W.2d 205 (1970).

It is a well-settled rule of construction that special provisions in a law relating to a particular subject matter will prevail over general provisions, so far as there is a conflict. *State v. Cornell*, 53 Neb. 556, 74 N.W. 59 (1898). An act complete and independent in itself may incidentally amend, modify, or have impact upon the provisions of existing statutes without controverting the constitutional requirement that an amendatory act contain the section amended. *State ex rel. Douglas v. Gradwohl*, 194 Neb. 745, 235 N.W.2d 854 (1975).

Other courts have interpreted statutes similar to § 25-222 as providing absolute "outer limits" within which certain types of actions must be brought. Courts have also upheld these acts against claims that they violate a plaintiff's due process rights.

In *Mathis v. Eli Lilly and Co.*, 719 F.2d 134 (6th Cir. 1983), the court reviewed various decisions dealing with statutes which imposed an absolute time limit for bringing certain types of actions. That case involved a Tennessee statute of limitations that barred products liability actions against manufacturers and sellers more than 10 years after the product was purchased, which was held valid against claims that the statute violated due process. The court held the statute valid even though it effectively extinguished some claims before they could arise.

The court of appeals in the *Mathis* case cited with approval several cases in which it was held that language similar to that used in § 25-222 creates an absolute time limit after the expiration of which all claims are barred. "In *Hawkins*, plaintiff was injured in 1979 by an allegedly defective machine bought in 1966, and he filed suit within one year of the accident, which involved very serious permanently disabling injuries. Judge Wilson held that

the ten-year bar to the Tennessee statute precluded the suit. He described this statute as follows: 'TCA § 23-3703 is clearly not a conventional statute of limitation based upon the occurrence of an event giving rise to a cause of action. Instead it establishes an absolute limit of ten years from the date a product was sold for use or consumption after which all product liability actions are barred.' *Hawkins v. D & J Press Co.*, 527 F. Supp. at 388. He noted the legislative preface and held the law as 'clearly an attempt by the Legislature to create a reasonable time frame to enable manufacturers and distributors as well as their insurance carriers to calculate injury claims arising from the production of goods without compromising the rights of users or consumers of such goods to bring actions for damages within a reasonable number of years after the sale of the product. Although the proposed Uniform Product Liability Act (63 A.L.R.3d Product Liability § 221, 1980 Supplement) provides for a ten year limit without an absolute cutoff date, the Court cannot say that the Tennessee act which does provide an absolute limit would be impermissibly arbitrary. The Court also notes the existence of other absolute time limitations existing under Tennessee law which have been approved by the Tennessee Supreme Court . . . .' " *Mathis*, *supra* at 140, quoting *Hawkins v. D & J Press Co., Inc.*, 527 F. Supp. 386 (E.D. Tenn. 1981).

The court in *Mathis*, *supra* at 140-41, went on to say: "In a comparable kind of situation, statutes of limitation barring suits against professionals such as architects and engineers after lapse of a specific period following the design, plan, supervision or construction have been upheld in federal courts despite the fact that the injury arising from a claimed defect may have occurred after the limitation period. The effect of holding such a state limitation bar valid is to preclude an injured party from suing a party claimed to be responsible, although his knowl-

edge of the defect, or his injury as a consequence of the effect, did not come about, or could not have come about, until after the statutory period prescribed. *See Wiggins v. Proctor & Schwartz*, 330 F. Supp. 350 (E.D. Va. 1971), *aff'd*, No. 71-1952 (4th Cir., 3/8/72, per curiam); *Smith v. Allen-Bradley Co.*, 371 F. Supp. 698 (W.D. Va. 1974); *Agus v. Future Chattanooga Dev. Corp.*, 358 F. Supp. 246 (E.D. Tenn. 1973)."

The court of appeals in *Mathis*, *supra* at 142-43, also cited with approval *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978).

"In *Harrison v. Schrader*, *supra*, the Tennessee Supreme Court had upheld the constitutionality of the Medical Malpractice Act and the three-year limitation, set out in Tenn.Code Ann. § 23-3415(a), which reads, in pertinent part: 'in no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment . . . .' The Tennessee Supreme Court in a decision by its Chief Justice, now deceased, in *Harrison*, 569 S.W.2d at 824, observed: 'It should be noted at the outset that this is not a conventional statute of limitations. Rather it is an outer limit or ceiling superimposed upon the existing [negligence] statute . . . . Suits must be brought within one year from and after the date of the injury or damage, or the date such injury or damage was discovered, subject to the three-year ceiling fixed by Sec. 23-2415(a). *See Watts v. Putnam County*, 525 S.W.2d 488 (Tenn. 1975).'

"The Supreme Court concluded that the three-year 'outer limit or ceiling' was not demonstrably unreasonable and irrational even though it applied only to those suffering injuries from 'health care providers.' 569 S.W.2d at 825. There was a recognized 'medical malpractice insurance crisis,' and 'premiums had risen astronomically.' 569 S.W.2d at 826. The court observed, quoting from *Barnes v. Kyle*, 202 Tenn.

529, 535 (1957), that '[t]he constitutional guaranty providing for open courts and insuring a remedy for injuries does not guaranty a remedy for every species of injury, but applies only to such injuries as constitute violations of established law of which the courts can properly take cognizance.'

"In addition, the Tennessee Supreme Court in *Harrison v. Schrader*, 569 S.W.2d at 827, quoted with approval United States District Judge Frank Wilson's decision in *Hargraves v. Brackett Stripping Machine*, 317 F. Supp. at 682, that '[t]he legislative body, in enacting such legislation, may weigh the conflicting interests between one person's right to enforce an otherwise valid claim and another person's right to be confronted with any claim against him [within a reasonable time].' "

Section 25-222 was enacted as a statute of ultimate repose. In so doing, the Legislature sought to balance the rights of the injured party with the right of a defendant to protect himself from stale claims and to enable him to present an effective defense. While it may be considered unfortunate that in some cases the 10-year period will have run before suit can be brought, the legislative history reveals that the Legislature was aware that such events may occur. However, the Legislature intended to impose an absolute time bar in professional negligence cases rather than leave the time period somewhat open-ended. The majority opinion fails to give effect to the clear intentions of the Legislature with regard to § 25-222.

HASTINGS, J., joins in this dissent.

DOROTHY MACK, APPELLANT, V. PAULINE D. LUEBBEN ET AL., APPELLEES.

341 N.W.2d 335

Filed December 9, 1983. No. 82-547.

1. **Quiet Title.** One seeking to have title quieted in himself is required to recover on the strength of his own title and not on the weakness of his adversary's title.
2. **Adverse Possession.** After the running of the statute an adverse possessor has an indefeasible title which can only be divested by his conveyance of the land to another, or by a subsequent disseisin for the statutory period.
3. **Adverse Possession: Tax Sale: Redemption.** A party who has acquired the title to land by adverse possession may redeem from a delinquent tax sale before the delivery of a tax deed.
4. **Tax Sale: Redemption.** Where land has been redeemed from a delinquent tax sale, a tax deed issued after the redemption is void.
5. **Tax Sale: Limitations of Actions.** The statute of limitations barring actions for the recovery of real estate sold for the nonpayment of taxes has no application where the tax deed was void.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Affirmed.

Michael W. Ellwanger of Kindig, Beebe, Rawlings, Nieland & Killinger, for appellant.

Smith, Smith & Boyd, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

BOSLAUGH, J.

This appeal arises from an action by Dorothy Mack to quiet title to 15 acres of land located in Dakota County, Nebraska. Mack claimed ownership by virtue of a treasurer's tax deed. Defendants Orville and Pauline Luebben and Oscar and Charlene Stone filed a cross-petition claiming ownership by adverse possession and requesting that title be quieted in them. Other defendants did not appear. Following trial, the court quieted title in Pauline Luebben subject to the conjugal rights of her husband and subject to the contractual rights of the Stones. Mack appeals.

The legal description of the property at issue is the east 15 acres of the southeast quarter of the northwest quarter of Section 24, Township 29 North, Range 8 East, of the 6th P.M., Dakota County, Nebraska. The land is located just south of the Missouri River and is separated from the river by several acres of accretion ground. The 15 acres are otherwise surrounded by two farms owned by Oscar Stone. There is no road access to the 15 acres, and in order to reach it one must cross the land owned by Stone. A lane which had been used as a road was plowed under in the early 1950s when George Sohn, the defendants' predecessor in title, acquired the land upon which the lane was located.

The evidence shows that the McKernan family lived upon the 15 acres from the early 1920s to 1952, with some absences of short duration. The McKernans ceased living there in 1952, although they paid taxes on the property for several years after 1952. In the early 1950s defendants' predecessor in title, George Sohn, acquired the farm which surrounds the 15 acres on the west and the south and began using the 15 acres for farming purposes. Sohn continued to farm the 15 acres until his death in 1974. Upon his death the fee simple title was acquired by Sohn's wife, Pauline, now Pauline Luebben. In 1976 Pauline Sohn sold the 15 acres and the surrounding farm, through a land contract, to her daughter and son-in-law, Charlene and Oscar Stone. Stone has farmed the tract since 1974. Stone recently acquired the farm which lies directly east of the tract.

The plaintiff, Dorothy Mack, is a niece of the McKernans. On November 6, 1967, Mack obtained a treasurer's certificate of tax sale to the 15 acres when the land was sold for the delinquent taxes for 1965 and 1966. Following publication of notice, she obtained a treasurer's tax deed on April 16, 1971, which she recorded the same day. The record also shows that Mack had obtained a quitclaim deed to the 15 acres from Ross McKernan, which she re-

corded on April 21, 1970. On April 26, 1971, Mack served notice of her ownership on the Sohns. Mack testified that she used the land for recreational purposes in the 1970s.

On March 18, 1970, George Sohn paid the delinquent taxes on the property for the years 1965 and 1966, and obtained a treasurer's redemption certificate. This was a redemption of the property from the sale to Mack. Stone has continued to farm the 15 acres until the present time. Mack filed this action on February 11, 1981.

On appeal Mack argues that the defendants did not prove that they had acquired title through adverse possession and thus had no right to redeem from the tax sale to Mack. Alternatively, Mack contends that even if the defendants had a right to redeem the property, their claims against the treasurer's tax deed held by Mack are barred by the statute of limitations, Neb. Rev. Stat. § 77-1855 (Reissue 1981).

An action to quiet title is an action in equity and is considered de novo in the Supreme Court. *Bartlett v. Kloepping*, 195 Neb. 755, 240 N.W.2d 592 (1976); Neb. Rev. Stat. § 25-1925 (Reissue 1979). It is the duty of the Supreme Court to reach an independent conclusion without reference to the findings of the District Court. *Pokorski v. McAdams*, 204 Neb. 725, 285 N.W.2d 824 (1979). One seeking to have title quieted in himself is required to recover on the strength of his own title and not on the weakness of his adversary's title. *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977); *Bode v. Flobert Industries, Inc.*, 197 Neb. 488, 249 N.W.2d 750 (1977), *rev'd on other grounds* 211 Neb. 757, 320 N.W.2d 463 (1982). One claiming title through adverse possession may maintain an action to quiet title. *Tourtelotte v. Pearce*, 27 Neb. 57, 42 N.W. 915 (1889).

The evidence in the present case shows that the Sohns and Stones acquired ownership of the 15 acres through adverse possession. One who claims owner-

ship by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for a period of 10 years. *Berglund v. Sisler*, 210 Neb. 258, 313 N.W.2d 679 (1981); Neb. Rev. Stat. § 25-202 (Reissue 1979). The evidence here is that Stone and his predecessor in title farmed the 15 acres continuously for a period of almost 30 years. During this time, the McKernans failed to exercise their rights to the property. Under such circumstances the defendants acquired ownership to the 15 acres. See, e.g., *Cunningham v. Stice*, 181 Neb. 299, 147 N.W.2d 921 (1967); *Dunnick v. Stockgrowers Bank of Marmouth*, 191 Neb. 370, 215 N.W.2d 93 (1974). After the running of the statute an adverse possessor has an indefeasible title which can only be divested by his conveyance of the land to another, or by a subsequent disseisin for the statutory period. *Hendrickson v. Glaser*, 204 Neb. 492, 283 N.W.2d 41 (1979).

Neb. Rev. Stat. § 77-1824 (Reissue 1981) provides: "The *owner or occupant of any land sold for taxes* or any person having a lien thereupon or interest therein, *may redeem the same at any time before the delivery of tax deed* by the county treasurer by paying the county treasurer for the use of such purchaser, his or her heirs or assigns, the sum mentioned in his or her certificate, with interest thereon at the rate specified in section 45-104.01, as such rate may from time to time be adjusted by the Legislature, from the date of purchase to date of redemption, together with all other taxes subsequently paid, whether for any year or years previous or subsequent to said sale, and interest thereon at the same rate from date of such payment to date of redemption." (Emphasis supplied.) It is clear from the evidence in this case that defendants were owners of the 15 acres through adverse possession and were entitled to redeem the property from the tax sale to Dorothy Mack, pursuant to the provisions of

§ 77-1824. See *Thomas v. Flynn*, 169 Neb. 458, 100 N.W.2d 37 (1959).

The evidence shows that Sohn redeemed the property before the tax deed was delivered to Mack. The redemption thus inured to the benefit of the defendants, as they claim through Sohn and are the persons having legal or equitable title to the property redeemed. Neb. Rev. Stat. § 77-1828 (Reissue 1981).

Proof of such redemption defeats any title conveyed by the tax deed. Neb. Rev. Stat. § 77-1843 (Reissue 1981). Furthermore, Neb. Rev. Stat. § 77-1845 (Reissue 1981) provides that a treasurer's deed issued as a result of a tax sale "shall not convey the title" if the owner has paid his taxes and the sale was made through a mistake made in the treasurer's books. The effect of the statute is to declare the deed to Mack void, since it was issued erroneously after redemption had occurred. The tax deed held by Mack was void and did not convey title to her, because the equitable owner had redeemed the property.

Mack's contention that the defendants were barred by Neb. Rev. Stat. § 77-1855 (Reissue 1981) from quieting title to the property as against her is without merit. The statute purports to bar actions for the recovery of real estate sold for the nonpayment of taxes 5 years after the execution and recording of a treasurer's deed. Mack was not in possession and the deed was absolutely void.

It is generally held that possession under the deed is essential to asserting the bar of such so-called "short" statutes of limitation. 72 Am. Jur. 2d *State and Local Taxation* § 1057 (1974). In *Baldwin v. Merriam*, 16 Neb. 199, 201, 20 N.W. 250, 251 (1884), this court said: "Even if the deeds had been valid on their face the statute would not commence to run in favor of the holder until he took posession. . . . If a party claims under a tax deed and invokes the aid of

the special statute of limitations he must bring himself within the rule as to adverse possession."

Where the tax deed is regular on its face but void for a jurisdictional defect, the generally accepted rule is that a special or "short" statute of limitations does not apply. 72 Am. Jur. 2d *State and Local Taxation* § 1054 (1974).

Where the taxes have actually been paid at the time of the sale, the defect is considered jurisdictional. The decided weight of authority is to the effect that a purchaser at a tax sale which is void because the taxes in fact have been paid does not acquire title under the void deed by possession for the period of a "short" statute of limitations. Annot., 26 A.L.R. 622 (1923).

In *Wells v. Bloom*, 96 Neb. 430, 147 N.W. 1112 (1914), the plaintiff alleged the defendant's tax deed was void because the defendant had failed to comply with the statutory provision regarding notice of the expiration of the period of redemption. Although the defendant had been in possession for more than 6 years, this court held that the plaintiff could redeem at any time within 10 years. The opinion states at 434, 147 N.W. at 1113-14: "We therefore hold that the rights of the parties in this case must be determined under the revenue law of 1901 (chapter 77, art. I) in force at the time defendant purchased the land in controversy at tax sale and obtained his tax sale certificate. This being true, then, under the facts pleaded in plaintiff's petition as above set out, which are expressly admitted by the demurrer, defendant's tax deed is void and conferred upon him nothing more than color of title. Plaintiff, therefore, had a right to proceed to quiet his title and to redeem at any time within ten years. Having proceeded within that period, the court erred in sustaining the demurrer and dismissing the suit."

Upon similar facts in *Lanigan v. Gilroy*, 97 Neb. 754, 757, 151 N.W. 297, 298 (1915), this court said: "If it be said that the tax deeds in question, when con-

sidered apart from the evidence on which they were executed, are valid on their face, they are nevertheless void, and the grantee acquired no rights by reason of their execution. *Stewart v. Ridenour*, *ante* p. 451; *Peck v. Garfield County*, 88 Neb. 635; *Thomsen v. Dickey*, 42 Neb. 314; *State v. Gayhart*, 34 Neb. 192." See, also, *Brokaw v. Cottrell*, 114 Neb. 858, 211 N.W. 184 (1926).

The order quieting title in the defendants was correct. The judgment is affirmed.

AFFIRMED.

WHITE, J., concurs in the result.

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

I concur in the result reached by the majority herein and write separately because I believe that while the result reached by the majority is correct, they have injected a concept which is incorrect. I specifically refer to that portion of the majority opinion which provides that the deed issued to Mack was void because of the treasurer's error and therefore the provisions of Neb. Rev. Stat. § 77-1855 (Reissue 1981) have no application. I do not believe that that is the case.

Section 77-1855 has been a part of the Nebraska statutes since before 1903. Early decisions based on the forerunner of § 77-1855 made it clear that one is to determine the validity of the deed for the purposes of § 77-1855 based upon whether the deed is "void on its face." If the deed is not void on its face but merely voidable, as in the present case, then the statute applies. In one of the very early cases we said: "A tax deed must be valid *on its face* to entitle the party claiming under it to the benefit of the special limitation of the revenue law." (Emphasis supplied.) (Syllabus of the court.) *Bendexen v. Fenton*, 21 Neb. 184, 31 N.W. 685 (1887). See, also, *Housel v. Boggs*, 17 Neb. 94, 22 N.W. 226 (1885). That has been the standard applied by this court since that time. See, also, *Sherlock v. Gillis*, 108 Neb. 72, 187 N.W. 812 (1922), *overruled on other grounds* in

Podewitz v. Gering Nat. Bank, 171 Neb. 380, 106 N.W.2d 497 (1960); *Lanigan v. Gilroy*, 97 Neb. 754, 151 N.W. 297 (1915); *Opp v. Smith*, 102 Neb. 152, 166 N.W. 265 (1918). If, indeed, the tax deed in this case was void because it was issued by reason of a mistake made in the treasurer's books, not appearing on the face of the deed, then the provisions of § 77-1855 apply.

The majority, however, is correct in its conclusion because, in addition to acquiring a deed valid on its face, one further requirement is imposed before the provisions of § 77-1855 apply. That requirement is that the claimant must be in *actual* possession of the land. In *Baldwin v. Merriam*, 16 Neb. 199, 201, 20 N.W. 250, 251 (1884), this court held: "Even if the deeds had been valid on their face the statute would not commence to run in favor of the holder until he took possession. A party in actual possession of real estate cannot be ousted from such possession or his title divested by merely recording a tax deed of which he may not be aware and under which nothing is claimed. If a party claims under a tax deed and invokes the aid of the special statute of limitations he must bring himself within the rule as to *adverse possession*." (Emphasis supplied.) The evidence in this case is clear that Mack could not bring herself within the rules regarding adverse possession because whatever possession she may have had with regard to the property, and the evidence is less than clear, it was not possession by actual, open, *exclusive*, and continuous possession, and therefore was not sufficient to invoke the provisions of § 77-1855.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1536, APPELLEE, V. LINCOLN ELECTRIC SYSTEM, APPELLANT.

341 N.W.2d 340

Filed December 9, 1983. No. 82-663.

1. **Labor and Labor Relations: Employer and Employee.** Individuals who are authorized to responsibly direct other employees are supervisory employees and should be excluded from an employee bargaining unit.
2. _____: _____. Factors to be considered in determining whether a community of interest exists are mutuality of interest in wages, hours, and working conditions; the duties and skills of the employees; the extent of union organization among the employees; the desires of the employees; the extent of employee interchange; and the policy against fragmentation of units.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed in part, and in part reversed and remanded.

Douglas L. Curry of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry and Gordon, for appellant.

Thomas C. Lansworth of Bauer, Galter & Geier, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The respondent, Lincoln Electric System, has appealed from the order of the Commission of Industrial Relations determining the composition of the bargaining unit represented by the petitioner.

The commission found that the line clearance crew foremen, the equipment mechanic crew foremen, the line construction and maintenance foremen, and four classifications of employees in the power supply division should be included in the bargaining unit. The substation construction foreman, meter department crew foreman, and communication and test technician crew foreman were excluded from the bargaining unit.

The respondent contends that the crew foremen and the employees in the power supply division should not be included in the bargaining unit. Only the respondent has appealed from the order of the commission.

The issue with respect to the crew foremen is whether they are supervisory personnel and should be excluded from an employee bargaining unit. In *City of Grand Island v. American Federation of S. C. & M. Employees*, 186 Neb. 711, 185 N.W.2d 860 (1971), we determined that individuals who are authorized to responsibly direct other employees are supervisory employees and should be excluded from an employee bargaining unit. See, also, *Nebraska Assn. of Pub. Emp. v. Nebraska Game & Parks Commission*, 197 Neb. 178, 247 N.W.2d 449 (1976).

The evidence in this case shows that the line of authority in the operations division is generally from the operations manager through a supervisor, general foreman, and crew foreman to the individual workmen. Each crew foreman who is under a general foreman receives orders and supervision from his general foreman. However, the crew foreman is responsible for the direction and management of the employees assigned to his crew, including the training of apprentices, and is required to perform employee performance appraisals of the members of his crew.

The fact that the foremen also perform the same or some of the same duties as other members of the crew and work alongside the other members of the crew is not determinative. The controlling consideration is that the crew foremen are authorized and required to responsibly direct the other members of the crew. We conclude that the finding of the commission on the issue in regard to the crew foremen involved in this appeal is not supported by substantial evidence and must be reversed.

The remaining issue is whether three generation employees in the power supply division should be

included in the bargaining unit comprised of employees in the operations division of the respondent. The evidence is that the power supply division is a separate division and that there is little relationship between the two divisions. The generation employees involved are classified as boiler operator, Operator I, and Operator II. There are five employees in these classifications, of whom three are members of the petitioner. There are approximately 17 employees in similar power supply division classifications who are not members of the petitioner.

We think the evidence fails to show a community of interest between the employees of the two divisions. Factors to be considered in determining whether a community of interest exists are mutuality of interest in wages, hours, and working conditions; the duties and skills of the employees; the extent of union organization among the employees; the desires of the employees; the extent of employee interchange; and the policy against fragmentation of units. *City of Grand Island v. American Federation of S. C. & M. Employees, supra*; *American Assn. of University Professors v. Board of Regents*, 198 Neb. 243, 253 N.W.2d 1 (1977); *Sheldon Station Employees Assn. v. Nebraska P.P. Dist.*, 202 Neb. 391, 275 N.W.2d 816 (1979).

The commission based its finding on this issue on the facts that the employees of both divisions enjoy the same fringe benefits, the generation employees do not require a significantly greater amount of education or training, and the generation employees involved have been members of the bargaining unit for 2 years. These factors do not outweigh the facts that the divisions operate separately, the employees of the two divisions perform entirely separate duties, and there has been little union organization among the employees of the power supply division. We conclude that the finding of the commission on this issue is not supported by substantial evidence and must be reversed.

The order of the commission is affirmed in part and in part reversed and the cause remanded.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

KRIVOSHA, C.J., not participating.

SANITARY AND IMPROVEMENT DISTRICT NO. 32 OF SARPY COUNTY, NEBRASKA, APPELLANT, V. CONTINENTAL WESTERN CORPORATION ET AL., APPELLEES.

343 N.W.2d 314

Filed December 9, 1983. No. 82-666.

1. **Actions: Parties: Sanitary and Improvement Districts.** An action to determine the rights and liabilities of parties to a sanitary and improvement district warrant is an action at law.
2. **Declaratory Judgments: Appeal and Error.** Where a jury is waived in a declaratory judgment action in which there are questions of fact, the findings of the trial court on such issues have the effect of a jury verdict and will not be set aside unless clearly wrong.
3. **Governmental Subdivisions: Sanitary and Improvement Districts.** A sanitary and improvement district is a governmental unit such as is contemplated by Neb. U.C.C. § 3-105(1)(g) (Reissue 1980).
4. **Negotiable Instruments.** Whether one has taken a negotiable instrument in good faith is determined subjectively, that is to say, whether there was honesty of intent rather than the absence of circumstances which would put an ordinarily prudent holder on inquiry.
5. **Sanitary and Improvement Districts.** A transaction between a sanitary and improvement district and an entity with which it shares common directors, officers, or attorneys need not be, on that ground alone, illegal and a nullity.
6. **Negotiable Instruments: Consideration.** Failure of consideration is no defense to a negotiable instrument in the hands of a holder in due course.
7. **Negotiable Instruments: Fraud.** Although fraud in the factum is a defense as against a holder in due course of a negotiable instrument, fraud in the inducement is not.
8. **Contracts: Negotiable Instruments: Fraud.** The fraud practiced by misrepresenting the intention to perform a contract is fraud in the inducement and is not available as a defense against a holder in due course of a negotiable instrument.

9. **Contracts: Negotiable Instruments: Consideration.** The consideration necessary to support a contract or negotiable instrument must be within the contemplation of the parties.
10. **Limitations of Actions.** The bar of a statute of limitations is an affirmative defense and must be pled.

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

Robert C. Doyle of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellant.

Thomas J. Culhane of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellee American Savings.

Clayton Byam, and Richard Croker of Croker, Huck & McReynolds, for appellee Judy Co.

James D. Sherrets of Kutak Rock & Huie, for appellees Frankson and Robertson.

Warren S. Zweiback of Zweiback, Kasher, Flaherty & DeWitt, P.C., for appellee Alexander & Alexander.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

In this suit for declaratory judgment plaintiff-appellant, Sanitary and Improvement District No. 32 of Sarpy County, Nebraska, seeks to have certain warrants it has issued declared invalid. The defendants who answered below, the appellees herein, are the present holders of some of those warrants. They counterclaim, seeking an order that the district levy taxes and retire their warrants. The trial court, which tried the action without a jury, dismissed the district's petition and granted the relief sought by the answering warrant holders. This appeal followed. We affirm in part and in part reverse and remand for further proceedings.

BACKGROUND

The district was formed in 1965. By 1974 all the land within the district was owned by Continental Western Corporation and Southroads Corporation, with the exception of undivided interests in a small tract deeded to each of the members of the board of trustees of the district in order to enable them to so serve. These two corporations were effectively under the control of Antilles Corporation, which, in turn, was controlled by J. R. Swenson.

In 1973 Continental Western commenced the construction of a golf course in the Coronado Estates subdivision of the district. On May 1, 1974, the board of trustees of the district adopted a resolution of necessity empowering its chairman and clerk to enter into a contract to purchase the golf course from Continental Western. Pursuant thereto, a purchase agreement was entered into which called for the district to purchase the golf course and issue to Continental Western $350,000 in warrants as a downpayment on the purchase price. The balance of the $2,408,000 purchase price was to be paid to Continental Western as the work on the partially constructed golf course progressed. On May 2, 1974, the board of trustees approved a resolution to issue bonds in order to pay the balance of the purchase price of the golf course. The bond issue was to be handled by Hawkins Brothers, Inc., of Kansas City.

Warrants numbered 1A through 47A, totaling $350,000, were issued to Continental Western on May 7, 1974, for the downpayment. Subsequently, The Judy Company purchased warrants 19A, 20A, and 32A through 40A from Frank Hawkins, who was Continental Western's original transferee. Alexander & Alexander, Inc., purchased warrants 14A, 15A, and 16A from Continental Western. American Savings Company purchased warrants 27A through 31A from Continental Western. Roy Robertson purchased warrants 6A and 7A from Continental Western. Donald W. Frankson purchased 4A and 5A

from Continental Western. These parties gave value totaling $137,800 for the warrants, the face value of which was $185,000, were without notice of any irregularity in the issuance of the warrants, and answered and counterclaimed in the court below. They are referred to hereinafter as the "answering warrant holders."

On June 17, 1974, the Nebraska District Court, Second Judicial District, Sarpy County, entered a decree approving the bond issue and related matters concerning the construction and purchase by the district of the golf course.

In the summer of 1974 First Westroads Bank instituted foreclosure proceedings on some of the land in the district held by Continental Western. Because of this and other foreclosures on the holdings of Continental Western within the district, Hawkins Brothers was unable to sell the bonds, which had already been printed and delivered to the State Auditor's office for registration. The district did not ask Continental Western to return the warrants after it became apparent that the bond issue would fail.

All the land in the district is now owned by two banks, Metro North State Bank of Kansas City and First National Bank of Council Bluffs, the latter having acquired the Coronado Estates subdivision through foreclosure and by purchasing another bank's interest. It appears that Metro North was aware of the warrants at the time it foreclosed, or shortly thereafter, on Continental Western's holdings in the district.

On February 7, 1975, after Metro North had instituted a foreclosure on Continental Western's holdings in the district, it entered into an agreement with the district that the district would not incur any additional indebtedness without that bank's prior approval. At this time it appears that Metro North knew of the outstanding warrants. In July or August of 1979 First National took control of the board of trustees of the district. First National, through its

president who is now a trustee of the district, claims not to have had any knowledge of the $350,000 in outstanding warrants until July of 1979.

In 1980 the district instituted this suit. It appears that some of the parties named as defendants failed to answer the district's petition. They are Continental Western, William Ramsey, and J. Sig Swenson. Frank Hawkins filed an answer denying any interest in the warrants in question, and has made no appearance in this court. The trial court dismissed the district's petition as to all the parties named as defendants. Only the answering warrant holders made an appearance and filed a brief in this court.

ISSUES

The issues presented by the district's assignments of error may be summarized as asking, (1) What is the nature of a sanitary and improvement district warrant? (2) What defenses to liability on such a warrant are available as against one who gave value and had no notice of any irregularity? and (3) What defenses are available as against a party to the transaction underlying the warrants? No arguments are presented by the district to this court as to the propriety of the trial court's direction that the board of trustees levy taxes and redeem the warrants.

SCOPE OF REVIEW

A suit for declaratory judgment is sui generis and may involve questions of both law and equity. *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 318 N.W.2d 70 (1982). Issues of fact in declaratory judgment suits may be tried and determined as in other civil actions. Neb. Rev. Stat. § 25-21,157 (Reissue 1979).

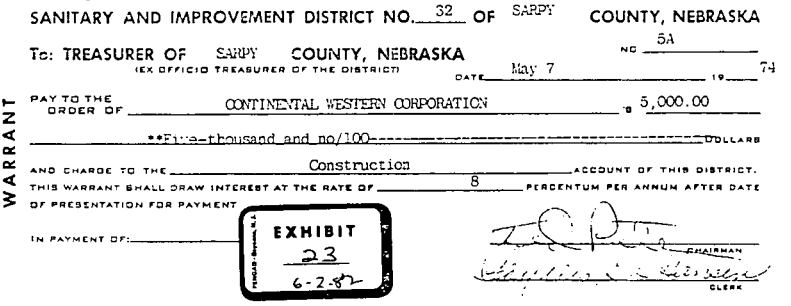
An action to determine the rights and liabilities of parties to a sanitary and improvement district warrant, as with a promissory note, is an action at law, *Klitzing v. Didier*, *ante* p. 122, 337 N.W.2d 418 (1983), and, as such, the parties herein were entitled to a jury trial on the fact issues presented. A jury hav-

ing been waived, however, the findings of the trial court on the fact issues involved have the effect of a jury verdict and will not be set aside unless clearly wrong. *Hemenway v. MFA Life Ins. Co.*, *supra*; *Larutan Corp. v. Magnolia Homes Manuf. Co.*, 190 Neb. 425, 209 N.W.2d 177 (1973).

NATURE OF WARRANTS

Not Investment Securities

We first turn our attention to the nature of the warrants in question, which were issued in the following form:



SANITARY AND IMPROVEMENT DISTRICT NO. 32 OF SARPY COUNTY, NEBRASKA

No. 5A

To: TREASURER OF SARPY COUNTY, NEBRASKA
(EX OFFICIO TREASURER OF THE DISTRICT)

DATE May 7, 19 74

WARRANT

PAY TO THE ORDER OF CONTINENTAL WESTERN CORPORATION $ 5,000.00

**Five-thousand and no/100---------- DOLLARS

AND CHARGE TO THE Construction ACCOUNT OF THIS DISTRICT.

THIS WARRANT SHALL DRAW INTEREST AT THE RATE OF 8 PERCENTUM PER ANNUM AFTER DATE OF PRESENTATION FOR PAYMENT

IN PAYMENT OF:

EXHIBIT 23 6-2-82

CHAIRMAN

CLERK

It was not until 1976 that Neb. Rev. Stat. § 31-727(5)(d) (Reissue 1978) provided: "(5) For the purposes of sections 31-727 to 31-762, unless the context otherwise requires:

. . . .

"(d) Warrant shall mean a short-term interest-bearing order payable on a specified date issued by the board of trustees of a sanitary and improvement district to be paid from funds expected to be received in the future, including, but not limited to, property tax collections, special assessment collections, and proceeds of sale of general obligation bonds." 1976 Neb. Laws, L.B. 313.

In 1978 the following language was added to Neb. Rev. Stat. § 31-755 (Reissue 1978): "Interest on capital outlay warrants shall be represented by coupons payable to bearer attached to each warrant, but coupons shall not be issued for interest accruing after the due date of such warrant. Such coupons

shall not be deemed to be investment securities under article 8 of the Uniform Commercial Code and coupons shall always be subject to all defenses which the district may have to payment of the warrant itself. All coupons shall show on their face the number of the warrant to which they appertain and that the coupon shall not be valid for payment of any interest after the warrant has been called for redemption or redeemed. Warrant interest coupons not paid when due for lack of funds shall be registered, bear interest, and be paid the same as is provided in section 10-209 for bond coupons." 1978 Neb. Laws, L.B. 870.

In 1982, § 31-727(5)(d) (Cum. Supp. 1982) was amended to read as follows: "(5) For the purposes of sections 31-727 to 31-762, 31-735.06, and 31-771 to 31-780, unless the context otherwise requires:

. . . .

"(d) Warrant shall mean *an investment security under article 8 of the Uniform Commercial Code in the form of* a short-term interest-bearing order payable on a specified date issued by the board of trustees or administrator of a sanitary and improvement district to be paid from funds expected to be received in the future, including, but not limited to, property tax collections, special assessment collections, and proceeds of sale of general obligation bonds." (Emphasis supplied.) 1982 Neb. Laws, L.B. 868.

At the same time, § 31-755 (Reissue 1978) was amended by removing the language which read, "Such coupons shall not be deemed to be investment securities under article 8 of the Uniform Commercial Code and coupons shall always be subject to all defenses which the district may have to payment of the warrant itself." 1982 Neb. Laws, L.B. 868. The latest version of the pertinent portion of § 31-755 (Cum. Supp. 1982) reads: "Interest on capital outlay warrants shall be represented by coupons payable to bearer attached to each warrant, but cou-

pons shall not be issued for interest accruing after the due date of such warrant. All coupons shall show on their face the number of the warrant to which they appertain and that the coupon shall not be valid for payment of any interest after the warrant has been called for redemption or redeemed. Warrant interest coupons not paid when due for lack of funds shall be registered, bear interest, and be paid the same as is provided in section 10-209 for bond coupons." 1982 Neb. Laws, L.B. 868.

The answering warrant holders argue that these various legislative enactments demonstrate that the 1982 amendment of § 31-727(5)(d) merely declared what warrants had always been and what the warrants in question were when issued, namely, investment securities under article 8 of the Uniform Commercial Code.

