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GORDON J. NELSON AND MERRILL K. BISHOP, APPELLANTS, V. SIOUX CITY BOAT CLUB, A CORPORATION, ET AL., APPELLEES.

344 N.W.2d 634

Filed February 17, 1984. No. 82-766.

1. **Pleadings: Motions to Dismiss.** A motion to dismiss is not allowable as a pretrial pleading.
2. **Jurisdiction.** The absence of subject matter jurisdiction may be raised by demurrer, or may be decided on a motion for summary judgment or by trial on the merits.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Reversed and remanded for further proceedings.

Norris G. Leamer, for appellants.

Bruce A. Crary and Dennis R. Ringgenberg, for appellees.

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

GRANT, J.

Plaintiffs, Gordon J. Nelson and Merrill K. Bishop, filed a quiet title action in the district court for Dakota County, Nebraska, alleging that they owned certain land in Dakota County and that they were in possession of such land. The defendants named in the petition were Sioux City Boat Club, a corporation (hereinafter Boat Club), David J. La Fleur, and all persons "having or claiming any interest in" the described land. What service of process was made after the filing of the petition is not shown in the record before us. As shown in the record, the only responsive pleading to the petition was filed by defendant Boat Club. In its answer Boat Club generally denied the allegations of the petition and alleged that the Boat Club owned certain described property in Union County, South Dakota, and that the land described in plaintiffs' petition constituted "accretions" to the South Dakota land owned

by the Boat Club. Boat Club also filed a counterclaim alleging that it owned the same land described in plaintiffs' petition (which land defendant's counterclaim states is in Dakota County, Nebraska), and the Boat Club prayed that title be quieted in it.

On June 28, 1982, Boat Club filed a motion to dismiss "for want of jurisdiction . . . over the subject matter." On the same day, Boat Club filed a motion to withdraw its counterclaim, asking the court "for an order withdrawing the counterclaim of the Defendant and separately docketing said counterclaim for trial at a later date."

On June 29, 1982, hearings were held on Boat Club's motion to dismiss. In the hearing, defendant Boat Club was procedurally treated as a plaintiff and, without objection, adduced its evidence and "rested." Plaintiffs then, acting as defendants, adduced evidence and "rested." Defendant Boat Club called six witnesses and plaintiffs called one witness. Thirty-four exhibits were offered. All testimony and exhibits were directed to the issue of whether the land in question was in South Dakota or Nebraska.

At this hearing, so far as the record shows, there were no other parties represented, although immediately before the hearings began an attorney was appointed as guardian ad litem, apparently for unknown defendants, incompetents, and persons in the military service.

Later, the court entered an order sustaining defendant's motion to dismiss and striking the petition.

Plaintiffs timely filed a motion for new trial, alleging, among other things, that "[t]he Defendant's motion to dismiss was not made at the proper time and the Court should not have considered the same at this stage in the proceedings." Plaintiffs' motion was overruled, and this appeal followed.

The case is disposed of simply. As stated in *Blitzkie v. State*, 216 Neb. 105, 106-07, 342 N.W.2d 5, 6 (1983), "The district court was correct in concluding

that a motion to dismiss is not allowable as a pretrial pleading. Neb. Rev. Stat. § 25-803 (Reissue 1979). It was also correct in stating that an irregular pleading such as a motion to dismiss may sometimes be recognized as a demurrer if the parties by stipulation, or the court by rule of court, permits the same. *State, ex rel. Johnson, v. Consumers Public Power District*, 142 Neb. 114, 5 N.W.2d 202 (1942)." The "irregular pleading" in this case cannot be recognized as, or converted into, any allowable pleading. It is the sort of trial motion made by a defendant when plaintiff rests after presenting all its evidence at a trial.

In *Blitzkie* the court went on to say at 107, 342 N.W.2d at 7, "The trial court based its ruling on the theory that subject matter jurisdiction was lacking. The defendant in its brief also argues absence of jurisdiction. This may be raised by demurrer, or may be decided on a motion for summary judgment, or by trial on the merits."

Blitzkie controls this case. It is no answer, as a matter of convenience, to say that the case should be disposed of on the merits on this record. Questions as to the burden of proof, or the res judicata effect of a judgment based on a pleading not recognized by this state, should not be determined academically. There are enough uncertainties in the law without expanding them by introducing procedures not contained in our statutes or court rules.

We are not by this action exalting form over substance, but we are stating that procedural laws as to the conduct of civil litigation must be followed in order to let trial courts and appellate courts maintain some uniformity as to the posture of cases ripe for decision.

In this state, for over 100 years, cases have been decided in trial courts and in this court on known methods of presenting legal questions. There is no need to strike off in a new direction in this case.

Here, as in *Blitzkie*, the issue of jurisdiction should

be procedurally determined by demurrer (if available), on motion for summary judgment (if available), or by trial on the merits. If the plaintiffs cannot prove jurisdiction, they will not have proven the basic part of what they must prove to obtain legal relief. They must be afforded that opportunity in a proper setting.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JOHN GARREANS, JR., A MINOR, BY HIS NEXT FRIEND AND FATHER, JOHN GARREANS, SR., ET AL., APPELLEES, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

345 N.W.2d 309

Filed February 17, 1984. No. 82-814.

1. **Recreation Liability Act: Negligence: Liability.** Under the Nebraska Recreation Liability Act the owner of a recreational facility is not liable for ordinary negligence unless a fee was charged for the right to enter the facility.
2. **Recreation Liability Act: Fees.** The clear meaning of Neb. Rev. Stat. § 37-1008 (Reissue 1978) is that in order to constitute a charge, any moneys paid must be paid for the right to enter the facility.
3. **Statutes.** Where the language of a statute is plain, direct, and unambiguous, no interpretation is needed, and the court is without authority to change such language.
4. **Recreation Liability Act: Negligence: Liability.** Under the Nebraska Recreation Liability Act the owner of a recreational facility may be liable for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity even though no charge was made to enter or go upon the land.
5. **Negligence.** In order for an action to be willful or wanton, the evidence must show that the defendant acted with actual knowledge that a danger existed and that the defendant intentionally failed to act to prevent the harm which was reasonably likely to result.
6. _____. To constitute willful misconduct there must be actual knowledge, or its legal equivalent, of the peril to be apprehended, coupled with a conscious failure to avert injury.
7. _____. An actor cannot act willfully in failing to remove a danger when he has no knowledge of it.

8. _____. An actor is contributorily negligent if he breaches the duty imposed upon him by law to protect himself from injury; if his actions concur and cooperate with actionable negligence of the defendant; and if his actions contribute to his injuries as a proximate cause.
9. **Negligence: Minors.** A child is required to exercise that degree of care which a person of that age would naturally and ordinarily use in the same situation under the same circumstances.
10. **Negligence.** The degree of care required increases when an actor is dealing with a dangerous activity such as exploding firecrackers.

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

Herbert M. Fitle, City Attorney, James E. Fellows, and Timothy M. Kenny, for appellant.

Thomas F. Dowd and John P. Fahey of Dowd & Fahey, and J. Patrick Green, for appellees.

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

BOSLAUGH, J.

This is an action under the Nebraska Political Subdivisions Tort Claims Act against the City of Omaha, Nebraska, to recover damages for the injuries sustained by the plaintiffs, John Garreans, Jr., and Vince Hartline, in an explosion which occurred at N.P. Dodge Park on July 5, 1980, while the plaintiffs were visiting with their grandparents, Ray and Evelyn Stoops, at the park. The petition included a second cause of action for the medical expenses incurred by the parents of the plaintiffs as a result of the explosion. At the time of the accident both plaintiffs were 12 years of age. The action was brought by their fathers as the next friends of the plaintiffs. The defendant has raised no issue in this court concerning joinder.

The evidence shows that on July 3, 1980, Ray and Evelyn Stoops entered N.P. Dodge Park in Omaha, Nebraska, with their camper, intending to camp in the park over the 3-day holiday. Evelyn Stoops paid

a $10.50 fee at the concessionaire's office for the use of camper pad No. 25 for the 3-day period. Electrical service was provided at that pad. While they were setting up camp, the Stoopses noticed a black, 55-gallon drum nearby. The black drum was in addition to a trash barrel at the pad, which was a 55-gallon drum from which the top had been removed. Trash barrels, which consisted of 55-gallon drums from which the tops or lids had been removed, were distributed throughout the park, including the camping area. These drums were painted various colors and were labeled "TRASH" on the side.

Printing or lettering on the side of the black drum indicated that it had contained an antifreeze compound. A red or orange label, approximately 4 inches square, was affixed to the top of the drum. The label bore the legend "Flammable Liquid" printed below a representation of a fire or flames.

The lid or top of the black drum was intact, and the drum was closed except for a small opening, approximately 1 inch in diameter, from which a plug had been removed. There is no evidence that the city placed the black drum in the park, and a search of city records showed that the city had not purchased the black drum. The plaintiffs contended that the city was negligent in failing to remove the drum from the park.

On July 5, 1980, the plaintiffs entered the park to visit with their grandparents at camper pad No. 25. In accordance with park policy no admission fee was charged them. Both boys had been given firecrackers by their fathers. The boys used a cigarette lighter to light the firecrackers, and used the black drum as a shelf for their activities. The explosion occurred when they dropped a lighted firecracker into the black drum through the 1-inch hole in the lid. The drum exploded, spraying flammable liquid on the boys. John received severe burns on his

lower extremities. Vince suffered injuries to his nose and arm, and was also burned.

The trial court found that the city had failed to properly supervise the area around camper pad No. 25; had failed to observe, inspect, and remove the 55-gallon drum; had failed to warn the public of the dangerous nature of the drum; was guilty of willful negligence; and that the plaintiffs were not contributorily negligent. Judgment was entered in the amount of $243,190.57 for John Garreans, Jr., and in the amount of $104,726.95 for Vince Hartline.

One of the principal issues in the case was whether the Recreation Liability Act was applicable. The city assigns as error the failure of the court to properly apply the standard of care found in the Recreation Liability Act.

Neb. Rev. Stat. § 37-1002 (Reissue 1978) provides: "Subject to the provisions of section 37-1005, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes."

Neb. Rev. Stat. § 37-1005 (Reissue 1978) provides: "Nothing in sections 37-1001 to 37-1008 limits in any way any liability which otherwise exists (1) for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity, or (2) for injury suffered in any case where the owner of land charges the person or persons who enter or go on the land. Rental paid by a group, organization, corporation, the state or federal government shall not be deemed a charge made by the owner of the land."

The act thus provides that an owner of a recreational facility is not liable for ordinary negligence unless a fee was charged for the right to enter the facility, although the owner may be liable for certain willful actions.

The trial court found that the fee paid by Evelyn

Stoops for the use of the camper pad constituted a "charge" for entry upon land and that the actions of the city amounted to "willful negligence."

Findings of fact made by the district court in cases brought under the Political Subdivisions Tort Claims Act will not be disturbed on appeal unless clearly wrong. *Studley v. School Dist. No. 38*, 210 Neb. 669, 316 N.W.2d 603 (1982); *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981).

The city through its operation of N.P. Dodge Park provides camping, picnic, and sports facilities, and the park is a "recreational facility" within the meaning of the act. Neb. Rev. Stat. § 37-1008 (Reissue 1978) provides in part: "(3) the term recreational purposes shall include, but not be limited to, any one or any combination of the following: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and visiting, viewing, or enjoying historical, archaeological, scenic, or scientific sites, or otherwise using land for purposes of the user." See *Watson v. City of Omaha*, *supra*.

The term "charge" is defined in § 37-1008: "(4) the term charge shall mean the amount of money asked in return for an invitation to enter or go upon the land."

The clear meaning of this statute is that in order to constitute a charge, any moneys paid must be paid for the right to enter the facility. Where the language of a statute is plain, direct, and unambiguous, no interpretation is needed, and the court is without authority to change such language. *County of Douglas v. Board of Regents*, 210 Neb. 573, 316 N.W.2d 62 (1982); *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981).

The evidence in the present case is undisputed that no charge was made by the city for the right to enter N.P. Dodge Park. Those entering the park paid no admission fee. Charges were made for the right to park a camper on a pad, for the right to

pitch a tent in a tent camping area, and for the use of camper dumping facilities. Payment of the fee by Mrs. Stoops did not entitle her to a greater right to use any of the park's other facilities than that had by the general public. We conclude that the fee paid by Evelyn Stoops was not a charge for entry upon the land but was a fee paid for the right to park a camper upon a specific pad.

This conclusion has been reached by other courts faced with similar issues. In *Stone Mountain Mem. Assn. v. Herrington*, 225 Ga. 746, 171 S.E.2d 521 (1969), a fee paid to park a vehicle in a park was held not to constitute a charge for admission, as no charge was made upon those who entered on foot. See, also, *Jones v. United States*, 693 F.2d 1299 (9th Cir. 1982), wherein a fee for use of an inner tube was held not to be a charge within the contemplation of Washington's recreational use statute.

In *Moss v. Dept.*, 62 Ohio St. 2d 138, 142, 404 N.E.2d 742, 745 (1980), the Ohio Supreme Court stated: "R.C. 1533.18(B) defines a 'recreational user' as one who has permission *to enter* upon 'premises' without the payment of a fee or consideration. It is conceded that the Mosses and decedent O'Neal did not pay a fee 'to enter' the parks; rather, the consideration paid went for the purchase of gas, food and for the rental of a canoe. Nor was this a situation wherein the state attempted to circumvent liability by charging fees for the use of all facilities, in essence charging an entrance fee, although not labelling it as such. It is undisputed that the Mosses and decedent O'Neal could have brought the same items to the parks that they purchased or rented while there, and still have made use of the park facilities. Consideration should not be deemed given under R.C. 1533.18(B) unless it is a charge necessary to utilize the overall benefits of a recreational area so that it may be regarded as an entrance or admittance fee. Appellants' contention is without merit."

Moreover, the fee for use of camper pad No. 25 was paid by Evelyn Stoops and not by the plaintiffs. The plaintiffs therefore were nonpaying, recreational users of the park facilities and thus are not entitled to recover for injuries not caused by the city's willful actions. See *Garfield v. United States*, 297 F. Supp. 891 (W.D. Wis. 1969).

Since the plaintiffs did not pay a charge to enter the park, the next issue which we consider is whether the evidence will support a finding that the city was guilty of a "willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity." A review of the evidence in light of the applicable law warrants only the conclusion that the actions of the city were not willful or malicious. The finding of the trial court on this issue is not supported by the evidence.

In order for an action to be willful or wanton, the evidence must show that one acted with actual knowledge that a danger existed and that he intentionally failed to act to prevent the harm which was reasonably likely to result. The term imparts knowledge and consciousness that injury is likely to result from the act done or omission to act, and a constructive intention as to the consequences. To constitute willful misconduct there must be actual knowledge, or its legal equivalent, of the peril to be apprehended, coupled with a conscious failure to avert injury. To constitute willful negligence the act done or omitted must be intended or must involve such reckless disregard of security and right as to imply bad faith. Wanton negligence has been said to be doing or failing to do an act with reckless indifference to the consequences and with consciousness that the act or omission would probably cause serious injury. 57 Am. Jur. 2d *Negligence* §§ 101-105 (1971).

In *Ashton v. Blue River Power Co.*, 117 Neb. 661, 222 N.W. 42 (1928), a workmen's compensation case, the court stated: "[W]ilful negligence may be de-

fined as (1) a deliberate act; or (2) such conduct as evidenced reckless indifference to safety. As a statutory term it involves more than want of ordinary care. It implies a rash and careless spirit, not necessarily amounting to wantonness, but approximating it in a degree, a willingness to take a chance." (Syllabus of the court.)

In *Roberts v. Brown*, 384 So. 2d 1047, 1048 (Ala. 1980), the court said: " 'Wantonness has been defined as the conscious doing of some act or the omission of some duty which under knowledge of existing conditions and while conscious that, from the doing of such act or the omission of such duty, injury will likely or probably result, and before a party can be said to be guilty of wanton conduct it must be shown that with reckless indifference to the consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the result. *Griffin Lumber Co. v. Harper*, 247 Ala. 616, 25 So.2d 505; *Taylor v. Thompson*, 271 Ala. 18, 122 So.2d 277; *Johnson v. Sexton* [277 Ala. 627, 173 So.2d 790], supra.' *Lewis v. Zell*, 279 Ala. 33, 36, 181 So.2d 101 (1965)."

In *Ewing v. Cloverleaf Bowl*, 20 Cal. 3d 389, 402, 572 P.2d 1155, 1161, 143 Cal. Rptr. 13, 20 (1978), the court stated: " '[W]illful misconduct implies the intentional doing of something either with knowledge, express or implied, that serious injury is a probable, as distinguished from a possible, result, or the intentional doing of an act with a wanton and reckless disregard of its consequences.' (*Williams v. Carr*, *supra*, 68 Cal.2d 579 584 [440 P.2d 505, 509, 68 Cal. Rptr. 305, 309 (1968)].) 'If conduct is sufficiently lacking in consideration for the rights of others, reckless, heedless to an extreme, and indifferent to the consequences it may impose, then, regardless of the actual state of the mind of the actor and his actual concern for the rights of others, we call it willful misconduct. . . .' "

In *Jones v. United States*, 693 F.2d 1299 (9th Cir.

1982), the court addressed the issue of what constitutes willful or wanton misconduct under Washington's recreational use statute. The court held that the defendant must act or fail to act with actual knowledge of the hazard in order to be held liable under the statute.

The record does show that park employees did not observe the barrel on their routine trips through the park. The employees testified that had they noticed the barrel, they would have removed it.

The failure to observe the barrel may have been ordinary negligence in that the city in the exercise of due care "should have known" of the existence of a danger, but that does not amount to willful misconduct. An actor cannot act willfully in failing to remove a danger when he has no knowledge of it.

The city has also assigned as error the finding of the trial court that the plaintiffs were not guilty of contributory negligence. An actor is contributorily negligent if he breaches the duty imposed upon him by law to protect himself from injury; if his actions concur and cooperate with actionable negligence of the defendant; and if his actions contribute to his injuries as a proximate cause. *Stephen v. City of Lincoln*, 209 Neb. 792, 311 N.W.2d 889 (1981). A child is required to exercise that degree of care which a person of that age would naturally and ordinarily use in the same situation under the same circumstances. *Huff v. Ames*, 16 Neb. 139, 19 N.W. 623 (1884); *Camerlinck v. Thomas*, 209 Neb. 843, 312 N.W.2d 260 (1981).

Although we have concluded that no "willful or malicious" negligence existed on the part of the city, we believe the evidence in this case shows that the plaintiffs were contributorily negligent sufficient to bar their recovery as a matter of law. The finding of the trial court to the contrary was clearly wrong.

The use of firecrackers in the city of Omaha and within the park was prohibited by ordinance, as well as by park regulation. The plaintiffs had been

warned by their parents that fireworks were dangerous and that they should be careful when using them. The plaintiffs testified that they were aware of the danger involved in using fireworks. The degree of care required increases when an actor is dealing with a dangerous activity such as exploding firecrackers. See *Martinez v. Hoveling*, 184 Neb. 560, 169 N.W.2d 428 (1969). Despite these warnings, the evidence is that the plaintiffs were lighting firecrackers above the opening in the drum and dropping lighted firecrackers into the drum.

Although there is conflicting testimony with regard to whether the boys noticed the "flammable" marking on the drum, the label was plainly visible, and the plaintiffs testified that they understood what the term "flammable" meant. In the exercise of proper care the boys should have seen the warning label on the top of the drum upon which they were lighting firecrackers. Moreover, they should have known that dropping lighted firecrackers into the drum created an unreasonable risk of explosion.

In the following cases the actions of children with regard to their use of firecrackers was held to be contributory negligence: *Thornton v. Ionia Free Fair Association*, 229 Mich. 1, 200 N.W. 958 (1924) (14-year-old, who had experience with firecrackers, held negligent in setting off firecrackers he found at fairgrounds); *Mathews v. City of Albany*, 36 Cal. App. 2d 147, 97 P.2d 266 (1939) (12-year-old who had knowledge of properties of fireworks held contributorily negligent); *Shelanie v. National Fireworks Association*, 487 S.W.2d 921 (Ky. App. 1972) (14-year-old who admitted he knew and had been warned about dangers of fireworks held contributorily negligent).

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

REVERSED AND REMANDED WITH DIRECTIONS.

SHANAHAN, J., dissenting.

The majority opinion misconstrues the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 through 37-1008 (Reissue 1978). Section 37-1001 states: "The purpose of sections 37-1001 to 37-1008 is to encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon." The legislative history of the Recreation Liability Act and numerous interpretative decisions by courts of states having statutes similar to the Nebraska act compel the conclusion that the act does not apply to the present case. The Recreation Liability Act is designed to encourage public access to and recreational use of privately held undeveloped lands. To induce the private landowner's permission for such public use, the Legislature has promised reduced exposure to liability for injuries occurring in recreational areas opened to the public. See, *Tallaksen v. Ross*, 167 N.J. Super. 1, 400 A.2d 485 (1979); *Harrison v. Middlesex Water Company*, 158 N.J. Super. 368, 386 A.2d 405 (1978); *Michalovic v. Racing Assn*, 79 A.D.2d 82, 436 N.Y.S.2d 468 (1981); *Johnson v. Stryker Corp.*, 70 Ill. App. 3d 717, 388 N.E.2d 932 (1979); *Cedeno v. Lockwood, Inc.*, 250 Ga. 799, 301 S.E.2d 265 (1983). "The purpose of this [recreational use legislation] is to limit the liability of private landowners, thereby encouraging them to make their property available for public recreation. . . . Thus, there is an objective basis for the aim of recreational use acts: to promote increased public access to private lands by reducing the liability of landowners and occupiers." Barrett, *Good Sports and Bad Lands: The Application of Washington's Recreational Use Statute Limiting Landowner Liability*, 53 Wash. L. Rev. 1, 3-4 (1977). By the Recreation Liability Act the state avoids expensive acquisition of considerable land for

public recreational use, that is, state-owned or -leased areas, and in return grants restricted or limited liability to private landowners providing areas for public recreation. Consequently, the question of negligence in operating a city park is not within the purview of the Recreation Liability Act. Putting aside the particular situation involved in this case, patrons of public parks should be alert to the effect of the majority opinion and its rule regarding care required in operating a municipal park, i.e., responsibility for injury caused only by willful or malicious failure to protect the public admitted without charge to any city park.

Without conceding applicability of the Nebraska Recreation Liability Act to the present case, we disagree with other aspects of the majority opinion.

There were 46 camper pads within the city park. Ray Stoops, grandfather of the plaintiffs, paid $10.50 to park his trailer on camper pad No. 25. The fee or charge entitled the Stoopses to 3 days' occupancy of the camper pad, namely, until July 6, according to registration receipt No. 6268 issued by the park caretaker for pad No. 25. Also, in exchange for the fee, the city provided Stoops with electrical service for his camper pad, or, as the city superintendent of parks testified, Stoops was "allowed to plug into the electrical stanchion that's at that particular pad for his trailer." Electrical service was not available to everyone entering the park but was provided only to those paying for particular camper pads. As testified by city park employees, the superintendent of parks, district foreman, and caretaker for the park, Stoops had "exclusive possession" of pad No. 25, for, as the superintendent of parks testified, "That's the whole intent." The district park foreman acknowledged that when a person "rented" a pad, that person was entitled to exclusive use to the extent that, upon request by the paying occupant of the pad, park personnel would remove any unwanted or unauthorized person intruding upon the camper pad.

If those efforts of park personnel were unsuccessful, police would be summoned to remove the unwanted intruder. As described by the park caretaker: "I would call the cruiser." The park caretaker also testified there was no restriction regarding visitors to Stoops' camper pad, including visits by Stoops' grandchildren, which was "consistent with the fee that he paid."

The majority opinion acknowledges that Stoops paid "a fee . . . for the right to park a camper upon a specific pad." Although the majority feels that the nature of negligence under the Recreation Liability Act turns only on the presence or absence of a charge for admission, an admission fee is not the sole determinant regarding the type or degree of negligence required for liability under the act. The March 26, 1965, Committee Statement on L.B. 280 (Recreation Liability Act), of the Agriculture and Recreation Committee, contains the following: "The act provides no inherent limitations on liability for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity, or for injury suffered in any case when a charge is made *unless that charge be in the nature of rent.*" (Emphasis supplied.) Stoops' use and occupancy of the camper pad included benefits and rights not enjoyed by the general public admitted to the park, and even included exclusion of the public from the camper pad, if Stoops saw fit. Stoops acquired such benefits and rights by payment of the fee or charge not required of the general public for admission to the park. In the final analysis, and by any reasonable definition or construction, the charge paid by Stoops was rent, that is, consideration or compensation "paid for use or occupation of property." Black's Law Dictionary 1166 (5th ed. 1979). See, *Modular Concepts, Inc. v. So. Brunswick Twp.*, 146 N.J. Super. 138, 369 A.2d 32 (1977); *Rosewood Corp. v. Transamerica Ins.*, 57 Ill. 2d 247, 311 N.E.2d 673 (1974); *Whiting Paper Co. v. Holyoke Water Power*

Co., 276 Mass. 542, 177 N.E. 574 (1931); *White Roofing Company v. Wheeler*, 39 Ala. App. 662, 106 So. 2d 658 (1957); *Kennedy v. Boston-Continental Nat. Bank*, 11 F. Supp. 611 (D. Mass. 1935); *Young v. Home Telephone Co.*, 201 S.W. 635 (Mo. App. 1918). "Charge," within the Recreation Liability Act, includes not only payment for admission to a recreational area but also the charge paid for the use or occupancy of a site within the recreational area. The Recreation Liability Act was clearly intended to preserve rights of persons injured by ordinary negligence of the landowners charging rent as in the case now before us.

As one of the grounds for denying recovery by the plaintiffs, the majority states: "Moreover, the fee for use of camper pad No. 25 was paid by Evelyn Stoops [plaintiffs' grandmother] and not by the plaintiffs." Lurking within the majority opinion is the requirement of privity—liability dependent upon a precedent contractual relationship between the injured person and the negligent tort-feasor. "At one time a showing of privity was considered necessary to occasion liability for negligence, but the courts have been getting away from that doctrine and many have entirely repudiated and discarded it; and under the modern doctrine liability is based on foreseeability rather than privity." 65 C.J.S. *Negligence* § 4(11) at 502 (1966). Justice Cardozo, almost 70 years ago, rejected the condition or requirement of privity in a product liability suit for negligence, when he stated in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 390, 394, 111 N.E. 1050, 1053-54 (1916): "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. . . . [F]oresight of the consequences involves the creation of a duty." As expressed in *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 86, 199 N.E.2d 769, 779 (1964): "It is axiomatic that every person owes to all others a duty to exercise ordinary

care to guard against injury which naturally flows as a reasonably probable and foreseeable consequence of his act, and that such duty does not depend upon contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons." See, also, *Webel v. Yale University*, 125 Conn. 515, 7 A.2d 215 (1939); cf., *McKinley v. Slenderella Systems of Camden, N.J., Inc.*, 63 N.J. Super. 571, 165 A.2d 207 (1960); *Robinson v. Colebrook Guaranty Bank*, 109 N.H. 382, 254 A.2d 837 (1969). Today, most courts adhere to the rule that duty as an element of negligence is based not on privity but on foreseeability that harm may result if care is not exercised. See, *Harvard v. Palmer & Baker Engineers, Inc.*, 293 Ala. 301, 302 So. 2d 228 (1974); *Orlo v. Connecticut Co.*, 128 Conn. 231, 21 A.2d 402 (1941); cf. *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979). "The duty of vigilance to prevent injury has its source in the law applicable to human relations rather than in a narrow conception of privity." 57 Am. Jur. 2d *Negligence* § 37 at 385 (1971). In the case before us it was foreseeable that family members, including the Stoopses' grandchildren, would be visiting Ray and Evelyn Stoops at their trailer. This foreseeability resulted in the city's duty to use reasonable care in protecting Stoops' visitors, namely, guarding against injuries caused by hazards such as the barrel bomb on pad No. 25. It is some small solace that the explosion did not launch the trailer from the pad. "The rule of reasonable care under the circumstances could not limit the conduct of Robinson Crusoe as he was first situated. But as soon as he saw the tracks in the sand, the rule began to have vitality. He then had notice that there might be other persons on the island, and this knowledge of their presence made it his duty as a reasonable man to use reasonable care to the end that no act of his should injure them." *Huckabee v. Grace*, 48 Ga. App. 621, 628, 173 S.E. 744, 749 (1934). Footprints, camper pads, and trash bar-

rels; the result is the same. At sea on privity, Nebraska jurisprudence will find itself on an island without even Crusoe.

Established park policy called for removal of any barrel not placed in the park by the city. The city had no black barrels as a part of the trash collection system for the park. (On July 5, after the explosion and in front of the caretaker's house in the park, an arson investigator for the Omaha Police Department found a similar "55-gallon drum, trash-can" bearing a precaution about contents with an "extremely high flash point.") City employees made frequent trips in the area of pad No. 25 and daily removed trash from the other, differently colored barrel sitting inches from the black barrel. The city's activity, or more aptly the city's inactivity, and the barrel's continued presence at pad No. 25 would lead anyone to conclude there was nothing dangerous in that setting. As testified by Evelyn Stoops, grandmother of the plaintiffs: "Anything in the park is supposed to be safe . . . ." Under the circumstances one would reasonably believe and rely that the city had provided a safe park and not a dump for a discarded, dangerous barrel containing combustible material. " 'In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence.' [Citations omitted.] Moreover, under the Political Subdivisions Tort Claims Act, section 23-2406, R.R.S. 1943, the 'findings of a District Court under the act will not be disturbed on appeal unless they are clearly wrong.' [Citation omitted.]" *Daniels v. Andersen*, 195 Neb. 95, 98, 237 N.W.2d 397, 400 (1975). Negligence—the city's negligence and contributory negligence of the plaintiffs—was a question of fact resolved by the trial court in favor of the plaintiffs.

That conclusion and determination is not clearly wrong.

For these reasons the judgment of the trial court should have been affirmed.

WHITE and GRANT, JJ., join in this dissent.

DALLAS R. SCHROEDER AND FREDA F. SCHROEDER, DOING BUSINESS AS SCHROEDER'S STANDARD AND THE GROCERY HOUSE, APPELLEES, V. NEBRASKA LIQUOR CONTROL COMMISSION ET AL., APPELLANTS.

344 N.W.2d 463

Filed February 17, 1984. No. 83-060.

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

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

Donn K. Nelson of Armbruster, Nelson & Hart, for appellees.

BOSLAUGH, WHITE, HASTINGS, and SHANAHAN, JJ., and BRODKEY, J., Retired.

PER CURIAM.

The Nebraska Liquor Control Commission (commission) appeals the order of the Dawson County District Court, which reversed the commission's order denying the application of Dallas R. Schroeder and Freda F. Schroeder (Schroeders) and directed issuance of a license to Schroeders in accordance with their application. We reverse and remand with directions.

On July 9, 1982, the commission denied Schroeders' application for a retail beer license, off-sale only, to be located within Cozad, Nebraska. The solitary finding of the commission for denial of the application and license was "the local governing

body recommended denial" of the application.

This matter is controlled by our opinion in *McChesney v. City of No. Platte*, *ante* p. 416, 343 N.W.2d 925 (1984), which was issued on February 10.

Therefore, in accordance with the rule and reason contained in *McChesney v. City of No. Platte*, *supra*, the judgment of the district court is reversed, and the cause is remanded with directions to the district court to remand the case to the commission to make findings of fact and conclusions of law supporting the order which it may issue.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. THOMAS C. DOERR, RESPONDENT.

344 N.W.2d 464

Filed February 17, 1984. No. 83-142.

1. **Disciplinary Proceedings: Appeal and Error.** In determining whether and to what extent discipline should be imposed, it is necessary that we consider the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law.
2. **Disciplinary Proceedings.** Cumulative acts of misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions.
3. _____. An attorney who neglects a matter entrusted to him has failed to act competently.

Original action. Judgment of disbarment.

Alison L. Larson, for relator.

Charles F. Gotch of Cassem, Tierney, Adams, Gotch & Douglas, for respondent.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE,

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

PER CURIAM.

This is an original proceeding wherein the Nebraska State Bar Association, relator, filed formal charges against Thomas C. Doerr, respondent, who was admitted to the practice of law in this state on June 24, 1960.

Formal charges in two counts were filed against respondent in this court on February 24, 1983.

With respect to the first count respondent was engaged, sometime prior to August 30, 1977, to probate the last will and testament of one Louis Henry Heil, respondent's great-uncle. On August 30, 1977, Martha Bohlsen, an aunt of the respondent, was appointed as the personal representative and trustee for the testamentary trusts created by the will. Bohlsen left the estate, which had a value of approximately a quarter of a million dollars and was to be distributed to 22 beneficiaries, entirely in respondent's hands. Among the testamentary trusts to be created was one for the Lutheran Family and Social Service of Nebraska. Bohlsen was named as trustee. Several requests, beginning in December 1981, by Lutheran Family Service for information concerning why it had received no money went unanswered. On April 15, 1982, Lutheran Family Service filed a petition in the Douglas County Court, which sought an accounting and removal of Bohlsen as trustee. Neither respondent nor Bohlsen appeared at the hearing as originally scheduled. When the hearing was ultimately held, respondent appeared and represented that he would forthwith file an estate accounting and report. Such did not occur, and on December 14, 1982, the trustee was replaced and Lutheran Family Service filed another petition to remove the personal representative. On December 30, 1982, the court removed Mrs. Bohlsen as personal representative as well and appointed a

successor personal representative. The successor representative continued to encounter difficulties in obtaining from respondent the documents and other information required to make an accounting and report for the estate and to file certain tax returns for the years 1977 through 1982 which respondent had failed to file. By August of 1983 the successor representative was successful in obtaining the necessary information. Although there was no evidence of misappropriation of estate or trust assets, the documents supplied by respondent to the successor representative established that estate and trust funds had not been properly segregated from other funds.

The foregoing conduct resulted in the charge that respondent violated the oath of his office requiring that as an attorney he faithfully discharge his duties and refrain from impeding or obstructing the administration of justice. Neb. Rev. Stat. § 7-104 (Reissue 1977); *State ex rel. Nebraska State Bar Assn. v. McArthur*, 212 Neb. 815, 326 N.W.2d 173 (1982). He was also charged with violating disciplinary rules 1-102, 6-101, and 9-102 of the Code of Professional Responsibility. These disciplinary rules provide in part as follows: "DR 1-102. . . . A. A lawyer shall not: 1. Violate a Disciplinary Rule. . . . 4. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

"DR 6-101. . . . A. A lawyer shall not: . . . 3. Neglect a legal matter entrusted to him."

"DR 9-102. . . . B. A lawyer shall: 1. Promptly notify a client of the receipt of his funds, securities, or other properties. 2. Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable. 3. Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them. 4. Promptly pay or deliver to the client as requested by a client the funds,

securities, or other properties in the possession of the lawyer which the client is entitled to receive."

As to the second count, the record establishes that respondent was retained on February 9, 1982, by Barbara and Gary Keiser to defend a suit which had been filed against them on January 25, 1982, in the district court for Douglas County, Nebraska. A default judgment was taken against the Keisers on April 6, 1982, as a consequence of respondent's failure to act in accordance with his engagement. On July 9, 1982, the Keisers filed suit against the respondent, seeking to recover from him the amount of their loss. Respondent paid to the plaintiffs the amount for which they prayed.

As a result of the foregoing conduct, respondent was charged with the violation of his oath of office and with violating disciplinary rules 1-102 and 6-101, as set forth above.

On March 4, 1983, a third count was filed against respondent in this court. In connection therewith the record shows that respondent failed to timely respond and deliver trust funds to the heirs of one Rose Veylupek, who died in May of 1982. The funds had been put in trust prior to June 26, 1956, by respondent's father, also a lawyer. Respondent had continued to hold the funds in trust following his father's death in 1974. After Mrs. Veylupek's death her son made several written requests concerning an accounting of those trust assets. Doerr failed to respond. After a complaint was filed against him on January 17, 1983, the funds were distributed to the heirs of Mrs. Veylupek on July 27, 1983.

As a result of the conduct which is the subject of the third count, respondent was charged with violating his oath of office and with violating disciplinary rules 1-102, 6-101, and 9-102. In connection with this count disciplinary rule 1-102 provides that a lawyer shall not violate a disciplinary rule nor "6. Engage in any other conduct that adversely reflects on his fitness to practice law." The language of discipli-

nary rules 6-101 and 9-102 related to this count is as previously set forth.

In addition, the record reflects that on November 17, 1981, respondent was privately reprimanded for his failure to handle other estates with reasonable dispatch. The record does not reveal the number or the details of those transactions.

Respondent was inattentive to the disciplinary proceedings resulting in the charges presently before us, including being a full 1½ hours late at the hearing before the Committee on Inquiry of the Second Disciplinary District held on January 13, 1983.

Respondent does not dispute the conduct charged against him. His explanation essentially is that he was not suited by temperament, experience, or training to carry out his professional engagements. He argues that upon graduation from law school he joined his father in the practice of law, but was permitted to do little more than function as a law clerk; he was neither permitted to interview clients nor to appear in court. In short, he was not allowed to develop as a lawyer. Consequently, he is not comfortable with adversarial proceedings. He was not trained nor required to keep regular office hours, although he did work in an office maintained at his home. A fire at his home in late 1979 impaired his ability, for a period of about 3 months, to devote himself to his practice, and damaged his papers, including those involved in the Heil estate. In addition, his wife's health was such that his family obligations—there are three children—demanded much of his time, and more than is the usual case.

He assures us he now limits his practice to matters he is competent to handle and that he is current on all of his engagements. Attorney James Nanfito, with whom respondent has shared offices since his admission to practice, has offered to assist respondent, and reports that respondent has made progress in assuming the management of his practice. Mr. Nanfito, to his credit, has indicated a willingness to

continue to help respondent discharge his professional duties.

At the suggestion of his attorney in these proceedings, respondent was examined on April 18, 1983, by Dr. Merle E. Sjogren, a psychiatrist. Dr. Sjogren found that respondent has a keen intellect, testing in the 93d to 97th percentile mental ability range. He demonstrates no psychopathology or thought process disorder, but did show "some leveling of his enthusiasm," which Dr. Sjogren associated with a mild depression which respondent "was very resistive to dealing with." Dr. Sjogren found respondent to have a "procrastinating type of personality" and had "some emotional crisis which was reactive to a situational work stress variable." According to Dr. Sjogren, respondent "doesn't particularly appreciate the legal profession . . . and he feels very uncomfortable in it as it is, he would prefer to be in mechanical type of legal work which would be, according to him [respondent], patent type of attorney but there is very little of that in this locality." Dr. Sjogren stated that "it may be necessary for him [respondent] to consider a different vocation which may be risky in an individual of this age."

The real question in this case is one of determining what disciplinary sanction is appropriate. As we have observed in the past, in determining whether and to what extent discipline should be imposed, it is necessary that we consider the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. *State ex rel. Nebraska State Bar Assn. v. McArthur*, 212 Neb. 815, 326 N.W.2d 173 (1982). We have also declared that cumulative acts of misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions. *State ex rel. NSBA v. Frank*, 214 Neb. 825, 336 N.W.2d 557 (1983).

The referee appointed by this court recommended that respondent's license to practice law be suspended for 1 year. It is clear, however, that this court has the obligation to review the evidence de novo upon the record and to determine if discipline should be imposed and, if it should, the extent thereof. *State ex rel. NSBA v. Frank, supra.*

This is not a case which involves dishonesty or other moral turpitude. But such are not the only grounds for disciplining lawyers. We have held on prior occasions that violation of any of the ethical standards relating to the practice of law, or any conduct of an attorney which tends to bring the courts or legal profession into disrepute, constitutes grounds for suspension or disbarment. *State ex rel. Nebraska State Bar Association v. Walsh*, 206 Neb. 737, 294 N.W.2d 873 (1980); *State ex rel. Nebraska State Bar Assn. v. Ledwith*, 197 Neb. 572, 250 N.W.2d 230 (1977).

It is also true that although respondent initially failed to respond to the bar's concerns about his conduct, he now has devoted his attention to these proceedings. The fact remains, however, that the evidence establishes not sporadic, isolated acts of procrastination but, rather, a long-established pattern of neglecting professional engagements. We have held that an attorney who neglects a matter entrusted to him has failed to act competently. *State ex rel. Nebraska State Bar Assn. v. Divis*, 212 Neb. 699, 325 N.W.2d 652 (1982). Respondent has had 24 years in which to learn and understand the nature and demands of his profession. He has failed to do so. We see nothing which convinces us that respondent has, or ever will, acquire the characteristics required of a practicing attorney. Members of the public who entrust their affairs to those licensed to practice law in this state are entitled, among other things, to have them attended to in a reasonably timely fashion.

We do not believe that suspension of respondent's

license would serve any useful purpose in this case. While a suspension would punish respondent and likely deter others, the resulting period of professional inactivity would not further respondent's understanding of the requirements and demands of the practice of law.

When we balance the need to protect the public, the nature of respondent's offenses, the need for deterring others, and the reputation of the bar as a whole against respondent's interest in preserving his privilege to practice law, we must conclude that the only appropriate judgment is to disbar the respondent. Accordingly, we enter a judgment of disbarment.

JUDGMENT OF DISBARMENT.

CAPORALE, J., dissenting in part.

I agree that respondent's conduct is such that disciplinary action is appropriate. I also agree with the clear implication of the majority opinion that justice cannot, and this jurisdiction will not, tolerate interminable procrastinations. In my mind such should certainly be the case. Indeed, such should be the case whether unreasonable delay be practiced by the lawyers who serve justice or the judges who administer it.

It seems to me, however, that the sanction in this case is entirely too harsh, unnecessary, and disproportionate to what has been done in the past. At the very moment when, after two dozen years, respondent demonstrates a glimmer of understanding the nature and requirements of his profession, we make it impossible for him to demonstrate that he is indeed capable of serving the public as a lawyer.

Less than a year ago, we suspended for 1 year one who had accepted a retainer from his client, failed to render the service for which he was retained, lied to his client about his inactivity, and, in a separate matter, failed to disclose the withdrawal of estate funds. *State ex rel. NSBA v. Tomek*, 214 Neb. 220, 333 N.W.2d 409 (1983). In *State ex rel. Nebraska*

State Bar Assn. v. Divis, 212 Neb. 699, 325 N.W.2d 652 (1982), we publicly reprimanded and placed on probation for 1 year a member of the bar who failed to "act competently by neglecting a matter entrusted to him." *Id.* at 700, 325 N.W.2d at 653. I recognize that there is both a quantitative and qualitative difference between the isolated acts presented by the record in *Divis* and the series of inordinate procrastinations presented by this record. Nonetheless, it seems to me that sacrificing respondent's professional life without first giving him an opportunity to remedy his conduct is too high a tax to impose in order that others may be deterred or the bar's reputation protected.

The public could be protected and all other purposes of discipline served by publicly censuring respondent and placing him on probation for a period of 3 years, during which period he would be subject to disbarment should he lapse into his old habits. The terms of probation would require that he procure and maintain malpractice insurance in an amount not less than $500,000; institute and maintain a calendar control system for all professional engagements; display such system to Counsel for Discipline of the Nebraska State Bar Association; and submit to monitoring of continuing compliance with the conditions of probation by Counsel for Discipline or his designate, with any material deviation therefrom to be reported to this court for appropriate action.

SHANAHAN, J., joins in this dissent.

CHARLES V. SEDERSTROM, JR., TRUSTEE, ET AL., APPELLANTS, V. MELVIN L. BURGE ET AL., APPELLEES.

343 N.W.2d 770

Filed February 17, 1984. No. 83-163.

1. **Contracts: Evidence.** If negotiations between the parties result in

an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity.

2. **Contracts: Parol Evidence.** Oral testimony is not admissible under the ambiguity exception to the parol evidence rule to establish an understanding at variance with the plain terms of the written instrument.

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

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

Alan J. Mackiewicz of Lich, Herold & Mackiewicz, for appellees.

BOSLAUGH, WHITE, HASTINGS, and SHANAHAN, JJ., and BRODKEY, J., Retired.

BOSLAUGH, J.

The plaintiffs appeal from the order of the district court dismissing their petition for foreclosure of a trust deed executed by the defendants Melvin L. Burge and Mary A. Burge.

The record shows that the trust deed in question was executed by the defendants to secure a loan in the amount of $16,000 from American Securities & Loan, Inc., to Derald D. Lucht and Karen L. Lucht. The loan to the Luchts was secured by a trust deed on a residence property in Plattsmouth, Nebraska, owned by the Luchts. The trust deed from the Burges pledged a residence property in Omaha, Nebraska, owned by the Burges, and was given as additional security and collateral for the Lucht loan pursuant to a hypothecation agreement.

Because the defendants wanted to limit their exposure on the Lucht loan to $6,000, the president of American Securities delivered a letter to the Burges at the time the trust deed was executed, which stated: "Upon the reduction of the principal balance of said loan to $10,000.00, then American Secu-

rities & Loan, Inc. does hereby warrant to deed and reconviene [sic] 5602 Oak Street to Melvin L. Burge and Mary A. Burge."

Several days later an addendum to the trust deed was executed, which contained this provision: "(4) That notwithstanding any of the terms of the Trust Deed, upon the reduction of the principal balance of said loan to $10,000.00, the parties hereto agree to deed and convey the aforedescribed real estate back to Melvin L. Burge and Mary A. Burge."

On April 13, 1981, the Luchts filed a voluntary petition in bankruptcy. The Plattsmouth, Nebraska, property was surrendered to American Securities, which sold the property and applied the proceeds to the Lucht loan. As a result, the balance due was reduced to $7,745.74 as of December 28, 1981. This action was commenced December 31, 1981. On January 8, 1982, the defendant Melvin L. Burge demanded that the trust deed be released and the Omaha residence property be reconveyed by American Securities.

The plaintiffs contend that the word "reduction," used in the letter from the president of American Securities, and in the addendum to the trust deed, meant "reduction by regular payments according to the terms of the loan agreement." Brief for Appellants at 9. On the theory that the terms of the agreement were vague and ambiguous, the plaintiffs offered testimony by the president of American Securities that the plaintiffs expected the defendants to pay $6,000 to American Securities in the event of a default on the Lucht loan. Over an objection based on the parol evidence rule, the president testified that "reduce" was a term of art in the loan business and that to "reduce a loan" means through payments according to the terms of the loan and not through a sale of collateral.

The trial court found generally for the defendants; that the terms of the agreement were clear; that parol evidence was not admissible to explain the

agreement; and that before the plaintiffs could recover it would be necessary to effectively change or reform the agreement between the parties to read "reduction by regular payments by the Luchts."

If negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. *Silverman v. Arbor Street Partnership*, 213 Neb. 628, 330 N.W.2d 904 (1983). Oral testimony is not admissible under the ambiguity exception to the parol evidence rule to establish an understanding at variance with the plain terms of the written instrument. *Spilker v. First Nat. Bank & Trust Co.*, 211 Neb. 540, 319 N.W.2d 429 (1982).

We think the terms of the agreement between the parties in this case were clear and definite, not vague or ambiguous. Consequently, parol evidence was not admissible on the theory that the agreement was ambiguous and subject to construction to establish a meaning not expressed in the agreement.

The judgment of the district court is correct, and it is affirmed. The defendants Melvin L. Burge and Mary A. Burge are allowed $750 for the services of their attorneys in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PETER HOCHSTEIN, APPELLANT.

344 N.W.2d 469

Filed February 17, 1984. No. 83-254.

1. **Post Conviction: Appeal and Error.** A motion for post conviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
2. _____: _____. A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal unless the questions are such that they would make the judgment of conviction void or voidable under the state or federal Constitution.

3. _____: _____. One seeking post conviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed on appeal unless they are clearly erroneous.
4. **Post Conviction: Effectiveness of Counsel: Proof.** 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.
5. **Post Conviction: Effectiveness of Counsel: Proof: Appeal and Error.** In a post conviction case the person challenging the competency of counsel has the burden of proof to establish the incompetency of counsel, and the findings of the district court denying relief will not be disturbed on appeal unless clearly erroneous.

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

David L. Herzog and Alan G. Stoler, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

PER CURIAM.

The appellant, Peter Hochstein, appeals from an order entered by the district court for Douglas County, Nebraska, denying Hochstein's request for post conviction relief sought pursuant to the Nebraska Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). We have thoroughly and meticulously reviewed the record in this case and conclude that the trial court was correct in denying relief. For that reason the judgment is affirmed.

The facts which resulted in Hochstein's conviction for the first degree murder of Ronald J. Abboud and which give rise to this action are set out in our earlier decision of *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980) (*Anderson and Hochstein I*), and will not be repeated here.

Hochstein has assigned four errors allegedly com-

mitted by the trial court entitling him to post conviction relief. The errors, as assigned, are that (1) the trial court erred in refusing to suppress the testimony of Lon Reams; (2) the trial court erred in not finding the interlocutory decision by Justice McCown and the affirming of that decision by this court are contrary to the standards of appellate review and constitutionally void; (3) the trial court erred in not finding that petitioner received inadequate representation by counsel at his trial and sentencing; and (4) the trial court erred in that it did not find that the death penalty, Neb. Rev. Stat. §§ 29-2521.01 et seq. (Reissue 1979), was applied incorrectly.

Before considering the assignments, it might be helpful to once again set out the rules applicable to post conviction relief and appeals taken therefrom. "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*, 215 Neb. 401, 405, 338 N.W.2d 776, 778 (1983). Additionally, a defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal unless the questions are such that they would make the judgment of conviction void or voidable under the state or federal Constitution. See *State v. Stranghoener*, 212 Neb. 203, 322 N.W.2d 407 (1982). One seeking post conviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed on appeal unless they are clearly erroneous. See, *State v. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982); *State v. Stranghoener, supra*. The reasons for such rules are obvious. As we noted in *State v. Weiland*, 190 Neb. 111, 113, 206 N.W.2d 336, 338 (1973): "There must be an end to litigation. A defendant will not be permitted to rephrase issues previously raised or raise new issues which could have been previously raised for the purpose of securing another review on appeal."

By reason of those recognized rules by which we

review post conviction relief cases, we may dispose of assignments Nos. 1, 2, and 4 by noting that these matters were previously raised and disposed of adversely to Hochstein in his direct appeal reported in *Anderson and Hochstein I.* These assignments of error may now be slightly rephrased; however, as we have noted, this is of no significance. These were issues which were directly involved in the direct appeal and will not now be reconsidered. Therefore, this leaves us with only assignment of error No. 3, to the effect that Hochstein received ineffective assistance of counsel at trial and at sentencing.

With regard to the assignment of error concerning ineffective assistance of counsel, we must also keep in mind certain basic rules. "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. Otey*, 212 Neb. 103, 321 N.W.2d 453 (1982); [citation omitted]." (Emphasis supplied.) *State v. Crouch*, 215 Neb. 205, 208, 337 N.W.2d 766, 768-69 (1983). See, also, *State v. Clark*, *ante* p. 49, 342 N.W.2d 366 (1983). In a post conviction case the person challenging the competency of counsel has the burden of proof to establish the incompetency of counsel, *State v. Otey*, 212 Neb. 103, 321 N.W.2d 453 (1982), and *State v. Holloman*, 209 Neb. 828, 311 N.W.2d 914 (1981), and the findings of the district court denying relief will not be disturbed on appeal unless clearly erroneous. *State v. Paulson*, *supra*. The record must affirmatively support a claim of ineffective assistance of counsel, and the ineffectiveness of counsel is not to be judged by hindsight. *State v. Meredith*,

212 Neb. 109, 321 N.W.2d 456 (1982); *State v. Fowler*, 201 Neb. 647, 271 N.W.2d 341 (1978). We do not examine the claim of ineffective assistance of counsel as "Monday-morning quarterbacks" attempting to determine whether something might have been done that might have produced better results in light of what in fact transpired. What we are called upon to do is to determine whether a defendant was afforded his constitutional right by receiving effective assistance of counsel in light of recognized standards. A defendant is not constitutionally entitled to receive a "perfect trial," only a fair and constitutional trial.

Hochstein lists some 10 alleged examples of ineffective assistance of counsel. A number of them require us to accept Hochstein's version of the facts rather than evidence to the contrary. This we are not compelled to do in determining ineffective assistance of counsel. Other claims are simply without any factual basis in the record. Hochstein's first claim regarding ineffective assistance of counsel is that the State's principal witness, Lon Reams, should have been cross-examined concerning testimony that Hochstein had removed his lower teeth in order to disguise himself, when, in reality, it was his upper teeth which are false. We are not shown how that testimony would have changed the results in this case. Additionally, a reading of the record does not support Hochstein's claim concerning what Reams actually testified to regarding the false teeth. Therefore, this allegation of ineffective assistance of counsel has no factual basis.

Hochstein further argues, in a series of examples, that his trial counsel failed to adequately conduct investigations, coach witnesses, confer with him, or permit him to see police reports or witness lists. Yet, he is unable to establish in any meaningful way how those failures, if in fact they occurred, prejudiced Hochstein or, if handled in another manner, would have produced a different result. His claims

at best are mere assertions. As we noted in *State v. Holtan*, 205 Neb. 314, 319, 287 N.W.2d 671, 675 (1980): "In either event, defendant does not in any manner show us how, had counsel discussed the matter with defendant any more than he did, anything different would have occurred. The adequacy of counsel cannot be determined solely on the basis of the amount of time he spent interviewing his client." And, further, in *State v. Pankey*, 208 Neb. 377, 378, 303 N.W.2d 305, 306 (1981), we said: "We have previously held that error or prejudice allegedly resulting from the ineffective assistance of counsel cannot be established where witnesses were not called, absent a showing in the record of the beneficial nature of such witnesses' testimony." The defect in Hochstein's position is that he is unable to show us, in the record, how it would have changed the results if counsel would have taken the steps he now claims were defective.

He further claims that counsel was ineffective because he did not object to the sitting of a juror, did not advise Hochstein he could call witnesses at the sentencing hearing, did not move for severance of trial or severance of the sentencing hearing, and counsel was not independent enough but, rather, was dominated by counsel for the codefendant. Again, he fails to produce a shred of evidence to support his claim that any of these alleged failures affected the outcome of this trial.

We believe it is sufficient at this point to simply observe that we have reviewed the record in light of each and every claim by Hochstein of ineffective assistance of counsel, and we are unable to determine that the trial court, in any manner, abused its discretion in refusing to find that such claims did in fact deprive Hochstein of effective assistance of counsel. The mere belief by appellant and his present counsel that more could have been done does not establish ineffective assistance of counsel. For these reasons we believe the judgment of the trial

court denying Hochstein's post conviction relief was in all respects correct and should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. C. MICHAEL ANDERSON, APPELLANT.

344 N.W.2d 473

Filed February 17, 1984. No. 83-267.

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

Richard J. Bruckner and W. Joseph Bruckner, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

PER CURIAM.

This is a companion case to the case of *State v. Hochstein*, *ante* p. 515, 344 N.W.2d 469 (1984), and grows out of the facts set out in detail in our earlier decision of *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980). The appellant, C. Michael Anderson, together with Peter Hochstein, was convicted of the first degree murder of Ronald J. Abboud and, after hearing, was sentenced to be executed. Anderson filed a petition for post conviction relief pursuant to the provisions of the Nebraska Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). The petition, after hearing, was denied, and Anderson now appeals to this court. We have reviewed the record as we did in *State v. Hochstein*, *supra*, and, as we concluded in *State v. Hochstein*, find that the trial court was correct in denying

Anderson's request for post conviction relief. For this reason we affirm the decision of the trial court.

Anderson has assigned the same four errors as assigned by Hochstein, and has adopted by reference Hochstein's brief with regard to assignments Nos. 1, 2, and 4. As in the case of *State v. Hochstein*, we may disregard assignments Nos. 1, 2, and 4 because they were matters previously considered by us in *State v. Anderson and Hochstein*, *supra*, and are not proper matters to be raised in a post conviction proceeding. *State v. Ohler*, 215 Neb. 401, 338 N.W.2d 776 (1983). That leaves us, then, only with Anderson's claim that the trial court erred in failing to find that he had ineffective assistance of counsel at trial and sentencing.

What we said in *State v. Hochstein*, *supra*, regarding ineffective assistance of counsel can be repeated in toto here. Anderson claims that he received ineffective assistance of counsel, but he fails in every respect to meet his burden by pointing out how his claims would have produced a different result. He claims that counsel was ineffective because he failed to call several witnesses, including Anderson's ex-wife, members of the victim's family, a magazine author, and a police officer. Furthermore, these same witnesses were not called at the post conviction hearing, and therefore, even if we were to assume that their testimony was either admissible or relevant, we do not know that they would have testified or what they would have said. Perhaps one example is sufficient to highlight the point. Anderson maintains that he received ineffective assistance of counsel because his ex-wife was not called as a witness to testify that persons other than Anderson had grudges against the victim. The record discloses, however, that the victim and Anderson's ex-wife may have been engaged in an extramarital affair and defense counsel was afraid that if she was called to testify, and this relationship was disclosed to the jury, the jury could conclude that Anderson

had a motive to see that Abboud was killed. We certainly cannot say that counsel was ineffective because he chose not to give the jury further evidence of a motive to kill.

Anderson's additional claims are much like Hochstein's, and include failure to seek severance of the trial and failure of counsel to adequately confer with him. He also claims of counsel's failure to call a sufficient number of witnesses at the sentencing hearing, even though seven witnesses were called. As with Hochstein, Anderson makes the claims but produces no evidence.

Anderson's claims of ineffective assistance of counsel are even weaker than those of Hochstein's that we have already observed failed to meet the test. And, as with Hochstein, Anderson fails to establish what the evidence would have been or how taking other action would have changed the result. Anderson has simply failed to meet his burden. As we did with Hochstein, we have examined each and every claim and find none of them to have merit. For that reason we conclude that the trial court was correct in denying the relief sought, and the judgment of the trial court is affirmed.

AFFIRMED.

FRANK R. SPULAK, APPELLANT, V. JAMES W. ESTEP ET AL., APPELLEES.

344 N.W.2d 475

Filed February 17, 1984. No. 83-389.

1. **Workmen's Compensation: Contracts: Independent Contractor.** Where a written contract between the claimant and alleged employer exists, which not only denominates the relationship as that of independent contractor but also describes that kind of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not

to be deemed an employee within the meaning of the workmen's compensation statutes.

2. **Workmen's Compensation: Appeal and Error.** When there is evidence in the record to support the Nebraska Workmen's Compensation Court's finding of fact, we are bound by that finding.
3. **Workmen's Compensation: Independent Contractor.** Control or the right of control is the chief criterion in the determination of whether one acts as an independent contractor.

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

Robert C. Guinan and Daniel K. Powers, for appellant.

Arthur J. Nevins of Gaines, Otis, Haggart, Mullen & Carta, for appellees.

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

WHITE, J.

This is an appeal from the decision of a three-judge panel of the Workmen's Compensation Court denying benefits to Frank R. Spulak. He appeals.

The principal error assigned is that the three-judge panel erred in finding that appellant was an independent contractor and not an employee or statutory employee of the appellees, Empire Life Insurance Company and/or James W. Estep. We affirm.

Appellant, a licensed life insurance agent, answered an ad in the Omaha World-Herald soliciting applications from persons qualified as insurance agents. The advertisement named the person to whom the application should be sent as James Houghton. Houghton, it develops, was a partner with Estep in a general agency variously known as Self-Employed Benefit and Self-Employed Benefit Advisory Agency. Houghton and Estep were also general agents for Empire Life Insurance Company.

Appellant answered the advertisement and, after a discussion with Estep and Houghton, signed a contract entitled "Special Agent's Agreement." The

document was an extended designation of duties and authority of appellant in the solicitation and sale of Empire policies. In paragraph 5 of the agreement the following appears: "5. Status of Agent. The authority of the Agent shall extend no further than the authority expressly granted to the Agent in this agreement, but within the scope of his authority the Agent shall be considered a full-time life insurance salesman and shall be free to exercise independent judgment as to the persons from whom applications for insurance are solicited and the time, place and manner of solicitation. No provisions contained in this agreement nor any rule or regulation of the Company shall be construed as creating the relationship of employer and employee between the Company and the Agent. If training courses, sales methods and materials, prospect leads, office facilities or similar aids and services are extended or made available to the Agent, the parties nevertheless agree that the purpose and effect thereof shall not be to give the Company control over the time of the Agent or direction or control over the manner or means by which he shall conduct his business but only to assist the Agent in obtaining applications for insurance with the Company. In the event that any rules or regulations of the Internal Revenue Service, the Social Security Administration and/or any state or local revenue authorities require the Company to withhold any sums from the commissions payable to the Agent under this agreement, then the Agent hereby consents to such withholding and acknowledges that such withholding shall not be construed as creating the relationship of employer and employee between the Company and the Agent."

The appellant was given a short period of instruction concerning types of coverages sold by the company, and instructed in the use of "lead" cards. A "lead" card is a simple post card on which a prospective customer would write his or her name and address, and other unsuspecting information, and

mail it back to a Washington, D.C., address. A Louisiana-based company would then sell the "leads" to Houghton and Estep. Although disputed as to whether the continued appointment of an agent depended on the prompt use and followup of the lead cards, their use was recommended. However, the contract provided that applications for insurance could be solicited from anyone, but with geographical limitations as directed by the company.

The contract provided for commissions to be paid on premiums received by Empire on policies sold by Spulak. The commission earned was the sole compensation of the agent, and Empire did not pay for expenses of any kind to the agent.

On the Monday following the instruction period, Spulak began calling on leads supplied by Estep. On the following Wednesday, August 19, 1981, while engaged in that endeavor, and driving from the residence of one lead to another, Spulak was in an automobile accident and suffered injuries for which this action was brought.

With respect to clauses in contracts for service, similar to the subject case, we said in *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 23, 286 N.W.2d 420, 426 (1979): "[W]here . . . a written contract exists which not only denominates the relationship as that of independent contractor but also describes that type of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workmen's compensation statutes."

Neither the contract nor the actual performance of the contract required a specific method of performance. The appellant was free to accomplish his duties at the time and by any method he chose. His only responsibility was to execute the insurance application on the authorized policies with the required

premium collected. There is no evidence that the contract was a sham to conceal the true arrangement of the parties. See, Neb. Rev. Stat. § 48-116 (Reissue 1978); *Bohy v. Pfister Hybrid Co.*, 179 Neb. 337, 138 N.W.2d 23 (1965).

The findings of fact by the compensation court are supported by evidence and are therefore binding on us. *Stephens v. Celeryvale Transport, Inc.*, *supra*.

It is unnecessary to evaluate the facts herein in light of the 10-part test recently enunciated by this court in *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983). In analyzing the test, this court said: "Generally, control or the right of control is the chief criterion in the determination of whether one acts as an independent contractor." *Id.* at 71, 333 N.W.2d at 648.

The evidence demonstrates that the appellant was not controlled by Empire or Estep. The judgment of the compensation court cannot be said to be clearly wrong; therefore, the judgment must be affirmed.

AFFIRMED.

BERNARD ANDERJASKA, APPELLANT, V. JOSEPH C. ANDERJASKA ET AL., APPELLEES.

344 N.W.2d 478

Filed February 17, 1984. No. 83-464.

1. **Wills: Intent.** The cardinal rule in construing wills is to ascertain and effectuate the intention of the testator if that intention is not contrary to law.
2. _____: _____. When there are definite and unambiguous expressions in a will, other expressions that are capable of more than one construction must be construed, if reasonably practicable, so as to harmonize with the plain provisions of the will.

Appeal from the District Court for Hayes County: JACK H. HENDRIX, Judge. Affirmed.

Kenneth D. Gaskins and Teresa A. Beaufait of

McGill, Koley, Parsonage & Lanphier, P.C., for appellant.

Fred J. Schroeder, Jr., for appellees.

BOSLAUGH, HASTINGS, WHITE, and SHANAHAN, JJ., and BRODKEY, J., Retired.

BOSLAUGH, J.

This case arises out of a controversy concerning the will of Joseph C. Anderjaska, who died July 1, 1977. The will was admitted to probate in formal probate proceedings in the county court for Hayes County, Nebraska, on August 19, 1977. A final order directing distribution of the estate was entered on October 18, 1978.

This action to quiet title was commenced in 1982 by Bernard Anderjaska, a son of the deceased, claiming an undivided one-seventh interest in the real estate owned by his deceased father. An amended petition included a prayer that the will of the deceased be construed.

Paragraph 1 of the will directed the payment of debts, administration expenses, and funeral expenses.

Paragraph 2 of the will provided as follows: "I give, devise and bequeath unto my Wife, Lucy Anderjaska, all of the *remaining property* of my estate to be hers absolutely. In the event that my said Wife pre-deceases me, then I direct that this provision for her shall lapse and be null and void, and all of *said remaining personal property* shall descend equally to my following children: Gerald Anderjaska, Arnold Anderjaska, Coran T. Anderjaska, Joan J. Barger, Claire B. Uerling, and Audrey M. Suiter, share and share alike. I make no provision herein for my son, Bernard Anderjaska, for the reason that I consider he has already received his share of my estate because of various advancements made by me to my said son during my lifetime; and in this connection, I do hereby cancel and forgive any in-

debtedness that may be due and owing to me or to my estate from my said son." (Emphasis supplied.)

Paragraph 3 of the will devised the real estate of the deceased in trust for the use of his wife, Lucy, during her lifetime. Upon the death of Lucy the real estate was to be sold and the proceeds divided equally among the six children of the deceased, other than Bernard. Paragraph 3 also included a provision that Bernard Anderjaska would not share in the proceeds for the reasons stated in paragraph 2 of the will.

The plaintiff claims that paragraph 2 of the will devised all of the property of the deceased to his wife, Lucy, and upon her death the plaintiff inherited a one-seventh interest in the real estate.

The trial court found that, by error, the word "personal" had been omitted between the words "remaining" and "property" in the second line of paragraph 2 of the will but that the intent of the testator was clear even though the word had been omitted. The plaintiff appeals from the judgment dismissing his petition.

The plaintiff contends that the trial court's construction of the will was erroneous and that parol evidence was not admissible as an aid to construction. The parties have presented no issue in this court concerning the effect of the final order of distribution entered in the county court on October 18, 1978.

The cardinal rule in construing wills is to ascertain and effectuate the intention of the testator if that intention is not contrary to law. *In re Johnson Trust Estates*, 211 Neb. 750, 320 N.W.2d 466 (1982). When there are definite and unambiguous expressions in a will, other expressions that are capable of more than one construction must be construed, if reasonably practicable, so as to harmonize with the plain provisions of the will. *In re Testamentary Trust of Criss*, 213 Neb. 379, 329 N.W.2d 842 (1983).

When the will in its entirety is considered, we think it is clear that the testator intended, in paragraph 2, to make a disposition of his personal property remaining after the payment of debts and expenses. His real estate was devised in paragraph 3 of the will. This construction is reinforced by the use of the word "personal" in the fourth line of paragraph 2. We conclude that the construction of the will made by the district court was correct.

It is unnecessary to consider the other assignment of error. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JACK L. FISHER, APPELLANT.

343 N.W.2d 772

Filed February 17, 1984. No. 83-519.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Reversed and remanded with directions.

James H. Truell of Ahlschwede & Truell, for appellant.

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

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

PER CURIAM.

Defendant, Jack L. Fisher, appeals from his conviction on the charge of having made "terroristic threats." We reverse and remand with directions to dismiss.

Fisher was arrested following his threat to blow apart a hairdresser working at a hairstyling shop on November 16, 1982, where his wife had preceded him

and asked that someone call the police. He was charged with and convicted of violating Neb. Rev. Stat. § 28-311 (Reissue 1979), which reads: "(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; or

"(b) He intentionally makes false statements with the intent of causing the evacuation of a building, place of assembly, or facility of public transportation.

"(2) Terroristic threats is a Class IV felony."

The trial court rejected Fisher's challenge to the constitutionality of that statute.

This case is controlled by *State v. Hamilton*, 215 Neb. 694, 340 N.W.2d 397 (1983), which declared § 28-311 unconstitutional as being impermissibly vague.

Accordingly, the judgment of conviction is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE CONTEMPT OF RALPH LILES. STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS ET AL., APPELLEES, V. FAITH BAPTIST CHURCH OF LOUISVILLE, NEBRASKA, ET AL., APPELLANTS.

344 N.W.2d 626

Filed February 9, 1984. No. 84-052.*

1. **Contempt.** One who is in privity with an enjoined party and also has knowledge of the injunction, or one who aids and abets the violation of the injunction, is subject to the contempt powers of the court.

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* Together with In re Contempt of David Carlson, No. 84-053; In re Contempt of James Glenn, No. 84-054; In re Contempt of Herman Buchanan, No. 84-055; In re Contempt of Ken Stastny, No. 84-056; and In re Contempt of Larry Nolte, No. 84-057.

2. _____. A contempt sanction which aims to compel future obedience to the court's orders and decrees is conditioned upon the contemner's continued noncompliance and is coercive in nature.
3. _____. A punitive contempt sanction is absolute and not subject to mitigation if the contemner alters his future conduct toward the court.
4. _____. A coercive contempt sanction is not final and therefore not appealable; it is subject to collateral attack by habeas corpus.
5. _____. A punitive contempt sanction takes on the aspects of a final order or an order affecting a substantial right issued in a special proceeding and is appealable.
6. _____. One committed to jail in order to coerce compliance with a court order is entitled neither to have the sanction stayed nor to bail pending the outcome of his attack on the order.

Appeal from the District Court for Cass County: RONALD E. REAGAN, Judge. Appeal dismissed; motion for stay of sentence or bail denied.

Michael P. Farris and Diane E. White, and William J. Morris of Nelson, Morris & Holdeman, for contemner Liles.

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

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

PER CURIAM.

On September 11, 1979, the district court for Cass County enjoined the original defendants herein from the "further operation of a private school or the using of church property for the operation of a private school until such time as they have complied with the Nebraska statutes and the rules and regulations of the Department of Education governing approved schools." The district court's injunction was affirmed by this court on January 30, 1981. *State ex. rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed* 454 U.S. 803, 102 S. Ct. 75, 70 L. Ed. 2d 72. On March 16, 1981, this court issued its mandate directing the entry of judgment in conformity with its opinion.

On October 27, 1983, the Cass County attorney filed

a motion and affidavit reciting that Ralph Liles, contemner, had knowledge of the aforementioned injunction, was in privity with the original defendants herein, and was violating said injunction. The motion asked the district court to, among other things, cite contemner for willful contempt and order him to appear and be punished as provided by law. On that date the district court issued an order directing contemner to appear and show cause why he should not be found in contempt.

On November 23, 1983, contemner was jailed for contemptuously refusing to take the witness stand at the show cause hearing, not for violating the 1979 injunction. Subsequently, on December 14, 1983, he answered questions identifying himself and his residence and establishing that he was married. He then refused to answer a question concerning whether he had children of that marriage. At that point he asserted his fifth amendment privilege to remain free from self-incrimination. He was thereupon returned to jail, where he now remains.

This matter first appeared before this court on December 21, 1983, in the form of a request for leave to docket an original action for a writ of habeas corpus. We, as an appellate court having limited means for conducting evidentiary hearings, denied such leave without prejudice to seek a writ of habeas corpus in the district court for Cass County. So far as we are advised, no such relief has been sought to date.

The proceeding is now before us on the motion of contemner for a stay of the execution of his sentence or, alternatively, for release or for bail pending his purported appeal to this court of the district court's order of December 14, 1983.

It is clear, and has long been the rule, that one who is in privity with an enjoined party and also has knowledge of the injunction, or one who aids and abets the violation of the injunction, is subject to the contempt powers of the court. *Lackaff v. Bogue*, 158 Neb. 174, 62 N.W.2d 889 (1954); *Wilcox v. Ashford*,

131 Neb. 338, 268 N.W. 81 (1936); *Sharp v. State*, 109 Neb. 766, 192 N.W. 726 (1923).

The first question which then presents itself is whether the district court's order of December 14, 1983, is appealable. It is not. We have addressed various aspects of the contempt powers of courts and the methods of review in a number of cases. See, *Petersen v. Petersen*, 208 Neb. 1, 301 N.W.2d 592 (1981); *Payne v. Glebe*, 190 Neb. 268, 207 N.W.2d 386 (1973); *McFarland v. State*, 165 Neb. 487, 86 N.W.2d 182 (1957); *In re Havlik*, 45 Neb. 747, 64 N.W. 234 (1895). Although the language in these cases may not always be as clear as we might wish, in *McFarland v. State, supra*, we distinguished between contempt sanctions which are coercive in nature and those which are punitive in nature; that is to say, between those which aim to compel future obedience to the court's orders and decrees and are therefore coercive, and those which punish past disrespectful or contumacious conduct and vindicate the court's authority. In the coercive sanction, the type involved here, the contemner holds the keys to his jail cell, in that the sentence is conditioned upon his continued noncompliance. The punitive sanction is much like the sentence in a criminal case, in that it is absolute and not subject to mitigation if the contemner alters his future conduct toward the court, and takes on the aspects of a final order or of an order affecting a substantial right issued in a special proceeding, both of which are reviewable on appeal. Neb. Rev. Stat. § 25-1902 (Reissue 1979). The coercive sanction, on the other hand, is always subject to modification by the contemner's conduct; that sanction is not final in any sense. Therefore, punitive sanctions are reviewable by appeal; whereas coercive sanctions can only be attacked collaterally by habeas corpus. *McFarland v. State, supra.* See, also, *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 31 S. Ct. 492, 55 L. Ed. 797 (1911); *Southern Railway Company v. Lanham*, 403 F.2d 119 (5th Cir. 1968).

Since the contempt citation is not appealable, contemner is entitled neither to have his sentence stayed nor to bail. Were one committed to jail in order to coerce compliance with a court order entitled to bail pending the outcome of his attack on the order, the commitment to jail would be deprived of its coercive features. *Matter of Clark*, 20 Hun 551 (1880), *appeal dismissed* 81 N.Y. 638.

There being no basis for an appeal to this court in the present posture of these proceedings, contemner's appeal is hereby dismissed for lack of an appealable order.

APPEAL DISMISSED; MOTION FOR STAY OF SENTENCE OR BAIL DENIED.

IN RE COMPLAINT OF FECHT.
JOHN A. FECHT, ACTING SUPERVISOR OF PUBLIC WAREHOUSES, NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, V. DAVID CITY GRAIN COMPANY, INC., APPELLEE.
FRANK FICHTL ET AL., APPELLANTS.
344 N.W.2d 636

Filed February 24, 1984. No. 82-675.

Public Service Commission: Jurisdiction. The jurisdiction of the Nebraska Public Service Commission over public grain warehouses is limited to the functions specifically set out in Neb. Rev. Stat. §§ 88-501 to 88-524 (Reissue 1981).

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

Donn K. Bieber of Otrakovsky & Bieber, for appellants.

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

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

GRANT, J.

David City Grain Company, Inc. (Grain Company), was a licensed public grain warehouse operating in David City, Nebraska. On March 31, 1981, the Nebraska Public Service Commission (hereinafter Commission) through John A. Fecht, its acting supervisor of public warehouses, filed a complaint before the Commission seeking to revoke defendant Grain Company's warehouse license. This complaint was styled "John A. Fecht, Acting Supervisor of Public Warehouses Nebraska Public Service Commission Complainant vs. David City Grain Co., Inc. . . . Defendant."

The complaint alleged, and evidence adduced later established, that an examination of Grain Company's warehouse, conducted by the Commission's inspectors on March 24, 1981, had disclosed shortages of wheat, corn, milo, and soybeans and that there was no grain at all in the warehouse. Pursuant to this complaint, the Commission on the same day temporarily suspended Grain Company's license. Thereafter, appropriate notices were published, and a hearing before the Commission was held on May 4, 1981. At this initial hearing John Fecht appeared with counsel and Grain Company appeared by counsel. Evidence was adduced by the complainant. No evidence was presented by Grain Company. On May 5, 1981, the Commission canceled Grain Company's warehouse license.

Thereafter, a notice was published informing the public that Grain Company's warehouse had been closed and that any depositors of grain in that warehouse should notify the Commission by September 1, 1981. Additionally, the depositors in the warehouse as determined by the Commission's audit were individually notified, and the Commission attempted to compile a list of storers of grain in the closed warehouse.

A hearing was held before the Commission on January 19, 1982, "for the purpose of determining valid

claims to the proceeds of the Public Grain Warehouse Bond" of defendant Grain Company. The Commission aptly described this hearing as "one more step in determining the storers of grain." At this hearing Mr. Fecht was present with Commission staff counsel. Three grain depositors were also present by counsel and, for the first time in the record, Frank Fichtl and Mildred Fichtl, with counsel, entered an appearance as "indemnitors on the bond." The New Hampshire Insurance Company, the statutorily required and Commission-ordered surety bond for the Grain Company, also appeared, for the first time on the record, by counsel. David City Grain Company, Inc., itself entered no appearances at this hearing nor at any subsequent hearing before the Commission. The Grain Company has been denominated a defendant and an appellee in this court, but has made no appearance here.

At this hearing, evidence was adduced by the Commission staff. Eight "public witnesses" were sworn, made statements, and submitted some evidence as to the amount of grain each claimed to have in the closed warehouse. In addition, the manager of the warehouse testified, as did Frank Fichtl, who testified that he was the indemnitor on the warehouse bond. The Commission took the matter under advisement.

The Commission hearing was reconvened on April 26, 1982, and further evidence was adduced. At this hearing the surety was present by counsel, the indemnitors were present with counsel, and Commission staff were present, as were "public witnesses."

On June 8, 1982, the Commission filed its "Opinion and Findings," setting forth in detail all the evidence adduced at the January 19 and April 26, 1982, hearings, and determining that depositors of grain held in grain bank accounts were entitled to recover against the surety bond. The Commission attached to its opinion and findings an appendix setting out a list with the amounts due to each of three grain de-

positors with "Open Storage Accounts" and the amounts due to each of 15 depositors who had "Grain Bank Accounts." The amounts were calculated at values as of March 31, 1981, and gave credit for storage due to the warehouse as of that date. The Commission ordered that the New Hampshire Insurance Company, as surety for the closed Grain Company, should deposit the sum of $18,274.33 with the Commission, to be disbursed to the persons named in the Commission's opinion. No mention was made in the order of any obligation of the indemnitors to anyone, although the Commission did note in its opinion that Frank Fichtl did testify that he had settled with 80.6 percent of all the people who had grain in storage.

On June 16, 1982, Frank Fichtl filed his motion for rehearing on the Commission order of June 8, 1982, alleging that the allowance of grain bank accounts was contrary to law and that the Commission erred in refusing "to allow the elevator to tender grain to the storers of grain." On June 17, 1982, the New Hampshire Insurance Company filed its motion for rehearing on general grounds.

On September 7, 1982, the Commission, after hearing, overruled the motions for rehearing. On October 6, 1982, Frank and Mildred Fichtl, indemnitors, and the New Hampshire Insurance Company, surety for the named defendant David City Grain Company, filed with the Commission their joint "Notice of Intention To Appeal."

In their joint brief on appeal the appellants set out the following assignments of error: "1. The Commission erred in finding that the grain bank accounts were covered by the bond. 2. The Commission erred in ordering the payment of moneys instead of in-kind grain to the storers of grain." For reasons hereinafter stated we cannot answer the first of these questions, but we do answer the latter and remand the cause for such further proceedings as the Commission may desire to initiate.

The Public Service Commission is initially provided for in article IV, § 20, of the Constitution of the State of Nebraska. That section provides in pertinent part as follows: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." It is clear that the jurisdiction of the Commission is based on the Constitution insofar as jurisdiction over common carriers is concerned, and, in the absence of specific legislation, the Commission may exercise broad jurisdiction over all aspects of regulating common carriers.

The situation with respect to the Commission's jurisdiction over "public grain warehouses," as spelled out in Neb. Rev. Stat. §§ 88-501 to 88-524 (Reissue 1981), is different. The authority of the Commission in the instant case must spring from legislative enactment, and nothing else. A public warehouse cannot be considered a "common carrier." In *Consumers P. P. Dist. v. Twin Valleys P. P. Dist.*, 172 Neb. 315, 318, 109 N.W.2d 372, 374 (1961), we stated, "Consumers and Twin Valleys, although public utilities, are not common carriers. While public utilities are subject to regulation by the state, any such regulatory power by the railway commission must originate from a delegation of legislative authority by legislative enactment." In that case we determined that by the specific statute in question the Legislature delegated to the Commission (at that time called the Nebraska State Railway Commission) power only to regulate the manner of the construction of transmission lines and did *not* delegate any general power of regulation and control over public power companies.

Applying that same overall theory to the instant case, we determine that while public grain ware-

houses are not common carriers, such warehouses are subject to regulation by the state, that such regulation may be delegated to the Public Service Commission, but that such regulation must be exercised completely within the statutory scheme set out in Neb. Rev. Stat. ch. 88, art. 5 (Reissue 1981).

Chapter 88, article 5, gives the Commission broad licensing, bonding, regulating, inspecting, and investigating powers over all public grain warehouses. The Commission has properly exercised many of those powers in this case in suspending the license of Grain Company and in investigating thoroughly the rights of grain depositors in the failed warehouse. We determine, however, that the Commission exceeded its powers when it ordered the surety for the failed warehouse to pay a definite amount of money from its surety bond in to the Commission.

Section 88-515(3) provides in part: "In the event that the commission determines that a shortage of grain exists at a duly licensed warehouse, necessitating the closing of the warehouse, the commission may: (a) Take title to all grain stored in the public grain warehouse at that time in trust, for distribution on a pro rata basis to all valid owners, depositors, or storers of grain who shall be holders of evidence of ownership of grain. Such distribution can be made in grain or in proceeds from the sale of grain; *or* (b) *Commence a suit in district court for the benefit of owners, depositors, or storers of grain.*" (Emphasis supplied.)

This section sets out a logical plan for the situation where grain is in storage at a closed warehouse, in that the section authorizes the Commission to take title to the remaining grain and to conserve that grain for the benefit of grain depositors. That is not this case. Here, there was no grain, and to protect the depositors in that eventuality the statute authorizes the Commission to "[c]ommence a suit in district court for the benefit of owners, depositors, or storers of grain."

In such a suit, under appropriate pleadings, the relationships and liabilities between the depositors of grain and the bonding company, and between the bonding company and the indemnitors, could be determined and an appropriate, binding money judgment rendered so that all parties could enforce their respective rights. In actuality, neither the Commission nor this court, on this record, can make any disposition of the problem between the indemnitors and the depositors of grain. The indemnitors have no standing before the Commission nor, on this appeal, before this court. The grain depositors have a right to have the Commission "commence a suit" to assert their claims against the surety bond and, if the claims are established, to have an appropriate, binding, enforceable money judgment entered against that surety in the district court. That stated concept, of course, disposes of any claim that the indemnitors can satisfy obligations of the David City Grain Company, Inc., by tendering bushels of grain which depositors are required to accept.

The fact remains that the Commission did not have jurisdiction to enter a money judgment against the surety.

The judgment of the Commission is reversed and the cause remanded to the Commission for whatever further action it may desire to take under § 88-515(3).

REVERSED AND REMANDED.

FEATHER DELL RANDALL, APPELLEE AND CROSS-APPELLANT, V. ROBERT WILKINSON RANDALL, APPELLANT AND CROSS-APPELLEE.

345 N.W.2d 319

Filed February 24, 1984. No. 82-808.

1. **Marriage.** The general rule is that the validity of a marriage is determined by the law of the place where it was contracted; if valid

there it will be held valid everywhere, and, conversely, if invalid by the lex loci contractus, it will be invalid wherever the question may arise.

2. **Divorce: Courts: Jurisdiction.** The powers of the court in a divorce action are statutory. Unless the source of the power is found in the statute, a court is without authority to exercise it.

Appeal from the District Court for Douglas County: STEVEN J. DAVIS, Judge. Reversed and remanded with directions to dismiss.

Joseph J. Barmettler and Lyle E. Strom of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellant.

Donald A. Roberts of Lustgarten & Roberts, for appellee.

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

KRIVOSHA, C.J.

By this appeal we are asked to determine whether the validity of a marriage should be determined in accordance with the laws where the marriage was performed or pursuant to the laws where the parties reside. The trial court concluded that although the marriage was invalid under the laws where performed, it was "substantially" in accordance with the laws where the parties resided, and therefore should be recognized. Because we believe the trial court was in error, we must reverse and dismiss.

The appellee, Feather Dell Randall, and the appellant, Robert W. Randall, met sometime during the summer of 1963. At that time Ms. Randall was working as a receptionist to support herself and her infant son. By the late summer of 1963 the parties to this action had established a meretricious relationship. They were unable to marry because Mr. Randall was then married and did not obtain a decree of divorce until October 4, 1963. Under Nebraska law this meant that Mr. Randall was not free to marry anyone else *anywhere* in the world until April

5, 1964, a fact known to both Ms. Randall and Mr. Randall. *Copple v. Bowlin*, 172 Neb. 467, 110 N.W.2d 117 (1961); *Eaton v. Eaton*, 66 Neb. 676, 92 N.W. 995 (1902); *Lee v. Lee*, 150 Iowa 611, 130 N.W. 128 (1911).

While there is a dispute, we find from the evidence that in March of 1964 the parties traveled to Acapulco, Mexico, for the purpose of entering into marriage sometime while in Mexico. Prior to April 5, 1964, the first date both parties knew they were free to marry, they went to a local government office in order to obtain a marriage license. The parties answered questions concerning their origins, occupations, marital status, and other information; they were fingerprinted; and they signed their names to a document in Spanish, before four witnesses. At the conclusion of the proceedings they were congratulated by a Mexican official, who advised them that they were now married. The parties then advised the official that they could not get married until April 5, 1964, and both parties obviously recognized that whatever transaction took place before the Mexican official was not sufficient to cause them to be husband and wife under Mexican law.

The next day, on April 5, 1964, the parties drove to Mexico City, Mexico, to find an English-speaking minister by whom they could be married. Again, there is a conflict, but it appears clear from the evidence that both parties were advised by the minister that under Mexican law a religious ceremony was not valid unless there had earlier been a valid Mexican civil ceremony. By deposition, the minister testified that he specifically recalled advising the parties that in Mexico a religious ceremony had no legal validity. The religious ceremony was merely a "blessing" upon a prior civil marriage. Mexican law recognizes only those marriages which are performed in a proceeding before a Mexican civil authority. Civil Code of Mexico, tit. 4, ch. VII, art. 103b; tit. 5, ch. II, art. 146 (1964). Rev. Leonard Stahlke's testimony was supported by his wife, the

only other person present that evening. She testified that the minister carefully explained to both parties that the religious service he was about to perform would not constitute a legal marriage, nor would it have any legal effect on their prior civil marriage. She further testified that both of the parties seemed to understand. The record clearly establishes that no valid Mexican civil ceremony was ever performed, and therefore under Mexican law the religious ceremony was likewise invalid.

The parties left Mexico the next day and went to California for several days, and then returned to Nebraska where they have continuously resided. The evidence is without dispute that from the time of their return to Nebraska until the time they separated, the parties to this action cohabited in this state as husband and wife, filed tax returns as married persons, and otherwise conducted their business as husband and wife. The record further discloses that Mr. Randall adopted Ms. Randall's son by her previous marriage. The son has now reached his majority and is not involved in this action.

The trial court specifically found that the marriage performed in Mexico was void. It did find, however, that by applying Nebraska law the religious ceremony performed in Mexico substantially complied with the requirements of the Nebraska law and that therefore the parties in fact were husband and wife. The court then divided the marital estate between the parties, and directed Mr. Randall to pay Ms. Randall certain alimony.

Mr. Randall has now appealed to this court, assigning five specific errors committed by the trial court. Mr. Randall's principal assignment of error is that once the trial court determined that both of the marriage ceremonies performed in Mexico were invalid, and therefore failed to create a valid marriage, nothing more was required to be decided. We believe that Mr. Randall is correct in his assertion.

We have long held in this jurisdiction that the

validity of a marriage is generally determined by the law of the place where it was contracted. Specifically, we have said in *Abramson v. Abramson*, 161 Neb. 782, 787, 74 N.W.2d 919, 924 (1956): " 'The general rule is that the validity of a marriage is determined by the law of the place where it was contracted; if valid there it will be held valid everywhere, and conversely if invalid by the lex loci contractus, it will be invalid wherever the question may arise.' " See, also, *Scott v. Scott*, 153 Neb. 906, 46 N.W.2d 627 (1951); *Forshay v. Johnston*, 144 Neb. 525, 13 N.W.2d 873 (1944).

It appears to us that the rationale for this rule compels the result in this case. If indeed marriage is a contract, then it seems to follow that the validity of the contract should be determined by the law of the place where the contract is entered into, when entered into, and the validity should not be determined by hindsight. Other courts which have been called upon to decide this question have reached similar conclusions. In *Estate of Levie*, 50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1975), the California court held that the marriage between two California residents who went to Reno, Nevada, to be married was invalid in California because it was invalid under the laws of Nevada. The court stated at 576, 123 Cal. Rptr. at 447: "It is true that the statute . . . do[es] not speak expressly of the invalidity in California of a marriage which was void where performed. But the statute by implication adopts the common law rule that 'the law of the place of marriage controls the question of its validity.' "

Similarly, in *Gamez v. Industrial Commission*, 114 Ariz. 179, 559 P.2d 1094 (1976), the Arizona Court of Appeals held that if a marriage entered into in Mexico was invalid in Mexico then it was to be considered invalid in Arizona.

In *Copple v. Bowlin*, 172 Neb. 467, 110 N.W.2d 117 (1961), Elinor Campbell married Cecil Bowlin on December 18, 1952, in Nebraska City, Nebraska. They

obtained a proper license and had a proper ceremony. By this marriage one son was born, who was 6 years old at the time of Mr. Bowlin's accidental death in 1959. In denying workmen's compensation benefits because it appeared that the ceremony was performed 1 day before Mrs. Bowlin's divorce became final, we said at 471, 110 N.W.2d at 121: "The record shows that Elinor Bowlin was granted a decree of divorce from Arthur L. Campbell on June 18, 1952. This decree was not effective until December 19, 1952. § 42-340, R.R.S. 1943. It is clear that Elinor Bowlin was not free to enter into a marriage until 6 months after the date of her divorce from Arthur L. Campbell. Where a certain period must elapse before a divorce becomes final, in determining whether or not such period has elapsed, the rule is to exclude the first day and include the whole of the last day in said period. Garrett v. State, 118 Neb. 373, 224 N.W. 860. The evidence shows that the ceremonial marriage between Elinor Bowlin and the deceased was entered into in the utmost good faith. This is not, however, a matter that can be advanced to sustain the marriage. The statute is one of legislative policy involving a subject over which it has complete control. The wisdom of the legislation is for the Legislature, with which this court has no right to interfere. We necessarily conclude that Elinor Bowlin was the wife of Arthur L. Campbell at the time of her purported marriage to the deceased. As a result, her marriage to the deceased was wholly void and she was not the wife of Cecil Bowlin at the time of his death. Scott v. Scott, 153 Neb. 906, 46 N.W.2d 627, 23 A.L.R.2d 1431."

Furthermore, even if we were to look to the law of Nebraska, which we have declared we should not, the marriage ceremony conducted on April 5, 1964, would have been invalid under Nebraska law. It is conceded by all of the parties that the religious ceremony performed on April 5, 1964, was not preceded by the parties' first obtaining a valid marriage li-

cense. Appellee argues that under Nebraska law the failure to obtain a license does not void the marriage. We are unable to understand how that argument is made, in light of the clear language of Neb. Rev. Stat. § 42-104 (Reissue 1978), which provides: "Previous to the solemnization of any marriage in this state, a license for that purpose *must* be obtained from a county court in the State of Nebraska, and no marriage hereafter contracted shall be recognized as valid unless such license has been previously obtained . . . ." (Emphasis supplied.) Ms. Randall argues that the statute may require that one obtain a license, but it does not make the failure to obtain the license grounds for voiding the marriage. We cannot imagine how the Legislature could make it any clearer than to say that "no marriage . . . shall be recognized as valid unless such license has been previously obtained." Ms. Randall specifically argues that, while reading that section alone, it might mean that the marriage is invalid, when one reads the entire act together, that language is not repeated in every section, and therefore the failure to obtain a license cannot cause the marriage to be invalid. Such an argument simply fails to recognize statutory rules of construction. The act is not to be read in fragments, but rather to be read in its entirety. See, *Little Blue N.R.D. v. Lower Platte North N.R.D.*, 206 Neb. 535, 294 N.W.2d 598 (1980); *School Dist. No. 17 and Westside Comm. Schools v. State*, 210 Neb. 762, 316 N.W.2d 767 (1982). One cannot create a valid marriage ceremony in Nebraska as if one were ordering from a menu in a Chinese restaurant, taking one from column A and one from column B. Under Nebraska law, failure to obtain a valid license prior to entering into the marriage ceremony invalidates the marriage. In view of the fact that Nebraska does not recognize common-law marriages, see *Abramson v. Abramson*, 161 Neb. 782, 74 N.W.2d 919 (1956), a marriage not entered into in accord with the requirements of Nebraska

law is no marriage at all, and, regardless of the sincerity of the parties, it fails to create the relationship of husband and wife. It is the requirement of obtaining the license and going through the ceremony which prevents common-law marriages from being valid in Nebraska. See, *Collins v. Hoag & Rollins*, 122 Neb. 805, 241 N.W. 766 (1932); *Ropken v. Ropken*, 169 Neb. 352, 99 N.W.2d 480 (1959); *In re Estate of McCartney*, 213 Neb. 550, 330 N.W.2d 723 (1983). The religious ceremony in Mexico, absent the issuance of a valid license, did not make the Mexican marriage ceremony valid in Nebraska, regardless of which law we look to for validity. This marriage was invalid under both Mexican and Nebraska law.

Having therefore determined that the marriage of the parties, though sincere, was invalid, the trial court was without authority to grant any further relief. In the *Abramson* case we said at 792, 74 N.W.2d at 927: "Having come to the conclusion that no marriage ever existed between these parties the following is applicable: ' "* * * The action was one in equity; both parties were asserting rights founded upon an illegal and void contract. In such a case, it is a well-settled rule that a court of equity leaves the parties to such a situation just where they placed themselves and as the court found them. . . ." ' "

Ms. Randall argues that even if the court determines that no valid marriage existed, the court nevertheless has jurisdiction to award a division of property under the provisions of Neb. Rev. Stat. § 42-378 (Reissue 1978), which reads: "When the court finds that a party entered into the contract of marriage in good faith supposing the other to be capable of contracting, and the marriage is declared a nullity, such fact shall be entered in the decree and the court may order such innocent party compensated as in the case of dissolution of marriage, including an award for costs and attorney fees." That section, however, has no application to the case at

bar. This is not a situation in which Ms. Randall was unaware that the parties could not marry until April 5, 1964, or that in Mexico a religious ceremony alone was insufficient to constitute a valid marriage. We believe the evidence is sufficient to establish that the information was known to both parties, and therefore the provisions of § 42-378 are not applicable.

While the facts of this case may create an unfortunate result, courts are without authority to correct every error. As we noted in *Ropken v. Ropken*, *supra* at 356, 99 N.W.2d at 484: "The powers of the court in a divorce action are statutory. Unless the source of the power is found in the statute, a court is without authority to exercise it. . . . 'Jurisdiction relative to divorce and alimony is given by statute, and every power exercised by the court with reference thereto must look for its source in the statute, or it does not exist.' " Being unable to find any such authority in the statutes, we are without right to make an award.

Therefore, we believe that with the exception of the temporary alimony paid by Mr. Randall to Ms. Randall pursuant to the court's authority prior to determining the invalidity of the marriage and pursuant to an agreement of the parties, all other sums ordered by the court to be paid to Ms. Randall, whether already paid or to be paid in the future, were beyond the court's authority and must be set aside. Ms. Randall, of course, is permitted to retain the property which she holds in her possession and which has been in her own name, having the apparent value of some $179,000, as well as the $36,000 that she received in support payments prior to the entry of the decree by the district court. All other sums ordered by the court, whether paid or not, must be set aside, and any sums paid by Mr. Randall to Ms. Randall in excess of those amounts which Ms. Randall is entitled to keep must be returned to Mr. Randall.

The judgment of the district court is therefore reversed and the action dismissed pursuant to this decree.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

CAPORALE, J., not participating.

CITY OF HASTINGS, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. PETER ELLIS FARMS, INC., A CORPORATION, ET AL., APPELLEES.

344 N.W.2d 640

Filed February 24, 1984. No. 82-809.

1. **Eminent Domain: Leases: Damages.** The measure of damages in the taking or injury of a leasehold is the difference between the rental value of the remainder of the term and the rent reserved in the lease.
2. **Eminent Domain: Damages: Appeal and Error.** 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.
3. **Evidence: Appeal and Error.** The general rule is that when evidence is improperly received but immediately ordered stricken and the jury is instructed to disregard it, any error is cured.

Appeal from the District Court for Adams County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Michael E. Sullivan, for appellant.

Conway and Connolly, P.C., for appellees.

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

WHITE, J.

This is an eminent domain proceeding in which appellant, City of Hastings, Nebraska, took fee title to .375 acres of a 5.85-acre tract of land owned by three corporations. The entire tract is subject to a lease of which K mart Corporation is the tenant. The pur-

pose of the taking was for road and utility construction at the intersection of Second Street and Marian Road in Hastings.

The appraisers in the county court fixed the combined value of the fee and the leasehold interest at $65,318. The appraisers assigned $54,625.57 as the value of the leasehold and the remainder to the owners' interest. The tenant K mart did not appeal to the district court and later successfully moved the district court to dismiss it from the appeal of the three corporate landlords. As there was no appeal by the city as to the award to K mart, that judgment was final and is not involved in this case.

At the conclusion of the trial in the district court, the jury found the value of the owners' interest to be $64,216.18. The City of Hastings appeals, assigning as error that the verdict is not supported by the evidence.

The main thrust of the city's argument is based on a pretrial stipulation of owners and the city that the value of all interests taken was $65,316.18. The city finds itself in the position of being compelled to pay nearly $120,000 for a tract of land which the evidence establishes was worth approximately half that amount. Indeed, it is a curious dilemma in which the appellant is placed; however, it is a dilemma of the appellant's own making. The city had the right to appeal from the award of the appraisers to the tenant and did not do so. Our procedure does not permit us to rescue the city from the consequences of its own decision. We can only examine the record to determine if the award to the owners is supportable.

At trial the landowners' appraiser testified that the tenant sustained no damage to its leasehold interest and therefore the landowners should be awarded the full amount of the stipulated damages. The appraiser's opinion was based on the facts that the tenant's use of the building, customer parking,

customer access, and economic rent were not affected by the taking.

The appraiser for the city testified that the tenant's damages were $65,290 as a result of the taking. This testimony was based, in part, on the fact that the tenant had 21.7 years remaining on the initial lease, with options for an additional 50 years. He noted that the tenant could sublease a portion of this land for the remaining term of the lease, and because some of the land was taken, the tenant has lost potential rental income.

The measure of damages in the taking or injury of a leasehold is the difference between the rental value of the remainder of the term and the rent reserved in the lease. *Foreman & Clark of Nebraska, Inc. v. City of Omaha*, 203 Neb. 746, 280 N.W.2d 892 (1979). The difference in the evidence concerning the damages to the owners' interest created a question of fact for the jury. The general rule was recently stated in *Wear v. State of Nebraska*, 215 Neb. 69, 76, 337 N.W.2d 708, 714 (1983): "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."

In the instant case the jury's verdict was within the range of the testimony and is supported by sufficient competent evidence. It is not this court's function to weigh the evidence to determine whether we would have returned a different verdict.

The appellant also argues that the verdict must be set aside because the jury was allowed to hear improper rebuttal evidence concerning a quitclaim deed from K mart to the City of Hastings. Because the city was to pay no consideration for the deed, the appellees apparently wanted the jury to draw the inference that K mart believed it was not damaged by the taking. The record reveals that the court sus-

tained appellant's objection to the testimony, ordered it stricken, and admonished the jury to disregard the testimony.

Applicable here is the general rule that when evidence is improperly received but immediately ordered stricken and the jury is instructed to disregard it, any error is cured. *Pearce v. ELIC Corp.*, 213 Neb. 193, 329 N.W.2d 74 (1982).

The judgment of the district court was correct and it is affirmed. The appellees are awarded $1,500 for attorney fees incurred on appeal to this court. Neb. Rev. Stat. § 76-720 (Reissue 1981).

AFFIRMED.

PMD INVESTMENT COMPANY (FORMERLY PAMIDA, INC.), A NEBRASKA CORPORATION, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF REVENUE, APPELLEE.

345 N.W.2d 815

Filed February 24, 1984. No. 82-844.

1. **Taxation: Corporations: Appeal and Error.** The review in this court of an order of the Tax Commissioner imposing a deficiency assessment for the franchise or income tax of a corporation is de novo on the record.
2. _____: _____: _____. Such an order may be reversed or modified only if it is (a) in violation of constitutional provisions; (b) in excess of the statutory authority or jurisdiction of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) unsupported by competent, material, and substantial evidence; or (f) arbitrary or capricious.
3. **Taxation: Corporations.** The purpose of the combined or unitary apportionment method of reporting is to permit a fair determination of the portion of business income that is attributable to business activity within the state by the reporting member of the unitary group.
4. _____: _____. A unitary business operation is one in which there is a high degree of interrelationship and interdependence between, typically, one corporation, which generally is a parent corporation, and its corporate subsidiaries or otherwise associated corporations, which group is usually engaged in multistate, and in some cases in international, business operations.

5. _____: _____. The Nebraska Revenue Act of 1967, as amended, Neb. Rev. Stat. §§ 77-2701 et seq. (Reissue 1981), authorizes the use of the combined or unitary apportionment method of reporting to determine the income of a corporation engaged in a unitary business operation.
6. _____: _____. The fact that a taxpayer uses a method of separate accounting is not binding on the state if in fact the taxpayer is engaged in a unitary business operation.

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

William H. Coates and Harvey B. Cooper of Abrahams, Kaslow & Cassman, 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.

This is an appeal in a proceeding to review an order of the Tax Commissioner which assessed a deficiency in the amount of $85,877 against the appellant, PMD Investment Company, for its franchise or income tax for the taxable years ending January 31, 1973, through January 31, 1976. The appellant was formerly known as Pamida, Inc., and will be referred to as Pamida.

The district court found that the order of the Tax Commissioner was supported by competent, material, and substantial evidence, and affirmed the order of the commissioner. Pamida has now appealed to this court.

Neb. Rev. Stat. §§ 77-27,127 and 77-27,128 (Reissue 1981) provide that the procedure for the judicial review of any final action of the Tax Commissioner, including the assessment of a proposed deficiency, is that provided in Neb. Rev. Stat. §§ 84-917 to 84-919 (Reissue 1981). The order may be reversed or modified only if it is (a) in violation of constitutional provisions; (b) in excess of the statutory authority or jurisdiction of the agency; (c) made upon unlawful

procedure; (d) affected by other error of law; (e) unsupported by competent, material, and substantial evidence; or (f) arbitrary or capricious. The review in this court is de novo on the record.

The principal controversy between the parties is whether Pamida is subject to being taxed by the combined income method on the theory that it operates a unitary business through its subsidiary corporations. Pamida contends that for tax purposes its income should be computed by a separate accounting method.

These accounting methods were discussed and defined in *Caterpillar Tractor Co. v. Lenckos*, 84 Ill. 2d 102, 115-16, 417 N.E.2d 1343, 1350-51 (1981), *appeal dismissed* ____ U.S. ____, 103 S. Ct. 3562, 77 L. Ed. 2d 1402 (1983), as follows: "There are two basic methods of accounting used by State tax officials to determine net taxable income in such a way as to avoid the constitutional problems which arise when a State attempts to tax that portion of a corporation's business income which clearly has been earned in other States or countries. The first method, called separate accounting, attempts to segregate and identify the sources or transactions which account for the generation of business income. . . .

"The other method of accounting, which the Director agreed should apply here, and which has been described, is the combined or unitary apportionment method of reporting. In order to apply this method to the tax returns of a corporate taxpayer, it must first be determined that it is a member of a unitary business group. As was briefly discussed, the term 'unitary business group,' when applied to a corporation which has subsidiaries or other associated corporations in other States or countries, is used to describe a group of functionally integrated corporate units which are so interrelated and interdependent that it becomes relatively impossible for one State to determine the net income generated by a particular corporation's activities within the State and there-

fore allocable to that State for purposes of taxation."

The purpose of the combined or unitary apportionment method of reporting is to permit a fair determination of the portion of business income that is attributable to business activity within the state by the reporting member of the unitary group.

The Illinois court defined a unitary business operation in these words: "A unitary business operation is one in which there is a high degree of interrelationship and interdependence between, typically, one corporation, which generally is a parent corporation, and its corporate subsidiaries or otherwise associated corporations, which group is usually engaged in multistate, and in some cases in international, business operations. Because of this integrated relationship, which is reflected in all phases of the business operations, it is extremely difficult, for purposes of taxation, to determine accurately the measure of taxable income generated within a State by an individual corporation of the unitary group which is conducting business in the State. Typically, the corporation's transactions and the income derived from them actually represent the business efforts of the individual corporation, plus efforts of other and possibly all members of the unitary business operation. As a result, the claimed income of each member of the group standing alone does not, in a real sense, reflect the conducting of a unitary business operation because the income is not attributable solely to the effort of the particular corporation." *Caterpillar Tractor Co. v. Lenckos*, *supra* at 108, 417 N.E.2d at 1347. See, also, *Kellogg Company v. Herrington*, *ante* p. 138, 343 N.W.2d 326 (1984).

The evidence before the commissioner consisted primarily of a stipulation of facts entered into by Pamida and the Department of Revenue. The stipulation shows that Pamida and its subsidiaries are primarily engaged in discount retailing and service merchandising or "rack jobbing."

Pamida and its subsidiaries are organized as a

three-tier corporate structure. In the first tier is Pamida, which is the parent corporation for all of the affiliated corporations and owns 100 percent of the stock of the second tier corporations. The second tier consists of three corporations, NuWay Drug Service of South Dakota, NuWay Drug Service, Inc. (an Iowa corporation), and NuWay Drug Service, Inc. (a Nebraska corporation), which operate the rack jobbing business and a corporation in each state where the discount retailing business is carried on. The third tier is comprised of corporations which own and operate the individual Gibson Discount stores and Quality Discount Centers. These third tier corporations are domestic corporations of the state in which the store is located. The stock of these corporations is owned by the second tier corporations.

The directors and officers of the subsidiaries of Pamida are also officers or employees of Pamida. Two men who serve as directors and officers of the subsidiaries are also directors as well as officers of Pamida.

All of the discount stores operate on a self-service, discount, primarily cash-and-carry basis, with the object of maximizing sales volume and inventory turnover with minimum overhead expenses. Pamida has a procedures manual which provides the procedures and policies for activities relating to the operation of local Gibson Discount Centers. Each discount center serves essentially a very small geographic district. The principal categories of merchandise sold in the Gibson Discount Centers are the following: health and beauty aids, soft goods (including apparel and footwear), automotive supplies, hardware and appliances, housewares, sporting goods, food and tobacco products, school and pet supplies, toys, jewelry, cameras, and film. Commencing with fiscal 1973, there were 145 general merchandise Gibson Discount Centers in operation in the states of Illinois, Iowa, Kansas, Minnesota,

Missouri, Nebraska, North Dakota, South Dakota, Wisconsin, and Wyoming.

Pamida employs district managers who are assigned by geographic region. They have primary responsibility for preparing new stores for opening, including furnishing such stores with fixtures and initial inventories of goods, and hiring the initial store staff. With respect to existing stores the district managers have responsibility for locating and correcting trouble areas and for the handling of major personnel problems. The district managers also evaluate the managers and make recommendations to Pamida regarding transfers, promotions, and termination of managers. In fiscal 1973 there were 11 district managers; in 1974, 16; in 1975, 17; and in 1976, 17.

Pamida hires assistant managers, places them for on-the-job training at Gibson Discount Centers, and carries them on its payroll during this limited training period. It determines the promotion of assistant managers and, with the concurrence of the affected manager, transfers managers from one store to another. It sets the salary and bonuses for the managers for the Gibson Discount Centers and Quality Discount Centers.

The managers of the Gibson Discount Centers are given discretion in several areas. They hire and fire their subordinates, except for assistant managers or manager trainees. They set the wage levels for these same employees. They can purchase merchandise from local vendors. These items include cigarettes, magazines, candy, and other similar items. They can place local advertising. They can write checks for small purchases. Except in the case of store managers and assistant store managers, transfer of personnel between discount centers is nonexistent.

Thirty-five to forty percent of the merchandise sold by Gibson Discount Centers comes through the Pamida warehouse. Another 35 to 40 percent is pur-

chased from outside suppliers on the basis of contracts negotiated by Pamida. The remainder is purchased by the manager of the Gibson Discount Center from local vendors. Pamida determines what type of merchandise may be carried by the Gibson Discount Centers after taking into account recommendations of the store managers, particularly with respect to regional needs and demands.

Initial financing of the inventory for a new Gibson Discount Center is through credit provided by Pamida and outside suppliers. Other financing may be arranged by Pamida through the local store's local banks. Operating capital is obtained by Pamida through loans under which Pamida and its subsidiaries are severally and jointly liable. Insurance for the retail stores is obtained by Pamida, but each local store is separately billed. The leasing of store facilities not owned by Pamida is arranged by Pamida; however, the lease payments are the liability of the local store.

Pamida performs a number of administrative services for the Gibson Discount Centers. It maintains the books and records for the local stores. It pays all invoices for merchandise from outside suppliers, writing checks on the stores' local checking accounts. It prepares the payroll for Gibson Discount Centers, although time records are kept by the local stores and the rates of pay are set by the local managers. It prepares and files all the tax returns for the retail stores. For these services Pamida charges the local stores 2.4 percent of their soft goods sales and 2 percent of all other sales.

Pamida provides group insurance, profit sharing, and stock option plans for employees of the Gibson Discount Centers. Payrolls are handled by Pamida. The complaint procedures for Gibson employees include an appeal to the personnel director and district manager of Pamida. Pictures of all managers, assistant managers, group managers, and department supervisors are required to be on file with

Pamida. Personnel procedures and policies are provided in the Pamida procedures manual.

Virtually all income and approximately 95 percent of all expenses are attributed to individual store locations through the use of a cost accounting system. Expenses relating to the acquisition and the transportation of goods for sale are allocated by a markup, so that each store incurs an expense of approximately 8 percent over and above the actual cost of acquiring the goods. Administrative expenses are allocated by a management fee charge of 2 to 2.4 percent of sales.

NuWay Drug Service, Inc., an Iowa corporation, is a wholly owned subsidiary of Pamida. It sells health and beauty aids, housewares, soft goods, and miscellaneous supplies through a rack jobbing operation, and sells merchandise to Gibson Discount Centers, NuWay Drug Service of South Dakota, and NuWay Drug Service, Inc., of Nebraska, and to nonaffiliated companies.

NuWay Drug Service, Inc., a Nebraska corporation, is a wholly owned subsidiary of Pamida. During 1972, 1973, 1974, and 1975, its business consisted almost exclusively of selling merchandise to Pamida and its subsidiaries. It has several wholly owned subsidiaries which operated small discount retail stores which were operated like the Gibson Discount Centers.

The service merchandising or rack jobbing business operated from warehouses in Omaha and South Sioux City, Nebraska, by the NuWay Drug Service corporations of Iowa, Nebraska, and South Dakota, did, at various times during the years in question, distribute about 8,500 nonfood items to approximately 1,400 nonaffiliated retailers located in nine midwestern states.

The evidence which has been summarized, and which was taken from the stipulation of the parties, supports a finding that Pamida and its subsidiaries conduct a unitary business and that the proper meth-

od of determining the income derived from sources in Nebraska was the combined income approach. *Coca Cola Co. v. Dept. of Rev.*, 271 Or. 517, 533 P.2d 788 (1975); *Mont. Dept. of Revenue v. ASARCO*, 173 Mont. 316, 567 P.2d 901 (1977), *appeal dismissed* 434 U.S. 1042, 98 S. Ct. 884, 54 L. Ed. 2d 793 (1978).

Pamida complains that rules Reg-24-16 and Reg-24-17 of the Nebraska Corporation Income Tax Regulations, which became effective January 26, 1974, could not be applied to income from prior years. The district court correctly determined that Nebraska's version of the Uniform Division of Income for Tax Purposes Act, Neb. Rev. Stat. §§ 77-2735 to 77-2752 (Reissue 1981), the Multistate Tax Compact, Neb. Rev. Stat. § 77-2901 (Reissue 1981), and other statutory provisions authorize the use of the combined income approach. See *Kellogg Company v. Herrington*, *ante* p. 138, 343 N.W.2d 326 (1984).

As the Illinois court stated in *Caterpillar Tractor Co. v. Lenckos*, 84 Ill. 2d 102, 117-20, 417 N.E.2d 1343, 1351-53 (1981): "The first major attempt in promoting uniformity among the States with respect to taxing interstate business was the drafting and adoption of the Uniform Division of Income for Tax Purposes Act (UDITPA). UDITPA was incorporated into article IV of the Multistate Tax Compact (MTC) (Ill. Rev. Stat. 1973, ch. 120, par. 871 *et seq.*) and as stated in the Official Commentary cited above, the MTC became effective in Illinois on July 1, 1967. The questions before us now are: (1) whether UDITPA authorizes the use of the unitary method of apportionment; and (2) if it does, whether this method has been incorporated into the Illinois Income Tax Act.

"Considering whether UDITPA authorizes the use of unitary apportionment, we first observe that UDITPA does not make any reference to unitary apportionment or combined reporting. The absence of specific reference to the unitary method is not, how-

ever, critical, for in a number of jurisdictions that adopted UDITPA and in some of them, the MTC as well, courts have held that unitary apportionment or combined reporting was authorized though the particular income tax statute made no reference to this method of reporting. In *Coca Cola Co. v. Department of Revenue* (1975), 271 Or. 517, 533 P.2d 788, the Oregon Department of Revenue applied a unitary or combined apportionment method of accounting to the income tax returns of the plaintiff corporation and its wholly owned subsidiaries, which had filed separate returns using Oregon's three-factor apportionment formula, which is similar to that set out in the Illinois statute. The Department argued that the combined method, though not specifically provided for in the tax statutes into which UDITPA had been incorporated, would more accurately reflect the income of what it contended was a unitary business operation. Concluding that the company's syrup and bottling operations were so inextricably connected as to constitute a unitary business, the court stated: 'The combined method of apportionment reporting is wholly consistent with, and a natural extension of, the apportionment method.' (271 Or. 517, 528, 533 P.2d 788, 793.) The court held that the plaintiff and its subsidiaries 'are all part of the same unitary operation and were required to use the combined method of reporting for the tax years in question.' 271 Or. 517, 529, 533 P.2d 788, 794. See also *American Smelting & Refining Co. v. Idaho State Tax Com.* (1979), 99 Idaho 924, 592 P.2d 39; *Montana Department of Revenue v. American Smelting & Refining Co.* (1977), 173 Mont. 316, 567 P.2d 901.

"The Supreme Court has also held that the absence of any statutory reference to the unitary method of reporting does not forbid its use. In *Butler Brothers v. McColgan* (1942), 315 U.S. 501, 86 L. Ed. 991, 62 S. Ct. 701, the plaintiff, an Illinois corporation conducting a wholesale goods and general merchandise business, was licensed to conduct

business in California. The company had wholesale distributing divisions located in seven states, including California, each serving a district area and each controlling its own sales force, accounting procedures, sales operations and credit and financing procedures as well. Though the California tax statute did not specifically authorize the combined method of reporting or make any references to unitary operations, the court upheld the State's decision to apply the unitary method to the combined income derived from the operations of the seven divisions. In its holding the court stated that 'this Court has recognized that unity of the use and management of a business which is scattered through several states may be considered when a State attempts to impose a tax on an apportionment basis. As stated in *Hans Rees' Sons, Inc. v. North Carolina*, [(1931), 283 U.S. 123, 133, 75 L. Ed. 879, 905, 51 S. Ct. 385, 389], "the enterprise of a corporation which manufactures and sells its manufactured product is ordinarily a unitary business, and all the factors in that enterprise are essential to the realization of profits." ' 315 U.S. 501, 508, 86 L. Ed. 991, 996, 62 S. Ct. 701, 704-05.

"In a later case, *Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U.S. 450, 3 L. Ed. 2d 421, 79 S. Ct. 357, the court addressed a similar challenge to the use of a unitary apportionment method, and in citing *Hans Rees'* and other apportionment decisions (*e.g., Bass, Ratcliff & Gretton, Ltd. v. State Tax Com.* (1924), 266 U.S. 271, 69 L. Ed. 282, 45 S. Ct. 82; *Underwood Typewriter Co. v. Chamberlain* (1920), 254 U.S. 113, 65 L. Ed. 165, 41 S. Ct. 45) the court upheld the use declaring: 'These cases stand for the doctrine that the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs.' 358 U.S. 450, 460, 3 L. Ed. 2d 421, 428, 79 S. Ct. 357, 363. See also *Exxon Corp. v. Wisconsin Department*

of Revenue (1980), 447 U.S. 207, 65 L. Ed. 2d 66, 100 S. Ct. 2109; *Mobil Oil Corp. v. Commissioner of Taxes* (1980), 445 U.S. 425, 63 L. Ed. 2d 510, 100 S. Ct. 1223."

The fact that Pamida uses a method of separate accounting is not binding upon the State. In *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 100 S. Ct. 2109, 65 L. Ed. 2d 66 (1980), the U.S. Supreme Court held that the use of a separate functional accounting system by Exxon did not prevent Wisconsin from using the combined or unitary apportionment method to determine the income of Exxon which was subject to tax in Wisconsin. The Court said at 221-23: "As this Court has on several occasions recognized, a company's internal accounting techniques are not binding on a State for tax purposes. For example, in *Butler Bros.* v. *McColgan*, *supra*, an interstate business challenged the application of the California apportionment statute. The company was engaged in the wholesale dry goods and general merchandise business as a middleman, and it had distributing houses in seven States, including one in California. Each house maintained stocks of goods, had a cognizable territory, had its own sales force, did its own solicitation of sales, made its own credit and collection arrangements, and kept its own books. There was, however, a central buying division that was able to purchase goods for resale at a lower price. The company used 'recognized accounting principles,' 315 U.S., at 505, to allocate all costs and charges to each house, with certain centralized expenses allocated among the houses. Based on that 'separate accounting system,' *id.*, at 507, the business asserted there was no net income in California.

"We concluded that California could constitutionally apply its apportionment formula to the company's total net income to establish taxable income, rather than being limited to the income shown by the

taxpayer's accounting methods to be attributable to the one house in that State. . . .

"Similarly, in *Mobil Oil Corp.* v. *Commissioner of Taxes*, we noted that 'separate accounting, while it purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale.' 445 U.S., at 438. Since such factors arise 'from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable "source." Although separate geographical accounting may be useful for internal auditing, for purposes of state taxation it is not constitutionally required.' "

We conclude that the order of the commissioner was supported by competent, material, and substantial evidence; it was not in violation of constitutional provisions nor in excess of the statutory authority or jurisdiction of the agency; and it was not arbitrary nor capricious. The judgment of the district court must be affirmed.

AFFIRMED.

PAMELA S. RICHEY, APPELLANT, V. RICHARD J. RICHEY, APPELLEE.

344 N.W.2d 642

Filed February 24, 1984. No. 83-046.

1. **Child Custody: Appeal and Error.** A divorce decree will not be modified as to custody 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.
2. _____: _____. Although an award of custody is subject to review de novo, the determination of the trial court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
3. **Child Custody.** Although it is generally sound public policy to keep children together in the custody of one parent when possible, con-

siderations of public policy do not, in all cases, prevent dividing of custody so that each parent may have custody of a child or children.

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

Randal B. Brown, for appellant.

Richard L. Halbert, for appellee.

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

GRANT, J.

This is an appeal from the district court's modification of a divorce decree wherein the custody of the older of two minor children was changed from the appellant mother to the appellee father. This case is heard before us de novo. *Dunne v. Dunne*, 211 Neb. 636, 319 N.W.2d 741 (1982).

On December 6, 1979, a decree was entered dissolving the marriage of the parties and granting custody of the two minor children, Jeremy, born July 1, 1977, and Timothy, born August 6, 1979, to the children's mother. A petition to modify the decree was filed by the children's father on October 6, 1982. After a hearing on December 17, 1982, the court determined that a change of circumstances had occurred and that the best interests of Jeremy required that his custody be awarded to the father. The mother appeals.

The petition to modify the decree contained no request to also change the custody of the younger brother, Timothy, and although this results in concern to the court, we restrict our review to the older brother, Jeremy.

Evidence adduced at the hearing indicated the appellant remarried sometime after the divorce and was divorced again on September 10, 1982, from her second husband, Richard Beer.

Jeremy suffers from "flecked retina syndrome," which has left him legally blind. He has attended

school for the visually handicapped in Nebraska City since November 29, 1982. His schooling will not be disrupted by the custody change to the appellee.

Testimony at the hearing showed that Jeremy had suffered a number of "accidents." These accidents included an incident when Jeremy drank gasoline, which required hospitalization for 4 days. This incident occurred on May 5, 1979, prior to the divorce between these parties but at a time when appellant had temporary custody of Jeremy. Appellant was with Jeremy at a trailer owned by Richard Beer, who married appellant after the divorce between appellant and appellee. Mr. Beer and appellant were painting and, during appellant's absence to go to her mother's home 4 miles away, Jeremy drank some gasoline. Appellant was later informed and, with Mr. Beer, took Jeremy to a hospital in Falls City. The hospital report stated: "This child apparently ingested undetermined amount of gasoline at home several hours, like about 6 hours before this hospital admission." Appellee found out about this incident from a nurse at the hospital.

On July 20, 1980, Jeremy suffered a scalp laceration. According to the appellant, this was the result of falling out of bed. On November 8, 1980, Jeremy suffered a ½-inch laceration to the left hand, requiring stitches, when he apparently fell on a pop bottle while playing outdoors. On September 24, 1982, Jeremy's heel and tendons in his foot were cut by a riding lawnmower operated by the appellant's second husband, Mr. Beer. Jeremy was confined to a wheelchair for a month after this incident.

In addition, Jeremy complained to the appellant in the summer of 1980 that a young relative of appellant's husband had sexually molested him while they were "playing." Appellant told appellee about this incident, but by the time the child was examined the medical doctor concluded that too much time had passed to properly evaluate the situation.

The paternal grandmother, Paula Richey, testified

that on visitations when the appellee would bring Jeremy directly to her home, she would bathe him because he was dirty. There was also evidence that Jeremy's clothing was dirty on his visits to Paula Richey. Some of Jeremy's battleship-gray underclothing was introduced in evidence. Mrs. Richey also complained of the child's riding in the back of a pickup truck without adult supervision while in his mother's care.

Mr. Beer testified that since his divorce from appellant, he has cared for the children, sometimes overnight, when the appellant was on dates.

The decree in this matter will not be modified unless there has been a change of circumstances indicating that the person who has custody is unfit for that purpose or that the best interests of the child require such action. *Dunne v. Dunne*, 211 Neb. 636, 319 N.W.2d 741 (1982). The district court determined that a change in circumstances had occurred and that the best interests of the child required the change of custody. On a de novo review we determine that the action of the trial court was correct and that it is in the best interests of Jeremy to change his custody to his father at this time.

The appellant contends that if Jeremy's custody is changed, it will damage the relationship he has with his brother, Timothy. We are not convinced that the potential emotional damage of such a separation outweighs the physical damage already suffered by Jeremy. Although it is generally sound public policy to keep children together in the custody of one of the parents, considerations of public policy do not, in all cases, prevent dividing the custody of children in a marriage dissolution situation so that each parent may have custody of a child or children. *Boroff v. Boroff*, 197 Neb. 641, 250 N.W.2d 613 (1977).

The trial court's action was proper and is affirmed.

AFFIRMED.

Cite as 216 Neb. 569

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

344 N.W.2d 645

Filed February 24, 1984. No. 83-145.

1. **Search Warrants: Affidavits.** An affidavit based upon a tip from an informant is sufficient if the magistrate is informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible.
2. _____: _____. An affidavit made to obtain a search warrant is presumed valid, and the defendant has the burden to establish that the affidavit was false.
3. _____. _____. If the allegations remaining, after statements shown to be false are removed from the affidavit, are sufficient to support the issuance of a warrant, the affidavit and warrant are valid.

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

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

Paul L. Douglas, Attorney General, and Linda L. Willard, for appellee.

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

BOSLAUGH, J.

This is an appeal in a post conviction proceeding brought pursuant to Neb. Rev. Stat. § 29-3001 (Reissue 1979).

The defendant, Ernest Sims, was convicted in August 1975 of the unlawful possession with intent to deliver heroin and was sentenced to a term of 3 to 10 years' imprisonment. The judgment was affirmed by this court on September 16, 1977.

In this action the defendant seeks post conviction relief to vacate the conviction and sentence on the ground that the no-knock search warrant issued upon the affidavit of police officer Leonard Smith, and which led to the discovery of heroin at the de-

fendant's residence, was obtained in violation of his constitutional rights. In particular, the defendant contends that Smith, the officer-affiant, was not credible and his informant, James Washington, was not shown to be credible and reliable.

The issue is raised for the first time in this proceeding. A motion to suppress was not filed by defense counsel prior to the trial.

The district court denied post conviction relief and found that Smith was a "credible witness who obtained information from an informant who had on prior occasions supplied information to the Omaha Police Division and that said prior information proved to be credible and that at the time of the issuance of the warrant in question the informant was a reliable informant based upon the evidence produced at the above hearing." This finding is assigned as error.

The statement of probable cause in the affidavit was as follows: "That the following are the grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit: On February 11 1975 Omaha Police Officer Leonard Smith received information from a past proven reliable informant, who has proven his reliability in the past to Officer Smith in connection with Narcotics, which Leonard Smith had diligently checked out and found to be true and accurate and with some of this informants information officer Smith has been able to make felony arrests within the past sixty days in connection with Narcotics violations. This informant advised Officer Smith that they had been inside the residence of 1801 Pinkney Street, Omaha Douglas County Nebraska within the past twenty-four hours and observed Ernest Sims inside of this residence and had in his possession several bags of what the informant knows from prior experience to be Heroin. It is personally known by Officer Smith through previous investigations into Ernest Sims that 1801 Pinkney is at least a part-time residence of

Ernest Sims and his new wife whose maiden name was Beverly Curtis. It is personally known by Officer Smith through other investigations and information from non-confirmed informants that Ernest Sims is an active Heroin dealer in the Omaha Nebraska area. From the information provided by the reliable informant and the personal knowledge that Officer Smith has of Ernest Sims and Beverly Curtis, Officer Smith feels that he has reasonalbe [sic] grounds to believe and does believe that Ernest Sims and/or Beverly Curtis have concealed inside of 1801 Pinkney Street Heroin which is contrary to the laws of the State of Nebraska."

At the hearing Smith testified that in addition to the informant, James Washington, he also relied upon "non-confirmed" informants and his own personal knowledge. Smith testified that without his records he could not remember having made felony arrests based on information from Washington within 60 days before the affidavit was signed. Smith stated that it was an Omaha police procedure to have an informant make three "confirmed buys" supervised by police before the informant was considered reliable. Smith testified that Washington had voluntarily contacted the police department with information and that Washington had given the police reliable information on prior occasions and had proven his reliability to police. Deputy Police Chief Swanson testified that before an informant's information could be used as the basis for an affidavit, his reliability had to be proven to the department.

The evidence shows that in 1976 Officer Smith was indicted by a federal grand jury for solicitation of bribes, later amended to conspiracy to distribute heroin. Smith was convicted and sentenced on that charge. The indictment alleged that Smith was contacted by the conspiracy in August 1975, 6 months after the affidavit in the present case was signed.

The evidence further shows that in December 1975, at a hearing in another case, Smith testified

that he had known the informant Washington for approximately a year. Smith testified that he had relied upon information given by Washington in two prior investigations, that of Sims and that of a Doris Thornton.

James Washington testified that he had been hospitalized for a mental illness for approximately 5 years and had received shock treatments. Washington was unable to remember more than hazily any of the events of 1975, and in particular he could not remember acting as a police informant during this period.

The defendant contends that the warrant was invalid because the information supplied by the affiant was untrue, and, therefore, the affidavit did not contain the requisite information to support the issuance of a warrant based upon an informant's tip.

One seeking post conviction relief has the burden of establishing the basis for such relief. The findings of the district court in denying relief will not be disturbed on appeal unless they are clearly erroneous. *State v. Pope*, 213 Neb. 645, 330 N.W.2d 747 (1983); *State v. Herren*, 212 Neb. 706, 325 N.W.2d 151 (1982).

In *State v. Stickelman*, 207 Neb. 429, 435, 299 N.W.2d 520, 524 (1980) (quoting *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)), we stated that there is " ' a presumption of validity with respect to the affidavit supporting the search warrant. . . .' " In order to overcome this presumption the defendant bears the burden of demonstrating that the affidavit was false. *State v. Stickelman*, *supra*. *Franks v. Delaware*, *supra*, indicates that in order to invalidate a warrant it must be shown that the affiant made a deliberate falsehood or acted with reckless disregard for the truth, and it must be demonstrated that the challenged material is "material" or necessary to a finding of probable cause. *United States v. Young Buffalo*, 591 F.2d 506 (9th Cir. 1979), *cert. denied* 441 U.S. 950, 99 S. Ct.

2178, 60 L. Ed. 2d 1055. The defendant must then show that when the challenged matter is excised from the affidavit, the affidavit is left with insufficient content to establish probable cause. *Franks v. Delaware*, *supra*; *United States v. Young Buffalo*, *supra*.

In the present case Sims contends that Smith's inability to recall, due to lack of access to his records, whether he had made prior arrests based upon information from Washington, and what the nature of Washington's "controlled buys" were, renders the information contained in the affidavit not credible. This simply is not the case. Smith's testimony by itself does not overcome the presumption that the affidavit is valid. It merely indicates that without the use of his records, Smith could not recall events which occurred 8 years before the hearing.

Sims also argues that because Smith testified in December 1975 that he had used information from Washington on two prior occasions and that the dates of the cases involved show that the Sims case was the first case in which Smith relied upon Washington's information, it follows that Smith's statement that Washington was a "past proven reliable informant" whose information had led to "felony arrests within the past sixty days" was false. While the Sims case may have been the first one resulting in an arrest in which Smith relied upon Washington, it is not necessarily the first time that Smith had relied upon Washington. Smith testified that police procedure required that an informant make three confirmed buys before any arrests can be made through him. This proves the reliability of an informant to the department. Smith testified that, although he could not recall the details without access to the records, Washington had so proven his reliability. Deputy Police Chief Swanson testified that it was police practice to not use information from an informant on an affidavit until he had been proven reliable.

The evidence does not establish that arrests had been made *by Smith* based upon information from Washington prior to the affidavit, as alleged in the affidavit. At the hearing Smith was unable to recall the details of any such arrests. Smith's testimony in December 1975 indicates that Sims' arrest was the first one made by Smith in reliance upon Washington's information. We conclude that the statement in regard to prior felony arrests must be disregarded.

While the fact that Smith was indicted and convicted of conspiracy to deliver heroin may affect his credibility generally, it does not prove that all of the statements made in the affidavit were untrue.

If the statement with regard to felony arrests made within 60 days before the affidavit is disregarded, the remainder of the affidavit is sufficient to support the issuance of a warrant. The affidavit alleges that Smith relied upon information of a past proven reliable informant who had given reliable information to Smith in the past, which Smith had found to be true. The affidavit states that the informant personally observed heroin in Sims' possession at his residence. This was sufficient to authorize the issuance of a search warrant. An affidavit based upon a tip from an informant is sufficient if the magistrate is informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible. *State v. Graves*, 193 Neb. 797, 229 N.W.2d 538 (1975).

The judgment of the district court is affirmed.

AFFIRMED.

Cite as 216 Neb. 575

VIRGINIA T. HANZLIK, APPELLANT, V. FREDERICK F. PAUSTIAN, APPELLEE.

344 N.W.2d 649

Filed February 24, 1984. No. 83-295.

1. **Summary Judgment: Affidavits.** In a summary judgment proceeding, affidavits of a lay witness attempting to interpret medical testimony and to arrive at conclusions as to the possible negligence of a physician and surgeon generally are insufficient to meet the burden of a party refuting a prima facie showing of no negligence by the movant.
2. _____: _____. An affidavit opposing the rendition of a summary judgment, to be effective, must be made on personal knowledge, must set forth such facts as would be admissible in evidence in detail and with precision, and must show affirmatively that the affiant is competent to testify to the matters stated therein.

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

Jon B. Abbott, for appellant.

Thomas J. Shomaker of Sodoro, Daly & Sodoro, for appellee.

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

HASTINGS, J.

The plaintiff has appealed an order of the district court granting the defendant's motion for summary judgment.

This case appears here for the second time. The previous case, one involving alleged medical malpractice, appears under the same title at 211 Neb. 322, 318 N.W.2d 712 (1982), wherein the factual background is set forth. We reversed the granting of defendant's motion for summary judgment.

By way of review we would note that in the previous case we held that whether a specific manner of treatment or exercise of skill by a physician demonstrates a lack of skill or knowledge, or a failure to exercise reasonable care, is a matter that must usually be proved by expert testimony. We further pointed out that in a case such as this, where the de-

fendant is the moving party, such party must make a prima facie showing of the absence of negligence before the burden of producing evidence shifted to the plaintiff.