We cannot agree. In this connection we find the district's argument persuasive, namely, that the 1978 amendment to § 31-755 was to keep the coupons, which upon detachment from a warrant become payable to bearer, from being treated differently than the underlying warrant. When in 1982 the Legislature declared warrants to be investment securities by amending § 31-727(5)(d), there was no longer any reason to treat the coupons as anything other than investment securities. We conclude, therefore, that the 1982 amendment to § 31-727(5)(d) changed the preexisting nature of warrants rather than merely declaring what they had always been.

The question remains, however, whether, notwithstanding the various forms of §§ 31-727(5)(d) and 31-755, the subject warrants are nonetheless investment securities under the language of Neb. U.C.C. § 8-102(1)(a) (Reissue 1980), which at all relevant times provided, as it does presently: "A 'security' is an instrument which (i) is issued in bearer or registered form; and (ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt

in as a medium for investment; and (iii) is either one of a class or series or by its terms is divisible into a class or series of instruments; and (iv) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer."

The parties hereto stipulated that the warrants in question met the requirements of subsections (ii), (iii), and (iv) above, leaving only compliance with subsection (i) at issue.

It is clear, however, that the warrants were issued payable "to the order of Continental Western Corporation," not to "bearer." "A security is in 'bearer form' when it runs to bearer according to its terms and not to [sic] reason of any indorsement." § 8-102(1)(d).

Neither are they in "registered form" as defined in § 8-102(1)(c): "A security is in 'registered form' when it specifies a person entitled to the security or the rights it evidences and when its transfer may be registered upon books maintained for that purpose by or on behalf of an issuer or the security so states."

In this latter regard we again agree with the district that the provisions of Neb. Rev. Stat. §§ 77-2201 et seq. (Reissue 1981), which require governmental treasurers to register warrants such as those in question for payment in the order of presentment as money becomes available, do not fulfill the requirements of § 8-102(1)(c) above. That section contemplates that a security is in registered form when it specifies a person entitled to the security or the rights it evidences and when its transfer may be registered upon books maintained for that purpose by or on behalf of an issuer, or the security so states. That is to say, it is in registered form when it is transferable only on the books of the issuer. See *Victory Nat. Bk., Nowata v. Oklahoma St. Bk., Vinita*, 520 P.2d 675 (Okla. 1973).

We therefore conclude that the warrants in ques-

tion fail to meet the requirements of § 8-102(1)(a)(i) and are not investment securities.

Are Negotiable Instruments

The question now becomes whether they are negotiable instruments within the contemplation of article 3 of the Uniform Commercial Code.

Since its enactment in 1963, Neb. U.C.C. § 3-104 (Reissue 1980) has provided in part: "(1) Any writing to be a negotiable instrument within this article must (a) be signed by the maker or drawer; and (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this article; and (c) be payable on demand or at a definite time; and (d) be payable to order or to bearer."

The warrants are in writing, are signed by the district as the maker, and are payable to order. See Neb. U.C.C. § 3-110 (Reissue 1980), which provides that an instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty. Thus, the requirements of § 3-104(1)(a) and (d) are clearly met.

The requirement of § 3-104(1)(b) is likewise met. Neb. U.C.C. § 3-105 (Reissue 1980) has always provided in part: "(1) A promise or order otherwise unconditional is not made conditional by the fact that the instrument . . . (g) is limited to payment out of a particular fund or the proceeds of a particular source, if the instrument is issued by a government or governmental agency or unit." A sanitary and improvement district is such a governmental unit, as is contemplated by § 3-105(1)(g), under the provisions of Neb. Rev. Stat. § 31-705 (Reissue 1978), which has always stated that such a district shall be "a body corporate and politic." See, also, *Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276*, 204 Neb. 316, 282 N.W.2d 576 (1979); *Hayes v.*

Sanitary & Improvement Dist. No. 194, 196 Neb. 653, 244 N.W.2d 505 (1976); Comment 6 to § 3-105.

The requirement of § 3-104(1)(c) is met as well. Neb. U.C.C. § 3-108 (Reissue 1980) has, at all relevant times, provided: "Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated." See, also, *Erickson v. Newell*, 183 Neb. 641, 163 N.W.2d 286 (1968), holding that a note which did not contain a due date was a demand note drawing interest until paid.

We conclude, therefore, that the subject warrants are negotiable instruments.

DEFENSES

Holders in Due Course

We next need to determine the status of the answering warrant holders. At all material times Neb. U.C.C. § 3-302 (Reissue 1980) has provided in part: "(1) A holder in due course is a holder who takes the instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person."

A holder has consistently been defined as one who is in possession of an instrument issued or endorsed to him or to his order, or to bearer or in blank. Neb. U.C.C. § 1-201(20) (Reissue 1980). Each of the answering warrant holders is in possession of warrants which had been endorsed to him or it by Continental Western or the latter's transferee. Each is therefore a holder. The question now becomes whether each is a holder in due course.

Each answering warrant holder gave value. It was stipulated that The Judy Company, Alexander & Alexander, Inc., and American Savings Company, which at various relevant times was also known as American Securities Company and American Thrift and Loan, Inc., gave value. Frankson and Robertson each testified that he gave value.

We deal with the "good faith" and "without no-

tice" requirements of § 3-302(1)(b) and (c) together, for although they are separate elements, the same set of facts at times may, as they do in this case, resolve both issues.

"Good faith" has always been defined in § 1-201(19) as honesty in fact in the conduct or transaction concerned. Whether one has taken a negotiable instrument in good faith is determined subjectively, that is to say, whether there was honesty of intent rather than the absence of circumstances which would put an ordinarily prudent holder on inquiry. *Leininger v. Anderson*, 255 N.W.2d 22 (Minn. 1977); *Frantz v. First Nat. Bank of Anchorage*, 584 P.2d 1125 (Alaska 1978); *Favors v. Yaffe*, 605 S.W.2d 342 (Tex. Civ. App. 1980); *Breslin v. New Jersey Investors, Inc.*, 70 N.J. 466, 361 A.2d 1 (1976). See, also, J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 14-6 (2d ed. 1980). Compare, however, *Saka v. Sahara-Nevada Corp.*, 92 Nev. 703, 558 P.2d 535 (1976), stating that bad faith may be presumed from a reckless refusal to inquire.

Under the provisions of § 1-201(25) one has at all relevant times had "notice" of a fact when "(a) he has actual knowledge of it; or (b) he has received a notice or notification of it; or (c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists. . . ."

Neb. U.C.C. § 3-304 (Reissue 1980) has listed a variety of circumstances in which a purchaser is deemed to have notice, and others which do not of themselves give the purchaser notice of a claim or defense.

We therefore analyze the evidence in light of § 3-304. It was stipulated that the purchase of the warrants by The Judy Company and Alexander & Alexander, Inc., was "without notice" of any adverse claim to, or defect in, said warrants. The former president of American Savings testified, without contradiction, that he had no knowledge as

to how Continental Western acquired the warrants purchased by American Savings, did not know the specific purpose for which they were issued, had no knowledge of any adverse claim or defense with respect to them, and, in fact, had been assured by the district's attorney that the warrants had been properly issued. Frankson testified that although he at some time served on Continental Western's board, he did not know the purpose for which the warrants he had purchased were issued, and had no knowledge of any defect or infirmity or of any adverse claim or defense against them. He, too, had been assured by the district's attorney that the warrants were "a sound investment." Robertson also served on the board at some time. He knew the warrants he had purchased were for the golf course, in connection with which he had made an inspection and had seen "pipe and all the other things." He testified he had no knowledge of any defects or infirmity in or defenses to the warrants. He also had been assured by the district's attorney that the matter had been "handled properly and [there] was nothing to be afraid of."

Under these circumstances it cannot be said the trial court was clearly wrong in concluding that the answering warrant holders took the warrants for value and in good faith. All of the requirements of § 3-302 having thus been met, the answering warrant holders are holders in due course.

One of the more important consequences of being a holder in due course of a negotiable instrument is that such a holder is not subject to certain defenses or claims which may exist between the original parties to the instrument. The rule has been set forth in Neb. U.C.C. § 3-305 (Reissue 1980) as follows: "To the extent that a holder is a holder in due course he takes the instrument free from

"(1) all claims to it on the part of any person; and

"(2) all defenses of any party to the instrument with whom the holder has not dealt except

"(a) infancy, to the extent that it is a defense to a simple contract; and

"(b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and

"(c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and

"(d) discharge in insolvency proceedings; and

"(e) any other discharge of which the holder has notice when he takes the instrument."

The district claims its obligation is a nullity because its warrants were issued in relationship with an illegal transaction. Therefore, it argues, the answering warrant holders took the warrants subject to that defense pursuant to the provision of § 3-305(2)(b).

In support of its position the district cites what it characterizes as "black letter law," which holds that contracts between municipal corporations and others which involve a conflict of interest because of employee, officer, director, or attorney relationships are void as against public policy. The district further contends that since, at the time of the golf course transaction, (1) Continental Western's attorney was also the district's attorney, (2) several members of the board of trustees of the district were employees of Continental Western, and (3) the others were subject to removal at Continental Western's desire, the transaction should be declared illegal and a nullity. We do not agree.

In 1976 the Legislature specifically provided, Neb. Rev. Stat. § 31-740 (Reissue 1978), that any purchase by a sanitary and improvement district of "public parks, playgrounds and recreational facilities so approved may be completed and shall be valid notwithstanding any interest of any trustee of the district

in the transaction." 1976 Neb. Laws, L.B. 313.

The approval referred to in the quoted portion of § 31-740 is that of either the county board or a municipality's governing body. Such approval was required by statute at the time of the golf course transaction in the present case. 1974 Neb. Laws, L.B. 629 (passed with an emergency clause, making the statute effective on March 22, 1974).

The district argues that the 1976 legislative pronouncement is evidence that the common law governing conflicts of interest in contracts with municipal corporations, which we accept for purposes of this analysis but do not decide to be as characterized by the district, was applicable to sanitary and improvement districts prior to 1976. It argues that the Legislature was not willing to change the applicability of that common-law rule until it required that an outside, independent body review the transaction. The answering warrant holders, on the other hand, argue that the 1976 legislative pronouncement was one which merely clarified a point of possible confusion.

While the district's argument on this issue is not without some logical basis, we are not convinced by it. The approval requirement was changed in 1974, some 2 years prior to the L.B. 313 additions. Moreover, the unvarnished fact of the matter is that, to a certain extent, a sanitary and improvement district is designed to be a government of, by, and for developers. The sanitary and improvement districts law, Neb. Rev. Stat. §§ 31-727 et seq. (Reissue 1978), has always contemplated that owners of land may form a sanitary and improvement district, name the board of trustees, and carry out its corporate purposes. A largely undeveloped sanitary and improvement district which consists of but one or several large landowners could not function without some amount of self-dealing. The sewer systems, streets, and other necessary improvements must be located somewhere in the district. Land for parks,

golf courses, and other recreational facilities must be purchased from someone owning land in the district. Such an owner may also be a member of the board of trustees or exert some influence upon it.

We also note that, at the relevant time, §§ 31-749 to 31-759 (Reissue 1974) required that the details of the purchase be published and provided for a hearing on any objection to the purchase, and the issuance of bonds to pay for the purchase was ultimately subject to the approval of the District Court. Although a decree of the District Court confirming the legality and validity of the bond issue does not determine the validity or invalidity of every contract made by the district in connection with the project which the bond issue was designed to finance, *Hayes v. Sanitary & Improvement Dist. No. 194*, 196 Neb. 653, 244 N.W.2d 505 (1976), there was nonetheless a mechanism for independent review of the transaction, which was utilized in this case.

We hold that a transaction between a sanitary and improvement district and an entity with which it shares common directors, officers, or attorneys need not be, on that ground alone, illegal and a nullity. Consequently, that defense, as asserted by the district, does not fall within the ambit of § 3-305(2)(b). It is therefore unavailing against the answering warrant holders who, as we have said previously, are holders in due course.

As we noted earlier, the approval provisions of § 31-740 were changed on March 22, 1974, by L.B. 629, which added the language which is bracketed in the following quoted portion: "Prior to the installation of any of the improvements provided for in this section, the plans for such improvements, other than for public parks, playgrounds and recreational facilities, shall be approved by the public works department of any municipality when such improvements or any part thereof are within the area of the zoning jurisdiction of such municipality[; Provided, that if such improvements are without the area of

the zoning jurisdiction of any municipality, plans for such improvements shall be approved by the county board of the county wherein such improvements are located], and plans and exact costs for public parks, playgrounds and recreational facilities shall be approved by resolution of the governing body of such municipality [or county]. Such approval shall relate to conformity with the master plan and the construction specifications and standards theretofore established by such municipality [or county]; Provided, where no master plan and construction specifications and standards have been established such approval shall not be required."

From our review of the record it appears that neither the district nor Continental Western was aware of this legislative action which took place a little more than a month prior to the golf course transaction. In their brief the answering warrant holders state that approval was not required at the time of the purchase. In its brief the district appears to be under the erroneous assumption that the approval changes made by the Legislature in 1974 were not accomplished until 1976. Neither in its pleadings nor in its brief does the district raise any contentions that since the approval required by L.B. 629 was not obtained, the transaction between it and Continental Western was an illegal one. On the other hand, the answering warrant holders do not contend that such approval was unnecessary because of the lack of a municipal or county master plan or construction specifications and standards.

The district has not established that the approval of a county or municipal governmental body was necessary. Lack of such approval, if it was required, may have been such a defect as to render the golf course transaction illegal and, thus, render the obligation of the district on the warrants a nullity. This type of defense would be good against a holder in due course. § 3-305(2)(b). See, also, *City of Plattsmouth v. Murphy*, 74 Neb. 749, 105 N.W. 293

(1905), 78 Neb. 163, 110 N.W. 749 (1907), voiding a public contract made in violation of a mandatory provision of a city charter requiring a prior estimate of cost and its submission to the city council.

Neb. U.C.C. § 3-307 (Reissue 1980) places the burden of pleading and proving defenses to a negotiable instrument upon the party attempting to avoid liability on the instrument. *Bank of Valley v. Mattson*, *ante* p. 596, 339 N.W.2d 923 (1983); *Columbus Bank & Trust Co. v. High Country Stable*, 202 Neb. 724, 277 N.W.2d 81 (1979). Since the district has not carried its burden in proving this defense, it is likewise unavailing against the answering warrant holders.

On the facts presented by this record it cannot be said the trial court's finding that the transaction was not illegal and a nullity was clearly wrong.

The district further argues it should not be liable on its warrants, since retention of the warrants by Continental Western after the failure of the bond issue amounted to a fraud and resulted in a conversion of the warrants by Continental Western.

In essence, these claims are contractual defenses based upon a failure of consideration or, in the worst light, a fraudulent intent by Continental Western when it entered into the golf course transaction.

It has long been the law of this jurisdiction that failure of consideration is no defense to a negotiable instrument in the hands of a holder in due course. *Farmers State Bank v. Lydick*, 112 Neb. 586, 200 N.W. 50 (1924); *Bank of Commerce & Savings v. Randell*, 107 Neb. 332, 186 N.W. 70 (1921); *Second Nat. Bank v. Snoqualmie Trust Co.*, 83 Neb. 645, 120 N.W. 182 (1909); *Blue Valley Lumber Co. v. Smith*, 48 Neb. 293, 67 N.W. 159 (1896).

It has also long been the law of this jurisdiction that although fraud in the factum is a defense as against a holder in due course of a negotiable instrument, fraud in the inducement is not. Therefore, we have held the fraud practiced upon an illiterate which induced him to believe that the instrument

signed was of some other character was a good defense as against a holder in due course. *Shenandoah Nat. Bank v. Gravatte*, 4 Neb. (Unoff.) 591, 95 N.W. 694 (1903); *Willard v. Nelson*, 35 Neb. 651, 53 N.W. 572 (1892); *First National Bank of Omaha v. Lierman*, 5 Neb. 247 (1876). On the other hand, we have held that the fraud practiced by misrepresenting the quality of a product is not a valid defense as against a holder in due course. *Broadway Bank of Kansas City v. Sager*, 122 Neb. 894, 240 N.W. 561 (1932); *Farmers State Bank v. Lydick*, *supra*. In *Second Nat. Bank v. Snoqualmie Trust Co.*, *supra*, a misrepresentation concerning the ownership of personal property was held not to be a valid defense against a holder in due course. We have also held that the fraud practiced by an imposter in inducing one to endorse a negotiable instrument under a mistaken belief as to the imposter's identity is not available as a defense to a holder in due course. *Hoffman v. American Exchange Nat. Bank*, 2 Neb. (Unoff.) 217, 96 N.W. 112 (1901), *aff'd on rehearing* 2 Neb. (Unoff.) 222, 96 N.W. 112 (1902). See, also, Comment 7 to § 3-305(2)(c).

We conclude that even if Continental Western possessed a fraudulent intent with respect to its performance when entering into the golf course transaction, it would amount to no more than fraud in the inducement. Therefore, the district has no defenses to the validity of its warrants which are in the hands of the answering warrant holders.

Nonholder in Due Course

While the language of the trial court is unclear on the point, it apparently found that such warrants as may be held by Continental Western were valid, enforceable obligations of the district. With this, we do not agree.

The evidence presented at trial shows that the warrants were issued as partial payment on the contract purchase price of a golf course. Due to Continental Western's tenuous financial position, the bond

issue to finance the balance of the purchase price was unsuccessful. The district never received a golf course. Consequently, it received nothing for its $350,000 in warrants.

Failure of consideration is a valid defense against liability on a warrant in the hands of a nonholder in due course, as it is on a note. Neb. U.C.C. § 3-306(c) (Reissue 1980). See, also, *Organ Company v. Boyle*, 10 Neb. 409, 6 N.W. 473 (1880).

Statements by the answering warrant holders that the consideration given to the district in return for its warrants was the opportunity to purchase a golf course are unpersuasive. It is clear that the district was not purchasing an option by its contract with Continental Western, but a golf course. The consideration necessary to support a contract or negotiable instrument must be within the contemplation of the parties. *Schrempp v. Gallup*, 210 Neb. 415, 315 N.W.2d 248 (1982). Even if we were to accept this theory of consideration, that opportunity to purchase was destroyed by Continental Western because its actions prevented the district from exercising any right to acquire the golf course.

While it is true that the payee of a negotiable instrument may be a holder in due course, § 3-302(2), Continental Western has not achieved that status. It has given no value. Unless one has the rights of a holder in due course, he is subject to all the defenses of any party which would be available in an action on a simple contract, including failure of consideration. § 3-306; Neb. U.C.C. § 3-408 (Reissue 1980). We conclude that the trial court's finding that such warrants as may be in the hands of Continental Western are valid, enforceable obligations of the district is clearly wrong.

While it appears there may be a question as to whether the district's action against Continental Western may not have been commenced within the statutory time limitation, Continental Western did not plead to the district's petition and therefore did

not assert any limitations bar as a defense. Such a defense is an affirmative one and must be pled in order to render it available as a defense. *Bell v. Rice*, 50 Neb. 547, 70 N.W. 25 (1897); *Scroggin v. National Lumber Co.*, 41 Neb. 195, 59 N.W. 548 (1894); 54 C.J.S. *Limitations of Actions* § 354 (1948).

OTHER PARTIES

The findings of the trial court that the district's petition failed to establish any rights flowing to it from the other nonanswering defendants William Ramsey and J. Sig Swenson are not clearly wrong. Neither did the district establish it has any rights against the defendant Frank Hawkins.

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

GERALD L. KENNEY, FATHER AND NEXT FRIEND OF DEBBIE L. KENNEY, A MINOR, APPELLEE, V. ROBERT J. BARNA, APPELLANT.

341 N.W.2d 901

Filed December 9, 1983. No. 82-737.

1. **Trespass: Words and Phrases.** A trespasser is a person who enters or remains upon premises in possession of another without the express or implied consent of the possessor.
2. **Trespass: Minors.** While the age of a child will not protect such child if the act is denominated a trespass, yet, as trespass is an intentional tort, an initial determination must be made whether the child concerned formed the intent to do the physical act which released the harmful force.
3. **Trespass.** A person can trespass on another's property by simply extending his or her arm over the boundary fence.
4. **Trespass: Minors.** In making a determination as to whether a child was capable of the necessary intent to be classed as a trespasser, the standard of conduct to be used is that of a reasonable person of like age, intelligence, and experience under the circumstances.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Gerald L. Friedrichsen of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellant.

Michael G. Helms of Schmid, Ford, Mooney & Frederick, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

This was an action brought by the plaintiff, Gerald L. Kenney, father and next friend of Debbie L. Kenney, a minor, under Neb. Rev. Stat. § 54-601 (Reissue 1978), the "dogbite" statute. The jury returned a verdict for the plaintiff in the amount of $607. The trial court sustained the plaintiff's motion for a new trial on the basis of inadequacy of the verdict.

The defendant has appealed and has assigned as errors that the trial court denied his motion for a directed verdict, made at the close of all evidence, on the ground that Debbie was a trespasser and that the verdict was in fact not inadequate.

On November 24, 1978, Debbie, who was then 7 years old, went with her mother to visit Debbie's great-grandmother who lived in Omaha. Living next door to her was the defendant, Robert J. Barna, who owned a dog. Barna's yard was enclosed all around with a wire fence which was 6 feet high and had 2- by 4-inch rectangular openings. In addition, he had built a kennel, or dog run, within the fenced-in area, utilizing the boundary fence on the side of his yard adjacent to the yard of Debbie's great-grandmother as one of the outside lines of the kennel.

Debbie testified that she was given permission to go out to play, and while outside she reached through the fence and tried to pet the dog "three or four times . . . and it bit me." She also testified that she had petted this dog once or twice before that day, but she admitted that she had never seen Mr.

Barna, nor had she asked anyone on the defendant's premises whether she could pet the dog.

Mr. Barna testified that he never did allow the dog to be outside of the kennel enclosure unless he was in the backyard, nor did he ever allow any children to play with the dog unless he also was outside. There is nothing in the record to suggest that Debbie ever had permission to reach through the fence and pet this dog or that the defendant was aware of the fact that she or any children had done so in the past.

The statute, § 54-601, provides in part that "the owner or owners of any dog . . . shall be liable for any and all damages that may accrue (1) to any person, *other than a trespasser*, by reason of having been bitten by any such dog . . . ." (Emphasis supplied.) The defendant argues that the plaintiff was a trespasser, and therefore there was no liability to her under the statute. In ruling adversely to the defendant's contention, the trial judge stated: "I think in this case that there may have been a technical trespass by Debbie Kenney when she put her hand through the fence, but I don't think it's that type of technical trespass that is contemplated by the statute." Therefore, the key question which we must answer is whether the plaintiff was a trespasser within the meaning of the statute.

A trespasser is a person who enters or remains upon premises in possession of another without the express or implied consent of the possessor. *Malolepszy v. Central Market*, 143 Neb. 356, 9 N.W.2d 474 (1943).

But what of the age of the alleged trespasser? "While the age of the child will not protect him from liability if his act is denominated a trespass, yet as trespass is an intentional tort an initial determination must be made whether the child concerned formed the intent to do the physical act which released the harmful force." *Cleveland Park Club v. Perry*, 165 A.2d 485, 488 (Mun. Ct. App. D.C. 1960).

In an action for damages resulting from a tres-

pass, it is not necessary that the trespasser intended the injury resulting from his unauthorized invasion, but only that such person intended to commit the physical act constituting the trespass. " 'Accordingly, where the only intention necessary to the commission of the tort is to perform the physical act in question, as in trespass to property or person, it seems settled that even an infant of quite tender years may be held liable. . . .' " *Brown v. Dellinger*, 355 S.W.2d 742, 746 (Tex. Civ. App. 1962).

In that case a money judgment had been entered against the two appellants, who were between the ages of 7 and 8 years, because of a fire causing damage to the appellee's premises. The boys entered the premises without authorization and built a fire in a portable grill. This fire ignited a curtain which in turn burned down the garage, house, and contents. The Texas court said: "We hold that the record is conclusive that the minor appellants unquestionably became trespassers as a matter of law when they ignited the fire in the charcoal grill in appellee's garage.

. . . .

"The acts of the minor defendants in bringing matches onto the premises of appellee and igniting the fire in the charcoal burner in appellee's garage were all voluntary and purposeful and were acts which they even at their tender years had sufficient capacity to do, as evidenced by the fact that they did do such acts." *Id.* at 746-47.

Minnesota has a "dogbite" statute which subjects a dog owner to liability for damages done by a dog to any person who is peaceably conducting himself in any place where he may lawfully be. In *Matson v. Kivimaki*, 294 Minn. 140, 200 N.W.2d 164 (1972), a boy, aged 2½ years, leaned through the lower boards of the defendant's rear fence, waved his hand at the defendant's dog, and it jumped up and bit him. The trial court awarded general damages to the child.

The Supreme Court reversed, holding that it was error to permit the jury, by instruction, to consider one of the elements necessary to attach liability to the dog owner, i.e., that the plaintiff was at a place where he may lawfully be. The court said: "However, we hold that it was improper to submit the statutory question to the jury for consideration in this case, since there is no evidence that would justify a finding that Erik was lawfully in a place he was entitled to be at the time of the incident.

"In making this determination as a matter of law, we have carefully reviewed the entire record in this case and find no evidence whatsoever which would allow an inference of an implied invitation for Erik to project his body through defendant's fence onto defendant's property. In constructing a substantial fence, defendant clearly manifested an intent to circumscribe his property with a barricade to increase both his right of privacy and his right to use his own property without interference from others. The fence not only served to keep others out, but permitted defendant to give his dog a limited amount of freedom while still containing the dog on his own property." *Id.* at 146, 200 N.W.2d at 167-68.

The Minnesota court cited a California District Court of Appeal case, *Fullerton v. Conan*, 87 Cal. App. 2d 354, 197 P.2d 59 (1948), which considered a similar statute. That case involved a 5-year-old child who opened the gate in the defendant's fence, walked into the backyard, and was bitten by the defendant's dog. The court said: "The court, however, went on to hold (87 Cal. App. 2d 358, 197 P. 2d 62):

. . . .

" 'In the circumstances here presented, "The owner of any dog which shall bite any person" is liable only when such person is, "lawfully upon the private property of such owner." The conclusion reached by the trial court that the child was a "trespasser" simply means that the child was not law-

fully upon the property of the dog owner at the point where the biting occurred.' " *Matson* at 148, 200 N.W.2d at 168-69.

The plaintiff relies almost exclusively on the holding and language of *Verrilli v. Damilowski*, 140 Conn. 358, 100 A.2d 462 (1953). Connecticut has a statute similar to that under consideration here, which excludes damages to the body of a person who at the time was committing a trespass or other tort. The plaintiff in that case was crossing the premises of the defendant "on a right of way which had been used by the public for several years." *Id.* at 359, 100 A.2d at 463. The court discussed in some detail the development of the statute and its prior decisions, which it concluded influenced the legislative changes.

The language in which the plaintiff takes comfort is as follows: " 'The trespasses and torts which the framers of this exception had in mind were those which were committed upon the person or property of the owner or keeper, or of his family, and other torts of a like character, and which the dog, with his characteristic loyalty, would instinctively defend and protect, and those torts committed upon the dog to which we referred in *Kelley v. Killourey*, supra, as likely to excite a dog to the use of its natural weapons of defense.' . . .

". . . 'The expression "trespass or other tort" in the statute suggests more than a mere entry and the plain intent of the statute is to bar recovery where the plaintiff was committing or intending to commit some injurious act.' " *Id.* at 363-64, 100 A.2d at 464.

However, we would point out that the case of *Kelley v. Killourey*, 81 Conn. 320, 70 A. 1031 (1908), referred to above, involved a court-interpreted limitation on the original absolute liability statute, when the victim was teasing and tormenting the dog. The latter paragraph of the above quotation was taken from *Hanson v. Carroll*, 133 Conn. 505, 52 A.2d 700 (1947), in which the plaintiff had come onto the defendant's

property to inquire about some fertilizer advertised for sale. Apparently, he would not be a trespasser.

We conclude that the *Verrilli* case and the authorities cited by it are distinguishable from the instant case, both on the facts and the interpretation of legislative intent.

Perhaps a case more nearly in point, not cited by anyone, is *McCarthy v. Daunis*, 117 Conn. 307, 167 A. 918 (1933). However, in that case the dog was confined by a fence containing 6-inch squares. A large police dog so confined stuck his head through one of the openings, grabbed a small dog on the outside of the fence, pulled it against the fence so that the small dog's collar became entangled in the wire, and it was left suspended above the ground. The plaintiff, a boy passing on a bicycle, heard the small dog whining, and stopped to free it. As he was in the process of doing so, the defendant's police dog ran up to the fence, *thrust his jaws through the fence*, and bit off the end of one of the plaintiff's fingers. The court held that the plaintiff was not a trespasser within the meaning of the statute. However, the facts of that case are also clearly distinguishable. Not only did the boy not reach through the fence but, in fact, it was the dog who actually did the trespassing.

Nor does the instant case fit within the purview of *Rossi v. DelDuca*, 344 Mass. 66, 181 N.E.2d 591 (1962). That case laid out the doctrine of an "incomplete privilege." An 8-year-old plaintiff was chased onto the defendant's property by a stray German Weimaraner, whereupon she was bitten by the defendant's Great Dane. In an opinion which supported the position of the plaintiff, the court said: "This evidence brings the case, we think, within the principle that one is privileged to enter land in the possession of another if it is, or reasonably appears to be, necessary to prevent serious harm to the actor or his property." *Id.* at 70, 181 N.E.2d at 593.

This court has not yet been called upon to deal

with the question of who are trespassers under the "dogbite" statute. In *Donner v. Plymate*, 193 Neb. 647, 228 N.W.2d 612 (1975), we held that the words "killing, wounding, worrying, or chasing" as used in § 54-601 excluded the playful and mischievous acts of dogs. However, importantly, we did state: "The Legislature . . . removed the common law restriction of proving scienter or knowledge of the dangerous propensities of dogs, but only as it applied to the actions of dogs specified in the statute," *id.* at 649, 228 N.W.2d at 614; and "Dog owners are statutorily liable for any and all damage without proof of scienter or knowledge of dangerous propensities of their dog for biting . . . persons," *id.* at 650, 228 N.W.2d at 614.

In *Paulsen v. Courtney*, 202 Neb. 791, 277 N.W.2d 233 (1979), a 10-year-old boy was bitten by the defendant's dog. The defense was provocation and that the boy was a trespasser. The jury returned a verdict for the defendant, and we affirmed on the ground that there was evidence to support the verdict as to provocation. We pointed out that § 54-601 eliminated the common-law requirement that before the dog owner would be liable, he must have been guilty of negligence or had knowledge of the dog's propensity for viciousness.

We went on to say: "It is, however, a recognized rule of construction that statutes which effect a change in the common law or take away a common law right should be strictly construed . . . ." *Id.* at 794, 277 N.W.2d at 235. We concluded that although the statute creates a cause of action based upon strict liability on the part of a dog owner, "Nevertheless, it would seem strange indeed if one could now intentionally provoke a dog under any circumstances and yet hold an owner liable under the provisions of the 'dog bite' statute." *Id.* at 795, 277 N.W.2d at 235. We declared that the question of whether the victim was guilty of intentionally provoking the animal was a question of fact.

In the same manner, we believe that the word "trespasser" as used in the statute must be construed strictly. Again, "it would seem strange indeed" if a dog owner, knowing that he is held strictly accountable for the actions of his dog, keeps the dog confined to his own property, yet could be held liable to one who came on the premises without permission. A person can trespass on another's property by extending his arm over the boundary fence. *Hannabalson v. Sessions*, 116 Iowa 457, 90 N.W. 93 (1902); Restatement (Second) of Torts § 159, Illus. 3 to subsection (1) (1965).

Because the act constituting the trespass itself must be a willful act, the question presents itself as to whether the plaintiff in this instance was of sufficient age and maturity so as to possess the capacity to form such intent. Although dealing with the applicability of the doctrine of attractive nuisance, we said in *Haden v. Hockenberger & Chambers Co.*, 193 Neb. 713, 228 N.W.2d 883 (1975), that a person on the premises of another without the permission of the owner, who is of sufficient age, mentality, experience, and ability to observe, is an adult trespasser.

In *Camerlinck v. Thomas*, 209 Neb. 843, 312 N.W.2d 260 (1981), we held that as to contributory negligence, if the actor is a child, the standard of conduct to which such child must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under the circumstances.

In this instance the trial court was in error in holding as a matter of law that the plaintiff was not a trespasser and that the defendant was liable for the plaintiff's injuries. The jury should have been instructed that the defendant would not be liable if the plaintiff was a trespasser, and further instructed as to the definition of "trespasser," including the element of intent.

We affirm the action of the District Court in grant-

ing a new trial, but for reasons different from those declared by the trial court.

AFFIRMED.

IN RE ESTATE OF JERALD E. FEUERHELM, DECEASED. HAYDEN THOMPSON, TRUSTEE OF THE PAULINE H. THOMPSON TESTAMENTARY TRUST, APPELLANT, V. DUANE R. FEUERHELM, PERSONAL REPRESENTATIVE OF THE ESTATE OF JERALD E. FEUERHELM, APPELLEE.

341 N.W.2d 342

Filed December 9, 1983. No. 82-830.

1. **Decedents' Estates: Claims.** The purpose of the nonclaim statute, Neb. Rev. Stat. § 30-2485 (Reissue 1979), is facilitation and expedition of proceedings for distribution of a decedent's estate, including an early appraisal of the respective rights of interested persons and the prompt settlement of demands against the estate.
2. **Decedents' Estates: Notice: Claims.** Notice to a representative of an estate regarding a possible demand or claim against an estate does not constitute presenting or filing a claim under Neb. Rev. Stat. § 30-2486 (Reissue 1979).

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

Jay S. Horowitz and Dwight C. Seeley of Jay S. Horowitz, P.C., and Dale A. Norris of Whelan, Foote & Scherr, P.C., for appellant.

David H. Fisher of Fitzgerald, Brown & Dunmire, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Hayden Thompson, trustee of the Pauline H. Thompson Testamentary Trust, appeals the Adams County District Court's judgment affirming the county court's refusal to allow the trustee's filing a belated claim pursuant to Neb. Rev. Stat. § 30-2485(a)(1) (Reissue 1979). We affirm.

The trustee and personal representative have stipulated the facts in this case. Jerald E. Feuerhelm died on June 5, 1980. On June 6, 1980, Hayden Thompson had actual notice of Feuerhelm's death. The personal representative for the Feuerhelm estate was appointed on July 9. As required by § 30-2485, notice to creditors was published on July 11. On July 15 the personal representative mailed a copy of the published notice to Thompson in his individual status and in some of his sundry representative capacities. The personal representative of the estate did not mail a copy of the published notice to Thompson in his representative capacity as trustee.

On September 9 Thompson, individually and in his several representative capacities other than trustee, filed seven claims against the Feuerhelm estate. In his individual capacity Thompson filed a contingent claim in the amount of $211,178.48, plus interest. Thompson's claim as an individual was based upon a promissory note of the decedent and an agreement between Thompson, individually, and the decedent. Thompson's "STATEMENT OF CLAIM" filed on September 9 contained the following: "Claimant has assigned his interest in the above-referenced Promissory Note to the Pauline H. Thompson Testamentary Trust. Claimant intended this assignment to include his entire interest and the proceeds thereof. [C]laim is made individually for that part of such proceeds, if any, not effectively assigned to said Pauline H. Thompson Testamentary Trust." The claim is undated, was filed as a contingent claim, and was signed by Thompson individually and not in any representative capacity.

By Thompson's claim filed in the county court of Adams County, the personal representative and his attorneys had actual notice that a claim against the estate had been assigned to the trust. On October 17 the trustee filed a petition in the county court seeking permission to file a belated, unliquidated claim in the amount of $211,178.48, plus interest, i.e., a

claim based on the same promissory note and agreement mentioned in the claim by Thompson as an individual which had been filed on September 9.