In that earlier case we determined that the defendant, Dr. Paustian, in his deposition explained the surgical procedures followed by him and detailed the possible consequences which might be expected therefrom, but concluded that "nowhere do we find any evidence that such procedures met the accepted standards of reasonable medical care." *Id.* at 327, 318 N.W.2d at 716.

On remand to the district court the defendant again filed a motion for summary judgment, supported by his affidavit that "he followed the generally accepted and recognized standard of care or skill of the community or similar communities in the use of the dilitation [sic] procedure." That evidence satisfied our requirement that the moving party must make a prima facie showing of the absence of negligence. To meet her burden of producing evidence of negligence on the part of the defendant as referred to above, the plaintiff submitted the affidavit of her trial attorney.

As recited in her brief, that portion of the affidavit which the plaintiff argues establishes evidence of negligence on the part of the defendant refers to two entries made by the defendant in the "Doctor's Orders and Progress Notes" taken from the hospital records. A portion of the entries made on August 22, 1974, include "$\bar{o}$ subcut. emphysema. A-1) Mucosal tear $\bar{s}$ evidence infection." In his affidavit plaintiff's counsel interprets those entries as follows: "$\bar{o}$ (some degree) subcut(aneous) emphysema. A-1) Mucosal tear $\bar{s}$ (without/or some) evidence infection." However, the glossary of abbreviations and symbols, the source of which is not shown, attached to the affidavit reveals that the symbol $\bar{s}$ means "without."

Counsel then argues that the defendant had testified in his deposition that the dilation procedure

would be terminated upon there appearing evidence of a rupture of the esophagus and that a rupture is conclusively evident upon finding evidence of subcutaneous emphysema.

The deposition testimony alleged to support the conclusion that the dilation procedure would be terminated upon there appearing evidence of a rupture of the esophagus may be summarized as follows: The defendant testified that, generally speaking, dilation procedures are terminated if there is concern about a rupture, even though it may be only on a temporary basis. Serial blood counts and X-rays are then obtained.

There is no indication in the records that these latter procedures were carried out on August 22 or before the next dilation, which was accomplished on August 23. However, an esophagram study, a barium X-ray to determine any possible disruption of the integrity of the esophageal wall, was carried out on August 23, following dilation. This indicated a mucosal irregularity as of a superficial tear, but disclosed no evidence of any compromise of the integrity of the wall of the esophagus.

In support of her argument that a rupture of the esophagus would be conclusively evident upon a finding of subcutaneous emphysema, plaintiff cites additional deposition testimony of the defendant. The defendant did describe subcutaneous emphysema as an accumulation of air beneath the skin. He went on to say that a very distinctive sign of a perforation of the esophagus is a so-called mediastinal emphysema, which means an accumulation of air within the tissues of the mediastinum. Signs of such a condition include the sound of a mediastinal crunch, which is detected by the use of a stethoscope; and a fair inference may be drawn from the defendant's testimony that such a procedure was carried out.

The defendant agreed that a tear in the esophagus may involve swelling in the tissues of the neck, which was not present in this case. Finally, ac-

cording to the deposition, a superficial tear of the mucosa would not necessarily involve a weakening of the esophageal wall. But if there was a disruption of the muscle coat such that there was communication between the lumen of the esophagus and the surrounding mediastinal tissues, then it would be justified to suspect the development of a mediastinal emphysema problem. In such a case one might very well expect an infection within those tissues, and no infection was found.

The affidavit then concludes with the following recitation: "C) that Defendant failed to terminate procedures on the 22nd and treat conservatively with antibiotics, especially Clendamycin [sic], the most powerful and least used (toxic) except in life threatening situations; but rather waiting, did not employ it until it was too late on August 25th, the day of major surgery to save Plaintiff's life.

"16. That experts are available and will testify, verifying the facts herein, upon being subpoenaed; the trial of this case being specially set on a day certain far enough in the future to ensure their appearance; that the Defendant by affidavit, filed January 12, 1983, has admitted that the procedures he employed are 'the generally accepted and recognized standard of care or skill of the community or similar communities in the use of the dilitation [sic] procedure'; but Defendant has not denied negligence in the use of non-dilitation [sic] procedures."

The various statements and conclusions offered by the plaintiff's counsel in his affidavit are attempts by a lay witness to interpret medical testimony and arrive at conclusions as to the possible negligence of a physician and surgeon. We adhere to the rule expressed in our former opinion, *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982), that this must be proved by expert testimony.

We do not agree with counsel's conclusion that "Defendant has not denied negligence in the use of non-dilitation [sic] procedures." In his affidavit the

defendant states "that based upon his personal knowledge and experience as a specialist in the practice of gastroenterology, he denies any negligence on his part in his treatment of Plaintiff." Furthermore, he stated "that he followed the generally accepted and recognized standard of care or skill of the community or similar communities in the use of the dilitation [sic] procedure." This is the approved test for determining whether a physician was negligent in the performance of medical services. *Kortus v. Jensen*, 195 Neb. 261, 237 N.W.2d 845 (1976).

We believe that the defendant has now made a prima facie showing that he would be entitled to a judgment if the evidence were uncontroverted at trial, as required by our former opinion in *Hanzlik*. Therefore, "Summary judgment should be granted to the movant unless the opposing party offers *competent evidence* . . . that there is a genuine issue as to a material fact." (Emphasis supplied.) *Hanzlik* at 328, 318 N.W.2d at 716.

A conclusionary statement of alleged facts made by a nonexpert witness as to the care, skill, or diligence exercised by one in the treatment of a medical condition, to be verified by unidentified experts at the time of trial, does not fulfill the plaintiff's burden of establishing a genuine issue of a material fact. *Hanzlik v. Paustian, supra.*

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Neb. Rev. Stat. § 25-1334 (Reissue 1979).

" 'Under this provision [Fed. R. Civ. P. 56(e)], therefore, statements in affidavits as to opinion, belief, or conclusions of law are of no effect. The same is true of summaries of facts or arguments, and of statements which would be inadmissible in

evidence * * *.' " *Eden v. Klaas*, 165 Neb. 323, 328, 85 N.W.2d 643, 646 (1957).

"An affidavit opposing the rendition of a summary judgment, to be effective, must be made on personal knowledge, must set forth such facts as would be admissible in evidence in detail and with precision, and must show affirmatively that the affiant is competent to testify to the matters stated therein." *In re Freeholders Petition*, 210 Neb. 583, 589, 316 N.W.2d 294, 298 (1982).

The judgment of the district court in granting summary judgment was correct and is affirmed.

AFFIRMED.

JOHN M. MCHENRY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT W. REDDING, DECEASED, APPELLANT, V. FIRST NATIONAL BANK & TRUST COMPANY OF LINCOLN, APPELLEE.

344 N.W.2d 652

Filed February 24, 1984. No. 83-314.

1. **Summary Judgment.** One is entitled to summary judgment only when there is no genuine issue as to any material fact, the ultimate inferences to be drawn from the facts are clear, and he is entitled to judgment as a matter of law.
2. _____. In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn therefrom.
3. **Banks and Banking: Trust Funds: Liability.** When a bank accepts a deposit of funds it knows to be of a trust nature, and also knows that the depositor is without authority to deal with those funds, it distributes the funds to the depositor at its peril, with liability to the true owner of those funds.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded for further proceedings.

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

Daniel R. Stogsdill of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

KRIVOSHA, C.J., WHITE, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired.

CAPORALE, J.

Plaintiff-appellant, John M. McHenry, personal representative of the estate of Robert W. Redding, deceased, filed this action against First National Bank & Trust Company of Lincoln, defendant-appellee, claiming that First National negligently transferred funds out of the estate's checking account to one not empowered to receive them. The trial court entered a summary judgment in favor of First National, dismissing McHenry's suit. We reverse and remand for further proceedings consistent with this opinion.

On April 28, 1980, the deceased executed a document granting his daughter, Joanna Mitchell of Ogden, Utah, a durable power of attorney. On that same day Mitchell transferred funds held jointly by the deceased and his wife in two accounts at National Bank of Commerce at Lincoln, Nebraska, to a new account at the same bank, in which account she and the deceased were named as joint owners. The parties assert the amount involved is $12,474.45, a fact not documented by the record. Decedent's death occurred on April 30, 1980, 2 days later.

On the very same day of decedent's death, Mitchell withdrew the funds from the 2-day-old joint account.

Immediately after decedent's death, McHenry, a member of the Nebraska bar practicing at Lincoln, was appointed as conservator and guardian for the decedent's widow. McHenry was informed that Mitchell was returning to Utah with the subject funds, and traced her to a motel. He requested that she return the funds.

Mitchell contacted Miles Johnston, Sr., another Lincoln attorney, and on May 2, 1980, Johnston and Mitchell went to First National in order to open an es-

tate checking account. First National opened such an account through its employee Eve Uridil and accepted a $12,000 deposit. The account was opened in the name of "Robert W. Redding Estate By Joanna M. Mitchell, Personal Representative." The signature card noted that Mitchell's appointment as personal representative was in process. On or about that same date Mitchell filed a petition for appointment as personal representative of the decedent's estate. Johnston later withdrew from the representation of Mitchell.

Uridil testified that First National's procedure is to require production of the appointment document when an estate account is opened. The document is to be copied and kept in the bank's files. She also testified that she would open an estate account without requiring production of the appointment document if the appointment was "in the mill." Another bank employee testified, however, that First National's procedure is to require production of the appointment document and that she would not open an estate account without such production.

McHenry testified that shortly after the First National account was opened, he spoke to Uridil and verbally advised her that Mitchell would not be appointed the personal representative of decedent's estate and that a "hold" should be placed on the account. According to McHenry, Uridil said she would put a "flag" on the account. Uridil denies any such conversation.

McHenry pled that on May 23, 1980, Mitchell requested the funds be electronically transferred from First National to the trust account of Stephen Farr, a Utah attorney. Although the record does not establish at whose request the transfer was made, First National, during oral argument, accepted McHenry's allegation in that regard as factually correct. (As will be seen from the discussion which follows, First National's position would not be improved were the transfer made at the request of

someone other than Mitchell.) McHenry testified he spoke with Uridil after the transfer, and she stated that the transfer should not have been made, since the account was "flagged" on the computer.

McHenry commenced this suit, alleging that First National was negligent in several respects, including its failure to make reasonable inquiry as to who had been appointed as the personal representative and as to what authority or right Mitchell had to transfer the funds.

McHenry assigns as operative error the granting of First National's motion for summary judgment.

We remind ourselves at this point that one is entitled to summary judgment only when there is no genuine issue as to any material fact, the ultimate inferences to be drawn from the facts are clear, and he is entitled to judgment as a matter of law. Moreover, in considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn therefrom. Neb. Rev. Stat. § 25-1332 (Reissue 1979); *McFarland v. King*, *ante* p. 92, 341 N.W.2d 920 (1983); *Swanson v. First Fidelity Life Ins. Co.*, 214 Neb. 654, 335 N.W.2d 538 (1983).

There is no question that there is a dispute as to what, if any, conversations McHenry had with Uridil. The issues therefore become whether this dispute creates genuine issues as to material facts and whether First National is entitled to judgment as a matter of law in any event.

The normal duty of a bank is to honor its customers' withdrawal requests. Neb. U.C.C. § 4-402 (Reissue 1980), concerning a bank's liability for wrongful dishonor. It normally has no duty to third persons, absent their compliance with Neb. U.C.C. § 3-603 (Reissue 1980). But when a bank accepts a deposit from a customer who labels herself as personal representative of an estate, the bank is

charged with knowledge of the trust character of the deposit. *State ex rel. Davis v. Farmers & Merchants Bank*, 112 Neb. 840, 201 N.W. 897 (1924); *Allen v. Fourth National Bank*, 224 Mass. 239, 112 N.E. 650 (1916).

First National takes considerable unfounded comfort from language in *Nehawka Bank v. Ingersoll*, 2 Neb. (Unoff.) 617, 89 N.W. 618 (1902), to the effect that a bank must honor a depositor's checks and cannot refuse to honor them on the ground that the money deposited belonged to some other person. That opinion goes on to observe that the rule "applies to the deposit of trust funds the same as it does to individual funds deposited." *Id.* at 623, 89 N.W. at 620. The relevant facts in *Nehawka* are that the plaintiff, Nehawka Bank, apparently based upon a letter of credit directed to it by Dorsey Bros. & Co., provided money to one Ingersoll, who, pursuant to authority granted him by Dorsey, drew drafts against that credit in payment of cattle he purchased for Dorsey and which Dorsey in turn sold to others. Dorsey's purchasers paid by delivery weight slips, which were deposited in Dorsey's account at the defendant Packers' National Bank. Packers' collected the proceeds due on the weight slips and, upon Dorsey's checks, paid those and other funds to various parties. Dorsey became insolvent and Nehawka sought to recover from Packers' the funds Nehawka had advanced on an Ingersoll draft. Nehawka alleged, among other things, that when the weight slips were collected by Packers', it knew that Dorsey was insolvent, that Dorsey was selling cattle belonging to others, that the proceeds did not belong to Dorsey but to the sellers of the cattle, and knew of Ingersoll's outstanding draft. Therefore, according to Nehawka, Packers' misapplied trust funds. It is readily apparent that the *Nehawka* facts have no relationship to the matter at hand. Whatever the nature of the credit under which Nehawka paid pursuant to Ingersoll's draft, Nehawka, in dealing with Ingersoll,

dealt with one specifically authorized to deal with the credit fund. The comment made in *Nehawka* about trust funds was made in the context of a bank paying on the order of a customer authorized to draw upon the credit fund. That is not the situation presented by this case, and, consequently, *Nehawka* has no application to the case before us.

In *State ex rel. Davis v. Farmers & Merchants Bank*, *supra*, the administrator of an estate deposited moneys in the bank to the credit of "L. A. Berge, Administrator." Berge later withdrew the estate funds and apparently misappropriated them. Berge's surety reimbursed the estate and then sought recovery from the bank. In affirming the trial court's denial of recovery, we said at 843, 201 N.W. at 898: "Having reached the conclusion that the money was regularly withdrawn from the bank by Berge as administrator, what are the legal relations and responsibilities of the parties? The deposit of the money to the credit of Berge, administrator, charged the bank with notice of the trust nature thereof; *but the bank was charged with no duty as to the proper application of the fund, unless it had notice of a threatened misapplication, or of facts sufficient to put it upon inquiry.* In the absence of such notice or facts, if the fund was withdrawn upon checks or orders of Berge as administrator, the bank was not required to follow the money and see that it was properly applied." (Emphasis supplied.) No statute or decision has been cited to us which changes this common-law duty.

When the account was opened, First National was told that Mitchell was depositing the funds to the credit of an estate for which she was yet to be appointed the personal representative. In effect, First National was told that the funds did not belong to Mitchell and that Mitchell was making the deposit in anticipation that she would later be given the authority to deal with the money. The powers and duties of a personal representative commence upon ap-

pointment. Neb. Rev. Stat. § 30-2462 (Reissue 1979). Accordingly, First National had actual knowledge that Mitchell was without authority to deal with the estate's assets unless and until she became the duly appointed representative.

The ordinary practice of First National was not to open an estate account without proof of the personal representative's appointment. The soundness of such a practice is discussed in a publication designed for distribution to commercial bankers, wherein it is stated: "Absent grounds for estoppel or transfer to a good faith purchaser, discussed below, persons dealing with fiduciaries beyond their power or authority must always return to the principal or beneficiary whatever they have received in the transaction and, since any act done by the fiduciary beyond his power is void, the third party can make no claim for loss against the principal. Under these circumstances, it is always proper for one dealing with a fiduciary to demand and receive full evidence of the authority and power under which he acts; persons failing to get such proof act at their peril so far as concerns holding the property of the principal or beneficiary." F. Beutel & M. Schroeder, Bank Officer's Handbook of Commercial Banking Law § 27-20 at 458-59 (5th ed. 1982).

We have held that the failure to abide by custom or ordinary practice is competent evidence of negligence. *Wilbur v. Schweitzer Excavating Co.*, 181 Neb. 317, 148 N.W.2d 192 (1967); *O'Dell v. Goodsell*, 152 Neb. 290, 41 N.W.2d 123 (1950).

In *Holden v. Bank*, 77 N.H. 535, 93 A. 1040 (1915), two sons were named by a will as coexecutors of their father's estate. They deposited estate moneys into an account labeled as "E. A. and B. F. Cook, executors." The bank did not check to determine the validity of their appointment. In reality, they were never formally appointed. The money was paid out by checks drawn by the two. The true executor instituted suit against the bank and his recovery was

denied. There, the bank never had any knowledge that the alleged executors were not the true executors. That court stated that if the bank received such information later, it would be bound to investigate. See, also, 5A Michie on Banks and Banking ch. 9, § 90 at 284 (repl. 1983), wherein it is stated: "Where a deposit in a bank to the credit of an administrator is withdrawn on his checks, signed in official character, the responsibility of the bank is ended. And a bank in which persons, as executors, make a deposit may pay it out on their order as such, *till notified of the falsity of their representation that they are executors.*" (Emphasis supplied.)

We hold that when a bank accepts a deposit of funds it knows to be of a trust nature, and also knows that the depositor is without authority to deal with those funds, it distributes the funds to the depositor at its peril, with liability to the true owner of those funds.

In view of that rule it matters not whether McHenry and Uridil had any conversations after the account was opened. First National knew when the funds were deposited that they were of a trust nature and took no steps to determine whether Mitchell had in fact been given authority to deal with them when it transferred the funds at Mitchell's behest. It is obvious, therefore, that First National is not the party entitled to judgment as a matter of law.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE APPEAL OF STEVE BONNETT. STEVE BONNETT, APPELLANT, V. CIVIL SERVICE COMMISSION AND CITY OF BLAIR, NEBRASKA, APPELLEES.

344 N.W.2d 657

Filed February 24, 1984. No. 83-391.

1. **Administrative Law: Due Process: Notice.** To satisfy the requirement of due process, a notice in proceedings before an admin-

istrative agency must reasonably provide information regarding the accusation levied.

2. **Administrative Law: Notice.** Charges in administrative proceedings must be specific enough to allow a party to prepare a defense, but the charges need not be drawn with the same refinements, strictness, exactitude, and subtleties as pleadings for judicial proceedings.
3. _____: _____. Notice of an accusation in administrative proceedings must sufficiently inform a party about the nature of the proceedings in order to avoid surprising or misleading the accused.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Affirmed.

Jerold V. Fennell of Robert E. O'Connor & Associates, for appellant.

Wyman E. Nelson, for appellees.

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

PER CURIAM.

Steve Bonnett appeals the judgment of the district court for Washington County, Nebraska, upholding the decision of the civil service commission of Blair, Nebraska, regarding termination of Bonnett's employment with the Blair Police Department. We affirm.

Bonnett entered employment with the Blair Police Department approximately 8 months before the incident which resulted in Bonnett's dismissal from the police department. Around 3 a.m. on an unspecified day in the summer of 1982, Bonnett went off duty and proceeded to a fellow officer's apartment. Bonnett, still in uniform and carrying his .38-caliber service revolver, arrived at the apartment. Sometime between 3 and 5 a.m., Bonnett, who was sitting on a footstool in the apartment's main room, commenced a demonstration of "fast loading" his revolver. Seated in the room with Bonnett were the other officer and two ladies. According to Bonnett, as he viewed the revolver from the rear, the revolver's barrel was in the "12-o'clock" position. A cartridge was visible in the "1-o'clock" position in the revolver's cylinder, namely, immediately to the

right of the barrel chamber of the cylinder. Expecting the cylinder to rotate clockwise, Bonnett aimed the .38 at a concrete wall in the apartment, pulled the trigger, with the cylinder rotating counterclockwise, and fired a bullet into the concrete wall about 36 inches from the floor of the apartment.

At 5 p.m. on the same day of the incident, Bonnett discussed the matter with the assistant chief of police. The assistant chief of police was the middleman in the chain of command, with the chief of police at the top and a sergeant as Bonnett's immediate supervisor. Bonnett never filed any written report or other memorandum concerning the incident in which his service revolver was accidentally discharged in the apartment.

The Blair Police Department "rules, regulations and procedures manual" in effect at the time of the incident in the apartment contained two rules or regulations requiring written confirmation about discharge of firearms, namely: "1216 FIREARMS

. . . .

".02 Officers shall not draw or display their sidearms in any public place, except when they are to be used, or for inspection by a superior. Officers shall not "Dry Fire," clean, repair, load, or unload their firearms except on the target range. Officers shall not place or store any firearms or other weapons in police building except when the place of storage is locked. Officers firing a gun accidentally or intentionally, except on a target range, shall report the circumstances to the chief immediately and *shall file a written report of the incident within eight hours.*"

. . . .

"1429 FIREARMS HANDLING RESTRICTIONS

. . . .

".06 A policeman who discharges a weapon off duty, except at a target range or during a hunting excursion, *shall file memorandum* [sic] *as soon as*

practical after the discharge to his supervisor." (Emphasis supplied.)

According to Bonnett, the apartment incident was a matter of common knowledge throughout the police department, but the chief of police testified that he did not learn of the incident until January 1983. After an investigation into the incident, the chief of police discharged Bonnett from the Blair Police Department. The mayor and city council of Blair confirmed Bonnett's dismissal by the chief of police in resolution No. 1983-03, issued on January 14, 1983, that is, "NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF BLAIR, NEBRASKA, that the action of the Chief of Police in discharging from employment in the Blair Police Department Officer Steve Bonnett is hereby confirmed based upon the following: Violation of department rules and regulations in an improper discharge of a firearm, failure to properly document and report the incident."

A copy of the resolution was received by Bonnett, who requested a hearing before the civil service commission. In his opening remarks at the hearing of the civil service commission, Bonnett's attorney stated in reference to the apartment incident: "He did not intend to discharge the gun. It was merely an accident. . . . We're admitting that this incident took place." Four witnesses in addition to Bonnett were called to support Bonnett's position. Witnesses also testified for the city. Bonnett acknowledged receiving a copy of police rules and regulations, that he had put it "in my drawer" and had "read parts" of such rules and regulations, but disclaimed any knowledge of the required written report to the chief of police pursuant to § 1216.02. On the basis of the evidence presented at the hearing, the civil service commission affirmed Bonnett's dismissal from the police department.

Bonnett appealed the commission's decision to the district court. The district court found that suf-

ficient notice of the accusation had been given to Bonnett and that Bonnett's dismissal was in good faith and for cause, as required by Neb. Rev. Stat. § 19-1808 (Reissue 1977).

In his appeal Bonnett raises only one question, namely, whether the notice regarding dismissal was sufficient for due process. In particular, Bonnett claims the notice was insufficient because the written accusation did not state the date on which the incident occurred, where the incident occurred, the status of Bonnett, i.e., on or off duty at the time of the incident, the identity of his accuser, and the specific police rule or regulation violated by Bonnett.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314-15, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

To satisfy the requirement of due process, a notice in proceedings before an administrative agency or tribunal, such as the civil service commission in the present case, must reasonably provide information regarding the accusation levied. See *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983); cf. *Irwin v. Board of Ed. of Sch. Dist. No. 25*, 215 Neb. 794, 340 N.W.2d 877 (1983).

Charges in administrative proceedings must be specific enough to allow a party to prepare a defense, but the charges need not be drawn with the same refinements, strictness, exactitude, and subtleties as pleadings for judicial proceedings. See, *Jenkins v. Univ. Civil Service Merit Bd.*, 106 Ill. App. 3d 215, 435 N.E.2d 804 (1982); *Buras v. Bd. of*

Trustees of Pol. Pens. Fund, 430 So. 2d 237 (La. App. 1983).

The modern trend in administrative pleading is to require simply that the parties be sufficiently apprised of the nature of the proceedings so that there is no unfair surprise. See *North State Tel. Co., Inc. v. Alaska Public Util. Com'n*, 522 P.2d 711 (Alaska 1974); cf. *Sabine Bank v. State Banking Bd.*, 630 S.W.2d 523 (Tex. App. 1982).

"In an administrative proceeding it is only necessary that the one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled." *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953). See, also, *Savina Home Industries v. Secretary of Labor*, 594 F.2d 1358 (10th Cir. 1979).

The off-duty occurrence of the incident at the apartment was admitted by Bonnett and, therefore, was not an issue before the civil service commission. Admitting occurrence of the incident but questioning sufficiency of the notice regarding the date and location of such incident is a retrospective attempt to inject an issue where none existed at the hearing. To suggest the notice left some mystery about the identity of Bonnett's accuser disregards the language of resolution No. 1983-03 approving the "action of the Chief of Police in discharging" Bonnett from employment. Both Bonnett and the city called the chief of police as a witness at the hearing of the civil service commission. There was no doubt about the identity of the accuser under the circumstances. The notice did not mislead Bonnett, and no surprise is shown regarding any aspect of the incident or the identity of Bonnett's accuser. Consequently, the notice sufficiently informed Bonnett about the incident and his accuser.

With the exception of firing a weapon while hunting or on a target range, the police rules and regulations of the Blair Police Department required an of-

ficer to make a written report about firing a weapon, whether the weapon's discharge occurs on or off duty, and whether discharging a weapon is accidental or intentional. The essence of the accusation against Bonnett is failure to make a written report concerning the incident at the apartment, the accidental discharge of Bonnett's service revolver. Bonnett's attack on sufficiency of the notice by claiming that the accusation did not specify the particular police rule or regulation, i.e., §§ 1216.02 or 1429.06, is a specious argument. Either of the mentioned regulations required written confirmation about discharge of a firearm—a document which Bonnett failed to render. Bonnett was aware of the departmental regulations governing conduct of officers of the Blair Police Department. If Bonnett had not thoroughly read the departmental regulations before notice of his dismissal, after notice of dismissal Bonnett had every good reason and ample opportunity to acquaint himself with those regulations. Allowing one engaged in law enforcement to use his vincible ignorance of two departmental regulations as a defense to the alleged violation of those regulations is sophistry. Nothing indicates that the absence of specific mention of either of the applicable regulations caused prejudice to Bonnett in preparing his defense or presenting his case. If there were a question about any regulation in reference to the accusation, Bonnett could have eliminated any uncertainty on his part simply by requesting specification. Bonnett was charged with knowledge of all the rules and regulations in the police manual and cannot claim that he was misled or surprised in the reference to departmental rules and regulations under the circumstances. Cf. *State ex rel. Messner v. Milw. C. Civil S. Comm.*, 56 Wis. 2d 438, 202 N.W.2d 13 (1972). The notice sufficiently informed Bonnett concerning the rules and regulations upon which the accusation was based. Any surprise in this case occurred in the apartment, not at the hearing.

Under the circumstances the judgment of the district court is correct and is affirmed.

AFFIRMED.

BOSLAUGH, J., concurring in the result.

I concur in the judgment of the court in this case.

The review provided by Neb. Rev. Stat. § 19-1808 (Reissue 1977) is very limited. The statute provides that the appeal "shall be confined to the determination of whether or not the judgment or order of . . . the commission, was made in good faith for cause. *No appeal to such court shall be taken except upon such ground or grounds.*" (Emphasis supplied.)

The only issue raised by the appellant in this case related to the "constitutional sufficiency" of the notice served upon him. Such an issue cannot be determined in the limited appeal provided by § 19-1808, but may be determined in another proceeding in which the limitations prescribed in § 19-1808 are not applicable.

Although I do not disagree with the conclusions reached in the majority opinion, the sole issue raised by the appellant cannot be determined in an appeal under § 19-1808. If the majority opinion is correct, the limitations imposed by the Legislature in that section have become meaningless.

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

STATE OF NEBRASKA, APPELLEE, V. RICHARD D. HOLTAN, APPELLANT.

344 N.W.2d 661

Filed February 24, 1984. No. 83-393.

1. **Criminal Law: Pleas.** It would not be proper as a matter of right for a trial judge to permit the withdrawal of a plea of guilty or nolo contendere which was knowingly, intelligently, and voluntarily made unless such withdrawal is necessary to correct a manifest injustice.
2. _____: _____. In an action to withdraw a plea of guilty or nolo contendere, the burden is on the defendant to establish the manifest injustice by clear and convincing evidence.

3. _____: _____. Withdrawal of a plea of guilty or nolo contendere is necessary to correct a manifest injustice whenever the defendant proves that (1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule; (2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf; (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or (4) he did not receive the charge or sentence concessions contemplated by the plea agreement, and the prosecuting attorney failed to seek or not to oppose those concessions as promised in the plea agreement.

4. _____: _____. In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.

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

J. William Gallup, for appellant.

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

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

KRIVOSHA, C.J.

In embarking upon our review of this case, we note at the outset that this appeal presents to the court the very narrow question of whether the action of the district judge in denying to the appellant, Richard D. Holtan, the right to withdraw his previously entered plea of nolo contendere constituted an abuse of discretion. We believe that the district court's action did not constitute an abuse of discretion, and we affirm the action of the district court in denying the request.

This is the third appearance of this case before this court. In the first case, *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977) (*Holtan I*), we affirmed the judgment of the district court which

found Holtan guilty of first degree murder in the perpetration of a robbery and of shooting with intent to kill, wound, or maim. Holtan had entered a plea of nolo contendere to both counts and was sentenced to death on the first count and to serve 15 to 45 years on the second count. The specific facts of the case are set out in detail in *Holtan I* and need not be repeated here.

In the second case, *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980) (*Holtan II*), we affirmed the trial court's denial of a motion seeking post conviction relief under the provisions of the Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). Holtan then filed an action in the U.S. District Court for the District of Nebraska, seeking a writ of habeas corpus. The U.S. District Court for the District of Nebraska, Urbom, Chief Judge, denied Holtan's request for federal habeas corpus in an unreported memorandum decision (CV 81-L-07, October 10, 1981). Holtan appealed that denial to the U.S. Court of Appeals for the Eighth Circuit. Because the court of appeals vacated the judgment of the U.S. District Court and remanded the matter for further proceedings, we are now presented with this appeal. See *Holtan v. Parratt*, 683 F.2d 1163 (8th Cir. 1982) (*Holtan III*).

In his action to the U.S. District Court and the subsequent appeal to the court of appeals in *Holtan III*, Holtan alleged a number of errors. The single issue considered by the court of appeals was whether Holtan was denied effective assistance of counsel when his court-appointed attorney did not request permission of the district court for Douglas County, Nebraska, to withdraw his previously entered plea of nolo contendere. More specifically, however, the court of appeals stated that it could not determine with certainty whether the district court for Douglas County would have favorably entertained Holtan's motion to withdraw his previously entered plea, and for that reason vacated the judgment of the U.S. Dis-

trict Court so as to afford the district court for Douglas County an opportunity to consider an appropriate motion by Holtan to withdraw his plea of nolo contendere. That motion was subsequently made by Holtan, considered by the district court for Douglas County, and denied. It is from that denial that this appeal was taken.

The right to withdraw a plea previously entered is not absolute, and in the absence of a clear abuse of discretion exercised by the trial judge, will not be disturbed on appeal. See *State v. Miller*, 202 Neb. 443, 275 N.W.2d 614 (1979). It would not be proper as a matter of right for a trial judge to permit the withdrawal of a plea of guilty or nolo contendere which was knowingly, intelligently, and voluntarily made unless such withdrawal is necessary to correct a manifest injustice. See, *State v. Evans*, 194 Neb. 559, 234 N.W.2d 199 (1975); *State v. Johnson*, 187 Neb. 26, 187 N.W.2d 99 (1971). The burden is on the defendant to establish the manifest injustice by clear and convincing evidence. See, *State v. Krug*, 187 Neb. 551, 192 N.W.2d 163 (1971); *State v. Miller*, *supra*.

What is "manifest injustice" has been determined previously by this court. In *State v. Evans*, *supra*, we adopted a portion of the ABA Standards Relating to Pleas of Guilty (Approved Draft 1968), including the definition of "manifest injustice." In adopting that portion (§ 2.1) of the ABA Standards, we said in *State v. Evans* at 562, 234 N.W.2d at 201: " '(ii) Withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:

" '(1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule;

" '(2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;

" '(3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence

actually imposed could be imposed; or

" '(4) he did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose those concessions as promised in the plea agreement. . . .' " The record in this case is clear beyond any question that items (2), (3), and (4) do not exist. Therefore, only item (1), ineffective assistance of counsel, need be considered. We review that item in two aspects: before the entry of the plea and before the imposition of the sentence. We do this because it appears to us that if Holtan had effective assistance of counsel when initially entering his plea, all of the requirements of the ABA Standards defining "manifest injustice" would be met and Holtan's right to withdraw his plea would be a matter of discretion with the court instead of a matter of right in Holtan.

An examination of the entire record, of our previous decisions, and of the decision by the court of appeals makes it clear beyond question that Holtan was not denied effective assistance of counsel prior to the time he entered his plea of nolo contendere. The federal District Court found, in connection with its resolution of this question, that Holtan's nolo contendere plea was not entered into as a result of any ineffective assistance of counsel, but, rather, because Holtan insisted on entering the plea as a result of a mistaken impression on his part that by entering the plea he could avoid confronting a certain prosecution witness and, thus, hopefully avoid the death penalty. There is no evidence that anyone told him anything that would lead him to that conclusion, but only that he mistakenly believed that to be so. And, indeed, the court of appeals observed in *Holtan III* at 1170 that "when Holtan entered his plea, the trial court entered into an extensive colloquy with the defendant, covering forty pages of transcript, and did a commendable job both of informing Holtan of the

consequences of the plea and of satisfying itself that Holtan understood these consequences.

. . . .

"This court nevertheless observes that although the plea was entered into under a mistaken impression on Holtan's part, and although the trial court did not uncover this mistake at the time the plea was entered, the mistake was not the result of ineffective assistance on the part of counsel, or of any misconduct on the part of the prosecution, and the trial court's investigation of the voluntariness of the plea was clearly adequate. In these circumstances, we are unable to state that Holtan was entitled to withdraw his plea as a matter of right."

We wholly concur in the observation made by the court of appeals. On the basis of the record made in this case, we are able to say as a matter of law that there was no evidence of a manifest injustice as contemplated by our holding in *State v. Evans*, *supra*, and Holtan was not entitled to withdraw his previous plea of nolo contendere made knowingly, intelligently, and voluntarily.

Therefore, if he has any right to withdraw the plea it must be because of the second part of the ABA Standards adopted by us in *State v. Evans* at 563, 234 N.W.2d at 201. The second portion provides: " '(b) In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.' "

Therefore, in order for us to reverse the action of the trial judge in the instant case, we must first find that there was some fair and just reason for permitting Holtan to withdraw his plea and that the trial court therefore abused its discretion. We do not be-

lieve the record will support that position. Notwithstanding the fact that Holtan was advised of the consequences of his plea and that by entering a plea of nolo contendere he was waiving all of his rights and subjecting himself to the possible penalty of death by execution, he nevertheless freely, knowingly, and intelligently entered that plea. He now maintains that had he known that a live witness could appear at the sentencing hearing he would not have entered such a plea. His argument, however, is without any sense. Holtan knew that his counsel had been unsuccessful in efforts to get any prior agreement about the sentence, and he further knew that by entering a plea of nolo contendere he was subjecting himself to the possibility of having the death sentence imposed. Moreover, and perhaps more importantly, had Holtan not entered his plea of nolo contendere he would have been required to confront the witness whom he sought to avoid. Therefore, whether he entered a plea of nolo contendere or did not enter a plea of nolo contendere would not have prevented the appearance of the witness Holtan sought to avoid. Holtan was no novice to the criminal courtroom, and he knew that the trial judge would make an investigation into the nature of the crime.

One of Holtan's earlier claims of error was that his court-appointed counsel should have subpoenaed witnesses from the State of Washington who could have testified as to his good character. He knew witnesses could be called after a plea and before the imposition of a sentence. If he could call witnesses of good character, he had to understand that the State could call witnesses regarding bad character, including the witness he sought to avoid. See *Holtan II*.

Further, he knew that because of the nature of the crime and the callous way in which the victim was killed, there was at least the possibility of the death penalty being imposed. To therefore suggest that

refusing to permit Holtan to withdraw his plea of nolo contendere because he did not realize that a witness might appear at the sentencing hearing constitutes fair and just reason is to attempt to give a meaning to "fair and just reason" beyond any reason. Holtan has simply failed to establish any fair and just reason for withdrawing his plea, and the trial court was not in any manner guilty of an abuse of discretion in so holding.

The court of appeals, in vacating the judgment entered by the U.S. District Court, concluded by saying: "Consequently, we cannot conclude with certainty that Holtan would have been allowed to withdraw his plea if a request for such withdrawal had been timely made." *Holtan III* at 1170. At Holtan's request the world has been set back in time, and he has been permitted to make that request to the very same judge who accepted his plea in the first instance and to whom his subsequent request would have been made. Upon consideration of the record the trial judge has now determined that had the request been made to him then he would have denied it, as he now denied it. No evidence of an abuse of discretion under the circumstances can be found. Finding no abuse of discretion, we must conclude the action of the trial court was correct, and the judgment denying Holtan's request must be affirmed.

AFFIRMED.

SHANAHAN, J., concurring in the result.

The reason for affirming the judgment of the trial court is not mutuality of prospective testimony as indicated in the majority opinion, that is, if Holtan could call favorable witnesses at the sentence hearing, then the State could call witnesses adverse to Holtan for such hearing.

The trial court fully explained the consequences of Holtan's plea of nolo contendere, including the possible imposition of the death penalty for the execution-type murder committed by Holtan during a robbery

and shooting in which one died but two victims survived. See *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977).

After the court's explanation and without any comment by the court or representation by the prosecution about any sentence hearing, Holtan entered his plea. Holtan's plea was prompted by his miscalculation that a surviving victim of the shooting would not testify at the sentence hearing. At some point between conviction upon his plea but before sentencing and as a result of concern about sentencing (presumably the possible appearance of a surviving victim at such hearing), Holtan alleges he instructed his attorney to request withdrawal of Holtan's plea, but no such request was made.

In the federal habeas corpus proceedings the circuit court was concerned that, when Holtan entered his plea, there was no reference to possible testimony from surviving witnesses at a sentence hearing, namely, "at no time during this colloquy did the parties or the court discuss the possibility that witnesses to the shooting could and would testify at the sentence hearing." *Holtan v. Parratt*, 683 F.2d 1163, 1170 (8th Cir. 1982). The federal court then wondered whether the missing mention of possible witnesses at the sentence hearing was a suitable basis for allowing Holtan to withdraw his plea under Nebraska law.

At the time of Holtan's plea Nebraska law provided: "In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death. . . ." Neb. Rev. Stat. § 29-2521 (Reissue 1979).

Nebraska has adopted the ABA Standards Relat-

ing to Pleas of Guilty (Approved Draft 1968). These standards provide: "2.1 Plea withdrawal. . . . (b) . . . Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea."

Withdrawal of a guilty plea before imposition of sentence should be freely granted in order to protect a defendant's right to a jury trial for determination of guilt or innocence. See, *Kadwell v. United States*, 315 F.2d 667 (9th Cir. 1963); *Commonwealth v. Hayes*, 462 Pa. 291, 341 A.2d 85 (1975).

Underlying a request to withdraw a guilty plea, there must be a fair and just reason and not a mere desire to have a trial. See, *Dudrey v. State*, 74 Wis. 2d 480, 247 N.W.2d 105 (1976); *Everett v. United States*, 336 F.2d 979 (D.C. Cir. 1964). "Were withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim. In fact, however, a guilty plea is no such trifle, but 'a grave and solemn act' which is 'accepted only with care and discernment.' " *United States v. Barker*, 514 F.2d 208, 221 (D.C. Cir. 1975).

Although a defendant is not required to allege innocence in order to request withdrawal of a guilty plea, the reason for the request to withdraw a plea must be reasonably related to the existence of a defendant's guilt or innocence. See, ABA Standards, *supra* § 2.1(a) (iii); cf. *United States v. Needles*, 472 F.2d 652 (2d Cir. 1973).

The issue in this case involves a hypothetical and becomes: If a timely request had been presented to the trial court, would Holtan have been allowed to withdraw his plea of nolo contendere? Before that question can be answered, there is a preliminary question presented, namely, Does a defendant have

a protected right of expectation in the quantity of adverse information which can be presented at a sentence hearing?

Before conviction, the defendant's voice—and his alone—dictates the course of action for determination of guilt or innocence, i.e., to plead guilty or stand trial. If the defendant chooses to give up his right to a trial, especially a jury trial, unreasonableness or inequity producing the plea are reasons for allowing a defendant to withdraw a guilty plea. However, after conviction upon a defendant's plea there is another voice to be heard—society's expressed sanction for commission of the crime. In our system of criminal justice and for imposition of an appropriate sentence upon conviction, the sentencing judge, and in this case the three-judge panel convened pursuant to Neb. Rev. Stat. § 29-2520 (Reissue 1979), must have as much relevant information as possible for determination of a suitable sanction for criminal conduct, that is, an appropriate penalty to fit the offender. See *Neely v. State*, 47 Wis. 2d 330, 177 N.W.2d 79 (1970).

Relevant information for a sentencing court should include facts of the crime itself and facts which tend to aggravate or mitigate the offense. See *People v. Schleyhahn*, 4 Ill. App. 3d 591, 281 N.E.2d 409 (1972). Testimony from an eyewitness is quite essential in an accurate description of the crime and, therefore, is necessary for a sentencing court's clear understanding of the circumstances surrounding commission of the crime. Cf. *State v. Leckis*, 79 N.J. Super. 479, 192 A.2d 161 (1963) (in reference to a "good presentence report" containing interviews of witnesses).

If Holtan were allowed to withdraw his plea because adverse information moved from mere possibility to probability, then our procedure for determining criminal penalties would become ironically undermined by efficient accumulation and presentation of *all* relevant information bearing upon the na-

ture and extent of the penalty to be imposed. The incongruity in that situation is found in the equation: Allowance to withdraw a presentence guilty plea is in direct proportion to the prospective quantity of adverse information presentable at a sentence hearing. Recognition of that ratio as a reason to allow withdrawing a guilty plea frustrates reasonably expeditious finality of proceedings as one of the objectives of our criminal justice system.

Courts have repeatedly held that expected but unreceived leniency not indicated by the court or promised by the prosecution or a harsher sentence than anticipated are not reasons for allowing a defendant to withdraw a guilty plea after sentencing. See, *Dudrey v. State*, 74 Wis. 2d 480, 247 N.W.2d 105 (1976); *United States v. Maggio*, 514 F.2d 80 (5th Cir. 1975); *State v. Hanson*, 627 P.2d 53 (Utah 1981); *State v. Pettigrew*, 284 S.E.2d 370 (W. Va. 1981).

At a sentence hearing a defendant can question, contradict, or explain adverse information presented by the State. Such procedure ensures the basic fairness required in the criminal justice system. However, a defendant having received a sentence more harsh than expected is not allowed to withdraw a plea of guilty because a defendant "chose to test the water and found it too fervid." *United States v. Prince*, 533 F.2d 205, 209 (5th Cir. 1976). By analogy to *Prince*, in a presentence situation a defendant cannot be allowed to withdraw a guilty plea simply because the prospective adverse information indicates that the water is deeper than a defendant has calculated.

In conjunction with a defendant's guilty plea, a court should not be required to foretell the quantity, quality, or source of potentially damaging information presentable at a sentence hearing. To require a court to forecast the contents of a sentence hearing would only open avenues of alleged judicial error if the prediction did not materialize. That could hardly be called a system, much less justice.

In the absence of some expectancy founded on a comment by the court or promise by the prosecution, a defendant does not have a protected right of expectation in the quantity of adverse information which can be presented at a sentence hearing.

Holtan's request for withdrawal of his plea, had such a request been timely made, presented no fair and just reason to the trial court for allowing the plea to be withdrawn. In the absence of any fair and just reason presented to the trial court for withdrawal of the plea, we need not consider the presence or absence of substantial prejudice to the prosecution regarding withdrawal of Holtan's plea. Cf., *United States v. Rasmussen*, 642 F.2d 165 (5th Cir. 1981); *United States v. Rodriguez-DeMaya*, 674 F.2d 1122 (5th Cir. 1982).

Under the circumstances, had Holtan's request for withdrawal of his plea been submitted to the trial court, there would have been no abuse of discretion in denying such request.

STATE OF NEBRASKA, APPELLEE, V. NORMA FERRIS, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. DANIEL FERRIS, APPELLANT.

344 N.W.2d 668

Filed February 24, 1984. Nos. 83-421, 83-422.

Motions for New Trial: Evidence. Where a motion for new trial is based on newly discovered evidence, the rule is well established that the newly discovered evidence must be of such a nature that, if offered and admitted at the former trial, it probably would have produced a substantial difference in the result.

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

Barlow, Johnson, DeMars & Flodman, for appellants.

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

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

PER CURIAM.

These are appeals from the decisions of the district court for Lancaster County denying the appellants' motions for new trial on the ground of newly discovered evidence. Neb. Rev. Stat. § 29-2101 (Reissue 1979).

This is the second appearance of these cases in this court. The opinion affirming the judgments of conviction is found in *State v. Ferris*, 212 Neb. 835, 326 N.W.2d 185 (1982). The facts are contained in that opinion and will not be repeated here.

We conclude this court has no jurisdiction in this matter. Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982) provides that, with certain exceptions not material here, the district court reviews appeals from the county court for error appearing on the record made in the county court. Consequently, a motion for new trial based on newly discovered evidence is to be presented to the county court as the fact finder, not to the district court which sat as an appellate court.

We point out that in any event the appellants' position is without merit. The newly discovered evidence is the taped statement of a sister of the victim, who is alienated from the victim due to a family dispute. The sister, at the hearings on the motions for new trial, professed not to remember the details of a taped statement given to an investigator for the appellants, the details of the trial itself, and few of the details concerning the entire incident.

The taped statement given to the investigator 13 months after the trial purports to give the details of a telephone conversation between the victim and the sister, in which the victim informed the sister of a plan to secure repayment of money from the appel-

lants by the filing of false charges of assault.

The testimony of the sister's husband denies any knowledge of the tape on which his voice appears, and denies any recollection of the contents of the tape.

During cross-examination of the sister and her husband, the details of a police investigation were revealed in which the sister and her husband falsely accused the victim of theft of rings and blackmail. The motive for the false charges is not clear from the record, but appears to relate to an alleged debt due the sister from the victim and suspicion of improper sexual liaisons between the victim and the sister's husband.

The trial court observed tnat testimony of the sister and her husband was simply not to be believed.

While there is substantial doubt that the newly discovered evidence, i.e., the alleged fabrication of the assault, could not have been discovered by expedient interviewing or deposing the sister, and thus was not sufficient to justify the granting of a new trial, § 29-2101(5), the salient fact exists that in view of the demonstrated hostility, the professed loss of memories, the false charges filed against the victim, and the contradictory stories of the sister and her husband (some versions of which must necessarily be lies), it is obvious that a new trial cannot be said to probably result in a different outcome. *State v. Hortman*, 207 Neb. 393, 299 N.W.2d 187 (1980).

The decisions of the district court in denying the motions for new trial were correct and are affirmed.

AFFIRMED.

Cite as 216 Neb. 609

STATE OF NEBRASKA, APPELLEE, V. NOEL J. HEATHMAN, APPELLANT.

344 N.W.2d 670

Filed February 24, 1984. No. 83-457.

1. **Effectiveness of Counsel.** The test for determining the competency or effectiveness of trial counsel is that he perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area and that he conscientiously protect the interests of his client.
2. **Constitutional Law: Attorney and Client: Conflict of Interest.** The possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his sixth amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

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

Michael Lehan, for appellant.

Paul L. Douglas, Attorney General, and Lynne R. Fritz, for appellee.

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

WHITE, J.

This is an appeal from the denial of post conviction relief. The appellant is presently incarcerated in the Nebraska Penal and Correctional Complex, serving concurrent terms of life (kidnaping) and 8 to 10 years' imprisonment (first degree sexual assault), and a consecutive term of 3 to 5 years (use of a firearm in the commission of a felony). The principal case was affirmed. *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981).

Three errors are assigned. The trial court erred (1) in denying appellant permission to appear in person rather than by deposition at the post conviction hearing, (2) in failing to find that the appellant was denied effective assistance of counsel at trial, and (3) in failing to find that appellant's counsel repre-

sented conflicting interests at trial. We affirm.

The first assignment of error is not discussed in the brief and will not be considered by this court on appeal. Neb. Ct. R. 9D(1)d (Rev. 1982). We merely note that the exact procedure followed by the trial court is authorized in Neb. Rev. Stat. § 29-3001 (Reissue 1979).

The second and third assignments of error will be discussed together. In consideration of these assignments we keep in mind that the standard for determining whether counsel for a defendant in a criminal prosecution has adequately represented a client is whether trial counsel performed at least as well as a lawyer with ordinary training and skill in the criminal law in his area and conscientiously protected the interests of his client. *Marteney v. State*, 210 Neb. 172, 313 N.W.2d 449 (1981); *State v. Leadinghorse*, 192 Neb. 485, 222 N.W.2d 573 (1974). The defendant who alleges incompetency of counsel bears the burden of showing that his defense was prejudiced. *State v. Holloman*, 209 Neb. 828, 311 N.W.2d 914 (1981).

As to an alleged conflict of interest, the defendant, who made no complaint at trial, must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *State v. Pope*, 211 Neb. 425, 318 N.W.2d 883 (1982).

The alleged conflict of interest arose because of the dual representation of the appellant and one John L. Koger, a codefendant. According to appellant's version, appellant was instructed to testify that the gun used in the abduction and rape belonged to him, not to his codefendant as appellant maintains was the fact. The conflict, appellant asserts, prevented his counsel from questioning Koger's assertion that the gun belonged to appellant.

Trial counsel denied the assertion, and the trial court believed counsel. In addition, as is apparent from a reading of the record, the ownership of the gun was irrelevant. The appellant admitted han-

dling the gun during the afternoon preceding the abduction, and the victim testified that at least two of the three defendants handled the gun during the incident. The defense urged by appellant was consent. Appellant admitted that the victim left the 7-Eleven Store and that he had sexual intercourse with her, and it was established that a gun was found in the car in which the victim and the three defendants were riding. We find no conflict of interest, and even if it were so established, the appellant has not demonstrated any prejudice.

Appellant asserts that his trial counsel failed to obtain possession of a cash register tape. The tape, appellant suggests, would show a last purchase of $5 before the victim left the store, thereby impeaching the victim's testimony that no purchase was made by the codefendants. Assuming the questionable materiality of the tape, counsel testified that he inquired of an executive of the 7-Eleven chain as to the existence of the tape, found that the tape was not in existence, and, further, that if the tape existed, no time-dating would be present on the tape. Even assuming the materiality of the tape, counsel took reasonable efforts to secure the tape. The issue of fact is resolved against the appellant.

The last area of appellant's complaint is counsel's failure to interview and present certain witnesses. The appellant suggests that one of the witnesses would testify that, prior to the incident, the appellant was consuming alcohol and ingesting drugs. Other witnesses would presumably testify as to the appellant's character. We will not dignify the contention further. The failure to procure the testimony of the witness as to drug and alcohol consumption is not only nonproductive and not demonstrably prejudicial but it is within the tactical area of judgment of competent counsel. Trial counsel was evidently convinced that the testimony was not helpful, and the trial court agreed with his judgment.

We are not favored by appellant with the sub-

stance of the testimony of the "character" witnesses. Considering the appellant's rather extended previous record, the decision not to adduce any more testimony than absolutely necessary concerning the character of the appellant seemed to the trial court not the act of an incompetent counsel but an extremely prudent one. There is no merit to the assigned errors. Therefore, the denial of post conviction relief is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. THOMAS M. ZIEMBA, APPELLEE.

346 N.W.2d 208

Filed February 24, 1984. No. 83-501.

1. **Criminal Law: Courts: Judgments: Appeal and Error.** An order of the district court reversing a judgment of the county court in a criminal case, vacating the sentence, and remanding the cause for imposition of sentence may be reviewed under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1982).
2. **Pleas.** A valid plea of guilty waives all defenses to the charge, whether procedural, statutory, or constitutional.
3. _____. In order to make an intelligent and voluntary plea at a group arraignment, the defendant must have been present when the court advised those charged of their constitutional rights. The record must disclose that defendant was present at that time.
4. **Pleas: Drunk Driving: Prior Convictions.** An accused being arraigned for driving while intoxicated must be advised whether he is charged with a first, second, or third offense and the maximum penalties applicable to the offense charged.
5. **Complaints: Drunk Driving: Prior Convictions.** A complaint charging second or third offense driving while intoxicated should allege the facts upon which the State relies to establish that the offense charged is a second or third offense.
6. **Drunk Driving: Prior Convictions.** The record of an enhancement proceeding for second or third offense driving while intoxicated must show that the requirements set out in *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), and Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982) were satisfied.
7. **Drunk Driving: Prior Convictions: Waiver.** A defendant charged with second or third offense driving while intoxicated may

waive proof of a prior conviction by a transcript of the judgment, and may waive the rights provided in Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982) in regard to prior convictions.

8. **Pleas.** Under certain circumstances a checklist authenticated by the signature or initials of the judge can be considered a part of the record. Such a checklist may serve to affirmatively establish that a defendant made an intelligent and voluntary guilty plea. Such a checklist must comply with *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981).
9. _____. A verbatim transcript of the rendition of a guilty plea is not constitutionally required, nor does absence of such a transcript require a finding that the plea was invalid.
10. **Cases Disapproved.** *State v. Feagin*, 196 Neb. 261, 242 N.W.2d 124 (1976), and *State v. Prichard*, 215 Neb. 488, 339 N.W.2d 748 (1983), disapproved in part.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Exceptions sustained in part, and in part overruled.

J. Patrick Kelly, Sarpy County Attorney, and Michael D. Wellman, for appellant.

Owen A. Giles and John S. Barrett, for appellee.

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

BOSLAUGH, J.

This is a proceeding under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1982) to review an order of the district court made on June 6, 1983, reversing the judgment of the county court, vacating the sentence imposed by the county court, and remanding the cause to the county court for imposition of sentence.

After this court had granted leave to docket the proceeding, the defendant moved to dismiss the proceeding on the ground that there had been no final order from which the defendant could appeal to this court. The statute permits a review of "any ruling or decision of the court made during the prosecution of a cause." The application for leave must be presented within 20 days after the final order has been entered in the cause. § 29-2315.01.

The order of the district court made on June 6,

1983, was a final order so far as the ruling now being questioned is concerned. The trial court in this instance was the county court, and the order for which review is sought is the order of the district court *on appeal*, reversing the judgment of the county court, vacating the sentence, and remanding the cause for imposition of sentence.

The situation in this case is similar to that in *State v. Amick*, 173 Neb. 770, 114 N.W.2d 893 (1962), where the district court sustained a motion to quash in an appeal from the municipal court where the defendant had been found guilty of violating a municipal ordinance and fined $100 and costs. In the *Amick* case this court reversed the judgment of the district court and remanded the cause. See, also, *State v. Hutter*, 145 Neb. 798, 18 N.W.2d 203 (1945).

In a complaint filed in the county court on August 25, 1982, the defendant, Thomas M. Ziemba, was charged with third offense driving while intoxicated. A second count charging driving under suspension was dismissed later.

The record shows that the following took place at a group arraignment in the county court on September 13, 1982: "THE COURT: Good morning, be seated, please, in the courtroom. We are on the record. Matters that come before the Court, at this time, arraignments under State Statutes and City Ordinances. I will first of all advise you as to courtroom proceedures [sic], as your name is called if you would then come foreward [sic] before the microphone, out here in front of the bench. At which time you will be informed of the charge that has been filed against you, by the county attorney for Sarpy County. You will also be informed of the possible penalty on conviction. At arraignment, as we are having here this morning, you have a choice to make. First of all, you may plead guilty and if you do that a penalty within that prescribed by Statute will be assessed. You can then take the complaint back down to the traffic fine window, at the clerk of

court, and arranges [sic] there for payment of any fines assessed. Secondly, you may plead not guilty and if you do that your case will be set for trial at a later date. And you are entitled to have a bond set on condition of further appearances. Finally, you are entitled for a continuance for further arraignment, if you intend to consult with your attorney, or for some other good reason. Also advise you as to you [sic] constitutional rights. At trial you have a right to a fair and impartial trial, by jury, in the case of misdemeanors where the state has the burden of proving the charge beyond a reasonable doubt. You have a right to be present at trial, with your attorney, to confront the witnesses that would appear against you and to cross examine them. If the charge carries a possible jail sentence, on conviction, you have a right to a court appointed public defender, that is an attorney at public expense, if you ask for an attorney and if you further qualify, by being indegent [sic] as defined by law. You would have the further right at trial to present your evidence. And in that regard to have the subpoena powers of the court for the attendance of your witnesses. The right to remain silent, yourself. That is, you would not have to testify at trial, unless you would choose to do so. Finally, you would have the right to appeal these proceedings and the decision of this Court, on the record, to district court. Now this morning, deputy county attorney, Miss Gryva is prosecuting. You may call your cases.

"MISS GRYVA: Thomas M. Ziemba. Z-I-E-M-B-A. Charged with driving while intoxicated, third offense, and driving under suspension.

"THE COURT: All right. Mr. Ziemba, the complaint here docket 74, page 748, charges you with two counts of misdemeanor, as you have been informed. Do you understand these charges, or do you wish to have this complaint read to you?

"MR. ZIEMBA: No, Sir, I understand them.

"THE COURT: Now even though this charges a

third offense, on this complaint, I am going to give you the possible penalty, on conviction, under this new law for first, second and third offense. Now, this is known as a Class W misdemeanor and for a first conviction, seven days imprisonment with a six months license suspension and a $200 fine, if probation is granted license suspension for a minimum of 60 days. Second conviction, 30 days imprisonment with a one year license suspension and $500 fine, if probation is granted minimum six months license suspension and 48 hours jail. Third conviction, three months minimum imprisonment, to six months maximum imprisonment, permanent license suspension or revocation and a $500 fine, if probation is granted a seven day imprisonment with one year license suspension. And also to Count II, the driving under suspension, work permit, which is listed as a Class IV misdemeanor on conviction, the possible penalty on that would be a minimum fine $100, maximum $500. Do you understand your rights to a trial and to an attorney?

"MR. ZIEMBA: Yes, Sir.

"THE COURT: And are you ready, this morning, to waive those rights and proceed, here, to a plea on these charges?

"MR. ZIEMBA: Yes, Sir, I would rather waive rights.

"THE COURT: Okay. Then how do you plead to, then, to the charges?

"MR. ZIEMBA: Guilty."

The county court then determined that there was a factual basis for the plea, continued the matter for a presentence investigation, and announced that a hearing regarding prior convictions would be held at the time of sentencing. The defendant failed to appear before the probation officer and did not appear on October 8, 1982, the date set for sentencing.

At a sentencing hearing on November 5, 1982, the court noted that the defendant had been convicted of driving while intoxicated on January 20, 1979, and

again on November 13, 1980. The defendant was fined $500; his operator's license and driving privileges were suspended permanently; and he was sentenced to jail for 3 months.

Upon appeal to the district court that court found that "the record affirmatively supports a finding the defendant was properly advised of his constitutional rights and he effectively waived them in entering pleas of guilt."

The district court further found that the defendant "was never advised of his right to present mitigating facts or object to the validity of the prior convictions" as required by Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982). The sentence was vacated and the cause remanded for a determination of the number of prior offenses by the defendant.

At a sentencing hearing in the county court on March 25, 1983, the State offered certified copies of the record of two prior convictions, which were received over objection. The defendant was then allowed to testify concerning the two previous convictions. The defendant admitted that he had waived his right to counsel in both cases. At the conclusion of the hearing the court found that the offense charged was a third offense and fined the defendant $500, sentenced him to jail for 3 months, and permanently suspended the defendant's license. The defendant again appealed to the district court.

Upon the second appeal the district court, on June 6, 1983, found that the records of the prior convictions offered in the county court at the second sentencing hearing on March 25, 1983, were insufficient and that testimony by the judge presiding at the hearing or a verbatim transcript of the hearing was necessary to prove a voluntary and intelligent waiver of constitutional rights. The finding of the county court that the defendant was guilty of third offense driving while intoxicated was vacated; the defendant was found guilty of first offense driving while intoxicated; and the cause was remanded to

the county court for sentencing. It is to review that order of the district court that the State has prosecuted error proceedings.

The State contends that proof of prior convictions was unnecessary because the defendant pleaded guilty to third offense driving while intoxicated at the arraignment in county court on September 13, 1982.

In *State v. Feagin*, 196 Neb. 261, 262, 242 N.W.2d 124, 124-25 (1976), we stated: "The plea of guilty eliminated the necessity of proof of the prior convictions or that the defendant had been represented by counsel or had knowingly and intelligently waived his right to counsel at the time of those convictions."

In the *Feagin* case the defendant, who had pleaded guilty to third offense driving while intoxicated, argued that the court erred in considering the prior convictions alleged in the information when sentencing him. We stated that "[a] plea of guilty waives all defenses to the charge whether procedural, statutory, or constitutional." *Id.* at 262, 242 N.W.2d at 125. See, also, *State v. Falcone*, 212 Neb. 720, 325 N.W.2d 160 (1982); *State v. Herren*, 212 Neb. 706, 325 N.W.2d 151 (1982).

In *Feagin*, as in this case, the complaint alleged the facts concerning the prior convictions. In *State v. Prichard*, 215 Neb. 488, 339 N.W.2d 748 (1983), the complaint alleged no facts concerning the prior convictions and contained only the words "Third Offense."

Feagin was decided in 1976, prior to our decisions in *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981); *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983); *State v. Kucera*, 215 Neb. 337, 338 N.W.2d 443 (1983); and *State v. Prichard*, *supra*; and prior to the 1982 amendments to § 39-669.07.

The basic principle stated in *Feagin* remains unchanged: a valid plea of guilty waives all defenses to the charge, whether procedural, statutory, or constitutional. However, there are now additional re-

quirements that must be complied with in taking a valid plea of guilty to a misdemeanor charge, and a more complete record must be made to establish that the plea was a valid plea. Although driving while intoxicated is but one offense, *Haffke v. State*, 149 Neb. 83, 30 N.W.2d 462 (1948), it is essential that the accused be advised at the arraignment whether he is charged with a first, second, or third offense, because the punishment varies depending upon whether it is a first, second, or third offense. A plea cannot be voluntarily or intelligently made if the accused is not advised as to the maximum penalties which may be imposed and the facts which the State relies upon if the offense charged is other than a first offense.

Since both second and third offense driving while intoxicated are now misdemeanors, where the accused elects to enter a plea of guilty, the enhancement and sentencing proceeding may immediately follow the arraignment so that the entire matter may be disposed of at one hearing.

In addition to satisfying the requirements set out in *State v. Tweedy*, *supra*, in regard to accepting pleas of guilty in misdemeanor cases, the enhancement proceeding must satisfy the requirements set out in § 39-669.07 and *State v. Smith*, *supra*. *State v. Prichard*, *supra*. The transcript of a judgment used to prove a prior conviction must show that at the time of the conviction the defendant was represented by counsel or waived his right to counsel. A defendant may, as in *State v. Smith*, *supra*, object to the admission of the record of a prior conviction on the basis that the record does not affirmatively establish that he was represented by counsel or waived his right to counsel. A transcript of judgment which does not contain such an affirmative showing is not admissible and cannot be used to prove a prior conviction. *State v. Smith*, *supra*.

Section 39-669.07(3) now provides that "[t]he defendant shall be given the 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."

There is no requirement that the State prove a prior conviction by a transcript of the judgment if the defendant admits that he was in fact convicted as alleged in the complaint. However, in accepting such a waiver the trial court must address the defendant and ascertain that he was represented by counsel at the time of the prior conviction or waived his right to counsel.

In either event the trial court is required to advise the defendant that he has a right to review the record of the prior conviction, bring mitigating facts to the attention of the court prior to sentencing, and object to the validity of the prior conviction as provided in § 39-669.07. The defendant, however, cannot relitigate the former conviction in the enhancement proceeding. *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983). After being advised of his rights under § 39-669.07, the defendant may waive any or all of those rights. The trial court may then impose sentence or order that a presentence investigation be made.

To the extent that *State v. Feagin*, 196 Neb. 261, 242 N.W.2d 124 (1976), implies that the procedures just described are not essential to a valid plea of guilty and sentence, it is disapproved. To the extent that *State v. Prichard*, 215 Neb. 488, 339 N.W.2d 748 (1983), suggests that proof of prior convictions may not be waived and that the rights under § 39-669.07(3) may not be waived, it is disapproved.

A defendant who has entered a guilty plea may, on direct appeal, challenge the validity of his plea. On the first appeal to the district court, Ziemba argued that the arraignment was constitutionally infirm because the record did not affirmatively establish that he was present in the courtroom when the court advised the group of defendants of their rights. The

district court rejected that argument and found that the plea was valid.

In *State v. Tweedy*, 209 Neb. 649, 652, 309 N.W.2d 94, 96-97 (1981), quoting *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971), we said that " 'a plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily.' " The record must demonstrate that the defendant was advised of his right to a jury trial, his right to confront witnesses against him, and of the privilege against self-incrimination. *State v. Tweedy, supra.* In order to make an intelligent and voluntary plea where there has been a group arraignment, the defendant must have been present when the court advised those charged of their constitutional rights. The record must disclose that defendant was present at that time. See *State v. Smith, supra.*

In *State v. Turner, supra*, we held that while a defendant's attention need not be directed to each constitutional right and a separate waiver be obtained for each, the court must personally examine the defendant to ensure that he understands that his guilty plea waives those rights. See, also, *United States v. Crook*, 526 F.2d 708 (5th Cir. 1976); *United States v. Fels*, 599 F.2d 142 (7th Cir. 1979).

In the *Fels* case the court advised three defendants at one time of their constitutional rights. The court of appeals held that Fed. R. Crim. P. 11(c), which requires the court to personally address the defendant, had been complied with because the record showed that the court had called the attention of all three defendants to the fact that he was speaking to them. The court of appeals also suggested the use of a checklist to ensure that the defendant is fully advised as to his constitutional rights which will be waived by a plea of guilty.

In the present case the record shows that after the group arraignment the county court merely inquired

of the defendant if he understood his rights to a trial and to an attorney. The record does not show that the defendant was present in the courtroom at the time the court advised the group of defendants of their rights. A conviction cannot be sustained where the record does not affirmatively show that the defendant waived his rights with a knowledge based upon a court advisement of those rights. *State v. Tweedy*, *supra*. We conclude that the record fails to show a valid plea of guilty.

The records of the prior convictions which were offered at the second sentencing hearing in the county court on March 25, 1983, consisted of certified copies of the complaints and checklists used by the county court at the hearings.

The checklist in the first case shows, through use of the judge's initials "JLC," that the following took place:

"ARRAIGNMENT Held 4/9/79 Defendant present s/JLC With Counsel Waived

Constitutional rights explained s/JLC Explanation waived _____

Understands rights s/JLC yes ____ no State's counsel Mary Gryva

Penalty explained s/JLC yes ____ no Jail sentence possible s/JLC yes ____ no ____ waived

Understands elements of offense s/JLC Understands penalty s/JLC

"PLEA Date: 4/9/79 Counts: Guilty s/JLC No contest ____ Not guilty ____

Changed _____ Guilty _____ No contest _____ Not guilty _____

Admits guilt: ____ yes ____ no Factual basis for plea: s/JLC yes ____ no

Wants guilty plea accepted notwithstanding possible innocence _____

Plea voluntary s/JLC yes ____ no Intelligently entered s/JLC yes ____ no"

The checklist for the second conviction shows similar initialed information and reveals that Ziemba

appeared without counsel and pleaded guilty to that charge following an advisement of his rights. The judge noted that the plea was made voluntarily, intelligently, and upon a factual basis.

The State contends that the district court's finding that the checklists did not constitute an adequate record of the prior arraignments was erroneous; that it was error for the trial court to conclude that the checklist was not part of the record or transcript; and that it was error for the trial court to conclude that absent either a verbatim transcript or testimony from a judge regarding the making of the guilty plea, the standards of *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), cannot be met.

Under certain circumstances a checklist authenticated by the signature or initials of the judge can be considered a part of the record. Such a checklist may serve to affirmatively establish that defendant made an intelligent and voluntary guilty plea. Such a checklist must comply with *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981).

Neb. Rev. Stat. § 25-1301(2) (Reissue 1979) provides: "Rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action."

The checklists used by the county court were similar to the notations on the trial docket made in the rendition of judgment. § 25-1301. As such they were properly a part of the record.

Moreover, we note that the checklists may form a part of the "common-law record," since they are part of the written history of the proceedings drawn by the proper officer. In *United States v. Taylor*, 147 U.S. 695, 698-99, 13 S. Ct. 479, 37 L. Ed. 335 (1893), the Court said: "A record is substantially a written history of the proceedings from the beginning to the end of the case, but nothing which is not properly

matter of record can be made such by inserting it therein. . . .

". . . Perhaps the most satisfactory definition of a common law record in a criminal case under the American practice is found in *McKinney v. People*, 7 Illinois, 540, 551, wherein it is said: 'In a criminal case, after the caption stating the time and place of holding the court, the record should consist of the indictment properly endorsed, as found by the grand jury; the arraignment of the accused, his plea, the impanelling of the traverse jury, their verdict, and the judgment of the court. This in general is all that the record need state.' "

In *Garguilo v. Moore*, 156 Conn. 359, 364, 242 A.2d 716 720 (1968), the court stated: "Usually, a record in a judicial proceeding is 'a precise history of the suit from its commencement to its termination, including the conclusion of law therein, drawn by the proper officer for the purpose of perpetuating the exact state of facts.' "

Courts in other jurisdictions have held similar entries to constitute a part of the record. In *Shanahan v. Boston & Northern St. R'y.*, 193 Mass. 412, 413, 79 N.E. 751 (1907), the court stated that "the cases are before us on a copy of the docket entries, supplemented by an agreed statement of the parties . . . . Until formally extended these entries constitute the record . . . ." In *State v. Simpson*, 91 Me. 77, 39 A. 286 (1897), it was said: "The docket is deemed to be the record until a more extended record is made, and the same rules of imported verity apply to the docket entries as to the completed record." See, also, *People v. Lee*, 39 Ill. App. 3d 750, 350 N.E.2d 580 (1976), in which a checklist similar to that used herein was impliedly deemed part of the record.

Since a checklist may constitute a part of the record, it can serve to affirmatively establish a voluntary and intelligent waiver of rights within the rules set forth in *State v. Tweedy*, *supra*, and *State v. Smith*, *supra*.

The district court held that absent either a verbatim transcript or testimony from the presiding judge, an appellate court would not be able to determine whether a valid waiver of rights occurred. We have held that the validity of certain proceedings may be proven by something less than a verbatim transcript.

In *State v. Martin*, 198 Neb. 811, 255 N.W.2d 844 (1977), the defendant argued that the record did not adequately reflect that the jury was sworn. The only indication that the jury had been sworn was found in a journal entry by the court. We stated: "In this case there is an affirmative showing in the record that the jury was sworn. A journal entry in a duly authenticated record imports verity, and it is sufficient to support a finding unless there is proof to the contrary." *Id.* at 816, 255 N.W.2d at 848.

In *State v. Hall*, 188 Neb. 130, 195 N.W.2d 201 (1972), the verbatim transcript of the rendition of the guilty plea was lost. Defendant argued that the plea should therefore be vacated. We stated at 134, 195 N.W.2d at 204: "We think it wholly unrealistic to determine that the loss of the actual record of proceedings should require the vacation of a guilty plea even where the State has established by other evidence [testimony of the judge] a reasonably accurate account of what took place. Such a record is not a 'silent record' even though it speaks with less authority than the verbatim record of the proceedings required under section 1.7, American Bar Association Standards Relating to Pleas of Guilty, previously adopted by this court in State v. Turner, 186 Neb. 424, 183 N.W.2d 763."

In *People v. Hopping*, 60 Ill. 2d 246, 252, 326 N.E.2d 395, 398-99 (1975), the court, quoting *Mayer v. City of Chicago*, 404 U.S. 189, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971), stated: "The Supreme Court has pointed out:

" 'A "record of sufficient completeness" does not translate automatically into a complete verbatim

transcript. We said in *Griffin* [*v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956)] that a State "may find other means [than providing stenographic transcripts for] affording adequate and effective appellate review to indigent defendants." 351 U.S., at 20, [100 L. Ed. at 899]. We considered this more fully in *Draper v. Washington*, *supra* [372 U.S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963)], at 495-496, [9 L. Ed. 2d at 905]:

" ' "Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events of trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript. . . ." ' "

In *Twyman v. State*, 293 Ala. 75, 82, 300 So. 2d 124, 131 (1974), the court said, "In *Boykin*, the court said the affirmative showing must be made, but the court did not say that the showing must be made by the transcript and certificate of the court reporter."

In *People v. Kline*, 16 Ill. App. 3d 1017, 307 N.E.2d 398 (1974), the court found that the minutes of the court clerk were sufficient to establish a valid guilty plea. "The only 'record' before us of the guilty plea proceedings is that shown by the minutes of the court clerk. Such minutes, brief in form and limited in scope, recite that the defendant tendered a plea of guilty, that he then was 'advised by the Court as to his rights and the possible consequences upon his said plea of guilty entered herein'; that the court explained to him 'his full legal and constitutional rights in the premises, and his right to a trial by a jury and to require proof of the charged offense beyond all reasonable doubt, and to confront and cross-examine witnesses'; that the defendant waived his right to a jury trial and persisted in his plea; and

that the court accepted the plea and adjudged the defendant guilty. The presumption is that the common law record imports verity unless contradicted by other facts in the record." *Id.* at 1021, 307 N.E.2d at 402-03.

In *People v. Lee*, 39 Ill. App. 3d 750, 752-53, 350 N.E.2d 580, 582-83 (1976), the court stated: "The only basis upon which defendant asserts his claim for reversal is that he is entitled to such reversal simply by virtue of the fact that a detailed record of defendant's guilty plea was not made. In the case of *People v. Hopping*, 60 Ill. 2d 246, 326 N.E.2d 395, which stems from two cases arising in this district (*People v. Hopping*, 16 Ill. App. 3d 275, 305 N.E.2d 610; *People v. Kline*, 16 Ill. App. 3d 1017, 307 N.E.2d 398), the Supreme Court specifically found that the failure to have verbatim transcripts of proceedings setting forth the details of the entry of the guilty plea did not require that convictions of defendants be set aside, when such defendants do not take advantage of available procedures to compile a proper record and who did not move to set aside the judgments of conviction. The court indicated that the preservation of a complete record, on the basis of which to appraise attacks made on judgments of conviction, had not been transformed into a constitutional requirement by the adoption of rules relating to verbatim transcripts with respect to waivers of counsel and admonitions to defendant in connection with entry of a plea of guilty."

In *Crew v. Nelson*, 88 S.D. 162, 166, 216 N.W.2d 565, 567 (1974), the court said: "We still hold to the view that the preferred procedure is for the court to actively participate in advising the accused of his rights on the record before permitting the entry of a guilty plea. We merely hold here that where the court fully advised defendant of his rights but failed to make a stenographic record of the same pursuant to the usual procedure in misdemeanor courts to date, that this lack of a written record does not viti-

ate the plea. In accordance with Merrill we will consider collateral evidence from the trial judge which clearly shows that the petitioner was aware of his constitutional rights and that he understood those rights at the time of plea."

We conclude that a verbatim transcript of the rendition of a guilty plea is not constitutionally required, nor does absence of such a transcript require a finding that the plea was invalid. A checklist or other docket entry which is sufficiently complete to comply with the requirements of *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), and the requirements previously set out in this opinion can establish a valid waiver. A checklist or other such docket entry which is made by one authorized to make it imports verity, and unless contradicted it stands as a true record of the event. To the extent that *State v. Prichard*, 215 Neb. 488, 339 N.W.2d 748 (1983), implies that a verbatim transcript is necessary, it is disapproved. The constitutional minimum is that there be a record showing that defendant waived his rights knowingly and voluntarily.

EXCEPTIONS SUSTAINED IN PART,
AND IN PART OVERRULED.

WHITE, J., concurs in the result.

HARLAN FRIEDRICHSEN ET AL., APPELLANTS, V. JOHN KOEHN ET AL., APPELLEES.

344 N.W.2d 672

Filed February 24, 1984. No. 83-552.

Child Custody: Habeas Corpus: Parental Rights. Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.

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

Nye, Hervert, Jorgensen & Watson, P.C., for appellants.

Berreckman & Berreckman, P.C., for appellees.

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

PER CURIAM.

This is an appeal by Harlan Friedrichsen and Betty Friedrichsen from an order of the district court for Lincoln County, Nebraska, denying their petition for writ of habeas corpus against the appellees, John Koehn and Margaret Koehn. The Friedrichsens are the adoptive parents of Karen Friedrichsen, who was age 17 at the time the petition was filed. John and Margaret Koehn are the brother-in-law and sister of Karen. The petition, which was filed in February 1983, alleges that the Koehns are illegally detaining Karen and prayed that the court give care, custody, and possession of Karen to the Friedrichsens.

The inception of the convoluted legal struggle began in 1980 when a petition was filed by the Dawson County deputy attorney, ostensibly at the request of the Friedrichsens, alleging that Karen, then age 14, was a child as defined by Neb. Rev. Stat. § 43-202(4) (Reissue 1978) by reason of the facts that Karen was wayward or habitually disobedient, and was uncontrolled by her parent, guardian, or custodian.

At the hearing in the juvenile court Karen admitted the allegations in the petition. The Dawson County Court placed Karen in temporary custody of John and Margaret Koehn. The Friedrichsens appealed to the district court, which affirmed the county court's determination. The case was then appealed to this court.

During the time the appeal was pending in this court, the Friedrichsens approached the Dawson

County attorney and advised him that it was not their desire that juvenile proceedings be commenced against Karen in the first instance.

Notwithstanding the existence of the order of the district court and the fact that the case was on appeal to this court, thereby staying all other proceedings, the county attorney proceeded to file a dismissal of the action in Dawson County Court. The county court, apparently persuaded that it had the authority, dismissed the case. Thereafter, appellants' counsel, under the erroneous belief that the issue was moot, voluntarily dismissed the appeal in this court and elected to proceed under a writ of habeas corpus.

Disregarding the rather cavalier attitude of both the county attorney and the county court concerning their authority to dismiss a case in a lower court pending on appeal in this court, and considering only the merits of the matter in habeas corpus, the evidence discloses that Karen Friedrichsen, now over 18 years of age, has for the last nearly 4 years lived with her sister and brother-in-law. Since that time, Karen has secured the equivalent of a high school degree through the completion of a General Educational Development degree program. She has found gainful employment and has greatly matured. She is happy living with the Koehns and does not desire to return to her parents' home. It is also questionable whether the appellants are sincere in their desire to have Karen return to their home, or, rather, simply wish to acquire physical custody for the purpose of a mental examination and commitment, although the record is absolutely silent of the necessity of any such procedure.

We said in *Nielsen v. Nielsen*, 207 Neb. 141, 149, 296 N.W.2d 483, 488 (1980): "Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent."

Apparent from the face of the record is the fact that the differences between Karen and her parents are irreconcilable. Karen, who is no longer subject to the juvenile authorities and who has approximately 1 year until she reaches the age of majority, has become fully emancipated. While it is true that the Koehns are graciously providing a home for Karen, they do not assert legal custody, apparently believing, as did the other parties involved, that the juvenile proceeding became null and void by reason of the county attorney's rather precipitous dismissal in the county court.

In review of the facts and circumstances of this case, we are inclined to agree with the decision of the district court that the best interests of Karen require that she be allowed to continue her life as an adult in an environment of her own choosing. No good would result by taking an apparently well-adjusted person and placing her back in the custody of parents from whom she has become estranged and who do not appear to be, in fact, greatly attached to their daughter.

AFFIRMED.

IN RE INTEREST OF C.L.F., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. R.F., APPELLANT.

344 N.W.2d 674

Filed February 24, 1984. No. 83-585.

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

Bruce H. Abrahamson and Timothy L. Korb of Gunderson, Abrahamson & Grewe, for appellant.

Donald L. Knowles, Douglas County Attorney, and Douglas D. Grieser, for appellee.

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

PER CURIAM.

The separate juvenile court ordered the termination of the parental rights of the mother of C.L.F., a female child born on December 12, 1982. The mother, 19 years old on the date of her child's birth, is apparently unmarried. Although counsel appearing for the mother in this court indicates that his client has never contacted him, he has perfected this appeal for her.

The Douglas County Child Protective Services received a referral on C.L.F. on December 15, 1982, which alleged that the mother was unable to take care of the child upon her release from the hospital. The first contact with the mother was made on December 21 at her home, where she was found to be sniffing paint and in a state of intoxication.

Since January 18, 1983, the Douglas County Welfare Administration has had 16 direct contacts with the mother. Eight of those contacts were home visits, on the first of which, February 14, the mother appeared to be under the influence of drugs. Following that date, she was apparently free of such influence for four visits. However, on the sixth visit, May 24, which was arranged because of the concern of a boyfriend of the mother, she was found to be openly sniffing paint, and was incoherent, staggering, slobbering, and emaciated.

Through the intervention of the county attorney and the board of mental health, the mother was admitted to the Douglas County Hospital. As part of her probation, arising out of a sentence of probation from the Omaha Municipal Court, she was then admitted to the Nova Therapeutic Community on June 2, 1983, but as of June 8 she left that facility without explanation, and appparently efforts by the case-

worker to locate her have been unavailing.

The mother's criminal record indicates that between May 4, 1982, and May 7, 1983, she was convicted of 10 counts of using a toxic inhalant and was sentenced to a total of 365 days' imprisonment, and she apparently served 169 days in the Douglas County Correctional Center.

According to a report of a Nebraska Children's Home Society caseworker, the child, C.L.F., at the time of her release from the hospital and placement in foster care, had a great deal of seizure activity, which indicated neurological damage either as a result of birth trauma or caused in utero prior to her birth. She had little use of her arms or legs, almost no head control, and experienced considerable difficulty feeding, as she did a lot of gagging. Reports from the neurologist caring for C.L.F. during the months of March, April, and May 1983 indicated diffuse hypotonia, developmental delay in the realm of motor activity, and seizures. She did seem to show some progress in what the physician called a present excellent home situation.

The initial hearing in this matter, a detention hearing, was held on January 13, 1983, at which the mother did not appear, although service was made at her last known address. An order of detention was made, and an adjudication hearing was set for March 1, 1983. The mother apparently was in the vicinity of the courtroom at approximately 12:30 p.m. on that date, but left before the hearing commenced. This hearing was continued to May 24, 1983, at which the mother did not appear, although she had been served with summons.

Based on the evidence at this latter hearing, the trial court found that C.L.F. is a child within the meaning of Neb. Rev. Stat. §§ 43-247(3)(a) and 43-292(2) (Cum. Supp. 1982), and ordered that the issue of determination of parental rights be taken under advisement pending a dispositional hearing.

The dispositional hearing was held on June 29,

1983, at which evidence in the form of written reports from various welfare agencies and the neurologist, as set out above, was received. Again, the mother failed to appear, although summons was served upon her to appear at that hearing. Following that hearing, an order terminating the parental rights of the mother was entered by the court.

The appellant's only assignment of error is that the court erred in finding that she has substantially and continuously or repeatedly neglected her child and refused to give the child necessary parental care and protection within the meaning of § 43-292(2). Her strongest argument seems to be that the period of time between the birth of the child and the parental termination was so brief that a proper program of rehabilitation was never implemented. However, as she herself concedes, there is no requirement that the court must implement a rehabilitation plan for the parent of a child found to be dependent and neglected.

On a de novo review of this record, it is abundantly clear that this child, who suffers extreme medical problems, possibly due to her mother's abuse of toxic inhalants, will never receive the necessary treatment and care from this same person who not only refuses to change her personal habits but, by her failure to attend any of the court sessions, has displayed a total lack of concern for the welfare of this child. The evidence is clear and convincing that the parental rights should be terminated in this case and that the best interests of the child require that it be done immediately.

The judgment of the separate juvenile court was correct and is affirmed.

AFFIRMED.

Cite as 216 Neb. 635

STATE OF NEBRASKA, APPELLANT, V. MARK POIT, APPELLEE.

344 N.W.2d 914

Filed February 24, 1984. No. 83-696.

1. **Criminal Law: Evidence.** One exception to the exclusionary rule is the "inevitable discovery" rule, which allows illegally obtained evidence to be admitted into evidence if the illegal act merely contributed to the discovery of the allegedly tainted information and such information would have been acquired lawfully even if the illegal act had never transpired.
2. **Criminal Law: Evidence: Proof.** Not all illegally obtained evidence can be admitted simply because law enforcement officials assert that it would have been inevitably discovered. The mere assertion of inevitable discovery must fail. After the accused has challenged the legality of the witness' acquisition and of the use of the witness' testimony, the police must show that when the illegality occurred they possessed and were actively pursuing the evidence or leads that would have led to the discovery of the challenged witness and that there was a reasonable probability that that witness would have thereby been discovered. The prosecution must bear the burden of proof on this issue. The court then must find that reasonable probability of subsequent discovery existed, based on this showing and the record generally.

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

Patrick Vipond, for appellant.

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

KRIVOSHA, C.J.

This appeal is brought pursuant to the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1979), which provides in part that the State shall have the right to appeal a trial court's order granting a motion to suppress to a single judge of the Supreme Court at chambers. See, also, *State v. Hagen*, 180 Neb. 564, 143 N.W.2d 904 (1966).

The appellee, Mark Poit, was charged on an information filed in Hall County District Court with the offense of possession of a controlled substance other than marijuana, to wit, lysergic acid diethylamide

(LSD), in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 1979). The record before me discloses that on February 14, 1983, an investigator of the Nebraska State Patrol (Investigator) applied for and received a search warrant for "[t]he basement apartment located under a wood frame residence at 818 West 8th Street, Grand Island, Hall County, Nebraska, Apt. #4." The search warrant specifically authorized the Investigator to conduct a search of the residence for the purpose of "discovery and seizure of property, to-wit: lysergic acid diethylamide (LSD) and other controlled substances, drug paraphernalia and items indicating or showing the identities of the person or persons living in the residence at 818 West 8th, Apt. #4 . . . ."

Armed with the search warrant and assisted by other law enforcement officers, the Investigator executed the search warrant on February 14, 1983, at approximately 10 p.m. After knocking on the door of the premises and having it opened by Poit, the Investigator entered.

Upon entering the apartment the Investigator searched Poit and went through his wallet, which Poit had removed from his pocket at the Investigator's request. During the course of the examination of the wallet, the Investigator discovered 10 "hits" of LSD. A search was then conducted of the premises, pursuant to the search warrant, and a number of other items were seized, including marijuana and drug paraphernalia. Poit was arrested and charged with possession of a controlled substance, to wit, LSD.

On August 5, 1983, Poit filed a motion to suppress the evidence seized from his residence. He amended the motion on August 15, seeking to suppress the evidence seized from his person. The trial court generally overruled the motion to suppress the items obtained in the house pursuant to the warrant, but did grant the motion to suppress all evidence

seized from Poit's wallet. It is from that order which the State now appeals.

The State argues to us that the trial court's order should be overruled because a warrant to search a place based upon probable information that the resident of that place has committed or is committing a crime in that place authorizes the search of the residence as reasonably and necessarily within the scope of the warrant, and includes a search of the individual found within the residence. Poit, on the other hand, argues that the order of the trial court suppressing the evidence obtained from his wallet was correct because a warrant authorizing the search of a particular place or premises does not give the officers the right to search persons who may be found in it. I believe, however, that because of an exception to the general rule concerning search and seizure, I need not address that issue.

In passing, I note that the trial court was correct in overruling Poit's motion to suppress the evidence obtained in the premises pursuant to the search warrant issued. I believe that the affidavit filed in this case sufficiently established probable cause to justify the magistrate in issuing a warrant to search the premises. It is by reason of my determination that the warrant was lawfully issued that I find the trial court's order suppressing the LSD found in Poit's wallet was in error.

Not all evidence obtained is inadmissible simply because during the course of an investigation some illegal act was committed by the government. There are several well-recognized exceptions to the exclusionary rule, among which are attenuation and the "plain-view" doctrine. See, *United States v. Ceccolini*, 435 U.S. 268, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978), *Nardone v. United States*, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). A third exception, and the one applicable to this case, is what has come to be known as the "in-

evitable discovery'' rule. This exception allows illegally obtained evidence to be admitted if it would have been discovered in the course of a proper investigation. While the U.S. Supreme Court has never directly passed upon this exception, it has impliedly suggested its validity. See *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). And the exception has been approved by a number of federal circuits, including the first, second, third, fifth, seventh, eighth, ninth, and eleventh. See, *United States v. Bienvenue*, 632 F.2d 910 (1st Cir. 1980); *United States v. Ceccolini*, 542 F.2d 136 (2d Cir. 1976), *rev'd on other grounds* 435 U.S. 268, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978); *Government of Virgin Islands v. Gereau*, 502 F.2d 914 (3d Cir. 1974); *United States v. Brookins*, 614 F.2d 1037 (5th Cir. 1980); *United States ex rel. Owens v. Twomey*, 508 F.2d 858 (7th Cir. 1974); *United States v. Apker*, 705 F.2d 293 (8th Cir. 1983); *United States v. Kandik*, 633 F.2d 1334 (9th Cir. 1980). Only the sixth circuit has expressly rejected the inevitable discovery exception. See *United States v. Griffin*, 502 F.2d 959 (6th Cir. 1974).

I believe an examination of the rationale underlying the exception is controlling in this case and should be applied. The rationale is set out in some detail in the opinion by the U.S. Court of Appeals for the Fifth Circuit in *United States v. Brookins*, *supra*. There, the fifth circuit noted at 1044: '' '[T]he exclusionary rule does not come into play merely because the proffered evidence is in fact the product of an illegal act. If . . . the illegal act merely contributed to the discovery of the allegedly tainted information and . . . such information would have been acquired lawfully even if the illegal act had never transpired, the presumptive taint is removed, and the apparently poisoned fruit is made whole. In other words, if . . . the illegal act was not an indispensable cause of the discovery of the proffered evidence, the exclusionary rule does not apply.' ''

The fifth circuit then went on to note at 1046-47: "In the fourth amendment context, the 'single and distinct' purpose for the exclusionary rule is deterrence of police violations of that constitutional protection against unreasonable searches and seizures. [Citations omitted.] In the fifth and sixth amendment context, the 'prime purpose' of the exclusionary rule as applied to the fruits of police illegality is deterrence of government denial of the self-incrimination privilege or the counsel right [citations omitted], but a secondary purpose is ensuring the trustworthiness of incriminating statements [citations omitted]. The attenuated connection exception and the independent source exception are justified because it is unlikely that suppression of attenuated or independently discovered derivative evidence would deter police misconduct and would bar untrustworthy evidence. [Citations omitted.] This justification also applies to the inevitable discovery exception.

"Deterrence is only marginally served by suppression of testimony derived from illegally obtained evidence if such testimony would have been discovered without the illegal actions, because the motivation for the illegal search or interrogation was not the quest for derivative evidence that the police were already pursuing and would probably have been discovered in any event."

In the instant case the evidence is without contradiction that the entry into Poit's home was pursuant to a validly issued search warrant. The evidence is further clear that, pursuant to that validly issued search warrant, the officers, had they first searched the premises rather than Poit, would have discovered the illegal drugs and drug paraphernalia and would have, pursuant to the warrant, arrested Poit. Having therefore arrested Poit for possession of marijuana and illegal drug paraphernalia, they would have conducted a search of his person. That search would have disclosed the presence of the LSD

in Poit's wallet, and therefore the LSD would have been "inevitably discovered." *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973). To suppress the evidence because it was found, in essence, "out of order" does not seem to me to fulfill any of the reasons for which the exclusionary rule was created.

In reaching my conclusion I think it of value, however, to further note the admonitions of the fifth circuit in the *Brookins* case. The fifth circuit noted at 1048: "This approach does not mean that any illegally obtained evidence can be admitted simply because law enforcement officials assert that it would have been inevitably discovered. The mere assertion of inevitable discovery must fail. After the accused has challenged the legality of the witness' acquisition and of the use of the witness' testimony, the police must show that when the illegality occurred they possessed and were actively pursuing the evidence or leads that would have led to the discovery of the challenged witness and that there was a reasonable probability that that witness would have thereby been discovered. The prosecution must bear the burden of proof on this issue. [Citations omitted.] The court then must find that reasonable probability of subsequent discovery existed based on this showing and the record generally. Our holding, therefore, is that, despite a prior illegality which led to the discovery of a witness, that witness' voluntary testimony is admissible if the prosecution proves that the witness and his testimony would have been discovered in a lawful manner, had the prior illegality not occurred, by virtue of ordinary investigations of evidence or leads already in their possession."

While the *Brookins* case talks about witnesses, as noted by the decision of the U.S. Court of Appeals for the Eighth Circuit in *United States v. Apker*, 705 F.2d 293 (8th Cir. 1983), the "inevitable discovery" rule applies not only to witnesses but to tangible evidence as well.

For that reason the order of the district court for Hall County, Nebraska, suppressing evidence of lysergic acid diethylamide found in the wallet of Mark Poit is reversed.

REVERSED.

RICHARD D. JACKSON, APPELLEE AND CROSS-APPELLANT, V. JERALD E. CLEMENS AND CLEMENS MOBILE HOMES, INC., A DISSOLVED CORPORATION, APPELLANTS AND CROSS-APPELLEES.

345 N.W.2d 28

Filed March 2, 1984. No. 82-742.

1. **Accounting: Partnerships: Equity.** Where the relationships of the parties to a partnership are intertwined with other business relationships of the parties, an adequate remedy in an accounting case is available only within the equitable jurisdiction of the court.
2. **Equity: Appeal and Error.** In an action at equity this court must review the record de novo and reach an independent conclusion without being influenced by the findings of the trial court, except, however, that where credible evidence is in conflict, we must give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

James R. Hancock, 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 action was instituted by appellee, Richard D. Jackson, against Jerald E. Clemens and Clemens Mobile Homes, Inc., a dissolved corporation (hereinafter corporation). Jackson's amended petition alleged that he and Clemens had entered into a written partnership agreement on August 1, 1973, for the

sale of scuba diving equipment and accessories; that the partnership had terminated on December 31, 1977; and that all income and disbursements from August 1973 to December 31, 1977, were transacted through the general account of the defendant corporation. The amended petition further alleged that the parties agreed to terminate the partnership on December 31, 1977; that Jackson left the scuba business in December of 1978 because of Clemens' refusal to account; and that Clemens had refused to allow Jackson to take any of the closing inventory of the partnership, and had retained such inventory in Clemens' possession. Jackson sought an accounting of all moneys and property received by Clemens and the corporation on behalf of the partnership.

Clemens and the corporation filed a joint answer and counterclaim alleging that Jackson and the corporation, rather than Clemens, had entered into the partnership described in the petition and that Clemens was "the majority stockholder of Clemens Mobile Homes, Inc., which is a corporation." Defendants' counterclaim alleged that the partnership was "wound-up" on September 31 [sic], 1978, and sought an accounting from Jackson for the profits of Jackson's wholly owned enterprise entitled "Fathom Diving," which defendants alleged was operated during the existence of the partnership and should have been a part of the partnership.

After trial to the court, the court found that the partnership was between Jackson and Clemens personally and that the partnership began on August 1, 1973, and terminated on December 31, 1978. The court made findings of fact and conclusions of law, found generally for Jackson and against Clemens, and set out in its order a generalized accounting between Jackson and Clemens during the time of the partnership. This accounting gave Clemens a credit, pursuant to the theory advanced in Clemens' counterclaim; entered judgment for Jackson and against Clemens in the amount of $27,991.57; and

further directed that a certain 1978 GMC van be sold and the proceeds divided equally between the partners.

Clemens and the corporation timely filed a joint notice of appeal. In their joint brief in this court, their basic argument is that the trial court erred in determining that the partnership existed between Jackson and Clemens rather than between Jackson and the corporation. In this connection we must assume, although Clemens and the corporation state in their joint answer that Clemens is a majority stockholder of the corporation, that in fact Clemens is the sole stockholder. Otherwise, counsel for appellants is in a blatant conflict of interest position between Clemens and the corporation, because one or the other was going to be helped financially by any decision in the case, to the detriment of the other. We therefore proceed in the assumption that Clemens is, in effect, also the corporation. This approach also gives some meaning to the form of appellants' remaining assignments of error.

The appellants' five remaining assignments of error may be summarized as follows: (1) That "the court erred in failing to find that [Jackson] . . . did not [sic] in bad faith convert the assets of the partnership to himself without the knowledge or consent of [the corporation]," and in failing to award the corporation damages against Jackson for that conversion; (2) That the court erred in failing to find for the corporation on accounting issues and in granting judgment in favor of Jackson against the corporation on the corporation's account; and (3) That the court erred in failing to discredit, as a matter of law, all testimony of Jackson.

Jackson cross-appeals, assigning as error the court's determination that the partnership terminated on December 31, 1978, rather than in 1977 and that the court erred in requiring Jackson to account to the partnership for $8,413.95 of net profit from Jackson's personal operations in 1977 and 1978. For

the reasons set out hereinafter we affirm the judgment of the trial court in its entirety.

We must first determine the scope of our review. All parties proceed as if the matter were one within the court's jurisdiction in equity, and we agree. In *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 124, 317 N.W.2d 900, 902 (1982), we stated, "Where . . . the intimate relationships of the parties are involved, an adequate remedy was available only within the equitable jurisdiction of the court."

In that situation, as stated further in *Philip G. Johnson & Co.* at 124-25, 317 N.W.2d at 902, "Accordingly, we review the record de novo and reach an independent conclusion without being influenced by the findings of the trial court, except, however, that where credible evidence is in conflict, we must give weight to the fact the trial court saw the witnesses and observed their demeanor while testifying. [Citations omitted.]"

The evidence as to the identity of the partners is clear. Jackson and Clemens each signed, as an individual, a typewritten 13-line agreement dated August 1, 1973. The first four lines of the agreement were: "This is to serve as an agreement between Richard Jackson and Jerald Clemens conducting business selling Scuba equipment and accessories. The above parties have agreed to enter into business and share the profits equally." During the pleading phase of the case, Clemens and the corporation were asked, by formal request for admissions filed by Jackson on September 2, 1981, to "[a]dmit that on the 1st day of August, 1973, plaintiff and defendant Jerald E. Clemens entered into a partnership by written agreement for the sale of scuba equipment and accessories." Clemens formally answered that request sometime in 1981 by the word "Admitted." This answer to request for admissions was signed by Clemens, under oath, as "the Defendant above named." No officer of the corporation separately signed the answer.

On March 15, 1982, apparently galvanized by the realization that the corporation was a dissolved corporation, defendants filed "Amended Answers to Requests for Admissions." In these amended answers, the answer to the request for admissions set out above was changed to read: "It is admitted that Jerald E. Clemens signed the partnership agreement, however, the partnership agreement was actually between Richard D. Jackson and Clemens Mobile Homes, Inc., and Jerald E. Clemens was signing in his representative capacity for the corporation not intending thereby to become personally involved in the partnership. The partnership was intended to be between Richard D. Jackson and Clemens Mobile Homes, Inc., through its President, Jerald E. Clemens. The former answer to the extent that it purports to show an individual obligation of Jerald E. Clemens is withdrawn." These amended answers were offered in evidence by defendants, but Jackson's objections to them were sustained. Clemens does not assign any error in this regard, but the amended answers are herein referred to only to show Clemens' changing position throughout this litigation.

Clemens testified that the corporation, and not Clemens, was the partner. The only evidence that even remotely supported that position was that the agreement was typed on stationery of the corporation. Our independent review of the facts leads to the inescapable conclusion that the partnership existed between Jackson and Clemens.

With regard to the accounting itself, the evidence is much less clear. Confusion is injected into the case by the fact that Clemens insisted that accounting matters of the partnership be handled within the corporation's books. Only Clemens could sign checks, and Clemens therefore controlled both accounting practices and disbursements. There were no separate partnership books of account.

Further confusion arises because of disagreement

between the partners in 1977. As part of the operation of the partnership, Jackson had organized field trips for scuba students, to give the students an opportunity to test their diving skills, in such places as California, the Cayman Islands, and San Salvador. The trips would be arranged by Jackson, deposits to transportation companies were made by the partnership, and the students would pay fees for the trips to the partnership. Jackson thought the trips were beneficial to the partnership because a percentage of transportation fares were paid to the partnership and the trips were an incentive to present and future students of the scuba school. Clemens thought otherwise, and that the primary purpose of the trips was to afford Jackson a vacation. In 1977 Clemens refused to write any more checks for such trips. Jackson took the position that the trips were profitable and beneficial to the partnership and should continue. In order to do so Jackson then established accounting procedures in a personal account of his own, called "Fathom Diving," for handling all funds in connection with the diving trips. In February of 1978 Jackson incorporated Fathom Diving School, Inc., and continued to handle all income and disbursements for diving trips through the new corporation. In early 1978 Clemens refused to sign checks to pay certain accounts owed by the partnership, and Jackson used his corporation, Fathom Diving School, Inc., to pay such accounts and to operate the scuba operation in other respects.

In late 1977 and early 1978, then, the partnership between Jackson and Clemens was being operated through two entirely different corporate accounts—partly as a division within Clemens Mobile Homes, Inc. (controlled solely by Clemens), and partly as Fathom Diving School, Inc. (controlled solely by Jackson). The same accountant was handling all accounting matters for each of the partners. No testimony was obtained from this accountant during the pretrial procedures as to any of these matters.

The accountant died before trial. Both Jackson and Clemens testified at length as to various accounting procedures, expenditures, and income as to the various legal entities involved. It is fair to say that the evidence is not only in conflict but in disarray. We have reviewed the record de novo, but in the situation as presented we must give weight to the trial court's findings, due to the fact that "the trial court saw the witnesses and observed their demeanor while testifying." *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 125, 317 N.W.2d 900, 902 (1982). We find the trial court, in the accounting phase of this case, has properly disposed of a tangled mass of evidence in a Herculean effort somewhat comparable to cleaning out the Augean stables.

Clemens' assignment of error concerning the alleged failure of the court to discredit all of Jackson's testimony as a matter of law is totally frivolous. This assignment can only be considered as responsive to the trial court's finding that much of Clemens' testimony was discredited as a matter of law, pursuant to *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981), because of changes in testimony given by Clemens in this case as compared with that presented by Clemens in a different lawsuit between these same parties.

In his cross-appeal Jackson alleges that the court erred in determining that the partnership terminated on December 31, 1978, rather than in 1977. The evidence showed that, although the two parties had disagreed in late 1977 as to the manner in which the affairs of the partnership had been conducted, neither of the partners had given the other the written notice required by the partnership agreement to terminate the partnership. Jackson continued to work during 1978 in various positions with Clemens in other operations, and also continued to run the scuba operation through Fathom Diving School, Inc. The trial court, in its accounting, properly required Jackson to account to Clemens for all profits made

by Fathom Diving School, Inc., in 1977 and 1978. That phase of the court's accounting satisfied the other of Clemens' assignments of error, and Jackson's complaint that such accounting was in error is without merit.

We conclude that the trial court correctly computed the accounting between the parties, and affirm the trial court's decree in all respects.

AFFIRMED.

LUMIR T. KOTAS AND DOROTHY E. KOTAS, APPELLEES, v. GEORGE M. SORENSEN, APPELLANT.

345 N.W.2d 1

Filed March 2, 1984. No. 82-801.

1. **Debtors and Creditors: Promissory Notes: Limitations of Actions: Revival.** To toll the statute of limitations and to remove the bar of that statute, Neb. Rev. Stat. § 25-205 (Reissue 1979), a debtor must unqualifiedly acknowledge an existing liability.
2. _____: _____: _____: _____. A mere reference to a promissory note, although consistent with its existing validity and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an "acknowledgment" as contemplated by Neb. Rev. Stat. § 25-216 (Reissue 1979).

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded with directions to dismiss.

W. Travis Burney, for appellant.

Joseph J. Cariotto, for appellees.

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

GRANT, J.

On November 1, 1969, plaintiffs, Lumir T. and Dorothy E. Kotas, entered into a written agreement with George M. Sorensen. The Kotases gave Sorensen $5,000, which Sorensen agreed to repay within 60 days after written demand. Sorensen also agreed to

pay 4 percent interest per quarter on the borrowed sum. The legal interest rate at the time was 9 percent per annum.

On February 1, 1974, Sorensen wrote to Mr. Kotas as follows: "As you remember on 2 May 1973 I sent you a letter informing you that I was terminating all the investment accounts in Pheonix [sic]. I made a trip to Pheonix [sic] the weekend of Dec 15, 1973 and talked to Bob Ronhovde regarding the delay in settling the program there. Some of you know that a law suit was filed there, and until it is settled I will be unable to clear up your account. I was informed that it would come to court on the 11th of January. I Contacted Bob Ronhovde by telephone January 20, 1974 and was informed that there are still some delays such as, they wanted a complete inventory and assessed valuation of everything involved and it could take another 60 days or more. I do appreciate very much your patience in this."

On January 17, 1979, the Kotases filed a petition against Sorensen, alleging that only $2,330 had been paid on the agreement and seeking recovery of $9,800 plus interest and costs. In the petition it was alleged that Sorensen had renewed the agreement by the written letter of February 1, 1974, set out above.

Sorensen's amended answer to the petition alleged that the Kotases' suit was barred by the statute of limitations and that the interest rate was usurious.

Pursuant to Neb. Rev. Stat. § 25-221 (Reissue 1979), a hearing was held before the trial judge, sitting without a jury, to determine the issue of the defense of the 5-year statute of limitations, Neb. Rev. Stat. § 25-205 (Reissue 1979). At this hearing the evidence showed without dispute that the last payment of interest was made on January 30, 1973, and that the statute of limitations period had run unless Sorensen's letter of February 1, 1974, tolled the statute. The trial judge determined that the statute of limitations was tolled by the February 1, 1974,

letter and that, therefore, the statute had not yet run when the action was begun.

The case immediately proceeded to jury trial on the remaining issues. The jury returned a verdict of $8,182.32 for Mr. and Mrs. Kotas and against Sorensen. Judgment was entered on this amount, and this appeal timely followed.

Sorensen, in his assignments of error in this court, alleges that the trial court erred in overruling Sorensen's defense that the statute of limitations had run; in failing to find that the agreement between the parties was usurious as a matter of law; and in improperly instructing the jury. We determine that the trial court erred in failing to find that the statute of limitations had run, and we reverse and remand the case with directions to dismiss.

It is clear that the written agreement between the parties is, in effect, a demand note due 60 days after written demand. Section 25-205 provides that actions on written agreements must be instituted within 5 years after the cause of action accrues. In this case the statute of limitations would have run 5 years and 60 days after November 1, 1969. Neb. U.C.C. § 3-122 (Reissue 1980). Therefore, unless the running of the statute was tolled by Sorensen's letter of February 1, 1974, the statute bars the Kotases' action.

Neb. Rev. Stat. § 25-216 (Reissue 1979) provides that the statute of limitations on a written agreement will be tolled "when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing liability, debt or claim, or any promise to pay the same shall have been made in writing . . . ."

The question presented is whether Sorensen has made "an acknowledgment of an existing liability . . . in writing." In determining what constitutes acknowledgment, Nebraska cases have followed the rule set out in 54 C.J.S. *Limitations of Actions* § 311 at 380-81 (1948), where it is stated: "An ac-

knowledgment sufficient to warrant or support the inference of a promise to pay the debt and to toll or remove the bar of the statute of limitations must be clear, certain, direct, and unequivocal. Acts or declarations relied on as acknowledgments sufficient to remove the bar of the statute of limitations will be closely scrutinized. The words used must be construed according to their just and natural import, without putting on them any force or constraint, and mere vague and uncertain expressions or conversations will not suffice. The most profuse acknowledgment of gratitude or of other moral obligation will not do."

In 51 Am. Jur. 2d *Limitation of Actions* § 328 at 827-29 (1970), it is stated: "An acknowledgment of a debt, to remove the bar of the statute of limitations, must be a distinct, unqualified, unconditional recognition of an obligation for which the person making the admission is liable. . . .

"Applying the foregoing rule, it is held that the following are insufficient to remove the bar of the statute: declarations by a debtor that he has no funds to pay a debt; a mere admission of legal liability; an admission of the original justness of the claim; a mere acknowledgment of the debt, although in writing, as having once existed; . . . . It has been held that a mere reference to the indebtedness, although consistent with its existing validity and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an acknowledgment as is contemplated by the statute . . . ."

The Nebraska cases on this question begin with *Nelson v. Becker*, 32 Neb. 99, 48 N.W. 962 (1891). In that case the debtor Becker wrote two letters in 1886 concerning an 1878 judgment in New York. In the first letter Becker referred to a "wrongfully procured judgment," and stated: "Your judgment is long since outlawed in this country, and was it not you could not collect from me. . . . If I was in your

place with all my effects you could not collect $1 from me. I am much out of health; if you will cause the judgment to be discharged . . . I will pay you ($40) forty dollars." *Id.* at 101, 48 N.W. at 962. Becker's second letter said that he did not "care much about this *wicked judgment*," and renewed the offer to settle for $40. *Id.* at 101, 48 N.W. at 963. We stated at 103-04, 92 N.W. at 963: "To remove the bar of the statute, the debtor must unqualifiedly acknowledge an existing liability." We held that Becker's letters did not take the judgment out of the statute of limitations.

In *France v. Ruby*, 93 Neb. 214, 140 N.W. 175 (1913), Ruby, the debtor, wrote some 26 years after the execution of a promissory note payable 5 days after April 21, 1883, "In regard to that note it is impossible to do anything about it. I have nothing to pay with. This is the third year in succession for crops to burn up here, so you see we are in no position to do anything." *Id.* at 215, 140 N.W. at 176. We held that this letter was not an unqualified acknowledgment of an existing debt, citing *Nelson v. Becker*, *supra*.

Both the *Becker* case and the *Ruby* case quoted with approval identical language from *Hanson v. Towle, Adm'r.*, 19 Kan. 273, 281 (1877): "A mere reference to the indebtedness, although consistent with its existing validity, and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an 'acknowledgment' as is contemplated by the statute. This must be an unqualified and direct admission of a present-subsisting debt on which the party is liable . . . ."

In *Degmetich v. Beranek*, 188 Neb. 659, 199 N.W.2d 8 (1972), in a case determining that an executor does not bind himself as an individual when he acknowledges a past due debt, as an executor only, we quoted with approval from *France v. Ruby*, *supra*,

including the language cited above from *Hanson v. Towle, Adm'r., supra.*

We determine that the trial court erred in determining that Sorensen's letter of February 1, 1974, tolled the statute of limitations. We hold that that letter did not toll the statute and that § 25-205, properly pleaded as a defense to the Kotases' action, was a total defense to that action. Judgment should have been entered for defendant Sorensen.

In view of this disposition of the case, the other assignments of error on the usury issue need not be determined.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

CHARLES L. KNUDTSON ET AL., APPELLANTS, V. MICHAEL F. TRAINOR ET AL., APPELLEES.

345 N.W.2d 4

Filed March 2, 1984. No. 82-843.

1. **Equity: Appeal and Error.** On appeal to this court actions in equity are reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Restrictive Covenants.** Covenants restricting the use of property are not favored in the law and, if ambiguous, will be construed in a manner permitting the maximum unrestricted use of the property.
3. _____. Whether or not a particular use of residential property violates a restrictive covenant is a question of fact.

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

Jack G. Wolfe of Wolfe, Hurd & Rierden, on brief, for appellants.

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

Michael G. Heavican, Lancaster County Attorney, and Douglas D. Cyr, for appellees Lancaster County Office of Mental Retardation et al.

Debora D. Brownyard and Timothy F. Shaw, for amicus curiae Nebraska Advocacy Services for Developmentally Disabled Citizens, Inc.

Louis Michael Thrasher of Mattson, Ricketts, Davies, Stewart, Calkins & Duxbury, for amici curiae Association for Retarded Citizens—Nebraska and Association for Retarded Citizens—Capital.

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

WHITE, J.

The appellants, owners of a house and lot in the Trendwood Addition to the City of Lincoln, Nebraska, brought suit in the district court for Lancaster County against Michael F. and Marie Ann Trainor, doing business as Trainor Investments, the Lancaster County Office of Mental Retardation, the County of Lancaster, and the individual members of the Lancaster County Board of Commissioners. The purpose of the suit was to enjoin all defendants from entering into a lease from the Trainors to the office of mental retardation of a house and lot in Trendwood for the purpose of operating a group home for five mentally retarded persons.

The trial court refused to enjoin the execution of the lease and the operation of the group home, and dismissed the petition. Appellants, Charles L. and Esther Knudtson, appeal. We affirm.

Although there are several assignments of error, the decisive issue is whether the restrictive covenants binding on all owners of lots in Trendwood prohibit the operation of a group home in the addition.

The restrictive covenant at issue states: "1. No lot shall be used except for residential purposes. No building shall be erected, altered, placed or permitted to remain on any lot other than one detached

single family dwelling not to exceed two and one-half stories in height, and a private garage."

Two questions present themselves in an analysis of this provision as related to the factual situation here under consideration: (1) Is the operation of a group home a "residential" use? (2) Does the phrase "single family dwelling" describe an architectual style, or is it a description of the relationship of the persons occupying the structure?

We approach the analysis with the caveat that covenants which restrict the use of land are not favored by the law, and, if ambiguous, they should be construed in a manner which allows the maximum unrestricted use of the property. *Ross v. Newman*, 206 Neb. 42, 291 N.W.2d 228 (1980).

We review this matter de novo, taking into consideration the superior position of the trial judge as to credibility of witnesses where there are factual disputes. *Gerberding v. Schnakenberg*, *ante* p. 200, 343 N.W.2d 62 (1984).

In our review we accept the version of the facts as found by the trial court: "4. The five mentally retarded women who will be living in the proposed group home will share the common areas of the house, the living room, dining room and recreation room and they will prepare and eat their meals together. They will live in the proposed group home with their houseparents and will be taught the skills which are normally taught and performed in a residence such as taking care of the house, cleaning, preparing meals and money management.

. . . .

"6. . . . This proposed group home is not a halfway house but is a permanent residence intended to allow these five retarded women to lead fuller and more normalized lives in the community than would be possible in an institution."

At issue in *Reed v. Williamson*, 164 Neb. 99, 82 N.W.2d 18 (1957), was the enforceability of a clause in a document entitled "RESTRICTIVE COVE-

NANTS" and signed by all owners of an addition to Kimball, Nebraska. The clause provided that " '[a]ll of the lots in said Addition shall be exclusively a residential area . . . .' " *Id.* at 102, 82 N.W.2d at 20. The court then construed the clause against defendants who proposed to drill oil and gas wells on lots whose use was restricted.

In considering the meaning of the word "residential," this court in *Reed*, *supra* at 107-08, 82 N.W.2d at 23, quoted with approval from *Jernigan v. Capps*, 187 Va. 73, 45 S.E.2d 886 (1948): " 'It is not necessary that we go to a dictionary or a law book to ascertain the meaning of "a residential building." Giving the words their plain and ordinary meaning, we would say that such a building is one which is used for residential purposes,—that is, one in which people reside or dwell, or in which they make their homes, as distinguished from one which is used for commercial or business purposes. But if the obvious must be supported by authority or judicial precedent, we find that they are of the same view. Webster's New International Dictionary, 2d Ed., defines "residential" as: "Used, serving, or designed as a residence or for occupation by residents; * * *. Adapted to, or occupied by, residences; as, a residential quarter." ' "

No evidence was introduced that could support a finding that the proposed use of the residence as a group home involved the operation of a business or commercial enterprise as those terms are commonly understood. Cases in accord with the view we take here, that the operation of a group home is a residential purpose within the meaning of a covenant that the property shall be used only for residential purposes, are: *Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E.2d 174 (1981); *Linn County v. City of Hiawatha*, 311 N.W.2d 95 (Iowa 1981); *Costley v. Caromin House, Inc.*, 313 N.W.2d 21 (Minn. 1981); *Berger v. State*, 71 N.J. 206, 364 A.2d

993 (1976); *Crowley v. Knapp*, 94 Wis. 2d 421, 288 N.W.2d 815 (1980).

Holding, as we do, that the group home is a use permitted under the "residential purposes" portion of the covenant, we proceed to a discussion of the second question.

Although no Nebraska case appears to have discussed the issue of the implications of the words "single-family dwelling," other states have done so. The trial court discussed those cases in its order, and we adopt the language of the trial court. "The Georgia Court in *Sissel v. Smith*, 242 Ga. 595, 250 S.E.2d 463, held that a limitation on the type of building that can be constructed on a lot is not also a limitation on its use. The Court said: 'Strictly construed, restrictive covenant restricting use of lots in subdivision to "single-family residence purposes only" should be interpreted as a restriction upon types of buildings that can be constructed on lot, that is, only buildings intended to be used as residences can be constructed, and not as a limitation on types of activities that can take place in buildings so constructed; thus construed, whether restrictive covenants prevent incidental use of a portion of residence for business or trade purposes is a question of fact depending upon facts and circumstances of a given case.'

"The New Jersey Supreme Court in *Y.M.C.A. v. Board of Adjustment*, 134 NJ Super 384, 341 A.2d 356 stated: 'To suggest that "families" composed of residents of group homes are to be distinguished from natural families in determining which single-family districts will be considered open to them, is to confuse the power to control physical use of premises with the power to distinguish among occupants making the same physical use of them.'

"The New York Court in *Little Neck Community Association v. Working Organization*, 383 NYS2d 364, 52 A.2d 90 stated: "It is our opinion that a group home for mentally retarded children constitutes a

family for the purpose of a zoning ordinance...zoning is intended to control types of housing and living and not genetic or intimate and internal family relations of human beings.'

"The Minnesota Supreme Court in *Costly* [sic] *v. Caromin House, Inc.*, 313 N.W.2d 21 (1981) considered questions very similar to those presently before this Court when it construed a city zoning ordinance. The Minnesota Supreme Court stated: 'Restrictive covenants are strictly construed against limitations on the use of property.... Since the law favors the unrestricted use of property, courts will not adopt a strained construction in favor of restrictions.... According to Webster's Third New International Dictionary (1971), a dwelling is simply "a building or construction used for a residence." The group home fits this description both in appearance and in use and thus complies with the covenant.

" 'Even if the covenant were interpreted to permit only "single-family dwellings", the group home would be a permitted use under the same reasoning as discussed above for the definition of "family" in zoning regulations. From the outside, the home looks like all other single-family homes in the neighborhood. The residents live in a family-type setting and call the dwelling their home. The courts in other jurisdictions have found similar group homes in compliance with single-family restrictive covenants.'

"The Michigan Appellant [sic] Court in the case of *Malcolm v. Shamie*, 290 N.W.2d 101 (1980) held that five mentally retarded women living with a foster parent in an environment therapeutically designed to emulate a more conventional family environment constituted a 'family' for purposes of a restrictive covenant precluding any building other than detached single-family dwellings. The restrictive covenant before that court read as follows: 'No structures or buildings shall be erected, altered, placed or permitted to remain in any of the lots...

other than one detached single-family dwelling not to exceed two stories in height and a private garage for not more than two cars.'

"The Michigan court stated: 'Five mentally retarded women living with a foster parent in an environment therapeutically designed to emulate a more conventional family environment should also be considered a family and such use of the property an appropriate family residential use. The residents are more than a group of unrelated individuals sharing a common roof. They do not have natural families on which to rely, and due to their unique circumstances, it is unlikely that these women will ever rejoin their parents or marry and form independent families. The substitute family provided by the group home allows the residents to lead more normal and meaningful lives within the community than would be feasible were they institutionalized.'

"The Michigan court in *Malcom* [sic] *v. Shamie*, supra, noted that cases of this nature present a confrontation between two basic public policies. 'First, restrictive covenants are valuable property rights subject to judicial protection against those who would violate them. Second, this state encourages the maintenance and development of quality programs and facilities for the care and treatment of the mentally handicapped.' The Court recognizes the confrontation between these two basic policies in the case now before it and have [sic] endeavored to give full consideration to those policies.

"From an examination of the evidence before this Court and the law applicable to these types of cases it appears that the house at 1625 South 77th Street will remain a single-family dwelling if occupied by the five mentally retarded women and their houseparents. The house will be [sic] appear no different than any of the other houses in the neighborhood to any persons passing by. The house itself will remain the same with the addition of a wood deck which will also serve as a fire escape. The five

women and their houseparents will live together as a family unit."

The decision of the trial court was correct and is hereby affirmed.

AFFIRMED.

CAPORALE and GRANT, JJ., not participating.

AETNA CASUALTY & SURETY COMPANY, A CORPORATION, APPELLEE, V. JACK L. DICKINSON ET AL., APPELLANTS, WILLIAM G. DICK ET AL., APPELLEES.

345 N.W.2d 8

Filed March 2, 1984. No. 83-051.

1. **Judgments: Motions to Vacate.** Under Neb. Rev. Stat. § 25-2001 (Reissue 1979), an "unavoidable casualty" is not of itself ground for the granting of a new trial at a subsequent term of court. The "casualty," to be available for that purpose, must be one "preventing the party from prosecuting or defending."
2. **Trial: Courts.** It is the duty of the courts to prevent abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice.
3. _____: _____. This court will not tolerate or reward a course of conduct deliberately designed to disrupt the orderly administration of justice.

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

Brian R. Watkins, for appellants.

Larry Ruth of Knudsen, Berkheimer, Richardson & Endacott, for appellee Aetna.

KRIVOSHA, C.J., WHITE, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired.

KRIVOSHA, C.J.

This appeal clearly establishes how some individuals believe that litigants may "play games" with the courts, and how this court will not tolerate such behavior. The appeal arises out of a refusal by the district court for Lancaster County, Nebraska, to set

aside a default judgment entered in favor of the appellee Aetna Casualty & Surety Company against the appellants, Jack L. and Virginia Dickinson, husband and wife. In September of 1979 suit was commenced by Aetna against the Dickinsons on a certain guaranty allegedly executed by the Dickinsons in favor of Aetna. The facts underlying the execution of the guaranty are not material to this appeal.

On October 6, 1980, Aetna filed a motion to require the Dickinsons to produce documents bearing their signatures. This was done pursuant to Neb. Rev. Stat. § 25-1267.39 (Reissue 1979), since repealed. Specifically, the motion sought the production of 12 documents, all signed in the years 1972, 1973, and 1974, with at least two signatures having been made in each year. On October 24, 1980, the district court for Lancaster County issued an order requiring production of the requested documents by November 17, 1980. The relevance of these documents became more apparent when, on February 5, 1981, the Dickinsons filed an answer admitting all the allegations of Aetna's petition except paragraph 5, which alleged that the Dickinsons had executed the guaranty agreements. Although the Dickinsons had been ordered to produce these documents by November 17, 1980, they did not comply; and on February 6, 1981, Aetna filed a motion in the district court for Lancaster County, seeking an order deeming the signatures admitted as a sanction for failure to comply with the discovery order dated October 24, 1980. For reasons which are not at all clear from the record, the court, on February 10, 1981, overruled the motion for sanctions. The documents, however, had still not been produced, and therefore the court ordered the production of the documents by February 19, 1981, at 3 p.m. On February 20, 1981, the Dickinsons, still not having produced the documents, through their attorney moved for an order suspending the court's order of February 10. As support for the motion, an affidavit was attached, reciting that the Dickinsons

were vacationing in Mexico and the date of their return was unknown. No order was entered in response to this motion. On February 23, 1981, Aetna filed a further motion for sanctions. On March 11, 1981, the trial court sustained Aetna's motion for sanctions and ordered entry of a default judgment against the Dickinsons. On March 18, 1981, the court entered an order setting out the amount of the judgment, together with interest and attorney fees. No significant action was taken by the Dickinsons on this default judgment for more than 16 months, until on July 20, 1982, the Dickinsons filed a motion to set aside the judgment. The motion was denied by the trial court.

The Dickinsons have now appealed to this court, maintaining that the trial court erred in not setting aside the judgment on the grounds that the Dickinsons were prevented from defending the action by virtue of unavoidable casualty or misfortune, as provided for in Neb. Rev. Stat. § 25-2001 (Reissue 1979). Furthermore, the Dickinsons argue to this court that even if that assignment is not valid, there are three alleged plain errors they wish to raise for the first time in this court.

As the basis of their claim that they could not defend because of unavoidable casualty or misfortune, they argue to the trial court that sometime between February 15 and February 25, 1981, the exact date unknown, Jack Dickinson suffered a head injury while in Mexico, which prevented him from returning to the United States until June or July of 1981. Moreover, his wife, who was with him, cared for him during all of that time. This claim, even if true, is simply preposterous.

In the first instance, the documents which were sought to be produced were documents which were in existence for nearly 10 years prior to the alleged accident and did not require Jack Dickinson to execute any further document. Even if we can assume that during the time he was confined to the hospital

he could not advise his attorney where the documents were located, the record is clear that his wife could have done so. More importantly, 4 months expired from the time the court first ordered the Dickinsons to produce these documents and the time that Mr. Dickinson allegedly suffered his head injury. This was more than ample time in which to comply with the court's order. And even when the Dickinsons moved on February 20, 1981, for an order suspending the court's previous orders, no mention was made of their inability to locate or produce the documents. The excuse that was given was simply that the Dickinsons were on vacation out of the country and apparently would comply with the court's orders when they got good and ready. The parties may not disregard court orders until they choose. And even after the judgment was entered, the Dickinsons waited until after term, nearly 16 months, to have the judgment set aside. We do not believe this in any manner comes within the terms of § 25-2001, which provides: "A district court shall have power to vacate or modify its own judgments or orders after the term at which such judgments or orders were made . . . (7) for unavoidable casualty or misfortune, preventing the party from prosecuting or defending . . . ." There is nothing about the facts presented, either to the trial court in the first instance or to this court on appeal, which would support a claim that the Dickinsons were unable to defend the action because of unavoidable casualty or misfortune. They were unable to defend this action because they chose to ignore this action.

As we noted in *Norfolk Packing Co. v. American Ins. Co.*, 116 Neb. 118, 122, 216 N.W. 309, 310 (1927): "Under the statute an 'unavoidable casualty' is not of itself ground for the granting of a new trial at a subsequent term of court. The 'casualty,' to be available for that purpose, must be one 'preventing the party from prosecuting or defending.' " There is nothing in this record to indicate that Dickinson's

injury in any manner prevented the production of these documents, either when originally ordered and ignored or some long time thereafter. This was a case of lack of diligence on the part of the Dickinsons, and as we noted in *Emry v. American Honda Motor Co.*, 214 Neb. 435, 443, 334 N.W.2d 786, 792 (1983), " 'The power to modify or set aside a judgment ends with the adjournment of the term at which it was rendered except as provided in section 25-2001, R.R.S. 1943. . . . In an action to vacate judgment after the adjournment of the term, the applicant must allege and prove that he exercised due diligence and that his failure to secure a proper decision was not due to his fault or negligence.' [Citations omitted.]"

The rule is well established in this state that lack of diligence or negligence of counsel is not an unavoidable casualty or misfortune. See, *Lyman v. Dunn*, 125 Neb. 770, 252 N.W. 197 (1934); *Brown v. Lincoln*, 157 Neb. 840, 61 N.W.2d 836 (1954). Nor is a court of this state authorized to set aside a judgment or order after the term because of a party's own mistake, inadvertence, or neglect. See, *State, ex rel. Spillman, v. Commercial State Bank*, 143 Neb. 490, 10 N.W.2d 268 (1943); *Kulhanek v. Kulhanek*, 106 Neb. 595, 184 N.W. 139 (1921). The difficulty in this case was brought about by appellants' lack of interest and concern in the lawsuit, and the trial court was correct in refusing to set aside the default judgment after term on the basis of unavoidable casualty or misfortune.

Additionally, contrary to the statute, the Dickinsons, when moving to set aside the judgment, offered no defense to the merits of the case. See, Neb. Rev. Stat. § 25-2002 (Reissue 1979); *Hoeppner v. Bruckman*, 129 Neb. 390, 261 N.W. 572 (1935).

In *Sargent Feed & Grain v. Anderson*, *ante* p. 421, 425, 344 N.W.2d 59, 61 (1984), we said: "It is the duty of the courts to prevent abuse of process, unnecessary delays, and dilatory and frivolous pro-

ceedings in the administration of justice. *Beliveau v. Goodrich*, 185 Neb. 98, 173 N.W.2d 877 (1970). This court will not tolerate or reward a course of conduct deliberately designed to disrupt the orderly administration of justice. *Morgan v. Weiner*, 173 Neb. 715, 114 N.W.2d 720 (1962)."

One further matter requires our attention. Dickinsons argue, and assign as error, that the court erred in entering a judgment in excess of the amount disclosed by the record. In view of the fact that we have determined that the trial court did not err in refusing to set aside the default judgment, we are compelled to further find that the judgment, when entered, became a final and binding judgment from which an appeal had to have been taken within 1 month or was no longer subject to review. See, Neb. Rev. Stat. § 25-1912 (Reissue 1979); *American Legion Post No. 90 v. Nebraska Liquor Control Commission*, 199 Neb. 429, 259 N.W.2d 36 (1977); *Frenchman-Cambridge Irrigation Dist. v. Ferguson*, 154 Neb. 20, 46 N.W.2d 692 (1951). Determining as we do that the trial court was correct in refusing to set aside the default judgment, we must therefore conclude that this court would be without jurisdiction to review any other errors alleged by the Dickinsons, including any which they maintain are plain error in the original default judgment from which no appeal was taken.

The judgment of the trial court is affirmed.

AFFIRMED.

SHIRLEY RODGERS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD RODGERS, DECEASED, APPELLANT, V. CHIMNEY ROCK PUBLIC POWER DISTRICT, A CORPORATION, APPELLEE.

345 N.W.2d 12

Filed March 2, 1984. No. 83-087.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** The findings of fact of the trial court in a proceeding under the Political Subdivisions Tort Claims Act will not be disturbed unless they are clearly wrong.
2. **Electricity: Negligence.** One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself into contact with it, as by touching it with conductors of electricity, is guilty of negligence.
3. **Negligence.** One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself to the danger assumes the risk of injury from it.
4. _____. One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.
5. **Public Utilities: Electricity: Negligence.** A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines. The degree of care varies with the circumstances, but it must be commensurate with the dangers involved; and where wires are designed to carry electricity of high voltage, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business to avoid injury to persons and property.
6. _____: _____: _____. Electric companies are not insurers of the safety of the public and hence are not liable for injuries unless guilty of some wrongful act or omission.
7. _____: _____: _____. Power companies engaged in the transmission of electricity, especially electricity of high voltage, are charged with the duty of exercising a very high degree of care to safeguard those whose lawful activities expose them to the risk of inadvertent contact with the electric lines, but they are not insurers and not liable for damages in the absence of negligence.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed.

Jim Zimmerman of Atkins, Ferguson, Zimmerman, Carney & Law, and Joseph M. Epstein of Kripke and Epstein, P.C., for appellant.

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

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

BOSLAUGH, J.

This is a wrongful death action brought under the Political Subdivisions Tort Claims Act by the personal representative of Harold Rodgers, deceased. Rodgers, who will be referred to as the plaintiff, was electrocuted on October 8, 1980, while working on his farm in Morrill County, Nebraska.

The defendant, Chimney Rock Public Power District, is engaged in the distribution and sale of electrical power. In 1965, at about the time the plaintiff moved onto his property, the defendant constructed a 7,200-volt distribution line across a part of the property. The line ran from the "south pole," which was located near the south boundary of the property, to the "north pole," or meter pole, which was located on the property north and east of the plaintiff's house. At the time the line was constructed a transformer mounted on the south pole was moved to the north pole. The meter was also mounted on the north pole.

The distribution line consisted of two uninsulated wires located one above the other, and ran above a well located approximately 75 feet south of the north pole. At that point the neutral wire was approximately 19 feet above the ground. The primary wire, also described as the "hot" or phase wire, was approximately 22 feet 6 inches above the ground.

The well pit was covered by a concrete cap or slab approximately 5½ feet square, the top of which was approximately level with the surface of the ground. A manhole cover on the slab could be removed to gain access to the well pit. At the time the distribution line was constructed, the well pit was covered with wooden planks.

Rodgers was engaged in cleaning sand from the

well at the time he was electrocuted. A part of the equipment he was using consisted of a metal pipe approximately 28 or 30 feet in length which was to be placed in the well. Air from a compressor would then be piped into the well so that sand between the casings would be forced up and out of the well. Although there were no witnesses to the accident, burn marks found on the pipe indicate that it came in contact with the primary or phase wire of the distribution line while it was being used by Rodgers. The electric current which traveled down the pipe from the primary or phase wire caused Rodgers to be electrocuted.

The amended petition alleged that the defendant was negligent and the line was defective because the line was not insulated; it was not constructed at a sufficient height above the ground; and it passed over the well. The answer alleged contributory negligence and assumption of risk.

The trial court found that the defendant was negligent in maintaining the uninsulated distribution line across the plaintiff's farmyard but that the plaintiff was guilty of negligence which was more than slight, which was a proximate cause or a proximately contributing cause of the accident, and that the plaintiff had assumed the risk of injury from the dangerous condition. The petition was dismissed.

The findings of fact of the trial court in a proceeding under the Political Subdivisions Tort Claims Act will not be disturbed unless they are clearly wrong. *Rawson v. City of Omaha*, 212 Neb. 159, 322 N.W.2d 381 (1982).