On July 31, 1981, the county court determined that the trustee "has failed to establish good cause for the filing of his belated claim . . ." and dismissed the trustee's petition to file the belated claim in the Feuerhelm estate. On November 16, 1982, the District Court affirmed the judgment of the county court.

The trustee assigns and argues two errors. First, the trustee claims that Thompson's claim as an individual was (a) proper notice to the Feuerhelm estate regarding the claim of the trust or (b) a claim filed on behalf of the trust. Second, he claims good cause was shown for permitting the filing of a belated claim by the trust.

One of the statutes involved in the proceedings is § 30-2485: "Limitations on presentation of claims. (a) All claims against a decedent's estate . . . are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

"(1) within two months after the date of the first publication of notice to creditors if notice is given in compliance with section 30-2483 . . . . If any creditor has a claim against a decedent's estate which arose before the death of the decedent and which was not presented within the time allowed by this subdivision, including any creditor who did not receive notice, such creditor may apply to the court within sixty days after the expiration date provided in this subdivision for additional time and the court, upon good cause shown, may allow further time not to exceed thirty days."

The purpose of the nonclaim statute, § 30-2485, is facilitation and expedition of proceedings for distribution of a decedent's estate, including an early appraisal of the respective rights of interested persons and prompt settlement of demands against the es-

tate. As a result of the nonclaim statute, the probate court or the personal representative can readily ascertain the nature and extent of the decedent's debts, determine whether any sale of property is necessary to satisfy a decedent's debts, and project a probable time at which the decedent's estate will be ready for distribution. See, 2A Neb. Rev. Stat. General Comment at 674 (Reissue 1979); *Simpson v. First Nat. Bank & Trust Co. of Lake Worth*, 318 So. 2d 209 (Fla. App. 1975).

Neb. Rev. Stat. § 30-2486(1) (Reissue 1979) states that "[t]he *claimant* may file a written *statement of the claim* . . . ." (Emphasis supplied.) Implicit in such language is the requirement that the creditor to whom the decedent is obligated is the claimant who can present a demand against the estate. On September 9 Thompson filed his claim as an individual regarding possibly unassigned proceeds from the decedent's promissory note. Any filing by Thompson in his individual capacity is not a presentation of a claim by the trust. Consequently, the trust did not file its "written statement of the claim" as required by the statute. The suggested "claim" demonstrates further deficiency. Although the language of Thompson's individual claim did alert the personal representative to the possibility of a claim by the trust, Thompson's claim did not contain a demand by the trust upon the estate for satisfaction of any obligation. Mere notice to a representative of an estate regarding a possible demand or claim against an estate does not constitute presenting or filing a claim under § 30-2486. If notice were accorded the stature of a claim, the resultant state of flux and uncertainty would frustrate and avoid the purpose and objectives of the nonclaim statute. See *Nathanson v. Superior Court*, 12 Cal. 3d 355, 525 P.2d 687, 115 Cal. Rptr. 783 (1974). The document filed by Thompson on September 9 suffered from the described double deficiency, nullifying presentation of a claim by the trust within the meaning of § 30-2486.

We conclude that the trust has not filed a claim against the Feuerhelm estate.

In the absence of "good cause shown" the county judge has no discretion to grant permission to file a belated claim. See, *In re Estate of Hoferer*, 116 Neb. 254, 216 N.W. 826 (1927); *Lesoing v. Dirks*, 157 Neb. 183, 59 N.W.2d 164 (1953); *In re Estate of Golden*, 120 Neb. 226, 231 N.W. 833 (1930). The "good cause" which must be shown "is analogous to that required by a court of equity in granting a new trial." *Gunn v. Emerald, Inc.*, 201 Neb. 635, 638, 271 N.W.2d 334, 336 (1978). See, also, *In re Estate of Golden, supra*.

Did the trustee show "good cause" excusing failure to file a claim within 2 months after the date of the first publication as required by § 30-2485(a)(1)?

The stipulated facts insert nothing into the vacuum existing between July 11, when the notice to creditors was published, and the last day for presenting a claim. We are given no facts from which we can deduce that anyone had prepared a claim by the trustee. Assuming that a written statement of the trustee's claim had been prepared, there is no explanation for the failure to present the trustee's claim within the time prescribed by statute. "Good cause" within § 30-2485(a)(1) envisions a claimant proceeding diligently toward presenting a claim against a decedent's estate, but the presentation of the claim is prevented by fraud, accident, mistake, unavoidable misfortune, or excusable neglect. See, *In re Estate of Golden, supra*; *Gunn v. Emerald, Inc., supra*. Whatever may have existed in terms of the trustee's preparing a claim to be presented within the allotted time is left to speculation. There probably was a great deal of dramatic and dynamic diligence in preparing and filing the petition for a belated claim. However, circumstances and activities preceding the last day for presenting claims are crucial in determining whether "good cause" has been shown. Under the facts presented to us, there

is no cause shown, good or otherwise. We, as were the county judge and the District Court, are compelled to the conclusion that "good cause" has not been shown and that the trustee's petition for a belated claim must be rejected. Consequently, the judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., participating on briefs.

SUSAN RANDALL, APPELLANT, V. SAFEWAY STORES, INC., APPELLEE.

341 N.W.2d 345

Filed December 9, 1983. No. 82-841.

1. **Workmen's Compensation: Proof.** In order to recover compensation benefits a claimant must prove by a preponderance of the evidence that his disability was caused by an accident arising out of and in the course of his employment.
2. **Workmen's Compensation: Evidence.** Testimony with regard to causation must be definite and certain to warrant a compensation award.
3. **Workmen's Compensation: Appeal and Error.** The findings of the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
4. **Workmen's Compensation: Expert Witnesses.** The trier of fact is not required to take the opinion of experts in regard to the causal connection between the alleged injury and the disability as binding upon it.
5. **Workmen's Compensation: Proof.** A workmen's compensation award cannot be based on speculation, and if an inference favorable to the claimant can only be reached on the basis thereof, then she cannot recover.

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

Lynn R. Carey, Jr., for appellant.

Rodney G. Gnuse of Schmid, Ford, Mooney & Frederick, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

This is an appeal in a proceeding under the Workmen's Compensation Act. The plaintiff, Susan Randall, claims that she was injured on November 10, 1980, while employed by Safeway Stores at its Millard store. According to the plaintiff, when she was in the storage area in the backroom of the store, a metal shelf fell and struck her head, producing a large bump. The plaintiff testified that she fell to the floor on her knees and was "kind of disoriented" for a few minutes. A coworker testified that he observed the incident. The plaintiff testified that she reported the accident to the store manager before she left for the day. The manager denied the conversation.

Shortly after the accident, the plaintiff developed a stiff neck, which grew progressively worse. She did not consult a physician about her neck until March 1981. The plaintiff is still receiving medication and treatment for her neck condition, and claims that she is unable to work.

After the hearing before a single judge, and upon rehearing before the three-judge panel, the compensation court found that the plaintiff had failed to prove that the injury and disability about which she now complains was caused by the "blow on her head by the shelf."

In order to recover compensation benefits a claimant must prove by a preponderance of the evidence that his disability was caused by an accident arising out of and in the course of his employment. *Eliker v. D. H. Merritt & Sons*, 195 Neb. 154, 237 N.W.2d 130 (1975); *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 308 N.W.2d 734 (1981); *Negrete v. Western Electric Co., Inc.*, 212 Neb. 876, 326 N.W.2d 681 (1982). Testimony with regard to causation must be definite and certain to warrant a compensation award. *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981).

In reviewing findings of fact in workmen's com-

pensation cases, the Supreme Court is not free to weigh the facts anew. The findings of the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982); *Niesen v. Logan County Co-op Oil Assn.*, *ante* p. 587, 340 N.W.2d 146 (1983). A finding with regard to the causation of an injury is one for determination by the fact finder; it will not be set aside unless clearly wrong. *Aguallo v. Western Potato, Inc.*, 208 Neb. 66, 302 N.W.2d 41 (1981); *Hilt Truck Lines, Inc. v. Jones*, 204 Neb. 115, 281 N.W.2d 399 (1979); *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980).

Dr. John Woodbury testified that the plaintiff first consulted him in regard to neck pain on March 5, 1981. At about that time she said that she had slipped and fallen while on the job. However, in a report dated November 4, 1981, Dr. Woodbury stated that prior to October 1981 "Ms. Randall had at no time commented to me that she had injured herself on the job."

X-ray examination disclosed degenerative disk disease. In response to hypothetical questions Dr. Woodbury testified that a blow to the head by a "heavy" metal shelf could not cause degenerative disk disease but could cause the disability which the plaintiff had.

The plaintiff was referred by Dr. Woodbury to Dr. Daniel L. McKinney, a neurosurgeon. Prior to October 1981, the plaintiff made no mention to Dr. McKinney of a specific accident in November 1980. In answer to a hypothetical question Dr. McKinney stated that if an individual were struck with "a heavy object" in the head, it could cause the condition from which the plaintiff suffered. On cross-examination Dr. McKinney stated that a fall down some steps in April 1981 could be a possible cause of the plaintiff's condition.

In 1981 the plaintiff submitted claims for her neck

injury to the Health and Welfare Fund of her union and received disability benefits in the amount of $139 per week for 26 weeks from this fund. In making these claims the plaintiff stated that the claim was not the result of an accident or a work-related illness or injury.

On July 23, 1982, the plaintiff was examined by Dr. Joseph F. Gross, an orthopedic surgeon. In the history obtained by Dr. Gross, the plaintiff stated that she had been injured on November 10, 1980, when a metal shelf fell and hit her on the top of the head. Dr. Gross testified that in his opinion the plaintiff had a 10-percent loss of use of the body as a whole as a result of her injury and subsequent surgery. The plaintiff claims that this testimony was "clear and compelling" and established that the finding of the compensation court was clearly wrong.

It is clear from the testimony of Dr. Gross that his reference to the plaintiff's injury was based upon the history given to him, which did not include mention of the fall down some steps in April 1981. In any event, the compensation court was not bound to accept the testimony of Dr. Gross on the issue of causation. The trier of fact is not required to take the opinion of experts in regard to the causal connection between the alleged injury and the disability as binding upon it. *Butler v. Midwest Supply Co.*, 212 Neb. 421, 322 N.W.2d 815 (1982).

In the present case the claimant stated that she was injured when metal shelves fell on her head. However, there was substantial evidence which tended to prove that such an accident had not occurred. Upon this questionable foundation the claimant introduced expert medical testimony. The value of an opinion of an expert is no stronger than the facts upon which it is based. *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 308 N.W.2d 734 (1981). Dr. Woodbury and Dr. McKinney each testified that such an accident *could* have caused claimant's symptoms. This testimony does not ful-

fill the requirements of certainty and definiteness. A workmen's compensation award cannot be based on speculation, and if an inference favorable to the claimant can only be reached on the basis thereof, then she cannot recover. *Erving v. Tri-Con Industries*, 210 Neb. 339, 314 N.W.2d 253 (1982). See, also, *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 307 N.W.2d 814 (1981).

The findings of the compensation court are amply supported by the record and the judgment must be affirmed.

AFFIRMED.

JAMES E. MINSHALL, APPELLEE AND CROSS-APPELLANT, v. PLAINS MANUFACTURING COMPANY AND THE MARYLAND CASUALTY COMPANY, APPELLANTS AND CROSS-APPELLEES.

341 N.W.2d 906

Filed December 9, 1983. No. 83-146.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. _____: _____. In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably deducible from it.
3. **Workmen's Compensation: Words and Phrases.** Disability under Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1978) is defined in terms of employability and earning capacity rather than in terms of loss of bodily function.
4. _____: _____. In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof.
5. _____: _____. A "reasonable controversy" between the parties, sufficient to protect the employer against statutory penalties for waiting time for failure to pay total disability benefits based on impairment of the body as a whole, must rest upon facts concerning employability and not solely upon a disability rating.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed in part, and in part reversed and remanded.

Harry R. Meister of Brenner and Meister Law Office, for appellants.

Robert W. Mullin of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

This is an appeal by defendant employer and its insurance carrier (hereinafter collectively called "Plains") from the decision of a three-judge panel of the Workmen's Compensation Court, which had affirmed the judgment of a single-judge court. The three-judge panel held that as of October 26, 1982, plaintiff Minshall was still totally disabled from a compensable accident of October 13, 1977; that Minshall should recover from Plains total disability payments of $140 per week from October 21, 1977, to October 26, 1982, and so long in the future as plaintiff shall remain totally disabled; that Plains should pay certain medical expenses incurred and should continue to provide future medical and hospital care; that no attorney fees or additions for waiting time should be assessed against Plains because there was a reasonable controversy between the parties; that Plains should pay attorney fees and deposition costs incurred in connection with the appeal to the three-judge panel; and that appellee was entitled to vocational rehabilitation services as provided in Neb. Rev. Stat. § 48-162.01 (Reissue 1978).

Plains appeals from the compensation court's order on rehearing, and assigns as error the findings of the compensation court that Minshall was still totally disabled at the time of the rehearing; that Minshall was temporarily totally disabled while working part-time after taking a rehabilitation

course; in failing to find that Minshall had a 20-percent partial disability at the most; and in awarding attorney fees and deposition costs to Minshall on rehearing.

Minshall cross-appeals from the denial of his claims for waiting time benefits, and alleges that there was no reasonable controversy between the parties and that Plains should be penalized according to statute.

For reasons hereinafter set out we affirm the judgment of the compensation court insofar as that court determined that Minshall was totally disabled and was entitled to the benefits awarded him based on that disability, but we reverse the finding of the compensation court that there was a reasonable controversy between the parties.

There is no dispute between the parties that Minshall's injuries arose out of and in the course of his employment with Plains. The accident occurred on October 13, 1977, when Minshall was knocked unconscious and injured while unloading the truck he was driving for Plains. On October 21, 1977, Plains began paying $140 per week to Minshall as temporary total disability payments. These payments were made regularly until June 30, 1980, when Plains reduced the payments to $29.23 per week. This rate corresponds to a 20-percent permanent partial disability rating given to Minshall in a letter dated June 28, 1978, from Dr. Ropp to Maryland Casualty Company. This action was instituted by Minshall on January 14, 1982, seeking restoration and continuation of the total disability benefits.

The record shows that Minshall was 48 years old at the time of the accident in 1977. He had been primarily a truckdriver for 30 years but had worked at different times at various other jobs, such as a security guard and a cook. Since the accident, Minshall has never returned to the job of truckdriver.

After the accident Minshall received rehabilitative services by taking a correspondence course in en-

gine repair. He completed this 18-month course in November 1980 and began working 6 hours per day in his brother's shop. His hours were subsequently reduced due to pain in his back and neck. Minshall apparently worked less than 1 year in his brother's shop, and then worked on his own in his own residence garage until May of 1982. During the last year, he was able to work about 2 hours in the morning and, after a break, about another hour in the afternoon.

In October 1982 Minshall testified that he had dizziness, blurred vision, lapses of memory, pains in his back and neck, numbness in his right side, and lack of coordination in his right arm. He testified that after the accident there were occasions when he stumbled and fell to the ground. Minshall further testified that after he left his brother's shop he has limited himself to part-time tuneup jobs, oil changes, and lawnmower engine repair. This work is done in the garage at his home. He also testified that he had applied for other jobs but had not been successful in obtaining employment and that he would like to work because he had been a worker all his life.

Minshall's wife corroborated the plaintiff's testimony as to his hours of work, the type of work he did, the pain he suffered, and his lapses of memory.

During the 5 years after the accident, Minshall saw Dr. Cutright, his family physician, who referred him to three different specialists: Dr. Ropp, an orthopedic surgeon; Dr. Beehler, a neurosurgeon; and Dr. Edgar, also a neurosurgeon. The record contains depositions from all the doctors except Dr. Beehler.

All of the testifying doctors were in agreement that the plaintiff is not able and should not return to work as a truckdriver. They also felt that the engine repair work was too much of a physical strain on the plaintiff. Drs. Cutright and Edgar testified the plaintiff's occupation should be limited to a more

sedentary nature, or a job that does not require awkward working positions. Dr. Ropp was the only doctor to venture a percentage of disability, which he rated as a "20% whole body permanent physical impairment and loss of physical function."

In appeals from the Nebraska Workmen's Compensation Court, this court is to apply the limited standards of review used in civil jury cases. As stated in *Sortino v. Miller*, 214 Neb. 592, 594-95, 335 N.W.2d 284, 286 (1983), " 'Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. . . . In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his or her favor, and he or she must receive the benefit of every inference reasonably deducible from it.' "

Disability under Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1978) of the Nebraska workmen's compensation law is defined in the cases in terms of employability and earning capacity rather than in terms of loss of bodily function. As stated in *Craig v. American Community Stores Corp.*, 205 Neb. 286, 289, 287 N.W.2d 426, 428 (1980), " ' "In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof." . . .' " See, also, *Nordahl v. Erickson*, 174 Neb. 204, 116 N.W.2d 275 (1962); *Miller v. Peterson*, 165 Neb. 344, 85 N.W.2d 700 (1957).

Before the accident, Minshall was earning an average weekly income of $212.22 as a truckdriver. His books showed cash income of $102.94 in November and December of 1980. His gross income for all of 1981 in engine repair was $2,217, resulting in a net loss of $450. At the time of rehearing the plaintiff

was limited to tuneup jobs and oil changes in his garage at home. He had actively sought employment in other areas, such as security guard and police work, but was unable to secure a job. All the medical witnesses agree that Minshall can never return to his employment of truckdriver.

A workman who is unable to perform or to obtain any substantial amount of labor, either in his particular line of work or in any other for which he would be fitted except for the injury, is totally disabled within the meaning of the Workmen's Compensation Act. *Runyan v. State*, 179 Neb. 371, 138 N.W.2d 484 (1965).

The finding of total disability by the three-judge panel is not in error. The record justifies the conclusion that Minshall attempted to work after his rehabilitation and was physically unable to continue. A disabled person must be able to attempt employment after his injury without fear that that attempt, if unsuccessful, will result in the loss of the benefits under the compensation law.

With regard to the awarding of attorney fees and deposition costs to Minshall on the rehearing, the right to award such amounts is governed by Neb. Rev. Stat. § 48-125 (Reissue 1978), which stated in part, at the time of the rehearing, "In the event the employer files an application for a rehearing before the compensation court en banc from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court sitting en banc may allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court." The right to award such fees was approved in *Harrington v. State*, 198 Neb. 4, 251 N.W.2d 653 (1977).

The rehearing court did not err in awarding an attorney fee. The statute is clear, and the record in

this case shows that the employer failed to obtain any reduction in the award. It is further ordered that appellants pay to appellee the sum of $750 as attorney fees for proceedings in this court.

Minshall has cross-appealed, alleging that the Workmen's Compensation Court erred in finding that a reasonable controversy existed justifying Plains' failure to make timely payment. Based on this finding, the compensation court held "That no attorney's fees or additions for waiting time may be assessed against the defendant, there being a reasonable controversy between the parties."

Minshall argues that under § 48-125, as that statute was in effect during the proceedings in the compensation court, he should have been awarded a 50-percent penalty on payments determined to be due, and an attorney fee. The law in this area is settled. In *Savage v. Hensel Phelps Constr. Co.*, 208 Neb. 676, 680, 305 N.W.2d 375, 378 (1981), we stated, "We have previously held that where a reasonable controversy exists between the parties as to the payment of compensation, an injured employee is not entitled to the statutory penalties for waiting time."

We have further held that whether there was a reasonable controversy between the parties is always a fact question and that this court is bound by findings of fact of the compensation court after rehearing, to the extent that such findings have support in the evidence. *Savage v. Hensel Phelps Constr. Co.*, *supra*.

This court has carefully searched the record seeking support for the compensation court's finding "that there is a reasonable controversy so that the plaintiff is not entitled to attorney's fees for defendant's failure to make timely payments." The compensation court made no specific finding in this regard.

Plains states in its brief that "[t]he insurance carrier was advised that Mr. Minshall had returned to work; that is when the carrier began to pay the

twenty percent permanent partial disability payments." Reply Brief for Appellants at 3. We are not given any citation to the record to support that factual statement, and we can find no such support. The record shows that Minshall completed his rehabilitation training correspondence course in about 18 months, finishing in November of 1980. On November 7, 1980, Minshall opened his shop in his brother's filling station. In the succeeding 2 months Minshall did 14 jobs, resulting in net income to him of $102.94. His work record in the succeeding year is set out above.

Our examination of the record shows no factual matter brought to Plains' attention that changed Minshall's disability situation as of July 1, 1980, except Dr. Ropp's letter of June 28, 1978, as updated by his letter of June 25, 1980. That letter referred to the 20-percent permanent partial disability rating. As set out above, this court has often held that in defining total disability, losses in bodily function are not important in themselves, but are only important insofar as they relate to employability and earning capacity, and the loss thereof. *Craig v. American Community Stores Corp.*, 205 Neb. 286, 287 N.W.2d 426 (1980); *Nordahl v. Erickson*, 174 Neb. 204, 116 N.W.2d 275 (1962); *Miller v. Peterson*, 165 Neb. 344, 85 N.W.2d 700 (1957).

In this case Plains had been paying total disability payments to Minshall since October 21, 1977. On July 1, 1980, Plains, acting unilaterally and with no consultation with Minshall, with no evidence except what had been in its hands since June of 1978, reduced Minshall's payments to a rate equivalent to a 20-percent permanent partial disability. From the record before us we can only determine that on the date of the reduction Minshall had not even completed his rehabilitation course. He certainly was not fully employed. There are no facts in the record to support a finding that there was a "reasonable controversy" between the parties. All the facts re-

cited above to affirm the compensation court's findings of total disability serve to show that there was no "reasonable controversy" between the parties as of July 1, 1980, or thereafter, as to Minshall's total disability. The 20-percent disability rating relied on by Plains to reduce its payments did not in and of itself warrant the conclusion that Minshall was not totally disabled within the meaning of the workmen's compensation statutes.

Accordingly, the judgment of the Workmen's Compensation Court as to Minshall's total disability is affirmed in its entirety. The judgment of the compensation court that Minshall is not entitled to statutory penalties, including attorney fees for waiting time after July 1, 1980, is reversed, and the cause is remanded with directions to enter a judgment in favor of Minshall for the appropriate statutory penalties and attorney fees.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

JACQUELINE L. HAAKE, APPELLANT, V. STACY L. HAAKE, APPELLEE.

341 N.W.2d 911

Filed December 9, 1983. No. 83-162.

1. **Child Custody.** In determining the question as to custody of children in a modification hearing, the paramount consideration for the court is the best interests of the children.
2. _____. Orders fixing custody of minor children should not be modified unless there has been a change of circumstances indicating that the person who has custody is unfit for that purpose or that the best interests of the children require such action.

Appeal from the District Court for Johnson County: ROBERT T. FINN, Judge. Reversed and remanded with directions.

Daniel E. Wherry of Johnson, Barber, Wherry & Knight, for appellant.

Michael E. Willet of Everson, Noble, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

This is an appeal by the petitioner-appellant, Jacqueline L. Haake, now Jacqueline Woltemath, from an order of the District Court changing custody of her two minor children to her former husband, respondent-appellee herein, Stacy L. Haake. The parties were married in May of 1970 when Jacqueline was 16 and Stacy was 19, and they had two children: a son, Shannon, born December 22, 1970, and a daughter, Stashia, born January 22, 1975.

Jacqueline filed this action seeking dissolution of the marriage, custody of the two children, and a division of property. Stacy cross-petitioned seeking the same relief, except for his request that he have custody of Shannon while Stashia's custody be given to Jacqueline. The case was tried on all issues. The court entered its decree on March 8, 1982, dissolving the marriage, disposing of the parties' interest in their real and personal property, and granting temporary physical custody of Stashia to her mother and of Shannon to his father, and setting a further hearing "to determine the final placement of custody" for July 1, 1982.

No appeal was taken from this decree. On August 2, 1982, a further hearing on custody was held. On August 23, 1982, the court, by its order, found both parties fit and proper persons to have custody and awarded custody of both children to their mother, Jacqueline.

On September 22, 1982, respondent Stacy filed his application to modify the decree as to custody, alleging that Jacqueline had removed the minor children from Nebraska, that there had been a change of circumstances, and that the best interests of the children would be served if their custody was given

to Stacy. On November 4, 1982, Jacqueline filed her application to modify the decree to authorize her to remove the children to Wyoming because of her remarriage and her move to Wyoming to make her permanent home.

Hearing was held on both applications on January 28, 1983. By order signed February 9, 1983, the trial court modifed its earlier custody orders and gave physical custody of both children to Stacy. The court found "that there has been a change in circumstances since the hearing held in the matter on August 2, 1982; that the physical custody of the minor children . . . should be placed with Respondent herein." There were no findings as to the fitness or unfitness of either parent. Jacqueline was ordered to pay child support of $125 per month per child and was given generous summer and holiday visitation. Jacqueline appeals from this order changing custody.

In actions such as this, seeking modification of the trial court's order as to custody of children in a dissolution of marriage case, on appeal this court must review de novo the determinations of the trial court with regard to whether a change in circumstances has occurred which justifies the modification of the earlier custody order. We are required to make independent conclusions of fact without reference to the conclusion reached by the trial court, recognizing, however, that we will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite. *Dunne v. Dunne*, 211 Neb. 636, 319 N.W.2d 741 (1982).

Acting within that scope of review, and giving appropriate weight to the fact that the trial court did observe the witnesses, we determine that the trial court erred in changing custody, and we therefore reverse.

The parties agree that in determining the question of who should have the care and custody of the chil-

dren in a modification hearing, the paramount consideration is the best interests of the children. *Kuhn v. Kuhn*, 204 Neb. 363, 282 N.W.2d 43 (1979); *Dunne v. Dunne*, *supra*.

The undisputed facts before the trial court showed that after Jacqueline filed her petition for dissolution, she had no money and moved with her two children into the home of her friends, Brad and Cindy Woltemath. The Woltemaths were in the process of getting a dissolution of their marriage, but for reasons of economy continued to live in the same house. Cindy Woltemath was Jacqueline's best friend, and both Cindy and her husband agreed to the arrangement. Jacqueline paid for her living costs, and she testified that "we just lived together as friends and family and shared the expenses." The arrangement was necessary, according to Jacqueline, because no one, including her parents or her husband, was supportive of her, although her husband did pay her support during this time. In this same year of 1981 Stacy earned wages of over $21,000, had interest income of over $11,000, and gross farm income of $51,649 (resulting in a net loss in farm income of $13,188). The great portion of the income was spent on the purchase of the farm the parties were living on. This apparently was the prime source of the parties' marital difficulty. Jacqueline described the situation: "I was physically drained, and I just couldn't handle any more work. The farm began to be just more than I could handle, and if — all Stacy wanted to do was buy another farm and I just couldn't — There just was noway [sic] we could do any more than we were already doing."

Jacqueline had not precipitated the filing of the Woltemath divorce, nor was she a precipitating factor in its conclusion. On September 1, 1981, Jacqueline moved to Wyoming with Brad Woltemath and with Stashia. Shannon remained with his father, both due to the fact he was already enrolled in a Nebraska school which was helping his slight learning

disability and because of Stacy's insistence. Jacqueline obtained a job with Brad Woltemath as the two-person management team of a portion of a 200,000-acre Wyoming ranch. They lived together and Stashia lived with them. There was never any sexual activity in the presence of the children.

Shannon lived with his father at the time. Stacy was then working a full-time 8-hour job, and was farming. He had to leave for work each morning about 5:30 a.m., and would return about 5 p.m. His farming work was done after 5 p.m. and on weekends. Shannon would get up with an alarm clock, go to school, and return to a neighbor's home.

All of the above facts were testified to before the trial judge in the February 1982 trial. By its decree of March 8, 1982, the court found that Jacqueline was a fit and proper person to have physical custody of Stashia and that Stacy was a fit and proper person to have physical custody of Shannon. These custody orders were made subject to a later hearing set for July 1, 1982.

In April of 1982 the trial court ordered Stacy to allow Shannon to visit his mother in Wyoming.

Although not reflected in its formal findings, after the conclusion of the February dissolution hearing, the trial court noted that while both parties were fine people, the court was dissatisfied with Jacqueline's living in Wyoming, and was dissatisfied with Stacy in that the court saw no way a man could "drive 120 miles a day, work an eight-hour shift, farm 320 acres and properly raise a child . . . ." The court then gave each parent temporary physical custody of the child then with that parent.

Further hearing on custody was held in August of 1982. Evidence at that time showed that Jacqueline had moved back to Lincoln, Nebraska, on June 15, 1982, after school was out in Wyoming. Shannon had gone to Wyoming on June 7 and moved back with Jacqueline and Stashia. On her return Jacqueline first lived with her 78-year-old grandfather, but the

children were a little too much for him, and after 2 weeks she moved into a mobile home. At the time of the hearing she testified that she was satisfied with the housing. Jacqueline got a job in the retail florist department of a grocery store at $3.50 per hour. Jacqueline further testified that she had "no present plans with Brad Woltemath as of right now."

Stacy testified that he was still working at his job and his other living arrangements had not changed much. After the hearing the court determined that both parents were fit and proper persons to have custody, and gave physical custody of both children to Jacqueline.

Further hearing on the custody issue was held in January 1983 pursuant to the applications of both parties, as set out above. Evidence at this hearing showed that Stacy had, with court permission, taken over custody of both children in December 1982 and that both children were in school in Nebraska. Stacy had been injured on his job on June 25, was on disability until August 18, 1982, and had not been recalled to work. He was farming. Stacy further testified that he had received a letter from Jacqueline on September 14, 1982, telling him that she had married Brad Woltemath and had moved the children to Wyoming.

Jacqueline testified that while, on August 2, 1982, she had testified that she had no plans to remarry, she did decide to marry Brad Woltemath about September 8 and actually married him on September 19, 1982.

She further testified that her former employers in Wyoming had reoffered her former job to her and that she and Brad Woltemath were again managing the ranch. Brad Woltemath testified as to the marriage, the job situation, and the fact he knew and could help care for the two children. Jacqueline's employer testified, in person, that Jacqueline and Brad cared for a 10,000-acre ranch, which was a por-

tion of the employer's overall operation, and that they had basically done so since September 1981. The employer stated that the two were impressive people and that the employer wanted and needed them in the ranch operation. The employer also testified that Jacqueline was a fine homemaker (the employer had "never seen anyone so talented") and a good mother.

An educational diagnostician and a teacher from Newcastle, Wyoming, both testified by deposition as to the programs available in Wyoming for Shannon's type of learning disability and that Shannon had done very well in that program while in Wyoming.

The guardian ad litem appointed for the children also testified. His investigation showed that he felt Shannon's learning disability was slight and existed only in the areas of visual discrimination and memory. He testified the schooling opportunities were substantially similar in both Nebraska and Wyoming. The guardian further testified that both parents love the children but that Stacy needed some parent counseling to improve his parental and communication skills. He further testified that both children told him they wanted to be with their mother in Wyoming but that he had the feeling they were somewhat coached.

The trial court did not interview the children. As set out above, the court did not make any further finding after the January 1983 hearing as to the fitness of the parties. The facts, then, as presented in the record, show that physical custody had been given to Jacqueline while she was living in a small mobile home in Lincoln, earning $3.50 per hour, and working many hours, due to both the demands of her job and her need for money. The change in circumstances is that she has moved to Wyoming and married the man with whom she had been living.

In Wyoming she can provide the same home which the court found satisfactory when giving her custody of Stashia. Jacqueline has stabilized her relation-

ship with Brad Woltemath by marrying him. The court had not disapproved Stashia's living in the residence of Jacqueline and Brad even before they married. And most of all, she can furnish to Shannon the type of personal, loving parenting that he seems to need as he progresses through his schooling. It is unfortunate that Stacy cannot provide such personal help because of the demands on him to earn his living, but that is the fact.

We appreciate the fact that the court felt it had been taken advantage of in Jacqueline's sudden marriage decision and decision to live in Wyoming. When the comparison is made, however, between living in a small mobile home and working at minimum wages for long hours and living in the ranch atmosphere available in Wyoming, we find that there is not a sufficient change in circumstances to change custody. As stated in *Dunne v. Dunne*, 211 Neb. 636, 644-45, 319 N.W.2d 741, 745 (1982), "We must also remember that orders fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person who has custody is unfit for that purpose or that the best interests of the child require such action."

The trial court's concern with the visitation aspect of a custody order when the custodial parent is to live outside the state is well founded. We have stated, " 'In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration in the determination thereof and this policy should yield to the best interests of the child.' " *Campbell v. Campbell*, 156 Neb. 155, 159, 55 N.W.2d 347, 350 (1952), quoted with approval in *Jafari v. Jafari*, 204 Neb. 622, 284 N.W.2d 554 (1979). In *Jafari*, *supra* at 624, 284 N.W.2d at 555, we further stated, "The general rule in cases where a custodial parent wishes to leave the jurisdiction for any legitimate reason is

that the minor children will be allowed to accompany the custodial parent if the court finds it to be in the best interests of the children to continue to live with that parent."

We find that the best interests of the children require that the children remain in the custody of their mother in the State of Wyoming and that the court erred in changing custody of the children after its January 1983 hearing. The provisions of the trial court's order of February 9, 1983, should be reversed, and the trial court is directed to enter an order giving custody of the children to petitioner, Jacqueline, beginning January 3, 1984; to require respondent to pay $125 per child per month, beginning January 3, 1984; and to provide a visitation period of 8 weeks each summer to respondent, along with appropriate alternate holiday visitation after January 1984. We further note that there should be no retention of custody in the court.

REVERSED AND REMANDED WITH DIRECTIONS.

CARO, INC., APPELLANT, V. KEITH L. ROBY, APPELLEE.
342 N.W.2d 182

Filed December 16, 1983. No. 82-634.

1. **Pleadings.** In exercising its sound discretion to permit or refuse the filing of an amended petition, the trial court may consider all the surrounding circumstances, including consideration as to whether the proposed amendment properly states a cause of action.
2. **Contracts.** A contract complete in itself will be conclusively presumed to supersede a prior contract between the same parties and concerning the same subject matter where the terms of the two are so inconsistent that they cannot subsist together.

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

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

David J. Nielson of McGrath, North, O'Malley & Kratz, P.C., for appellee.

BOSLAUGH, HASTINGS, SHANAHAN, and GRANT, JJ., and CAMBRIDGE, D.J.

GRANT, J.

Plaintiff-appellant, Caro, Inc., filed a petition against defendant-appellee Roby seeking a temporary and permanent injunction against Roby to restrain him from engaging in the funeral director business within a radius of 20 miles from Plattsmouth, Nebraska, for a period of 10 years.

Plaintiff's verified petition was based on an attached January 6, 1977, written agreement between the parties providing in part that Roby agreed "that at the time of his termination from the company's employ, regardless of the reason therefore [sic], that for a period of 10 years from the date of such termination he will not either as an owner, employee, partner, or a stockholder of [sic] any other manner, directly or indirectly engage in the business of funeral director, mortician, undertaker, or embalmer within a radius of 20 miles from Plattsmouth, Nebraska."

Based on that petition, on June 21, 1982, a temporary restraining order was signed granting the relief which plaintiff requested and setting a hearing on plaintiff's application for a temporary injunction on July 1, 1982.

On July 1, 1982, the trial court dissolved the restraining order and denied plaintiff's application for temporary injunction. This order was based on the evidence adduced at the hearing, including Roby's evidence that the January 6, 1977, contract had been entirely superseded by a new and different contract which deleted the noncompete agreement. On July 23 Roby filed his answer alleging in part that the agreement on which plaintiff sued had been superseded in its entirety by the terms of a later written agreement dated December 16, 1981, which agree-

ment contained no provisions concerning noncompeting, and which agreement specifically provided that it superseded all prior agreements between the parties.

On August 3 Roby filed a motion for summary judgment based on the pleadings and the evidence adduced at the July 1, 1982, hearing. The hearing on the summary judgment motion was set for August 13.

On August 12, 1982, Caro filed an amended petition. This petition was not verified. Leave of court was not obtained for filing.

On August 13, 1982, after the hearing on the motion for summary judgment, the trial court entered its order, which stated in part, "Plaintiff's Motion to Amend the Petition is overruled and Defendant's Motion for Summary Judgment is sustained."

Caro's motion for new trial was filed on August 24, 1982. On September 10, 1982, the motion for new trial was denied on the basis that it had not been timely filed as shown by the facts that the order sustaining Roby's summary judgment motion was entered on August 13 and Caro's motion was not filed until August 24, 1982.

Caro filed its notice of appeal and paid the statutory fee on September 13, 1982, a date within the statutory time for appeals as set in Neb. Rev. Stat. § 25-1912 (Reissue 1979), because September 12 was a Sunday. Neb. Rev. Stat. § 25-2221 (Reissue 1979). Caro assigns as error the actions of the trial court in (1) refusing to permit Caro to amend its petition to allege fraud, which refusal was an abuse of discretion; (2) granting summary judgment in favor of Roby without giving Caro a chance to establish fraud, which action was an abuse of discretion on the part of the trial court; (3) finding that the second contract superseded the earlier contract; (4) entering summary judgment in favor of Roby when there were genuine issues of fact present; and (5) entering

summary judgment which was contrary to the law and the facts.

We have considered each of the assignments of error, and we affirm the judgment of the trial court for the reasons hereinafter set out.

Appellee Roby presents an issue which must be disposed of before the merits of the case can be considered. Roby contends that in appeals in equity actions a motion for new trial must be timely filed to review the actions of the trial court with regard to amendment of the pleadings. Appellant Caro failed to file its motion for new trial within 10 days. Roby cites *Petersen v. Petersen*, 208 Neb. 1, 3, 301 N.W.2d 592, 594 (1981), where this court said, "There is no question that in appeals in equity actions a motion for new trial is required to review rulings of the trial court on the admission or exclusion of evidence *and on the amendment of pleadings.*" (Emphasis supplied.) In this case, however, appellee is entitled to rely on the procedural provisions of Neb. Rev. Stat. § 25-1912.01(1) (Cum. Supp. 1982) (effective date of July 17, 1982), which provides, "A motion for a new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears in the record." The order and judgment appealed from in this case was entered on August 13, 1982. Since Caro filed its notice of appeal and docket fee within 1 month of the judgment, this court has jurisdiction of the appeal.

Turning to the question as to whether the trial court should have permitted Caro to amend its petition by its filing the day before the hearing on Roby's motion for summary judgment, we are faced with an unnecessary problem. The act of permitting or refusing the filing of amended pleadings is one governed by the sound discretion of the trial court. Both parties agree to that. The problem arises, however, if the trial court is fettered in any way in the exercise of its discretion. In this case appellee has cited two cases to us dealing with the

proposition that an "excuse" must be offered by the amending party to explain the reason for failing to include in the original pleading the facts set out in the proposed amendatory pleading. One of these two cases was directly overruled, and the other distinguished, in *Louis Hoffman Co. v. Western Smelting & Refining Co.*, 150 Neb. 524, 34 N.W.2d 889 (1948). If these same cases were cited to the trial court and relied upon by the trial court, it would be possible that its discretion would not have been exercised properly. No facts are before us on that issue.

We must therefore examine with great care what the trial court did in refusing to permit the filing of the amended petition. It is obvious that Caro knew of the facts set out in the amended petition before it filed its original petition, since its president, Rod Rozanek, was a signatory to the contract which Roby asserts as a defense, and since the second contract was specifically referred to by Roby when he resigned on June 7, 1982. It is also clear that the filing of the amended petition was a last-minute act, done 1 day before the hearing on the summary judgment motion, and some 42 days after the hearing of July 1, at which there had been full disclosure of all the relevant documents, and 52 days after the filing of the original petition. Examination of the proposed amended petition shows conclusively that Caro did not properly raise any fraud issue. The amended petition sets out, with regard to the alleged fraud issue therein, the following: "7. Defendant has raised by motion for summary judgment the defense that on the 16th day of December, 1981 the parties entered into a new and different contract, a part of which provides that the new agreement shall supersede any and all previous agreements of any kind between the parties. A copy of said purported contract is marked Exhibit 'B' and is attached hereto and incorporated by reference herein. 8. Defendant procured the plaintiff's execution of Exhibit 'B' by fraud, deceit, and misrepresentatation [sic] in

that defendant insisted that plaintiff sign the purported contract without consultation with his lawyer when defendant was advised that plaintiff was immediately embarking on a trip and wanted the contract checked. Defendant further advised plaintiff that there were no changes in the contract previously existing between the parties, and the subject matter of this action, except as to compensation and defendants [sic] additional rights to participate in plaintiff's business. Defendant well knew that he intended to secure an abrogation of the non-competative [sic] clause by trickery and that plaintiff had not assented to any agreement eliminating the non-competition clause."

The facts alleged in the proposed amended petition as to the fraud issue were only two: defendant's insistence "that plaintiff sign the purported contract without consultation with his lawyer," and in defendant's advising plaintiff "that there were no changes in the contract previously existing between the parties . . . except as to compensation and defendants [sic] additional rights to participate in plaintiff's business."

The facts relevant to the signing of the second contract are not in dispute. The second contract, of December 16, 1981, was a 1-page typewritten document of 25 lines. It concluded with the sentence, immediately above Rozanek's signature, "This contract is the reduction to writing of previous oral understandings or conversations and shall supercede [sic] any and all previous agreememts [sic] of any kind between the parties." Plaintiff's president and sole stockholder, Rod Rozanek, was a man experienced in the funeral director business and was involved in eight such businesses, each located in a different Nebraska town. He had invited Roby to come to work for Caro in Plattsmouth at a time when Roby was employed in Ainsworth. After Roby had moved to Plattsmouth with his family and had worked some 2 months pursuant to an oral contract, Caro and its

president required that Roby sign the January 6, 1977, contract containing the 10-year noncompete clause, or be fired. On December 16, 1981, Roby made an appointment with Rozanek and drove to Fremont for the meeting. By Rozanek's own testimony he "glanced" at the document while he was conferring with Roby for 5 or 10 minutes. Rozanek signed the agreement.

When the brevity of the December 16, 1981, contract is considered together with the fact that Mr. Rozanek admitted signing the contract, the fact of Mr. Rozanek's long business experience, and the fact that the document was signed in Rozanek's place of business and witnessed by another of Rozanek's employees after a meeting of 5 or 10 minutes, the conclusion is inescapable that the facts as to fraud alleged in the amended petition fit precisely into the legal holdings of *Erftmier v. Eickhoff*, 210 Neb. 726, 732, 316 N.W.2d 754, 757 (1982), where this court stated, "Fraud is never presumed but must be established by the party alleging it by clear and satisfactory evidence. The general rule is that where ordinary prudence would have prevented the deception, an action for the fraud perpetrated by such deception will not lie."

Clearly, any exercise of the slightest prudence would have prevented any claim of possible deception. Based on the totality of the circumstances before the trial court, i.e., the late filing of the amended petition, the failure to originally plead facts known to Caro that might well have resulted in the refusal to issue the temporary restraining order, the facts known to all as a result of the hearing of July 1, the fact that Caro did not present even a claim of fraud in its testimony at the July 1 hearing, the fact that no affidavits alleging fraud were offered by Caro at the summary judgment hearing of August 13, the facts as to the December 16, 1981, contract itself, and the fact that the proposed amended petition did not set forth any proper allegations of

fraud, we determine that the trial court did not abuse its discretion in refusing to permit the filing of the amended petition.

A similar situation was presented to this court in *Ogallala Fertilizer Co. v. Salsbery*, 186 Neb. 537, 184 N.W.2d 729 (1971). In that case plaintiff contended that the trial court abused its discretion when it denied plaintiff the right to file a second amended petition. The court stated at 540-41, 184 N.W.2d at 731-32, "The amended petition proffered sought to change the cause of action to one for unjust enrichment. In this respect, it failed as it did not allege facts sufficient to constitute a cause of action. . . . Denial of the right to file an amended pleading not tending to promote the interests of justice is not an abuse of discretion." The trial court did not err in refusing to permit the filing of the amended petition.

Roby's motion for summary judgment, then, was properly submitted on the pleadings (the petition and the answer) and the evidence and testimony adduced at the July 1, 1982, hearing on Caro's motion for temporary injunction. So far as the record before us shows, neither party presented any other testimony or evidence at the summary judgment hearing.

We agree with the trial court that there was no genuine issue as to any material fact presented and that, as a matter of law, the second contract of December 16, 1981, was complete in itself and completely superseded and discharged the first contract of January 6, 1977. By its terms the second contract gave Roby an additional right to buy 50 percent of any new funeral business bought or built by Caro in Cass County, Nebraska; it substantially changed Roby's remuneration by raising his salary and giving him additional fringe benefits; and it concluded with words, set out above, superseding the original contract. 17A C.J.S. *Contracts* § 395 at 475-76 (1963) sets forth the rule with regard to subsequent inconsistent agreements as follows: "A contract com-

plete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter, where the terms of the latter are inconsistent with those of the former so that they cannot subsist together. However, deviations or changes in a contract do not necessarily abrogate it or imply its abandonment, and where it is claimed that by reason of inconsistency between the terms of the new agreement and those of the old the old one is discharged, the fact that such was the intention of the parties must clearly appear."

This statement of law is specifically affirmed in *Hagerbaumer v. Hagerbaumer Brothers, Inc.*, 208 Neb. 613, 305 N.W.2d 4 (1981), and *In re Estate of Wise*, 144 Neb. 273, 13 N.W.2d 146 (1944).

Applying that rule to the instant case, it is clear, as a matter of law, that the second contract of December 1981 is complete in itself, that its terms are inconsistent with the terms of the earlier contract, and that the earlier and later contracts cannot subsist together. It is also clear, from the wording of the later contract itself, that the parties could not have intended anything other than the superseding of the earlier contract. Accordingly, it is conclusively presumed that the later contract supersedes the earlier.

The trial court was correct in holding that Roby was entitled to judgment as a matter of law.

AFFIRMED.

WEST TOWN HOMEOWNERS ASSOCIATION, INC., A NEBRASKA CORPORATION, APPELLEE, V. MICHAEL D. SCHNEIDER, APPELLANT.

341 N.W.2d 588

Filed December 16, 1983. No. 82-724.

1. **Res Judicata.** Any right, fact, or matter in issue and directly ad-

judicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered 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.

2. **Pleadings.** Under Neb. Rev. Stat. § 25-852 (Reissue 1979), a pleading may be amended in the furtherance of justice to conform to the proof, if the proposed amendment does not change substantially the claim or defense. The decision to allow or deny the proposed amendment rests in the sound discretion of the trial court.
3. **Judgments: Appeal and Error.** A judgment on a fact issue tried to the court alone has the effect of a verdict of a jury and will not be set aside unless clearly wrong.
4. **Attorney Fees.** A litigant may not have an allowance of an attorney fee by the court unless it is authorized by statute or a uniform course of procedure.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed in part, and in part reversed.

David W. Jorgensen of Nye, Hervert, Jorgensen & Waton, P.C., for appellant.

Patrick J. Nelson of Jacobsen, Orr & Nelson, for appellee.

BOSLAUGH, WHITE, and GRANT, JJ., and NORTON, D.J., and COLWELL, D.J., Retired.

NORTON, D.J.

West Town Homeowners Association, Inc., brought this action in the county court of Buffalo County, Nebraska, to recover assessments alleged due from the defendant, Michael D. Schneider, a member of the association. Trial was to the court, and plaintiff was granted judgment for $903.33, together with interest, costs, and an attorney fee of $800. Upon appeal to the District Court of Buffalo County, Nebraska, the judgment was affirmed. We affirm in part and reverse in part.

West Town Homeowners Association, Inc., is a nonprofit corporation located in Buffalo County, Nebraska, and incorporated under the provisions of Neb. Rev. Stat. §§ 76-801 through 76-824 (Reissue

1981), which is an act known as the Condominium Property Act. Michael D. Schneider is an owner of real property located within the area comprising the boundaries of the association. This is the third lawsuit between these parties, involving several of the same issues. No appeal was perfected from the judgment of the trial court in the first two cases.

At the conclusion of the evidence the plaintiff was permitted to amend its petition by interlineation to conform to certain evidence, and it appears that the amendments requested were in fact completed. These amendments had the effect of increasing the amount of the prayer from $263.33 to $937.35.

The defendant raises six assignments of error. In response thereto the plaintiff objects to the first three on the defense of res judicata. It appears from the record that this defense was raised in the trial court by proper pleading as required. See, *Burke v. Munger*, 138 Neb. 74, 292 N.W. 53 (1940); *In re Estate of Schuette*, 138 Neb. 568, 293 N.W. 421 (1940). The evidence offered in support of this defense consisted of complete transcripts of the two former trials, including the judgment of the trial court in each instance. The first three assignments of error were fully litigated in the previous trials and a decision rendered thereon by the trial court. This court has previously stated the rule applicable in the following language: "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 . . . 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." (Syllabus of the court.) *Brommer v. City of Hastings*, 212 Neb. 367, 322 N.W.2d 787 (1982). The first three assignments of error are without merit and will not be discussed further in this opinion.

The remaining three assignments of error are:

(1) Whether the trial court abused its discretion in permitting the plaintiff to amend its petition at the time of trial; (2) Whether or not the plaintiff complied with the requirements of the declaration in assessing and increasing the annual assessment; and (3) Whether or not there was an error in the assessment of attorney fees.

The right to amend pleadings is statutory in nature and well recognized in Nebraska. See Neb. Rev. Stat. § 25-852 (Reissue 1979). This right is limited to some degree by that statute, and the limitations have been subject to much litigation in the past. Recently, this court restated the rule applicable in this situation as follows: "Under § 25-852, a pleading may be amended in the furtherance of justice, to conform to the proof, if the proposed amendment does not change substantially the claim or defense." *Meyer v. Sandhills Beef, Inc.*, 211 Neb. 388, 396, 318 N.W.2d 863, 867 (1982). In *Mahoney v. May*, 207 Neb. 187, 189, 297 N.W.2d 157, 159 (1980), the court also stated: "The decision to allow or deny a proposed amendment to the pleadings rests in the sound discretion of the trial court."

The amendments of which the defendant complains relate directly to the amount of the annual assessment, which is charged against the account of each member at the rate of one-twelfth of the total each month. The amendments were requested principally because of the passage of time between the date of the filing of the petition and the trial date. The amount added to the original request of the prayer logically belongs in this action, and such addition does not substantially change the nature of the claim or the defense. We cannot say that the trial court abused its discretion in this instance, and therefore find no merit in this assignment of error.

The second assignment of error deals with the manner in which the annual assessment of the membership was fixed. Specifically, the defendant complains that the requirements of a certain document,

known as a declaration, were not followed in changing the annual assessment from $35 for the preceding year to $960 effective September 1, 1981. To determine if the trial court erred in its judgment on this question, it is necessary to review the evidence offered and received at the time of trial. This includes the declaration, an instrument of record which is in fact a written statement of the rights, duties, and obligations that exist between the association and its members. Article IV, § 6, of this instrument provides in part: "The Board of Directors shall fix the amount of the annual assessment against each lot at least thirty (30) days in advance of each annual assessment period. Written notice of the annual assessment shall be sent to every owner subject thereto." The section does not describe the form of the notice or when it is to be sent, nor does this information appear elsewhere in the declaration. Part (a) of § 3 of said article provides that from and after January 1 of the year immediately following the conveyance of the first lot to an owner, the annual assessment may be increased above the maximum assessment for the previous year "not more than 7% . . . without a vote of the membership." Part (b) of this section permits the maximum annual assessment to be increased above the 7 percent "by a vote of two-thirds (⅔) of each class of members who are voting in person or by proxy, at a meeting duly called for this purpose." Article III, § 2, purports to establish two classes of memberships, but by the very terms of this article all members were merged into one class no later than December 31, 1979. The present action was filed November 12, 1981, and deals exclusively with matters arising after the year 1979. Section 4 of article IV states that "assessments shall be approved and ratified by the Directors at the annual meeting prior to any other business to be undertaken at said annual meeting."

It appears that a meeting of the board of directors

of the plaintiff association was held on July 9, 1981. At this meeting the board adopted an annual budget for the fiscal year beginning September 1, 1981, and thereafter fixed the annual assessment at $960 per lot per year, payable monthly beginning September 1, 1981. The motion raising the assessment was offered and adopted with the knowledge that inasmuch as this exceeded the maximum 7-percent increase over the preceding year, the action of the board would have to be submitted to the membership of the association for their approval.

The Condominium Property Act, referred to above, requires associations incorporated thereunder to adopt bylaws. There is in evidence in this case a copy of the bylaws adopted by this association. Section I of article II of these bylaws provides that the annual meeting of the members of the association be held on the fourth Tuesday in the month of July of each year. A meeting of the membership of the plaintiff association was held on July 28, 1981, the fourth Tuesday of July in that year. At this meeting action was taken to approve a raise in the annual assessment to $960 per lot per year. However, subsequent to this meeting it was discovered that a quorum had not attended. In consequence thereof, on August 18, 1981, the board of directors held a special meeting and adopted a resolution calling for a special meeting of the membership of the association on August 31, 1981. Notice of this special meeting was given to each known member of the association, including the defendant, at his or her last known address. Evidence indicates that the notice was posted more than 10 days prior to the meeting, pursuant to a requirement of the bylaws that notice of meetings be given not less than 10 days nor more than 30 days before the meeting. On August 31, 1981, the membership met immediately following a special meeting of the board of directors. At the meeting of the board a resolution had been adopted to raise the annual dues to $960 per year be-

ginning September 1, 1981, payable in monthly installments. At the membership meeting a motion was made and seconded calling for the ratification and approval of the action of the board in raising the annual dues to $960 per year beginning September 1, 1981. This was adopted by unanimous vote. Sometime later the defendant was billed in writing for his account.

From this and other evidence the trial court reached its conclusions and entered judgment in favor of the plaintiff in the amount of $903.33. In our examination of the evidence it does not appear that the trial court was clearly wrong in its judgment on this fact question. "A judgment on a fact issue tried to the court alone has the effect of a verdict of a jury and will not be set aside unless clearly wrong." (Syllabus of the court.) *MFA Ins. Companies v. Mendenhall*, 205 Neb. 430, 288 N.W.2d 270 (1980). We therefore conclude that this assignment of error has no merit.

The remaining assignment of error deals with the matter of the attorney fees allowed by the trial court. In connection therewith, there appears the following discourse between the trial court and counsel for the plaintiff, on page 48 of the bill of exceptions from that court, to wit: "THE COURT: Are you relying upon the statutory attorney's fees for your allegations of attorney's fees? MR. NELSON: No. The attorney's fees, Your Honor, are pursuant to the declaration itself."

The law in this state with respect to the allowance of attorney fees is well settled. In *Borden v. General Insurance Co.*, 157 Neb. 98, 59 N.W.2d 141 (1953), the rule was stated as follows: "A litigant may not have an allowance of an attorney fee by the court unless it is authorized by statute or a uniform course of procedure." (Syllabus of the court.) In this instance the plaintiff urges that it is entitled to an attorney fee by reason of the provisions of the declaration, undoubtedly on the theory that the defend-

ant has consented to an award. However, a close reading of the applicable portions of this instrument does not clearly establish the right of the plaintiff to collect attorney fees in actions brought against members for the sole purpose of enforcing delinquent assessments. In absence thereof, the award is in error, and that part of the judgment of the trial court must be reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

BANK OF VALLEY, A CORPORATION, APPELLANT, V. THE UNITED STATES NATIONAL BANK OF OMAHA, A CORPORATION, ET AL., APPELLEES.

341 N.W.2d 592

Filed December 16, 1983. No. 82-730.

1. **Leases: Property.** In determining whether a residence constructed on leased property is personal property, the intention of the parties is controlling.
2. **Leases: Property: Security Interests.** Where the lease gives the lessee the right to remove a residence constructed upon the leased property, the residence remains personal property, and a financing statement granting a security interest in the residence should be filed in the office of the county clerk of the county of the debtor's residence. Neb. U.C.C. § 9-401(1)(c) (Supp. 1977).

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

Robert P. Miller, for appellant.

Robert G. Decker, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

BOSLAUGH, J.

This is an appeal in a declaratory judgment action brought to determine the priority of liens between the plaintiff Bank of Valley's security agreement

and the defendant The United States National Bank of Omaha's security agreement. The property involved was a residence built on leased land.

The evidence is not in dispute. On July 26, 1973, Robert Luethge entered into a lease agreement with Ginger Cove, Inc., for Lot 66, in Ginger Cove. The lease provided: "11. REMOVAL OF LEASEHOLD IMPROVEMENTS. Lessee has the privilege to remove all improvements made by Lessee on said premises provided the same are removed before sixty (60) days after the expiration of this lease, time being of the essence and a material consideration in the regard. If not removed within such sixty (60) days, Lessee shall forfeit all property then remaining on the premises."

Luethge subsequently erected a five-bedroom frame home on Lot 66, Ginger Cove. On February 28, 1978, Robert and Shirley Luethge executed a financing statement granting Bank of Valley a security interest in the frame house "situated on lot 66 Ginger Cove Valley, Ne.," to secure advances made by the bank to the Luethges. The financing statement was filed on March 3, 1978, in the office of the Douglas County clerk. At the time of trial the unpaid balance owed by the Luethges amounted to $30,500, plus accrued interest.

The Luethges subsequently sold the home to Nafus, Nafus sold to Smith, and on February 19, 1981, Smith sold the home to the defendants Edward and Sarah Zachary. Each time the house was sold, the sellers assigned their leasehold interest in Lot 66 to the purchasers.

On February 18, 1981, the Zacharys executed a financing statement granting United States National Bank a security interest in the house on Lot 66, which was filed in the office of the Douglas County register of deeds on February 19, 1981. A copy of the financing statement was also filed in the office of the Douglas County clerk.

The Bank of Valley brought the present action to

determine the priority of the liens of the parties in the frame house. Both parties moved for summary judgment. At the hearing on the motions documentary evidence was received and considered by the court. The trial court found that no material issue of fact existed, that the Bank of Valley had filed its financing statement improperly, and that the lien of the United States National Bank was prior. The Bank of Valley appeals.

The trial court determined that the house should be deemed a fixture. The proper place for filing a statement granting a security interest in a fixture in 1978 was in the office of the register of deeds. Neb. U.C.C. § 9-401(1)(b) (Supp. 1977) provided: "When the collateral is goods which at the time the security interest attaches are or are to become fixtures, then in the office of the register of deeds . . . ."

The Bank of Valley argues that a house located on leased property is personal property if the lease provides for the removal of improvements. The proper place for filing a financing statement granting an interest in personal property is in the office of the county clerk. Section 9-401(1)(c) (Supp. 1977) provided in part: "When the collateral is any other type of tangible or intangible personal property, the following rules apply: When the debtor is a resident of this state, then in the office of the county clerk in the county of the debtor's residence."

Prior to 1980, the Nebraska statute did not contain a definition of the term "fixtures." The question as to when chattels become realty by affixation was to be determined by the general law of the jurisdiction. See Neb. U.C.C. § 9-313 (Reissue 1971), and comment 2 thereto.

"[T]here can be no definition of the term 'fixtures' which will embrace all conditions under all circumstances. Each case must be determined on its own particular facts." *Bond Investment Co. v. Blakeley*, 83 Cal. App. 696, 701, 257 P. 189, 191 (1927).

In determining whether a thing has become a fix-

ture, the following factors are considered: " ' " '1st. Actual annexation to the realty, or something appurtenant thereto. 2d. Appropriation to the use or purpose of that part of the realty with which it is connected. 3d. The intention of the party making the annexation to make the article a permanent accession to the freehold. This intention being inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.' [Citation omitted.] The third test, namely that of 'intention,' appears by the clear weight of modern authority to be the controlling consideration." ' [Citation omitted.]" *T-V Transmission v. County Bd. of Equal.*, *ante* p. 363, 366, 338 N.W.2d 752, 754 (1983). " 'Of these three tests, the clear tendency of modern authority seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and the others (the first and second statements) seem to derive their chief value as evidence of such intention.' " *Bemis v. First National Bank*, 63 Ark. 625, 629, 40 S.W. 127, 128 (1897).

The intention of the parties may be made manifest by an agreement between the parties. "Even 'fixtures' are not real estate when understood by the parties involved to be personal property." *Gilman v. Northern States Power Co.*, 242 Wis. 130, 136, 7 N.W.2d 606, 609 (1943).

" 'Ordinarily a building placed upon land is a fixture, becomes part of the real estate and passes with it; but the buildings may be personal property under some circumstances. Parties are at liberty to make any agreement or arrangement with regard to their property, to dwelling houses or any other property that they see fit, and if the agreement is such a one as will make the property personal property, as between those parties it is personal property, and may be so treated.'

". . . 'The parties concerned may, by agreement in due form, give to fixtures the legal character of realty or personalty at their option, and the law will respect and enforce their understandings . . . .' " *Nathan Myrick v. Rose A. Bill, et al.*, 3 Dakota 284, 287-88, 17 N.W. 268, 269 (1883).

This court stated in *Freeman v. Lynch*, 8 Neb. 192, 199 (1879): "Parties by contract may make such arrangements as to the removal of fixtures as they see fit. In its correct sense, the term 'fixtures' includes such things only of a personal character as have been annexed to the realty, and which may be afterwards severed or removed by the party who united them, or his personal representatives, against the will of the owner of the freehold. Broom's Legal Maxims, 419, and cases cited. The term is often used, however, to designate those articles which are not by law removable when once attached to the freehold, as well as those which are severable therefrom. It is well settled by the clear weight of authority in this country, that houses or other structures of a permanent character erected on the land of another, under an agreement, express or implied, that they are to remain the personal property of the builder, do not attach to and become annexed to the realty." See, also, *Waters v. Reuber*, 16 Neb. 99, 19 N.W. 687 (1884).

In *Garrison General Tire Service, Inc. v. Montgomery*, 75 N.M. 321, 404 P.2d 143 (1965), a lessee built a cabin upon the leased realty. In determining that the cabin was the personal property of the lessee, the court stated at 325, 404 P.2d at 146: "The undisputed evidence is that the owner-lessor of the land and the defendant, the original lessee thereof, recognized the cabin in question as the personal property of the lessee and intended it to so remain, expressly providing in the lease for its removal upon the expiration or termination thereof. It is also undisputed that this had been the established practice of the community and of the owner-lessor for many

years. Where the lessor and lessee expressly so agree, structures placed on leased premises by a lessee remain the personal property of the lessee." See, also, *Hughes v. Kershow*, 42 Colo. 210, 93 P. 1116 (1908), in which it was held that a building built on leased premises remained the personal property of the lessee during the lease term as the lease provided that the building may be removed during the last 60 days of the lease.

In the present case the lease between Luethge and Ginger Cove, Inc., provided for the removal of any improvements. The parties thus intended that the house remain the personal property of the lessee. As such, the financing statement, granting a security interest in the house, was properly filed in the office of the clerk of the county of the debtor's residence. § 9-401(1)(c) (Supp. 1977). This having been done, the interest of the Bank of Valley was properly perfected and is prior to that of United States National Bank. See Neb. U.C.C. §§ 9-303, 9-312 (Reissue 1971).

The judgment of the District Court is reversed and the cause remanded with directions to enter judgment in favor of the plaintiff in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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In error proceedings taken from findings and orders of an administrative agency or body acting in a quasi-judicial capacity, as in the case at bar, only two questions are ordinarily presented for decision. The general rule is that if it appears in such cases that such agency or body has acted within its jurisdiction and that all of the jurisdictional facts essential to uphold its findings and orders are sustained by some competent evidence, such findings and orders will be upheld in error proceedings to the District Court and on appeal to this court. Garza v. City of Omaha 714

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1. Upon review of an order of the Nebraska Power Review Board, this court is guided by the rule that determination of what is consistent with the public convenience and necessity is a question of fact peculiarly for the determination of the board. This court may question only whether the board acted within the scope of its authority and if the order complained of is supported by the evidence and is reasonable and not arbitrarily made. In re Applications of Nebraska P.P. Dist. 8
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3. The findings of a court in a law action have the effect of a jury verdict and will not be set aside unless clearly wrong. Jameson v. Giacalone 33

4. In equity cases we review the record de novo and reach an independent conclusion without reference to the conclusion reached by the trial court; except, however, that where credible evidence is in conflict we give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying. Spilinek v. Spilinek 35
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5. Whether properties, the subject of other sales, are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of aid to the jury, must necessarily rest largely in the sound discretion of the trial court. The trial court's determination will not be interfered with in the absence of an abuse of discretion. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case. Wear v. State of Nebraska 69

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14. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere differ-

ence of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. Spencer Holiday House v. County Bd. of Equal. 194

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16. 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. Heironymus v. Jacobsen Transfer 209
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Randall v. Safeway Stores 877
Minshall v. Plains Mfg. Co. 881

17. In reviewing cases involving conflicting testimony 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 evidence to support it. State v. Beach 213

18. In the absence of an abuse of discretion by the trial court, this court will not disturb on appeal a sentence imposed within the statutory limits. State v. Beach ... 213
State v. Pearson 339
State v. Nix 410
State v. Pierce and Wells 512

19. A decree fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Tautfest v. Tautfest 233

20. Inasmuch as no specific theories of recovery are required to be pleaded in small claims court, that court's decision must be affirmed by the District Court if it can be founded on any theory supported by the evidence. Harris v. Eberhardt 240

21. A party has the right to cross-examine a witness with

regard to an interest which affects credibility. Failure to permit such inquiry constitutes reversible error if prejudice results to the complaining party. L. J. Vontz Constr. Co. v. Alliance Indus. 268
22. In an appeal to the Supreme Court from a decree of dissolution, the marital status continues until a final determination is had. State v. Palmer 273
23. A lien claimant has the burden to establish the validity and amount of his lien. Columbus Fed. S. & L. Assn. v. Swails Constr. Co. 287
24. On appeal of domestic relations cases, this court is required to make independent conclusions of fact without reference to the conclusion reached by the trial court. Hinz v. Hinz 335
Martin v. Martin 508
25. As a general rule, a proper judgment will not be reversed even if the trial court did not give the right reason for its rendition. Hinz v. Hinz 335
26. Questions presented on appeal but not necessary to a decision need not be determined. State v. Wenzel 395
27. A motion for post conviction relief can not be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Ohler 401
28. Once a motion for post conviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of the filing of the prior motion. State v. Ohler 401
29. Where two or more defendants are convicted for the same offense and different penalties are inflicted, and it appears from the evidence that the defendant receiving the least punishment is at least equally guilty, it may be necessary for this court to examine the evidence to determine whether there were justifiable reasons for the distinctions and whether the higher sentence should be reduced. State v. Nix 410
30. In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after rendition of the judgment or decree or the making of the final order. Sederstrom v. Wrehe 429
31. After a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence, if the evidence sustains some rational theory of guilt. State v. Evans 433
32. In determining the sufficiency of the evidence to sus-

tain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Evans 433
State v. Pierce and Wells 512
33. Consideration of assignments of error is limited to those discussed in the brief. State v. Evans 433
Nerud v. Haybuster Mfg. 604
34. Error cannot be predicated on the failure to give tendered jury instructions absent prejudice to the rights of the defendant. State v. Evans 433
35. An order denying probation and a sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge. State v. Evans 433
36. An assignment of error which requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions; the only question presented under such circumstances is the sufficiency of the pleadings to sustain the judgment of the trial court. State v. Robinson 449
37. The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. State v. Gilreath 466
38. A judgment will not be reversed for error in admitting evidence which is cumulative in nature if evidence which was properly admitted clearly established the guilt of the defendant beyond a reasonable doubt. State v. Gilreath 466
39. The Supreme Court reserves the right to note and correct plain error which appears on the face of the record, in furtherance of the interests of substantial justice. State v. Prichard 488
40. Absent a showing of an abuse of discretion, the Supreme Court will not ordinarily set aside a determination by the District Court as to whether or not good cause has been shown. Singleton v. South Platte Nat. Resources Dist. 504
41. The fact that counsel is misinformed or uninformed as to the requirements of filing a petition on appeal in the District Court is not a showing of good cause within the meaning of the statute. Singleton v. South Platte Nat. Resources Dist. 504
42. Although this court is hesitant to disturb the division of

property made by the trial court in a dissolution proceeding, we must do so when it is patently unfair on the record. Martin v. Martin 508
43. The trial court is vested with broad discretion in considering requests of defense counsel for discovery, and error can be predicated only upon an abuse of such discretion. State v. Pierce and Wells 512
44. A motion for continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal. State v. Pierce and Wells 512
45. Appeals from a determination by a claims deputy to an appeal tribunal, under Neb. Rev. Stat. § 48-634 (Cum. Supp. 1982) of the Employment Security Law, must be filed within 20 days of the date of mailing of the notice of determination, except that for good cause shown the tribunal may take jurisdiction over appeals filed outside the prescribed appeal period. Nicholson v. City of Bellevue 540
46. Decisions of an appeal tribunal appealed to the District Court shall be heard de novo on the record, except that the court on its own motion may order additional evidence to be taken before it. Nicholson v. City of Bellevue 540
47. Appeals from the District Court involving the Employment Security Law are heard by this court de novo on the record. Nicholson v. City of Bellevue 540
48. Generally, the right of appeal is statutory, and the time requirements set forth in the statute are mandatory and must be complied with before the appellate tribunal acquires jurisdiction of the subject matter. Nicholson v. City of Bellevue 540
49. A claim of newly discovered evidence will not sustain the appellant's burden of showing good cause for filing a late appeal under Neb. Rev. Stat. § 48-634 (Cum. Supp. 1982) of the Employment Security Law, unless it appears that such evidence, if offered and admitted in the former proceeding, probably would have produced a different result. In other words, the appellant must demonstrate that with the newly discovered evidence he or she is able to make out a valid claim or defense before an appeal tribunal may take jurisdiction over an appeal filed beyond the 20-day limitation. Nicholson v. City of Bellevue 540
50. This court hears appeals of juvenile proceedings de novo upon the record, but accords the findings of fact of the juvenile court great weight because it both heard

and observed the parties and witnesses. In re Interest of Hochstetler 546
In re Interest of R.D.J. and K.S.J. 724
51. Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. State v. Whitmore, White, and Henderson 560
52. Findings of fact made by the compensation court will not be set aside on appeal unless clearly wrong. However, where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact do not support the award, this court must modify, reverse, or set aside the award. Niesen v. Logan County Co-op Oil Assn. 587
53. This court will not consider generalized and vague assertions of error which do not advise as to the issues submitted for decision. Nerud v. Haybuster Mfg. 604
54. Findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In such a circumstance it is not within our province to resolve conflicts in or to weigh the evidence; if there is a conflict in the evidence, this court will review the judgment rendered and will presume that controverted facts were decided in favor of the successful party. Nerud v. Haybuster Mfg. 604
55. A proper judgment will not be reversed even if the trial court did not give the right reason for its rendition; a trial court's judgment is to be affirmed if the evidence sustains any theory of recovery pled by the plaintiff, irrespective of which theory the trial court relied upon. Nerud v. Haybuster Mfg. 604
56. The failure to endorse the names of the State's witnesses on the information is not grounds for reversal in the absence of a showing of prejudice. State v. Esluer 616
57. All 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. Esluer 616
58. Evidence which does not appear in the record cannot be considered on appeal by the Supreme Court. Mace v. Mace 640
59. In a marriage of less than 2 years' duration, where the trial court has restored the parties to approximately the position each was in before the marriage, such disposition, if supported by the evidence, will be affirmed on review. Humphrey v. Humphrey 664
60. In reviewing the sustaining of a demurrer this court

must treat the facts alleged in the petition as undisputed. Morris v. Lutheran Medical Center 677
61. The court must accept the facts as set forth in the petition and may not notice or consider extrinsic matters in determining whether a pleading states a cause of action. Morris v. Lutheran Medical Center 677
62. A defendant cannot predicate error on the admission of evidence to which no objection was made at the time the evidence was adduced. State v. Harper 686
63. In error proceedings taken from findings and orders of an administrative agency or body acting in a quasi-judicial capacity, as in the case at bar, only two questions are ordinarily presented for decision. The general rule is that if it appears in such cases that such agency or body has acted within its jurisdiction and that all of the jurisdictional facts essential to uphold its findings and orders are sustained by some competent evidence, such findings and orders will be upheld in error proceedings to the District Court and on appeal to this court. Garza v. City of Omaha 714
64. An action for specific performance is triable de novo on appeal to this court. Cole v. Hickey 728
65. One cannot be denied the right of review in the appellate courts. City of Lincoln v. Soukup 732
66. A contract to compel parties to arbitrate future disputes and thus to oust the courts of jurisdiction to settle such disputes is against the public policy of this state and is void. City of Lincoln v. Soukup 732
67. When a new trial is sought for juror misconduct, the finding of the trial court will not be set aside unless the evidence of misconduct is clear and convincing. Ellis v. Far-Mar-Co 736
68. An action to compel the specific performance of an oral contract to devise real property by will is equitable in nature and is reviewed de novo on the record on appeal to this court. Matthews v. Matthews 744
69. The court regards with grave suspicion any claim of an oral contract to devise property by will, and must, in its de novo review of the record, discover clear, satisfactory, and unequivocal evidence of the existence of the alleged oral contract and its terms. Matthews v. Matthews 744
70. Application for a physical examination of an injured party should be made before the commencement of the trial of a cause, and if not made until after the trial has commenced, a sufficient reason should be assigned why such request was not made before the commencement of the trial. Where such request is made during the

progress of the trial, it rests within the sound discretion of the court whether such request be granted, and the ruling of the court thereon will not be disturbed, unless from all the circumstances an abuse of discretion appears. Hoegerl v. Burt 752

71. A verdict will not be set aside unless it is against the weight of the evidence, or appears to have been the result of passion, prejudice, mistake, or disregard of the rules of evidence or the law. Hoegerl v. Burt 752

72. The determination of the admissibility of a photograph is within the discretion of the trial court. The decision of the trial court will not be reversed in the absence of a clear abuse of discretion. State v. Birge 761

73. A proper objection, stating the specific grounds therefor, and an adverse ruling thereon must appear on the record to preserve the issue for consideration on appeal. State v. Birge 761

74. In determining whether the rights of a defendant have been prejudiced such that a reversal of a conviction is warranted, the claim of prejudice must be evaluated in the context of the entire record. State v. Birge 761

75. One seeking post conviction relief has the burden of establishing the 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. Waterman 768

76. An order or decree sustaining a demurrer will be affirmed if any one ground of the demurrer is well taken, irrespective of whether the ruling is based on an erroneous ground. Harmon Care Centers v. Knight 779

77. An equitable action for an injunction is reviewed 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. Burton v. Annett 788

78. The requirement that a transcript of the proceedings in the lower tribunal be filed with a petition in error is mandatory and jurisdictional. School Dist. No. 39 v. Farber 791

79. In a proceeding in error additional evidence may not be received, and the issues must be determined solely from the transcript filed with the petition. School Dist. No. 39 v. Farber 791

80. As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the compensation court. Hamer v. Henry 805

81. In testing the sufficiency of the evidence to support the findings of the compensation court, every controverted fact must be resolved in favor of the successful party, and such party should have the benefit of every inference that can be drawn therefrom. Hamer v. Henry .. 805
Minshall v. Plains Mfg. Co. 881
82. Where a jury is waived in a declaratory judgment action in which there are questions of fact, the findings of the trial court on such issues have the effect of a jury verdict and will not be set aside unless clearly wrong. S.I.D. No. 32 v. Continental Western Corp. 843
83. A judgment on a fact issue tried to the court alone has the effect of a verdict of a jury and will not be set aside unless clearly wrong. West Town Homeowners Assn. v. Schneider 905

Appurtenances.