The record shows that Rodgers was 48 years of age at the time he was electrocuted. The distribution line had been in place for approximately 15 years. The plaintiff knew of the existence of the line and the dangerous nature of electricity, and in moving equipment and haystacks was careful to avoid coming in contact with the lines. The plaintiff's father, Cecil Rodgers, testified that the plaintiff

had assisted him in installing electric wiring and that 5 or 6 years ago they had installed an electric fence wire by fastening it to the poles a short distance below the neutral wire. About 5 years before the accident, the plaintiff had used a Farmhand mounted on a tractor to clean and deepen the well.

There are a number of precautions which the plaintiff could have taken, any one of which would have avoided the accident. The plaintiff could have requested that the line be deenergized while the well was being cleaned. A plastic pipe could have been substituted for the metal pipe. Instead, the plaintiff went about the task of cleaning the well in complete disregard of the danger inherent in the overhead power line.

The case is similar in some respects to *Disney v. Butler County Rural P.P. Dist.*, 183 Neb. 420, 160 N.W.2d 757 (1968), in which the plaintiff was injured while moving an irrigation sprinkler under a 7,200-volt power line on his farm. One of the sprinkler arms struck the hot line, or arced with the hot line, resulting in a serious electrical shock to the plaintiff. In holding that the trial court had properly dismissed the action on the ground that the plaintiff was guilty of contributory negligence as a matter of law, we said: "The general rule is accurately set out in 29 C.J.S., Electricity, § 53, p. 1115: 'One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself into contact with it, as by touching it with conductors of electricity, is guilty of negligence and cannot hold the company for the resulting injuries, and this is true of an adult although he is wholly unskilled in the handling of electricity. * * * To constitute want of due care on his part it is not required that he should have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that he placed himself in a position of a known danger where there was no need for him to be or that he knew or should have

known that substantial injury was likely to result from his acts.' " *Id.* at 423-24, 160 N.W.2d at 759.

We further stated: "Unless we were to hold the defendant liable on the doctrine of absolute liability for injuries arising from the transmission of electricity, the facts in this case are conclusive of contributory negligence on the part of the plaintiff. Clearly the plaintiff was capable of understanding and discretion, at the time had knowledge of and was conscious of the danger involved, knew of the dangerous condition, and failed to exercise ordinary care to avoid dangers which were open and obvious." *Id.* at 424, 160 N.W.2d at 760.

In the *Disney* case we further held that the plaintiff had assumed the risk of injury, and stated: " 'One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself to the danger assumes the risk of injury from it.' " *Id.* at 423, 160 N.W.2d at 759.

See, also, *Connolley v. Omaha Public Power Dist.*, 185 Neb. 501, 177 N.W.2d 492 (1970); *Omaha Nat. Bank v. Omaha P.P. Dist.*, 186 Neb. 6, 180 N.W.2d 229 (1970); *Lorence v. Omaha P.P. Dist.*, 191 Neb. 68, 214 N.W.2d 238 (1974).

One who is capable of understanding and discretion, such as the plaintiff in this case, and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. The evidence was sufficient for the trial court to find that the plaintiff was guilty of contributory negligence which was more than slight and that the plaintiff had assumed the risk of injury from contact between the metal pipe and the primary or phase wire.

The plaintiff called an expert witness, a forensic psychologist, who was allowed to testify that in her opinion the conduct of the plaintiff was reasonable. In effect, this witness testified that it is human nature sometimes to ignore the obvious and disregard the familiar, and a person may be so distracted by

his work that at the time the accident occurs the injured party is unaware of the dangerous condition which results in an injury. It is still the rule in this jurisdiction that one must exercise ordinary care for his own safety, and this duty is commensurate with the danger to which he is exposed. There is no rule which protects an injured party who assumes the risk of injury and fails to use due care to avoid injury from dangers which are open and obvious.

The plaintiff urges that we adopt the doctrine of strict liability with respect to the distribution of electrical power and that electric power should be considered to be a product or "goods," so that the rules regarding implied warranties would be applicable.

We adhere to the following rules which were stated in *Roos v. Consumers Public Power Dist.*, 171 Neb. 563, 106 N.W.2d 871 (1961), and *Lorence v. Omaha P.P. Dist.*, *supra*.

"A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines. The degree of care varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business to avoid injury to persons and property. Scott v. Claiborne Electric Co-operative (La), 13 So. 2d 524; Gellert v. Missouri Service Co. (Mo.), 221 S.W.2d 177; Rice v. City of Lumberton, 235 N.C. 227, 69 S.E.2d 543. Electric companies are not insurers of the safety of the public and hence are not liable for injuries unless guilty of some wrongful act or omission. New Omaha Thompson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N.W. 89. Such companies, being engaged in the transmission of a dangerous commodity, must anticipate and guard against events which may reasonably be expected to occur, and a failure to do so is negligence." *Roos v.*

Consumers Public Power Dist., *supra* at 570-71, 106 N.W.2d at 876.

"Power companies engaged in the transmission of electricity, especially electricity of high voltage, are charged with the duty of exercising a very high degree of care to safeguard those whose lawful activities expose them to the risk of inadvertent contact with the electric lines but they are not insurers and not liable for damages in the absence of negligence." *Lorence v. Omaha P.P. Dist.*, *supra* at 72, 214 N.W.2d at 240.

The judgment of the district court is affirmed.

AFFIRMED.

PIONEER ENTERPRISES, INC., A NEBRASKA CORPORATION, APPELLANT, V. LEE RAY EDENS, APPELLEE.

345 N.W.2d 16

Filed March 2, 1984. No. 83-099.

1. **Judgments: Appeal and Error.** The judgment of the trial court in a law action where a jury has been waived has the effect of a jury verdict and will not be set aside unless clearly wrong.
2. **Judgments: Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it.
3. **Contracts.** There is implied in every contract for work or services a duty to perform it skillfully, carefully, diligently, and in a workmanlike manner.
4. **Construction Contracts: Substantial Performance.** Substantial performance is shown in a building contract when all of the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract.
5. **Construction Contracts.** In building and construction contracts, in the absence of an express agreement to the contrary, it is implied that the building will be erected in a reasonably good and work-

manlike manner and will be reasonably fit for the intended purpose.

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

C. Morris Gillespie, for appellant.

Steven C. Smith of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

BOSLAUGH, WHITE, HASTINGS, and SHANAHAN, JJ., and BRODKEY, J., Retired.

HASTINGS, J.

This is an action for recovery of the balance due on a written contract to build a grain storage facility, brought by the plaintiff, Pioneer Enterprises, Inc. (Pioneer), against the defendant, Lee Ray Edens.

In this action at law, tried without a jury, Edens raised the defenses that the agreement was not substantially performed, that Pioneer failed to perform the agreement in a workmanlike manner, and that the grain storage facility was not fit for the purpose for which it was intended. Edens also raised various setoffs and counterclaims, some of which were settled prior to trial.

Pioneer appeals the district court findings that it did not substantially perform the terms of the agreement, that the grain storage facility was not erected in a workmanlike manner and was not fit for the purpose for which it was intended, that the building defects could not be corrected without dismantling and reconstructing the structure, that the value of the building as constructed was $25,000, which had already been paid, and that Edens had not accepted the facility.

On appeal to this court the only assignment of error necessary for us to consider is whether there was sufficient evidence to sustain the judgment of the trial court.

The judgment of the trial court in a law action

where a jury has been waived has the effect of a jury verdict and will not be set aside unless clearly wrong. *Moss v. Speck*, 209 Neb. 46, 306 N.W.2d 156 (1981). Also, in determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it. *Tibbs v. Fisher*, 208 Neb. 306, 303 N.W.2d 293 (1981).

The district court found that Pioneer did not substantially perform the terms and conditions of the parties' agreement because the building was never fit for the intended purpose of storing grain. While it is true Edens did store grain in this Curvet building, the evidence is uncontroverted that many leaks existed which rendered the facility useless as a storage facility. Even the plaintiff's expert, Meridath Schaff, believed the facility was not fit to store grain in, and testified that puddles of water were caused by leaks from the ceiling of the building and by leaks from outside the stem wall.

Although there is a conflict between the evidence offered by the parties, there were other defects and omissions by Pioneer which rendered the Curvet building ineffective. There was an absence of a necessary auger or scroll or number of downspouts needed to distribute grain. Next, the aeration system, integral to a large storage system, had not been installed properly and did not work. Also, there was testimony to indicate concrete work was incomplete and one of the motors supplied was defective, while another was not even received.

It is clear there is more than sufficient evidence present to affirm the district court judgment.

It is well recognized that, as a general rule, every contract for work or services includes an implied duty to perform the work or services skillfully, carefully, diligently, and in a workmanlike manner. *Tibbs v. Fisher*, *supra*. The written contract pro-

posals contained an express warranty as follows: "All work to be completed in a workmanlike manner according to standard practices."

The record abounds with evidence of unacceptable workmanship. The most characteristic evidence is the testimony of Doug Keszler, who had been in the steel erection business for 12 years and had built six Behlen Curvet facilities similar to the one in this case. Keszler stated: "From my opinion as to what is causing this building to leak is just a little bit of everything. It is not one particular problem. It is some unacceptable workmanship practices, some missing washers, some elongation of bolt holes, improperly applied caulk and it all attributes to what I counted 57 leaks in the building . . . ."

Substantial performance is shown in a building contract when all of the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract. *Tibbs v. Fisher*, *supra*; *Jones v. Elliott*, 172 Neb. 96, 108 N.W.2d 742 (1961). The evidence shows Pioneer failed to substantially perform its contract in a workmanlike manner.

In building and construction contracts, in the absence of an express agreement to the contrary, it is implied that the building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose. *Henggeler v. Jindra*, 191 Neb. 317, 214 N.W.2d 925 (1974). Here, Pioneer was in the business of erecting grain storage facilities and Edens relied on Pioneer to select its own materials to construct the facility. Leaks in the building caused substantial water and insect damage until the structure was emptied, beginning in late 1981 and finishing in March 1982, by order of the ASCS. Edens had not used this building for grain storage since March 1982, but could use the

facility as a garage or shop, since the building is useless for long-term grain storage.

The judgment of the district court is affirmed.

AFFIRMED.

CENTRAL PARK PHARMACY, INC., ET AL., APPELLANTS, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE, AMERICAN COMMUNITY STORES, DOING BUSINESS AS HINKY DINKY, INTERVENOR-APPELLEE.

344 N.W.2d 918

Filed March 2, 1984. No. 83-216.

1. **Administrative Law: Words and Phrases.** A proceeding becomes a "contested case," within the meaning of Neb. Rev. Stat. § 84-901(3) (Reissue 1981), when a hearing is required.
2. **Liquor Licenses.** The relocation of an existing liquor license is not the issuance of a new one.

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

Tim J. Kielty of Gast & Kielty, for appellants.

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

Soren S. Jensen and Thomas J. Culhane of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for intervenor-appellee.

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

CAPORALE, J.

Appellants filed a petition in the district court, which appears both to undertake an appeal to that court of a Nebraska Liquor Control Commission ruling and, at the same time, to seek original declaratory and injunctive relief. The district court determined the commission's ruling to be proper and dis-

missed the appeal. Without in any way approving the procedure employed in this case, for the reasons hereinafter discussed we affirm.

The stipulated facts establish that American Community Stores sought to transfer one of its liquor licenses from one location to another in the city of Omaha under the provisions of Neb. Rev. Stat. § 53-129 (Cum. Supp. 1982). Since August 1, 1980, that statute has provided in part: "After such license has been granted for particular premises, the commission, with the approval of the local governing body, and upon proper showing, may endorse upon the license permission to abandon the premises therein described and remove therefrom to other premises approved by him, her, or it, but in order to obtain such approval the retail licensee shall file with the local governing body a request in writing, and a statement under oath which shall show that the premises to which removal is to be made comply in all respects with the requirements of this act. No such removal shall be made by any such licensee until his or her said license has been endorsed to that effect in writing both by the local governing body and by the commission."

American Community Stores owns interests in more than the two liquor licenses it would now be permitted but for the fact that it owned such interests prior to March 4, 1963. See Neb. Rev. Stat. § 53-124.02 (Reissue 1978).

Central Park Pharmacy, Inc., shares a common wall with American Community Stores at the new location to which the latter sought to transfer one of its "grandfathered" off-sale beer licenses. Central Park Pharmacy, Inc., also owns an interest in a liquor license which permits it to, among other things, dispense off-sale beer. Central Park Pharmacy, Inc., and others, collectively hereinafter called Central Park, were opposed to permitting the transfer. Central Park made its opposition known to the commission and, additionally, petitioned the

commission to issue a ruling which, among other things, would declare that the commission lacked authority to permit the transfer of a grandfathered license.

Before making any ruling with respect to Central Park's petition, the commission approved American Community Stores' request to transfer its license. Central Park then filed this action in the district court.

Neb. Rev. Stat. § 84-917(1) (Reissue 1981) provides that "[a]ny person aggrieved by a final decision in a *contested case*, whether such decision is affirmative or negative in form, is entitled to judicial review under sections 84-917 to 84-919. Nothing in this section shall be deemed to prevent resort to other means of review, redress, or relief provided by law." (Emphasis supplied.)

A "contested case" is defined in Neb. Rev. Stat. § 84-901(3) (Reissue 1981) as a "proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." We have held that a proceeding becomes a contested case when a hearing is required. *J K & J, Inc. v. Nebraska Liquor Control Commission*, 194 Neb. 413, 231 N.W.2d 694 (1975); *City of Lincoln v. Nebraska Liquor Control Commission*, 181 Neb. 277, 147 N.W.2d 803 (1967).

As noted earlier, unlike the procedure specified by Neb. Rev. Stat. § 53-133 (Cum. Supp. 1982) with respect to applications for first issue licenses, § 53-129 makes no provisions for members of the general public to become protestants when the request is merely to transfer the location of an existing license. Stated another way, the statutory scheme does not contemplate that the commission make the determination in a contested case of whether an existing license is to be transferred. In its appearance before the commission to object to the transfer, Central Park was a mere interloper.

Since the determination allowing American Community Stores to transfer its license was not made in a contested case, Central Park was not aggrieved by a final decision made in a contested case, and therefore had no standing to appeal from that action.

The statute providing for declaratory rulings such as the one sought by Central Park is Neb. Rev. Stat. § 84-912 (Reissue 1981), which provides: "On petition of any interested person, any agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged unless it is altered or set aside by a court. Such a ruling is subject to review in the manner provided in sections 84-917 to 84-919, for the review of decisions in contested cases. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition."

We recognize that § 84-912 provides that a declaratory ruling is subject to review in the same manner in which decisions in contested cases are reviewed. The difficulty from Central Park's point of view in that connection, however, is that this is not an appeal from a declaratory ruling.

The district court was therefore correct in dismissing Central Park's appeal of the commission's ruling to that court.

We now turn our attention to Central Park's request for an original declaration of rights by the district court.

The operative assignment of error in that connection, in effect, is that the district court erred in its interpretation of applicable law. We disagree; the district court was entirely correct.

Central Park's central contention is that the transfer of a license from one location to another in actuality involves the replacement of an existing li-

cense with a new license. Since American Community Stores has in excess of two licenses, it is not entitled, so Central Park argues, to a new license. This contention was addressed in *City of Lincoln v. Nebraska Liquor Control Comm.*, 208 Neb. 630, 304 N.W.2d 922 (1981), and rejected. In that case the city argued that the issuance of a new license and the removal procedure of § 53-129 (Reissue 1978) were effectively equivalent. We met that contention by stating therein at 632, 304 N.W.2d at 924: "The meaning and purpose of § 53-129 becomes clear when we recognize that under the laws of the State of Nebraska a liquor license is issued to a named licensee for a named location. It may not be used by any entity other than that to whom it has been issued, nor may the license be used in any other premises except that which is specifically noted in the license. If, then, a named licensee desires to relocate the license, it may do so under the provisions of § 53-129 by making application to either the commission or the local governing body and, when approved by the local governing body, may move to the new location. In this respect, the relocation of a license from its issued premises to new premises is dependent upon approval by the local governing body. If the local governing body disapproves, then the license may not be relocated." And at 634, 304 N.W.2d at 925: "The City and Jax urge us, in effect, to read the statute as though a new licensee may be created under the provisions of § 53-129 by a transfer. The statute, however, is clear and unambiguous and not open to interpretation."

In *City of Lincoln v. Nebraska Liquor Control Commission*, 181 Neb. 277, 147 N.W.2d 803 (1967), we declared that § 53-129 provided a short procedure for a change of location in the business of a liquor licensee when neither the commission nor the municipality involved objects thereto.

It is clear from the above two cases that this jurisdiction is committed to the view that the relocation

of an existing liquor license is not the issuance of a new one.

Central Park directs our attention to *Hewitt et al v. Gage*, 257 Ark. 579, 519 S.W.2d 749 (1975), which, it argues, takes a contrary view. The short answer to that argument, we suppose, is that the law of Arkansas need not be the law of Nebraska. Moreover, a reading of the Arkansas statute, Ark. Stat. Ann. § 48-310.2 (Supp. 1973), reveals that it specifically provided that neither a new nor "replacement" permit was to be issued to any person who had an interest in another permit. The Arkansas Supreme Court, dealing with that specific statutory language, held that the relocation of an existing permit violated the prohibition contained in the statute. Nebraska has no statute which equates relocation of an existing license with the issuance of a new one. Indeed, as noted earlier, quite the contrary is true; the Nebraska statutes treat the two situations differently.

Central Park also seems to believe that *Safeway Stores, Inc. v. Nebraska Liquor Control Commission*, 179 Neb. 817, 140 N.W.2d 668 (1966), lends support to its position. In fact, that case does not address the issue at all. Therein, Safeway, which already held 10 licenses, applied for a new license to sell beer. When that new license was denied on the ground that Safeway already held more than two licenses and thus was not entitled to more, Safeway attacked the constitutionality of Neb. Rev. Stat. §§ 53-124.02 et seq. (Cum. Supp. 1963). This court held that the Legislature has plenary power to regulate the dispensing of liquor, and although certain statutory enactments then in question were unconstitutional, certain other portions were not.

Neb. Rev. Stat. § 53-124.05 (Reissue 1978) provides: "Nothing in sections 53-124.02 to 53-124.07 shall affect the right of any holder of retail licenses prior to March 4, 1963 to continue to hold, use, and renew such licenses."

Central Park contends that since the statute does not include the term "transfer" in describing the rights of a license holder prior to March 4, 1963, it does not permit those holding in excess of two licenses to relocate a grandfathered license. It further contends that those granted grandfather rights should be limited in the exercise of existing uses, citing *County of Saunders v. Moore*, 182 Neb. 377, 155 N.W.2d 317 (1967). That case involved a zoning restriction and the extent to which a nonconforming use existing prior to the enactment of the zoning restriction would be permitted. The applicability of that case to the present inquiry, which concerns a question of statutory interpretation, is not apparent.

As has often been said, 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*, 215 Neb. 35, 337 N.W.2d 122 (1983). There is nothing in § 53-124.05 which limits the "use" of a grandfathered license to the location for which it was first granted. The plain, ordinary meaning of the unqualified word "use" means that one may avail himself of all the rights incident to its existence; that includes relocating it under the appropriate statutory procedure.

Even if we assume for the purposes of argument that § 53-124.05 were somehow ambiguous, thereby requiring us to discern the Legislature's intent in adopting it, *North Star Lodge #227 v. City of Lincoln*, 212 Neb. 236, 322 N.W.2d 419 (1982), the legislative history does not support Central Park's position.

The Miscellaneous Subjects Committee hearing, 73d Leg. 3 (Jan. 30, 1963), attributed to Senator Jerome Warner, the principal introducer of L.B. 105, 1963 Neb. Laws, ch. 308, § 4, p. 910, the following statement: "[I]t [the bill] would restrict to two the number of alcoholic beverage retail licenses that any person could have a beneficial interest in. Some chain operations use alcoholic beverages as a loss

leader which encourages the public to overbuy this item.

"This bill contains the grandfather clause to protect those that now have a beneficial interest in more than two alcoholic beverage retail licenses.

"The passage of this bill would help to foster and promote temperance in the consumption of alcoholic liquors as set forth in the Nebraska Liquor Control Act.

"Briefly, it has two designs; one, to *prevent* concentration of liquor control and to keep the small private operator from financial competition that is too great from the bigger businesses." (Emphasis supplied.)

Neither of the purposes indicated an intent to reduce the concentration of control already present. In fact, just the opposite can be inferred from § 53-124.05. First of all, the concentration addressed was the identity of those who acquired licenses, not the location of licensed premises. In any event, the Legislature was willing to accept whatever amount of license concentration already existed.

Central Park further contends that the term "right," as used in § 53-124.05, refers to those rights enumerated in Neb. Rev. Stat. § 53-123.04 (Reissue 1978), which do not include the right to remove a license. This is clearly erroneous. Section 53-123.04 refers to the rights enjoyed by a holder of a license, which include the right to sell alcohol on the premises specified in the license. The word "right" in § 53-124.05 refers to the right to sell as well as to hold and renew.

The trial court's judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. CHARLES A. KANDT, LINCOLN COUNTY ATTORNEY, APPELLEE, V. NORTH PLATTE BAPTIST CHURCH OF NORTH PLATTE, NEBRASKA, A CORPORATION, ET AL., APPELLANTS.

345 N.W.2d 19

Filed March 2, 1984. No. 83-409.

Summary Judgment. Where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law, summary judgment is a proper remedy.

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

David C. Gibbs, Jr., Charles E. Craze, and Richard W. Moore of Gibbs & Craze, and George E. Clough of Clough & Hays, P.C., for appellants.

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

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

PER CURIAM.

This was an action brought by the county attorney of Lincoln County, Nebraska, to enjoin the defendants from operating the North Platte Christian School in North Platte, Nebraska, without complying with the school laws of the State of Nebraska. The defendants answered that their religious convictions prevented them from complying with the school laws and that the laws in question violated the free exercise clause of the first amendment to the Constitution of the United States and other provisions of that Constitution and the Constitution of Nebraska.

The trial court sustained the plaintiff's motion for a summary judgment and entered a permanent injunction against the operation of the school until there had been compliance with the school laws. The defendants have appealed.

The record discloses that there are no genuine issues of fact and that the issues of law are controlled

by our decision in *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed* 454 U.S. 803, 102 S. Ct. 75, 70 L. Ed. 2d 72. The summary judgment in favor of the plaintiff was properly entered.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANTONIA A. DREW, APPELLANT.

344 N.W.2d 923

Filed March 2, 1984. No. 83-431.

1. **Homicide: Words and Phrases.** Manslaughter is the killing of another without malice, either upon a sudden quarrel or unintentionally while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305(1) (Reissue 1979).
2. **Homicide: Self-Defense.** A killing resulting from the accidental discharge of a gun during a scuffle, while the gun is being used in an attempt to strike the other party, is excused only if the force used was justified under the circumstances.
3. **Homicide: Lesser-Included Offenses: Jury Instructions.** When, in a prosecution for murder, the evidence will support a finding of manslaughter, the trial court is required to give such an instruction.
4. **Trial: Witnesses: Prior Inconsistent Statements: Impeachment.** When a nonparty witness admits making earlier statements contradicting his testimony at trial, the earlier statements are not admissible for purposes of impeachment.

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

James Martin Davis, for appellant.

Paul L. Douglas, Attorney General, and Michaela M. White, for appellee.

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

BOSLAUGH, J.

The defendant, Antonia A. Drew, appeals from her

conviction for manslaughter and her sentence to 10 years' imprisonment.

The evidence shows that on the morning of October 6, 1982, the defendant and the victim, Sandra Shepherd, were involved in an argument on the sidewalk at 24th and Franklin Streets in Omaha, Nebraska. Witnesses testified that they heard shouting between the two women and saw what appeared to be a scuffle. The defendant testified that Shepherd had begun an argument with her, cursed at her, and had threatened her. The defendant testified that Shepherd picked her up and threw her against a van. During the scuffle, the defendant pulled a gun from her pocket. The defendant testified that when she attempted to hit Shepherd in the head with the gun, the gun discharged accidentally, wounding Shepherd.

The bullet entered above the left eye and lodged in the brain of the victim. The defendant ran from the scene but surrendered to the police on October 7, 1982. The victim was taken to St. Joseph's Hospital where she died on October 12, 1982, as a result of the gunshot wound.

When the defendant surrendered to the police she was arrested, given *Miranda* warnings, and charged with assault. After the victim died the defendant was charged with second degree murder. Following trial to a jury she was convicted of manslaughter and sentenced to 10 years' imprisonment.

The defendant contends that it was error for the trial court to refuse to give a tendered instruction on the defense of accident or excusable homicide; that it was error to submit manslaughter to the jury; and that it was error to exclude certain evidence offered for the purposes of impeachment.

The defendant requested an instruction that, although she did not rely on the defense of self-defense, she was privileged to use force in protecting herself; and if such action unintentionally and unexpectedly caused the death of the victim, the de-

fendant could not be found guilty of second degree murder or manslaughter. The defendant also requested an instruction that the burden was upon the State to prove, beyond a reasonable doubt, that the killing was not accidental.

The court refused to give the requested instructions. However, the court did instruct on the defense of justification or self-defense, in accordance with the provisions of Neb. Rev. Stat. § 28-1409 (Reissue 1979).

The defendant contends that the failure to give the requested instructions left the jury with no other choice but to convict her of manslaughter, even if they concluded that the death was the result of an accident.

Neb. Rev. Stat. § 28-305(1) (Reissue 1979) provides: "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act."

Drew argues that this statute requires a conviction of manslaughter whenever the evidence shows that a death occurred as the result of some act by the defendant during a sudden quarrel. Drew contends that the jury must be instructed that an accidental death resulting from the use of justifiable force is a defense to a charge of manslaughter. In her brief Drew states the following rule: "If the blow itself was *privileged*, a death unexpectedly and unintentionally resulting therefrom is excusable." (Emphasis supplied.) Brief for Appellant at 14.

As the rule quoted above indicates, the focus of the inquiry is not whether the gun discharged *accidentally* but, rather, whether the defendant was acting lawfully at the time the gun discharged. The defendant must establish that the use of the gun was privileged at the time it discharged. The threatening use of a firearm is an unlawful assault sufficient to convict one of manslaughter, when defined as causing the death of another unintentionally while

in the commission of an unlawful act. § 28-305(1). Similarly, the accidental discharge of a gun, the use of which was not justified under the circumstances, is not a defense to manslaughter when the killing occurred upon a sudden quarrel.

In *Ford v. State*, 71 Neb. 246, 98 N.W. 807 (1904), we held that the fact that a gun discharged accidentally did not entitle the defendant to acquittal, as the pointing of the gun at another constituted an unlawful assault. No issue of self-defense was raised by the facts in that case.

In *State v. Archbold*, 178 Neb. 433, 436, 133 N.W.2d 601, 603 (1965), we held that the proper defense for such use of a gun is self-defense: "We consider defendant's assignments of error as designated and in the order listed in his brief. Number I involves the giving of instruction No. 13, which reads: 'You are further instructed "the intentional pointing of a loaded pistol at a person is ordinarily an unlawful assault, and when under these circumstances the pistol is unintentionally discharged and a person killed, such acts constitute manslaughter". ' Defendant does not deny that this is a correct statement of law, but insists that when it is applied to the facts in this case it is erroneous and prejudicial. This instruction is derived from Ford v. State, 71 Neb. 246, 98 N.W. 807, 115 Am. S. R. 591, which involved the accidental discharge of a gun intentionally pointed at the deceased. Self-defense was not an issue in that case. Defendant argues that in this case the instruction is equivalent to directing a verdict of guilty. It is a sufficient answer to defendant's contention to say that *except for the issue of self-defense*, the defendant would be guilty of manslaughter on his own testimony if the jury found that he intentionally pointed the gun at the deceased." (Emphasis supplied.)

In *People v. Piorkowski*, 41 Cal. App. 3d 324, 115 Cal. Rptr. 830 (1974), it was held that the use of a gun which was clearly in excess of reasonable force

renders the *statutory* defense of accidental killing inapplicable. Thus, the reasonableness of the force used in self-defense is the primary consideration in determining whether an accident could excuse the defendant from liability.

In *James Gunn, Jr. v. State of Indiana*, 174 Ind. App. 26, 31-32, 365 N.E.2d 1234, 1238-39 (1977), the court discussed the relationship between the assertion that the killing was accidental and the assertion that the defendant acted in self-defense: "First, the theory of self-defense itself embraces intentional as well as accidental killings. 1 Wharton's Criminal Law and Procedure, § 213, p. 464, 465 (1957). In *McDermott v. State*, *supra*, at 195, our Supreme Court held:

" 'In all cases where the killing of the assailant is purposely done by the assaulted party, he must have acted under the belief that such killing was necessary to preserve his own life, or to save himself from great bodily harm, to render the killing excusable. We do not mean to say, however, that to render the killing excusable the assaulted party must have acted under the belief that the death of the assailant was necessary. As we have said, in proper cases the assaulted party has the right to meet force with force; and if, in a proper defence, death results to the assailant, the killing may be excusable without a belief on the part of the assaulted party that it was necessary for his own safety. In such cases the defence is purposely made, *but the killing is not purposely done. It is simply the result of the defence. Runyan v. State*, 57 Ind. 80 (26 Am. R. 52); Whart. Crim. Law, sec. 1019; Hor. & Thomp. Cases on Self-Defence, 492.' (Emphasis added).

"Thus, self-defense is available to the accused who accidentally kills his assailant while properly exerting force to assure his own safety.

"Second, and similarly, because the proper exercise of the right to defend oneself is a lawful act, such an act may satisfy the requirement that the ac-

cused be engaged in a lawful act when a killing occurs accidentally. This context is explained in a Virginia case, *Valentine v. Commonwealth*, *supra* [187 Va. 946, 953], 48 S.E.2d [264 (1948)] at 267-268, wherein that court quoted 40 C.J.S. *Homicide* § 112c, p. 981:

" 'Ordinarily the law of self-defense is not applicable in a case of a killing resulting from an act which was accidental and unintentional, particularly where the facts of the case are not such as would make such law applicable. However, *where the defense of excusable homicide by misadventure is relied on, the principles of self-defense may be involved not for the purpose of establishing defense of self, but for the purpose of determining whether accused was or was not at the time engaged in a lawful act; and it has been held that in such case the right, but not the law, of self-defense is invoked.* Accused is entitled to an acquittal where he was lawfully acting in self-defense and the death of his assailant resulted from accident or misadventure, as where in falling he struck or overturned an object and thereby received injuries resulting in his death, *or where in a struggle over the possession of a weapon it was accidentally discharged.*' (Emphasis added)."

Self-defense was the proper defense under the facts of the present case. If the force used was justified, the act was not an unlawful one and the accident flowing therefrom is excused.

The trial court was required to instruct on the defense of self-defense, and the instructions requested by the defendant were properly refused. The facts show that in the course of the quarrel Drew attempted to hit the victim with a dangerous weapon. The only issue raised was whether the use of the gun was justified under the circumstances. That issue was submitted to the jury.

The defendant next argues that it was error for the court to instruct on manslaughter, over her objection. The evidence supports the giving of the in-

struction. It is undisputed that Shepherd died as a result of a shot fired from the gun held by Drew. The evidence shows that Shepherd and Drew were involved in a quarrel. The jury could find that Drew did not intend to shoot Shepherd but that Drew was in the commission of an unlawful act, an assault or an assault and battery, at the time the gun was discharged. Under these facts an instruction on the elements of both types of manslaughter as embodied in § 28-305(1) was proper.

When, in a prosecution for murder, the evidence will support a finding of manslaughter, the trial court is required to give such an instruction. Neb. Rev. Stat. § 29-2027 (Reissue 1979) provides: "In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter; and if such person be convicted by confession in open court, the court shall proceed by examination of witnesses in open court, to determine the degree of the crime, and shall pronounce sentence accordingly."

In *Bourne v. State*, 116 Neb. 141, 216 N.W. 173 (1927), we held the provisions of this statute to be mandatory. In *State v. Worley*, 178 Neb. 232, 132 N.W.2d 764 (1965), it was held that it was not prejudicial error to give an instruction on manslaughter in a prosecution for second degree murder. See, also, *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982), in which § 29-2027 was held to require an instruction on such lesser degrees of homicide as find support in the evidence.

The defendant's final contention on appeal is that it was error for the trial court to exclude certain evidence offered for the purpose of impeachment. In particular, Drew contends that it was error to exclude a taped statement given to police by Otis Cullum, a witness who was in the vicinity of 24th and Franklin at the time the killing occurred. In his statement to the police Cullum stated that he did not

see Drew make any motions with her hands. At trial he testified that he saw Drew raise her hands. On cross-examination Drew's counsel read portions of the taped statement to Cullum. Cullum admitted that he did not tell the police what he had testified to at trial.

The issue was decided in *State v. Packett*, 206 Neb. 548, 294 N.W.2d 605 (1980), which is controlling here. When a nonparty witness admits making earlier statements contradicting his testimony at trial, the earlier statements are not admissible for purposes of impeachment.

There being no error, the judgment is affirmed.

AFFIRMED.

CECO CORPORATION, APPELLANT, V. WILLIAM CROCKER, APPELLEE.

345 N.W.2d 20

Filed March 2, 1984. No. 83-503.

1. **Workmen's Compensation: Appeal and Error.** In reviewing findings of fact in workmen's compensation 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.
2. _____: _____. A finding with regard to causation of an injury is one for determination by the fact finder; it will not be set aside unless clearly wrong.
3. _____: _____. In testing the sufficiency of evidence to support findings of the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
4. _____: _____. 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.
5. **Workmen's Compensation.** Whether a plaintiff in a Nebraska Workmen's Compensation Court case is totally and permanently disabled is a question of fact.

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

Diane Bevans Carlson and Walter E. Zink II of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Peter J. Hoagland of Schrempp, Hoagland & Gray, for appellee.

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

HASTINGS, J.

This is an appeal by the employer, Ceco Corporation, from the Workmen's Compensation Court on rehearing and judgment, which found William Crocker temporarily totally disabled from April 25, 1978, to March 11, 1983, and continuing for an indefinite period of time.

The compensation court on rehearing also ordered further vocational rehabilitation, payment of certain outstanding medical expenses, and an attorney fee in the amount of $1,500. Except for ordering payment of an attorney fee and certain medical expenses, the award on rehearing affirmed the action of the one-judge court in awarding disability benefits. We affirm.

On April 24, 1978, while working as a rough carpenter at the penal complex in Lincoln, William Crocker attempted to pull up a 100-pound frame when the 4-by-4 scaffolding he was standing on rolled, causing him to fall 2½ to 3 feet to the ground. After being taken home by a coworker and later taken to the hospital that day by his wife, Mr. Crocker was given medication and released. On May 22, 1978, Dr. Gene Lewallen performed a partial hemilaminectomy to remove protruding portions of the disk at the L3-4 and L4-5 regions of the lower back. After surgery Mr. Crocker did not return to work because of the constant pain in his lower back and down his right leg. The pain has prevented Mr. Crocker from doing manual labor involving bending, lifting, and twisting, essential skills for a carpenter. Mr. Crocker has worked as a carpenter since 1952.

Dr. Lewallen, the orthopedic surgeon who performed the back operation, testified that other than some mild to moderate degenerative changes, there are no concrete physical findings to support the patient's complaints of back pain since the surgery. According to Dr. Lewallen, when he initially saw Crocker he believed Crocker had a spasm and was in real pain, but that after the disk surgery Crocker has not really demonstrated reflex changes, sensory loss, or measurable objective findings, other than findings on X-rays to indicate there is some degenerative arthritis in the lower back. Specifically, Dr. Lewallen opined, "I doubt that much of it [degenerative arthritis] was caused by the accident. He had about the same amount in his initial films [X-rays taken shortly after the accident]."

Dr. George Hachiya, a board-certified psychiatrist and neurologist, who examined Crocker approximately 18 months after the date of the accident, testified the pain complained of exists because of "neurological damage done—which occurred at the accident." Dr. Hachiya, who has seen Crocker 68 times between October 17, 1979, and March 4, 1983, observed a diminished ankle reflex on the right side, which led him to believe nerve root trauma existed. Dr. Hachiya further testified that Crocker had a certain level of pain after the accident, which "is more or less with Mr. Crocker," and that this pain can become aggravated by lifting movements, but that the X level of pain at the onset was caused by the accident, which precipitated the problem.

While Dr. Lewallen was unsure whether the accident or degenerative changes were the cause of Crocker's back problems, he was certain Crocker was unable to engage in carpentry or similar work, and for these reasons rated Crocker 50 percent permanently disabled. Dr. Hachiya opined Crocker was 50 percent disabled overall psychologically and 100 percent disabled in terms of gainful employment.

It is noted Dr. Hachiya treated Crocker principally for psychological depression but encountered numerous complaints about lower back pain. Evidence was also introduced to show that Crocker participated in a 2-week summer camp for his Army Reserve unit in 1981. No eyewitness accounts of what duties were performed in the summer camp were provided, although the claimant did admit to repairing a door during this time. Crocker claims he worked as a "tester," watching recruits do pushups, situps, and the 2-mile run, but was not participating in any of these activities himself. Crocker resigned from the Army Reserve in March 1982.

The appellant assigned as error: (1) That there is not sufficient evidence to support either the compensation court's finding that a causal connection existed between the current back problems and the accident of April 24, 1978, or in awarding continuing total disability; and (2) That the compensation court erred in awarding vocational rehabilitation services, because the employee has waived his right to such services.

In reviewing findings of fact in workmen's compensation 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. *Wilson Concrete Co. v. Rork*, *ante* p. 447, 343 N.W.2d 764 (1984); *Randall v. Safeway Stores*, 215 Neb. 877, 341 N.W.2d 345 (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. *Randall v. Safeway Stores*, *supra*; *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).

It is also an established guideline that in testing the sufficiency of evidence to support findings of the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light

most favorable to the successful party. *Hatting v. Farmers Co-op Assn.*, 212 Neb. 242, 322 N.W.2d 423 (1982).

The testimony of Dr. Hachiya relating to his examinations of Mr. Crocker indicated that, in Dr. Hachiya's opinion, Mr. Crocker suffered "neurological damage" consisting of "nerve root trauma" which was caused by the accident. This opinion was based upon the objective neurological change of a diminished ankle reflex on the right side.

Even though conflicting evidence was presented to raise a reasonable doubt that the current pain was a result of degenerative arthritis and not the April 24, 1978, accident, this court must adhere to the rule that 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. *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983).

In light of this rule we cannot conclude the compensation court was clearly wrong in its finding that the present disability was caused by the accident.

The appellant's claim that there is insufficient evidence to sustain the finding of causation and the subsequent award of benefits is based upon the contention that Dr. Hachiya's testimony is without probative value, since Dr. Hachiya treated Crocker for psychiatric disorders and not back difficulties. The appellant cites as authority the case of *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978), wherein the majority of this court reversed a compensation court finding and made the finding that there was a causal connection between an employee's urinary tract infection and the injury. The compensation court's finding in *Spiker* was based upon the testimony of a physician who had not examined or treated the patient, whose testimony was based entirely upon an examination of the record, and whose testimony was contrary to the testimony of the treating physicians.

The situation in this case is much different than in the *Spiker* case because, here, Dr. Hachiya, who is also a neurologist, made neurological observations during the course of some 68 visits between October 17, 1979, and March 4, 1983. Although it is true Dr. Hachiya admitted Dr. Lewallen would best be able to address the cause of Crocker's back problems, Dr. Hachiya is not prohibited from testifying about the issue of causation. In that regard Dr. Hachiya testified that, based on a reasonable degree of medical certainty, Crocker's "X level of pain, the onset, the pathology and the neurological findings I would say was secondary to the accident which precipitated the problem."

Appellant also contends the award of continuing temporary total disability benefits is contrary to the preponderance of the evidence, and the compensation court erred in placing the burden of proof on the employer on the issue of the extent of the disability. Appellant refers to the order entered after rehearing, which said, "Although defendant [Crocker] may have been something less than totally disabled during the times he was engaged in National Guard training, the evidence is insufficient to enable the Court to determine during what periods of time the defendant was paid, and therefore the Court considers the defendant as having been temporarily totally disabled at all times since his injury."

While, admittedly, the language in the order might be confusing, the compensation court did not shift the burden of proof. The court only points out conflicting evidence exists, and notwithstanding the conflict, the burden to prove the extent of the disability by a preponderance of the evidence is met. It should be remembered that whether a claimant in a Nebraska Workmen's Compensation Court case is totally and permanently disabled is a question of fact. *Paris v. J. A. Baldwin Mfg. Co.*, *ante* p. 151, 342 N.W.2d 198 (1984); *Boults v. Church*, 200 Neb. 319, 263 N.W.2d 478 (1978). Having found the claim-

ant Crocker to be temporarily totally disabled was not clearly wrong.

The second assignment of error, that the compensation court erred in awarding vocational rehabilitation services, because the employee has waived his right to such services as a matter of law, is incorrect. The appellant contends Crocker has, without reasonable cause, refused to undertake rehabilitation services because he failed to follow through with certain job applications provided to him by a professional rehabilitation counselor.

Once again, a question of fact is presented: whether an employee continues to be entitled to vocational rehabilitation. Dr. Hachiya's testimony at rehearing indicated Crocker was at that time not a candidate for rehabilitation because the motivation was not there due to his depression. However, he observed that such depression was 100 percent recoverable and that, with continuing treatment, he felt that Crocker would be able to overcome that depression.

The compensation court determined that Crocker remains entitled to rehabilitation, provided that if he should, without reasonable cause, fail or refuse to submit to evaluation and cooperate in a reasonable program of rehabilitation, the court may, on proper application, reduce or limit the amount of compensation otherwise payable under the Nebraska workmen's compensation law. Such order is not unreasonable and is supported by competent evidence in the record.

The determination of the Workmen's Compensation Court was not clearly wrong, and its award on rehearing is affirmed. The appellee Crocker is awarded a fee of $1,000 for the services of his attorney in this court.

AFFIRMED.

Cite as 216 Neb. 699

STATE OF NEBRASKA, APPELLEE, V. MIKE ELLIS, APPELLANT.

345 N.W.2d 323

Filed March 2, 1984. No. 83-518.

1. **Appeal and Error.** This court is not bound by the appellant's assignments of error, but can, at its option, address issues presented by plain error on the part of the trial court.
2. **Prior Convictions: Proof.** In an enhancement proceeding the burden remains with the State to prove the prior convictions, and proof that the prior convictions were obtained in a proceeding wherein the defendant was either afforded counsel or informed of his right to counsel is a necessary part of that burden.
3. **Prior Convictions: Right to Counsel: Proof.** Where a record is silent as to a defendant's opportunity for counsel, we may not presume that such rights were respected.

Appeal from the District Court for Cedar County: FRANCIS J. KNEIFL, Judge. Reversed and remanded for further proceedings.

Kathryn A. Olson, for appellant.

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

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

PER CURIAM.

In his sole assignment of error the defendant-appellant, Mike Ellis, challenges his sentence as being excessive. Because of a plain error, we do not reach that assignment; we reverse the judgment of the trial court and remand for further proceedings not inconsistent with this opinion.

On September 4, 1979, an information was filed charging that Ellis "did, on or about the 4th day of October A.D. 1978, . . . feloniously with intent to defraud make and deliver a check in the amount of $26.78 to the Cedar Motel, Randolph, Nebraska, drawn upon the 1st State Bank of Randolph, Randolph, Nebraska knowing at the time of such making that he did not have an account for such check in said bank, and

"on or about February 6, 1976, said Mike Ellis was convicted of the offense of issuing a [sic] Insufficient Fund Check in the County Court of Cedar County, Nebraska, and the offense first above complained is a subsequent offense under Neb. Rev. Stat. 28-1212 (2) Reissue 1975 . . . ."

At the time in question Neb. Rev. Stat. § 28-1212 (Reissue 1975), since repealed and replaced with Neb. Rev. Stat. § 28-611 (Reissue 1979) as of January 1, 1979, provided: "Any person who, with intent to defraud, shall make or draw, utter or deliver any check, draft, assignment of funds, or order for the payment of money upon any bank, cooperative credit association, or other depository knowing, at the time of such making, drawing, uttering, or delivering, that the maker or drawer has no account or deposit in such bank, cooperative credit association, or depository, upon conviction thereof, shall be punished as follows: (1) If such check, draft, order or assignment of funds so issued be for a sum not exceeding seventy-five dollars, the person so convicted shall be fined in any sum not less than five dollars nor more than five hundred dollars, or shall be imprisoned in the county jail not more than six months, or be both so fined and imprisoned, at the discretion of the court, and shall pay the costs of prosecution; or (2) if such check, draft, order or assignment of funds so issued be for a sum greater than seventy-five dollars, or if any person shall have been previously convicted of issuing a check, draft, order or assignment of funds under one hundred dollars, the person so convicted shall be imprisoned in the Nebraska Penal and Correctional Complex not exceeding ten years, or be imprisoned in the county jail not exceeding one year, or be fined not less than fifty dollars nor more than five thousand dollars, or be both so fined and imprisoned, at the discretion of the court. Any such instrument given in payment for lodging or other accommodations at any apartment house, hotel or motel shall be presumed to have

been given with intent to defraud, but such presumption may be rebutted."

On December 6, 1979, Ellis withdrew his prior plea of not guilty and entered one of guilty. This change in pleas was precipitated by an agreement with the Cedar County attorney, who promised to recommend that any sentence Ellis was to receive be served concurrently with sentences he was already serving. Ellis admitted writing a no-fund check to the Randolph motel. The trial judge then, after informing Ellis of the rights he was waiving by entering a guilty plea, accepted Ellis' new plea.

After reviewing the presentence report the trial judge sentenced Ellis to a term of not less than 1 nor more than 5 years at the Nebraska Penal and Correctional Complex, to be served concurrently with two consecutive 6-month terms he was already serving.

In his brief before this court Ellis assigns as the sole error of the trial court the claim that the sentence he received was an excessive one. Due to the approach taken, we find it unnecessary to rule on that assignment of error. This court is not bound by the appellant's assignments of error, but can, at its option, address issues presented by plain error on the part of the trial court. Neb. Rev. Stat. § 25-1919 (Reissue 1979); *State v. Prichard*, 215 Neb. 488, 339 N.W.2d 748 (1983).

Under § 28-1212 (Reissue 1975) one convicted of issuing a no-fund check for less than $75 could, absent the prior conviction specified in § 28-1212(2), only have been fined from $5 to $500, or imprisoned for no more than 6 months in a county jail, or have been both so fined and imprisoned. If a person previously convicted under § 28-1212 of issuing a no-fund check *for less than $100* was subsequently convicted of issuing a no-fund check not exceeding $75, that person might have been imprisoned in the penal complex for no more than 10 years, or imprisoned in the county jail for no more than 1 year, or fined not

less than $50 nor more than $5,000, or have been both so fined and imprisoned.

So far as the record reflects, at the time Ellis' guilty plea was accepted, the prosecution presented no evidence that Ellis had been previously convicted of issuing an insufficient-fund check of less than $100 on February 6, 1976, as charged. While the trial judge made inquiry of the facts surrounding the Randolph motel check, he made no finding that Ellis had been previously convicted of issuing an insufficient-fund check on February 6, 1976. Ellis' presentence report shows no February 6, 1976, conviction. That report reflects that on February 9, 1976, no-fund check charges were dropped by the Cedar County attorney. The presentence report does disclose that Ellis was convicted of either no-fund or insufficient-fund check charges on three occasions prior to February 6, 1976; however, it does not disclose the amounts of the checks, unless that can be inferred from the amount of restitution ordered, nor does it disclose whether Ellis had or waived counsel at those proceedings.

In *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), a case detailing the requisite proof for enhancing the penalty for driving while intoxicated due to previous driving-while-intoxicated convictions, we held that in an enhancement proceeding the burden remains with the State to prove the prior convictions, and proof that the prior convictions were obtained in a proceeding wherein the defendant was either afforded counsel or informed of his right to counsel is a necessary part of that burden. See, also, *State v. Ziemba*, *ante* p. 612, 346 N.W.2d 208 (1984); *State v. Kucera*, 215 Neb. 337, 338 N.W.2d 443 (1983); *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981); *Addison v. Parratt*, 208 Neb. 459, 303 N.W.2d 785 (1981).

In *State v. Feagin*, 196 Neb. 261, 242 N.W.2d 124 (1976), we held that a plea of guilty to a charge of third offense driving while intoxicated eliminated

the necessity of proof of the prior convictions or that they were attended by an admonition to the defendant that he was entitled to counsel, or was in fact represented by an attorney. We recently modified that rule in *State v. Ziemba*, *supra*, in recognition that the law regarding the validity of guilty pleas has undergone a metamorphosis since the time *Feagin* was decided. See the above-cited cases.

While our opinion in *Ziemba* was concerned with the effect of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982), what was stated therein is applicable to this case. "There is no requirement that the State prove a prior conviction by a transcript of the judgment if the defendant admits that he was in fact convicted as alleged in the complaint. However, in accepting such a waiver the trial court must address the defendant and ascertain that he was represented by counsel at the time of the prior conviction or waived his right to counsel." *Ziemba*, *supra* at 620, 346 N.W.2d at 214.

In *State v. Sare*, 209 Neb. 91, 306 N.W.2d 164 (1981), we held that before a guilty plea to a felony could be accepted, there must be a factual basis for that plea. See, also, *State v. LeGear*, 187 Neb. 763, 193 N.W.2d 763 (1972); ABA Standards for Criminal Justice § 14-1.6 (1982). We also held that the factual basis could be supplied by inquiry of the defendant, inquiry of the county attorney, or examination of the presentence report. A necessary component of that factual basis, in cases where an enhanced penalty, amounting to incarceration due to prior convictions, is imposed, is that those prior convictions relied upon be obtained in a situation where the defendant was informed of and given the opportunity to exercise the right to counsel. The factual basis of a guilty plea to a crime charged under an enhanced penalty provision such as § 28-1212(2) (Reissue 1975) is not supplied by a record silent as to whether the prior convictions were obtained by affording the defendant an opportunity to exercise his sixth amend-

ment right to counsel. "Where a record is silent as to a defendant's opportunity for counsel, we may not presume that such rights were respected." *State v. Smith, supra* at 449, 329 N.W.2d at 566.

The record in the present case is silent in that regard, and, pursuant to the sixth amendment to the U.S. Constitution and article I, § 11, of the Constitution of the State of Nebraska, Ellis' conviction must be reversed.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

THE FIRST NATIONAL BANK AND TRUST COMPANY OF NORTH PLATTE, A NATIONAL BANKING CORPORATION, APPELLEE, V. GARNET I. LEHL, APPELLANT, NEBRASKA WESTERN SERVICE CO., INC., A CORPORATION, ET AL., APPELLEES.

345 N.W.2d 25

Filed March 2, 1984. No. 83-551.

Records: Appeal and Error. In the absence of a bill of exceptions it will be presumed that the evidence sustained the findings of the trial court. The only issue that can be considered is whether the pleadings support the judgment.

Appeal from the District Court for Keith County: KEITH WINDRUM and JOHN P. MURPHY, Judges. Affirmed.

Patrick B. Hays, for appellant.

Donald E. Girard of Girard and Gale, for appellee Bank.

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

WHITE, J.

This is an appeal from a judgment of foreclosure and subsequent sale of mortgaged real estate.

Appellant urges two errors on appeal: The court

erred (1) in refusing to allow an answer to be filed out of time, and (2) in confirming the sale. We affirm.

There is no bill of exceptions. Assuming that the court abused its discretion in refusing to allow the appellant to file an answer out of time (a questionable assumption, since the tendered answer contained in the transcript admits the execution of the note and mortgage and pleads no affirmative defenses), the appellant waived the error by consenting in writing to the entry of the decree. In the brief the appellant simply ignores the execution of the consent. The assigned error is without merit and totally frivolous.

The appellant did not appear at the hearing on confirmation, did not request the court to set aside the sale, but simply appealed. In *Caynor v. Caynor*, 213 Neb. 143, 144, 327 N.W.2d 633, 634 (1982), we said: "No bill of exceptions has been filed in this case. The applicable rule is that in the absence of a bill of exceptions it will be presumed that the evidence sustained the findings of the trial court. The only issue that can be considered is whether the pleadings support the judgment."

The pleadings support the finding of the trial court that a subsequent sale would not realize a greater amount. Therefore, the judgment must be affirmed.

AFFIRMED.

CHARLES G. MARTIN ET AL., APPELLEES, V. JOSEPH A. KOZUSZEK ET AL., APPELLANTS.

345 N.W.2d 26

Filed March 2, 1984. No. 83-697.

1. **Adverse Possession: Quiet Title: Appeal and Error.** On appeal to this court of an order quieting title by adverse possession, we review the record de novo without reference to the factual findings made in the lower court, giving weight to the fact, when the facts

are in dispute, that the trial judge had the opportunity to experience the demeanor of the witnesses and had the opportunity to view the premises in dispute.

2. **Adverse Possession: Quiet Title: Proof.** In order to prevail in a suit to quiet title based upon adverse possession, the party claiming such title is required to prove by a preponderance of the evidence that the possession has been actual, continuous, exclusive, notorious, and adverse under a claim of right for at least a 10-year period.
3. **Boundaries: Adverse Possession: Proof.** The placement of a fence within one's boundary line does not lead to the relinquishment of ownership of lands outside the fence, without an additional showing that those lands outside the fence have been used by the neighboring landowner under a claim of ownership for the requisite period of time.

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

David L. Kimble of Souchek & Kimble, for appellants.

Kent F. Jacobs of Blevens, Blevens & Jacobs, for appellees.

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

CAPORALE, J.

Joseph and Sandra Kozuszek, defendants below, appeal from the district court's order quieting title to a strip of land in the plaintiffs, Charles and Bessie Martin, owners of a parcel of land adjacent to that held by the Kozuszeks. The district court found that the Martins and their predecessors had established title to the disputed territory by adverse possession for the required 10-year period, and enjoined the Kozuszeks from preventing the replacement of a fence by the Martins on the boundary between the adjoining parcels. We reverse, remand, and direct dismissal.

On appeal to this court of an order quieting title by adverse possession, we review the record de novo without reference to the factual findings made in the

lower court. In undertaking this review we do give weight to the fact, when the facts are in dispute, that the trial judge had the opportunity to experience the demeanor of the witnesses and had the opportunity to view the premises in dispute. *Horky v. Schriner*, 215 Neb. 498, 340 N.W.2d 1 (1983); *Stricker v. Knaub*, 215 Neb. 372, 338 N.W.2d 757 (1983); *O'Keefe Elevator v. Second Ave. Properties*, *ante* p. 170, 343 N.W.2d 54 (1984).

The facts in this case are apparently not in dispute. Charles and Bessie Martin, husband and wife, hold title to the west half of Lots 1, 2, 3, 4, and 5 of Block 4, Beaver Crossing, Seward County, Nebraska (west half). They took title pursuant to a warranty deed from Mildred Miller, the daughter of and personal representative of the estate of Anna Albrecht. Albrecht and her husband received their title by a deed executed and recorded in 1949. Joseph and Sandra Kozuszek are the fee holders of the east half of Lots 1, 2, 3, 4, and 5 of Block 4, Beaver Crossing, Seward County, Nebraska (east half). They received their title by a warranty deed executed and recorded in 1976.

In 1949, when the Albrechts moved upon the west half, a fence was in place separating it from the east half. This fence extended the length of the property and was erected by the then owners of the east half. The fence was placed about 3.5 feet inside the west boundary of the east half. In the early 1950s the north 67.5 feet of the fence were removed. The Kozuszeks caused a survey of their land to be made in 1976, and then placed a chain link fence along the north 67.5 feet of their western border. This fence runs along a line parallel to and seven-tenths of a foot inside the boundary.

In 1982 the Martins wished to replace the original fence with a new one. This new fence was to be placed upon the entire length of the original fence line, which was 3.5 feet outside the Martins' eastern boundary and upon the land described in the Kozus-

zeks' deed. The Kozuszeks protested when the fence installers arrived, and this action ensued.

In order to prevail in a suit to quiet title based upon adverse possession, the party claiming such title is required to prove by a preponderance of the evidence that the possession has been actual, continuous, exclusive, notorious, and adverse under a claim of right for at least a 10-year period. *Berglund v. Sisler*, 210 Neb. 258, 313 N.W.2d 679 (1981).

While the Martins have established that at least the southern portion of the fence has been in place since not later than 1949, they have not shown any use of the disputed territory. They offer no testimony, nor does their witness, Mildred Miller, concerning the uses, if any, to which the 3.5-foot strip in question has been put. This lack of proof is fatal to their claim.

In *Linch v. Nichelson*, 178 Neb. 679, 134 N.W.2d 796 (1965), we held that the placement of a fence within one's boundary line does not lead to the relinquishment of ownership of lands outside the fence, without an additional showing that those lands outside the fence have been used by the neighboring landowner under a claim of ownership for the requisite period of time. We reaffirmed that rule in the recent case of *Horky v. Schriner*, *supra*. While the trial judge viewed the premises involved herein, and may have observed at that time the uses to which the Martins were putting the disputed territory, that momentary view tells us nothing about the 10-year period prior to his tour.

Since the Martins have failed to establish that their use, if any, of the disputed territory was with the requisite elements of adverse possession for the required period of time, their claim must fail. Accordingly, the order quieting title in the Martins and enjoining the Kozuszeks is reversed and the matter remanded to the court below for dismissal.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

Cite as 216 Neb. 709

STATE OF NEBRASKA, APPELLEE, V. MICHAEL E. NEAL, APPELLANT.

346 N.W.2d 218

Filed March 9, 1984. No. 82-693.

Pleas: Constitutional Rights. Defendants are entitled to be informed of the nature of the charges against them, the right to assistance of counsel, the right to confront witnesses against them, the right to a jury trial where otherwise authorized, and the privilege against self-incrimination.

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

Garrett Law Office, for appellant.

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

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

PER CURIAM.

Michael E. Neal was convicted of robbery and use of a firearm upon his plea of guilty entered in the Douglas County District Court and was sentenced to consecutive terms in the Nebraska Penal and Correctional Complex of not less than 14 nor more than 50 years on the robbery charge and to not less than 5 nor more than 20 years on the firearm charge. Neal appeals his conviction and sentence. We affirm.

Neal was arraigned on April 15, 1982, on the charges of robbery and use of a firearm in that robbery. At his arraignment Neal entered a plea of not guilty to each of the charges. After giving serious thought to withdrawing his not guilty pleas and discussing such withdrawal of the not guilty pleas with his attorney, Neal decided to withdraw his not guilty pleas and to plead guilty to each of the charges on the morning of his jury trial, namely, September 9, 1982. Outside the presence of a jury which had been empaneled for trial, Neal entered a plea of guilty to the

charges of robbery and use of a firearm in the commission of that robbery.

The trial court told Neal that his guilty pleas could be withdrawn until such pleas were accepted by the court, and also informed Neal about the various pleas which could be entered instead of a plea of guilty. Upon inquiry by the court Neal acknowledged he was taking Tofranil and Centrax prescribed by his physician. (There is nothing in the record indicating the medications adversely affected Neal's mental processes involved in entering his pleas of guilty.) While he did not know the identity of the first President of the United States, Neal knew that Ronald Reagan was the current President of the United States. Neal understood the court's explanation about the various pleas which could be entered regarding the charges against him. The trial court then informed Neal about each requirement for a proper plea under *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981). The court also informed Neal about possible sentences which could be imposed upon conviction, including mandatory consecutive sentences under the circumstances. When Neal stated to the court that he did not understand how he could be guilty of using a firearm during the robbery because he was not holding a gun, the court thoroughly explained aiding, abetting, and using a firearm during a robbery. After that explanation Neal acknowledged his understanding of the nature of the charges against him. Neal told the court that he had talked with his attorney about all possible defenses to the charges and was satisfied with his attorney's representation. The court found beyond a reasonable doubt that Neal understood his rights and freely, voluntarily, knowingly, and intelligently waived all rights accorded Neal under the law.

After the trial court had explained all elements of the charges to be proved by the State with evidence beyond a reasonable doubt, but before accepting Neal's plea, the court asked Neal whether he com-

mitted the offenses charged, and Neal answered, "Yeah." However, when the court inquired about Neal's participation in robbing the store, Neal said he went into the store merely to order a sandwich. According to Neal, while he was in the store, two individuals, Bray and Brooks, entered the store with a gun, at which point Neal ran from the store. The court refused to accept Neal's guilty plea and reinstated a not guilty plea on behalf of Neal, and a short recess was taken.

Later, still outside the presence of the jury, Neal said he wanted to tell the court about the facts and circumstances of the robbery, that is, Neal wanted to resume the court's interrupted inquiry about a factual basis to the charges. Neal told the court that as part of a plan of Bray, Brooks, and Neal, Neal entered the store for the purpose of distracting a clerk. While Neal was talking to the clerk about warming a sandwich he had ordered, Bray and Brooks entered the store. Brooks, brandishing a nickel-plated, .38-caliber revolver, demanded money from the store clerk. The clerk opened the register, money was taken, and Neal, with his accomplices, ran out of the store.

The trial court found there was a sufficient factual basis for accepting Neal's pleas of guilty to the charges of robbery and use of a firearm in the commission of that robbery. At this inquiry by the trial court Neal said he still wanted to plead guilty to both charges. After Neal again said he was acting freely and voluntarily in entering his pleas of guilty and, further, that Neal was freely and voluntarily waiving rights accorded a defendant under the law, the court accepted Neal's guilty pleas to both charges, found Neal guilty of the crimes charged, and deferred sentencing until completion of a presentence investigation ordered by the trial court.

On September 22, 1982, the trial court sentenced Neal to a term of not less than 14 nor more than 50 years on the robbery charge and to a term of not

less than 5 nor more than 20 years on the firearm charge. The sentences on the robbery and firearm charges ran consecutively, and those sentences were consecutive to sentences previously imposed for Neal's convictions for robberies of two other business establishments, namely, a sentence of 3 to 5 years for one of the additional robberies and a sentence of 7 to 10 years for the other robbery.

In his appeal Neal contends (1) the sentences imposed in this case are excessive and constitute cruel and unusual punishment, (2) there was no factual basis for his guilty plea to the charges, and (3) his pleas were not made knowingly and intelligently.

"[D]efendants are entitled to be informed of the nature of the charges against them, the right to assistance of counsel, the right to confront witnesses against them, the right to a jury trial where otherwise authorized, and the privilege against self-incrimination. A voluntary and intelligent waiver of these rights must affirmatively appear from the record." *State v. Tweedy*, 209 Neb. 649, 655, 309 N.W.2d 94, 98 (1981).

Upon a review of the entire record in this case, we hold that Neal's guilty pleas were entered in compliance with the requirements of *State v. Tweedy*, *supra*. We note the court did not inform Neal about his right to be represented by counsel during the proceedings, but the record does reflect that Neal at all times in every proceeding was in fact represented by an attorney from the Douglas County public defender's office. To hold that it is error upon a court's failure to inform a defendant of his right to counsel when a defendant has the benefit of counsel before the court and acknowledges that his counsel's representation has been satisfactory would be the epitome of slavish technicality. Neal's repeated acknowledgments before the trial court that he fully understood the proceedings, the effects of his pleas, and the rights he was waiving negative any claim

that Neal did not fully comprehend the nature of the proceedings.

Neal's claim that the sentences imposed are excessive or constitute cruel and unusual punishment is without any legitimate foundation or merit whatsoever.

Although Neal's criminal history is of recent vintage, spanning a period of some 5 years before conviction in this case, Neal's record is extensive and reflects a pattern of increasingly dangerous criminal activity. Among Neal's previous convictions are offenses and dates of sentencing as follows: false information (4/15/77, 1/21/80); three convictions for disorderly conduct (11/15/79, 11/24/80, 11/10/81); attempted fraud (12/4/79); four charges of theft by unlawful taking (7/3/80, 6/25/81, 9/9/81, 11/10/81); and trespassing (4/6/82). In addition to those convictions and before sentencing in the present case, a jury convicted Neal of a March 30, 1982, robbery, for which Neal was sentenced to 3 to 5 years in the Nebraska Penal and Correctional Complex. Further, in another trial, likewise before sentencing in the present case, a jury had convicted Neal of a March 8, 1982, robbery of still another business establishment. Neal was sentenced to 7 to 10 years for that March 8 robbery. The sentences for the two previous convictions were consecutive.

It is a well-settled rule that the court on appeal will not disturb a sentence imposed within the limits prescribed by statutes unless there has been an abuse of discretion on the part of the trial court imposing the sentence. See *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982). Conviction for robbery is punishable by imprisonment for a term of 1 to 50 years. See Neb. Rev. Stat. §§ 28-324 and 28-105 (Reissue 1979). Conviction for use of a firearm to commit a felony is punishable by imprisonment for a term of 1 to 20 years, by a fine of $25,000, or by both such imprisonment and fine. See Neb. Rev. Stat. §§ 28-1205 and 28-105 (Reissue 1979). Neb. Rev. Stat.

§ 83-1,105(1) (Reissue 1981) provides that "the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term, and the maximum limit shall not be greater than the maximum provided by law." In view of the relevant information presented to the trial court concerning Neal, we cannot say that the trial court abused its discretion in imposing the sentences in this case. The sentences are not excessive and do not violate constitutional prohibitions, state or federal, against cruel and unusual punishment. The judgment of the district court is affirmed in all respects.

AFFIRMED.

CLINTON HASENAUER ET AL., APPELLANTS, V. OLIVER L. DURBIN ET AL., APPELLEES.

346 N.W.2d 695

Filed March 9, 1984. No. 83-002.

1. **Pretrial Conferences.** The purpose of a pretrial conference is to simplify the issues, to amend pleadings when necessary, and to avoid unnecessary proof of facts at trial. To that end litigants must adhere to the spirit of the procedure and are bound by the pretrial order to which no exception has been taken.
2. **Trial: Appeal and Error.** Questions not presented or passed upon by the trial court will not be considered by this court on appeal.
3. **Contracts.** A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter where the terms of the latter are inconsistent with those of the former so that they cannot subsist together.
4. **Contracts: Consideration.** There is a sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, whether or not there is any actual loss or detriment to him or actual benefit to the promisor.

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

Jess C. Nielsen of Nielsen & Birch, for appellants.

Baskins & Rowlands, for appellees.

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

SHANAHAN, J.

Clinton and Mary Hasenauer and Albert and Arnella Corliss filed suit against Oliver and Mildred Durbin in the Lincoln County District Court, namely, a suit seeking specific performance of an agreement to convey real estate, and damages. Summary judgment was granted to Durbins, and the suit was dismissed by the court. We affirm.

Hasenauers lived at Wallace, Nebraska. Corlisses lived at Yuma, Colorado, where Albert Corliss was a farmer and rancher, and a realtor licensed in Colorado. Albert Corliss is the brother of Mary Hasenauer. Oliver Durbin is a retired farmer living in North Platte.