Station connects, or housedrops, a part of a cable television distribution system, which are actually annexed to the realty or something appurtenant thereto, are appropriated to the use or purpose of that part of the realty with which they are connected; and if the intention of the party making such annexation is to make these articles permanent accessions to the freehold, they become fixtures attached to the real estate of the subscriber and are not subject to taxation as personal property belonging to the cable television company. T-V Transmission v. County Bd. of Equal. 363

Assignments.

Generally, an assignor retains only those rights which have not passed to the assignee by the assignment, and the assignor loses all right to control or enforce an assigned right against the obligor. Ryder Truck Rental v. Transportation Equip. Co. 458

Attorney Fees.

1. In the determination of a reasonable attorney fee, the court should consider the importance of and the result of the case, the difficulties thereof, the degree of professional skill demonstrated, the diligence and ability required and exercised, the experience and professional training of the attorney, the difficulty of the questions of fact and law that are raised, and the time and labor necessarily required in the performance of those duties. Wear v. State of Nebraska 69
2. The court, in awarding a reasonable attorney fee, may consider the actual agreement existing between a liti-

gant and his attorney, including an obligation to pay a contingent fee. While the actual agreement is neither the sole factor nor a factor to be given any greater weight than any of the other factors, it may nevertheless be considered. Wear v. State of Nebraska 69

3. It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute. City of Gering v. Smith Co. 174
Anderson Mktg. Associates v. Roberts 670
West Town Homeowners Assn. v. Schneider 905
4. Ordinarily, attorney fees will not be allowed in an appeal of a default judgment. Anderson Mktg. Associates v. Roberts 670

Bailment.

In a bailment for hire or a mutually reciprocal bailment case, in the absence of statutory or contractual provisions to the contrary, once bailor proves delivery of property to bailee in good condition and failure to redeliver upon timely demand, the burden is irrevocably fixed upon bailee to prove by a preponderance of the evidence that he has exercised due care to prevent the loss, damage, or destruction of the property. This principle applies to all bailment for hire cases, whether brought in tort or in contract, in which bailee has exclusive control over the property at the time it was lost, destroyed, or damaged. *Nash v. City of North Platte*, 198 Neb. 623, 255 N.W.2d 52 (1977), and its predecessors are overruled. Knight v. H & H Chevrolet 166

Banks and Banking.

1. Mutuality in membership is basic and essential in a savings and loan association. Nebraska League of S. & L. Assns. v. Johnson 19
2. An act of a savings and loan association must conform with the statutes governing the existence and activities of savings and loan associations. Any act not authorized by such statutes is beyond the powers conferred upon a savings and loan association. Nebraska League of S. & L. Assns. v. Johnson 19

Boundaries.

1. The rule of recognition and acquiescence embodied in Neb. Rev. Stat. § 34-301 (Reissue 1978) is separate and

distinct from the theory of adverse possession. Spilinek v. Spilinek 35
2. In order for the estoppel created by recognition and acquiescence to operate, there must be an assent, by words, conduct, or silence, in a line as the boundary. Spilinek v. Spilinek 35
3. Neb. Rev. Stat. § 34-103 (Reissue 1978) does not authorize assessment of one-half the cost of surveying a disputed boundary line to the other party. Spilinek v. Spilinek 35
4. Where a fence is constructed as the boundary line, although it is not the actual boundary line, and the parties claim ownership of land up to the fence for the uninterrupted statutory period, the parties gain title to such land by adverse possession. Horky v. Schriner .. 498

Brokers.

Generally, a broker is entitled to a commission on a sale by the principal, where, in addition to language indicating an exclusive agency, there is a special contractual provision giving a right to a commission on a sale by the owner. Kerry-Rand & Associates v. Peddicord 798

Case Disapproved.

To the extent this decision is in conflict with our decision in *Sherlock v. Sherlock*, 112 Neb. 797, 201 N.W. 645 (1924), our opinion in *Sherlock* is disapproved. Franklin v. Pawley 624

Case Overruled.

In a bailment for hire or a mutually reciprocal bailment case, in the absence of statutory or contractual provisions to the contrary, once bailor proves delivery of property to bailee in good condition and failure to redeliver upon timely demand, the burden is irrevocably fixed upon bailee to prove by a preponderance of the evidence that he has exercised due care to prevent the loss, damage, or destruction of the property. This principle applies to all bailment for hire cases, whether brought in tort or in contract, in which bailee has exclusive control over the property at the time it was lost, destroyed, or damaged. *Nash v. City of North Platte*, 198 Neb. 623, 255 N.W.2d 52 (1977), and its predecessors are overruled. Knight v. H & H Chevrolet 166

Charities.

1. Property is not used for financial gain or profit to either the owner or user if no part of the income from it

is distributed to the owner's or user's members, directors, or officers, or to private individuals. United Way v. Douglas Co. Bd. of Equal. 1
2. Concurrent ownership and use of property in a single entity is not required in order for property to qualify for a charitable exemption from taxation. United Way v. Douglas Co. Bd. of Equal. 1
3. Lease of property to a charitable organization by a charitable organization for substantially less than its fair rental value is a use of the property for a charitable purpose. United Way v. Douglas Co. Bd. of Equal. 1
4. Vacant space in property owned by a charitable organization is exempt from taxation if it is intended for a charitable use, the dominant use of the property as a whole is for exempt purposes, and the conditions under which it is held preclude its use for commercial purposes. United Way v. Douglas Co. Bd. of Equal. 1

Child Custody.

1. A decree fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. Tautfest v. Tautfest 233
Haake v. Haake 889
2. Under Neb. Rev. Stat. § 42-364 (1978), the trial court on its own motion may make subsequent changes or modifications in a decree of dissolution of a marriage in relation to any minor children and their maintenance when required, but only after notice to the parties and an opportunity to be heard. Tautfest v. Tautfest 233
3. Sexual misconduct is a factor which may be considered in deciding the issue of custody. It may support a finding of a change of circumstances sufficient to conclude that one who had custody is no longer fit for that purpose or that the best interests of the child require such change. Hinz v. Hinz 335
4. Among the factors considered by a court in determination of custody in dissolution proceedings are moral fitness of the parents; respective environments offered by each parent; the emotional relationship between the child and the parents; the age, sex, and health of the child; the effect on the child of continuing or disrupting an existing relationship; the attitude and the stability of character of each parent; and the capacity to furnish the physical care, education, and needs of the child. Moeller v. Moeller 360
5. Habeas corpus proceedings may be used to enforce a

foreign judgment regarding child custody. Mace v. Mace 640
6. Neb. Rev. Stat. § 43-1213 (Cum. Supp. 1982) does not require automatic enforcement of a foreign decree or a foreign modification of a decree simply because it is shown to the court that it exists. Rather, the statute requires that the court in which enforcement is sought examine the jurisdictional foundation upon which the foreign court acted. Mace v. Mace 640
7. If the foreign court has assumed jurisdiction under statutory provisions substantially in accordance with the Uniform Child Custody Jurisdiction Act or under factual circumstances meeting the UCCJA jurisdictional standards, then the court must recognize and enforce the foreign decree. Mace v. Mace 640
8. Primarily, the Uniform Child Custody Jurisdiction Act is concerned with subject-matter jurisdiction and not personal jurisdiction. Submission of a person to the jurisdiction of the court does not alone confer jurisdiction under the act. Mace v. Mace 640
9. Usually the best interests of the children are served by having a determination in the state where the parties both reside and where the facts concerning the custody of the children are more readily available to the court. Mace v. Mace 640
10. The home state concept is therefore of the utmost importance in the Uniform Child Custody Jurisdiction Act, requiring the courts, when possible, to choose that forum to adjudicate custody disputes. Mace v. Mace . 640
11. The controlling consideration in a child custody determination is the best interests and welfare of the child. Mace v. Mace 640
Haake v. Haake 889
12. Among the factors to be considered in determining the best interests of the children are the moral fitness of the parents, respective environments offered by each parent, emotional relationship between the children and parents, and the age, sex, and health of the children. Sexual misconduct, while not determinative, may be considered. Mace v. Mace 640
13. A child's statement of preference of custody may be considered. Mace v. Mace 640
14. Other considerations are the effect on the children of continuing or disrupting an existing relationship, attitude and stability of each parent, and the capacity to furnish physical care, education, and needs of the children. Mace v. Mace 640

Child Support.

1. A court, in an appropriate case, may require sufficient security to be given for the payment of alimony and child support awards. Lacey v. Lacey 162
2. Where an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest child reaches his majority. The proper remedy, if this be deemed unjust, is to seek a modification of the decree in the court which entered it, on the basis of the changed circumstances. Johnson v. Johnson 689
3. A single amount to be paid periodically for the support of more than one child is not subject to an automatic pro rata reduction. Johnson v. Johnson 689
4. The fact that a decree fails to provide what is to happen upon the emancipation of a minor child does not create an ambiguity. Johnson v. Johnson 689
5. Where a party owes past due alimony or child support, the failure to pay must be found to be a willful failure in spite of an ability to pay before a request for modification of a decree may be dismissed on the basis of "unclean hands." Voichoskie v. Voichoskie 775

Civil Rights.

In order to sustain a charge of discrimination where there is no charge of a universal discriminatory practice or system, the complainant must establish that the employer intentionally engaged in acts that discriminated against the complainant in violation of the statutory prohibition. Nebraska P.P. Dist. v. Lacy 462

Claims.

1. The purpose of the nonclaim statute, Neb. Rev. Stat. § 30-2485 (Reissue 1979), is facilitation and expedition of proceedings for distribution of a decedent's estate, including an early appraisal of the respective rights of interested persons and the prompt settlement of demands against the estate. In re Estate of Feuerhelm 872
2. Notice to a representative of an estate regarding a possible demand or claim against an estate does not constitute presenting or filing a claim under Neb. Rev. Stat. § 30-2486 (Reissue 1979). In re Estate of Feuerhelm 872

Collateral Estoppel.

As a general rule, collateral estoppel may be applied if the identical issue was decided in a prior action, there

was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action. In re Applications of Nebraska P.P. Dist. 8
Cockle v. Cockle 329

Commission of Industrial Relations.

1. In our review of orders and decisions of the Commission of Industrial Relations, we are restricted to considering whether the order of that agency is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. IAFF Local 831 v. City of No. Platte 89
2. The Commission of Industrial Relations' sole function is to settle industrial disputes, and the principal onus in producing evidence is on the parties. The adversary nature of proceedings has been preserved in the commission by the Legislature in providing that proceedings shall conform to the code of civil procedure applicable to District Courts, Neb. Rev. Stat. § 48-812 (Cum. Supp. 1982), by the decision of this court as to burden of proof and, for that matter, by the procedures adopted and followed by the commission itself. IAFF Local 831 v. City of No. Platte 89

Compromise and Settlement.

Under Rule 408 of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-408 (Reissue 1979)), evidence of compromise and offers to compromise is inadmissible. This exclusion extends to evidence that any party to the litigation has settled a claim with a third party concerning the same transaction or subject matter involved in the litigation where such evidence is offered. Baker v. Blue Ridge Ins. Co. 111

Confessions.

1. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. The determination of whether a statement was voluntarily made necessarily turns on the consideration of the totality of the circumstances in any particular case. State v. Rife 132
2. A finding of the trial court that a statement of an ac-

cused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. State v. Rife 132
State v. Tucker 636
3. In a criminal trial a confession of guilt is not competent as evidence unless first shown to have been voluntarily made. State v. Tucker 636
4. Factors to be taken into account in the determination of whether a confession is voluntary are the circumstances of the arrest, the circumstances of continuing custody, the duration of custody, and the pattern of interrogation. State v. Tucker 636

Consideration.
1. There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. Kerry-Rand & Associates v. Peddicord 798
2. Failure of consideration is no defense to a negotiable instrument in the hands of a holder in due course. S.I.D. No. 32 v. Continental Western Corp. 843
3. The consideration necessary to support a contract or negotiable instrument must be within the contemplation of the parties. S.I.D. No. 32 v. Continental Western Corp. 843

Constitutional Law.
1. Neither double jeopardy nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded from imposing a new sentence, even though greater than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities, which information may have come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's recent prison record, or possibly from other sources. State v. Beach 213
2. Courts will not pass on the constitutionality of a city ordinance unless it becomes necessary to do so. State v. Wenzel 395
3. 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. State v. Evans 433
4. That defendant's constitutional rights were honored in

a prior conviction may not be proved by a silent record. State v. Prichard 488
5. Neb. Rev. Stat. §§ 28-813(1) and 28-807(9) (Reissue 1979) are not unconstitutionally vague. State v. Embassy Corp. 631
6. The fact that juries may reach different results on similar facts does not render obscenity statutes unconstitutional, nor does it create a right of reliance when other questionable material is exhibited. State v. Embassy Corp. 631
7. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. State v. Hamilton 694
8. The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose in advance what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things and providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another. State v. Hamilton 694
9. A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning, and differ as to its application, violates the first essential element of due process of law. State v. Hamilton 694
10. The test to determine whether a statute defining an offense is void for uncertainty is whether the language may apply not only to a particular act about which there can be little or no difference of opinion but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. The dividing line between what is lawful and what is unlawful cannot be left to conjecture. State v. Hamilton 694
11. Neb. Rev. Stat. § 28-311 (Reissue 1979) is unconstitutional. State v. Hamilton 694
12. In accordance with Neb. Rev. Stat. § 79-1254 (Reissue 1981), teachers having taught more than 2 years in a Class I, II, III, or VI school district have a property interest in their employment and as a consequence are entitled to procedural and substantive due process before termination of such employment is permitted. Irwin v. Board of Ed. of Sch. Dist. No. 25 794
13. Within the matrix of the particular circumstances pres-

ent when a teacher who is to be terminated for cause opposes his termination, minimum procedural due process requires that he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist; he be advised of the names and the nature of the testimony of witnesses against him; at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense; and that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges. Irwin v. Board of Ed. of Sch. Dist. No. 25 794

14. A teacher termination proceeding not in compliance with minimum procedural due process requirements is a nullity, and that teacher is not lawfully discharged. Irwin v. Board of Ed. of Sch. Dist. No. 25 794

Contracts.

1. A written contract expressed in unambiguous language is not subject to interpretation or construction and the parties' intention must be determined from its contents. Village of Morrill v. Roosevelt P.P. Dist. 41
Kansas-Nebraska Nat. Gas Co. v. Swanson Bros. 398
2. A suit for money had and received is based upon a notion that where one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay to the latter. Village of Morrill v. Roosevelt P.P. Dist. 41
3. An express or implied acceptance of work as in compliance with a building contract operates as a waiver of defective performance, but this rule is inapplicable where the acceptance was under protest or induced by fraud, or where the defects were latent and unknown to the owner. City of Gering v. Smith Co. 174
4. Ordinarily, the acceptance of performance after a default in performance waives the right to rely upon the default. City of Gering v. Smith Co. 174
5. It is established in Nebraska law that a vendee under an executory land contract is entitled to an equitable lien for such amount which has been paid on the purchase price as against a subsequent creditor or purchaser from the vendors. Sidney Fed. S. & L. Assn. v. Jones 225
6. In a case where performance of a land contract is frustrated by the act or neglect of the vendor, the measure of damages should be the recovery of amounts properly designated as principal and such amounts of interest and value of improvements as exceed the reasonable

value of the use of the property. Sidney Fed. S. & L. Assn. v. Jones 225
7. An application for the strict foreclosure of a land contract, being in the nature of a forfeiture, is addressed to the sound discretion of the court, and before this relief may be granted it must be clear that the property involved is of less value than the amount due on the contract for its sale or that it would not bring a surplus over the amount due if a sale were ordered. Ryan v. Kolterman 355
8. A trial court is not free to rewrite a contract for the parties or speculate as to the terms of a contract which the parties have not seen fit to set out or are contrary to the express terms of the contract. Kansas-Nebraska Nat. Gas Co. v. Swanson Bros. 398
9. A separate exclusionary clause in an insurance contract should be construed in light of the provisions of the whole contract and harmonized therewith if reasonably possible. Thos v. Employers Mutual Cas. Co. 424
10. An exclusion in a liability policy excluding from coverage injury to or destruction of any goods sold by the named insured, or work completed by the named insured out of which the accident arises, eliminates any coverage for injury to or destruction of the product furnished or work completed by the named insured. Thos v. Employers Mutual Cas. Co. 424
11. Under an exclusion in a liability policy excluding from coverage injury to goods sold or work completed by the named insured, if a defect in the product furnished or work completed by the named insured causes damage to other property, there is coverage for such damage to other property. Thos v. Employers Mutual Cas. Co. .. 424
12. A warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Nerud v. Haybuster Mfg. 604
13. 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 the written executory contract may be changed by a subsequent parol agreement before a breach thereof. Cole v. Hickey 728
14. An unqualified renunciation of an executory contract before time for performance by one party excuses tender of performance by the other party at the time set for performance. Cole v. Hickey 728
15. A contract to compel parties to arbitrate future disputes and thus to oust the courts of jurisdiction to settle

such disputes is against the public policy of this state and is void. City of Lincoln v. Soukup 732
16. An action to compel the specific performance of an oral contract to devise real property by will is equitable in nature and is reviewed de novo on the record on appeal to this court. Matthews v. Matthews 744
17. The court regards with grave suspicion any claim of an oral contract to devise property by will, and must, in its de novo review of the record, discover clear, satisfactory, and unequivocal evidence of the existence of the alleged oral contract and its terms. Matthews v. Matthews 744
18. In order to remove from the operation of the statute of frauds an oral contract to devise property, there must be performance referable solely to the contract sought to be enforced such that nonperformance by the other party would constitute a fraud upon the claimant. Matthews v. Matthews 744
19. A contract to coach is not a contract subject to the procedural and substantive requirements of Neb. Rev. Stat. § 79-1254 (Reissue 1981). Irwin v. Board of Ed. of Sch. Dist. No. 25 794
20. There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. Kerry-Rand & Associates v. Peddicord 798
21. Generally, a broker is entitled to a commission on a sale by the principal, where, in addition to language indicating an exclusive agency, there is a special contractual provision giving a right to a commission on a sale by the owner. Kerry-Rand & Associates v. Peddicord 798
22. The fraud practiced by misrepresenting the intention to perform a contract is fraud in the inducement and is not available as a defense against a holder in due course of a negotiable instrument. S.I.D. No. 32 v. Continental Western Corp. 843
23. The consideration necessary to support a contract or negotiable instrument must be within the contemplation of the parties. S.I.D. No. 32 v. Continental Western Corp. 843
24. A contract complete in itself will be conclusively presumed to supersede a prior contract between the same parties and concerning the same subject matter where the terms of the two are so inconsistent that they cannot subsist together. Caro, Inc. v. Roby 897

Convictions.

1. No defendant, once convicted, is entitled to probation as a matter of law. State v. Goodpasture 341
2. One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. State v. Evans 433
3. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Evans 433
   State v. Pierce and Wells 512

Court Rules.

A trial court may adopt rules and procedures designed to move cases from filing to disposition, whether disposition is to be by dismissal, trial, or other method. Brown v. Metropolitan Utilities Dist. 431

Courts.

1. One who invokes the power of a court on any question other than jurisdiction makes a general appearance such as to confer jurisdiction over himself. Cockle v. Cockle 329
2. A District Court has both statutory and inherent power to dismiss an action for lack of prosecution. Wilson v. Bryan Memorial Hosp. 446

Criminal Law.

1. In a criminal proceeding the right to inquire of a defendant of a previous conviction is for the purpose of attacking the credibility of the witness. If, in response to a question whether the defendant has ever been convicted of a felony, or a crime involving dishonesty or false statements, the defendant answers yes, the inquiry should end. It is improper to inquire into the nature of the crime or the details of the offense. State v. Daugherty 45
2. Two or more prior convictions arising out of the same set of circumstances may not be used to impose an enhanced penalty pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1979). State v. Lopez 65
3. A distinction exists between an offense and the unlawful act out of which it arises, it being possible that two

or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act. State v. Kuntzelman 115

4. An instrument not specifically enumerated in Neb. Rev. Stat. § 28-1202(1) (Reissue 1979) may be a "deadly weapon" if in the manner it is used or intended to be used it is capable of producing death or serious bodily injury. State v. Kanger 128
5. The question of whether an object or weapon not specifically enumerated in Neb. Rev. Stat. § 28-1202(1) (Reissue 1979) was a "deadly weapon" is a question of fact to be decided by the trier of fact. State v. Kanger 128
6. In a criminal case tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong, and the verdict must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Kanger 128
State v. Esluer 616
7. As a general rule, evidence of prior juvenile adjudications may not be admitted as criminal convictions for the purpose of impeaching the credibility of a witness. State v. Beach 213
8. Neither double jeopardy nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded from imposing a new sentence, even though greater than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities, which information may have come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's recent prison record, or possibly from other sources. State v. Beach 213
9. The provisions of Neb. Rev. Stat. § 29-3303 (Reissue 1979) require a showing of probable cause that a crime has been committed and that the person compelled to produce the nontestimonial evidence has committed that crime. State v. Evans 433
10. After a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency

of evidence, if the evidence sustains some rational theory of guilt. State v. Evans 433
11. A judgment will not be reversed for error in admitting evidence which is cumulative in nature if evidence which was properly admitted clearly established the guilt of the defendant beyond a reasonable doubt. State v. Gilreath 466
12. Neb. Rev. Stat. § 43-202.01 (Reissue 1978) and Neb. Rev. Stat. § 29-1816 (Reissue 1979) involve a balancing test, namely, public protection and societal security weighed against practical and not problematical rehabilitation, in determining whether there should be a waiver of jurisdiction in criminal proceedings with a transfer to the juvenile court. State v. Alexander 478
13. The probability of success and the duration of rehabilitative treatment must be considered in determining the manner and location of detention. State v. Alexander 478
14. Proper rebuttal testimony in a criminal prosecution is any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact. State v. Esluer 616
15. Rebuttal witnesses need not be endorsed on the information. State v. Esluer 616
16. The failure to endorse the names of the State's witnesses on the information is not grounds for reversal in the absence of a showing of prejudice. State v. Esluer 616
17. A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. State v. Hamilton 694
18. The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose in advance what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things and providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another. State v. Hamilton 694
19. A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning, and differ as to its application, violates the first essential element of due process of law. State v. Hamilton 694
20. The test to determine whether a statute defining an offense is void for uncertainty is whether the language may apply not only to a particular act about which there can be little or no difference of opinion but

equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. The dividing line between what is lawful and what is unlawful cannot be left to conjecture. State v. Hamilton 694

21. Neb. Rev. Stat. § 28-311 (Reissue 1979) is unconstitutional. State v. Hamilton 694
22. In determining whether the rights of a defendant have been prejudiced such that a reversal of a conviction is warranted, the claim of prejudice must be evaluated in the context of the entire record. State v. Birge 761
23. In responding to questions from the court, a defendant who is mentally competent can no more assume one posture at the time of arraignment and change positions afterwards to meet the exigencies of the situation than he can withhold facts from his attorney, and thereby experiment with one defense, and when that fails him, invoke the aid of the law to experiment with another which was fully known to him at the time. State v. Waterman 768

Damages.

1. Neb. Rev. Stat. § 34-103 (Reissue 1978) does not authorize assessment of one-half the cost of surveying a disputed boundary line to the other party. Spilinek v. Spilinek 35
2. The amount of damages sustained in a condemnation action is peculiarly a question of a local nature and ordinarily is to be determined by a jury. Where the evidence is conflicting, this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. Wear v. State of Nebraska 69
3. A claim for damages for tort cannot be used as a setoff against actions on contracts or suits on promissory notes secured by real estate mortgages. Klitzing v. Didier 122
4. In a case where performance of a land contract is frustrated by the act or neglect of the vendor, the measure of damages should be the recovery of amounts properly designated as principal and such amounts of interest and value of improvements as exceed the reasonable value of the use of the property. Sidney Fed. S. & L. Assn. v. Jones 225

Decedents' Estates.

1. Generally, one who assumes gratuitously to control or manage the property of another must account to the

beneficiaries of the person whose property he has assumed to control or manage. Miller v. Janecek 182
2. An action to compel the specific performance of an oral contract to devise real property by will is equitable in nature and is reviewed de novo on the record on appeal to this court. Matthews v. Matthews 744
3. The court regards with grave suspicion any claim of an oral contract to devise property by will, and must, in its de novo review of the record, discover clear, satisfactory, and unequivocal evidence of the existence of the alleged oral contract and its terms. Matthews v. Matthews 744
4. In order to remove from the operation of the statute of frauds an oral contract to devise property, there must be performance referable solely to the contract sought to be enforced such that nonperformance by the other party would constitute a fraud upon the claimant. Matthews v. Matthews 744
5. The purpose of the nonclaim statute, Neb. Rev. Stat. § 30-2485 (Reissue 1979), is facilitation and expedition of proceedings for distribution of a decedent's estate, including an early appraisal of the respective rights of interested persons and the prompt settlement of demands against the estate. In re Estate of Feuerhelm 872
6. Notice to a representative of an estate regarding a possible demand or claim against an estate does not constitute presenting or filing a claim under Neb. Rev. Stat. § 30-2486 (Reissue 1979). In re Estate of Feuerhelm 872

Declaratory Judgments.

Where a jury is waived in a declaratory judgment action in which there are questions of fact, the findings of the trial court on such issues have the effect of a jury verdict and will not be set aside unless clearly wrong. S.I.D. No. 32 v. Continental Western Corp. 843

Deeds.

1. The rule or doctrine of merger is that upon the delivery and acceptance of an unambiguous deed, all prior negotiations and agreements are deemed merged therein. This rule is equally applicable where prior oral negotiations result in a written contract. Beltzer v. Willeford Farms 102
2. The presence of fraud or mistake of fact is a recognized exception to the general rule that prior negotiations and agreements are merged into the final written contract of sale or deed. Beltzer v. Willeford Farms 102

Default Judgments.

1. Upon compliance with Neb. Rev. Stat. § 24-537 (Reissue 1979), the setting aside of a default judgment is not automatic, but rests in the sound discretion of the trial court. Such discretion is not an arbitrary one and must be exercised reasonably. Anderson Mktg. Associates v. Roberts 670
2. In addition to the requirements of Neb. Rev. Stat. § 24-537 (Reissue 1979), a party seeking to vacate a default judgment must also tender an answer or other proof disclosing a meritorious defense. Anderson Mktg. Associates v. Roberts 670
3. Ordinarily, attorney fees will not be allowed in an appeal of a default judgment. Anderson Mktg. Associates v. Roberts 670

Demurrer.

1. In reviewing the sustaining of a demurrer this court must treat the facts alleged in the petition as undisputed. Morris v. Lutheran Medical Center 677
2. A general demurrer admits only such facts as are well pleaded and does not admit mere conclusions of the pleader. Morris v. Lutheran Medical Center 677
3. An order or decree sustaining a demurrer will be affirmed if any one ground of the demurrer is well taken, irrespective of whether the ruling is based on an erroneous ground. Harmon Care Centers v. Knight 779

Directed Verdict.

1. A motion for a directed verdict at the conclusion of all the evidence is judged in the light of the total evidence at the time such motion is made, that is, the evidence as it stands at the close of the trial, and such motion is not determined only on the evidence existing at the time of the initial motion at the close of an adversary's case. Church of the Holy Spirit v. Bevco, Inc. 299
2. A motion for directed verdict is to be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. Bank of Valley v. Mattson .. 596

Discrimination.

In order to sustain a charge of discrimination where there is no charge of a universal discriminatory practice or system, the complainant must establish that the

employer intentionally engaged in acts that discriminated against the complainant in violation of the statutory prohibition. Nebraska P.P. Dist. v. Lacy 462

Dismissal and Nonsuit.

As a general rule, a dismissal with prejudice is an adjudication on the merits, and where the parties to an action have settled their dispute and agreed to a dismissal, that is a retraxit and amounts to a decision upon the merits. Simpson v. City of North Platte 351

Divorce.

1. A court, in an appropriate case, may require sufficient security to be given for the payment of alimony and child support awards. Lacey v. Lacey 162
2. In an appeal to the Supreme Court from a decree of dissolution, the marital status continues until a final determination is had. State v. Palmer 273
3. During the period after rendition of the decree and before a divorce becomes effective to change the status of the parties, the parties are husband and wife with respect to their competency to testify for or against each other. State v. Palmer 273
4. On appeal of domestic relations cases, this court is required to make independent conclusions of fact without reference to the conclusion reached by the trial court. Hinz v. Hinz 335
   Martin v. Martin 508
5. Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, the decree will not thereafter be vacated or modified as to such property provisions. One of the exceptions to the rule, however, is that the decree may be vacated or modified where there is evidence of fraud. Colson v. Colson 452
6. In a marriage of less than 2 years' duration, where the trial court has restored the parties to approximately the position each was in before the marriage, such disposition, if supported by the evidence, will be affirmed on review. Humphrey v. Humphrey 664
7. The practice of trial courts in dissolving a marriage but retaining for later disposition the property rights of the parties is disapproved. Humphrey v. Humphrey 664

Double Jeopardy.

A distinction exists between an offense and the unlawful

act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act. State v. Kuntzelman 115

Easements.

1. Prescriptive rights are not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence. Stricker v. Knaub 372
2. The party claiming a prescriptive easement must prove that his user was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full prescriptive period. Stricker v. Knaub 372
3. Proof of the user must be such that the identity of the thing enjoyed may be determined. Stricker v. Knaub 372
4. A claimed easement must be viewed from both ends of the prescriptive period. The nature and extent or scope of the user must from the beginning be clearly established. At the end of the period it must appear in retrospect that there has been no material change or variance from the limits or course adopted or established at the beginning. A lesser user prevents a right to an easement and a greater user is of no importance until the full prescriptive period has elapsed from the initiation of the greater use. The law requires that the easement must be clearly definable and precisely measured. Stricker v. Knaub 372

Eminent Domain.

1. Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. Wear v. State of Nebraska 69
2. Whether properties, the subject of other sales, are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of aid to the jury, must necessarily rest largely in the sound discretion of the trial court. The trial court's

determination will not be interfered with in the absence of an abuse of discretion. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case. Wear v. State of Nebraska 69

3. The weight and credibility of valuation testimony in a condemnation are for the jury, and in testing such evidence the condemnee is entitled to have all conflicts resolved in a light most favorable to him. Wear v. State of Nebraska 69
4. The amount of damages sustained in a condemnation action is peculiarly a question of a local nature and ordinarily is to be determined by a jury. Where the evidence is conflicting, this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. Wear v. State of Nebraska 69
5. A condemnee can recover fees and costs under Neb. Rev. Stat. § 76-1203.01 (Reissue 1981) only where the final judgment prevents the agency from acquiring the property by any condemnation proceeding or the agency abandons all attempts to acquire the property by condemnation. Sorensen v. Lower Niobrara Nat. Resources Dist. 681

Employer and Employee.