On March 14, 1979, the personal representative of the estate of Berniece A. Moore, deceased, held a real estate auction at the Lincoln County Courthouse to sell estate land consisting of approximately 1,040 acres of pasture.

At the auction a mutual friend introduced Oliver Durbin to Clinton Hasenauer and Albert Corliss. As bidding progressed at the auction and while Durbins were bidding on the entire tract of 1,040 acres, Hasenauer and Corliss indicated their interest in acquiring the south half of Section 27, a part of the tract on which Durbins were bidding. Hasenauer and Corliss claim that an agreement was reached with Oliver Durbin during the auction, namely, Hasenauer and Corliss would receive the south half of Section 27 for a payment of $301.50 per acre for the half-section, if Durbins were successful bidders on the entire tract. Durbins were high bidders, and

at the conclusion of the auction paid a downpayment to the estate, 15 percent of the Durbin bid.

Shortly after the auction on March 14, Durbins, Hasenauers, and Corlisses went to Durbins' residence, where Oliver Durbin signed and delivered to Hasenauers the following receipt:

"3-14-79

$7,236

Received of Clinton or Mary Hasenauer Seven Thousand Two Hundred Thirty Six & no/100 Dollars. 15% of South 160 acres of Sec. 27-9-33. Balance of $41,004.00 on this 160 acres when papers are finished by Att Don Pederson. All paper, revenue stamps and split abstract cost at expense of buyer.

phone 532-0874 /s/ O. L. Durbin
Buyer /s/ Clinton Hasenauer 601 South Elm
/s/ Mary L. Hasenauer No. Platte, Nebr."

Oliver Durbin contemporaneously gave the same form of receipt to Albert and Arnella Corliss. In exchange for the receipts, Oliver Durbin received separate checks from Hasenauers and Corlisses. Each of the two checks was dated March 14, 1979, and was in the amount of $7,236, as indicated by the receipts.

There was no contact involving Durbins, Hasenauers, and Corlisses until March 20 when the parties met at an attorney's office in North Platte. Early on the morning of March 20, Oliver Durbin gave the attorney some information concerning the Hasenauer-Corliss transaction. When the parties arrived at the attorney's office at midmorning on March 20, a memorandum prepared by the attorney was submitted for inspection by Durbins, Hasenauers, and Corlisses. Among the terms of sale contained in this initial memorandum was a "buy-back" provision, namely, before there was a sale of the south half of Section 27 during a period of 15 years from March 14, 1979, the land would first be offered to Durbins at $301.50 per acre. In the course of the meeting on March 20, Durbins also demanded "water protection," that is, irrigation on the south half of Sec-

tion 27 would be stopped pending determination of the cause of any water deficiency in stock or domestic wells on Durbin land adjacent to the half section in question. Later in the course of the morning on March 20, a second memorandum was prepared and signed by each of the parties before a notary public. In addition to the provision for "water protection," as proposed by Durbins, the second memorandum contained a "buy-back" arrangement existing for a period of 10 years from March 14, 1979, at $301.50 per acre, and a reservation of a 30-foot right-of-way across the Hasenauer-Corliss half section to Durbins' land lying north of the half section. There is no question that the parties read, signed, and acknowledged this second memorandum on March 20.

On April 10 the personal representative of the Moore estate delivered a deed to Oliver Durbin. On April 23 Hasenauers and Corlisses met with Oliver Durbin in the attorney's office in North Platte. Hasenauers and Corlisses had sought financing from the Federal Land Bank of North Platte to buy the half section. However, when a representative of the federal land bank noticed the "buy-back" provision in the agreement of March 20, he indicated that any federal land bank loan to Hasenauers and Corlisses would have to be "restructured," that is, Hasenauers and Corlisses would have to provide additional security for the federal land bank loan. Eventually, additional security was supplied and the loan was approved.

On April 27 the attorney placed a telephone call to Albert Corliss in Colorado. In that telephone conversation Corliss refused to go through with the March 20 agreement due to the "water reservation." Shortly after and on the same day as the attorney's telephone call to Albert Corliss, Hasenauer also refused to complete the transaction in view of Corliss' refusal to carry out the agreement of March 20.

Durbins never gave a deed to Corlisses or Hasenauers, and on June 5 Durbins returned the

March 14 checks to Hasenauers and Corlisses. Accompanying return of the checks was a request by Durbins that any personal property of Hasenauers or Corlisses be removed from the half section. Durbins gave Hasenauers and Corlisses until May 28, 1979, to perform the agreement of March 20, 1979.

The next event concerning the real estate transaction occurred on June 13, 1980, when Hasenauers and Corlisses sued Durbins for specific performance based on the agreement claimed to have been achieved on March 14, and also sought damages for Durbins' failure to convey the real estate. In their answer to the petition Durbins alleged the written agreement signed by the parties on March 20, 1979, and recited that any prior agreement between the parties was "merged" into the March 20 agreement which was the "sole agreement" of the parties. In their reply Hasenauers and Corlisses did not raise any affirmative defense to the agreement of March 20.

At a pretrial conference on June 21, 1982, the trial court determined that the nature of the action was specific performance and that the issues were: (1) Whether there was an agreement between the parties for acquisition of the real estate; (2) The terms of such agreement; (3) Whether the agreement of March 20 was a complete written agreement superseding any agreement existing before March 20; and (4) Whether there was consideration for the agreement of March 20. None of the parties objected to the pretrial conference order.

Durbins, on June 28, moved for summary judgment. On October 28 the trial court found there were no issues of material fact involved in the litigation; that the written contract of March 20 was undisputed; that any agreement prior to March 20 was executory; that no new consideration was required to amend or merge any prior agreement in relation to the agreement of March 20; and that, in any event, changes made by the written agreement of

March 20 constituted new consideration to support the March 20 agreement of the parties. After granting summary judgment to the defendants, the trial court dismissed the plaintiffs' action.

As assigned errors in their appeal, Hasenauers and Corlisses claim: (1) The March 20 agreement was not controlling between the parties; (2) Absence of new consideration for the March 20 agreement; (3) Fraud by Durbins caused loss of bargained benefits to Hasenauers and Corlisses; (4) The terms of the March 20 agreement were unconscionable; (5) The March 14 agreement should have been enforced; and (6) An issue of material fact existed precluding a summary judgment.

The purpose of a pretrial conference is to simplify the issues, to amend pleadings when necessary, and to avoid unnecessary proof of facts at trial. To that end litigants must adhere to the spirit of the procedure and are bound by the pretrial order to which no exception has been taken. See, *Tober v. Hampton*, 178 Neb. 858, 136 N.W.2d 194 (1965); *Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc.*, 179 Neb. 858, 140 N.W.2d 813 (1966). The only issues emerging from the pretrial conference related to the effect of the March 20 agreement, the availability of specific performance, and the question of consideration for the March 20 agreement. Before their appeal to this court, Hasenauers and Corlisses have never raised any affirmative defense to the March 20 agreement or to the effect of that contract. Under the circumstances presented we will consider only the issues formulated at the pretrial conference and will not consider issues not presented to and disposed of by the trial court. "The rule is well settled that questions not presented or passed upon by the trial court will not be considered by this court on appeal." *Guynan v. Guynan*, 208 Neb. 775, 781, 305 N.W.2d 882, 886 (1981). See, also, *Edquist v. Commercial Sav. & Loan Assn.*, 191 Neb. 618, 217 N.W.2d 82 (1974).

"Where a later contract is entered into between the same parties in relation to the same subject matter as the earlier one, and fully covers the terms of the earlier one, the later contract supersedes the earlier one which is deemed merged in it . . . ." 17A C.J.S. *Contracts* § 382 at 452 (1963). See, also, *Vaughn & Co. v. Saul*, 143 Ga. App. 74, 237 S.E.2d 622 (1977).

"A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter where the terms of the latter are inconsistent with those of the former so that they cannot subsist together." *DeFilipps v. Skinner*, 211 Neb. 801, 803-04, 320 N.W.2d 737, 738-39 (1982). See, also, *Price v. Platte Valley Public Power and Irrigation District*, 139 Neb. 787, 298 N.W. 746 (1941); *Hagerbaumer v. Hagerbaumer Brothers, Inc.*, 208 Neb. 613, 305 N.W.2d 4 (1981); *Goings v. Gerken*, 200 Neb. 247, 263 N.W.2d 655 (1978); 6 A. Corbin, Corbin on Contracts § 1293 (1962).

" 'Any or all parts of a transaction prior to or contemporaneous with a writing intended to record them finally are superseded and made legally ineffective by the writing.' " (Emphasis omitted.) *Loving Co. v. Latham*, 20 N.C. App. 318, 329, 201 S.E.2d 516, 523 (1974). See, also, *South Texas Land Co. v. Sorensen*, 199 Iowa 699, 202 N.W. 552 (1925).

" 'There is a sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, whether or not there is any actual loss or detriment to him or actual benefit to the promisor.' " *Phelps v. Blome*, 150 Neb. 547, 555, 35 N.W.2d 93, 97 (1948).

Regarding any question about consideration to support the March 20 contract, Hasenauers and Corlisses have painted themselves into a legal corner. The existence of the March 20 contract is undisputed. If the events of March 14 culminated in an agreement of the parties, then all rights and benefits under the March 14 agreement were surrendered when the parties entered the subsequent agreement of March 20. The new promises embodied in the March 20 agreement and the relinquishment or forbearance of any antecedent rights resulting from the March 14 agreement supplied consideration to support the new contract entered on March 20, 1979. See, also, *In re Estate of Griswold*, 113 Neb. 256, 202 N.W. 609 (1925); *Asmus v. Longenecker*, 131 Neb. 608, 269 N.W. 117 (1936).

Whatever agreement may have been achieved by the parties before March 20 or may have resulted from the encounter on March 14, it is beyond any question that the written contract of March 20 superseded and discharged any prior agreement involving Durbins, Hasenauers, and Corlisses. The terms of the March 20 agreement of the parties control and dispose of the issues in this case because there is no effective and enforceable agreement of the parties except the written contract of March 20, which Hasenauers and Corlisses have repudiated.

Based on the pleadings, issues, and relevant evidence presented, there was no genuine issue of any material fact concerning the contractual relationship and responsibilities of Durbins, Hasenauers, and Corlisses with respect to the real estate transaction. Durbins were entitled to a favorable judgment as a matter of law. Cf., *Reifschneider v. Nebraska Methodist Hospital*, 212 Neb. 91, 321 N.W.2d 445 (1982); *Manzer v. Pentico*, 209 Neb. 364, 307 N.W.2d 812 (1981). The judgment of the district court in granting summary judgment to Durbins and

dismissing the action of Hasenauers and Corlisses is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAVERN E. PLYMATE, APPELLANT.

345 N.W.2d 327

Filed March 9, 1984. No. 83-004.

1. **Criminal Law: Evidence: Prior Acts: Proof.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
2. _____: _____: _____: _____. Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused. The balancing of the need for "other-crimes" evidence against the possible prejudice to the defendant is within the appropriate discretion of the trial court.
3. **Criminal Law: Evidence: Appeal and Error.** Assumed error in the ruling on the admission of evidence which did not injuriously affect the substantial rights of the accused is not grounds for reversal.

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 Henry M. Grether III, for appellee.

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

WHITE, J.

This is an appeal of a judgment of conviction and sentence on a charge of sexual assault in the first degree. Neb. Rev. Stat. § 28-319 (Reissue 1979). Upon conviction by a jury the court sentenced the de-

fendant to a term of from 7 to 12 years in the Nebraska Penal and Correctional Complex.

Two errors are assigned: (1) That the court improperly admitted into evidence, by stipulation of the parties, testimony that the defendant made admissions to a newspaper reporter concerning commission of over 300 sexual assaults; and (2) That the court improperly admitted into evidence hearsay testimony of prior acts of the defendant.

For approximately 2 weeks prior to May 1, 1982, the 12-year-old victim, hereby referred to as Terry, became acquainted with the defendant, LaVern E. Plymate. The evidence disclosed that the defendant was 43 years old at the time he first encountered Terry in Hanscom Park in South Omaha on April 23, 1982. Terry, his brother, and his mother were fishing at the Hanscom Park lagoon when they met Plymate. After a conversation the defendant and Terry went to a store, where defendant bought pop and bait and gave it to Terry. Shortly thereafter, on the same day, the defendant decided to buy Terry and his younger brother new fishing poles, more pop, and other fishing equipment. Terry again met Plymate in Hanscom Park the next day, and on the following day, while at the park with his brother and a friend, Plymate offered to take the three children to a movie. Also on that day he purchased a bicycle for Terry, and he promised to buy the other two boys bicycles later. The defendant and the three boys then went to a movie. Finally, on Saturday, May 1, 1982, Plymate and Terry met early that morning. The purpose was for Terry to accompany Plymate to a bar and grill, where Plymate worked, to clean out a cooler. Plymate purchased breakfast for the two. They then rode the bus to Wendy's Bar and Grill. While Plymate was cleaning the cooler in the bar, Terry played video games with money furnished by Plymate. Later, the two took a bus to a movie at Westroads shopping center, and defendant gave Terry additional money to play games at a

game arcade. The two then took a bus to the defendant's apartment. It was in the defendant's apartment that the alleged assault took place.

According to Terry's testimony, Plymate sat down next to him on a couch and began fondling Terry's penis. Plymate forcibly took Terry to his bedroom. While in the bedroom, the defendant exposed Terry's penis and sucked on it. During the act, Plymate evidently bit Terry's penis. When the act was completed, Terry was released and given $10 with directions not to tell anybody about what happened. The day after the assault Terry called his mother into the bathroom, where he was taking a bath, to show her the teeth marks the defendant left on his penis. Terry told his mother the happenings at the defendant's apartment. Monday, following the incident, when Plymate showed up at Terry's home, his mother called the police. The defendant was arrested and charged with first degree sexual assault.

No error is claimed in the jury instructions, nor is there an argument that the evidence is not sufficient to sustain the conviction. Defendant's principal complaint arises over a stipulation of certain facts which was entered into by the parties and received in evidence over the objection of defendant's counsel. The subject of the stipulation was a description of an interview an Omaha World-Herald reporter, Steven Stingley, conducted with the defendant shortly before April 12, 1981. In the interview, as published in the World-Herald, Plymate admitted to sexually assaulting more than 300 children prior to an incarceration in 1962. In giving suggestions for detecting, preventing, and coping with child molestation, Plymate described his approaches to the children. He stated that he gave all the children he molested a lot of money and gifts and that the children also liked to spend a large amount of time alone with him.

Neb. Rev. Stat. § 27-404(2) (Reissue 1979) of the Nebraska Evidence Rules provides that "[e]vidence

of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Concerning the admissibility of such evidence, we have previously said: " '[I]t is a matter left to the discretion of the trial court as to whether the prior offenses are sufficiently similar to the one charged in the case on trial so that evidence thereof has probative value.' " (Emphasis omitted.) *State v. Ellis*, 208 Neb. 379, 393, 303 N.W.2d 741, 750 (1981).

In *State v. Hitt*, 207 Neb. 746, 749, 301 N.W.2d 96, 99 (1981), this court stated that "[s]exual crimes have consistently been classified as those in which evidence of other similar sexual conduct has been recognized as having independent relevancy, and courts generally hold that evidence of other sex offenses by the defendant may be admissible, whether the other offense involves the complaining witness or third parties."

If the issue in the instant case was simply the admissibility and connection of a 20-year-old crime with a current crime, we would have no hesitancy in declaring that it would not be sufficiently related in time that the probative value would outweigh the prejudicial effect. See *People v. Thomas*, 20 Cal. 3d 457, 573 P.2d 433, 143 Cal. Rptr. 215 (1978), where the court held, in a prosecution of a father for committing lascivious acts with his daughter and stepdaughter, that evidence that the father committed a similar act with another daughter between 10 and 18 years previously was not admissible.

We have here, however, a unique situation where the defendant, under the guise of giving advice to parents, is a self-admitted assaulter of over 300 children. In the defendant's statement, which was published less than 1 year from the date of this offense, he resurrects and makes current a plan or

scheme identical to that alleged in this case.

In *Irvin v. State*, 617 P.2d 588 (Okla. Crim. 1980), the defendant was convicted of first degree murder of an armored car driver. The court held that evidence the defendant had stated, 8 months prior to the offense, that he might be able to plan an armored car robbery and that whoever drove the vehicle would have to die was admissible as being indicative of defendant's plan and intent to commit the alleged crime. See, also, *State v. Mastracchio*, 112 R.I. 487, 312 A.2d 190 (1973).

In *State v. Desilets*, 96 N.H. 245, 73 A.2d 800 (1950), involving the commission of unnatural and lascivious acts committed upon a minor, evidence that the defendant used gifts, promises, threats, an assault, and false statements on prior occasions was admissible to show a plan by which the defendant " 'took the boy over.' " *Id.* at 247, 73 A.2d at 802.

Persuaded by the authorities cited herein, we hold that where a defendant has detailed a plan or scheme to commit a crime and ultimately carries out that plan or scheme, evidence concerning the same is admissible to show the defendant's plan and intent to commit the alleged crime.

The second claimed error is that of the admission of the evidence of a conversation between the victim and a friend in which the friend allegedly told the victim and others that the defendant "did this to some other boys, too." The statement, if offered to prove the truth of the assertion, was unquestionably hearsay and not admissible. However, Neb. Rev. Stat. § 29-2308 (Reissue 1979) provides in pertinent part: "No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence . . . if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

The matter arose in the following context. The de-

fense counsel inquired of the victim whether a conversation between the victim, the victim's friend, the friend's father, and the victim's mother took place, possibly to impeach the credibility of the victim as to the reasons for the disclosure of the alleged assault. The apparent purpose of defendant's counsel was to raise the possible inference that the idea of calling the assault to the attention of the victim's mother was triggered by the conversation with the victim's friend. The prosecution then inquired, in an apparent attempt to rehabilitate the victim, what the conversation was. It is difficult to determine from the record the purpose for which the statement was offered. Even if the statement was hearsay, however, we conclude that it was harmless error. The defendant had previously admitted to being a sexual deviant of monstrous proportions, had willingly exposed his record, and had made it current to the public at large, and the prosecution quite properly brought that matter before the jury. The receipt of a hearsay statement concerning some other boys, too, must be considered, in view of the self-proclaimed offenses of the defendant, harmless, indeed.

Therefore, there being no error in the record sufficient to reverse, the decision of the trial court is affirmed.

AFFIRMED.

GRANT, J., dissenting.

I respectfully dissent. Over objection of defendant as to admissibility, statements made by defendant to a newspaper reporter in an interview in April 1981 were admitted into evidence. In the interview defendant stated that prior to an incarceration in 1962 the story of his life included more than 300 sexual assaults on children, and "How can you tell if your child is being molested? Maybe all children wouldn't act the same but all my victims did. From my experiences the child wanted to spend a lot of time alone with me and go everywhere I went. They started to rebel against their parents. They

brought home a lot of money and unnecessary gifts. The children were no longer cautious around strangers. They were too friendly."

In the case at bar defendant is not charged with being a person who has sexually assaulted many children. He is charged with the specific crime of sexual assault in the first degree on a 12-year-old boy on May 1, 1982. Defendant has pleaded not guilty, is presumed to be innocent until proven guilty, and is entitled to a fair trial.

The only possible basis for admitting the defendant's statement appears to me to be Neb. Rev. Stat. § 27-404(2) (Reissue 1979). The first sentence of that statute, in my judgment, describes exactly what this disputed evidence tends to prove in this case, and why such evidence is not admissible: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith."

To justify the admission of this statement, then, the statement must be fitted into the exceptions carved out of that statute. It must be determined that the statements were admissible as evidence which would establish proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In its brief the State contends that the statement was admissible because it showed "modus operandi" or "pattern of seduction," and because the statement bore on defendant's intent. My objection is that I think it is wholly improper to attempt to prove plan or intent by a general statement concerning general conduct 20 years before the specific crime at issue.

As set out in *State v. Ellis*, 208 Neb. 379, 390, 303 N.W.2d 741, 749 (1981): " 'The "other-crimes" rule is a rule of relevance and such evidence is ordinarily prejudicial because prior criminal activity is irrelevant to the proof of the commission of a specific crime. . . .' " See, also, *State v. Coca*, *ante* p.76, 341 N.W.2d 606 (1983).

Likewise, in *Ellis*, *supra* at 392-93, 303 N.W.2d at 750, this court quoted at length from *Sall v. State*, 157 Neb. 688, 61 N.W.2d 256 (1953): " 'The extent to which the discretion of the trial court will be allowed to be exercised in this regard has not been fixed by any decision of this court. Probably it cannot be but depends upon the facts of each case. . . . In State v. Siddoway, 61 Utah 189, 211 P. 968, it was held: "No exact limitation of time can be fixed as to when another offense tending to prove the intent of the act charged is remote. The decision of that question must depend upon the circumstances of the particular case, and whether evidence is too remote or not is a question whose decision is largely in the sound discretion of the trial court.". . .' "

I suggest that in the case at bar we have approved the extension of the time relevancy of "other crimes" to a period of 20 years. I think that is far too great a span of time and that the trial court abused its discretion in permitting the introduction of defendant's statements. There has to be some time that is too remote, and it seems that 20 years should qualify.

In this connection it is of interest to note that in *State v. Dandridge*, 209 Neb. 885, 890, 312 N.W.2d 286, 291 (1981) (a case where the defendant sought to introduce evidence of allegedly similar crimes committed while defendant was in custody), the State of Nebraska argued "that the subsequent robberies were too remote in time or not sufficiently similar to the Burger King robbery for the evidence to be admissible." The two robberies referred to occurred 2 months and 4 months, respectively, after the crime in that case.

Aside from the remoteness of the offenses, there appears to be another bar to the admission of defendant's statement. In *State v. Johnson*, 205 Neb. 778, 781, 290 N.W.2d 205, 206 (1980), we said, "Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time,

place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused." To the same effect in *State v. Coca*, *supra* at 80, 341 N.W.2d at 609, we said, "Evidence of other crimes is admissible where there are unique, almost 'signature-like' similarities between them and the offense charged, or the evidence is otherwise so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the guilt of the accused."

All the cases seem to refer to specific crimes at specific times and places. In the instant case, due to the generality of the defendant's admissions, there is no fair opportunity to make a judgment as to the "time, place, and circumstances" of the earlier offenses, or to fairly determine the "signature-like" similarities of the earlier offenses. Thus, it is impossible to make a fair judgment on the similarity of the earlier offenses to the instant case.

With regard to defendant's second assignment of error, in its brief the State summarizes its position by entitling that section as follows: "THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE TESTIMONY BY THE VICTIM OF THE ASSAULT THAT HE OVERHEARD PERSONS SAY THE DEFENDANT HAD COMMITTED SIMILAR PRIOR ACTS." To read this statement is to conclude that the trial court indeed did err in this respect, and no more need be said except to determine whether the admission was "harmless error." The court's decision on that question is controlled largely by the fact that defendant's admission as to over 300 sexual assaults, committed 20 years before, rendered this particular error harmless, in that the improper hearsay testimony only involved an additional few boys. That logic may be sound, but since I believe the admission of defendant's statement was error, I do not have the predicate for the logical admission of this very prejudicial statement. There

is also the point that if the jury were at all inclined to think that perhaps events of 20 years ago were not dispositive of this case, then improperly admitted evidence of recent other crimes might well carry the day for conviction.

It seems that often when prosecutors for the State have a strong case, as they did in this instance, the temptation is irresistible to "paint the lily" and try to make the strong case overwhelming. I feel the function of the courts should be to keep the State's evidence in proper legal bounds and leave the matter to the jury for a decision not colored by improper evidence. I suspect the answer would be the same, without the necessity of bending the law out of shape, in order to avoid the retrial of a defendant who has established himself as a thoroughly despicable person.

I believe the trial court erred both in admitting defendant's statement and in admitting the hearsay testimony from the victim. I think both rulings were an abuse of discretion and constituted prejudicial error. The case should be remanded for a new trial.

HAVEN HOME INCORPORATED, DOING BUSINESS AS HAVEN HOME OF KENESAW, APPELLANT, V. DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF NEBRASKA ET AL., APPELLEES.

346 N.W.2d 225

Filed March 9, 1984. No. 83-025.

1. **Administrative Law: Constitutional Law.** Administrative agency classifications are constitutional where no constitutionally protected right of status is significantly impaired, and where the classification bears a rational relationship to a legitimate state interest.
2. **Administrative Law: Presumptions: Proof.** A rebuttable presumption of validity attaches to actions of administrative agencies;

the burden of proof rests with the party or parties challenging the action of an administrative agency.

3. **Social Security: Medical Assistance.** In enacting the amendment to the Social Security Act which requires that a state's plan for long-term health care assistance provide for payment of skilled nursing facilities' and intermediate care facilities' services on a reasonable cost-related basis, Congress intended that the states have freedom both to define allowable cost items and to set a value on the reasonable cost of such items.
4. **Social Security: Medical Assistance: Appeal and Error.** This court may not substitute its judgment for that of the Nebraska Department of Public Welfare in determining which method is preferable to determine a reasonable cost-related basis for reimbursing long-term health care facilities.
5. **Social Security: Medical Assistance.** A state is not obligated to participate in the medicaid program; however, once it has voluntarily elected to participate, the state must comply with federal standards.

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

Wright Rembolt Milligan & Berger, for appellant.

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellees.

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

WHITE, J.

This is an appeal from a judgment of the district court for Lancaster County which affirmed the determination of the Nebraska Department of Public Welfare (DPW) that appellant, Haven Home Incorporated, doing business as Haven Home of Kenesaw, was overpaid $50,948.59 in medicaid reimbursements by the DPW for fiscal year 1979. We affirm.

For purposes of this opinion we are concerned only with applicable state and federal law in effect for 1979.

Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 et seq. (Supp. IV 1965-68), and regulations promulgated thereunder, created the medical assist-

ance program known as Medicaid. Appellee John E. Knight is the past director of the DPW, the state agency designated to administer the medicaid program in Nebraska. The federal-state medicaid program requires states wishing to participate in the program to submit a state plan which meets the conditions specified in the Social Security Act and in the applicable federal regulations. In 1976 Nebraska adopted the Nebraska Medical Assistance Program (Plan). The Plan is a comprehensive set of regulations setting forth how the state and federal funds will be distributed to medical care providers. The federal government approved Nebraska's plan in 1976.

Interim payments to qualified medical care providers are made pursuant to the Plan, during any given year, based upon estimated reasonable charges. At the end of the year the DPW audits the financial records of each health care provider, and retroactive adjustments are made through refund or additional payment to bring the amounts paid into balance with amounts due under the Plan.

Haven Home is a licensed intermediate care facility located in Kenesaw, Nebraska. During 1979, Haven Home operated a service for mentally retarded patients, some of whom were qualified medicaid recipients. (This service will be referred to as ICF-MR.) In retroactively calculating Haven Home's reimbursement rate for 1979, the finance and accounting division of the DPW determined that Haven Home had been paid $50,948.59 in excess reimbursements. Haven Home appeals the district court's order, which affirmed the DPW's determination of overpayment.

Haven Home first argues that the formula used to reduce the 1979 medicaid reimbursement is invalid as a matter of law because it was never promulgated in accordance with the requirements of state and federal law. In support of their contention Haven Home argues that the formula used to com-

pute the retroactive adjustment, specifically § 1400(b) of the Nebraska Public Welfare Manual, IX-6000, Supp. A (Rev. July 1, 1976), was never promulgated, approved, or filed in accordance with the provisions of the Administrative Procedures Act (Act), Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1976), nor was § 1400(b) published in conformity with 42 C.F.R. § 447.306(c) (1979), which states in part: "If proposed rates or rate formulas provide for retroactive downward adjustments, the [state], in publishing the proposed rates or rate formulas . . . must state the deficiencies under which an adjustment would be made and the amount or percentage rate of the adjustment."

Section 1400(b) of the Plan states in part: "In computing the provider's total allowable cost apportionment, total inpatient days shall be the greater of the actual occupancy or 85% of total licensed bed days. For new construction (entire facility or bed additions) total inpatient days shall be the greater of actual occupancy or 50% of total licensed bed days available due to new construction during the first year of operation, commencing with the first day patients are admitted for care. Total inpatient days shall be days on which the patient occupies the bed at midnight, the bed is held for hospital or convalescent leave." Neb. Pub. Welfare Man., IX-6000, Supp. A, § 1400(b) at 4.

Haven Home concedes that § 1400(b), as set forth above, has been duly promulgated in accordance with the Act. It contends, however, that because neither an algebraic computation nor a clear explanation of the application of the section can be found in the Plan, it does not meet the state or federal publication requirements.

There is no doubt that § 1400(b) of the Plan is a rule or regulation that must be properly promulgated as provided in the Act. See *State ex rel. Nebraska Nurses Assn. v. State Board of Nursing*, 205 Neb. 792, 290 N.W.2d 453 (1980). The issue then be-

comes, To what degree of specificity must a rule or regulation be set forth in order to be valid?

The Nebraska Plan is a complex and comprehensive set of rules and regulations dealing with the specialized area of health care and health care reimbursement under state and federal law. Any specific provision of the Plan must be read in context with the entire Plan and with cognizance of to whom that provision applies. Limitations on reimbursement for allowable costs are set out in § 1400 of the Plan, § 1400(b) being the minimum occupancy requirement of 50 percent for new construction and 85 percent for other facilities. There is no evidence in the record which reflects that Haven Home did not understand the method in which § 1400(b) applied. Section 1400(b) is outlined in sufficient detail as to allow interested parties to decide whether to seek more information on the section's particular aspects.

The regulation is not so obscure that a reasonably competent administrator could not determine both the total bed capacity and the occupancy rate. Through the use of simple multiplication and division, with only three variables, total reimbursement can be easily calculated. The regulation is not defective.

Appellant next contends that it was denied equal protection of the law because § 1400(b) creates an improper, irrebuttable presumption that nursing homes that are not at least 85-percent occupied (or 50-percent in the case of new construction) are inefficient and uneconomical.

Generally, an irrebuttable presumption may not be used if the presumption is not necessarily or universally true and the state has reasonable alternative means for making the decision. *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973). Social welfare legislation and regulation, however, is treated differently by the courts. Classifications are upheld where no constitutionally pro-

tected right of status is significantly impaired, and where the classification bears a rational relationship to a legitimate legislative goal. In such cases classifications to avoid the administrative difficulty of individual determinations in every case are proper, even though the classifications adopted are neither necessarily nor universally true. *Weinberger v. Salfi*, 422 U.S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975); *Richardson v. Belcher*, 404 U.S. 78, 92 S. Ct. 254, 30 L. Ed. 2d 231 (1971); *Flemming v. Nestor*, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960).

The equal protection test, as applied to the instant case, requires only that in establishing the reimbursement rates the DPW's classification have some "reasonable basis." It is not unconsitutional merely because the classification is not made with mathematical nicety or because in practice it results in some inequity. *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970). A legislative classification must be sustained if it is rationally related to a legitimate government interest. *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973).

A presumption of validity attaches to the actions of administrative agencies. While the presumption is rebuttable, the burden of proof rests with the party challenging the agency's action. *Alabama Nursing Home Ass'n v. Harris*, 617 F.2d 388 (5th Cir. 1980).

In the guise of insisting that § 1400(b) creates an impermissible, irrebuttable presumption, the appellant is trying to shift the burden of proof to the DPW to justify the decision made. The ultimate details of the reimbursement plan are within the authority of the DPW. This court may not substitute its judgment for that of the DPW in determining which method or methods are preferable in reimbursements for ICF-MR services. The DPW is not obligated to justify why it arrived at an 85-percent mini-

mum occupancy requirement instead of one set at 80 percent or 90 percent.

Haven Home concedes that the State has a legitimate interest in maintaining efficiently and economically operated nursing homes. It then has the burden of proof to show that the minimum occupancy requirement of § 1400(b) is not rationally related to that interest. The burden of proof is not met, however, merely by maintaining that "things could have been done differently." Disregarding the assertions made by counsel for Haven Home, the record is conspicuously absent of any evidence that the minimum occupancy requirement is not rationally related to the State's interest. The reason for the occupancy requirement is obvious. Certain fixed expenses continue, irrespective of the number of occupants. If there is an unusually low occupancy rate, the private patients and the State (on behalf of the welfare recipients) pay a disproportionate share of expenses.

Appellant next contends that the Nebraska reimbursement rate structure violates the supremacy clause of article VI of the U.S. Constitution, in that § 1400(b) deprives it of medicaid reimbursement payments to which it was entitled under the standards set by Title XIX of the Social Security Act and the regulations promulgated thereunder. Specifically, Haven Home alleges that the Nebraska Plan violates 42 U.S.C. § 1396a(a)(13)(E) (Supp. III 1973), and 42 C.F.R. § 447.302(b) (1979), in that the Plan fails to adequately reimburse it for allowable cost in operating an ICF-MR unit.

A state is not obligated to participate in the medicaid program. However, once it has voluntarily elected to participate in the program, the state must comply with federal standards. *Alabama Nursing Home Ass'n v. Harris*, *supra*; *Country Club Home, Inc. v. Harder*, 228 Kan. 756, 620 P.2d 1140 (1980).

In 1972 Congress amended Title XIX of the Social Security Act to require that a state plan for long-

term health care assistance provide "for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the State on the basis of cost-finding methods approved and verified by the Secretary [of HEW]." Social Security Amendments of 1972, Pub. L. No. 92-603, § 249(a), 86 Stat. 1329, 1426 (1972) (codified as amended at 42 U.S.C. § 1396a(a)(13)(E) (Supp. III 1973)).

Title 42 C.F.R. § 447.302(b) (1979) provides that "[p]ayment rates must not be set lower than rates that the [state] reasonably finds to be adequate to reimburse in full the actual allowable costs of a facility that is economically and efficiently operated."

Title 42 U.S.C. § 1396a(a)(30) (Supp. IV 1965-68) requires the state "to assure that payments . . . are not in excess of reasonable charges consistent with efficiency, economy, and quality of care."

Congress intended that state authorities, in developing methodologies for reasonable cost-related reimbursement, have great flexibility in the areas of cost-finding and rate-setting. The legislative history indicates that states are to be free to experiment with methods and standards for payment that would be simpler and less expensive than the complex medicare reasonable-cost formula. See S. Rep. No. 1230, 92d Cong., 2d Sess. 287 (1972).

Under Title XIX the state is not required to reimburse a provider for every allowable cost. *Minn. Ass'n of Health Care Facilities, etc.*, 602 F.2d 150 (8th Cir. 1979); *Unicare Health Facilities, Inc. v. Miller*, 481 F. Supp. 496 (N.D. Ill. 1979).

We cannot say as a matter of law that the use of the 85-percent (50-percent for new construction) minimum occupancy requirement of § 1400(b) results in unreasonable rates for reimbursement which are not in accordance with federal law and

regulations. As noted previously, states are allowed great flexibility to experiment in developing methods of determining reasonable cost-related rates. This court, absent good cause, may not substitute its decision for that of the DPW. In the recent case of *Mississippi Hosp. Ass'n, Inc. v. Heckler*, 701 F.2d 511 (5th Cir. 1983), a minimum occupancy requirement not unlike § 1400(b) was upheld as not being violative of the federal law.

We also note that providers of health care services such as Haven Home are not required to participate in Nebraska's medicaid program. In application, the Plan is nothing more than a unilateral contract between the DPW and the participating health care provider. As such, those providers who do wish to participate are bound by reimbursement provisions of the Plan, as long as those provisions are not arbitrary or capricious or violative of federal law. The medicaid program is not designed to protect health care providers from the consequences of their business decisions or from business risks.

Viewing the record as a whole, we are satisfied that the minimum occupancy requirement of § 1400(b) was properly promulgated under both federal and state law and that it is not violative of the equal protection or supremacy clause of the U.S. Constitution.

The judgment of the district court is correct, and it is affirmed.

AFFIRMED.

ROBERT TODD SCHAEFER, APPELLEE, V. DENNIS McCREARY, DOING BUSINESS AS McCREARY BROS. REGENCY MOTORS, AND WILLIAM CURTIS BONHAM, APPELLANTS.

345 N.W.2d 821

Filed March 9, 1984. No. 83-090.

1. **Damages.** With respect to the matter of loss of future earnings, the determination as to the appropriate amount is based upon such factors as the plaintiff's age, life expectancy, health, habits, oc-

cupation, talents, skill, experience, training, and industry.

2. _____. Future loss of earnings is not necessarily measured by the plaintiff's calling or income at the time of the injury.
3. _____. There is no mathematical formula for the translation of pain and suffering and permanent disability into terms of dollars and cents. It is a matter left largely to the discretion of the jury, which saw the witnesses and heard the evidence.
4. **Trial: Rules of Evidence.** Under some circumstances a plea of guilty entered by a defendant in a criminal action may be used against him as an admission in a subsequent action involving the same subject matter.
5. **Negligence: Evidence.** A violation of a statute or ordinance enacted in the interest of public safety, while not negligence per se, is evidence of negligence.

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

Kennedy, Holland, DeLacy & Svoboda, for appellants.

Warren C. Schrempp and Frederick C. Gray of Schrempp, Hoagland & Gray, for appellee.

KRIVOSHA, C.J., CAPORALE, and GRANT, JJ., and CAMP, D.J., and COLWELL, D.J., Retired.

KRIVOSHA, C.J.

The appellants, Dennis McCreary, doing business as McCreary Bros. Regency Motors, and William Curtis Bonham, have appealed from a judgment entered by the district court for Douglas County, Nebraska, in favor of the appellee, Robert Todd Schaefer, and against the appellants and each of them. The action giving rise to this appeal was originally filed by Schaefer against the appellants for injuries allegedly sustained by Schaefer as a result of an automobile accident which occurred in Omaha, Nebraska, on or about October 31, 1975, when the vehicle being operated by Schaefer collided with a vehicle operated by Bonham and owned by McCreary Bros. Following trial, the jury returned a verdict in favor of Schaefer and against the appellants in the amount of $100,700. Appellants claim that the verdict should be set aside for essentially two reasons.

Appellants contend, first, that the verdict is clearly excessive, and therefore it must have been given under the influence of passion or prejudice; and, secondly, that the trial court erred in permitting counsel for Schaefer to inquire of Bonham whether he had pled guilty to a charge of reckless driving. Because of the assignments, we need not concern ourselves with the matter of liability or how the accident occurred, except to note that the accident occurred when Bonham swerved or lost control of the vehicle he was operating, drove over a raised median, and collided with Schaefer's car.

As one would anticipate, the evidence concerning the injury to Schaefer was in dispute and clearly raises a question of fact to be resolved by the jury. It was undisputed that Schaefer was injured as a result of the accident, was confined to bed for a time, and was required to use a cane for some period of time thereafter. According to Schaefer, following the collision he continued to experience back pains and developed a limp which he did not have prior to the collision. Appellants' physician maintains that the limp was not caused by reason of the accident, but by reason of a congenital defect. Appellants' physician did, however, testify that Schaefer had a permanent residual disability of not in excess of 5 percent.

The evidence further establishes that at the time of the accident Schaefer was a high school student who was employed with a roofing company, working part time during the school year and full time during the summer. At the time of the collision Schaefer was earning a net salary of approximately $100 per week. However, as a result of the collision, he was unable to return to work until June of 1976. When he did return, he was earning between $3.50 and $4 per hour. The evidence further discloses that Schaefer left the roofing company because he was unable to perform the work, due to his back injury. He has held a number of other jobs, none of which paid him what he would have earned had he continued to work for

the roofing company. In support of this claim Schaefer offered evidence which disclosed that when Schaefer worked for the roofing company, he worked with an individual by the name of Terry Johnson. In fact, Johnson learned roofing from Schaefer. At the time of the trial Johnson was still in the roofing business, earning approximately $19,000 to $20,000 a year, while Schaefer was earning $14,000 per year as an auto parts employee.

Appellants' argument with regard to the excessiveness of the verdict is based upon the contention that Schaefer alleged in his amended petition loss of wages in an amount of $4,100 and medical expenses to date of trial in the amount of $2,027.04, for a total of special damages not to exceed $6,127.04. Therefore, appellants contend that the jury, not being entitled to return special damages in an amount greater than pleaded, must have returned general damages in an amount nearly equal to $95,000, which is excessive. There is some indication from the argument made by Schaefer's counsel to the jury that the lost wages were in the amount of $39,691, and therefore the general damages would be only slightly more than $50,000. We do not believe, however, that it is necessary for us to attempt to resolve that alleged problem. Even if we assume that of the total award returned by the jury only $6,127.04 was for lost wages and medical bills incurred to date, we cannot say as a matter of law that the award was excessive and the product of passion and prejudice.

There is no formula for computing damages in a case such as this, and the final verdict is usually made up from a number of factors. As a general rule, the law gives the jury the right to determine the amount of recovery in cases such as this, and if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed. See *Dunn v. Safeway Cabs, Inc.*, 156 Neb. 554, 57 N.W.2d 75 (1953). The evidence established that in addition to the loss of wages to date of trial,

medical expenses incurred to date of trial, and pain and suffering experienced to date of trial, there could be damages awarded for future medical expenses, loss of future earning capacity, and future pain and suffering. All of those matters, of course, are recoverable under a prayer for general damages. See *Husak v. Omaha National Bank*, 165 Neb. 537, 86 N.W.2d 604 (1957).

Regarding future medical expenses, the amount need not be established with exact certainty. The need for future medical services and the reasonable value thereof may be inferred from proof of past medical services and their value. Nor is direct evidence, according to the general rule, always essential to establish the permanency or future effects of an injury. The test is whether the particular issue can be determined from the evidence presented and the common knowledge and usual experience of jurors. See *Yount v. Seager*, 181 Neb. 665, 150 N.W.2d 245 (1967). With respect to the matter of loss of future earnings, the determination as to the appropriate amount is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. See, *Baylor v. Tyrrell*, 177 Neb. 812, 131 N.W.2d 393 (1964); *Siciunas v. Checker Cab Co., Inc.*, 191 Neb. 766, 217 N.W.2d 824 (1974). Future loss of earnings is not necessarily measured by the plaintiff's calling or income at the time of the injury. See *Morford v. Lipsey Meat Co., Inc.*, 179 Neb. 420, 138 N.W.2d 653 (1965). And, finally, with regard to the matter of pain and suffering, we have frequently said that there is no mathematical formula for the translation of pain and suffering and permanent disability into terms of dollars and cents. It is a matter left largely to the discretion of the jury, which saw the witnesses and heard the evidence. See *Zawada v. Anderson*, 181 Neb. 467, 149 N.W.2d 329 (1967).

The evidence discloses that at the time of trial

Schaefer was 24 years of age and had a life expectancy of 48 years. Assuming that Schaefer worked only until the age of 65, he still had 41 more years of earning capacity. The evidence discloses that Schaefer's friend Johnson earned $5,000 a year more than Schaefer at the time of the trial, doing the kind of work that Schaefer would have done but for the accident. If this figure were extended for the remainder of Schaefer's working life, he would have lost $205,000 in future earnings alone. We recognize that this amount would be reduced to present worth. Nevertheless, when this discounted figure is added to what a jury could properly determine could be the amount of pain and suffering, even with a permanent disability of less than 5 percent for 48 years, plus some amount for future medical expenses occasioned by the permanent disability, one cannot say that an award of $100,700 is so excessive under the facts that it could have been the result of passion or prejudice. We believe that appellants' assignment of error in that regard must be overruled.

Turning, then, to the second assignment of error, appellants maintain that Schaefer's counsel committed prejudicial error when he asked Bonham whether he had pled guilty to a charge of reckless driving. Appellants acknowledge that under some circumstances a plea of guilty entered by a defendant in a criminal action may be used against him as an admission in a subsequent action involving the same subject matter. See, *Piechota v. Rapp*, 148 Neb. 442, 27 N.W.2d 682 (1947); Neb. Rev. Stat. § 27-410 (Reissue 1979). Additionally, a violation of a statute or ordinance enacted in the interest of public safety, while not negligence per se, is evidence of negligence. See, *Crandall v. Ladd*, 142 Neb. 736, 7 N.W.2d 642 (1943); *Clark Bilt, Inc. v. Wells Dairy Co.*, 200 Neb. 20, 261 N.W.2d 772 (1978). Appellants argue, however, that repeated interjection of the issue of a plea of guilty into the trial, where there is no evidence whatsoever that the defendant pled

guilty or even that he was ever charged with any violation, much less reckless driving, is error. While that may be true in a particular case, such are not the facts in the instant case.

Our review of the record does not lead us to reach the same conclusion. The questions and answers regarding this matter were as follows: "Q [By Mr. Schrempp] Did you subsequently enter a plea of guilty to a reckless driving charge arising out of this accident? MR. CASHEN: Object to it. No evidence that a reckless driving charge was issued in this instance. I think it's highly improper. . . . THE COURT: The objection is overruled. The witness will answer the question, if he can. . . . THE WITNESS: I do not remember if I got a ticket on the thing. *I think I got a ticket* and during the deposition I thought I might have gotten a ticket for reckless driving, but I do not know. Q (BY MR. SCHREMPP) Do you remember entering a plea of guilty to a reckless driving charge? . . . THE WITNESS: Like I say, I don't remember getting — whether I got a ticket for reckless driving per se or not. *I think I received a ticket for something.* If I did receive it, a ticket, I am sure I did plead guilty to it." (Emphasis supplied.)

It is clear from the answer given by Bonham, known to Schaefer's counsel by reason of Bonham's earlier deposition, that, in any event, Bonham did receive a ticket as a result of the accident and he did plead guilty to the complaint. He does not even deny that the ticket he received may have been for reckless driving; only that he did not recall exactly what it was for. But, in any event, he does acknowledge that he entered a plea of guilty to a charge arising out of the accident. In view of the fact that a violation of a law or ordinance in a proper case is evidence of negligence, even if the ticket were for some infraction other than reckless driving but related to the accident, as apparently it was, a plea of guilty would be an admission and evidence of negli-

gence. While the trial court attempted to minimize the effect of the question by specifically instructing the jury "that there is no evidence that defendant William Bonham was charged with reckless driving, and you will strictly disregard the statement to this effect which was contained in a question by one of the attorneys," neither the question nor the answer, standing alone, was objectionable or improperly prejudicial. Counsel had a right to inquire of this defendant whether he had entered a plea of guilty to the complaint, in view of the fact that he knew from the deposition that a ticket charging some offense had been given. The trial court, therefore, was correct in denying the motion for a new trial on that basis. Appellants' second assignment of error must likewise be overruled, and the judgment is in all respects affirmed.

AFFIRMED.

ANGELINE PITTMAN, APPELLEE AND CROSS-APPELLANT, V. EUGENE R. PITTMAN, APPELLANT AND CROSS-APPELLEE.

345 N.W.2d 332

Filed March 9, 1984. No. 83-191.

1. **Divorce: Appeal and Error.** An action for dissolution of marriage is reviewed de novo in this court, although weight is given to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
2. **Divorce: Property Division.** Generally speaking, awards in actions involving dissolution of marriage vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so when the marriage is of long duration and the parties are the parents of all the children involved.
3. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion under Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982) is one of reasonableness.
4. **Divorce: Attorney Fees.** In an action for dissolution of marriage

the award of an attorney fee rests in the discretion of the trial court, taking into consideration the division of property, alimony awarded, the earning capacity of the parties, and the general equities of the case.

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

Paul D. Merritt, Jr., of McGinley, Lane, Mueller, O'Donnell & Merritt, P.C., for appellant.

Robert E. Roeder, for appellee.

BOSLAUGH, HASTINGS, and GRANT, JJ., and CHEUVRONT, D.J., and COLWELL, D.J., Retired.

CHEUVRONT, D.J.

An action for dissolution of marriage was brought by the appellee, Angeline Pittman (Angeline), against the appellant, Eugene R. Pittman (Eugene). Trial was had on December 21, 1982, and a decree was filed on January 27, 1983, which dissolved the marriage, divided the property, and ordered Eugene to pay alimony of $350 per month for 121 months and an attorney fee to Angeline. Eugene appealed, assigning as error the division of property, the awarding of alimony, and the amount of the attorney fee. Angeline cross-appealed, assigning as error the amounts of alimony and attorney fee allowed by the trial court.

Eugene and Angeline were married on March 19, 1954, when Eugene was 18 and Angeline was 16 years of age. At the time of the marriage neither party had any assets. In fact, Angeline left high school in the 10th grade upon marriage. Four children were born to the parties, all of whom are of the age of majority. Three of the children have graduated from college; the youngest is presently enrolled at the University of Nebraska in Lincoln.

Eugene has worked for the Union Pacific Railroad for the past 25 years and had gross wages in 1981 of $37,682.35, as shown by his W-2 form. In addition, Eugene received $3,800 in 1982, representing back-

pay for 1981 and a portion of 1982. Eugene testified his 1982 income would be less than that of 1981, although he conceded that he voluntarily had cut back his hours of work. Angeline has worked continuously during the marriage, except for short periods following the birth of each child and a 13-month period in 1977 and 1978 when she attended cosmetology school; upon graduation she completed the state examination and commenced working as a hairdresser in late 1978, continuing as such to the date of trial. Her gross salary for 1981 and 1982 was $8,247.52 and $8,512.10, respectively.

The court awarded Angeline a 1979 Oldsmobile Toronado automobile, furniture and personal property in her possession, and several other small items. Eugene was awarded substantially all of the property of the parties, which included the residential real estate subject to the present mortgage, a 1977 Chevrolet pickup truck, and all other personal property of the parties, including several boats, guns, and other property not awarded to or in the possession of Angeline. In order to equalize the division of property, the trial court awarded Angeline a judgment in the amount of $30,500, $2,000 to be payable forthwith and the balance of $28,500 payable in monthly installments of $300 for a period of 5 years, with the balance to be due at such time. The unpaid balance was to draw interest at the rate of 12 percent per annum. In addition, Eugene was ordered to pay Angeline alimony of $350 per month for 121 months. Angeline was awarded an attorney fee of $1,100.

An action for dissolution of marriage is reviewed de novo in this court, although weight is given to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980).

There are no precise mathematical formulas which can be employed to determine the equitable

division of property in an action for dissolution of marriage. As stated in *Koubek v. Koubek*, 212 Neb. 2, 5, 321 N.W.2d 55, 58 (1982): "Generally speaking, awards in cases of this kind vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so when the marriage is of long duration and the parties are the parents of all the children involved." It is obvious that the trial court in this case attempted to divide the property in a manner that would result in each party receiving an equal share of the property accumulated during the marriage. Eugene's challenge to the court's decision questions whether an equal division was made. The evidence reflects a conflict with respect to the value of various items of property, and it appears that Eugene's dissatisfaction arises because the trial court failed to use his figures as to value. Upon a review of the record we find that the division of property made by the trial court is within the guidelines of this court and is not patently unfair. In addition, Eugene's argument as to the value of the marital property ignores his substantial withdrawals of sums of money from a savings account of the parties following their separation. The trial court commented, and we concur, that Eugene failed to account for these sums adequately.

Eugene complains that the award of alimony is excessive. Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982) sets forth the criteria which are to be used in determining the award and amount of alimony. The ultimate test is one of reasonableness. *Johnson v. Johnson*, 209 Neb. 317, 307 N.W.2d 783 (1981). We have here a marriage of 25 years' duration. The wife has worked almost continuously during the entire period, and continued to work to the date of trial. The husband currently has gross earnings of four to five times that of the wife. Under all the cir-

cumstances of this case the award of alimony is reasonable.

Eugene's last assignment of error challenges the attorney fee of $1,100 awarded Angeline. The awarding of attorney fees in such cases rests in the discretion of the trial court, taking into consideration the division of property, alimony awarded, the earning capacity of the parties, and the general equities of the case. *Brown v. Brown*, 199 Neb. 394, 259 N.W.2d 24 (1977). Considering the nature of this case, the award of an attorney fee of $1,100 was not an abuse of discretion.

The decree of the district court is affirmed. Angeline is awarded the sum of $750 for the services of her attorney in this court.

AFFIRMED.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, PLAINTIFF, V. DONNA KARNES, TAX COMMISSIONER OF THE STATE OF NEBRASKA, DEFENDANT.

346 N.W.2d 231

Filed March 9, 1984. No. 83-241.

Constitutional Law: Taxation. Nebraska's franchise tax, Neb. Rev. Stat. § 77-2734(2) (Cum. Supp. 1982), insofar as it is a tax on interest from federal obligations, is a discriminatory tax, contrary to federal law, and, therefore, invalid.

Original action. Judgment for plaintiff.

Wright Rembolt Milligan & Berger, for defendant.

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

William B. Brandt of Brandt, Horan & Hallstrom, for amicus curiae Nebraska Bankers Association, Inc.

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

SHANAHAN, J.

As authorized by Neb. Const. art. V, § 2, Neb. Rev. Stat. § 24-204 (Reissue 1979), and Neb. Ct. R. 15 (Rev. 1982), Paul L. Douglas, Attorney General of the State of Nebraska (Attorney General), filed an original action in this court against Donna Karnes, Tax Commissioner of the State of Nebraska (Commissioner), for a declaratory judgment that a part of the Nebraska corporate franchise tax, Neb. Rev. Stat. § 77-2734(2) (Cum. Supp. 1982), constitutes a discriminatory franchise tax prohibited by federal law [31 U.S.C. § 742 (1976); 31 U.S.C.A. § 3124(a) (1983)] and is, therefore, an invalid tax.

The Nebraska franchise tax is authorized by § 77-2734(2) (Reissue 1981), a part of the Nebraska Revenue Act of 1967: "[F]or the privilege of exercising its franchise or doing business in this state in a corporate capacity, there is hereby imposed a franchise tax on each corporation . . . measured by its entire net income derived from all sources within this state for the taxable year . . . . [T]he taxpayer's entire net income shall be its federal taxable income derived from sources within this state . . . *without regard to the modification referred to in section 77-2741* . . . ." (Emphasis supplied.)

Neb. Rev. Stat. § 77-2741 (Reissue 1981) provides: "Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state, subject to the modifications provided by section 77-2716." Reductions regarding tax-exempt interest income are found in Neb. Rev. Stat. § 77-2716(1) (Reissue 1981): "There shall be subtracted from federal taxable income interest or dividends on obligations of the United States . . . to the extent includible in gross income for federal income tax purposes but exempt from state income taxes under the laws of the United States; *Provided*, that the amount sub-

tracted under the provisions of this subsection shall be reduced by any interest on indebtedness incurred to carry the obligations or securities described in this subsection, and by any expenses incurred in the production of interest or dividend income described in this subsection to the extent that such expenses . . . are deductible in determining federal taxable income."

By precluding availability of § 77-2741 to a corporation, § 77-2734(2) excluded federal interest from a corporation's net (taxable) income as a base for the Nebraska franchise tax only so long as interest on U.S. obligations was also excluded from income taxation under federal law.

From September 22, 1959, until September 13, 1982, 31 U.S.C. § 742 provided: "[A]ll stocks, bonds, Treasury notes, and other obligations of the United States, *shall be exempt from taxation by or under State or municipal or local authority.* This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, *except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations* and except estate taxes or inheritance taxes." (Emphasis supplied.) (31 U.S.C. § 742 was replaced on September 13, 1982, by 31 U.S.C.A. § 3124(a) without any material effect on the question in this case.)

After enactment of the Nebraska franchise tax in 1967, and until 1976, the Internal Revenue Code excluded from "gross" and "taxable" income any interest on obligations of the United States. See I.R.C. §§ 61(a)(4), 63(a), and 103(a)(2) (1970).

By the Tax Reform Act of 1976 (Pub. L. No. 94-455, § 1901, 90 Stat. 1764), Congress amended I.R.C. § 103(a), namely, interest on obligations of a state or its political subdivisions remained excluded from gross income, but, more importantly, interest on obligations of the United States became includable in

gross income and ultimately in taxable income. While Congress changed federal law regarding taxability of interest from federal obligations, Nebraska did not alter its franchise tax, which still retained "federal taxable income" as the base for franchise tax liability. Nebraska's failure to adapt the franchise tax in light of the change in federal income tax law resulted in a franchise tax with a base excluding interest from obligations of a state or its political subdivisions but including interest on federal obligations.

The U.S. Supreme Court, on January 24, 1983, decided *Memphis Bank & Trust Co. v. Garner*, ____ U.S. ____, 103 S. Ct. 692, 74 L. Ed. 2d 562 (1983), wherein the court reviewed a Tennessee 3-percent tax on a bank's net earnings which included interest received on U.S. obligations and obligations of states other than Tennessee. The Supreme Court of Tennessee had held that the questioned bank tax was a nondiscriminatory franchise tax excepted by 31 U.S.C. § 742. See *Memphis Bank & Trust Co. v. Garner*, 624 S.W.2d 551 (Tenn. 1981). However, the U.S. Supreme Court held that the Tennessee bank tax discriminated against U.S. obligations, contrary to 31 U.S.C. § 742, and that the Tennessee tax, therefore, deprived U.S. obligations of the immunity from state taxation afforded by federal law.

During an extensive hearing before the Nebraska Legislature's Committee on Revenue, serious question was raised about Nebraska's franchise tax in view of *Memphis*. Measures were suggested in committee to cure or eliminate the "discriminatory provision in the current corporate franchise tax." See Introducer's Statement of Intent, Committee on Revenue, L.B. 619, 88th Leg., 1st Sess., and committee hearing (Mar. 16, 1983). Floor debate in the Legislature included reference to *Memphis* (the "Tennessee case"), the effect of that decision on the Nebraska franchise tax, and the "discriminatory manner" in which the franchise tax was applied re-

garding federal obligations. See Remarks for Special Permission to Introduce Bill, 88th Leg., 1st Sess., 1075 (Feb. 28, 1983), and Floor Debate, L.B. 619, at 4103 (Apr. 27, 1983). By a vote of 45 to 1, the 1983 Legislature passed L.B. 619 on May 18, 1983, and deleted from § 77-2734(2) the phrase "without regard to the modification referred to in section 77-2741." See § 77-2734(2) (Supp. 1983). The Governor signed L.B. 619 on May 23, 1983. As a result of such amendment in 1983 and through the statutory conduit of § 77-2741, the Nebraska franchise tax incorporated the provisions of § 77-2716(1), which in substance authorizes subtraction of federal interest or dividends from federal taxable income, and, before such reduction of federal taxable income, the amount to be subtracted shall itself be reduced "by any interest on indebtedness incurred to carry the obligations or securities . . . and [for] any expense incurred in the production of interest or dividend income . . . to the extent that such expenses . . . are deductible in determining federal taxable income." *Id.*

Generally, if a tax requires that earning income and exercising the privilege of doing business in a corporate form coincide before imposing tax liability, such tax is properly characterized as a franchise tax. See, *Educational Films Corp. v. Ward*, 282 U.S. 379, 51 S. Ct. 170, 75 L. Ed. 400 (1931); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S. Ct. 342, 55 L. Ed. 389 (1911); *Reuben L. Anderson-Cherne, Inc. v. Commr. of Taxation*, 303 Minn. 124, 226 N.W.2d 611 (1975). A franchise tax may be described as a tax imposed for the privilege of doing business as a corporation within a state. There is no doubt, and the parties concede, the tax imposed by § 77-2734(2) is a franchise tax.

The Attorney General, relying on *Memphis*, requests this court to declare invalid that part of the pre-1983 Nebraska franchise tax which conflicts with federal law [31 U.S.C. § 742; 31 U.S.C.A. § 3124(a)].

The Commissioner contends that the Nebraska

franchise tax does not discriminate against federal obligations, because the franchise tax does not "single out such obligations for special, burdensome treatment." Brief for Defendant at 10.

There are two parts of the U.S. Constitution affecting our decision, namely, article I, § 8, clause 2: "[The Congress shall have Power] To borrow Money on the credit of the United States," and article VI, clause 2, often called the supremacy clause: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Chief Justice John Marshall captured the essence of the supremacy clause by his expressions in two noteworthy cases decided shortly after adoption of the U.S. Constitution. "[T]he States have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared." *M'Culloch v. State of Maryland*, 17 U.S. 316 (4 Wheat. 316, 436) 4 L. Ed. 579 (1819). "But the framers of our constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interefere with, or are con-

trary to the laws of congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it." *Gibbons v. Ogden*, 22 U.S. 1 (9 Wheat. 1, 210-11) 6 L. Ed. 23 (1824).

"The basic rule under the Constitution is that whatever the Central Government ordains—within the broad and ever-expanding area of its authority—is *supreme law*, enforceable as such and binding no less upon state executives, legislatures, and judiciaries than upon officers of the nation itself. If state action is seen to be incompatible with any legitimate exercise of power by the Federal Government, it loses all claim to validity. And this is true even though the state action in question is taken within a sphere in which the states might otherwise act. Because of the Supremacy Clause, we must, in Webster's phrase, conclude that federal and state powers do not stand upon equal elevation." 1 B. Schwartz, A Commentary on the Constitution of the United States, *The Powers of Government* 39 (1963).

The supremacy clause is the very foundation of our central government. Without the supremacy clause the parts—individual states—might govern the whole—the federal government. Our government would be national in name only. In our form of national government the supremacy clause is a cost of constructing and maintaining constitutional federalism.

It is true that the Tax Reform Act of 1976 imposed a tax on previously excluded interest received from federal obligations. However, the fact remains that the questioned act of taxing, that is, the franchise tax, is an act of the State of Nebraska. Because Nebraska's system of taxation is so interrelated with federal income taxation, a change in federal tax law had a derivative but perhaps undetected conse-

quence in Nebraska's plan of taxation. Nevertheless, validity of a state law need not be determined by considering the motive behind the enactment of the law. Rather, the law " 'must be judged by its operation rather than by the motives which inspired it.' " *Tradesmens Bank v. Tax Comm'n*, 309 U.S. 560, 566, 60 S. Ct. 688, 84 L. Ed. 947 (1940). As Justice Holmes stated in *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48, 44 S. Ct. 405, 68 L. Ed. 841 (1924): "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." A change of circumstances may make a constitutional statute unconstitutional or a lawful act unlawful.

Congress enacted 31 U.S.C. § 742 to protect federal obligations against discriminatory state taxation when federal obligations are offered for sale in competition with state securities. In an effort to secure and protect credit, Congress provided federal obligations with immunity from discriminatory state taxes and sought to prevent the slightest diminution of market value or investment attractiveness of federal obligations. *Cf. N.J. Ins. Co. v. Div. of Tax Appeals,* 338 U.S. 665, 70 S. Ct. 413, 94 L. Ed. 439 (1950).

To *discriminate* means "to divide . . . to distinguish; to observe the difference between . . . to constitute a difference between." Webster's New Universal Unabridged Dictionary 522 (1983). See *Hudson County Board of Taxation—Jersey City v. Bettcher*, 22 N.J. Misc. 16, 34 A.2d 784 (1943).

The Commissioner contends that Nebraska's franchise tax does not "single out" federal obligations for special taxation. Although Nebraska's franchise tax does not point directly to federal obligations as objects of special taxation, the franchise tax does result in disparate taxation of governmental securities. *Memphis* condemned a discriminatory tax by Tennessee which extended preferential treatment only to the securities of Tennessee. In our case the

Nebraska franchise tax before 1983 imposed a tax on income from federal obligations and at the same time exempted interest income from securities of states, U.S. territories and possessions, the District of Columbia, and any political subdivisions of the foregoing. Such tax treatment cannot realistically be characterized as equal and uniform. This lack of equality and uniformity constitutes discrimination. Also, discrimination comes in forms other than preferential benefit conferred. Placing federal securities at a disadvantage in comparison with other governmental securities is just as discriminatory as preferentially favorable treatment of nonfederal securities. Nebraska's franchise tax afforded shelter to nonfederal securities but left federal securities out in the state tax-rain. That is discrimination under any meaning of the word. The disparity of state taxation under such circumstances is precisely the discrimination condemned by *Memphis*.

If the discrimination existing under the Nebraska franchise tax were permitted, a prospective corporate purchaser of government securities would be less inclined to purchase federal securities burdened with the extra onus of the Nebraska tax and would be more likely to purchase those governmental securities exempted from state tax liability. The Commissioner asserts that a prospective purchaser's preference is affected by existence of greater tax liability under federal income tax law and not by the smaller liability imposed by the Nebraska franchise tax. While that may be true in a commercial context, it is an irrelevant consideration under the Constitution. The degree of impaired marketability of federal obligations cannot be viewed as casual or incidental and, therefore, de minimis—a matter of triviality to the federal government. Buried in one of those fuzzy footnotes of *Memphis* is the U.S. Supreme Court's dismissal of de minimis in considering the impact on federal securities by a state's discriminatory tax condemned under 31 U.S.C. § 742.

See *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 398 n.8, 103 S. Ct. 692, 697 n.8, 74 L. Ed. 2d 562 (1983). In order that a discriminatory state tax be intolerable under federal law, how much burden on federal obligations is permissible? Implicit in *Memphis* is the conclusion: Any burden is too much. In a more fundamental analysis a discriminatory state tax on federal securities is intolerable because the tax is impermissible.

Under *Memphis* there is no doubt that the Nebraska franchise tax, § 77-2734(2) (Cum. Supp. 1982), conflicted with 31 U.S.C. § 742 and 31 U.S.C.A. § 3124(a). Therefore, the Nebraska franchise tax imposed by § 77-2734(2), insofar as such tax is based on interest attributable to a federal obligation, is an invalid tax under federal law.

With elimination of the condemned phrase "without regard to the modification referred in section 77-2741," the Nebraska franchise tax is subject to reductions relative to federal taxable income as described in § 77-2716(1). That presents still another tax problem. Availability of a reduction of federal taxable income by subtracting "interest or dividends" from federal obligations and yet another deduction or reduction for debt interest in carrying the interest-producing obligations and expenses in the production of interest or dividend income would afford two reductions under § 77-2716(1) relative to federal taxable income. If interest on federal obligations cannot be included in a corporation's gross income, reductions cannot be allowed regarding debt interest and other expenses incurred in producing interest income as described in § 77-2716(1). To hold otherwise would result in a possible double reduction relative to taxable income in view of the formula found in § 77-2716(1). An analogous disallowance of interest and expenses relating to tax-exempt income can be found in I.R.C. § 265 (1982); cf. I.R.C. Regs. §§ 1.265-1 and 1.265-2 (1984).

The Attorney General and Commissioner agree

that, if that part of the Nebraska franchise tax in question is held to be invalid, such provision is severable from the remainder of the franchise tax law. In 1967 Neb. Laws, ch. 487, § 136, p. 1533 (Nebraska Revenue Act of 1967), there is: "If any section, subsection, sentence, clause, or phrase of this act is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act." *Id.* at 1637. Upon reviewing the Nebraska franchise tax, § 77-2734(2), and in view of the criteria or tests for severability set forth in *State ex rel. Douglas v. Sporhase*, 213 Neb. 484, 329 N.W.2d 855 (1983), the federally offensive part of the Nebraska franchise tax, namely, "without regard to the modification referred to in section 77-2741," can be separated and excised from the Nebraska franchise tax so that the remainder of the franchise tax under § 77-2734(2) remains intact. See, also, *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967).

Therefore, we hold that the effect of the questioned part of the Nebraska franchise tax, "without regard to the modification referred to in section 77-2741" as found in § 77-2734(2), is a violation of 31 U.S.C. § 742 (31 U.S.C.A. § 3124(a)) and results in an invalid, discriminatory franchise tax proscribed by federal law. *Memphis Bank & Trust Co. v. Garner*, *supra*, was the death knell for state franchise taxes discriminating against federal obligations, which now tolls for the federally offensive part of the Nebraska franchise tax. After *Memphis* our holding can hardly be described as a decisional denouement, in view of the "Law of the Land."

JUDGMENT FOR PLAINTIFF.

Cite as 216 Neb. 761

STATE OF NEBRASKA, APPELLEE, V. CHARLES E. MAYHEW, ALSO KNOWN AS CHARLES E. O'KEEFE, APPELLANT.

346 N.W.2d 236

Filed March 9, 1984. No. 83-351.

1. **Confessions.** To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any direct or implied promises or inducements, however slight.
2. **Confessions: Prosecuting Attorneys.** A promise by a county attorney to an accused to recommend a concurrent sentence if an accused gives a statement or makes a confession is such an improper inducement as to render the resulting statement or confession inadmissible.
3. **Perjury: Proof.** In a prosecution for perjury, the falsity of the accused's sworn testimony cannot be established by the testimony of one witness alone, but may be established by testimony of one witness plus corroborative facts and circumstances sufficient to exclude all reasonable doubt of the guilt of the accused.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Reversed and remanded with directions to dismiss.

Charles W. Balsiger, 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.

GRANT, J.

Defendant, Charles E. Mayhew, also known as Charles E. O'Keefe (hereinafter Mayhew), appeals from his conviction for perjury. The information filed against Mayhew charged that on August 19, 1982, in a juvenile proceeding entitled "In the Interest of Timothy A. Mayhew," held in the county court for Gage County, Nebraska, Mayhew did, under oath, "depose, affirm or declare any matter of fact, knowing the same to be false, or deny any matter of fact, knowing the same to be true," in violation of Neb. Rev. Stat. § 28-915 (Reissue 1979). Mayhew pled not guilty and was convicted after jury trial.

The record herein shows that on April 22, 1982, Eva's Record Shop in Beatrice, Nebraska, was burglarized. Mayhew pled guilty to that burglary sometime before August 19, 1982, which was the date of the hearing before the county court for Gage County in the matter of Timothy Mayhew. On June 10, 1982, Timothy Mayhew, who is related to the defendant herein by marriage, had been charged with violation of his juvenile probation, in that Timothy Mayhew had allegedly burglarized Eva's Record Shop on the same date of April 22, 1982. The August 19 hearing was the hearing on Timothy's alleged violation of his probation.

Timothy's counsel at that hearing called Mayhew as a witness. Under oath, Mayhew testified that Timothy did not participate in the burglary at Eva's. On cross-examination by the county attorney in the Timothy Mayhew matter, Mayhew also testified that he committed the burglary alone, with no help from anyone else, and denied specifically that one Sheila Fentress was involved in the burglary. He further described in detail how he placed the proceeds from the burglary in a duffelbag, which he then carried to a hiding place as he left the scene of the burglary on foot.

Timothy Mayhew was found guilty of violation of his probation at the conclusion of the juvenile hearings.

Shortly after this juvenile hearing, Mayhew was sentenced to 1 year in the Nebraska Penal and Correctional Complex for the burglary of Eva's Record Shop. On October 13, 1982, the county attorney of Gage County went to the penal complex and took a statement from Mayhew. In this recorded statement Mayhew admitted that he had lied to the juvenile court at the August 19 hearing in two general particulars: (1) That he had not committed the burglary alone, but that Sheila Fentress had aided him by acting as a lookout; and (2) That he had lied in describing how he removed the proceeds from Eva's

and how he had departed from those premises, in that he and Sheila had used a car to remove the duffelbag from the premises, rather than Mayhew leaving the premises on foot carrying the duffelbag. In the statement Mayhew continued to insist that Timothy Mayhew had not been involved in the burglary.

On October 14, 1982, a complaint was filed in the county court for Gage County, alleging that Mayhew had committed perjury in the August 19, 1982, juvenile hearing. Preliminary hearing was held and Mayhew was bound over to the district court on the perjury charge. Jury trial was held. At this trial Mayhew's statement of October 13, 1982, was, in large part, admitted in evidence, and Sheila Fentress testified that Mayhew had not burglarized Eva's alone but that she (Sheila) had helped him and that they had used a car during the burglary. There was no evidence adduced on the question of the presence of Timothy Mayhew at the burglary. Mayhew was convicted, and timely appeals to this court.

In this court Mayhew assigns 10 errors. In his brief, however, he discusses only error in connection with the admission of Mayhew's statement of October 13, 1982, taken at the penal complex, and error in denying Mayhew's motion for a directed verdict of acquittal.

The record shows that on October 13, 1982, an officer of the Beatrice Police Department and the county attorney of Gage County went to the penal complex, where Mayhew was incarcerated pursuant to his burglary sentence. The record is clear that the sole purpose of this trip was to obtain a statement from Mayhew to be used in the upcoming charge of perjury against Mayhew. At the penal complex the officer and the attorney met Mayhew.

The officer read Mayhew all his *Miranda* rights, and Mayhew signed a form indicating that he understood all those rights and was willing to make a statement. Mayhew was then informed that the

county attorney intended to file perjury charges against Mayhew in connection with the August 19 hearing. The county attorney read § 28-915 to Mayhew and informed Mayhew of the penalty for that crime. The county attorney then told Mayhew that if Mayhew would give a statement and if Mayhew were later convicted of perjury, the county attorney would recommend that any sentence on the perjury charge should be concurrent with the sentence that Mayhew was then serving for the burglary.

Mayhew filed a motion to suppress his statement of October 13, 1982. At the hearing held on that motion to suppress, the police officer who accompanied the county attorney to the penal complex testified, in part, on cross-examination: "Q. Were any inducements given to the defendant? A. There was. Q. And do you know what the nature of those inducements were? A. Mr. Smith advised him that he would ask the judge to have the sentence, if a sentence were to be imposed, to run concurrently; but it was only — he made Mr. Mayhew understand that it was just a suggestion that he would make."

The recorded statement taken from Mayhew was later typed and introduced as evidence at the hearing on the motion to suppress the statement. Early in that statement, the county attorney asked the following question: "Allright [sic] prior to the tape being turned on today I made a comment to you that if you you [sic] told me the truth regarding this matter that I would ask, I advised you that I would be charging you with perjury but I will be asking the court to run your sentence concurrent with the sentence that your [sic] presently serving, is that correct?" Mayhew responded, "Yes."

The trial court overruled the motion to suppress. This is one of the errors assigned in this court.

At the jury trial the relevant portions of Mayhew's statement or confession were read to the jury, over objection. Much the same evidence was introduced

as to the promises made by the county attorney to Mayhew before Mayhew gave his statement. On the cross-examination of the police officer at the trial, the following questions were asked: "Q. Do you know during that period of time if any inducements were made to the defendant to get the statement? A. I do. Q. Do you feel inducements were made? A. They were. Q. Was that by Mr. Smith [the county attorney]? A. It was."

In this court Mayhew challenges the overruling of his motion to suppress his statement and the admission of the statement as evidence at the trial, on the grounds that the statement was not voluntary in that it was obtained by inducements and promises from the county attorney. We hold that the statement was not voluntary and that the motion to suppress should have been sustained and the statement not submitted to the jury.

The holding that any inducement made by a person in authority to a person charged with a crime to obtain a statement or confession will render that statement or confession not voluntary and therefore inadmissible has been long established in our law. In *Bram v. United States*, 168 U.S. 532, 542-43, 18 S. Ct. 183, 42 L. Ed. 568 (1897), the Supreme Court of the United States quoted with approval from a textbook stating: " 'But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight . . . .' "

The *Bram* case, and its rejection of a statement made by an accused, was explained in *Brady v. United States*, 397 U.S. 742, 754, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970), where the Court stated: "*Bram* dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because

defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess."

In *State v. Smith*, 203 Neb. 64, 66, 277 N.W.2d 441, 443 (1979), we stated: "Before taking the statement the police officer stated that if the defendant cooperated with the police he would attempt to have the matter transferred to juvenile court. This was an inducement which under the circumstances of this case rendered the statement involuntary."

In *State v. Smith, supra*, the defendant was a 15-year-old boy, in custody, interviewed in a sheriff's office. In the case at bar defendant was a 21-year-old incarcerated in the penal complex and interviewed within that complex. The county attorney's promise to ask for concurrent sentences if Mayhew gave a statement was clearly an inducement for Mayhew to make his incriminating statement. It should be noted that the promise of the attorney was honored. At the time of Mayhew's sentencing, the acting county attorney told the court: "[Y]our Honor, on October 13, 1982, the County Attorney of Gage County, Mr. Richard Smith visited with the defendant at the penal complex; and at that time, he told the defendant that if the defendant gave him a statement regarding the defendant's involvement in this perjury crime that the county attorney would recommend to the Court a sentence that would run concurrent with the sentence that he was serving at that time. I feel bound, your Honor, as acting county attorney, to make that recommendation. And therefore, on behalf of the State, as acting county attorney for Gage County, I make a recommendation to the Court that the sentence of the defendant run concurrent with the sentence he is now serving." The trial court specifically took "into account the recommendation," and sentenced Mayhew to a 1-year term concurrent with Mayhew's sentence for burglary, which Mayhew was then serving. The value of consideration which Mayhew received had

dropped sharply, because at the time of the perjury sentencing he had only 10 days left on his burglary sentence.

We hold that, under all the circumstances present, the county attorney's promise to recommend a concurrent sentence was an improper inducement to Mayhew and rendered Mayhew's statement inadmissible.

Without Mayhew's statement the case against him for perjury rests on the testimony of Sheila Fentress alone. That testimony, supplied by Mayhew's fiance, Sheila, who had had her crime reduced to a misdemeanor, with a promise of probation from the county attorney, was to the effect that Mayhew had lied when he said he committed the burglary alone, because Sheila had aided him by acting as a lookout. No other witness testified as to the fact used to convict Mayhew of perjury—whether Sheila Fentress was present or not—nor in corroboration of that fact.

In the degree of proof necessary to prove the crime of perjury, Nebraska has long adopted the rule set out in *Gandy v. State*, 23 Neb. 436, 450, 36 N.W. 817, 823 (1888), where we stated with regard to the degree of corroboration necessary to prove perjury: " 'If, therefore, the oath of the accused is met by a single oath, the corroborating circumstances ought at least to equal the testimony of a single witness; the lowest quantity of testimony it has been said upon which a human being can be found guilty.'

"This, perhaps, is the better and safer rule. It does not require the testimony of two witnesses to the same fact, but it does require that the proof of the corroborative facts shall be such as to give a clear preponderance of the evidence in favor of the state, and thus, by such preponderance, establish the falsity of the oath, beyond a reasonable doubt. . . . [T]he instruction asked by plaintiff in error should have been given." That instruction is set out at 449, 36 N.W. at 823: " 'The jury are instructed that, in this case, the testimony of a single

witness is not sufficient to negative the alleged false oath charged to have been taken by defendant. There must be either two witnesses to prove such falsity, or one witness testifying to such falsity, with material and independently established corroborative facts sufficient to amount to the testimony of another witness.' "

The State recognizes this burden in its brief when it states: "IN NEBRASKA, THE TWO WITNESS RULE IS NOT APPLICABLE. PERJURY MAY BE PROVED UPON THE TESTIMONY OF ONE WITNESS WHICH IS CORROBORATED.

"We believe that the appellant simply misapprehends the effect of the testimony which was received in this case.

"First, the defendant's statement disavowing his testimony under oath was introduced. He admitted he was lying. Secondly, Sheila Fentress, his accomplice and confederate in the burglary, testified that she did help him in the burglary. And thirdly, the county attorney, a police sergeant, and another police officer also testified as to the defendant's statement to them and as to the defendant's reading, correcting, and signing the statement which was introduced." Brief for Appellee at 9.

That statement of the case may well have been accurate, if Mayhew's statement or confession were admissible. Since it has been held not admissible, all of the other alleged corroborative testimony falls with it. It is clear that if the statement is inadmissible, testimony from other persons about the statement is equally inadmissible. In this case, then, only one witness, Sheila Fentress, testified as to the defendant's perjury. That is not sufficient evidence, as a matter of law, to convict the defendant. The State did not meet its burden of proof. Defendant's motion for a directed verdict should have been granted and the case dismissed.

In view of this disposition of the case, it is not necessary to determine the other question raised by

Mayhew as to the requirement of materiality of the alleged perjured testimony.

REVERSED AND REMANDED
WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. LUIS GARCIA, APPELLANT.
345 N.W.2d 826

Filed March 9, 1984. No. 83-505.

1. **Search and Seizure.** The determination of whether a consent to search is voluntarily given is a question of fact.
2. _____. The voluntariness of a consent to search should be determined from the totality of the circumstances surrounding it.
3. **Search and Seizure: Appeal and Error.** The findings of fact as to the voluntariness of a search will not be set aside on appeal unless they are clearly wrong. In making that determination a reviewing court will take into consideration the advantage of the trial court in having heard the oral testimony.
4. **Controlled Substances: Evidence: Proof.** Evidence that a defendant had constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession and to sustain a conviction for unlawful possession.
5. _____: _____: _____. Constructive possession may be proved by direct or circumstantial evidence and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance.
6. _____: _____: _____. Constructive possession may be proven by ownership, dominion, or control over the contraband itself, coupled with the intent to exercise control over the same.

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

Avis R. Andrews, for appellant.

Paul L. Douglas, Attorney General, and Lynne R. Fritz, for appellee.

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

HASTINGS, J.

The defendant was charged in a two-count information with delivery of marijuana weighing more than 1 pound and conspiracy to deliver a controlled substance, both Class III felonies providing for possible punishment by imprisonment of from 1 to 20 years. Following a jury trial, the defendant was convicted on both counts and was sentenced to consecutive sentences of imprisonment of from 5 to 8 years.

Although defendant's assignments of error are six in number, they may be stated generally in four parts: (1) The court erred in failing to sustain defendant's motion to suppress evidence; (2) The court erred in failing to find as a matter of law that defendant was entrapped into committing the crimes charged; (3) The verdicts were not sustained by sufficient evidence and therefore defendant's motion to dismiss should have been sustained; and (4) The sentences imposed were excessive. We affirm as modified.

The State's principal witnesses were a cooperating individual of the Fremont Police Department and police officers and Dodge County sheriff's deputies. The cooperating individual testified that he worked through a Harry Mildrexler, a codefendant of Luis Garcia. This witness further testified that he helped Mildrexler find a house to rent in Fremont so that he could get some marijuana from California and sell it. Through conversations with Mildrexler it was learned that a friend of his in California, the defendant Luis Garcia, was to bring in between 50 and 100 pounds of marijuana. Although the witness was present on several occasions when Mildrexler would talk to Garcia about the coming shipment, he denied that he ever talked to Garcia on the phone or otherwise during these negotiations.

After being advised that Garcia was to arrive in Nebraska on January 13, 1983, the witness called the Dodge County sheriff's office and verified that Gar-

cia was on the plane and on his way with something in a bag. The cooperating individual then testified that he and Mildrexler picked up Garcia at the airport in Omaha, using a car which the Fremont Police Department had furnished him. He opened the trunk of this car, and Mildrexler and Garcia placed Garcia's suitcases inside. Eventually the three of them drove to Fremont. The witness got out of the car and walked away, whereupon Mildrexler and Garcia were arrested.

According to the testimony of police Det. Sgt. Stephen Tellatin, Garcia and the codefendant were transported to the Fremont Police Department. Tellatin obtained the cooperating individual's permission to search the trunk of his automobile, where the two suitcases belonging to Garcia were found. This police officer then testified that he obtained the consent of Garcia to open the suitcases, and in each one marijuana was found. Police officer Jim Burkardt later testified that immediately following Garcia's arrest he was given his full *Miranda* warnings.

It was on the basis of the foregoing testimony that the defendant was tried and convicted.

Prior to trial the defendant filed motions to suppress all evidence seized from the trunk of the automobile, items seized from a search of the defendant's luggage, and evidence of statements made by the defendant to police officers following his arrest. The trial court overruled all three motions because, first, as to all three motions, they were not filed at least 10 days before trial as required by Neb. Rev. Stat. § 29-822 (Reissue 1979); that as to the search of the automobile, the defendant had no standing to object to that search because he did not have custody, control, or an ownership interest in the same, and he had consented to a search of his luggage; and, finally, that he had been advised of his *Miranda* rights and had voluntarily made such statements.

The motions were not filed 10 days before trial of

the case began. However, there is some indication that trial might have commenced earlier than anticipated because of a previously set jury case having been canceled. In any event, the other reasons given for overruling the motions were valid.

The search of the trunk of the automobile was proper. Sergeant Tellatin, among others, testified that he had reliable information that the defendant was going to bring marijuana into Nebraska on this date. Surveillance was maintained on the defendant's baggage by various law enforcement authorities in San Diego and in Denver, and by Tellatin at Omaha as he watched Mildrexler and Garcia pick up the baggage and place it in the trunk of the automobile in the charge of the cooperating individual.

Additional testimony indicated that this automobile was then followed back to Fremont by Dodge County Deputy Sheriff Dan Weddle and police Det. Thomas Tamke. It is apparent from this testimony that probable cause existed to make the arrest of Garcia and to search the trunk of the automobile without the necessity of a warrant. See *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970), *reh'g denied* 400 U.S. 856, 91 S. Ct. 23, 27 L. Ed. 2d 94. In any event, permission was obtained from the person who had charge of the automobile to search the trunk, as previously indicated.

The search of the defendant's luggage itself is, of course, another matter. However, the court concluded, after considering all of the evidence, that the defendant had voluntarily given his consent to that search. Detective Tamke testified that he was present when Sergeant Tellatin asked the defendant for his permission to search the luggage. According to Tamke, the defendant stated, "You'd get a search warrant anyway, so go ahead." Sergeant Tellatin testified to essentially the same facts, and denied that he had ever told the defendant that if he did not give permission he would get a search warrant. The defendant himself testified that at first he re-

fused permission to Sergeant Tellatin, but after the officer told him that he would get a search warrant if permission was not granted, the defendant stated that he said, "Well, you have them, so you don't need nothing. Go ahead and do whatever you want to do."

The determination of whether a consent to search is voluntarily given is a question of fact. *State v. Skonberg*, 194 Neb. 550, 233 N.W.2d 919 (1975). The voluntariness of the consent to search should be determined from the totality of the circumstances surrounding it. *State v. Van Ackeren*, 194 Neb. 650, 235 N.W.2d 210 (1975). The findings of fact in this respect will not be set aside on appeal unless they are clearly erroneous. In making that determination this court will take into consideration the advantage of the district court in having heard the oral testimony. *State v. Billups*, 209 Neb. 737, 311 N.W.2d 512 (1981). In this instance the findings of the district court cannot be said to be clearly erroneous.

The evidence clearly indicates that the defendant was advised of his *Miranda* rights and voluntarily made his statements to the authorities. The defendant does not argue in this court to the contrary. The trial court was correct in overruling the motions to suppress.

As to the defendant's claim of entrapment, the trial court gave as one of its instructions to the jury NJI 14.34. This instruction clearly and fairly sets forth the elements of entrapment and the fact that the burden is on the State to prove that the defendant was not improperly induced to commit the crime. Although the defendant testified that he was asked by the cooperating individual on three or four occasions to bring the marijuana into Nebraska, as previously stated, this individual specifically denied having ever talked to the defendant. A question of fact on this issue was fairly presented to the jury, which resolved it against the defendant.

The defendant's argument as to the insufficiency

of the evidence is based on his claim that he at no time had possession of the marijuana in Dodge County. In support of this argument he points to the fact that after placing his luggage in the trunk of the automobile, which was in the possession of the cooperating individual, the latter had the only key to the trunk, which placed that luggage beyond the control of the defendant. The testimony of the defendant himself does establish that he bought the marijuana in California, brought it into Nebraska in his suitcases, placed them in the trunk of the automobile, expected to have the suitcases returned to him when he got out of the car, and expected to sell the marijuana and to make a profit from that sale.

Evidence that a defendant had constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession and to sustain a conviction for unlawful possession. *State v. Britt*, 200 Neb. 601, 264 N.W.2d 670 (1978).

Constructive possession may be proved by direct or circumstantial evidence and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance. *State v. Sotelo*, 197 Neb. 334, 248 N.W.2d 767 (1977).

The fact that the defendant would have to ask the one in charge of the automobile to unlock the trunk for him did not detract from the defendant's dominion over his luggage. As the owner of that luggage, he had every legal right to insist on its return to him, much as he would in the event that he had checked it at a check stand. Constructive possession may be proven by ownership, dominion, or control over the contraband itself, coupled with the intent to exercise control over the same. *United States v. Salinas-Salinas*, 555 F.2d 470 (5th Cir. 1977); *Sewell v. United States*, 406 F.2d 1289 (8th Cir. 1969). The evidence was sufficient to sustain the verdict of the jury.

As to the claimed excessiveness of his sentence, the defendant points to the facts that Mildrexler, pursuant to a plea bargain, was successful in having the count involving possession dismissed, and was sentenced to a term of imprisonment of from 30 months to 6 years. Mildrexler's presentence investigation report discloses that his prior criminal record includes a conviction and sentence of from 1 to 3 years' imprisonment for delivery of a controlled substance, a 14-day jail sentence coupled with 2 years 50 weeks of probation for conspiracy to deliver a controlled substance, and a $300 fine for possession of a controlled substance. The defendant's prior record contains a conviction for reckless driving and an arrest for possession of marijuana of less than 1 ounce.

We recognize that Mildrexler's conviction was the result of an agreement involving a plea of guilty on his part. However, we cannot overlook the facts that he was as deeply involved in this crime as was the defendant, save only that the latter actually physically delivered the contraband, and that the defendant's prior record was rather clean by comparison. Accordingly, to impose a sentence of from 30 months to 6 years in the one instance and two consecutive terms of from 5 to 8 years in the defendant's case constitutes impermissible disparity of sentences for nearly similar criminal activity. *State v. Komor*, 213 Neb. 376, 329 N.W.2d 120 (1983).

The sentence of the trial court is modified to require that the two terms of imprisonment run concurrently.

AFFIRMED AS MODIFIED.

MICHAEL D. HARPSTER, APPELLANT, V. CHARLES L. BENSON, DIRECTOR, DEPARTMENT OF CORRECTIONAL SERVICES, ET AL., APPELLEES.

345 N.W.2d 335

Filed March 9, 1984. No. 83-569.

Sentences. When sentence is pronounced upon one already serving a sentence from another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise.

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

Michael D. Harpster, pro se.

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

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

PER CURIAM.

Michael D. Harpster filed an action for declaratory judgment (Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1979)) that Harpster's two sentences for felony convictions should run concurrently rather than consecutively. The Lancaster County District Court held Harpster's sentences ran consecutively. We affirm.

On March 28, 1977, Harpster, having been convicted by his guilty plea to a charge of larceny from the person, and being represented by counsel, was sentenced to the Nebraska Penal and Correctional Complex for a term of 1 to 3 years.

On December 2, 1977, Harpster, having been convicted by his guilty plea to a charge of robbery, and represented by counsel, was sentenced to the Nebraska Penal and Correctional Complex for a term of not less than 8 nor more than 10 years. The sentencing judge on the robbery charge was not the same judge who had sentenced Harpster on March

28 for the larceny conviction. The judge sentencing for the robbery conviction noted that Harpster was already an inmate in the Nebraska Penal and Correctional Complex, and made no pronouncement that the sentence for the robbery conviction ran concurrently with Harpster's sentence imposed in March 1977 regarding the larceny conviction.

After an evidentiary hearing regarding Harpster's petition, the district court for Lancaster County entered judgment that Harpster's sentences ran consecutively, and dismissed Harpster's petition.

For over 50 years Nebraska has maintained the following rule: When sentence is pronounced upon one already serving a sentence from another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise. See, *State, ex rel. Allen, v. Ryder*, 119 Neb. 704, 230 N.W. 586 (1930); *Brott v. Fenton*, 120 Neb. 792, 235 N.W. 449 (1931); *Nelson v. Wolff*, 190 Neb. 141, 206 N.W.2d 563 (1973). The district court was correct in ruling that Harpster's sentences were consecutive.

In addition to questioning the correctness of the trial court's judgment that the two sentences ran consecutively, Harpster contends his consecutive sentences violate the "double jeopardy clause" of the fifth amendment to the U.S. Constitution, that is, his consecutive sentences resulted in an increased sentence for the first conviction after Harpster had begun to serve the initial term of his imprisonment. The effect of the two sentences is not an increase in Harpster's initial sentence. Rather, Harpster has received two separate sentences imposed by different judges for convictions of factually unrelated crimes. There is no merit to Harpster's question about the constitutionality of his consecutive sentences.

The judgment of the district court is affirmed.

AFFIRMED.

FRANCES I. SMICK, PERSONAL REPRESENTATIVE OF THE ESTATE OF LORENE SMICK, DECEASED, APPELLANT, V. ALAN W. LANGVARDT ET AL., APPELLEES.

345 N.W.2d 830

Filed March 9, 1984. No. 83-625.

1. **Pleadings: Motions to Dismiss.** There is no pretrial pleading in Nebraska known as a "Motion to Dismiss."
2. **Pleadings: Appeal and Error.** Where the alleged defect is not apparent on the face of the petition, the defect becomes an affirmative matter which must be raised by the party seeking the benefit of the defect.
3. **Evidence: Records: Appeal and Error.** Before this court can consider evidence bearing upon an issue of fact, evidence must have been offered at the trial court and embodied in the bill of exceptions filed with this court.
4. **Evidence: Records.** Even where the evidence is received by stipulation, it must be offered in evidence and incorporated in a bill of exceptions.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Reversed and remanded.

William A. Wieland and Susan Jacobs of Healey, Brown, Wieland, Kluender, Atwood & Jacobs, for appellant.

James A. Snowden and William L. Tannehill of Knudsen, Berkheimer, Richardson & Endacott, for appellee Gogela.

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

KRIVOSHA, C.J.

The appellant, Frances I. Smick, as personal representative of the estate of LoRene Smick, deceased, commenced a wrongful death action in the district court for Gage County, Nebraska, against various defendants, including the appellee Louis J. Gogela, Jr. According to the petition, the defendants named in the action were physicians and a registered nurse anesthetist. Smick joined all of the defendants in a single petition, and alleged, in a conclusionary manner and without facts, that the provisions of the Ne-

braska Hospital-Medical Liability Act, Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 1978) (the Act), were unconstitutional, violative of the U.S. Constitution and the Constitution of the State of Nebraska. No specific facts were alleged as to how or in what manner the Act was unconstitutional, nor was any suggestion made as to which particular parts of either the U.S. Constitution or the Constitution of the State of Nebraska were involved.

Under the provisions of the Act, if one is a defined health care provider (§ 44-2803), such health care provider must qualify under the Act before the Act has application (§ 44-2801). The petition filed by Smick did not allege whether any of the named defendants were health care providers who had qualified under the Act, and therefore one could not discern from merely examining the allegations of the petition whether the Act applied. Furthermore, under the provisions of the Act, a patient may elect not to be bound by the terms of the Act, provided such election is made in accordance with the provisions of the Act. Again, no allegation was contained in the petition as to whether the deceased had elected not to come under the Act. If the Act did not apply, the allegations of the petition on its face were sufficient to state a cause of action.

The appellee Gogela filed a document entitled "Demurrer and Motion to Dismiss." The trial court overruled the demurrer because, as noted by the trial court in its order, "disposition in the matter upon demurrer would not be appropriate," but the trial court sustained the motion to dismiss, specifically finding that Gogela was a health care provider covered by the Act and therefore he could not be joined in the same petition as those health care providers who were not covered by the Act. Accordingly, the trial court dismissed the action as against the appellee Gogela, without prejudice.

There is no bill of exceptions in this case, and therefore there is no evidence other than the appel-

lant's petition and the appellee's motion to dismiss. We believe that under the circumstances, and in view of the lack of *evidence* presented to both the trial court initially and to this court on appeal, we are required to reverse and remand.

The trial court correctly overruled Gogela's demurrer, which was based upon Gogela's assertion that he could not be joined with the other defendants. However, because a demurrer goes only to those defects which appear on the face of the petition, see Neb. Rev. Stat § 25-806 (Reissue 1979), and because one might properly join all of the named defendants if all four had either elected to come under the Act or had elected not to come under the Act and had waived the benefit of the Act, the petition on its face was not defective. Had the defect of parties been apparent on its face, of course, the demurrer would have been proper. See *Johnson v. Platte Valley Public Power and Irrigation District*, 133 Neb. 97, 274 N.W. 386 (1937). As we have observed, however, the alleged defect with regard to misjoinder is not apparent on the face of the petition, and therefore, before the defect can be ascertained, it must be established by some evidence produced by the defendant. Apparently the trial court recognized this important distinction when it properly overruled the demurrer.

The court's sustaining of the motion to dismiss must rest upon the same footing. In the first instance there is no pretrial pleading in Nebraska known as a "Motion to Dismiss." See *Blitzkie v. State*, *ante* p. 105, 342 N.W.2d 5 (1983). But even if we were to treat the motion to dismiss as a demurrer, which we may sometimes do under limited conditions, see *State, ex rel. Johnson, v. Consumers Public Power District*, 142 Neb. 114, 5 N.W.2d 202 (1942), we must nevertheless conclude that, on the state of the record before us, the motion to dismiss, treated as a demurrer, should have been overruled for the very same reasons that the trial court concluded the demurrer itself should have been overruled. Where,

as here, the alleged defect is not apparent on the face of the petition, the misjoinder becomes an affirmative matter which must be raised by the party seeking the benefit of the defect. See, *Columbus Bank & Trust Co. v. High Country Stable*, 202 Neb. 724, 277 N.W.2d 81 (1979); *Carlson v. Nelson*, 204 Neb. 765, 285 N.W.2d 505 (1979).

The problem of treating a motion to dismiss as a demurrer for misjoinder of parties or causes of action is made more apparent when we observe the trial court's response to the pleading. Assuming for the moment that there was sufficient evidence available to Gogela to establish a misjoinder of parties or causes of action, the appropriate relief was not to dismiss the action as against Gogela but, rather, to permit Smick, upon motion, to separate the causes of action and have each docketed without the requirement of further service. See *McCague Savings Bank v. Croft*, 80 Neb. 702, 115 N.W. 315 (1908); 87 Neb. 770, 128 N.W. 504 (1910). In any event, dismissing the action as to the defendant Gogela on the basis of improper joinder of parties, not apparent on the face of the petition, was improper.

Appellee argues that a trial court may summarily dismiss any action over which it lacks subject matter jurisdiction. This argument apparently goes to the proposition that if one or more of the defendants have elected to come under the Act as health care providers, then Smick must first submit the matter to a review panel before the court may acquire jurisdiction over the action. Again, this may be true, but the evidence is not properly before this court, just as it was not properly before the trial court. The trial court concluded that Gogela must have been a health care provider who had elected to come under the Act, because a copy of a claim filed by appellant with a medical review panel was attached to Gogela's motion to dismiss. However, the notice of claim was not offered in evidence and was not properly before the trial court, nor is it before this court.

The filing of the claim proves nothing even if it could be considered as evidence, and, in light of this record, it cannot be so considered.

If Gogela had elected *not* to come under the Act and the appellant had erroneously filed a claim with the medical review panel, appellant would not be estopped from proceeding to file suit against the defendants, including Gogela, without having the claim considered.

Additionally, the trial court's order recites that "the parties in their submission to the Court of the circumstances involved have proceeded on the basis that defendant Gogela came within the Act and other defendants did not." And the trial court's order overruling the motion for new trial recited in part "that counsel for plaintiff and defendant Gogela have heretofore advised the Court that said defendant was a healthcare provider within the provisions of said Act, and the other defendants are not within its terms."

Before this court can consider evidence bearing upon an issue of fact, evidence must have been offered at the trial court and embodied in the bill of exceptions filed with this court. See *Timmerman v. Hertz*, 195 Neb. 237, 238 N.W.2d 220 (1976). Even where the evidence is received by stipulation, it must be offered in evidence and incorporated in a bill of exceptions. See, *Prokop v. Mlady*, 136 Neb. 644, 287 N.W. 55 (1939); *Caldwell v. Savage*, 157 Neb. 603, 60 N.W.2d 657 (1953); *Higgins v. Postal Life & Casualty Ins. Co.*, 161 Neb. 278, 73 N.W.2d 175 (1955). There is simply no evidence before us to support the action taken by the trial court, nor can we determine what evidence was before the trial court. Did the parties stipulate in open court or merely exchange comments with the trial judge in chambers? This we simply cannot determine.

This is not form over substance. In the case of *Christopherson v. Christopherson*, 177 Neb. 414, 129 N.W.2d 113 (1964), we were confronted with a situa-

tion not dissimilar to the instant case. In *Christopherson* we said at 417, 129 N.W.2d at 115: "We observe that appellee's pleading, considered as a motion to dismiss when addressed solely to a petition, is not a recognized pleading in this jurisdiction. Appellee is attempting to raise mere unverified allegations to the dignity of evidence and by this means to deprive appellant of his day in court. The issue of paternity cannot be injected into this case by a motion to dismiss. Our Code of Civil Procedure covers the proper pleading procedures in this jurisdiction. To avoid unnecessary costs and delays, litigants should confine themselves to those pleadings and procedures approved in this jurisdiction." And recently, in *Nelson v. Sioux City Boat Club*, *ante* p. 484, 486, 344 N.W.2d 634, 635 (1984), we said: "It is no answer, as a matter of convenience, to say that the case should be disposed of on the merits on this record. Questions as to the burden of proof, or the res judicata effect of a judgment based on a pleading not recognized by this state, should not be determined academically. There are enough uncertainties in the law without expanding them by introducing procedures not contained in our statutes or court rules.

"We are not by this action exalting form over substance, but we are stating that procedural laws as to the conduct of civil litigation must be followed in order to let trial courts and appellate courts maintain some uniformity as to the posture of cases ripe for decision."

In this case we are asked to examine a record containing no evidence offered at trial and to determine that one of the defendants is a qualified health care provider who has elected to come under the Act and that the other three health care providers have elected not to come under the Act. Moreover, we are asked to determine that the deceased was a patient who had not elected to opt out of the Act. And, finally, we are asked to pass upon the constitutional-

ity of a law without any effort to specify how or why the Act is unconstitutional. All of these matters may be true, but courts are not free to speculate on evidence and streamline procedures to the point where no standards exist. Rather, courts must have the evidence properly presented in proper pleadings before the evidence may be considered.

For that reason we believe that the action of the trial court in sustaining the motion to dismiss was in error and must be reversed.

REVERSED AND REMANDED.

BOSLAUGH, J., concurs in the result.

FRANCIS E. BAUER, APPELLANT, V. ANNA MARIE BAUER, APPELLEE.

345 N.W.2d 337

Filed March 9, 1984. No. 83-667.

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

Louie M. Ligouri, for appellant.

Case & Reinsch, P.C., for appellee.

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

PER CURIAM.

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

AFFIRMED.

ROBERT W. HYDE ET AL., APPELLEES, V. IRVING SHAPIRO ET AL., APPELLANTS, HARRY D. NICOLA, APPELLEE.

346 N.W.2d 241

Filed March 16, 1984. No. 83-196, 83-234.

1. **Contracts: Consideration.** A valuable consideration to support a contract need not be one translatable into dollars and cents; it is sufficient if it consists of the performance, or promise thereof, which the promisor treats and considers of value to him.
2. _____: _____. There is a sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, whether or not there is any actual loss or detriment to him or actual benefit to the promisor.
3. **Courts: Judgments.** The provisions of Neb. Rev. Stat. § 25-2002 (Reissue 1979) apply only to a modification of a judgment entered at a *subsequent* term. The law is clear that during the term the trial court has the inherent power to modify its judgment and no petition or summons is required.
4. _____: _____. Our law is clear that, absent an abuse of discretion, a court has the inherent power to vacate or modify its own judgment at any time during the term at which those judgments are pronounced and such power exists entirely independent of any statute.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Jim Zimmerman of Atkins, Ferguson, Zimmerman, Carney & Law, for appellant Shapiro.

Robert M. Brenner of Brenner and Meister Law Office, for appellant Vickery.

Robert W. Mullin of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellees Hyde et al.

KRIVOSHA, C.J., CAPORALE, and GRANT, JJ., and CAMP, D.J., and COLWELL, D.J., Retired.

KRIVOSHA, C.J.

Irving Shapiro and Harry Vickery appeal from a

judgment entered by the district court for Scotts Bluff County, Nebraska, in favor of the appellees, Robert W. Hyde, William S. Whitehead, John C. Hawkins, Jr., Donn C. Raymond, and Jerome A. Fuhrman. The judgment was entered against Harry D. Nicola as well, but Nicola has not appealed and is not involved in this matter. We believe that the action of the trial court was correct and should be affirmed.

The suit involved in this appeal was in the form of a declaratory judgment action asking the court to determine the enforceability of a contribution agreement signed by Shapiro and Vickery. The appellants, Shapiro and Vickery, maintain that the trial court erred in entering a judgment against them and in favor of the appellees because of a failure of consideration. The record discloses that all of the parties to this action were business associates in a restaurant enterprise known as Grampy's. The business entity consisted of a partnership known as Grampy's of Scottsbluff and a corporation known as Grampy's International, Inc. The partnership, which was created on February 5, 1973, consisted originally of appellees Hyde, Whitehead, Hawkins, and Raymond, but neither of the appellants. The corporation, which was formed on February 23, 1973, consisted of the appellees and appellant Vickery as original shareholders. Appellant Shapiro became a stockholder at a later time. On April 2, 1973, the partnership assigned to the corporation a licensing agreement and the exclusive right to do business under the trade name "Grampy's." In return for the assignment the partnership was to receive from the corporation a royalty of .0075 percent on all gross sales generated by any owned or franchised Grampy's restaurant. The royalties were to be distributed to the partners at least every 3 months. By at least June of 1979 the corporation encountered some financial difficulties and required additional funds. Shapiro and Vickery offered to provide cer-

tain of this additional funding, provided that they were made members of the partnership, as well as being stockholders in the corporation, thereby entitling them to a share of the royalties. The existing partners agreed to create a new partnership consisting of all of the former partners plus Shapiro and Vickery, provided that the new partners agreed to sign a certain contribution agreement. The books of the old partnership were to be closed and adjusted showing the new interests. All assets of the old partnership, except the royalties accrued prior to August 1, 1979, were to be shared among the newly formed group. In all other respects the original partnership agreement executed on February 5, 1973, was to remain in effect.

Both the partnership agreement and the contribution agreement made it clear that the consideration for the new partnership was an agreement by Shapiro and Vickery to sign the contribution agreement. The language of the amended partnership agreement specifically provided in part as follows: "WHEREAS, it is the desire of all parties to this Agreement to reorganize the partnership for purposes of admitting new partners *on the sole consideration* that they sign and execute a Contribution Agreement . . . ." (Emphasis supplied.) And, likewise, the contribution agreement stated in part: "[I]t is the intention of all of the undersigned to become equal partners . . . in the above-referred Partnership, which has been amended . . . to include the undersigned as equal partners, *solely upon the consideration* that each of the undersigned will execute this Contribution Agreement indemnifying the partners or stockholders who have signed prior guaranty agreements securing . . . the Corporation." (Emphasis supplied.)

Shapiro and Vickery now maintain that they are not bound by the contribution agreement because there has been a total failure of consideration because the partnership failed and, as a result, they

did not receive the royalties which they expected to receive. That is, they maintain that the sole consideration for signing the contribution agreement was the promise that they would receive royalties and, not having received them, they are entitled to be relieved of any obligation under the contribution agreement. Just as the trial court did not accept that argument, neither do we.

There is no question that there was adequate consideration for the execution of the contribution agreement in the first instance. While the consideration may not have proved ultimately to be of benefit to Shapiro and Vickery, this is not significant. The distinction between whether there was sufficient consideration and its value to Shapiro and Vickery becomes relevant as we review the case. In the case of *Omaha Nat. Bank v. Goddard Realty, Inc.*, 210 Neb. 604, 609-10, 316 N.W.2d 306, 309-10 (1982), we set out the rules with respect to consideration, saying: "There appears to be no precise statement as to what constitutes consideration for an agreement other than the general declaration that in order for there to be consideration for an agreement there must be a benefit to one of the parties or a detriment to the other. See, *Commuter Developments & Investments, Inc. v. Gramlich*, 203 Neb. 569, 279 N.W.2d 394 (1979); *Dorland v. Dorland*, 175 Neb. 233, 121 N.W.2d 28 (1963). What that benefit/detriment must be or how valuable it must be varies from case to case. It is clear, however, that even 'a peppercorn' may be sufficient. In *Asmus v. Longenecker*, 131 Neb. 608, 269 N.W. 117 (1936), we said: ' "A valuable consideration to support a contract need not be one translatable into dollars and cents; it is sufficient if it consists of the performance, or promise thereof, which the promisor treats and considers a value to him." . . . "A valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or

undertaken by the other." ' *Id.* at 611, 269 N.W. at 119. . . .

" ' "There is a sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, *whether or not there is any actual loss or detriment to him or actual benefit to the promisor.*" ' (Emphasis supplied.) *Phelps v. Blome*, 150 Neb. 547, 555, 35 N.W.2d 93, 97 (1948). . . .

". . . The question of consideration in this state has never been dependent upon whether the promisor considered the benefit received sufficient, but only whether, as a matter of law, the promisee suffered a detriment or did anything which he was not otherwise required to do, no matter how significant in fact was the detriment or promise. We are unable to say that, as a matter of law, an agreement knowingly entered into by and between two sophisticated parties should now be set aside because the consideration given for the agreement was not what one of the parties considers of particular value."

In the instant case it seems clear beyond question that the consideration for executing the contribution agreement was not the receiving of royalties but, rather, the admitting of Shapiro and Vickery into the partnership. Certainly, the existing partners did not have to admit additional partners, and by doing so they diminished their interests in the partnership and suffered a detriment. That the partnership agreement did not ultimately prove to be a benefit to Shapiro and Vickery does not change the fact that there was sufficient consideration for it.

We must next determine whether there was a failure of consideration.

Shapiro and Vickery argue, on the basis of our holding in *Cotner College v. Estate of Hester*, 155

Neb. 279, 51 N.W.2d 612 (1952), that the failure of the partnership to pay royalties to Shapiro and Vickery was a failure of consideration sufficient to excuse their performance under the contribution agreement. We believe not. As we indicated, the consideration for the contribution agreement was the amending of the partnership and not the payment of the royalties, though, to be sure, the payment of the royalties was one of the benefits to be derived as a result of amending the partnership. It was not, however, the only benefit to be derived. We believe that a close examination of *Cotner College* discloses that it has no application in the present case. In the *Cotner College* case a bequest payable on death was given to the college on the condition that the proceeds be used as a scholarship for students attending the college located at a specific site, teaching specific courses. In fact, the college ceased operating some 16 years before the last donor's death; and while it appears that some institution was operating in another site, it is clear that it was not the institution to which the donation had been pledged, nor was the new institution providing the same type of education as the old one to which the pledge was made. *Cotner College* held that where the purpose of the agreement totally failed, the donor was relieved of any further obligation. In the instant case, while the royalties may not in fact have been paid, the partnership was still in existence. If, indeed, Shapiro and Vickery had some rights to royalties which had been acquired by the partnership but not properly paid to Shapiro and Vickery, their recourse was to seek an accounting, to sue for the royalties, or bring some other appropriate legal action. But, contrary to the argument made by Shapiro and Vickery, they did not have a right to declare the contract at an end, thereby relieving them of their obligations under the contract.

The motive to contract and the consideration for the contract are distinct and different. 1 S. Wil-

liston, A Treatise on the Law of Contracts § 111 (3d ed. 1957). "An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is 'the cause or meritorious occasion requiring a mutual recompense in fact or in law.' " *Philpot v. Gruninger*, 81 U.S. 570, 577 (14 Wall.), 20 L. Ed. 743 (1871). Parties are led into agreement by many inducements, such as the hope of profit, the expectation of acquiring what they could not otherwise obtain. These inducements are not legal or equitable considerations, and compose no part of a contract. See 17 Am. Jur. 2d *Contracts* § 93 (1964). The sharing of the royalties may have been the motive for entering into the partnership agreement, but the consideration was the acceptance by the existing partners of the new partners.

Vickery and Shapiro knew of the business losses before the documents were signed. Exhibit 9, which contains the minutes of the May 29 and June 21 meetings, shows that, while there was continued interest in a plan to acquire properties in Ohio, there were discussions of the need to borrow more money and the need to acquire further personal guaranties. According to one of the appellees, Raymond, it was during those discussions that Shapiro refused to sign guaranties without being made an equal partner. The trial court was in all respects correct when it concluded that the failure to pay royalties did not constitute a failure of consideration for the contribution agreement.

Vickery raises one other issue. Following the entry of a judgment and during the term, the trial court on motion of the appellees modified the judgment to increase the amount slightly. Vickery argues that because neither a petition was filed nor a summons served upon him pursuant to the provisions of Neb. Rev. Stat. § 25-2002 (Reissue 1979), the action of the trial court in modifying the judgment was improper. We can dispose of this assignment quickly. Section 25-2002 has no application to the

instant case. The provisions of § 25-2002 apply only to a modification of a judgment entered at a *subsequent* term. The law is clear that during the term the trial court has the inherent power to modify its judgment, and no petition or summons is required. Our law is clear that, absent an abuse of discretion, a court has the inherent power to vacate or modify its own judgment at any time during the term at which those judgments are pronounced, and such power exists entirely independent of any statute. See, *Moackler v. Finley*, 207 Neb. 353, 299 N.W.2d 166 (1980); *A. Hirsh, Inc. v. National Hair Co.*, 210 Neb. 397, 315 N.W.2d 236 (1982); *In re Estate of Weinberger*, 207 Neb. 711, 300 N.W.2d 818 (1981); *DeVries v. Rix*, 203 Neb. 392, 279 N.W.2d 89 (1979); *Harman v. Swanson*, 169 Neb. 452, 100 N.W.2d 33 (1959). The assignment is without merit.

In view of our disposition of this case, we need not consider any other assignments raised by the parties. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. TIMOTHY L. PIERCE, ALSO KNOWN AS TIM PIERCE, APPELLEE.

345 N.W.2d 835

Filed March 16, 1984. No. 83-627.

1. **Post Conviction: Constitutional Law.** Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of Nebraska or the Constitution of the United States.
2. **Constitutional Law.** As a general rule, retroactive operation of a decision overruling a prior case is not required by constitutional provisions.
3. _____. Decisions of this court, although later overruled, may nonetheless remain the law for intermediate transactions.

Appeal from the District Court for Scotts Bluff

County: ALFRED J. KORTUM, Judge. Reversed and remanded with directions.

Douglas Warner, Deputy Scotts Bluff County Attorney, for appellant.

Timothy L. Pierce, pro se.

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

PER CURIAM.

This is an appeal from an order of the district court granting the defendant's motion for post conviction relief. The district court also vacated the conviction and sentence of defendant as an habitual criminal and returned him to the district court for resentencing.

This is the second appearance of this case before this court. In *State v. Pierce*, 204 Neb. 433, 283 N.W.2d 6 (1979), this court affirmed the defendant's conviction for the unlawful delivery of amphetamines, and affirmed the finding that Timothy Pierce was an habitual criminal within the meaning of Neb. Rev. Stat. § 29-2221 (Reissue 1979) and his sentence of imprisonment for 12 years. In *Pierce* this court found the habitual criminal statute applied to the defendant even though the two previous convictions and sentences were imposed on the same day and arose from the filing of a single information.

On April 29, 1983, this court expressly overruled *State v. Pierce* in the decision in *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983), and reinterpreted the habitual criminal statute to warrant the enhancement of the penalty when we said "the prior convictions, except the first conviction, must be for offenses committed after each preceding conviction, and all such prior convictions must precede the commission of the principal offense." *Id.* at 176, 333 N.W.2d at 394.

On May 16, 1983, Pierce filed a motion for post conviction relief requesting the district court to set

aside his sentence as an habitual criminal. He alleged that the maximum penalty for the crime of which he was convicted, without enhancement, was 5 years. The district court granted the motion and the State appeals.

The State assigns as error the district court's determination that the prisoner had alleged and proved facts which constituted a violation of his rights under the Constitution of Nebraska or of the United States, so as to make his conviction void or voidable, and that the court erred in applying *State v. Ellis*, *supra*, retroactively for the benefit of a defendant whose conviction had become final.

The applicable rule of law is that relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of Nebraska or of the United States. *State v. Glasenapp*, 212 Neb. 99, 321 N.W.2d 450 (1982); *State v. Miles*, 194 Neb. 128, 230 N.W.2d 227 (1975).

Neb. Rev. Stat. § 29-3001 (Reissue 1979) reads in part as follows: "A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence."

The problem here is that the defendant in his motion for post conviction relief has not alleged nor proved that his conviction or sentence as an habitual criminal is affected by any state or federal constitutional error. It is clear the defendant simply requested that the decision in *State v. Ellis*, *supra*, be applied retroactively to his case.

In *Ellis* this court simply overruled the court's

earlier interpretation of § 29-2221, and no state or federal constitutional rights have been denied or infringed.

Although the defendant contends due process of law and fundamental fairness cannot allow his sentence to stand uncorrected, it has often been recognized that retroactive operation of an overruling decision is neither required nor prohibited by constitutional provisions. *Gt. Northern Ry. v. Sunburst Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932); *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965); *Brown v. Louisiana*, 447 U.S. 323, 100 S. Ct. 2214, 65 L. Ed. 2d 159 (1980); *United States v. Johnson*, 457 U.S. 537, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982).

In *Gt. Northern Ry.*, *supra* at 364, referring to a state court's prospective overruling of a prior decision, the U.S. Supreme Court specifically said: "[T]he federal constitution has no voice upon the subject [of retroactivity]. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions." Thus it has been stated in federal law that there is no constitutional objection to overruling a case purely prospectively as we did in *Ellis*.

While many courts, including the U.S. Supreme Court, have struggled with the question of retroactivity, this court does not have to tackle such a matter of judicial policy and past precedents, because the statutory requirements for relief under the Post Conviction Act have not been met. Defendant's remedy might be found in executive clemency.

We reverse the action of the district court and remand the cause with directions to dismiss the motion for post conviction relief.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL E. NEAL, APPELLANT.

346 N.W.2d 221

Filed March 23, 1984. No. 82-583.

Criminal Law: Witnesses: Testimony. Testimony of a witness in a suppression hearing, as in a preliminary hearing, is admissible at trial, where the defendant has had the opportunity for cross-examination at the suppression hearing and the witness is unavailable at the trial on the merits of the case.

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

Garrett Law Office, for appellant.

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

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

PER CURIAM.

By a jury trial Michael E. Neal was convicted of robbery and sentenced to a term of not less than 7 nor more than 10 years in the Nebraska Penal and Correctional Complex. We affirm.

At 4:45 p.m. on March 8, 1982, Neal entered a booth at an Omaha gas station and told Dennis Lobeda, the station attendant, "Get 'em up." According to Lobeda, when Neal said "Give [me] the money" or Neal would kill the attendant, Lobeda removed money from his shirt pocket and gave that money to Neal. Another station attendant, Gerald Kinsel, was waiting on a customer on the service plaza and observed Neal at the gas station. After taking the money from Lobeda, Neal ran to a nearby car, containing two men, as Lobeda shouted, "We just been robbed." Neal and the men left the scene in the car.

March 16: An Omaha police officer brought photo albums to the gas station and asked Kinsel to examine the photographs. There were approximately

50 photographs in each album. From the albums Kinsel picked out a photograph of Neal, but told the officer he could not positively identify Neal.

March 30: Neal was arrested and taken to the police station, where he was included in a lineup. The lineup was composed of five casually dressed males of varied heights and weights. Three men in the lineup and Neal had facial hair. Three individuals were taller than Neal and a fourth was shorter. Neal was the only man in the lineup who had facial scarring due to acne. After he viewed the lineup for a minute, Lobeda identified Neal as the man who robbed him. At this time Lobeda was positive Neal was the man who "came into [the station] and robbed me." Shortly after Lobeda's view of the lineup and identification of Neal, Kinsel viewed the lineup and positively identified Neal as the robber.

March 31: Neal, having been advised of his "*Miranda* rights," gave a statement to Officer Jernigan of the Omaha Police Department. Jernigan did not ask Neal to make a written statement, nor did Jernigan record Neal's oral statement. In his oral statement given to Jernigan, Neal said "that he had been the one who had committed the robbery."

Before trial Neal filed a motion to suppress his oral statement, pretrial identifications of Neal from police photographs—mug shots and the lineup. After a hearing in which Kinsel testified, the court overruled Neal's motion for suppression of the evidence.

At the time of Neal's jury trial, a subpoena was issued for Kinsel's attendance at trial, but a psychiatrist attending Kinsel advised against Kinsel's appearance as a witness. Over Neal's objection and after the trial court had declared Gerald Kinsel unavailable, Kinsel's previous testimony given at the suppression hearing was read into evidence for the jury.

Neal contends the trial court committed error by

admitting Kinsel's testimony given at the suppression hearing.

Testimony of a witness at a preliminary hearing is admissible at trial, where the defendant has had the opportunity for cross-examination at the preliminary hearing and the witness is unavailable at the trial on the merits of the case. It is within the discretion of the trial court to determine whether a witness' unavailability has been demonstrated to the court. *State v. Williams*, 211 Neb. 693, 320 N.W.2d 105 (1982). Although *Williams* deals with testimony given at a preliminary hearing, the rule is equally applicable where prior testimony has been given at a suppression hearing. The record of the suppression hearing shows unrestricted cross-examination of Kinsel on matters relevant to the issues in Neal's trial. The psychiatrist expressed a professional opinion about Kinsel's mental condition so that the trial court was justified in finding Kinsel unavailable for purposes of Neal's trial. There was no abuse of discretion regarding admission of Kinsel's testimony given during the suppression hearing.

Neal contends that the trial court erred in admitting Neal's oral statement containing admissions to Officer Jernigan, because Neal's statement was neither written nor taped. Neal claims that such absence of a written or taped statement renders any of Neal's admissions involuntary.

Neal never objected to Officer Jernigan's testimony relating recollection of what Neal told the officer. The medium of a statement, oral or written, is immaterial in the determination of admissibility of a statement containing an admission of a defendant. Oral or written statements containing admissions of a defendant are admissible, if the statements are voluntary. *State v. Thompson*, 198 Neb. 48, 251 N.W.2d 387 (1977). The evidence before us establishes that Neal's statement was given freely and voluntarily, without any threat or inducement, and that Neal waived his right to the presence of an

attorney during the time when the statement was made. Whether a statement is voluntary turns upon the totality of the circumstances present in each case. *State v. Hunsberger*, 211 Neb. 667, 319 N.W.2d 757 (1982). Admission into evidence of a confession constitutes an independent determination by the trial court that the confession was voluntarily made. Such determination will not be set aside on appeal unless such finding is "clearly erroneous." See, *State v. Hunt*, 212 Neb. 214, 322 N.W.2d 621 (1982); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). We find nothing in the record before us showing that the trial court clearly erred in receiving Neal's statement into evidence.

Neal claims his motion to suppress the pretrial identifications by photograph and lineup should have been sustained. Neal contends that because he was the only person in the lineup that exhibited facial scarring due to acne, the lineup and photograph unnecessarily suggested Neal's identification and were conducive to irreparable mistaken identification of Neal as the robber.

"The determination as to whether the identification procedures were unnecessarily suggestive and conducive to a substantial likelihood of irreparable mistaken identification is to be made by a consideration of the totality of the circumstances surrounding the procedures." *State v. Joseph*, 202 Neb. 268, 271, 274 N.W.2d 880, 883 (1979). See, *State v. Harris*, 205 Neb. 844, 290 N.W.2d 645 (1980); *State v. Hunt*, *supra*. We cannot conclude that the photograph and lineup were so suggestive as to result in identification of Neal and a substantial likelihood of irreparable mistaken identification. The trial court did not abuse its discretion by refusing to suppress the pretrial identifications. See *State v. Harris*, *supra*. Consequently, we cannot say that the trial court erred in permitting identifications of Neal at trial by those who had identified Neal before his jury trial.

Neal's last contention is that the sentence imposed

is excessive and constitutes cruel and unusual punishment in violation of the state and federal Constitutions. Neal's last assignment of error lacks any legitimate foundation or merit whatsoever. Neal's short record of criminal history reflects a pattern of increasingly violent and dangerous criminal activity. We have reviewed his record in *State v. Neal*, *ante* p. 709, 346 N.W.2d 218 (1984), and reiteration of Neal's criminal record would unduly prolong this opinion.

A sentence imposed within the limits prescribed by statute will not be disturbed on appeal unless there has been an abuse of discretion on behalf of the trial court in imposing such sentence. See *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982). One convicted of robbery may be punished by a term of imprisonment of from 1 to 50 years. See Neb. Rev. Stat. §§ 28-324 and 28-105 (Reissue 1979). Neb. Rev. Stat. § 83-1,105(1) (Reissue 1981) provides: "[T]he minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term, and the maximum limit shall not be greater than the maximum provided by law." Neal was sentenced to 7 to 10 years —well within the statutory limits. Based upon the relevant information presented, we cannot say that the trial court abused its discretion in imposing such sentence. The sentence is correct, not excessive, and does not violate state and federal constitutional prohibitions against cruel and unusual punishment.

The judgment of the district court is affirmed.

AFFIRMED.

Cite as 216 Neb. 801

LUCAS BRUYNINGA, APPELLANT, V. GARY NUSS, DOING BUSINESS AS NUSS CONOCO, APPELLEE.

346 N.W.2d 245

Filed March 23, 1984. No. 82-617.

1. **Summary Judgment.** Summary judgment is appropriate where the moving party establishes that there exists no genuine issue of material fact in the case and that under the facts he is entitled to judgment as a matter of law.
2. _____. In considering a motion for summary judgment the court views the evidence in the light most favorable to the party against whom it is directed, giving that party the benefit of all favorable inferences that may reasonably be drawn therefrom.
3. **Invitor-Invitee: Negligence.** While the owner of premises owes the duty to exercise ordinary care to have the premises in a reasonably safe condition for use consonant with the purposes of the invitation, generally, there is no duty on the part of an invitor owner to protect the invitee against hazards which are known to the invitee or are so apparent that he may reasonably be expected to discover them and protect himself.
4. _____: _____. Generally, the invitee, who has knowledge of a dangerous condition on the premises or where the dangerous condition is obvious, is negligent as a matter of law if he fails to use reasonable care to avoid injury.

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

Mary Morgan Cote of Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellant.

Alan L. Plessman, for appellee.

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

PER CURIAM.

This is an action for damages for personal injuries sustained when the plaintiff collided with a glass panel adjacent to a glass door at the defendant's service station. The plaintiff has appealed from a grant of summary judgment in favor of the defendant.

We affirm.

Summary judgment is appropriate where the mov-

ing party establishes that there exists no genuine issue of material fact in the case and that under the facts he is entitled to a judgment as a matter of law. *Gitschel v. Sauer*, 212 Neb. 454, 323 N.W.2d 93 (1982).

Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. In considering a motion for summary judgment the court views the evidence in the light most favorable to the party against whom it is directed, giving him the benefit of all favorable inferences that may reasonably be drawn therefrom. *Gitschel v. Sauer*, *supra*.

The defendant, Gary Nuss, and his wife are the owners and operators of Nuss Conoco, a service station which is located just north of Interstate 80 at the Aurora, Nebraska, exit. In addition to the sale of gasoline they do mechanical work and sell automobile chemicals and food. The front of the service station is constructed of glass and consists of a glass door surrounded by several wider glass panels. Some of the glass panels have a horizontal metal bar across the center; however, the panels adjacent to the door do not have such bars. A 5-inch concrete footing is located at the base of each window.

On the day of the accident the plaintiff, Lucas Bruyninga, was en route from California to Michigan. He stopped at the defendant's service station and filled his van with gas. He walked into the station through the front door, which was open toward the inside of the station at approximately a 90° angle. According to the deposition of Kay Nuss, the door was propped open with a large bucket. The plaintiff walked to the counter at the back of the store and paid for the gas. He turned and started toward the doorway, but stopped in front of the candy and chips display, which was located to the right of the path leading from the counter to the doorway. He again proceeded toward the front door. However, he walked to the wrong side of the open door

and collided with the clear glass panel located adjacent to the actual doorway. The panel shattered, and Mr. Bruyninga suffered an injury to his leg.

There is no dispute as to the status of the plaintiff as a business invitee while on the defendant's premises. The duty owed by the owner of premises to his invitees is well established in this state. While the owner of premises owes the duty to an invitee to exercise ordinary care to have the premises in a reasonably safe condition for use consonant with the purposes of the invitation, generally, there is no duty on the part of an invitor owner to protect the invitee against hazards which are known to the invitee or are so apparent that he may reasonably be expected to discover them and protect himself. *Whitcomb v. State Fed. Sav. & Loan Assn.*, 190 Neb. 26, 205 N.W.2d 652 (1973).

Generally, an invitee, who has knowledge of a dangerous condition on the premises or where the dangerous condition is obvious, is negligent as a matter of law if he fails to use reasonable care to avoid injury. *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982).

Nebraska law in this area is in accord with the Restatement (Second) of Torts § 343 A (1965). See, *Corbin v. Mann's Int'l Meat Specialties*, 214 Neb. 222, 333 N.W.2d 668 (1983); *Tichenor v. Lohaus*, *supra*. Comment *e.* to § 343 A of the Restatement points out that reasonable care on the part of the possessor does not ordinarily require precautions, or even warning, against dangers which are known or obvious to the invitee. The example used to illustrate that principle is a situation where a customer mistakes a plate glass door for an open doorway, and the owner is not liable.

Clearly, § 343 A applies to this case. The evidence indicates that there was a visible difference between the doorway and the adjacent pane of glass which the plaintiff hit. At the base of the glass pane, and not present at the doorway, was a 5-inch-high con-

crete footing which raised the panel off the floor. The doorway was narrower, and there was a transom above the actual opening. A bucket was placed in such a position as to prop the door open. One additional fact indicating a lack of reasonable care is that the plaintiff had entered the building through the opening only moments before, without any difficulty, and was unable to retrace his steps back through the open doorway. Had the plaintiff exercised reasonable care and watched where he was walking, the accident would not have occurred. Many jurisdictions deny recovery in cases such as this on the basis that any danger in a glass door arrangement consisting of a glass door and glass panel side-by-side is open and obvious and that the plaintiff is contributorily negligent as a matter of law. See, *Brown v. Alabama Foods, Inc.*, 190 A.2d 257 (D.C. 1963); *Dukek v. Farwell, Ozmun, Kirk & Co.*, 248 Minn. 374, 80 N.W.2d 53 (1956); *Acme Laundry Company v. Ford*, 284 S.W.2d 745 (Tex. Civ. App. 1955); *Presbyterian School v. Clark*, 205 Va. 153, 135 S.E.2d 832 (1964); *Crosslin v. Alsup*, 594 S.W.2d 379 (Tenn. 1980).

While there are jurisdictions which allow recovery in this type of case, we are persuaded that in this instance the plaintiff's failure to see what was there to be seen constitutes contributory negligence sufficient to bar recovery as a matter of law.

AFFIRMED.

WHITE, J., dissenting.

I disagree with the majority holding that an individual who mistakes a glass panel for an open space, and is injured as a result, is contributorily negligent as a matter of law.

In tort cases of the kind where reasonable minds may differ as to whether an inference of negligence or contributory negligence is to be drawn from a given set of facts, summary judgment can have no application. *Pfeifer v. Pfeifer*, 195 Neb. 369, 238 N.W.2d 451 (1976).

While this court has not had occasion to review a plate glass collision case before, many jurisdictions have. In a great many instances the plaintiff has succeeded not only in having his cause submitted to the jury but in securing a judgment. The case which is perhaps most similar to the present case is *Scott v. Mercer Steel/Edwards Realty*, 263 Or. 464, 503 P.2d 1242 (1972). In that case a woman entered a realty office through an open doorway and went to the rear of the room to examine some maps. She turned to leave, saw the open door in its propped-open position adjacent to a glass panel, and assumed the glass panel was the doorway. She collided with the glass panel and suffered an injury to her leg. The jury awarded her damages, despite the existence of a ledge at the base of the window, as was present here, and despite the fact that she had entered the room through that same open doorway only moments before. On appeal the owner of the premises argued the same principles which the majority in this case has set forth. The Supreme Court of Oregon rejected the argument, and found that there was evidence from which the jury could properly find that the unmarked glass panel created a deceptive appearance involving an unreasonable risk of harm so as to impose liability on the owner.

There are several other jurisdictions which have pointed out that the question of the injured plaintiff's negligence in these types of cases cannot be determined as a matter of law. I find these authorities much more persuasive. See, *National Bank of Alaska v. McHugh*, 416 P.2d 239 (Alaska 1966); *Jaillet v. Godfried Home Bakeries, Inc.*, 354 Mass. 267, 236 N.E.2d 924 (1968); *Grabel v. Handro Co.*, 161 N.Y.S.2d 998 (City Ct. of N.Y. 1955); *Escribano v. Luby Chevrolet, Inc.*, 181 So. 2d 748 (Fla. App. 1966); *Blanco v. J. C. Penney Co.*, 251 Md. 707, 248 A.2d 645 (1968); *Perry v. Eastgreen Realty Co.*, 53 Ohio St. 2d 51, 372 N.E.2d 335 (1978).

The fact that so many cases result in judgments in

favor of the injured plaintiff indicates that reasonable minds can and do differ as to whether an individual is negligent or contributorily negligent in these types of cases. The transparency of glass can deceive even the most prudent person. As such, the issue is one which, in my opinion, cannot be determined as a matter of law. Summary judgment was not appropriate, and I would reverse.

KRIVOSHA, C.J., joins in this dissent.

ROCCO H. CASTELLANO, ALSO KNOWN AS ROCK H. CASTELLANO, APPELLEE, V. SAMUEL BITKOWER, APPELLANT.

346 N.W.2d 249

Filed March 23, 1984. No. 82-806.