1. Work not requested but permitted is worktime and compensable. North v. City of Omaha 107
2. When an employer retains a hold on employees during lunchtime so that the employees are not actually at liberty to leave, the lunchtime constitutes compensable time. North v. City of Omaha 107
3. Factors which have been used by the Supreme Court to determine employee status have been (1) the element of control, including the right of termination, the method of payment, and the availability of equipment, and (2) the nature of the work, including the skill required and the duration of the work. Franklin v. Pawley 624
4. Factors which help determine if the activity is within the owner's trade or business, so that the employees of the owner would be expected to ordinarily complete the task, may include (1) the nature of the business, (2) the previous activities of the business' employees, (3) the amount of participation in the job by the business' employees, (4) the company's charter, (5) the duration of the job, (6) the regularity of the activity, (7) the past practices of the business, (8) the employer's size, and

(9) the skilled manpower and tools available to complete the task. Franklin v. Pawley 624
5. Individuals who are authorized to responsibly direct other employees are supervisory employees and should be excluded from an employee bargaining unit. IBEW Local 1536 v. Lincoln Elec. Sys. 840
6. Factors to be considered in determining whether a community of interest exists are mutuality of interest in wages, hours, and working conditions; the duties and skills of the employees; the extent of union organization among the employees; the desires of the employees; the extent of employee interchange; and the policy against fragmentation of units. IBEW Local 1536 v. Lincoln Elec. Sys. 840

Employment Contracts.
1. No aspect of a contract of employment is more basic than the right of the employer to expect employees will appear for work on the day and at the hour agreed upon. Persistent failure to honor that obligation evinces a substantial disregard for the employer's interest, and may justify a finding of misconduct connected with the employment. McCorison v. City of Lincoln 474
2. Where an employment contract is for an indefinite duration, such indefiniteness by itself does not preclude job security provisions in an employee handbook from becoming part of the employment contract. Morris v. Lutheran Medical Center 677

Employment Security Law.
1. While the term "misconduct" is not specifically defined in Neb. Rev. Stat. § 48-628(b) (Reissue 1978), it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations. McCorison v. City of Lincoln 474
2. Appeals from a determination by a claims deputy to an appeal tribunal, under Neb. Rev. Stat. § 48-634 (Cum. Supp. 1982) of the Employment Security Law, must be filed within 20 days of the date of mailing of the notice of determination, except that for good cause shown the tribunal may take jurisdiction over appeals filed out-

side the prescribed appeal period. Nicholson v. City of Bellevue 540
3. Decisions of an appeal tribunal appealed to the District Court shall be heard de novo on the record, except that the court on its own motion may order additional evidence to be taken before it. Nicholson v. City of Bellevue 540
4. Appeals from the District Court involving the Employment Security Law are heard by this court de novo on the record. Nicholson v. City of Bellevue 540
5. A claim of newly discovered evidence will not sustain the appellant's burden of showing good cause for filing a late appeal under Neb. Rev. Stat. § 48-634 (Cum. Supp. 1982) of the Employment Security Law, unless it appears that such evidence, if offered and admitted in the former proceeding, probably would have produced a different result. In other words, the appellant must demonstrate that with the newly discovered evidence he or she is able to make out a valid claim or defense before an appeal tribunal may take jurisdiction over an appeal filed beyond the 20-day limitation. Nicholson v. City of Bellevue 540

Equal Opportunity Commission.

In order to sustain a charge of discrimination where there is no charge of a universal discriminatory practice or system, the complainant must establish that the employer intentionally engaged in acts that discriminated against the complainant in violation of the statutory prohibition. Nebraska P.P. Dist. v. Lacy 462

Equity.

1. In equity cases we review the record de novo and reach an independent conclusion without reference to the conclusion reached by the trial court; except, however, that where credible evidence is in conflict we give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying. Spilinek v. Spilinek 35
Northport Irr. Dist. v. Jess 152
Stricker v. Knaub 372
Matthews v. Matthews 744
2. A court of equity has a reasonable discretion to allow or withhold interest as is reasonable and just, except in cases where it is recoverable as a matter of right. Kullbom v. Kullbom 148
3. An action to compel the specific performance of an oral contract to devise real property by will is equitable in

nature and is reviewed de novo on the record on appeal to this court. Matthews v. Matthews 744
4. Conduct which forms a basis for a finding that a party has "unclean hands" must be willful in nature. Voichoskie v. Voichoskie 775

Estoppel.

In order for the estoppel created by recognition and acquiescence to operate, there must be an assent, by words, conduct, or silence, in a line as the boundary. Spilinek v. Spilinek 35

Evidence.

1. As a general rule, evidence presented at a hearing to determine what might be in the public interest in one state is not necessarily pertinent to a consideration of that issue in another state. In re Applications of Nebraska P.P. Dist. 8
2. A determination of the relevancy of evidence generally rests within the sound discretion of the trial tribunal. In re Applications of Nebraska P.P. Dist. 8
3. Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. Wear v. State of Nebraska 69
4. The weight and credibility of valuation testimony in a condemnation action are for the jury, and in testing such evidence the condemnee is entitled to have all conflicts resolved in a light most favorable to him. Wear v. State of Nebraska 69
5. It is within the sound discretion of a District Court in a civil case to allow a party to withdraw its rest and introduce additional evidence. IAFF Local 831 v. City of No. Platte 89
6. Issues of causation are for determination by the fact finder. Heironymus v. Jacobsen Transfer 209
Kokes v. Shafer 470
7. Causation may be established on the basis of medical probability. Heironymus v. Jacobsen Transfer 209
8. In reviewing cases involving conflicting testimony 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 evi-

dence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Beach 213

9. As a general rule, evidence of prior juvenile adjudications may not be admitted as criminal convictions for the purpose of impeaching the credibility of a witness. State v. Beach 213

10. Evidence relating to a "Mary Carter" agreement should be admitted where the agreement bears upon the bias and credibility of witnesses employed by a party to the agreement. L. J. Vontz Constr. Co. v. Alliance Indus. 268

11. For a tape recording of a telephone conversation between a witness and a defendant to be admissible in evidence, it need only be shown that the conversation is relevant; that it accurately reflected the conversation; that the tapes had not been altered, changed, or erased in any way; and that the voices heard on the tapes were those of the witness and the defendant. State v. Pearson 339

12. The use of profane or obscene language in an otherwise admissible statement or conversation generally does not destroy the nature and meaning of the statement nor make it inadmissible. State v. Pearson 339

13. Scientific testimony of factors that can override a person's will, to the extent that even the knowledge of the consequences of the act of suicide do not prevent the act from taking place, are admissible to demonstrate that the act was not willful. Friedeman v. State 413

14. While the act of suicide may be an independent intervening cause in some cases, it is certainly not so in those cases where the incontrovertible evidence shows that, without the injury, there would have been no suicide; that the suicide was merely an act intervening between the injury and the death and part of an unbroken chain of events from the injury to the death and not a cause intervening between the injury and death. Friedeman v. State 413

15. A suicide note written by the decedent within 24 hours of death is admissible as a declaration of present state-of-mind exception to the hearsay rule. Friedeman v. State 413

16. The Workmen's Compensation Court may receive in evidence matters not properly admissible in other courts bound by the rules of evidence. Friedeman v. State 413

17. A litigant may not recite upon oath one statement of

fact in one judicial proceeding and thereafter, to meet the exigencies of the case in trial of a different cause, recite an entirely different and inconsistent set of facts. In such a situation the evidence is discredited as a matter of law and will be disregarded. Kokes v. Shafer ... 470

18. The location, nature, and number of wounds inflicted on a victim are circumstances from which a jury can infer the mental process of the one inflicting the wounds. State v. Lynch 528
19. To recover compensation the evidence must show that the employee died as a result of an accident arising out of and in the course of his employment. Niesen v. Logan County Co-op Oil Assn. 587
20. Where the testimony gives rise to conflicting inferences of equal degree of probability such that a choice between them is a matter of conjecture, a workmen's compensation award cannot be sustained. Niesen v. Logan County Co-op Oil Assn. 587
21. Expert testimony is not necessary to enable the jury to judge the obscenity of materials which have been placed into evidence. State v. Embassy Corp. 631
22. A defendant cannot predicate error on the admission of evidence to which no objection was made at the time the evidence was adduced. State v. Harper 686
23. Application for a physical examination of an injured party should be made before the commencement of the trial of a cause, and if not made until after the trial has commenced, a sufficient reason should be assigned why such request was not made before the commencement of the trial. Where such request is made during the progress of the trial, it rests within the sound discretion of the court whether such request be granted, and the ruling of the court thereon will not be disturbed, unless from all the circumstances an abuse of discretion appears. Hoegerl v. Burt 752
24. Unless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony. Hamer v. Henry 805
25. Testimony with regard to causation must be definite and certain to warrant a compensation award. Randall v. Safeway Stores 877

Expert Witnesses.

1. Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.

The witness should not be allowed to express an opinion on an inadequate basis or in respect to facts not disclosed to the jury. State v. Johnson 391
Niesen v. Logan County Co-op Oil Assn. 587
2. Where the opinion testimony of an expert witness does not have a sound and reasonable basis, it should be stricken. State v. Johnson 391
3. The value of the opinion of an expert witness is dependent on, and no stronger than, the facts on which it is predicated. Such an opinion has no probative force if the assumptions upon which it is based are shown not to be true. Niesen v. Logan County Co-op Oil Assn. ... 587
4. Triers of fact are not required to take the opinions of experts as binding on them. Hamer v. Henry 805
5. The trier of fact is not required to take the opinion of experts in regard to the causal connection between the alleged injury and the disability as binding upon it. Randall v. Safeway Stores 877

Fees.

A condemnee can recover fees and costs under Neb. Rev. Stat. § 76-1203.01 (Reissue 1981) only where the final judgment prevents the agency from acquiring the property by any condemnation proceeding or the agency abandons all attempts to acquire the property by condemnation. Sorensen v. Lower Niobrara Nat. Resources Dist. 681

Final Orders.

The overruling of a motion for summary judgment is not a final, appealable order. Cockle v. Cockle 329

Foreclosure.

An application for the strict foreclosure of a land contract, being in the nature of a forfeiture, is addressed to the sound discretion of the court, and before this relief may be granted it must be clear that the property involved is of less value than the amount due on the contract for its sale or that it would not bring a surplus over the amount due if a sale were ordered. Ryan v. Kolterman 355

Foreign Judgments.

1. It is for the state of rendition to determine whether a judgment is final, even though it has been appealed. Cockle v. Cockle 329
2. A monetary judgment of a sister state will be enforced

in this jurisdiction only for the amount for which it is enforceable in the state of rendition. Cockle v. Cockle 329
3. Habeas corpus proceedings may be used to enforce a foreign judgment regarding child custody. Mace v. Mace 640
4. Neb. Rev. Stat. § 43-1213 (Cum. Supp. 1982) does not require automatic enforcement of a foreign decree or a foreign modification of a decree simply because it is shown to the court that it exists. Rather, the statute requires that the court in which enforcement is sought examine the jurisdictional foundation upon which the foreign court acted. Mace v. Mace 640
5. If the foreign court has assumed jurisdiction under statutory provisions substantially in accordance with the Uniform Child Custody Jurisdiction Act or under factual circumstances meeting the UCCJA jurisdictional standards, then the court must recognize and enforce the foreign decree. Mace v. Mace 640
6. Primarily, the Uniform Child Custody Jurisdiction Act is concerned with subject-matter jurisdiction and not personal jurisdiction. Submission of a person to the jurisdiction of the court does not alone confer jurisdiction under the act. Mace v. Mace 640

Fraud.

1. Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, the decree will not thereafter be vacated or modified as to such property provisions. One of the exceptions to the rule, however, is that the decree may be vacated or modified where there is evidence of fraud. Colson v. Colson 452
2. In reviewing a property settlement agreement entered into by the parties, the trial court is admonished not to regard the agreement lightly but, rather, is required to carefully scrutinize the agreement to be sure that neither party takes an unconscionable advantage over the other through fraud. Colson v. Colson 452
3. In order for the court to carry out its duty with regard to property settlement agreements, the parties must be honest and candid with the court so that the court may have all of the proper and necessary information before it in order to make its decision. Colson v. Colson 452
4. The fact that a decree is submitted and representations made to the court that the decree contains a description of matters previously disclosed to the court and agreed

to by the parties, when, in fact, they were not, is not sufficient to overcome an objection of fraud. Colson v. Colson 452

5. The material elements of a fraudulent misrepresentation are that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else was made recklessly; that the representation was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and that such party did, in fact, rely upon the misrepresentation and was induced thereby to act to his injury or damage. Bank of Valley v. Mattson 596
6. One is justified in relying upon a representation made to him as a positive statement of fact, where an investigation would be required to discover its falsity. Bank of Valley v. Mattson 596
7. Although fraud in the factum is a defense as against a holder in due course of a negotiable instrument, fraud in the inducement is not. S.I.D. No. 32 v. Continental Western Corp. 843
8. The fraud practiced by misrepresenting the intention to perform a contract is fraud in the inducement and is not available as a defense against a holder in due course of a negotiable instrument. S.I.D. No. 32 v. Continental Western Corp. 843

Good Cause.

1. Absent a showing of an abuse of discretion, the Supreme Court will not ordinarily set aside a determination by the District Court as to whether or not good cause has been shown. Singleton v. South Platte Nat. Resources Dist. 504
2. The fact that counsel is misinformed or uninformed as to the requirements of filing a petition on appeal in the District Court is not a showing of good cause within the meaning of the statute. Singleton v. South Platte Nat. Resources Dist. 504

Governmental Subdivisions.

A sanitary and improvement district is a governmental unit such as is contemplated by Neb. U.C.C. § 3-105(1)(g) (Reissue 1980). S.I.D. No. 32 v. Continental Western Corp. 843

Guaranty.

1. The general rule is that a surety or guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control,

and, therefore, in the absence of *assent*, *waiver*, or estoppel he is generally released by an act of the creditor which deprives him of such right. Myers v. Bank of Niobrara 29

2. Whatever restrictions may be imposed by law with regard to the debtor are likewise imposed with regard to the guarantor. Borg-Warner v. Watton 318

Habeas Corpus.

Habeas corpus proceedings may be used to enforce a foreign judgment regarding child custody. Mace v. Mace 640

Habitual Criminals.

Two or more prior convictions arising out of the same set of circumstances may not be used to impose an enhanced penalty pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1979). State v. Lopez 65

Hearsay.

Where the party against whom a statement is offered is present, hears the statement being made, and makes no objection, the trial court may consider such evidence as an exception to the hearsay rule. In re Interest of M. 383

Homicide.

1. In a homicide case photographs are generally admitted for the purpose of identification to show the condition of a body and to indicate the nature and extent of wounds or injuries. They may also be admitted to establish malice and intent. State v. Kuntzelman 115
State v. Rife 132
2. The use of deadly force shall not be justifiable unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnaping, or sexual intercourse compelled by force or threat, nor is it justifible if (a) the actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter, or (b) the actor knows that he can avoid the necessity of using such force with complete safety by retreating. State v. Kuntzelman 115
3. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome, where a proper foundation has been laid. State v. Rife 132
4. The location, nature, and number of wounds inflicted

on a victim are circumstances from which a jury can infer the mental process of the one inflicting the wounds. State v. Lynch 528
5. Although gruesome, photographs having probative value outweighing possible prejudice to the accused are admissible. State v. Lynch 528

Identification Procedures.

The provisions of Neb. Rev. Stat. § 29-3303 (Reissue 1979) require a showing of probable cause that a crime has been committed and that the person compelled to produce the nontestimonial evidence has committed that crime. State v. Evans 433

Impeachment.

As a general rule, evidence of prior juvenile adjudications may not be admitted as criminal convictions for the purpose of impeaching the credibility of a witness. State v. Beach 213

Independent Contractors.

The general test of whether work being done by an independent contractor for an owner is within the ambit of Neb. Rev. Stat. § 48-116 (Reissue 1978) is whether the work being done by the independent contractor would ordinarily be done by employees of the owner in view of the owner's past practices and the practices of employers in comparable businesses. Franklin v. Pawley 624

Injunction.

An equitable action for an injunction is reviewed 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. Burton v. Annett 788

Insanity.

In Neb. Rev. Stat. § 25-213 (Reissue 1979) *insanity* means such condition of mental derangement which actually prevents the sufferer from understanding and protecting his or her legal rights. Sacchi v. Blodig 817

Insurance.

1. A separate exclusionary clause in an insurance contract should be construed in light of the provisions of the whole contract and harmonized therewith if reasonably possible. Thos v. Employers Mutual Cas. Co. 424

2. An exclusion in a liability policy excluding from coverage injury to or destruction of any goods sold by the named insured, or work completed by the named insured out of which the accident arises, eliminates any coverage for injury to or destruction of the product furnished or work completed by the named insured. Thos v. Employers Mutual Cas. Co. 424
3. Under an exclusion in a liability policy excluding from coverage injury to goods sold or work completed by the named insured, if a defect in the product furnished or work completed by the named insured causes damage to other property, there is coverage for such damage to other property. Thos v. Employers Mutual Cas. Co. .. 424

Intent.

The location, nature, and number of wounds inflicted on a victim are circumstances from which a jury can infer the mental process of the one inflicting the wounds. State v. Lynch 528

Interest.

A court of equity has a reasonable discretion to allow or withhold interest as is reasonable and just, except in cases where it is recoverable as a matter of right. Kullbom v. Kullbom 148

Investigative Stops.

1. A police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. State v. Pierce and Wells 512
2. Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of the circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is, or has been, or is about to be engaged in criminal behavior. State v. Pierce and Wells 512

Invitor-Invitee.

1. Although an invitee on the premises of another may very well be aware of the dangers inherent in the premises, he may not necessarily be aware of the dangers inherent in the actions of the agents of the possessor of the premises. Ellis v. Far-Mar-Co 736

2. Where an invitee on the premises of another must of necessity knowingly place himself in a position of danger so as to accomplish his job, he is nevertheless entitled to a warning from the agents of the possessor of such premises before the latter cause a change in circumstances likely to cause injury to the invitee. Ellis v. Far-Mar Co 736

Issue Preclusion.

1. Even though two statutes appear to be identical, issues arising under these statutes are not necessarily the same so as to give rise to the rule of issue preclusion, because the policy under such statutes may be different. In re Applications of Nebraska P.P. Dist. 8
2. For the purposes of invoking the rule of issue preclusion, the determination of the public convenience and necessity in one state is not an identical issue to a similar determination in another state. In re Applications of Nebraska P.P. Dist. 8

Joint Ventures.

In a joint venture each of the parties must have an equal voice in the control of the agencies used therein, and the mere pooling of property, money, assets, skill, or knowledge does not create the relationship. Nelson v. Young 189

Judges.

A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. State v. Goodpasture 341

Judgments.

1. The findings of a court in a law action have the effect of a jury verdict and will not be set aside unless clearly wrong. Jameson v. Giacalone 33
2. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended. IAFF Local 831 v. City of No. Platte 89
3. Where different proof is required, a judgment in one action does not preclude another action. Northport Irr. Dist. v. Jess 152
   Cockle v. Cockle 329
4. As a general rule, a party recovering a judgment has a right to proceed to enforce it. Lacey v. Lacey 162

5. The doctrine of res judicata holds that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same action and generally is conclusive as to every question which was or might have been presented and determined in the first action. Sidel v. Spencer Foods 325
6. A judgment may be final for some purposes and yet not be final as to other matters. Cockle v. Cockle 329
7. As a general rule, a proper judgment will not be reversed even if the trial court did not give the right reason for its rendition. Hinz v. Hinz 335
8. The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. Simpson v. City of North Platte 351
9. A judgment of dismissal on the merits operates to preclude subsequent relitigation of the same cause of action. Simpson v. City of North Platte 351
10. As a general rule, a dismissal with prejudice is an adjudication on the merits, and where the parties to an action have settled their dispute and agreed to a dismissal, that is a retraxit and amounts to a decision upon the merits. Simpson v. City of North Platte 351
11. A District Court has both statutory and inherent power to dismiss an action for lack of prosecution. Wilson v. Bryan Memorial Hosp. 446
12. A judgment will not be reversed for error in admitting evidence which is cumulative in nature if evidence which was properly admitted clearly established the guilt of the defendant beyond a reasonable doubt. State v. Gilreath 466
13. Findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In such a circumstance it is not within our province to resolve conflicts in or to weigh the evidence; if there is a conflict in the evidence, this court will review the judgment rendered and will presume that controverted facts were decided in favor of the successful party. Nerud v. Haybuster Mfg. 604
West Town Homeowners Assn. v. Schneider 905
14. A proper judgment will not be reversed even if the trial court did not give the right reason for its rendition; a trial court's judgment is to be affirmed if the evidence sustains any theory of recovery pled by the plaintiff, ir-

respective of which theory the trial court relied upon. Nerud v. Haybuster Mfg. 604
15. The fact that a decree fails to provide what is to happen upon the emancipation of a minor child does not create an ambiguity. Johnson v. Johnson 689
16. An order or decree sustaining a demurrer will be affirmed if any one ground of the demurrer is well taken, irrespective of whether the ruling is based on an erroneous ground. Harmon Care Centers v. Knight 779

Juries.

1. If the evidence shows that a plaintiff's conduct may be negligent and a proximate cause of the accident, the issue of contributory negligence must be submitted to the jury. Davis v. Phillips 184
2. Although a defendant is negligent as a matter of law, the plaintiff's negligence which is a proximate cause requires a factual determination by the jury whether the negligence of the plaintiff is more than slight in comparison with the negligence of the defendant. Davis v. Phillips 184
3. The fact that juries may reach different results on similar facts does not render obscenity statutes unconstitutional, nor does it create a right of reliance when other questionable material is exhibited. State v. Embassy Corp. 631

Jurisdiction.

1. One who invokes the power of a court on any question other than jurisdiction makes a general appearance such as to confer jurisdiction over himself. Cockle v. Cockle 329
2. Neb. Rev. Stat. § 43-1213 (Cum. Supp. 1982) does not require automatic enforcement of a foreign decree or a foreign modification of a decree simply because it is shown to the court that it exists. Rather, the statute requires that the court in which enforcement is sought examine the jurisdictional foundation upon which the foreign court acted. Mace v. Mace 640
3. If the foreign court has assumed jurisdiction under statutory provisions substantially in accordance with the Uniform Child Custody Jurisdiction Act or under factual circumstances meeting the UCCJA jurisdictional standards, then the court must recognize and enforce the foreign decree. Mace v. Mace 640
4. Primarily, the Uniform Child Custody Jurisdiction Act is concerned with subject-matter jurisdiction and not personal jurisdiction. Submission of a person to the ju-

risdiction of the court does not alone confer jurisdiction under the act. Mace v. Mace 640
5. Usually the best interests of the children are served by having a determination in the state where the parties both reside and where the facts concerning the custody of the children are more readily available to the court. Mace v. Mace 640
6. The home state concept is therefore of the utmost importance in the Uniform Child Custody Jurisdiction Act, requiring the courts, when possible, to choose that forum to adjudicate custody disputes. Mace v. Mace . 640
7. Jurisdiction is the authority or power to decide a case. Venue is the site where the power to adjudicate is to be exercised. In the absence of statutory provisions to the contrary, an objection to venue can be waived. State ex rel. Bauersachs v. Williams 757

Juror Misconduct.

1. It is well established that charges of juror misconduct must be substantiated by competent evidence on the motion for new trial, the misconduct complained of must relate to a matter in dispute relevant to the issues in the case, and the misconduct must have influenced the jurors in arriving at a verdict. Ellis v. Far-Mar-Co 736
2. Proof of mere indiscretion in the conduct of a juror is not sufficient to avoid a verdict unless the proof establishes that his conduct was of such character that prejudice may be presumed. Ellis v. Far-Mar-Co 736
3. When a new trial is sought for juror misconduct, the finding of the trial court will not be set aside unless the evidence of misconduct is clear and convincing. Ellis v. Far-Mar-Co 736

Juror Qualifications.

1. The true object of challenges, either peremptory or for cause, is to enable the parties to avoid disqualified persons and secure an impartial jury. When that end is accomplished, there can be no just ground for complaint against the rulings of the court as to competency of the jurors. State v. Rife 132
2. In the absence of a showing of prejudice, a trial court is correct in denying a motion for mistrial. Opportunity for prejudice or disqualification of jurors does not raise a presumption that prejudice or disqualification exists. State v. Rife 132

Jury Instructions.

1. Error cannot be predicated on the failure to give ten-

dered jury instructions absent prejudice to the rights of the defendant. State v. Evans 433
2. All 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. Esluer 616
Ellis v. Far-Mar-Co 736

Juvenile Courts.

This court hears appeals of juvenile proceedings de novo upon the record, but accords the findings of fact of the juvenile court great weight because it both heard and observed the parties and witnesses. In re Interest of Hochstetler 546
In re Interest of R.D.J. and K.S.J. 724

Labor and Labor Relations.

1. Individuals who are authorized to responsibly direct other employees are supervisory employees and should be excluded from an employee bargaining unit. IBEW Local 1536 v. Lincoln Elec. Sys. 840
2. Factors to be considered in determining whether a community of interest exists are mutuality of interest in wages, hours, and working conditions; the duties and skills of the employees; the extent of union organization among the employees; the desires of the employees; the extent of employee interchange; and the policy against fragmentation of units. IBEW Local 1536 v. Lincoln Elec. Sys. 840

Landlord and Tenant.

1. The same rules apply to a sublessor-sublessee relationship as are applicable to a lessor-lessee relationship. Krance v. Faeh 242
2. A lease is a species of contract for the possession and profits of land and tenements, either for life or for a certain period of time, or during the pleasure of the parties, and the essential elements of a contract must be present. Krance v. Faeh 242
3. A lease is a hiring or renting of land for a certain time upon a named consideration. Krance v. Faeh 242
4. The categories of tenant and invitee are by definition mutually exclusive. Krance v. Faeh 242
5. The rule of caveat emptor applies to leases of real estate, wherein the control passes to the lessee, and, in the absence of fraud, deceit, or concealment, the duty devolves upon the lessee to examine the premises with

respect to suitability for his business and with respect to safety. Krance v. Faeh 242
6. A landlord is not liable to his tenant for any defects existing in the demised premises at the time of the lease that are perceptible to the senses or that can be discovered by reasonable inspection or examination. Krance v. Faeh 242
7. A lessor of land who conceals or fails to disclose to his lessee any condition, whether natural or artificial, which involves unreasonable risk of physical harm to persons on the land, is subject to liability to the lessee and others upon the land with the consent of the lessee or his sublessee for physical harm caused by the condition after the lessee has taken possession, if (a) the lessee does not know or have reason to know of the condition or the risk involved, and (b) the lessor knows or has reason to know of the condition, and realizes or should realize the risk involved and has reason to expect that the lessee will not discover the condition or realize the risk. Krance v. Faeh 242

Leases.

1. In determining whether a residence constructed on leased property is personal property, the intention of the parties is controlling. Bank of Valley v. U.S. Nat. Bank 912
2. Where the lease gives the lessee the right to remove a residence constructed upon the leased property, the residence remains personal property, and a financing statement granting a security interest in the residence should be filed in the office of the county clerk of the county of the debtor's residence. Neb. U.C.C. § 9-401(1)(c) (Supp. 1977). Bank of Valley v. U.S. Nat. Bank 912

Lesser-Included Offenses.

1. A lesser-included offense is one which is necessarily established by proof of the greater offense. State v. Miller 145
2. 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. Miller 145
3. Criminal trespass is not a lesser-included offense of burglary. State v. Miller 145

Liability.

1. A landlord is not liable to his tenant for any defects ex-

isting in the demised premises at the time of the lease that are perceptible to the senses or that can be discovered by reasonable inspection or examination. Krance v. Faeh 242

2. A lessor of land who conceals or fails to disclose to his lessee any condition, whether natural or artificial, which involves unreasonable risk of physical harm to persons on the land, is subject to liability to the lessee and others upon the land with the consent of the lessee or his sublessee for physical harm caused by the condition after the lessee has taken possession, if (a) the lessee does not know or have reason to know of the condition or the risk involved, and (b) the lessor knows or has reason to know of the condition, and realizes or should realize the risk involved and has reason to expect that the lessee will not discover the condition or realize the risk. Krance v. Faeh 242
3. Neb. U.C.C. § 3-409(2) (Reissue 1980) does not in any way affect any liability which may arise apart from the instrument itself. The drawee who fails to accept may be liable to the drawer or to the holder for breach of the terms of a letter of credit or any other agreement by which he is obligated to accept. He may be liable in tort or upon any other basis because of his representation that he has accepted, or that he intends to accept. The section leaves unaffected any liability of any kind apart from the instrument. Bigger v. Fremont Nat. Bank 580
4. Where the law imposes upon a state officer the performance of a ministerial duty in which a private individual has a special, direct, and distinctive interest, the officer is liable to such individual for any injury which he may proximately sustain in consequence of the failure to perform the duty at all, or to perform it properly. Harmon Care Centers v. Knight 779

Libel and Slander.

1. If it clearly appears that the allegations in a pleading are not pertinent, material, or relevant to the controversy in litigation, they are not privileged and may serve as the basis for a libel suit. Beckenhauer v. Predoehl 347
2. It is not necessary that the defamatory matter be relevant or pertinent to any issue before the court. It is necessary only that it have some relevance to the judicial function which is being performed. Beckenhauer v. Predoehl 347
3. If the defamatory matter has some reference to the

subject matter of the litigation, it is privileged. Beckenhauer v. Predoehl 347

Licenses.

Upon conviction for second offense driving while his license has been suspended, the court shall order the defendant not to operate a motor vehicle for any purpose for a period of 2 years from the date of his final discharge from jail or payment or satisfaction of any fine imposed, whichever is later. Neb. Rev. Stat. § 60-430.01 (Cum. Supp. 1982). State v. Moore 229

Liens.

1. It is established in Nebraska law that a vendee under an executory land contract is entitled to an equitable lien for such amount which has been paid on the purchase price as against a subsequent creditor or purchaser from the vendors. Sidney Fed. S. & L. Assn. v. Jones 225
2. A lien claimant has the burden to establish the validity and amount of his lien. Columbus Fed. S. & L. Assn. v. Swails Constr. Co. 287

Limitations of Actions.

1. In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence. Lincoln Grain v. Coopers & Lybrand 289
2. In cases of professional negligence the discovery rule governs accrual of a cause of action, i.e., a cause of action accrues when the malpractice is discovered or in the exercise of due diligence should have been discovered. Sacchi v. Blodig 817
3. Neb. Rev. Stat. § 25-222 (Reissue 1979) is a codification of the discovery rule and the time limits for discovery of professional negligence. Sacchi v. Blodig 817
4. In Neb. Rev. Stat. § 25-213 (Reissue 1979) *insanity* means such condition of mental derangement which actually prevents the sufferer from understanding and protecting his or her legal rights. Sacchi v. Blodig 817
5. Under the discovery rule one suffering a legal disability can, upon removal of such disability, commence an action for professional negligence as provided under Nebraska law. Sacchi v. Blodig 817
6. The statute of limitations barring actions for the recovery of real estate sold for the nonpayment of taxes has

no application where the tax deed was void. Mack v. Luebben 832
7. The bar of a statute of limitations is an affirmative defense and must be pled. S.I.D. No. 32 v. Continental Western Corp. 843

Mandamus.

Mandamus is available to enforce the performance of a ministerial duty, that is, an absolute duty to act in a prescribed manner upon existence of specified facts. State ex rel. Hilt Truck Line v. Peterson 81

Marriage.

1. In an appeal to the Supreme Court from a decree of dissolution, the marital status continues until a final determination is had. State v. Palmer 273
2. During the period after rendition of the decree and before a divorce becomes effective to change the status of the parties, the parties are husband and wife with respect to their competency to testify for or against each other. State v. Palmer 273

Mechanics' Liens.

1. A mechanic's lien is statutory, and a lien claimant must bring himself within the terms of the statute to establish a lien. Columbus Fed. S. & L. Assn. v. Swails Constr. Co. 287
2. The foundation for a mechanic's lien is a contract or agreement with the owner of the property. Columbus Fed. S. & L. Assn. v. Swails Constr. Co. 287

Medical Malpractice.

1. In cases of professional negligence the discovery rule governs accrual of a cause of action, i.e., a cause of action accrues when the malpractice is discovered or in the exercise of due diligence should have been discovered. Sacchi v. Blodig 817
2. Neb. Rev. Stat. § 25-222 (Reissue 1979) is a codification of the discovery rule and the time limits for discovery of professional negligence. Sacchi v. Blodig 817
3. Under the discovery rule one suffering a legal disability can, upon removal of such disability, commence an action for professional negligence as provided under Nebraska law. Sacchi v. Blodig 817

Merger.

1. The rule or doctrine of merger is that upon the delivery and acceptance of an unambiguous deed, all prior ne-

gotiations and agreements are deemed merged therein. This rule is equally applicable where prior oral negotiations result in a written contract. Beltzer v. Willeford Farms 102
2. The presence of fraud or mistake of fact is a recognized exception to the general rule that prior negotiations and agreements are merged into the final written contract of sale or deed. Beltzer v. Willeford Farms 102

Minors.

1. Neb. Rev. Stat. § 43-202.01 (Reissue 1978) and Neb. Rev. Stat. § 29-1816 (Reissue 1979) involve a balancing test, namely, public protection and societal security weighed against practical and not problematical rehabilitation, in determining whether there should be a waiver of jurisdiction in criminal proceedings with a transfer to the juvenile court. State v. Alexander 478
2. The probability of success and the duration of rehabilitative treatment must be considered in determining the manner and location of detention. State v. Alexander 478
3. While the age of a child will not protect such child if the act is denominated a trespass, yet, as trespass is an intentional tort, an initial determination must be made whether the child concerned formed the intent to do the physical act which released the harmful force. Kenney v. Barna 863
4. In making a determination as to whether a child was capable of the necessary intent to be classed as a trespasser, the standard of conduct to be used is that of a reasonable person of like age, intelligence, and experience under the circumstances. Kenney v. Barna 863

Modification of Decree.

1. Under Neb. Rev. Stat. § 42-364 (1978), the trial court on its own motion may make subsequent changes or modifications in a decree of dissolution of a marriage in relation to any minor children and their maintenance when required, but only after notice to the parties and an opportunity to be heard. Tautfest v. Tautfest 233
2. Where a party owes past due alimony or child support, the failure to pay must be found to be a willful failure in spite of an ability to pay before a request for modification of a decree may be dismissed on the basis of "unclean hands." Voichoskie v. Voichoskie 775

Motions for Continuance.

A motion for continuance is addressed to the sound discretion of the court, and in the absence of a showing of

an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal. In re Interest of M. 383
State v. Pierce and Wells 512

Motions for Mistrial.

In the absence of a showing of prejudice, a trial court is correct in denying a motion for mistrial. Opportunity for prejudice or disqualification of jurors does not raise a presumption that prejudice or disqualification exists. State v. Rife 132

Motions for New Trial.

1. Application for a new trial must be made within 10 days after a judgment is rendered. Sederstrom v. Wrehe .. 429
2. In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after rendition of the judgment or decree or the making of the final order. Sederstrom v. Wrehe 429
3. In order to justify a new trial, newly discovered evidence must involve something other than the credibility of a witness who testified at trial. State v. Pierce and Wells 512
4. When a new trial is sought for juror misconduct, the finding of the trial court will not be set aside unless the evidence of misconduct is clear and convincing. Ellis v. Far-Mar-Co 736

Motions to Suppress.

1. Failure to include minimization language as provided by Neb. Rev. Stat. § 86-705(6) (Reissue 1981) in an order to permit the interception of wire or oral communication when statutory guidelines have been supplied and when there exists a means of measuring compliance with minimization provisions of the statute is not fatal and does not warrant suppression of evidence. State v. Whitmore, White, and Henderson 560
2. No evidence may be suppressed because of technical irregularities not affecting the substantial rights of the accused. State v. Whitmore, White, and Henderson ... 560
3. Defendants seeking to suppress evidence obtained pursuant to wiretap because of the failure to comply with minimization requirements must do more than identify individual calls which they contend should not have been intercepted; they must establish a pattern of interception of innocent conversations which developed over the period of the wiretap. State v. Whitmore, White, and Henderson 560

4. Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. State v. Whitmore, White, and Henderson 560
5. One who seeks to suppress evidence seized pursuant to a warrant regular on its face has the burden of establishing that the warrant was invalid. State v. Whitmore, White, and Henderson 560

Motor Vehicles.

Upon conviction for second offense driving while his license has been suspended, the court shall order the defendant not to operate a motor vehicle for any purpose for a period of 2 years from the date of his final discharge from jail or payment or satisfaction of any fine imposed, whichever is later. Neb. Rev. Stat. § 60-430.01 (Cum. Supp. 1982). State v. Moore 229

Nebraska Power Review Board.

1. Upon review of an order of the Nebraska Power Review Board, this court is guided by the rule that determination of what is consistent with the public convenience and necessity is a question of fact peculiarly for the determination of the board. This court may question only whether the board acted within the scope of its authority and if the order complained of is supported by the evidence and is reasonable and not arbitrarily made. In re Applications of Nebraska P.P. Dist. 8
2. The word "may," as used in rule 28 of the Revised Rules of Practice and Procedure of the Nebraska Power Review Board (1975), relating to the conducting of an investigation by such board on its own motion, makes such investigation discretionary and not mandatory. In re Applications of Nebraska P.P. Dist. 8

Negligence.

1. In a bailment for hire or a mutually reciprocal bailment case, in the absence of statutory or contractual provisions to the contrary, once bailor proves delivery of property to bailee in good condition and failure to redeliver upon timely demand, the burden is irrevocably fixed upon bailee to prove by a preponderance of the evidence that he has exercised due care to prevent the loss, damage, or destruction of the property. This principle applies to all bailment for hire cases, whether brought in tort or in contract, in which bailee has exclusive control over the property at the time it was lost, destroyed, or damaged. *Nash v. City of North Platte*,

198 Neb. 623, 255 N.W.2d 52 (1977), and its predecessors are overruled. Knight v. H & H Chevrolet 166
2. If the evidence shows that a plaintiff's conduct may be negligent and a proximate cause of the accident, the issue of contributory negligence must be submitted to the jury. Davis v. Phillips 184
3. Although a defendant is negligent as a matter of law, the plaintiff's negligence which is a proximate cause requires a factual determination by the jury whether the negligence of the plaintiff is more than slight in comparison with the negligence of the defendant. Davis v. Phillips 184
4. In order for a continuous relationship to toll the statute of limitations regarding a claim for malpractice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence. Lincoln Grain v. Coopers & Lybrand 289
5. In an action for negligent manufacture an inference of negligence arises from proof that a defect existed at the time of manufacture. Nerud v. Haybuster Mfg. ... 604
6. The plaintiff in a negligence case must, in order to prove that a particular product is defective in its design, show both that the product presented an unreasonable risk of danger and that the manufacturer failed to exercise reasonable care in adopting its design. Nerud v. Haybuster Mfg. 604

Negotiable Instruments.

1. Neb. U.C.C. § 3-409(2) (Reissue 1980) does not in any way affect any liability which may arise apart from the instrument itself. The drawee who fails to accept may be liable to the drawer or to the holder for breach of the terms of a letter of credit or any other agreement by which he is obligated to accept. He may be liable in tort or upon any other basis because of his representation that he has accepted, or that he intends to accept. The section leaves unaffected any liability of any kind apart from the instrument. Bigger v. Fremont Nat. Bank 580
2. Whether one has taken a negotiable instrument in good faith is determined subjectively, that is to say, whether there was honesty of intent rather than the absence of circumstances which would put an ordinarily prudent holder on inquiry. S.I.D. No. 32 v. Continental Western Corp. 843
3. Failure of consideration is no defense to a negotiable

instrument in the hands of a holder in due course. S.I.D. No. 32 v. Continental Western Corp. 843
4. Although fraud in the factum is a defense as against a holder in due course of a negotiable instrument, fraud in the inducement is not. S.I.D. No. 32 v. Continental Western Corp. 843
5. The fraud practiced by misrepresenting the intention to perform a contract is fraud in the inducement and is not available as a defense against a holder in due course of a negotiable instrument. S.I.D. No. 32 v. Continental Western Corp. 843
6. The consideration necessary to support a contract or negotiable instrument must be within the contemplation of the parties. S.I.D. No. 32 v. Continental Western Corp. 843

Notice.

1. A guarantor is a debtor within the meaning of the term as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980) and is entitled to the notice required by Neb. U.C.C. § 9-504(3) (Reissue 1980). Butte State Bank v. Williamson 296
Borg-Warner v. Watton 318
2. An oral message does not satisfy the requirements of Neb. U.C.C. § 9-504(3) (Reissue 1980). Butte State Bank v. Williamson 296
3. Neb. Rev. Stat. § 77-1317 (Reissue 1981) does not require formal notice from the county assessor to the landowner that valuation of real estate has been changed as a result of improvements undisclosed at the time of a previous assessment. Ganser v. County of Lancaster 313
4. The guaranty itself need not be secured in order to entitle the guarantors to notice. All that need be secured to entitle the guarantor to notice is the debt for which the guaranty is executed. Borg-Warner v. Watton 318
5. It is the rule in this jurisdiction that compliance with the notice provisions of the Uniform Commercial Code is a condition precedent to the right of a creditor to recover a deficiency judgment. The failure to give the requisite notice is an absolute bar to recovery. Borg-Warner v. Watton 318
6. The Uniform Commercial Code makes it quite clear that the requirement of giving notice pursuant to Neb. U.C.C. § 9-504(3) (Reissue 1980) may not be waived prior to default. Borg-Warner v. Watton 318
7. Notice to a representative of an estate regarding a possible demand or claim against an estate does not

constitute presenting or filing a claim under Neb. Rev. Stat. § 30-2486 (Reissue 1979). In re Estate of Feuerhelm 872

Obscenity.

1. The fact that juries may reach different results on similar facts does not render obscenity statutes unconstitutional, nor does it create a right of reliance when other questionable material is exhibited. State v. Embassy Corp. 631
2. In a prosecution for exhibiting obscene material the State is not required to prove that the material was obscene, other than by introducing the material itself. State v. Embassy Corp. 631
3. Expert testimony is not necessary to enable the jury to judge the obscenity of materials which have been placed into evidence. State v. Embassy Corp. 631

Ordinances.

1. Courts will not pass on the constitutionality of a city ordinance unless it becomes necessary to do so. State v. Wenzel 395
2. As a general rule, the words "final and binding," when used in ordinances or statutes to refer to the decision of an administrative official or agency, mean that it is the definitive act of that official or agency and is binding until and unless it is set aside by judicial review. City of Lincoln v. Soukup 732

Parental Rights.

1. An order terminating parental rights must be based upon clear and convincing evidence. In re Interest of M. 383
   In re Interest of R.D.J. and K.S.J. 724
2. The right of parents to maintain custody of their child is a natural right, subject only to the paramount interests which the public has in the protection of the rights of a child. In re Interest of M. 383
   In re Interest of Hochstetler 546
3. Parental rights cannot be terminated simply because others may be in a position to be better providers for the children. In re Interest of M. 383
4. Termination of parental rights should indeed be a last resort, and should be implemented only when no other reasonable alternative exists. In re Interest of M. 383
5. When natural parents cannot rehabilitate themselves within a reasonable time, the best interests of the child

or children require that a final disposition be made without delay. In re Interest of M. 383
In re Interest of R.D.J. and K.S.J. 724

6. Where there are reasonable grounds to believe that the conditions giving rise to the parent's inability to care for her children will continue for a prolonged and indeterminate period, the parental rights may be terminated when such action is in the best interests of the children. In re Interest of M. 383
7. Where a parent is unable to discharge parental responsibilities because of mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, parental rights may be terminated if such action is in the best interests of the child. In re Interest of J.H.L. 718
In re Interest of R.D.J. and K.S.J. 724

Parol Agreement.

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 the written executory contract may be changed by a subsequent parol agreement before a breach thereof. Cole v. Hickey 728

Parties.

1. Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy but also have an interest of such a nature that a final decree cannot be made without affecting their rights or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Klitzing v. Didier ... 122
2. The general purpose of a third-party action pursuant to Neb. Rev. Stat. § 25-331 (Reissue 1979) is to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence, to obtain consistent results from identical or similar evidence, and to do away with the serious handicap to a defendant of a time difference between a judgment against him and a judgment in his favor against the third-party defendant. Church of the Holy Spirit v. Bevco, Inc. 299
3. A third-party claim under Neb. Rev. Stat. § 25-331 (Reissue 1979) may be asserted when a third-party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defendant. Church of the Holy Spirit v. Bevco, Inc. 299

4. A third-party defendant can be bound by the adjudication of the main claim. Church of the Holy Spirit v. Bevco, Inc. 299
5. Proper use of third-party practice will avoid inconsistent verdicts in the main action and the third-party action. Church of the Holy Spirit v. Bevco, Inc. 299
6. An action to determine the rights and liabilities of parties to a sanitary and improvement district warrant is an action at law. S.I.D. No. 32 v. Continental Western Corp. 843

Partition.

While it is generally true that there is a presumption in favor of partition in kind, it is likewise true that the character and location of the property, or the amount of the interest sought to be assigned, or both, may be such that it will be presumed that partition in kind cannot be made. Nordhausen v. Christner 367

Partnerships.

A suit by a partner to collect on a note representing his contribution to the partner's capital account is an action at law, and ordinarily such action may not be turned into an equitable action for an accounting by a cross-petition. Jameson v. Giacalone 33

Photographs.

1. In a homicide case photographs are generally admitted for the purpose of identification to show the condition of a body and to indicate the nature and extent of wounds or injuries. They may also be admitted to establish malice and intent. State v. Kuntzelman 115
   State v. Rife 132
2. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome, where a proper foundation has been laid. State v. Rife 132
3. Although gruesome, photographs having probative value outweighing possible prejudice to the accused are admissible. State v. Lynch 528
4. The determination of the admissibility of a photograph is within the discretion of the trial court. The decision of the trial court will not be reversed in the absence of a clear abuse of discretion. State v. Birge 761
5. A proper objection, stating the specific grounds therefor, and an adverse ruling thereon must appear on the record to preserve the issue for consideration on appeal. State v. Birge 761

6. Caution must be exercised when introducing police file photographs so that defendant is not prejudiced by evidence of a prior contact with the police. State v. Birge 761

Pleadings.

1. New and distinct matter not maintainable as a counterclaim under statutory provisions and not involved in a proper determination of the subject matter of the original suit must be litigated in a separate action. Klitzing v. Didier 122
2. A claim for damages for tort cannot be used as a setoff against actions on contracts or suits on promissory notes secured by real estate mortgages. Klitzing v. Didier 122
3 Inasmuch as no specific theories of recovery are required to be pleaded in small claims court, that court's decision must be affirmed by the District Court if it can be founded on any theory supported by the evidence. Harris v. Eberhardt 240
4. A general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof. Harris v. Eberhardt 240
5. Allegations in pleadings are privileged if material or pertinent to the controversy in litigation. Beckenhauer v. Predoehl 347
6. Where the question of relevancy and pertinency of matters is to be inquired into, all doubt should be resolved in favor of relevancy and pertinency. Beckenhauer v. Predoehl 347
7. If it clearly appears that the allegations in a pleading are not pertinent, material, or relevant to the controversy in litigation, they are not privileged and may serve as the basis for a libel suit. Beckenhauer v. Predoehl 347
8. Whether allegations in a pleading are privileged is a question of law. Beckenhauer v. Predoehl 347
9. It is not necessary that the defamatory matter be relevant or pertinent to any issue before the court. It is necessary only that it have some relevance to the judicial function which is being performed. Beckenhauer v. Predoehl 347
10. If the defamatory matter has some reference to the subject matter of the litigation, it is privileged. Beckenhauer v. Predoehl 347
11. An allegation in a pleading upon which an action is tried is a judicial admission and a limitation of the issues which is binding upon the party making the allegation. Ryder Truck Rental v. Transportation Equip. Co. 458

12. The court must accept the facts as set forth in the petition and may not notice or consider extrinsic matters in determining whether a pleading states a cause of action. Morris v. Lutheran Medical Center 677
13. A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. State v. Harper 686
14. It is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of evidence. State v. Harper 686
15. In testing whether a petition states a cause of action, we must accept as true all facts well pleaded, but we do not accept as true conclusions of law or of the pleader. Harmon Care Centers v. Knight 779
16. When the allegations of the pleadings have been pierced by a movant for summary judgment and resistance to the motion fails to show that a genuine issue of fact exists, summary judgment should be granted. Kerry-Rand & Associates v. Peddicord 798
17. In exercising its sound discretion to permit or refuse the filing of an amended petition, the trial court may consider all the surrounding circumstances, including consideration as to whether the proposed amendment properly states a cause of action. Caro, Inc. v. Roby 897
18. Under Neb. Rev. Stat. § 25-852 (Reissue 1979), a pleading may be amended in the furtherance of justice to conform to the proof, if the proposed amendment does not change substantially the claim or defense. The decision to allow or deny the proposed amendment rests in the sound discretion of the trial court. West Town Homeowners Assn. v. Schneider 905

Pleas.

1. A defendant who pleads guilty to a misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights. State v. Kucera 337
2. The vacation of a conviction following an improper plea of guilty, and a remand for rearraignment, does not subject a defendant to double jeopardy. State v. Kucera 337
3. A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively dis-

close that the defendant entered his plea understandingly and voluntarily. State v. Prichard 488

4. In responding to questions from the court, a defendant who is mentally competent can no more assume one posture at the time of arraignment and change positions afterwards to meet the exigencies of the situation than he can withhold facts from his attorney, and thereby experiment with one defense, and when that fails him, invoke the aid of the law to experiment with another which was fully known to him at the time. State v. Waterman 768

Police Officers and Sheriffs.

1. A police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. State v. Pierce and Wells 512
2. Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of the circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is, or has been, or is about to be engaged in criminal behavior. State v. Pierce and Wells 512
3. Roadside encounters between police and suspects are especially hazardous, and danger may arise from the possible presence of weapons in the area surrounding a suspect. Thus, the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer to believe that the suspect is dangerous and the suspect may gain immediate control of weapons. State v. Pierce and Wells 512

Political Subdivisions.

A political subdivision of Nebraska has only that power delegated by the Legislature. A grant of power to a political subdivision is strictly construed. Nebraska League of S. & L. Assns. v. Johnson 19

Polygraph Tests.

Generally speaking, where the mention of a polygraph

test was inadvertent and unrequested, the results of any such test, if given, were not disclosed, the reference was properly objected to, and the jury was instructed to disregard such references, no prejudicial error has been committed. State v. Beach 213

Post Conviction.

1. In order to establish a right to post conviction relief based on a claim of ineffective counsel, the criminal defendant has the burden to prove that counsel failed to perform at least as well as a lawyer with ordinary training and skill in the criminal law or that he failed to conscientiously protect his client's interests. Further, he must show on the record how he suffered prejudice in the defense of his case as a result of the counsel's action during trial. State v. Crouch 205
2. A motion for post conviction relief can not be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Ohler 401
3. Once a motion for post conviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of the filing of the prior motion. State v. Ohler 401
4. In order to state a cause of action for post conviction relief, the motion must allege facts which, if proved, constitute an infringement of the prisoner's constitutional rights; allegations which are mere conclusions are insufficient. State v. Robinson 449
5. In ruling on an application for post conviction relief, if the trial court finds from an examination of the files and records in the case that the proceeding is without foundation, an evidentiary hearing may properly be denied. State v. Waterman 768
6. One seeking post conviction relief has the burden of establishing the 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. Waterman 768
7. An evidentiary hearing must be granted on a petition for post conviction relief when the facts alleged would justify relief, if true, or when a factual dispute arises as to whether a constitutional right is being denied. State v. Waterman 768
8. Although an evidentiary hearing is not always necessary on an application for post conviction relief, such a

hearing is usually advisable to avoid protracted litigation. State v. Waterman 768

Prejudgment Interest.

1. Prejudgment interest may be recovered on claims that are liquidated. Land Paving Co. v. D. A. Constr. Co. 406
2. A claim is liquidated if the evidence furnishes data which, if believed, make it possible to compute the amount with exactness, without reliance upon opinion or discretion. Land Paving Co. v. D. A. Constr. Co. ... 406
3. Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed. Land Paving Co. v. D. A. Constr. Co. 406
4. Where the claim is otherwise liquidated, prejudgment interest should be denied only when the evidence shows there is a reasonable controversy as to the plaintiff's right to recover or as to the amount of such recovery. Land Paving Co. v. D. A. Constr. Co. 406

Presumptions.

1. It is the duty of an agent to communicate to his principal all the facts concerning the service in which he is engaged that come to his knowledge in the course of his employment, and this duty, in a subsequent action between his principal and a third person, he is conclusively presumed to have performed. City of Gering v. Smith Co. 174
2. Where the law of a sister state is not presented, it is presumed to be the same as the law of this jurisdiction. Cockle v. Cockle 329

Pretrial Motions.

The trial court is vested with broad discretion in considering requests of defense counsel for discovery, and error can be predicated only upon an abuse of such discretion. State v. Pierce and Wells 512

Principal and Agent.

1. It is the duty of an agent to communicate to his principal all the facts concerning the service in which he is engaged that come to his knowledge in the course of his employment, and this duty, in a subsequent action between his principal and a third person, he is conclusively presumed to have performed. City of Gering v. Smith Co. 174
2. Generally, one who assumes gratuitously to control or

manage the property of another must account to the beneficiaries of the person whose property he has assumed to control or manage. Miller v. Janecek 182
3. Generally, the loss of capacity by a principal terminates the authority of an agent. Miller v. Janecek 182

Prior Convictions.
1. In a criminal proceeding the right to inquire of a defendant of a previous conviction is for the purpose of attacking the credibility of the witness. If, in response to a question whether the defendant has ever been convicted of a felony, or a crime involving dishonesty or false statements, the defendant answers yes, the inquiry should end. It is improper to inquire into the nature of the crime or the details of the offense. State v. Daugherty 45
2. For each conviction under Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982), the court shall, as part of the judgment of conviction, make a finding on the record as to the number of the defendant's prior convictions, and shall give the defendant an opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions. State v. Prichard 488
3. In a proceeding to enhance the punishment because of prior convictions, the burden remains on the State to prove such convictions. State v. Prichard 488
4. That defendant's constitutional rights were honored in a prior conviction may not be proved by a silent record. State v. Prichard 488

Probable Cause.
1. The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. State v. Gilreath 466
2. The report of a citizen eyewitness supplies its own indicia of reliability and may be self-corroborating. State v. Gilreath 466
3. Doubtful or marginal cases should be determined largely by the preference to be accorded to warrants. State v. Gilreath 466
4. A police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. State v. Pierce and Wells 512
5. Police officers must have a particularized and objec-

tive basis for suspecting the person stopped of criminal activity. The assessment of the totality of the circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is, or has been, or is about to be engaged in criminal behavior. State v. Pierce and Wells 512

6. Roadside encounters between police and suspects are especially hazardous, and danger may arise from the possible presence of weapons in the area surrounding a suspect. Thus, the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer to believe that the suspect is dangerous and the suspect may gain immediate control of weapons. State v. Pierce and Wells 512

Probation and Parole.

No defendant, once convicted, is entitled to probation as a matter of law. State v. Goodpasture 341

Products Liability.

1. In an action for negligent manufacture an inference of negligence arises from proof that a defect existed at the time of manufacture. Nerud v. Haybuster Mfg. ... 604
2. The plaintiff in a negligence case must, in order to prove that a particular product is defective in its design, show both that the product presented an unreasonable risk of danger and that the manufacturer failed to exercise reasonable care in adopting its design. Nerud v. Haybuster Mfg. 604
3. A product is "unreasonably dangerous" when it has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics. Nerud v. Haybuster Mfg. 604
4. In a strict liability in tort case, the plaintiff, in order to prove that a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer. Nerud v. Haybuster Mfg. 604

Promissory Notes.

A suit by a partner to collect on a note representing his contribution to the partner's capital account is an action at law, and ordinarily such action may not be turned into an equitable action for an accounting by a cross-petition. Jameson v. Giacalone 33

Proof.

1. What constitutes public convenience and necessity is primarily a fact question with a number of imponderables to be taken into consideration. The facts in each case must be separately considered, and from those facts it must be determined whether public convenience and necessity require a given utility service to be performed. In re Applications of Nebraska P.P. Dist. 8
2. The grant or denial of an application of a utility company, based on public convenience and necessity, by the administrative agency charged with the responsibility for supervising such industry requires the exercise of administrative and legislative functions. In re Applications of Nebraska P.P. Dist. 8
3. For the purposes of invoking the rule of issue preclusion, the determination of the public convenience and necessity in one state is not an identical issue to a similar determination in another state. In re Applications of Nebraska P.P. Dist. 8
4. Where different proof is required, a judgment in one action does not preclude another action. Northport Irr. Dist. v. Jess 152
   Cockle v. Cockle 329
5. In a bailment for hire or a mutually reciprocal bailment case, in the absence of statutory or contractual provisions to the contrary, once bailor proves delivery of property to bailee in good condition and failure to redeliver upon timely demand, the burden is irrevocably fixed upon bailee to prove by a preponderance of the evidence that he has exercised due care to prevent the loss, damage, or destruction of the property. This principle applies to all bailment for hire cases, whether brought in tort or in contract, in which bailee has exclusive control over the property at the time it was lost, destroyed, or damaged. *Nash v. City of North Platte*, 198 Neb. 623, 255 N.W.2d 52 (1977), and its predecessors are overruled. Knight v. H & H Chevrolet 166
6. In compensation cases the burden of proof is always upon the claimant to prove by a preponderance of the evidence that the injury was caused to the employee by

an accident arising out of and in the course of his employment. Halbert v. Champion International 200
Hamer v. Henry 805
Randall v. Safeway Stores 877
7. Where the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, then the claimant sustains his burden of proof on the element involved. Halbert v. Champion International 200
8. Prescriptive rights are not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence. Stricker v. Knaub 372
9. The party claiming a prescriptive easement must prove that his user was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full prescriptive period. Stricker v. Knaub 372
10. Proof of the user must be such that the identity of the thing enjoyed may be determined. Stricker v. Knaub . 372
11. A claimed easement must be viewed from both ends of the prescriptive period. The nature and extent or scope of the user must from the beginning be clearly established. At the end of the period it must appear in retrospect that there has been no material change or variance from the limits or course adopted or established at the beginning. A lesser user prevents a right to an easement and a greater user is of no importance until the full prescriptive period has elapsed from the initiation of the greater use. The law requires that the easement must be clearly definable and precisely measured. Stricker v. Knaub 372
12. One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. State v. Evans 433
13. In a proceeding to enhance the punishment because of prior convictions, the burden remains on the State to prove such convictions. State v. Prichard 488
14. That defendant's constitutional rights were honored in a prior conviction may not be proved by a silent record. State v. Prichard 488
15. The burden of proof is on one asserting death from other than natural causes to establish such fact by a preponderance of the evidence. Niesen v. Logan County Co-op Oil Assn. 587
16. When an employee dies suddenly and mysteriously while engaged in his work, the burden of proof that his death resulted from an accident arising out of the em-

ployment rests upon the claimant for compensation, and such proof must amount to something more than a mere guess. Niesen v. Logan County Co-op Oil Assn. 587

17. In a prosecution for exhibiting obscene material the State is not required to prove that the material was obscene, other than by introducing the material itself. State v. Embassy Corp. 631

18. Unless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony. Hamer v. Henry 805

19. A workmen's compensation award cannot be based on speculation, and if an inference favorable to the claimant can only be reached on the basis thereof, then she cannot recover. Randall v. Safeway Stores 877

Property.

1. Station connects, or housedrops, a part of a cable television distribution system, which are actually annexed to the realty or something appurtenant thereto, are appropriated to the use or purpose of that part of the realty with which they are connected; and if the intention of the party making such annexation is to make these articles permanent accessions to the freehold, they become fixtures attached to the real estate of the subscriber and are not subject to taxation as personal property belonging to the cable television company. T-V Transmission v. County Bd. of Equal. 363

2. In determining whether a residence constructed on leased property is personal property, the intention of the parties is controlling. Bank of Valley v. U.S. Nat. Bank 912

3. Where the lease gives the lessee the right to remove a residence constructed upon the leased property, the residence remains personal property, and a financing statement granting a security interest in the residence should be filed in the office of the county clerk of the county of the debtor's residence. Neb. U.C.C. § 9-401(1)(c) (Supp. 1977). Bank of Valley v. U.S. Nat. Bank 912

Property Division.

1. Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, the decree will not thereafter be vacated or modified as to such property provisions. One of the exceptions to

the rule, however, is that the decree may be vacated or modified where there is evidence of fraud. Colson v. Colson 452

2. In every case involving the dissolution of a marriage and the division of property, the trial court must examine how the property is being divided, even if by agreement of the parties; the court can only approve the agreement if the court finds the agreement is not unconscionable. Colson v. Colson 452
3. In reviewing a property settlement agreement entered into by the parties, the trial court is admonished not to regard the agreement lightly but, rather, is required to carefully scrutinize the agreement to be sure that neither party takes an unconscionable advantage over the other through fraud. Colson v. Colson 452
4. In order for the court to carry out its duty with regard to property settlement agreements, the parties must be honest and candid with the court so that the court may have all of the proper and necessary information before it in order to make its decision. Colson v. Colson 452
5. The fact that a decree is submitted and representations made to the court that the decree contains a description of matters previously disclosed to the court and agreed to by the parties, when, in fact, they were not, is not sufficient to overcome an objection of fraud. Colson v. Colson 452
6. Generally speaking, in marriage dissolution proceedings awards of property to a spouse from the marital estate vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case. Martin v. Martin 508
7. Although this court is hesitant to disturb the division of property made by the trial court in a dissolution proceeding, we must do so when it is patently unfair on the record. Martin v. Martin 508
8. The ultimate test for division of marital property and an award of alimony is one of reasonableness. Burger v. Burger 699

Proximate Cause.

1. If the evidence shows that a plaintiff's conduct may be negligent and a proximate cause of the accident, the issue of contributory negligence must be submitted to the jury. Davis v. Phillips 184
2. Although a defendant is negligent as a matter of law, the plaintiff's negligence which is a proximate cause requires a factual determination by the jury whether

the negligence of the plaintiff is more than slight in comparison with the negligence of the defendant. Davis v. Phillips 184

3. The mere fact that one may become ill or experience pain during employment does not in and of itself prove that the employee is disabled as a result of an "accident" arising out of and in the course of employment, entitling the individual to compensation under the Nebraska Workmen's Compensation Act. Hamer v. Henry 805

Public Officers and Employees.

An original petition for recall of an elected official must purport to have been signed by signatories in a number determined by the formula found in Neb. Rev. Stat. § 23-2010 (Cum. Supp. 1982). Absent such minimum number of signatures on the original petition, a supplementary recall petition is not permitted. Spence v. Terry 810

Public Utilities.

1. What constitutes public convenience and necessity is primarily a fact question with a number of imponderables to be taken into consideration. The facts in each case must be separately considered, and from those facts it must be determined whether public convenience and necessity require a given utility service to be performed. In re Applications of Nebraska P.P. Dist. 8
2. The grant or denial of an application of a utility company, based on public convenience and necessity, by the administrative agency charged with the responsibility for supervising such industry requires the exercise of administrative and legislative functions. In re Applications of Nebraska P.P. Dist. 8
3. The reasonableness or unreasonableness of rates charged or action taken by the board of directors of a public power district is a proper matter for judicial examination and review. Village of Morrill v. Roosevelt P.P. Dist. 41

Questions of Law.

Whether allegations in a pleading are privileged is a question of law. Beckenhauer v. Predoehl 347

Quiet Title.

1. Actions to quiet title based upon adverse possession are equitable in nature. Horky v. Schriner 498
2. One seeking to have title quieted in himself is required

to recover on the strength of his own title and not on the weakness of his adversary's title. Mack v. Luebben .. 832

Rates.

The reasonableness or unreasonableness of rates charged or action taken by the board of directors of a public power district is a proper matter for judicial examination and review. Village of Morrill v. Roosevelt P.P. Dist. 41

Ratification.

1. An affirmance of an unauthorized transaction can be inferred from a failure to repudiate it. Bank of Valley v. Shunk 25
2. Ratification of an agent's unauthorized acts may be made by overt action or inferred from silence and inaction. Bank of Valley v. Shunk 25

Rebuttal Evidence.

1. Proper rebuttal testimony in a criminal prosecution is any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact. State v. Esluer 616
2. Rebuttal witnesses need not be endorsed on the information. State v. Esluer 616

Recall Petitions.

An original petition for recall of an elected official must purport to have been signed by signatories in a number determined by the formula found in Neb. Rev. Stat. § 23-2010 (Cum. Supp. 1982). Absent such minimum number of signatures on the original petition, a supplementary recall petition is not permitted. Spence v. Terry 810

Records.

1. Although the Nebraska Power Review Board may not be required to follow the technical common-law rules of evidence in ruling on offered evidence which may possess probative value, nonetheless neither that agency on initial hearing nor this court on review is required to sift through a voluminous record made in a hearing other than the one under consideration to determine whether such record contains anything probative of the particular issue under consideration. In such case the proponent of the evidence is required to index and designate that evidence which it feels is relevant in ac-

cordance with the rules of the agency. In re Applications of Nebraska P.P. Dist. 8
2. An assignment of error which requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions; the only question presented under such circumstances is the sufficiency of the pleadings to sustain the judgment of the trial court. State v. Robinson 449
3. Evidence which does not appear in the record cannot be considered on appeal by the Supreme Court. Mace v. Mace 640
4. The requirement that a transcript of the proceedings in the lower tribunal be filed with a petition in error is mandatory and jurisdictional. School Dist. No. 39 v. Farber 791
5. In a proceeding in error additional evidence may not be received, and the issues must be determined solely from the transcript filed with the petition. School Dist. No. 39 v. Farber 791

Redemption.

1. A party who has acquired the title to land by adverse possession may redeem from a delinquent tax sale before the delivery of a tax deed. Mack v. Luebben 832
2. Where land has been redeemed from a delinquent tax sale, a tax deed issued after the redemption is void. Mack v. Luebben 832

Res Judicata.

1. Where different proof is required, a judgment in one action does not preclude another action. Northport Irr. Dist. v. Jess 152
Cockle v. Cockle 329
2. The doctrine of res judicata holds that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same action and generally is conclusive as to every question which was or might have been presented and determined in the first action. Sidel v. Spencer Foods 325
Simpson v. City of North Platte 351
3. A judgment of dismissal on the merits operates to preclude subsequent relitigation of the same cause of action. Simpson v. City of North Platte 351
4. 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 cannot again be liti-

gated between the parties and privies, whether the claim or demand, purpose, or subject matter of the two suits is the same or not. West Town Homeowners Assn. v. Schneider 905

Right to Counsel.

1. The right of counsel, accorded under the sixth amendment to the U.S. Constitution, cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice. State v. Wyman 537
2. Defendant, by electing to act as his own counsel after the refusal of the court to permit lay counsel to appear for him, must be held responsible for his ineptness of counsel even though that counsel was himself. State v. Wyman 537

Rules of Evidence.

1. Under Rule 408 of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-408 (Reissue 1979)), evidence of compromise and offers to compromise is inadmissible. This exclusion extends to evidence that any party to the litigation has settled a claim with a third party concerning the same transaction or subject matter involved in the litigation where such evidence is offered. Baker v. Blue Ridge Ins. Co. 111
2. Where the party against whom a statement is offered is present, hears the statement being made, and makes no objection, the trial court may consider such evidence as an exception to the hearsay rule. In re Interest of M. 383

Sanitary and Improvement Districts.

1. An action to determine the rights and liabilities of parties to a sanitary and improvement district warrant is an action at law. S.I.D. No. 32 v. Continental Western Corp. 843
2. A sanitary and improvement district is a governmental unit such as is contemplated by Neb. U.C.C. § 3-105(1)(g) (Reissue 1980). S.I.D. No. 32 v. Continental Western Corp. 843
3. A transaction between a sanitary and improvement district and an entity with which it shares common directors, officers, or attorneys need not be, on that ground alone, illegal and a nullity. S.I.D. No. 32 v. Continental Western Corp. 843

Schools and School Districts.

1. An act of "immorality" within the meaning of Neb. Rev. Stat. § 79-1260 (Reissue 1981) must be an act which directly relates to a teacher's fitness to teach. Clarke v. Board of Education 250
2. A teacher commits an immoral act within the meaning of Neb. Rev. Stat. § 79-1260 (Reissue 1981) when he calls several black students in a racially mixed class "dumb niggers." Clarke v. Board of Education 250
3. If the conditions set out in Neb. Rev. Stat. § 79-420 (Reissue 1981) exist, it is the mandatory duty of the county superintendent to proceed. School Dist. No. 39 v. Farber 791
4. In accordance with Neb. Rev. Stat. § 79-1254 (Reissue 1981), teachers having taught more than 2 years in a Class I, II, III, or VI school district have a property interest in their employment and as a consequence are entitled to procedural and substantive due process before termination of such employment is permitted. Irwin v. Board of Ed. of Sch. Dist. No. 25 794
5. Within the matrix of the particular circumstances present when a teacher who is to be terminated for cause opposes his termination, minimum procedural due process requires that he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist; he be advised of the names and the nature of the testimony of witnesses against him; at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense; and that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges. Irwin v. Board of Ed. of Sch. Dist. No. 25 794
6. A teacher termination proceeding not in compliance with minimum procedural due process requirements is a nullity, and that teacher is not lawfully discharged. Irwin v. Board of Ed. of Sch. Dist. No. 25 794
7. A contract to coach is not a contract subject to the procedural and substantive requirements of Neb. Rev. Stat. § 79-1254 (Reissue 1981). Irwin v. Board of Ed. of Sch. Dist. No. 25 794

Search and Seizure.

1. Roadside encounters between police and suspects are especially hazardous, and danger may arise from the possible presence of weapons in the area surrounding a suspect. Thus, the search of the passenger compartment of an automobile, limited to those areas in which

a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer to believe that the suspect is dangerous and the suspect may gain immediate control of weapons. State v. Pierce and Wells 512
2. One who seeks to suppress evidence seized pursuant to a warrant regular on its face has the burden of establishing that the warrant was invalid. State v. Whitmore, White, and Henderson 560

Search Warrants.
1. A "totality of the circumstances" test is to be used to determine the sufficiency of an affidavit used to obtain a search warrant. State v. Gilreath 466
2. If the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, indicate that there is a fair probability that evidence of a crime may be found at the place described, the affidavit is sufficient. State v. Gilreath 466
3. An issuing magistrate is required only to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. State v. Gilreath 466
4. The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. State v. Gilreath 466
5. The report of a citizen eyewitness supplies its own indicia of reliability and may be self-corroborating. State v. Gilreath 466
6. Doubtful or marginal cases should be determined largely by the preference to be accorded to warrants. State v. Gilreath 466

Security Interests.
1. The guaranty itself need not be secured in order to entitle the guarantors to notice. All that need be secured to entitle the guarantor to notice is the debt for which the guaranty is executed. Borg-Warner v. Watton 318
2. Each guarantor is entitled to notice as a "debtor" under the definition of such in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980) as one who owes payment or other per-

formance of the obligation secured. Borg-Warner v. Watton 318
3. It is the rule in this jurisdiction that compliance with the notice provisions of the Uniform Commercial Code is a condition precedent to the right of a creditor to recover a deficiency judgment. The failure to give the requisite notice is an absolute bar to recovery. Borg-Warner v. Watton 318
4. Whatever restrictions may be imposed by law with regard to the debtor are likewise imposed with regard to the guarantor. Borg-Warner v. Watton 318
5. Where the lease gives the lessee the right to remove a residence constructed upon the leased property, the residence remains personal property, and a financing statement granting a security interest in the residence should be filed in the office of the county clerk of the county of the debtor's residence. Neb. U.C.C. § 9-401(1)(c) (Supp. 1977). Bank of Valley v. U.S. Nat. Bank 912

Self-Defense.

The use of deadly force shall not be justifiable unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnaping, or sexual intercourse compelled by force or threat, nor is it justifiable if (a) the actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter, or (b) the actor knows that he can avoid the necessity of using such force with complete safety by retreating. State v. Kuntzelman 115

Sentences.

1. Neither double jeopardy nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded from imposing a new sentence, even though greater than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities, which information may have come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's recent prison record, or possibly from other sources. State v. Beach 213
2. Whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for doing so must affirmatively appear from the record

and be based upon objective information occurring after the time of the original sentencing proceeding. State v. Beach 213
3. In the absence of an abuse of discretion by the trial court, this court will not disturb on appeal a sentence imposed within the statutory limits. State v. Beach ... 213
State v. Pearson 339
State v. Nix 410
State v. Pierce and Wells 512
4. Upon conviction for second offense driving while his license has been suspended, the court shall order the defendant not to operate a motor vehicle for any purpose for a period of 2 years from the date of his final discharge from jail or payment or satisfaction of any fine imposed, whichever is later. Neb. Rev. Stat. § 60-430.01 (Cum. Supp. 1982). State v. Moore 229
5. The law is well established in this state that in considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant. State v. Goodpasture 341
6. Where two or more defendants are convicted for the same offense and different penalties are inflicted, and it appears from the evidence that the defendant receiving the least punishment is at least equally guilty, it may be necessary for this court to examine the evidence to determine whether there were justifiable reasons for the distinctions and whether the higher sentence should be reduced. State v. Nix 410
7. An order denying probation and a sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge. State v. Evans 433
8. Under Neb. Rev. Stat. § 83-1,106 (Reissue 1981), one sentenced to life imprisonment is not entitled to credit for time in custodial detention pending disposition of the proceedings on the charge levied. State v. Lynch . 528
9. An offender's sentence, for the purpose of good time computations, is the sum of all sentences he receives, regardless of when incurred. Boston v. Black 701
10. The date of an offender's initial incarceration is the date on which service of such consolidated sentence is deemed to begin. Boston v. Black 701
11. Absent approval of the Board of Pardons, the good time

sentence reduction provisions of 1975 Neb. Laws, L.B. 567, are not applicable to an offender who started to serve his sentence prior to the effective date of L.B. 567. Boston v. Black 701

Sexual Misconduct.

Sexual misconduct is a factor which may be considered in deciding the issue of custody. It may support a finding of a change of circumstances sufficient to conclude that one who had custody is no longer fit for that purpose or that the best interests of the child require such change. Hinz v. Hinz 335

Small Claims Court.

1. The entire matter in small claims court is on a very informal basis, with a minimum of procedural requirements. Harris v. Eberhardt 240
2. Inasmuch as no specific theories of recovery are required to be pleaded in small claims court, that court's decision must be affirmed by the District Court if it can be founded on any theory supported by the evidence. Harris v. Eberhardt 240

Specific Performance.

1. An action for specific performance is triable de novo on appeal to this court. Cole v. Hickey 728
2. An action to compel the specific performance of an oral contract to devise real property by will is equitable in nature and is reviewed de novo on the record on appeal to this court. Matthews v. Matthews 744

Statute of Frauds.

1. A memorandum, in order to make enforceable a contract within the statute, may be any document or writing, formal or informal, signed by the party to be charged or by his agent actually or apparently authorized thereunto, which states with reasonable certainty (a) each party to the contract either by his own name or by such a description as will serve to identify him, or by the name or description of his agent, and (b) the land, goods, or other subject matter to which the contract relates, and (c) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made. Hansen v. Hill 573
2. A telegram may constitute a sufficient memorandum under the statute of frauds. Hansen v. Hill 573
3. A printed name may constitute a sufficient signing un-

der the statute of frauds, provided that it is recognized by the party sought to be charged. Hansen v. Hill 573
4. In order to remove from the operation of the statute of frauds an oral contract to devise property, there must be performance referable solely to the contract sought to be enforced such that nonperformance by the other party would constitute a fraud upon the claimant. Matthews v. Matthews 744

Statutes.

1. Even though two statutes appear to be identical, issues arising under these statutes are not necessarily the same so as to give rise to the rule of issue preclusion, because the policy under such statutes may be different. In re Applications of Nebraska P.P. Dist. 8
2. An act of a savings and loan association must conform with the statutes governing the existence and activities of savings and loan associations. Any act not authorized by such statutes is beyond the powers conferred upon a savings and loan association. Nebraska League of S. & L. Assns. v. Johnson 19
3. No interpretation is needed to ascertain the meaning of plain and unambiguous statutes; in the absence of anything to indicate the contrary, words used in a statute will be given their ordinary meaning. Spilinek v. Spilinek 35
State v. Palmer 273
4. In the construction of a statute which is clear and unambiguous, courts cannot supply missing language, and it is not within the court's power to read into a statute meaning which the clear language of the statute does not warrant. State v. Palmer 273
5. A mechanic's lien is statutory, and a lien claimant must bring himself within the terms of the statute to establish a lien. Columbus Fed. S. & L. Assn. v. Swails Constr. Co. 287
6. Where the law of a sister state is not presented, it is presumed to be the same as the law of this jurisdiction. Cockle v. Cockle 329
7. 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. State v. Evans 433
8. The fact that juries may reach different results on similar facts does not render obscenity statutes unconstitutional, nor does it create a right of reliance when

other questionable material is exhibited. State v. Embassy Corp. 631
9. The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose in advance what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things and providing a punishment for their violation should not admit of such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another. State v. Hamilton 694
10. A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning, and differ as to its application, violates the first essential element of due process of law. State v. Hamilton 694
11. The test to determine whether a statute defining an offense is void for uncertainty is whether the language may apply not only to a particular act about which there can be little or no difference of opinion but equally to other acts about which there may be radical differences, thereby devolving on the court the exercise of arbitrary power of discriminating between the several classes of acts. The dividing line between what is lawful and what is unlawful cannot be left to conjecture. State v. Hamilton 694
12. Neb. Rev. Stat. § 28-311 (Reissue 1979) is unconstitutional. State v. Hamilton 694
13. As a general rule, the words "final and binding," when used in ordinances or statutes to refer to the decision of an administrative official or agency, mean that it is the definitive act of that official or agency and is binding until and unless it is set aside by judicial review. City of Lincoln v. Soukup 732
14. If the conditions set out in Neb. Rev. Stat. § 79-420 (Reissue 1981) exist, it is the mandatory duty of the county superintendent to proceed. School Dist. No. 39 v. Farber 791
15. A contract to coach is not a contract subject to the procedural and substantive requirements of Neb. Rev. Stat. § 79-1254 (Reissue 1981). Irwin v. Board of Ed. of Sch. Dist. No. 25 794

Strict Liability.

In a strict liability in tort case, the plaintiff, in order to prove that a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer. Nerud v. Haybuster Mfg. 604

Subrogation.

The general rule is that a surety or guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control, and, therefore, in the absence of *assent*, *waiver*, or estoppel he is generally released by an act of the creditor which deprives him of such right. Myers v. Bank of Niobrara 29

Summary Judgment.

1. Where undisputed facts are reasonably susceptible of different and conflicting inferences or where the ultimate inferences to be drawn from those facts are not certain, summary judgment is not a proper disposition. Regnev, Inc. v. Shasta Beverages 230
2. Summary judgment may properly be granted where there exists no genuine issue as to any material fact, the ultimate inferences to be drawn from those facts are clear, and the movant is entitled to judgment as a matter of law. Butte State Bank v. Williamson 296
   Cockle v. Cockle 329
3. The overruling of a motion for summary judgment is not a final, appealable order. Cockle v. Cockle 329
4. A summary judgment is authorized only when the moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact to be determined, a summary judgment may not be properly entered. Hansen v. Hill 573
5. Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear. Bigger v. Fremont Nat. Bank 580
6. When the allegations of the pleadings have been pierced by a movant for summary judgment and resistance to the motion fails to show that a genuine issue of fact exists, summary judgment should be granted. Kerry-Rand & Associates v. Peddicord 798

Tape Recordings.

1. For a tape recording of a telephone conversation between a witness and a defendant to be admissible in evidence, it need only be shown that the conversation is relevant; that it accurately reflected the conversation; that the tapes had not been altered, changed, or erased in any way; and that the voices heard on the tapes were those of the witness and the defendant. State v. Pearson 339
2. The use of profane or obscene language in an otherwise

admissible statement or conversation generally does not destroy the nature and meaning of the statement nor make it inadmissible. State v. Pearson 339

Tax Sale.

1. A party who has acquired the title to land by adverse possession may redeem from a delinquent tax sale before the delivery of a tax deed. Mack v. Luebben ... 832
2. Where land has been redeemed from a delinquent tax sale, a tax deed issued after the redemption is void. Mack v. Luebben 832
3. The statute of limitations barring actions for the recovery of real estate sold for the nonpayment of taxes has no application where the tax deed was void. Mack v. Luebben 832

Taxation.

1. Property is not used for financial gain or profit to either the owner or user if no part of the income from it is distributed to the owner's or user's members, directors, or officers, or to private individuals. United Way v. Douglas Co. Bd. of Equal. 1
2. Concurrent ownership and use of property in a single entity is not required in order for property to qualify for a charitable exemption from taxation. United Way v. Douglas Co. Bd. of Equal. 1
3. Lease of property to a charitable organization by a charitable organization for substantially less than its fair rental value is a use of the property for a charitable purpose. United Way v. Douglas Co. Bd. of Equal. 1
4. Vacant space in property owned by a charitable organization is exempt from taxation if it is intended for a charitable use, the dominant use of the property as a whole is for exempt purposes, and the conditions under which it is held preclude its use for commercial purposes. United Way v. Douglas Co. Bd. of Equal. 1
5. All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made. Spencer Holiday House v. County Bd. of Equal. 194
6. Nothing in Neb. Rev. Stat. § 77-112 (Reissue 1981) requires a county assessor or county board to use all of the factors set forth therein to arrive at a proper valuation. Instead, they may use such factors or a combination thereof which they determine to be applicable in determining actual value under the Constitution of Ne-

braska. Spencer Holiday House v. County Bd. of Equal. 194
Airport Inn v. County Bd. of Equalization 659
7. In reviewing actions of a board of equalization in determining the actual value of property, the applicable statute, Neb. Rev. Stat. § 77-1511 (Reissue 1981), requires such appeals to be heard as in equity, with a determination anew of all questions raised before the county board relating to the amount of the assessment of the property, except that the court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary. Spencer Holiday House v. County Bd. of Equal. 194
8. 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, with the burden of showing such value to be unreasonable resting upon the appellant on appeal from the action of the board. Spencer Holiday House v. County Bd. of Equal. 194
Richman Gordman v. Board of Equalization 379
9. In appeals from actions of the county board of equalization in determining the actual value of property, the burden is upon the taxpayer to show by clear and convincing evidence that the board's determination as to actual value is incorrect and invalid. Spencer Holiday House v. County Bd. of Equal. 194
Richman Gordman v. Board of Equalization 379
Airport Inn v. County Bd. of Equalization 659
10. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. Spencer Holiday House v. County Bd. of Equal. 194
11. Neb. Rev. Stat. § 77-1317 (Reissue 1981) does not require formal notice from the county assessor to the landowner that valuation of real estate has been changed as a result of improvements undisclosed at the

time of a previous assessment. Ganser v. County of Lancaster 313
12. Station connects, or housedrops, a part of a cable television distribution system, which are actually annexed to the realty or something appurtenant thereto, are appropriated to the use or purpose of that part of the realty with which they are connected; and if the intention of the party making such annexation is to make these articles permanent accessions to the freehold, they become fixtures attached to the real estate of the subscriber and are not subject to taxation as personal property belonging to the cable television company. T-V Transmission v. County Bd. of Equal. 363
13. The trial of an appeal from a county board of equalization involving the valuation of real estate, both in District Court and the Supreme Court, is de novo as an equitable proceeding. Richman Gordman v. Board of Equalization 379
Airport Inn v. County Bd. of Equalization 659

Teacher Contracts.

1. In accordance with Neb. Rev. Stat. § 79-1254 (Reissue 1981), teachers having taught more than 2 years in a Class I, II, III, or VI school district have a property interest in their employment and as a consequence are entitled to procedural and substantive due process before termination of such employment is permitted. Irwin v. Board of Ed. of Sch. Dist. No. 25 794
2. Within the matrix of the particular circumstances present when a teacher who is to be terminated for cause opposes his termination, minimum procedural due process requires that he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist; he be advised of the names and the nature of the testimony of witnesses against him; at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense; and that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges. Irwin v. Board of Ed. of Sch. Dist. No. 25 794
3. A teacher termination proceeding not in compliance with minimum procedural due process requirements is a nullity, and that teacher is not lawfully discharged. Irwin v. Board of Ed. of Sch. Dist. No. 25 794

Termination of Employment.

When the employment is not for a definite term, and

there are no contractual or statutory restrictions upon the rights of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability. Morris v. Lutheran Medical Center 677

Time.

1. Application for a new trial must be made within 10 days after a judgment is rendered. Sederstrom v. Wrehe .. 429
2. In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after rendition of the judgment or decree or the making of the final order. Sederstrom v. Wrehe 429
3. Generally, the right of appeal is statutory, and the time requirements set forth in the statute are mandatory and must be complied with before the appellate tribunal acquires jurisdiction of the subject matter. Nicholson v. City of Bellevue 540
4. A claim of newly discovered evidence will not sustain the appellant's burden of showing good cause for filing a late appeal under Neb. Rev. Stat. § 48-634 (Cum. Supp. 1982) of the Employment Security Law, unless it appears that such evidence, if offered and admitted in the former proceeding, probably would have produced a different result. In other words, the appellant must demonstrate that with the newly discovered evidence he or she is able to make out a valid claim or defense before an appeal tribunal may take jurisdiction over an appeal filed beyond the 20-day limitation. Nicholson v. City of Bellevue 540
5. An unqualified renunciation of an executory contract before time for performance by one party excuses tender of performance by the other party at the time set for performance. Cole v. Hickey 728

Torts.

A claim for damages for tort cannot be used as a setoff against actions on contracts or suits on promissory notes secured by real estate mortgages. Klitzing v. Didier 122

Trespass.

1. A trespasser is a person who enters or remains upon premises in possession of another without the express or implied consent of the possessor. Kenney v. Barna 863
2. While the age of a child will not protect such child if the act is denominated a trespass, yet, as trespass is an intentional tort, an initial determination must be made

whether the child concerned formed the intent to do the physical act which released the harmful force. Kenney v. Barna 863
3. A person can trespass on another's property by simply extending his or her arm over the boundary fence. Kenney v. Barna 863
4. In making a determination as to whether a child was capable of the necessary intent to be classed as a trespasser, the standard of conduct to be used is that of a reasonable person of like age, intelligence, and experience under the circumstances. Kenney v. Barna 863

Trial.

1. It is within the sound discretion of a District Court in a civil case to allow a party to withdraw its rest and introduce additional evidence. IAFF Local 831 v. City of No. Platte 89
2. Expert testimony is not necessary to enable the jury to judge the obscenity of materials which have been placed into evidence. State v. Embassy Corp. 631
3. The practice of trial courts in dissolving a marriage but retaining for later disposition the property rights of the parties is disapproved. Humphrey v. Humphrey 664
4. Application for a physical examination of an injured party should be made before the commencement of the trial of a cause, and if not made until after the trial has commenced, a sufficient reason should be assigned why such request was not made before the commencement of the trial. Where such request is made during the progress of the trial, it rests within the sound discretion of the court whether such request be granted, and the ruling of the court thereon will not be disturbed, unless from all the circumstances an abuse of discretion appears. Hoegerl v. Burt 752

Uniform Commercial Code.

1. A guarantor is a debtor within the meaning of the term as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980) and is entitled to the notice required by Neb. U.C.C. § 9-504(3) (Reissue 1980). Butte State Bank v. Williamson 296
Borg-Warner v. Watton 318
2. An oral message does not satisfy the requirements of Neb. U.C.C. § 9-504(3) (Reissue 1980). Butte State Bank v. Williamson 296
3. The guaranty itself need not be secured in order to entitle the guarantors to notice. All that need be secured

to entitle the guarantor to notice is the debt for which the guaranty is executed. Borg-Warner v. Watton 318
4. It is the rule in this jurisdiction that compliance with the notice provisions of the Uniform Commercial Code is a condition precedent to the right of a creditor to recover a deficiency judgment. The failure to give the requisite notice is an absolute bar to recovery. Borg-Warner v. Watton 318
5. Whatever restrictions may be imposed by law with regard to the debtor are likewise imposed with regard to the guarantor. Borg-Warner v. Watton 318
6. The Uniform Commercial Code makes it quite clear that the requirement of giving notice pursuant to Neb. U.C.C. § 9-504(3) (Reissue 1980) may not be waived prior to default. Borg-Warner v. Watton 318
7. Neb. U.C.C. § 3-409(2) (Reissue 1980) does not in any way affect any liability which may arise apart from the instrument itself. The drawee who fails to accept may be liable to the drawer or to the holder for breach of the terms of a letter of credit or any other agreement by which he is obligated to accept. He may be liable in tort or upon any other basis because of his representation that he has accepted, or that he intends to accept. The section leaves unaffected any liability of any kind apart from the instrument. Bigger v. Fremont Nat. Bank 580
8. Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause, shall supplement its provisions. Bigger v. Fremont Nat. Bank 580

Valuation.

1. All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made. Spencer Holiday House v. County Bd. of Equal. 194
2. Nothing in Neb. Rev. Stat. § 77-112 (Reissue 1981) requires a county assessor or county board to use all of the factors set forth therein to arrive at a proper valuation. Instead, they may use such factors or a combination thereof which they determine to be applicable in determining actual value under the Constitu-

tion of Nebraska. Spencer Holiday House v. County Bd. of Equal. 194
Airport Inn v. County Bd. of Equalization 659
3. Neb. Rev. Stat. § 77-1317 (Reissue 1981) does not require formal notice from the county assessor to the landowner that valuation of real estate has been changed as a result of improvements undisclosed at the time of a previous assessment. Ganser v. County of Lancaster 313

Vendor and Vendee.

1. It is established in Nebraska law that a vendee under an executory land contract is entitled to an equitable lien for such amount which has been paid on the purchase price as against a subsequent creditor or purchaser from the vendors. Sidney Fed. S. & L. Assn. v. Jones 225
2. In a case where performance of a land contract is frustrated by the act or neglect of the vendor, the measure of damages should be the recovery of amounts properly designated as principal and such amounts of interest and value of improvements as exceed the reasonable value of the use of the property. Sidney Fed. S. & L. Assn. v. Jones 225

Venue.

1. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown. State v. Rife 132
2. Jurisdiction is the authority or power to decide a case. Venue is the site where the power to adjudicate is to be exercised. In the absence of statutory provisions to the contrary, an objection to venue can be waived. State ex rel. Bauersachs v. Williams 757

Verdicts.

1. A verdict of a trier of fact in a criminal proceeding will be sustained if, taking the view most favorable to the State, there is evidence to support it. State v. Lopez .. 65
State v. Esluer 616
2. In a criminal case tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong, and the verdict must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. State v. Kanger 128
3. After a jury has considered all the evidence and re-

turned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence, if the evidence sustains some rational theory of guilt. State v. Evans 433
4. A verdict will not be set aside unless it is against the weight of the evidence, or appears to have been the result of passion, prejudice, mistake, or disregard of the rules of evidence or the law. Hoegerl v. Burt 752

Video Tapes.

Admission of video tapes is generally within the trial court's discretion, subject to the same requirements for admission of still photographs. State v. Rife 132

Wages.

1. Work not requested but permitted is worktime and compensable. North v. City of Omaha 107
2. When an employer retains a hold on employees during lunchtime so that the employees are not actually at liberty to leave, the lunchtime constitutes compensable time. North v. City of Omaha 107

Waiver.

1. An express or implied acceptance of work as in compliance with a building contract operates as a waiver of defective performance, but this rule is inapplicable where the acceptance was under protest or induced by fraud, or where the defects were latent and unknown to the owner. City of Gering v. Smith Co. 174
2. Ordinarily, the acceptance of performance after a default in performance waives the right to rely upon the default. City of Gering v. Smith Co. 174
3. A general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof. Harris v. Eberhardt 240
4. The Uniform Commercial Code makes it quite clear that the requirement of giving notice pursuant to Neb. U.C.C. § 9-504(3) (Reissue 1980) may not be waived prior to default. Borg-Warner v. Watton 318
5. A defendant who pleads guilty to a misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights. State v. Kucera 337
6. Jurisdiction is the authority or power to decide a case.

Venue is the site where the power to adjudicate is to be exercised. In the absence of statutory provisions to the contrary, an objection to venue can be waived. State ex rel. Bauersachs v. Williams 757

Warranty.

A warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Nerud v. Haybuster Mfg. 604

Waters.

1. A watercourse is defined by statute as any depression or draw 2 feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook. Northport Irr. Dist. v. Jess 152
2. To constitute a watercourse, 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. Northport Irr. Dist. v. Jess 152
3. In order for a watercourse to exist there must be a permanent supply of water from similar conditions, such as rainfall or snowmelt, which will always produce a flow of water in the same channel and that these conditions will reoccur with some degree of regularity. Northport Irr. Dist. v. Jess 152
4. The corpus of running water in a natural stream is not the subject of private ownership. Such water is classified with light and the air in the atmosphere. It is publici juris, or belongs to the public. A usufructuary right, or right to use it, exists, and the corpus of any portion taken from the stream and reduced to possession is private property so long only as the possession continues. Northport Irr. Dist. v. Jess 152

Weapons.

1. An instrument not specifically enumerated in Neb. Rev. Stat. § 28-1202(1) (Reissue 1979) may be a "deadly weapon" if in the manner it is used or intended to be used it is capable of producing death or serious bodily injury. State v. Kanger 128
2. The question of whether an object or weapon not specifically enumerated in Neb. Rev. Stat. § 28-1202(1) (Reissue 1979) was a "deadly weapon" is a question of fact to be decided by the trier of fact. State v. Kanger 128

Wills.

Signing of a will by the witnesses prior to the testator's death is a formality of execution required by Neb. Rev. Stat. § 30-2327 (Reissue 1979). In re Estate of Flicker 495

Wiretaps.

1. No order entered under the provisions of Neb. Rev. Stat. § 86-705 (Reissue 1981) to permit the interception of wire communications may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of authorization, nor in any event longer than 30 days. State v. Whitmore, White, and Henderson 560
2. Failure to include minimization language as provided by Neb. Rev. Stat. § 86-705(6) (Reissue 1981) in an order to permit the interception of wire or oral communication when statutory guidelines have been supplied and when there exists a means of measuring compliance with minimization provisions of the statute is not fatal and does not warrant suppression of evidence. State v. Whitmore, White, and Henderson 560
3. For the purposes of a wiretap, minimization is to be judged on a case-by-case analysis of the reasonableness of the government's conduct under the facts and circumstances present. State v. Whitmore, White, and Henderson 560
4. Whether government agents acted reasonably in a wiretap case is affected by a number of factors, including the nature and scope of an alleged conspiracy, the government's reasonable expectations of the character of conversations they will be intercepting, and the extent of ongoing judicial supervision over surveillance. State v. Whitmore, White, and Henderson 560
5. Defendants seeking to suppress evidence obtained pursuant to wiretap because of the failure to comply with minimization requirements must do more than identify individual calls which they contend should not have been intercepted; they must establish a pattern of interception of innocent conversations which developed over the period of the wiretap. State v. Whitmore, White, and Henderson 560

Witnesses.

1. In a criminal proceeding the right to inquire of a defendant of a previous conviction is for the purpose of attacking the credibility of the witness. If, in response to a question whether the defendant has ever been convicted of a felony, or a crime involving dishonesty or

false statements, the defendant answers yes, the inquiry should end. It is improper to inquire into the nature of the crime or the details of the offense. State v. Daugherty 45

2. A party has the right to cross-examine the witnesses produced by his adversary touching every relation tending to show their interest or bias. L. J. Vontz Constr. Co. v. Alliance Indus. 268
3. A party has the right to cross-examine a witness with regard to an interest which affects credibility. Failure to permit such inquiry constitutes reversible error if prejudice results to the complaining party. L. J. Vontz Constr. Co. v. Alliance Indus. 268
4. Evidence relating to a "Mary Carter" agreement should be admitted where the agreement bears upon the bias and credibility of witnesses employed by a party to the agreement. L. J. Vontz Constr. Co. v. Alliance Indus. 268
5. During the period after rendition of the decree and before a divorce becomes effective to change the status of the parties, the parties are husband and wife with respect to their competency to testify for or against each other. State v. Palmer 273
6. Where the party against whom a statement is offered is present, hears the statement being made, and makes no objection, the trial court may consider such evidence as an exception to the hearsay rule. In re Interest of M. 383
7. Generally, the matter of a claimant's credibility is for the trier of fact to determine. Kokes v. Shafer 470
8. A litigant may not recite upon oath one statement of fact in one judicial proceeding and thereafter, to meet the exigencies of the case in trial of a different cause, recite an entirely different and inconsistent set of facts. In such a situation the evidence is discredited as a matter of law and will be disregarded. Kokes v. Shafer ... 470
9. Signing of a will by the witnesses prior to the testator's death is a formality of execution required by Neb. Rev. Stat. § 30-2327 (Reissue 1979). In re Estate of Flicker 495
10. Rebuttal witnesses need not be endorsed on the information. State v. Esluer 616
11. The failure to endorse the names of the State's witnesses on the information is not grounds for reversal in the absence of a showing of prejudice. State v. Esluer 616
12. A witness should not be allowed to express an opinion on an inadequate basis. Hoegerl v. Burt 752

Words and Phrases.

1. The word "may," as used in rule 28 of the Revised Rules of Practice and Procedure of the Nebraska Power Review Board (1975), relating to the conducting of an investigation by such board on its own motion, makes such investigation discretionary and not mandatory. In re Applications of Nebraska P.P. Dist. 8
2. An instrument not specifically enumerated in Neb. Rev. Stat. § 28-1202(1) (Reissue 1979) may be a "deadly weapon" if in the manner it is used or intended to be used it is capable of producing death or serious bodily injury. State v. Kanger 128
3. The question of whether an object or weapon not specifically enumerated in Neb. Rev. Stat. § 28-1202(1) (Reissue 1979) was a "deadly weapon" is a question of fact to be decided by the trier of fact. State v. Kanger 128
4. "Total disability" does not mean a state of absolute helplessness; one may be so disabled notwithstanding the fact he is able to obtain trivial, occasional employment under rare conditions at small remuneration. Heironymus v. Jacobsen Transfer 209
5. A lease is a species of contract for the possession and profits of land and tenements, either for life or for a certain period of time, or during the pleasure of the parties, and the essential elements of a contract must be present. Krance v. Faeh 242
6. A lease is a hiring or renting of land for a certain time upon a named consideration. Krance v. Faeh 242
7. The categories of tenant and invitee are by definition mutually exclusive. Krance v. Faeh 242
8. An act of "immorality" within the meaning of Neb. Rev. Stat. § 79-1260 (Reissue 1981) must be an act which directly relates to a teacher's fitness to teach. Clarke v. Board of Education 250
9. "Immorality" is not necessarily confined to matters sexual in their nature. In a given context the word may be construed to encircle acts which are contra bonos mores, inconsistent with rectitude and the standards of conscience and good morals. Its synonyms are: corrupt, indecent, depraved, dissolute; and its antonyms are: decent, upright, good, right. Clarke v. Board of Education 250
10. The term "immoral" has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness; or as willful,

flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare. Clarke v. Board of Education 250

11. A teacher commits an immoral act within the meaning of Neb. Rev. Stat. § 79-1260 (Reissue 1981) when he calls several black students in a racially mixed class "dumb niggers." Clarke v. Board of Education 250
12. While the term "misconduct" is not specifically defined in Neb. Rev. Stat. § 48-628(b) (Reissue 1978), it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations. McCorison v. City of Lincoln 474
13. A product is "unreasonably dangerous" when it has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics. Nerud v. Haybuster Mfg. 604
14. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. Garza v. City of Omaha 714
15. As a general rule, the words "final and binding," when used in ordinances or statutes to refer to the decision of an administrative official or agency, mean that it is the definitive act of that official or agency and is binding until and unless it is set aside by judicial review. City of Lincoln v. Soukup 732
16. Conduct which forms a basis for a finding that a party has "unclean hands" must be willful in nature. Voichoskie v. Voichoskie 775
17. In Neb. Rev. Stat. § 25-213 (Reissue 1979) *insanity* means such condition of mental derangement which actually prevents the sufferer from understanding and protecting his or her legal rights. Sacchi v. Blodig 817
18. A trespasser is a person who enters or remains upon premises in possession of another without the express or implied consent of the possessor. Kenney v. Barna 863
19. Disability under Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1978) is defined in terms of employability and

earning capacity rather than in terms of loss of bodily function. Minshall v. Plains Mfg. Co. 881
20. In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof. Minshall v. Plains Mfg. Co. 881
21. A "reasonable controversy" between the parties, sufficient to protect the employer against statutory penalties for waiting time for failure to pay total disability benefits based on impairment of the body as a whole, must rest upon facts concerning employability and not solely upon a disability rating. Minshall v. Plains Mfg. Co. 881

Workmen's Compensation.

1. Although disputed, if there are facts which would justify the finding that appellee sustained an accident arising out of and in the course of his employment, those findings will not be set aside on appeal. Halbert v. Champion International 200
2. In compensation cases the burden of proof is always upon the claimant to prove by a preponderance of the evidence that the injury was caused to the employee by an accident arising out of and in the course of his employment. Halbert v. Champion International 200
Hamer v. Henry 805
Randall v. Safeway Stores 877
3. Where the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, then the claimant sustains his burden of proof on the element involved. Halbert v. Champion International 200
4. One is totally disabled if he is unable to perform any work in which he has the experience or capacity to perform. Heironymus v. Jacobsen Transfer 209
5. "Total disability" does not mean a state of absolute helplessness; one may be so disabled notwithstanding the fact he is able to obtain trivial, occasional employment under rare conditions at small remuneration. Heironymus v. Jacobsen Transfer 209
6. 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. Heironymus v. Jacobsen Transfer 209
Friedeman v. State 413
Kokes v. Shafer 470
Brown v. Leavitt Lane Farm 522

Hamer v. Henry 805
Randall v. Safeway Stores 877
Minshall v. Plains Mfg. Co. 881
7. Issues of causation are for determination by the fact finder. Heironymus v. Jacobsen Transfer 209
Kokes v. Shafer 470
8. Causation may be established on the basis of medical probability. Heironymus v. Jacobsen Transfer 209
9. The statute authorizing an increase in a workmen's compensation award limits the basis for modification to that increased incapacity due solely and only to the compensable accident. Sidel v. Spencer Foods 325
10. The Workmen's Compensation Act is to be construed liberally so that its beneficent purposes may not be thwarted by technical refinement of interpretation. Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1978). Friedeman v. State 413
11. The fact that an employee knew that he was inflicting upon himself a mortal wound will not, in all cases, constitute willful negligence within the meaning of Neb. Rev. Stat. § 48-151(7) (Reissue 1978). Friedeman v. State 413
12. Scientific testimony of factors that can override a person's will, to the extent that even the knowledge of the consequences of the act of suicide do not prevent the act from taking place, are admissible to demonstrate that the act was not willful. Friedeman v. State 413
13. While the act of suicide may be an independent intervening cause in some cases, it is certainly not so in those cases where the incontrovertible evidence shows that, without the injury, there would have been no suicide; that the suicide was merely an act intervening between the injury and the death and part of an unbroken chain of events from the injury to the death and not a cause intervening between the injury and death. Friedeman v. State 413
14. A suicide note written by the decedent within 24 hours of death is admissible as a declaration of present state-of-mind exception to the hearsay rule. Friedeman v. State 413
15. The Workmen's Compensation Court may receive in evidence matters not properly admissible in other courts bound by the rules of evidence. Friedeman v. State 413
16. Generally, the matter of a claimant's credibility is for the trier of fact to determine. Kokes v. Shafer 470
17. An employer may engage in two separate businesses, one subject to the workmen's compensation law and

one exempt from that law. Brown v. Leavitt Lane Farm 522
18. To recover compensation the evidence must show that the employee died as a result of an accident arising out of and in the course of his employment. Niesen v. Logan County Co-op Oil Assn. 587
19. The burden of proof is on one asserting death from other than natural causes to establish such fact by a preponderance of the evidence. Niesen v. Logan County Co-op Oil Assn. 587
20. When an employee dies suddenly and mysteriously while engaged in his work, the burden of proof that his death resulted from an accident arising out of the employment rests upon the claimant for compensation, and such proof must amount to something more than a mere guess. Niesen v. Logan County Co-op Oil Assn. 587
21. Where the testimony gives rise to conflicting inferences of equal degree of probability such that a choice between them is a matter of conjecture, a workmen's compensation award cannot be sustained. Niesen v. Logan County Co-op Oil Assn. 587
22. Findings of fact made by the compensation court will not be set aside on appeal unless clearly wrong. However, where there is not sufficient competent evidence in the record to warrant the making of the award, or the findings of fact do not support the award, this court must modify, reverse, or set aside the award. Niesen v. Logan County Co-op Oil Assn. 587
23. Factors which have been used by the Supreme Court to determine employee status have been (1) the element of control, including the right of termination, the method of payment, and the availability of equipment, and (2) the nature of the work, including the skill required and the duration of the work. Franklin v. Pawley 624
24. The general test of whether work being done by an independent contractor for an owner is within the ambit of Neb. Rev. Stat. § 48-116 (Reissue 1978) is whether the work being done by the independent contractor would ordinarily be done by employees of the owner in view of the owner's past practices and the practices of employers in comparable businesses. Franklin v. Pawley 624
25. Factors which help determine if the activity is within the owner's trade or business, so that the employees of the owner would be expected to ordinarily complete the task, may include (1) the nature of the business, (2) the previous activities of the business' employees, (3) the amount of participation in the job by the business' em-

ployees, (4) the company's charter, (5) the duration of the job, (6) the regularity of the activity, (7) the past practices of the business, (8) the employer's size, and (9) the skilled manpower and tools available to complete the task. Franklin v. Pawley 624

26. The mere fact that one may become ill or experience pain during employment does not in and of itself prove that the employee is disabled as a result of an "accident" arising out of and in the course of employment, entitling the individual to compensation under the Nebraska Workmen's Compensation Act. Hamer v. Henry 805

27. Unless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony. Hamer v. Henry 805

28. As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the compensation court. Hamer v. Henry 805

29. In testing the sufficiency of the evidence to support the findings of the compensation court, every controverted fact must be resolved in favor of the successful party, and such party should have the benefit of every inference that can be drawn therefrom. Hamer v. Henry .. 805
Minshall v. Plains Mfg. Co. 881

30. Testimony with regard to causation must be definite and certain to warrant a compensation award. Randall v. Safeway Stores 877

31. The trier of fact is not required to take the opinion of experts in regard to the causal connection between the alleged injury and the disability as binding upon it. Randall v. Safeway Stores 877

32. A workmen's compensation award cannot be based on speculation, and if an inference favorable to the claimant can only be reached on the basis thereof, then she cannot recover. Randall v. Safeway Stores 877

33. Disability under Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1978) is defined in terms of employability and earning capacity rather than in terms of loss of bodily function. Minshall v. Plains Mfg. Co. 881

34. In defining total disability, losses in bodily function are not important in themselves but are only important insofar as they relate to earning capacity and the loss thereof. Minshall v. Plains Mfg. Co. 881

35. A "reasonable controversy" between the parties, sufficient to protect the employer against statutory penalties for waiting time for failure to pay total disability

benefits based on impairment of the body as a whole, must rest upon facts concerning employability and not solely upon a disability rating. Minshall v. Plains Mfg. Co. 881