1. **Promissory Notes: Evidence: Proof.** One seeking enforcement of a lost promissory note must by clear and convincing evidence establish (1) ownership of the instrument, (2) an explanation for absence or loss of the instrument, and (3) the terms of the instrument.
2. **Evidence: Words and Phrases.** Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
3. **Debtors and Creditors: Promissory Notes: Limitations of Actions: Revival.** Because part payment can result in a debtor's waiver or relinquishment of the defense afforded by the statute of limitations, a creditor must prove by clear and convincing evidence that there has been a part payment of the debt in order to enforce a claim barred by the statute of limitations.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded for a new trial.

Ronald Rosenberg of Rosenberg, Gibson & Taute, for appellant.

Joseph J. Cariotto, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Samuel Bitkower appeals a judgment in the Lancaster County District Court on a verdict in favor of Rocco Castellano for $53,000, as a result of an action on two lost promissory notes. We reverse and remand for a new trial.

On September 17, 1980, Castellano filed his petition alleging the following: On August 19, 1975, Bitkower made two promissory notes payable to Castellano on demand; one note was for $26,000, while the other was for $30,000; the notes were lost or stolen in December 1975; Bitkower had made payments of $3,000, namely, $1,000 paid on July 27, 1978, and $2,000 paid on October 8, 1978; and Castellano was the owner and holder of the notes. Castellano sought a judgment for $53,000, the unpaid balance on the lost notes. (Why the petition contained but one cause of action for two promissory notes is unexplained. Such imprecise pleading causes no small problem in resolving the questions presented in this appeal.)

Bitkower's amended answer generally denied Castellano's allegations, and raised the statute of limitations as an affirmative defense.

In 1960 Castellano met Bitkower, a diamond salesman. During 1968, Castellano occasionally bought diamonds from Bitkower, but did not buy any Bitkower diamonds after 1968.

Between May 10, 1968, and February 20, 1974, Castellano gave Bitkower 19 checks, for a total of $37,662.75. Castellano claimed those payments were loans to Bitkower, but Bitkower denied any loan whatsoever. Castellano acknowledged that every loan represented by the checks had been repaid at the time of trial, but also acknowledged that the loans reflected by the checks were part of the "basis for support of [his] claim for" the notes in question.

Castellano testified that it "could have been," and he "believed" it was, in October, November, or December 1973 when he met with Bitkower in a bar of a Lincoln motel, where Bitkower signed and delivered the two demand notes. Castellano further testified that he "definitely" had the notes in July or August of 1974. (Castellano's petition alleges the notes were executed on August 19, 1975.) The exact reason for the notes is not disclosed in the record, but the notes may have related to some undescribed, previous loan to Bitkower and some obscure diamond transaction.

The two notes were on printed forms supplied by Bitkower. At Bitkower's request, Castellano wrote in the date and amount for each note—one for $26,000 and the other for $30,000. Bitkower told Castellano he would not pay any interest regarding the notes, and then signed the notes.

Castellano put the notes in a safety deposit box at his bank, and later showed the notes to his accountant in 1974. Afterwards, Castellano hid the notes in books in his apartment, and, while he was moving from his apartment, Castellano, on December 3, 1975, discovered the notes were lost.

From various witnesses called by Castellano the testimony established that there were two notes, the notes were seen in 1974 and 1975, Bitkower's signature was recognized, and Castellano was the named payee on the notes.

Castellano claims and testified that Bitkower made two part payments on the debt represented by the lost notes, namely, two checks received by Castellano in 1978. Castellano received the checks in response to his demand on Bitkower for payment on the notes. The first check from Bitkower is dated July 27, 1978, payable to Castellano in the amount of $1,000, and bore the notation "For Loan." The second check is dated October 8, 1978, in the amount of $2,000, and also bore the notation "For Loan."

Castellano testified that he applied the proceeds from the checks as a credit on "one note."

Bitkower testified that he never borrowed money from Castellano and, in fact, Bitkower loaned money to Castellano, as reflected by the two Bitkower checks in 1978.

Although Bitkower tendered an instruction requiring "clear, convincing, and satisfactory" evidence to prove the lost notes, the trial court gave an instruction which required proof by a preponderance of evidence. Bitkower also tendered, and the court gave, an instruction that Castellano must prove the part payments by a preponderance of evidence.

The jury returned a $53,000 verdict for Castellano.

In his appeal Bitkower complains about the trial court's instructing the jury in terms of preponderance of the evidence regarding the lost notes, rather than evidence which was "clear, convincing, and satisfactory"; claims that the trial court erred in not sustaining Bitkower's motion for a directed verdict at the conclusion of all the evidence; and alleges error in the reception of certain checks as evidence.

Neb. U.C.C. § 3-804 (Reissue 1980) provides in part: "The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms."

"It is generally the rule that a party seeking to recover upon a lost or stolen written instrument has the burden of proving the former existence, execution, delivery, loss, and contents of the instrument relied upon by clear, satisfactory, and convincing evidence." *Kuenzli v. Kuenzli*, 150 Neb. 855, 858, 36 N.W.2d 247, 249 (1949).

Combining the requirements of § 3-804 with the quantum of proof required under *Kuenzli v. Kuenzli*, *supra*, we hold that one seeking enforcement of a

lost promissory note must by clear and convincing evidence establish (1) ownership of the instrument, (2) an explanation for absence or loss of the instrument, and (3) the terms of the instrument.

We are aware that the word *satisfactory* used in *Kuenzli* has been deleted in describing the proof required for recovery on a lost promissory note. Our discussion later in this opinion concerning clear and convincing evidence will supply the reason for such deletion.

An action on a demand promissory note must be commenced within 5 years of the date on which the demand note is issued. See, Neb. Rev. Stat. § 25-205 (Reissue 1979); Neb. U.C.C. § 3-122(1)(b) (Reissue 1980); *Degmetich v. Beranek*, 188 Neb. 659, 199 N.W.2d 8 (1972).

Before the statute of limitations has run, a voluntary part payment of principal interrupts, arrests, and tolls the statute of limitations. See, *Kienke v. Hudson*, 126 Neb. 551, 253 N.W. 687 (1934); *Beacom v. Daley*, 164 Neb. 120, 81 N.W.2d 907 (1957); *Pick v. Pick*, 184 Neb. 716, 171 N.W.2d 766 (1969). After a debt is barred by the statute of limitations, a voluntary payment of principal revives the debt. See, *Rolfe v. Pilloud*, 16 Neb. 21, 19 N.W. 970 (1884); *Ebersole v. Omaha National Bank*, 71 Neb. 778, 99 N.W. 664 (1904); *Blair v. Estate of Willman*, 105 Neb. 735, 181 N.W. 615 (1921). The theory underlying the effect of part payment on a debt is a voluntary acknowledgment of the debt which starts the statute of limitations running anew from the date of the payment. See, *T. S. McShane Co., Inc. v. Dominion Constr. Co.*, 203 Neb. 318, 278 N.W.2d 596 (1979); *Pick v. Pick, supra*; 54 C.J.S. *Limitations of Actions* §§ 321, 333 (1948).

In order to remove the bar to recovery imposed by the statute of limitations, a part payment must be made and accepted as a payment on the particular debt in question; must be made under circumstances which warrant a clear inference that the

debtor recognizes and acknowledges the entire debt as the debtor's existing liability; and must demonstrate the debtor's willingness, or at least his obligation, to pay the balance of the debt. The payment must be distinct, unequivocal, and without any condition or qualification. The debtor must definitely point out the debt or obligation on which the payment is made and clearly evidence an intention to discharge the debt in part as a result of the part payment. See *In re Estate of Anderson*, 148 Neb. 436, 27 N.W.2d 632 (1947).

There is some apparent contradiction in Castellano's account of the date on which Bitkower executed the notes. On the one hand, Castellano testified that the notes were signed late in 1973, perhaps in October, November, or December of that year. If the notes were signed by Bitkower in 1973, Castellano had to file suit before the day and month in 1978 corresponding with the date of execution in 1973. On the other hand, if the notes were signed by Bitkower on August 19, 1975, as alleged in the petition, Castellano had to file suit before August 18, 1980. Under either version regarding the execution of the notes and without the beneficial effect of a part payment in 1978, Castellano's claims on the notes were barred at the time when suit was filed on September 17, 1980. See Neb. Rev. Stat. § 25-216 (Reissue 1979).

" 'If the petition in an action sets forth facts which show upon its face that it is barred by statute, and in avoidance thereof further facts are alleged to remove the bar of the statute, all of which are positively denied by the answer, together with the added allegations that the cause of action is barred by the statute of limitations, the plaintiff cannot recover without first establishing the facts so alleged in avoidance.' " *In re Estate of Anderson*, *supra* at 438, 27 N.W.2d at 634. Cf. *S.I.D. No. 145 v. Nye*, *ante* p. 354, 343 N.W.2d 753 (1984).

Under the rule set forth in *In re Estate of Anderson*, *supra*, in order to remove the bar of the statute

of limitations, evidence regarding a part payment must be "clear and positive," while under *Johnson v. Ghost*, 11 Neb. 414, 8 N.W. 391 (1881), the evidence must be "clear and satisfactory."

"Clear and positive" evidence has been held to have the same meaning as clear and convincing evidence. See *People v. Reynolds*, 55 Cal. App. 3d 357, 127 Cal. Rptr. 561 (1976). "Clear and satisfactory" evidence means clear and convincing evidence. See *Cont. Sheep Co. v. Woodhouse*, 71 Wyo. 194, 256 P.2d 97 (1953).

Clear and convincing evidence has been held to mean more than a preponderance of evidence but less than evidence beyond a reasonable doubt. See, *In re Henderson*, 199 N.W.2d 111 (Iowa 1972); *Cromwell v. Hosbrook*, 81 S.D. 324, 134 N.W.2d 777 (1965); *State v. Commeau*, 409 A.2d 247 (Me. 1979); *Welton v. Gallagher*, 2 Hawaii App. 242, 630 P.2d 1077 (1981); *Aiello v. Knoll Golf Club*, 64 N.J. Super. 156, 165 A.2d 531 (1960); *Berkey v. Delia*, 287 Md. 302, 413 A.2d 170 (1980). It would undoubtedly cause total confusion to instruct a jury that an appropriate claim must be proved by more than a preponderance of evidence, as defined by NJI 2.12, but less than evidence beyond a reasonable doubt, as defined by NJI 14.08. Consequently, we hold that clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. See, *Aiello v. Knoll Golf Club*, *supra*; *Hellman v. Kincy*, 632 S.W.2d 216 (Tex. App. 1982); *Matter of C. G.*, 637 P.2d 66 (Okla. 1981); *Middleton v. Johnston*, 221 Va. 797, 273 S.E.2d 800 (1981).

In order to recover on the lost notes, Castellano must by clear and convincing evidence prove his ownership of the notes, provide an explanation for absence or loss of the notes, and establish all the terms of the promissory notes.

Because part payment can result in a debtor's waiver or relinquishment of the defense afforded by

the statute of limitations, the creditor, here Castellano, must prove by clear and convincing evidence that there has been a part payment of the debt in order to enforce a claim barred by the statute of limitations. See *United Trust Corp. v. Burgess*, 175 Misc. 511, 24 N.Y.S.2d 84 (1940).

Regarding Bitkower's claim that the trial court should have sustained his motion for a directed verdict at the conclusion of all evidence, the evidence was disheveled but sufficient to submit all questions to the jury. See *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 338 N.W.2d 601 (1983). Under the circumstances we cannot state that Castellano has not proved his case by clear and convincing evidence—a matter better left to a jury's determination based on all facts, including credibility of witnesses. Cf. *In re Estate of Shirk*, 194 Kan. 424, 399 P.2d 850 (1965).

On the back of each of the Bitkower checks in 1978, there was a notation which Bitkower believes to be a restrictive endorsement. On the check of July 27, 1978, there was the following notation on the back of the check: "(Partial repayment of money loaned to Samuel Bitkower by Mary Castellano) R. H. Castellano." On the October 8, 1978, check for $2,000, there was a similar notation: "Rock Castellano. Partial payment of loan from Sam Bitkower for Mary Castellano." The endorsements are not restrictive endorsements because they do not impose a condition on negotiation, do not prohibit further transfer, do not state any use or benefit of the endorser or of another person, and do not contain terms signifying a purpose of deposit or collection. See, Neb. U.C.C. § 3-205 (Reissue 1980); 11 Am. Jur. 2d *Bills and Notes* § 362 (1963); 2 R. Anderson, Anderson on the Uniform Commercial Code § 3-205:4 (2d ed. 1971). The data or information on the front of the checks was relevant to the question of part payment on the alleged debts and notes. There was no error in admitting the exhibits.

It was error not to instruct the jury on the requirement of clear and convincing evidence to prove the facts necessary for a recovery on the promissory notes in question. Therefore, the judgment of the district court is reversed and this cause is remanded to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WILLIAM EBERT, APPELLANT, V. CHARLES BLACK, WARDEN, ET AL., APPELLEES.

346 N.W.2d 254

Filed March 23, 1984. No. 83-139.

1. **Statutes.** When a statute is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of lawmakers.
2. _____. A court will try to avoid, if possible, construction of a statute which leads to absurd, unjust, or unconscionable results.
3. **Sentences.** Good time credits may not be arbitrarily taken from a prisoner.
4. _____. Where an indeterminate sentence has been imposed, a prisoner's earliest possible parole eligibility date under Neb. Rev. Stat. § 83-1,107(1)(a) (Reissue 1981) is to be determined by crediting good behavior time on the basis of the length of his minimum, not his maximum, term.

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 appellant.

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

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

CAPORALE, J.

Plaintiff-appellant, William Ebert, sought a declaration from the district court that defendants-appel-

lees, various persons connected with the Department of Correctional Services and the Board of Parole, had improperly computed his parole eligibility date. Ebert appeals from the district court's denial of the relief sought. We affirm.

Ebert was convicted of second degree forgery and sentenced to an indeterminate prison term of from 18 months to 4 years, with 2 days' credit for time spent in jail. He began to serve his sentence on January 12, 1982. On the following day the Department of Correctional Services gave Ebert credit for 3 months' good behavior time on his minimum term, leading to an earliest possible eligibility for parole date of April 9, 1983.

The two issues presented by Ebert's 11 assignments of error are how good behavior time is to be credited in determining his earliest possible parole eligibility date and whether he has been denied equal protection of the laws.

Neb. Rev. Stat. § 83-1,107(1) (Reissue 1981) provides: "The chief executive officer of a facility shall reduce for good behavior the term of a committed offender as follows: Two months on the first year, two months on the second year, three months on the third year, four months for each succeeding year of his term and pro rata for any part thereof which is less than a year. The total of all such reductions shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to section 83-1,106, and shall be deducted:

"(a) From his minimum term, to determine the date of his eligibility for release on parole; and

"(b) From his maximum term, to determine the date when his discharge from the custody of the state becomes mandatory."

Ebert claims that for the purpose of determining his earliest parole eligibility date, he was entitled to a credit of 11 months, not 3 months, as a deduction from his minimum period of incarceration of 18

months. In other words, he claims that for the purpose of determining a prisoner's parole eligibility, one looks only to the maximum period of possible incarceration, in this case 4 years, and deducts the good time credit computed on the basis of that maximum period from the minimum period of incarceration. If Ebert's contention is correct, his earliest parole eligibility date, though not computed in the record, would apparently have been August 9, 1982, rather than April 9, 1983, as computed by the Department of Correctional Services.

We dispose first of Ebert's contention that this case is somehow controlled by *Gochenour v. Bolin*, 208 Neb. 444, 303 N.W.2d 775 (1981). It is not. *Gochenour* concerned itself only with consolidating pre- and post-L.B. 567 sentences and the computation of various good time credits under that circumstance. That is not the situation presented here; therefore, the discussion in *Gochenour* concerning the computation of "good behavior" and "meritorious" good time credits has no relevance to this case. See, also, *Boston v. Black*, 215 Neb. 701, 340 N.W.2d 401 (1983).

Ebert's position overlooks the fact that an indeterminate sentence has, by its very nature, two terms, a minimum one and a maximum one. This elemental fact is recognized by the statutory scheme of which § 83-1,107(1) is but a part. See Neb. Rev. Stat. §§ 83-1,105 through 83-1,110 (Reissue 1981). These statutes speak of two terms, not of one term. Unfortunately, the use of the single word "term" in § 83-1,107(1) creates an ambiguity: To which term, the minimum or the maximum, is the good time computed in accordance with the formula set forth in § 83-1,107(1) to be applied in order to determine a prisoner's earliest possible parole eligibility date?

When a statute is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of lawmakers. *Adkisson v. City of Columbus*, 214 Neb.

129, 333 N.W.2d 661 (1983); *North Star Lodge #227 v. City of Lincoln*, 212 Neb. 236, 322 N.W.2d 419 (1982). A review of that history reveals that the computation made by the Department of Correctional Services in this case conforms to the illustrations used in explaining the application of § 83-1,107(1) to the Judiciary Committee of the Nebraska Legislature. Judiciary Committee Hearing, L.B. 567, 84th Leg., 1st Sess. 4-28 (March 10, 1975).

Moreover, a court will try to avoid, if possible, a construction which leads to absurd, unjust, or unconscionable results. *Adkisson v. City of Columbus*, *supra*; *State v. Coffman*, 213 Neb. 560, 330 N.W.2d 727 (1983). In order to avoid an absurd result, the statute in question must be construed to mean that the word "term" in § 83-1,107(1) refers to each of the two terms of an indeterminate sentence, not to just one of those terms. For example, if Ebert's contention were correct, a prisoner sentenced to an indeterminate sentence of from 1 to 5 years would be eligible for parole 3 months before he arrived at the prison gates. It may well be, as was suggested in oral argument, that equally bizarre results are in fact being achieved under other aspects of these "good time" statutes, but the fact that lunacy may exist in some spheres of public administration is no reason to completely abandon reason and logic in all areas of our lives.

We hold, therefore, that where an indeterminate sentence has been imposed, a prisoner's earliest possible parole eligibility date under § 83-1,107(1)(a) is to be determined by crediting good behavior time on the basis of the length of his minimum, not his maximum, term.

The result would be otherwise were we concerned with a prisoner's earliest possible release eligibility date under § 83-1,107(1)(b), in which case good behavior time would be computed on the basis of his maximum, not his minimum, term.

Ebert's second issue stems from the doctrine that good time credits may not be arbitrarily taken from

a prisoner. See, *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979). That principle is simply not involved in this case. Having determined that Ebert was never entitled to the 11-month credit he sought to have credited against his minimum term, no question of taking anything away from him is presented.

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

AFFIRMED.

RANDALL S. ROY, APPELLANT, V. AL MORFORD, ALSO KNOWN AS A. J. MORFORD AND MORFORD CO., APPELLEE.

346 N.W.2d 392

Filed March 23, 1984. No. 83-190.

1. **Summary Judgment.** The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact, the ultimate inferences to be drawn therefrom are clear, and where, under the facts, he is entitled to judgment as a matter of law.
2. _____. Upon a motion for summary judgment the court examines the evidence not to decide any issue of fact but to discover if any real issue of fact exists.

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

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

A. J. Whalen, for appellee.

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

COLWELL, D.J., Retired.

Plaintiff, Randall S. Roy, appeals the entry of a summary judgment in favor of defendant, Al Morford, also known as A. J. Morford and Morford Co., in a suit for personal injuries from a fall on the outside stairs of an apartment building in Omaha, Nebraska, owned by Vincent N. and Kathryn E. Spillane, Arvada, Colorado. Defendant was a licensed Nebraska real estate broker, living in Omaha, who managed the property.

In consideration of $32,500 plaintiff granted the Spillanes a covenant not to sue (release), with reservations.

Defendant claims that he was the Spillanes' agent and that the release discharged him from liability, relying on *Ericksen v. Pearson*, 211 Neb. 466, 475-76, 319 N.W.2d 76, 81 (1982): " '[A] valid release of one of the parties to the . . . principal-agent relationship releases the other.' " Plaintiff argues that *Ericksen* is not applicable, since defendant was an independent contractor.

The original petition named the Spillanes as the sole defendants. Morford was then made a third-party defendant. Plaintiff filed a second amended petition against Morford as the sole defendant, which included this allegation: "[T]he Defendant, Al Morford, entered into an oral management agreement concerning the property at 4901 Military Avenue . . . whereby the Defendant . . . agreed, in part, to perform certain duties related to renting said property, collecting rents, maintaining and repairing said property to keep the premises in a state of good repair . . . ." The release was executed, and the Spillanes were then dismissed as parties, without prejudice. Without answering the second amended petition, defendant filed his motion for summary judgment.

The evidence shows that Mr. Spillane and defendant made an oral agreement for defendant to "manage" the apartment house; the terms were not

clearly defined. Morford testified that his duties were to secure tenants, collect rentals on commission, hire workmen to make repairs to broken and nonoperating windows, doors, plumbing, utilities, and appliances. He further testified that he made no regular inspections and that some repairs and improvements were submitted to Spillane for approval. Spillane testified that Morford "was going to handle the property for me and rent the property if it came up vacant and handle any repairs that came up that had to be taken care of immediately; also, any major repairs, he would let me know and he would take care of it."

Generally, Morford supervised the repairs, redecoration, and improvements of the building without prior approval from Spillane; all labor was hired; the expense was deducted from rents as received. No outside repairs were made, although branches and other debris were removed on occasion. Spillane paid the insurance, taxes, and some utilities directly. There was no evidence as to the condition, known or unknown, of the handrail and whether or not it was a "major" repair.

The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact, the ultimate inferences to be drawn therefrom are clear, and where, under the facts, he is entitled to judgment as a matter of law. Upon a motion for summary judgment the court examines the evidence not to decide any issue of fact but to discover if any real issue of fact exists. *Stolte v. Blackstone*, 213 Neb. 113, 328 N.W.2d 462 (1982); *Bank of Valley v. Shunk*, 208 Neb. 200, 302 N.W.2d 711 (1981).

Plaintiff claims it was error (1) to grant summary judgment where there were genuine issues of material fact, and (2) for the trial court to make findings of fact that Morford was an agent and that the release in favor of the Spillanes released Morford.

Before discussing the claimed errors, two plead-

ing problems are apparent in the record. First, while Neb. Rev. Stat. § 25-1331 (Reissue 1979) allows a defendant to proceed in summary judgment prior to answer, the unsupported motion states only that there are no genuine issues of material fact. The motion provided no notice of his later claimed defense of the release. *De Costa Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982). See, also, *Nicholson v. Braddock*, 201 Neb. 531, 270 N.W.2d 314 (1978). Second, it is not clear from the petition whether plaintiff alleged facts that Morford was an independent contractor. In any event, those pleadings were not tested, and, from the record, it is apparent that the court and the parties considered those issues as submitted.

"In determining whether an individual is a servant as distinguished from an independent contractor, the basic test is whether or not his physical conduct in the performance of the service is controlled or subject to the right of control." *Meyer v. State Farm Mut. Auto. Ins. Co.*, 192 Neb. 831, 837, 224 N.W.2d 770, 774 (1975). " 'The contract under which service is performed and the performance thereunder determine the relationship between the contracting parties.' " *Id.* at 837, 224 N.W.2d at 774. "A person may be both an independent contractor and an agent for another." 41 Am. Jur. 2d *Independent Contractors* § 2 at 741 (1968). See, also, Restatement (Second) of Agency § 14 N., Comment *a.* (1958).

There were genuine issues of material fact and reasonable inferences thereof concerning whether or not Morford was an agent of the Spillanes or an independent contractor as to the maintenance and repair of the outside of the building, including the handrail. There is no evidence concerning the condition of the handrail, and whether it was a "major" repair. It was error to make findings of fact that Morford was

an agent and that the release given to the Spillanes released Morford.

REVERSED AND REMANDED
FOR FURTHER PROCEEDINGS.

DELBERT BUSSELL, APPELLANT, V. WESTERN DIESEL POWER, INC., A NEBRASKA CORPORATION, APPELLEE.

346 N.W.2d 394

Filed March 23, 1984. No. 83-259.

Jury Instructions. It is the duty of the trial court, whether requested to do so or not, to submit to and properly instruct the jury on all material issues presented by the pleadings and supported by the evidence. Instructions which misstate the issues or defenses and have a tendency to mislead the jury are erroneous.

Appeal from the District Court for Chase County: JACK H. HENDRIX, Judge. Reversed and remanded for a new trial.

Dan L. McCord, for appellant.

Stephen W. Kay of Kay & Kay, for appellee.

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

WHITE, J.

This is an appeal from a defendant's verdict in an action for failure to properly repair an engine. Both direct and consequential damages were claimed.

Delbert Bussell, appellant, plaintiff below, an operator of irrigated farmland, engaged the services of appellee, defendant below, to repair a G398 Caterpillar engine in June 1980. The engine provided the motive power to operate a center pivot irrigation system on approximately 400 acres of farmland owned by Bussell and his assignors. Appellee, Western Diesel Power, Inc. (Western), undertook the repair and billed Bussell $9,000, which was paid.

After the repair was completed considerable difficulty was experienced in attempting to operate the engine.

On July 21, 1980, the engine overheated, quit operation, and substantial damage resulted to the engine. Bussell also claimed that the engine failure caused a failure to make timely application of water to the irrigated crops. Western essentially denied faulty repair of the engine, alleged misuse by Bussell of the engine as the cause of the failure, and further alleged that the crop losses were caused by failure to timely apply insecticides and to procure substitute motive power.

We must note that this would seem to be a rather straightforward case of a breach of a contract, with recovery sought for the amount of the repair bill, the difference between the before and after value of the engine, and consequential damages. The defenses would include a denial of allegations of unskillful repair, independent causation, and failure to mitigate damages. The parties, however, chose to cast the matter into the form of a negligence action, with the recognizable form of allegations of affirmative acts of negligence, contributory negligence, and even assumption of risk. The form does not fit precisely, with awkward bulges and resultant tears in the fabric.

For plain error noted we reverse and remand for a new trial. Neb. Rev. Stat. § 25-1919 (Reissue 1979).

In his third amended petition Bussell alleges five separate acts of negligence with reference to the repair, essentially that the appellee's repairmen failed to exercise the degree of skill and knowledge of a mechanic in the area.

In response to those allegations of negligence, Western, by answer, alleged that Bussell was guilty of contributory negligence (a) in running the engine with the safeties disconnected, (b) in leaving the engine, while running, unattended with the safeties disconnected, (c) in failing to undertake proper meas-

sures to control insects in his corn crop, (d) in failing to locate an alternative source of power generation to irrigate his crop while the engine was being repaired, and (e) in failing to take action to mitigate his damages.

The trial court included each of the above elements, with the exception of substituting "[i]n misusing the engine" for (e) in its instruction on contributory negligence. The trial court then instructed the jury that if *any* of said allegations were proved by a preponderance of the evidence and that such contributory negligence was the proximate cause of the appellant's injuries, appellant could not recover. The standard comparative negligence instruction was also given.

Assuming that items (c) and (d) are, in a proper case, allegations of contributory negligence—at most could they be said to be so as to crop damage—yet, the effect of the instruction required the jury to deny Bussell's recovery for damages to the engine and the original repair charge if he failed "to undertake proper measures to control insects in his corn crop," and/or failed "to locate an alternative source of power generation to irrigate his crop while the engine was being repaired." The instruction, insofar as it purported to permit the jury to find against Bussell on those two allegations, was in error.

The trial court also instructed the jury on an assumption of the risk defense. Such instruction was clearly erroneous. See *Lincoln Grain v. Coopers & Lybrand*, *ante* p. 433, 345 N.W.2d 300 (1984).

It is the duty of the trial court, whether requested to do so or not, to submit to and properly instruct the jury on all material issues presented by the pleadings and supported by the evidence. Instructions which misstate the issues or defenses and have a tendency to mislead the jury are erroneous. *Juniata*

Feedyards v. Nuss, *ante* p. 29, 342 N.W.2d 1 (1983).

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. VERN S. KRIMMEL, APPELLANT.

346 N.W.2d 396

Filed March 23, 1984. No. 83-342.

1. **Homicide: Mental Competency.** In order to prove the requisite mental state for murder in the first degree, the State is required to show a condition of the mind which was manifested by intentionally doing a wrongful act without just cause or excuse and which is defined as any willful or corrupt intention of the mind.
2. **Homicide: Photographs.** In a homicide case photographs of the victim are admissible, even if gruesome, if a proper foundation is laid and they are received for purposes of identification, to show the nature and extent of the wounds, and to establish malice or intent.

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

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, 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, Vern S. Krimmel, appeals from his conviction for first degree murder and sentence to life imprisonment. On appeal Krimmel contends that there was insufficient evidence to support the conviction and that the court erred in admitting certain photographs.

The body of the victim, Louis Garland, was found in the bathtub at his residence on November 5, 1982, by his brother, Charles Garland. The victim had

approximately 25 stab wounds and lacerations on his neck and back. Following an investigation, the police arrested Krimmel, who had performed various "odd jobs" for the victim. Krimmel admits that he killed the victim.

Krimmel was charged with purposely killing Garland "with deliberate and premeditated malice or during the perpetration of a robbery." The evidence shows that on November 3, 1982, Krimmel told Charlotte Zogg, a friend of his, that he was going to collect a debt from "some guy" on the following day. At about 8 p.m. that evening Krimmel called the victim from Zogg's apartment and made arrangements to visit the victim the next day. Before he left Zogg's apartment, Krimmel asked Zogg if she had a knife. He selected a small paring knife from her set of kitchen knives.

Krimmel went to Garland's home on November 4, 1982, and requested that Garland pay the money he owed Krimmel. The victim gave Krimmel $5. Krimmel testified that Garland "was trying to cheat me out of my money that he owed me," and Krimmel became enraged. Krimmel admitted that he then took the knife and stabbed Garland to death.

Krimmel left the scene and went to Zogg's apartment. His clothes were bloodstained. He had the victim's billfold and other personal items with him. At the time the body was discovered, the pockets of the victim's pants were found turned inside out.

The evidence was sufficient to support a finding of guilty of first degree murder beyond a reasonable doubt. The statute under which defendant was charged provides: "A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice . . . ." Neb. Rev. Stat. § 28-303(1) (Reissue 1979).

There is no dispute that Krimmel killed the victim. In order to prove the requisite mental state, deliberate and premeditated malice, the State was

required to show a condition of the mind which was manifested by intentionally doing a wrongful act without just cause or excuse and which is defined as any willful or corrupt intention of the mind. *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983); *State v. Johnson*, 200 Neb. 760, 266 N.W.2d 193 (1978). In the present case the uncontroverted evidence shows that Krimmel made arrangements to see the victim to collect a debt. Before going to the victim's house Krimmel selected a knife, which he brought with him. When the victim did not pay Krimmel enough money, Krimmel stabbed and killed him. This evidence is sufficient to support the verdict on the theory of a deliberate and premeditated killing, as it establishes the requisite mental state.

Moreover, the evidence is sufficient to establish that Krimmel killed the victim while in the perpetration of a robbery. Krimmel went to the victim's house seeking payment and became enraged when he did not receive all of the money he felt he was entitled to. When the victim was found, his pants pockets had been turned inside out and his billfold had been taken by Krimmel. This evidence is sufficient to support the verdict on the theory of felony murder. See *State v. Montgomery*, 191 Neb. 470, 215 N.W.2d 881 (1974).

Defendant next assigns as error the admission into evidence of five photographs. These photographs show the position of the victim in the tub when he was found, the wounds suffered by the victim, and the blood in the bathroom. In a homicide case photographs of the victim are admissible, even if gruesome, if a proper foundation is laid and they are received for purposes of identification, to show the nature and extent of the wounds, and to establish malice or intent. *State v. Lamb*, *supra*; *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982). The few photographs admitted in this case were not particularly gruesome and were admitted into evidence in compliance with the requirements set forth above.

There being no error, the judgment is affirmed.

AFFIRMED.

ANN MARIE FRANDSEN, APPELLEE, V. FRANK CHARLES FRANDSEN, APPELLANT.

346 N.W.2d 398

Filed March 23, 1984. No. 83-376.

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

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

Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellee.

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

PER CURIAM.

Frank Charles Frandsen appeals an order entered March 23, 1983, in the Hall County District Court, whereby Frandsen was found guilty of contempt of court for willful failure to comply with the provisions of a decree of dissolution, that is, to hold harmless Ann Marie Frandsen regarding marital debts.

After finding Frandsen guilty of contempt the court ordered Frandsen committed to the Hall County jail for 6 months or "until purged of contempt."

We are asked to review the trial court's coercive order, that is, a contempt citation to compel compliance with a previous order of the trial court. Such order is not a final order subject to review in this court. See *In re Contempt of Liles*, 216 Neb. 531, 344 N.W.2d 626 (1984). Therefore, Frandsen's appeal is dismissed.

APPEAL DISMISSED.

Cite as 216 Neb. 829

IN RE ESTATE OF MARCY.

WILMA CAROL MARCY LABELLE, APPELLANT, V. ESTATE OF NELLE MARCY, ALSO KNOWN AS NELLIE MARCY, DECEASED, APPELLEE.

345 N.W.2d 337

Filed March 23, 1984. No. 83-439.

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

Wilma Carol Marcy LaBelle, pro se.

No appearance for appellee.

BOSLAUGH, HASTINGS, and GRANT, JJ., and BRODKEY, J., Retired, and RIST, D.J.

PER CURIAM.

This is an appeal from an estate proceeding. The appellant is one of four children of Nelle Marcy, who died August 31, 1980, and left a will dated April 17, 1975. The county court determined that the will was the last will and testament, and entered an order for final settlement of the estate. Pursuant to the order, the appellant received $19,187.41, which represented one-fourth of the balance of the estate after payment of a bequest to grandchildren, and payment of creditors. The order of the county court was affirmed by the district court for Sheridan County.

A review of the record reveals that the errors assigned by the appellant are without merit, and we accordingly affirm.

AFFIRMED.

GERALD J. WENSLEY ET AL., APPELLEES, V. NEW DARCO, INC., ET AL., APPELLANTS, JOHN BENALKEN ET AL., APPELLEES.

346 N.W.2d 257

Filed March 23, 1984. No. 83-584.

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

Terrence D. O'Hare of Boland, Mullin & Walsh, and Thomas A. Gleason of Dolan, Davis & Gleason, for appellants New Darco, Inc., et al.

Thomas M. Knepper, and Kirk S. Blecha of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellants Shearson, Hayden & Stone, and Johansen.

Amy S. Bones of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellants Hunter and Houlihan

R. David Garber of Garber & Batt, for appellees Wensley et al.

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

PER CURIAM.

Judgment affirmed.

AFFIRMED.

MARY JO SCHMIDT, APPELLEE, V. GEORGE HENRY SCHMIDT, APPELLANT.

346 N.W.2d 257

Filed March 23, 1984. No. 83-622.

Appeal from the District Court for Stanton County: RICHARD P. GARDEN, Judge. Affirmed.

Charles L. Caskey, for appellant.

Ross A. Stoffer of Mueting, DeLay & Stoffer, for appellee.

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

PER CURIAM.

The court, having reviewed the record in this case, finds that the judgment of the trial court should be affirmed. Appellee is awarded the sum of $500 for the services of her attorney in this court.

AFFIRMED.

ROLLAND JAKES, JR., APPELLANT, V. NEBRASKA BOARD OF PAROLE ET AL., APPELLEES.

346 N.W.2d 258

Filed March 23, 1984. No. 83-691.

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

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

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

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

HASTINGS, J.

The plaintiff, an inmate at the Nebraska Penal Complex, brought this action for declaratory judgment seeking to determine that he should be given credit on a parole revoked sentence during the time he was incarcerated in Nebraska but was serving a concurrent term imposed by the State of Minnesota. The Nebraska authorities had determined that he

did not recommence serving his Nebraska sentence until he was paroled by Minnesota.

The trial court granted the defendant's motion for summary judgment and ordered plaintiff's petition dismissed.

The facts are set forth in the plaintiff's earlier mandamus action found as *State ex rel. Jakes v. Nebraska Board of Parole*, 212 Neb. 181, 322 N.W.2d 394 (1982). In spite of the protestations of the plaintiff to the contrary, the facts of this case are nearly identical to *Falkner v. Nebraska Board of Parole*, 213 Neb. 474, 330 N.W.2d 141 (1983), which case is controlling.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JON RICHARD, APPELLANT.

346 N.W.2d 399

Filed March 23, 1984. No. 83-723.

Ordinances: Larceny: Words and Phrases. The term "steal," as used in a municipal ordinance, includes all the elements of larceny at common law.

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

Harris & Lippstreu, for appellant.

Del L. Rosenberry, for appellee.

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

PER CURIAM.

Defendant was convicted in the county court for

Scotts Bluff County of violation of Scottsbluff city ordinance § 13-201, which provided in part: "It is hereby declared unlawful for any person within the city to steal any money, goods or chattels of any kind whatever." Defendant appealed to the district court, where his conviction and fine of $100 were affirmed. Defendant appeals to this court. For the reasons hereinafter stated we reverse and dismiss.

The evidence on behalf of the State showed that defendant entered Alexander's Super Market on March 25, 1983, between 7 and 8 a.m. He examined the bacon displayed for sale, picked up a 1-pound package, and walked by the meat counter. Alexander's meat manager followed defendant, and by demonstration at trial showed that defendant thrust his hand into his coat, went toward the express lane, and "didn't have the bacon [in his hand] anymore." The meat manager told the checker to call "service 50," which indicated that "shoplifting" was going on.

Other Alexander employees then came up, and the meat manager saw nothing further. On cross-examination the meat manager testified that he followed and watched defendant "[b]ecause he looked suspicious," in that when he picked up the bacon he moved his head from side to side.

The manager of Alexander's testified that he responded to the "service 50" call and first saw defendant halfway down one of the aisles, approached him and talked to him about the bacon, and defendant took the pound of bacon from his coat. The bacon was priced at $1.89. This witness could not remember whether defendant told him that he was going to pay for the bacon, but did remember that defendant handed the bacon to the witness and walked out of the store after the confrontation.

A Scottsbluff policeman testified that the manager of the store told the police officer that defendant told them he was going to pay for the bacon, gave the

bacon back, informed the store personnel that "they were not going to hold him for the police," and left.

Defendant testified that he had examined different types of bacon, selected one pound, did not put it in his coat, was stopped by the store personnel, showed them his wallet with "seventy-some" dollars in it, offered to pay, and when that offer was refused told the store personnel that he was not trying to steal the bacon; and said, "either you're going to take my money or . . . I'm going to walk back, I'm going to put it down, I'm going to walk out of here."

It is clear from the evidence considered in the light most favorable to the State that the bacon was not removed from the store by defendant. Counsel for the parties agree that to constitute the crime of "stealing" there must be a taking and "asportation" with intent to steal. The State contends that in a self-service store, "The elements of a taking and asportation are satisfied where the evidence shows that the property was taken from the owner and was concealed or put in a convenient place for removal. The fact that the possession was brief or that the person was detected before the goods could be removed from the owner's premises is immaterial." Brief for Appellee at 4.

We cannot agree. With the changes in merchandising and the enactment of new and different statutes affecting a shopper's conduct, we have gone beyond the law cited by the State that to take an article feloniously is accomplished by simply laying hold of, grasping, or seizing it animo furandi, with the hands or otherwise, and that the very least removal of it by the thief from the place where found is an asportation or carrying away. *Gettinger v. State*, 13 Neb. 308, 14 N.W. 403 (1882). To constitute larceny the object stolen must be removed from the premises of the owner, with intent to steal, before the larceny is complete. In so stating we reiterate what we said in *State v. Hauck*, 190 Neb. 534, 537, 209 N.W.2d 580,

583 (1973): "The determination of what constitutes a taking and carrying away of property with the intent to permanently deprive the owner of possession and whether that taking is with or without the consent of the owner involves issues of intent which are often difficult of determination. Where merchandise in a store is involved, those issues are vitally affected if the store is operated on a self service basis. The cases appear to be in agreement that in a self service store, where customers select and pick up articles to be paid for at the checkout counter, the mere picking up of an article in the display area does not constitute asportation. See Durphy v. United States, 235 A.2d 326 (D.C. App., 1967)."

In *Durphy v. United States*, 235 A.2d 326, 327 (D.C. 1967), the court stated that "the normal procedure in this type of market is for customers to circulate through the sales area, taking from the shelves any items they wish to buy but not paying for their selections until they pass through the check-out counter. . . . The fact that appellant placed the goods in a shopping bag provided no valid reason for the trial court to infer a criminal intent or a possession clearly adverse to the interests of the store."

Our holding is not to be read that defendant's conduct might not have warranted conviction on other charges, such as attempted stealing (Neb. Rev. Stat. § 28-201 (Reissue 1979)), or a violation of Neb. Rev. Stat § 28-511.01(1) (Cum. Supp. 1982), which provides that a person commits the crime of theft by shoplifting when, with intent to appropriate property without paying for it, he "(a) Conceals or takes possession of the goods or merchandise of any store or retail establishment."

In this difficult area of the law regarding self-service stores, precision in charging and proving offenses will result in clarity in determining what conduct is, or is not, criminal.

REVERSED AND DISMISSED.

NEILL D. INGERSLEW ET AL., APPELLANTS, V. COLBY BARTHOLOMEW ET AL., APPELLEES.

346 N.W.2d 258

Filed March 23, 1984. No. 83-726.

Appeal and Error. This court will not consider questions not presented to or passed on by the district court, and upon appeal will dispose of the case upon the theory on which it was tried in the district court.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

Souchek & Kimble, for appellants.

Larry L. Brauer of Allan, Brauer & Mullally, for appellees.

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

PER CURIAM.

This case arises out of a controversy concerning a common driveway between two residence properties in Seward, Nebraska. The parties own adjacent lots which were purchased from a common grantor. The south 4.9 feet of the driveway is located on the plaintiffs' property. The north 9 feet of the driveway is located on the defendants' property.

It is quite apparent that the record in this case is incomplete. It is the responsibility of an appellant to see that the record in this court contains all of the matters which an appellant wants this court to consider in deciding the case.

The case was submitted in district court on a stipulation of facts. The stipulation recited that the gravel driveway between the properties had been used by the parties and the prior owner, Reinhardt Mueller, for more than 10 years. In 1982 the defendants erected a fence post on the east property line of the parties, at or near the boundary line between the

properties. The plaintiffs commenced this action on November 12, 1982, to enjoin the defendants from interfering with their use of the driveway.

The petition alleged that the plaintiffs had acquired an easement by prescription for the use of that portion of the driveway located on the defendants' land. The trial court found that the defendants had acquired their property in 1978; the plaintiffs, in 1980; and there had been insufficient time to acquire an easement by prescription. The trial court dismissed the petition.

Upon appeal the plaintiffs have abandoned their claim of an easement by prescription, and now rely upon a theory of an implied grant and dedication.

The rule is well established that this court will not consider questions not presented to or passed on by the district court, and upon appeal will dispose of the case upon the theory on which it was tried in the district court. *Ford v. County of Perkins*, 190 Neb. 304, 207 N.W.2d 694 (1973).

There was a complete failure of proof as to an easement by prescription. The record supports the judgment of the district court, and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL McNITT, APPELLANT.
346 N.W.2d 259

Filed March 23, 1984. No. 83-747.

1. **Habeas Corpus.** A writ of habeas corpus is not available to persons lawfully convicted if the court imposing the sentence had jurisdiction of the offense and of the person charged with the crime and if the sentence was within the power of the court.
2. **Pleas.** By entering a plea of guilty, knowingly, voluntarily, and intelligently, the defendant waives every defense of the charge, whether the defense is procedural, statutory, or constitutional.

3. **Constitutional Law: Speedy Trial.** Under the provisions of the Constitution of the United States or the State of Nebraska, the right of a speedy trial is relative and depends upon circumstances, and is not denied where delay is satisfactorily explained by government and the defendant was brought to trial as soon as was reasonably possible.
4. **Effectiveness of Counsel.** The person alleging ineffective assistance of counsel has the burden of proof of establishing the incompetency of counsel and, further, demonstrating how the inadequacy was prejudicial.
5. **Recusal.** The mere fact that a judge has acted previously in a cause does not establish prejudice.

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

Michael McNitt, pro se.

Paul L. Douglas, Attorney General, and Michaela M. White, for appellee.

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

KRIVOSHA, C.J.

The appellant, Michael McNitt, appeals from an order entered by the district court for Hall County, Nebraska, denying McNitt post conviction relief. McNitt filed a petition seeking a writ of habeas corpus, but, as noted by the trial court, the application for a writ of habeas corpus was misplaced. A writ of habeas corpus is not available to persons lawfully convicted if the court imposing the sentence had jurisdiction of the offense and of the person charged with the crime and if the sentence was within the power of the court. See, *Pruitt v. Parratt*, 197 Neb. 854, 251 N.W.2d 179 (1977); *Case v. State*, 177 Neb. 404, 129 N.W.2d 107 (1964). After the trial court specifically found that the application was not properly an application for a writ of habeas corpus, it considered the application filed by McNitt as an application for post conviction relief filed pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 et seq.

(Reissue 1979). We have now reviewed the record and the court's order denying relief and conclude that the trial court's order was in all respects correct.

On May 28, 1980, an information was filed in the district court for Hall County, Nebraska, charging McNitt with felony murder in violation of Neb. Rev. Stat. § 28-303(2) (Reissue 1979). The charge grew out of the killing of Brian Crittenden on February 1, 1980, during the perpetration of a robbery. On May 28, 1980, McNitt pled not guilty to the charges, and shortly thereafter filed several pretrial motions which were never ruled upon by the trial court. On December 3, 1980, the State filed an amended information charging McNitt with criminal conspiracy to commit murder in violation of Neb. Rev. Stat. § 28-202 (Reissue 1979). The original charge of felony murder was a Class I or IA felony, which could have subjected McNitt to either death by electrocution or life imprisonment. Neb. Rev. Stat. §§ 28-105(1), 28-303(2) (Reissue 1979). The amended complaint was a Class II felony, which, at most, would have subjected McNitt to imprisonment for not more than 50 years. §§ 28-105(1), 28-202.

The record includes a written copy of a plea agreement which contains a promise by the State that no other or different charges would be filed against McNitt other than conspiracy to commit first degree murder, conditioned upon McNitt remaining incarcerated but segregated from other codefendants until after the codefendants were tried, and further conditioned upon McNitt agreeing to cooperate with law enforcement officials by testifying in the trials of the defendants. McNitt's testimony at the trials of the codefendants was the basis upon which the State agreed to reduce the charge against McNitt, and therefore the State could not permit McNitt to plead to the reduced charge until after he had testified at the other trials. During all of the times relevant to the plea, McNitt was represented by counsel.

The record further discloses that McNitt was aware of all of these matters, including his obligation to testify, and freely and voluntarily participated in the agreement. Specifically, a portion of the plea agreement signed by McNitt recited in part as follows: "I have been informed of my constitutional rights by my attorneys, and I understand these rights and understand that by this agreement and upon entering of my plea of guilty to 'Conspiracy to Commit First Degree Murder' of Brian Crittenden, I will waive these rights." Additionally, the order of the court entered on December 3, 1980, at which time McNitt pled guilty to the amended charge, recites the fact that McNitt's rights were explained to him; that exhibit 1, the plea agreement, was offered and received in evidence; and that the speedy trial statute was explained in detail to McNitt. The order further recites that McNitt waived his speedy trial rights and entered his plea of guilty to the amended complaint. The record clearly establishes that at the time that McNitt entered his plea of guilty to the amended complaint, he did so freely, knowingly, and voluntarily. No claim is made by McNitt that any of those facts are untrue. McNitt was ultimately sentenced to imprisonment for a term of not less than 7 nor more than 30 years, with credit for the time served since April 8, 1980. McNitt then filed a notice of appeal to this court. The sentence was affirmed by this court without opinion on July 29, 1981. Thereafter, on August 31, 1983, McNitt, acting pro se, filed the application involved in this appeal in the district court for Hall County, Nebraska.

McNitt maintains that the trial court committed three errors in denying his request for post conviction relief. He contends (1) he was denied his right to a speedy trial; (2) he was denied his right to effective assistance of counsel with regard to the raising of his right to a speedy trial; and (3) the trial judge who sentenced him was prejudiced, because the trial judge had acted as county judge during the

preliminary hearing in the county court.

We find that there is no merit with regard to the first claim that McNitt was denied his right to a speedy trial. Whether we consider McNitt's claim under the Nebraska statute, Neb. Rev. Stat. § 29-1207 (Reissue 1979), which requires that a person be brought to trial within 6 months from the date an indictment is returned *or an information is filed*, or whether we consider McNitt's claim to a speedy trial under the Constitution of the United States or the State of Nebraska, see U.S. Const. amend. VI and Neb. Const. art. I, § 13, we reach the same conclusion. Neb. Rev. Stat. § 29-1209 (Reissue 1979) specifically provides: "Failure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to speedy trial." See, also, *State v. Hert*, 192 Neb. 751, 224 N.W.2d 188 (1974). The provisions of § 29-1209 are fully consistent with the rule long recognized in this jurisdiction that by entering a plea of guilty, knowingly, voluntarily, and intelligently, the defendant waives every defense of the charge, whether the defense is procedural, statutory, or constitutional. See *State v. Falcone*, 212 Neb. 720, 325 N.W.2d 160 (1982). By knowingly, intelligently, and voluntarily entering his plea to the amended charge, McNitt waived his right to a speedy trial. This is so as long as the defendant was properly advised of his rights by either counsel or the court, see *State v. Williams*, 211 Neb. 650, 319 N.W.2d 748 (1982), and applies even though the plea was entered after the 6-month period had expired. It is clear in this case that McNitt was properly advised of his rights by the court before he waived his right to a speedy trial. We therefore have no difficulty in finding that by voluntarily entering his plea of guilty to the amended charge, McNitt waived any rights to a speedy trial under the Nebraska statute.

Additionally, and perhaps of even greater impor-

tance, it would appear from the record that the 6-month period had not expired. The time in which a defendant must be brought to trial in accordance with § 29-1207 is not absolute. There are certain events which toll the 6-month period, including the events described in subsection (4)(a), which excludes from the 6-month period "[t]he period of delay resulting from other proceedings concerning the defendant, *including but not limited to* . . . the time consumed in the trial of other charges against the defendant." (Emphasis supplied.) While the delay here was not by reason of the trial of other charges against the defendant, its cause is of sufficient similarity to the items enumerated in subsection (4)(a) and clearly falls within that subsection.

The record discloses that on June 11, 1980, and well within the 6-month period, the plea agreement was executed. By the very terms of the agreement McNitt's time to plead was delayed and the provisions of § 29-1207(4)(a) tolled.

Turning briefly, then, to the constitutional provisions, we likewise have no difficulty in finding that McNitt was not denied a speedy trial under either federal or state constitutional provisions. " 'The constitutional guarantee of a "speedy trial" is intended to prevent the oppression of a citizen by delaying criminal prosecution for an indefinite time and to prevent delays in administration of justice by requiring judicial tribunals to proceed with reasonable dispatch in trial of criminal prosecutions. * * * A "speedy trial", generally, is one conducted according to prevailing rules and proceedings of law, free from arbitrary, vexatious and oppressive delays. . . . The right of a speedy trial is relative and depends upon circumstances and is not denied where delay is satisfactorily explained by government and defendant was brought to trial as soon as was reasonably possible.' " *Svehla v. State*, 168 Neb. 553, 568-69, 96 N.W.2d 649, 659 (1959). " 'The right of a speedy trial is necessarily relative. It is consistent with delays

and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.' [Citation omitted.] The delay must not be purposeful or oppressive. The essential ingredient is orderly expedition and not mere speed." *State v. Ford*, 186 Neb. 109, 110, 180 N.W.2d 922, 923 (1970). "The standard relating to federal and Nebraska constitutional guarantees is reasonableness." *State v. Pilgrim*, 182 Neb. 594, 597, 156 N.W.2d 171, 173 (1968).

The record in this case makes it clear that McNitt was in no manner prejudiced by the delay, and in fact was greatly benefited by it. Furthermore, it is clear that by reason of McNitt's obligation to testify the delay, in effect, was at the request of McNitt. Had the delay not occurred so that McNitt was permitted to enter a plea to the amended charge after the trial of the coconspirators, McNitt may very well himself have been tried for felony murder and subjected to punishment of at least life imprisonment. By being permitted to wait McNitt was permitted to enter a plea of guilty to an amended charge which resulted in his being incarcerated for a period of not less than 7 nor more than 30 years, which is substantially less than the life sentence facing him under the murder felony conviction. In his application McNitt makes no allegations of fact which would disclose any prejudice to him by reason of the delay, and we are unable to find any in the record. We therefore conclude that McNitt was not denied any rights under either the U.S. Constitution or the Nebraska Constitution by reason of his trial not taking place until December 3, 1980.

McNitt's second claim of ineffective assistance of counsel likewise must fall for the very reasons his first claim is without merit. The standard for determining whether counsel for a defendant in a criminal prosecution has provided adequate representation requires that trial counsel perform at least as well as a lawyer with ordinary training and skill in

the criminal law in his area and that he conscientiously protect the interests of his client. See *State v. Clark*, *ante* p. 49, 342 N.W.2d 366 (1983). The person alleging ineffective assistance of counsel has the burden of proof of establishing the incompetency of counsel and, further, demonstrating how the inadequacy was prejudicial. *State v. Herren*, 212 Neb. 706, 325 N.W.2d 151 (1982); *State v. Crouch*, 215 Neb. 205, 337 N.W.2d 766 (1983).

As we have already noted, the plea agreement which permitted McNitt to plead to the amended charge was executed on June 11, 1980, and it tolled the provisions of § 29-1207. McNitt was not entitled to be discharged on the grounds that he was not tried within 6 months of the filing of the information and that his constitutional rights had been denied. Because he was not entitled to discharge, his counsel could not be guilty of failing to advise him of an alleged right to be discharged. Counsel in this case can hardly be considered ineffective for negotiating an agreement that resulted in a substantially reduced charge. McNitt's claim is ludicrous.

McNitt's third claim concerning possible prejudice by the trial judge is likewise without merit. The record discloses that at the time McNitt was originally arraigned, Judge DeBacker, the trial judge in the district court, was then one of the county judges for Hall County, Nebraska, and served as the magistrate at the preliminary hearing which was held in connection with the charge of felony murder. Thereafter, Judge DeBacker was appointed to the district court and accepted the plea from McNitt. The record discloses, however, that all of the requirements of accepting a plea were complied with and that the plea by McNitt was made knowingly, voluntarily, and freely. McNitt has not alleged any prejudice, nor has he made any showing of any prejudice by the trial judge in this case, except for the fact that he took a guilty plea after having presided at the preliminary hearing. The

mere fact that a judge has acted previously in a cause does not establish prejudice. See, *Waupoose v. State*, 46 Wis. 2d 257, 174 N.W.2d 503 (1970); *State ex rel. French v. Hendricks Sup. Ct.*, 252 Ind. 213, 247 N.E.2d 519 (1969). We therefore believe that McNitt's application did not allege facts entitling him to a hearing or any relief under the Post Conviction Act and that the trial court's action in denying such application was correct. The judgment is affirmed.

AFFIRMED.

CATTLE BROKERS, INC., APPELLEE, V. LANNY BILLINGS, APPELLEE, AND O'NEILL NATIONAL BANK, A CORPORATION, APPELLANT.

346 N.W.2d 264

Filed March 23, 1984. No. 83-828.

1. **Banks and Banking.** A national bank is a body corporate brought into existence under federal legislation, and is an instrumentality of the federal government.
2. **Venue: Actions: Corporations.** Neb. Rev. Stat. § 25-408 (Reissue 1979) requires, with certain exceptions, that an action against a foreign corporation be brought in any county in which there may be property of or debts owing to said defendant, or where said defendant may be found.
3. **Venue: Actions.** Neb. Rev. Stat. § 25-409 (Reissue 1979) requires that an action, other than one for tort, against a resident or residents of this state be brought in the county where the defendant, or one of the defendants, resides or may be summoned.
4. **Venue: Actions: Courts.** Neb. Rev. Stat. §§ 25-408 and 25-409 (Reissue 1979) require the court in which an action has been improperly brought under the venue provisions of those statutes to transfer the case upon timely motion by a defendant.
5. **Venue.** A party is entitled to be tried where the law says it is to be tried.
6. _____. The situs of the offices of a party's attorney does not determine venue.

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

John C. Schraufnagel of Cronin, Symonds & Schraufnagel, for appellant.

Kent F. Jacobs of Blevens, Blevens & Jacobs, for appellee Cattle Brokers, Inc.

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

CAPORALE, J.

O'Neill National Bank appeals from the judgment of the district court for Seward County, which found that it owed Cattle Brokers, Inc., plaintiff below, for services rendered pursuant to an oral contract. We reverse and remand with directions to transfer the case to the district court for the proper county and grant a new trial.

O'Neill National Bank is a national bank located in O'Neill, Holt County, Nebraska. In December of 1981 Cattle Brokers, Inc., a company located in North Platte, Lincoln County, Nebraska, and involved in the management of the sale of livestock, conducted a sale of cattle belonging to Lanny Billings of Orchard, Antelope County, Nebraska. The sale was conducted at O'Neill, Nebraska, pursuant to an oral agreement entered into between Billings and Cattle Brokers at Billings' office in Neligh, Antelope County, Nebraska, on October 30, 1981. On November 6, 1981, a few days after the agreement was reached, Cattle Brokers contacted O'Neill National Bank, which held a security interest in Billings' cattle, and obtained the bank's approval to the sale. The bank and Billings were paid the proceeds of the sale, which were applied to reduce Billings' indebtedness to the bank. The bank thereafter made partial payment to Cattle Brokers on the agreed commission and expenses of conducting the sale. Failing to receive what it considered full payment, Cattle Brokers filed suit against both Billings and the bank in the district court for Seward County. Billings filed for bankruptcy prior to trial.

It appears that the only connection any of the parties has with Seward County is that it is the situs of the offices of the attorney prosecuting this action for Cattle Brokers.

After being served with process in Holt County, the bank filed a motion seeking to transfer the case to Holt County. This motion was overruled. The bank then answered the petition, preserving its venue objection, and on the day of trial raised the additional issue that, pursuant to federal statute, the action was not properly brought in Seward County.

The district court nonetheless proceeded to trial, found that O'Neill National Bank had ratified the contract and was liable for the amount due, and entered judgment accordingly.

In support of its appeal O'Neill National Bank assigns four errors to the trial court. Among them is an assertion that its motion to transfer should have been granted. That assignment is well taken, and, thus, we need not, and therefore do not, discuss the other issues, including the federal question, raised by the remaining assignments of error.

A national bank is a body corporate brought into existence under federal legislation, and is an instrumentality of the federal government. 12 U.S.C. § 24 (1976); *Dovey v. State*, 116 Neb. 533, 218 N.W. 390 (1928). There is authority that, as such, it cannot be considered a foreign corporation. *Com. v. 1st Pa. Overseas Fin. Corp.*, 425 Pa. 143, 229 A.2d 896 (1967); *Bezat v. Home Owners' Loan Corp.*, 55 Ariz. 85, 98 P.2d 852 (1940); *Homan v. Connett*, 348 Mo. 244, 152 S.W.2d 1053 (1941). There is also, however, authority which states that a federal corporation may be a foreign corporation in a given state. *Cooke v. The State National Bank of Boston*, 3 Abb. Pr. 339 (n.s. 1867); *Daly et al. v. The National Life Ins. Co. of the United States of America*, 64 Ind. 1 (1878); *Bowen agt. The First National Bank of Medina*, 34 How. Pr. 408 (1867). Since the statute, Neb. Rev. Stat. § 21-1202 (Cum. Supp. 1959), under which we previ-

ously determined that a federal corporation was a foreign corporation, has been repealed, 1963 Neb. Laws, ch. 98, § 135, p. 416, it appears we have no controlling case law on the subject. *Hills v. Burnett*, 172 Neb. 370, 109 N.W.2d 739 (1961), *vacated* 372 U.S. 591, 83 S. Ct. 914, 9 L. Ed. 2d 961 (1963), *on remand* 175 Neb. 871, 125 N.W.2d 66 (1963); *Robertson v. Burnett*, 172 Neb. 385, 109 N.W.2d 716 (1961), *vacated* 372 U.S. 591, 83 S. Ct. 914, 9 L. Ed. 2d 961 (1963).

Our present business corporation act states that a for-profit corporation organized under laws other than of this state for a purpose for which a corporation may be organized under our act is a foreign corporation. Neb. Rev. Stat. § 21-2002(2) (Reissue 1977). However, we need not resolve whether O'Neill National Bank is a foreign corporation to decide this case, and therefore do not.

Neb. Rev. Stat. § 25-408 (Reissue 1979) requires, with certain exceptions not relevant here, that an action against a foreign corporation be brought in any county in which there may be property of or debts owing to said defendant, or where said defendant may be found. Neb. Rev. Stat § 25-409 (Reissue 1979) requires that an action, other than one for tort, against a resident or residents of this state be brought in the county where the defendant, or one of the defendants, resides or may be summoned. Neither O'Neill National Bank nor Billings resides in Seward County. There has been no allegation that O'Neill National Bank owns property or is owed a debt in Seward County, nor is there any showing it was found and summoned in Seward County. The presence of the offices of Cattle Brokers' attorney in Seward County does not meet the venue requirements. Therefore, whether O'Neill National Bank is a foreign corporation or not, the venue was improper.

Both of the above-cited statutory sections require the court in which an action has been improperly brought under the venue provisions of those statutes

to transfer the case upon timely motion by a defendant. Such a motion was made. It should have been granted. O'Neill National Bank is entitled to be tried where the law says it is to be tried. Accordingly, the judgment of the district court is reversed and the cause remanded to the district court for Seward County with directions to transfer this case to the district court for Holt County for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLEE, V. ALLEN J. BEERMANN, SECRETARY OF STATE OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.

347 N.W.2d 297

Filed March 30, 1984. No. 83-091.

1. **Constitutional Law.** Neb. Rev. Stat. § 50-201 (Cum. Supp. 1982) does not violate the constitutionally mandated separation of legislative, executive, and judicial powers found in article II, § 1, of the Nebraska Constitution.
2. _____. A legislative statement that an enactment is within the constitutional exercise of the Legislature's power does not violate the constitutionally mandated separation of legislative, executive, and judicial powers found in article II, § 1, of the Nebraska Constitution.
3. _____. Neb. Rev. Stat. § 50-202 (Cum. Supp. 1982) does not violate article III, § 7, of the Nebraska Constitution.
4. _____. Constitutional provisions are not open to construction as a matter of course.
5. _____. Before rules of construction become available in regard to a constitutional provision, it must be demonstrated that the meaning of the provision is not clear and that the intent of the people in adopting the provision can be determined only by construction.
6. _____. The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense.
7. **Constitutional Law: Words and Phrases.** The word "pay," as used in article III, § 7, of the Nebraska Constitution, means wages,

remuneration, compensation, or fees.

8. _____: _____. The word "perquisite," as used in article III, § 7, of the Nebraska Constitution, means a gain or profit made incidentally from the office of legislator, in addition to regular salary.
9. **Words and Phrases.** "Expenses" are the charges incurred in connection with the performance of one's duties, and typically include transportation, meals, and lodging while traveling.
10. **Legislature: Public Officers and Employees.** Neb. Rev. Stat. § 50-202 (Cum. Supp. 1982) allows legislators reimbursement for expenses incurred in connection with the performance of their duties.
11. **Constitutional Law.** Ordinarily, executive construction of a constitutional provision, long acquiesced in by the Legislature, is entitled to substantial weight in determining the meaning of the provision.
12. _____. A presumption of constitutionality attaches to legislative enactments, and a reasonable legislative interpretation of a constitutional provision which has a doubtful meaning should be adopted by this court.
13. _____. The touchstone in determining the meaning of ambiguous constitutional language is to discover and give effect to the intent of the framers of the Constitution and the people in adopting it.

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

Walter H. Radcliffe, for appellants.

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

Herbert M. Fitle, Omaha City Attorney, and Timothy K. Kenny, for amicus curiae City of Omaha.

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

PER CURIAM.

The district court declared Neb. Rev. Stat. §§ 50-201 and 50-202 (Cum Supp. 1982) to be in contravention of article II, § 1, and article III, § 7, of the Nebraska Constitution. This appeal followed. For the reasons hereinafter stated we reverse and remand for judgment consistent with this opinion.

In the 1981 session of the Legislature, L.B. 206 was passed over the veto of then Governor Charles Thone and is codified at Neb. Rev. Stat. §§ 50-201 and

50-202 (Cum. Supp. 1982). These statutes provide: "The Legislature hereby finds and declares (1) that the Constitution of Nebraska, by expressly providing for the legislative branch of government, implies the powers and the duty to provide the means, accessories, and instrumentalities to carry into effect the purposes for which the Legislature was created, (2) that items in the nature of expenses incidental to holding the office are not pay or perquisites within the meaning of Article III, section 7 of the Constitution of Nebraska, and (3) that the Constitution is construed to allow expenses to members of the Legislature, incidental to the performance of their duties as members of the Legislature, without contravening any constitutional provision as to pay, perquisites, or compensation." § 50-201.

"Each member of the Legislature shall be allowed necessary expenses incurred while performing in the official capacity as a member of the Legislature." § 50-202.

The facts have been stipulated. On November 4, 1981, State Senator Ernie Chambers of the 11th Legislative District in Omaha filed a $29.40 claim with the Director of Administrative Services for mileage reimbursement for one round trip between Omaha and Lincoln in connection with his attendance at the first special session of the Eighty-seventh Legislature. This claim was honored and paid.

On November 6, 1981, Senator Chambers filed a claim for $250 to reimburse him for $147 in mileage, for five round trips between Omaha and Lincoln, and $103 in meals. These expenses were incurred also in connection with Senator Chambers' attendance at the 1981 special session. On December 30, 1981, Senator Chambers submitted a claim for $117.60 for four Omaha-to-Lincoln round trips, also for the 1981 special session. Senator Chambers has also filed claims for $50 per day, which includes mileage and meals, for the 1981 90-day regular session of the Legislature and the 1982 60-day regular

session. None of these claims have apparently been honored or paid by the Director of Administrative Services.

A petition, naming the Secretary of State and Director of Administrative Services as defendants, was filed by the Attorney General in the district court for Lancaster County, seeking a declaration that §§ 50-201 and 50-202 are in violation of article III, § 7, of the Nebraska Constitution, which provides in relevant part: "Each member of the Legislature shall receive a salary of not to exceed four hundred dollars per month during the term of his office. In addition to his salary, each member shall receive an amount equal to his actual expenses in traveling by the most usual route once to and returning from each regular or special session of the Legislature. Members of the Legislature shall receive no pay nor perquisites other than said salary and expenses, and employees of the Legislature shall receive no compensation other than their salary or per diem."

The district court found § 50-202 to be in conflict with the above-quoted constitutional provision, and § 50-201 an inordinate legislative exercise of judicial power in violation of the constitutionally mandated separation of legislative, executive, and judicial powers found in article II, § 1, of the Nebraska Constitution. It further found that Senator Chambers was entitled to reimbursement of his mileage expenses incurred for one round trip between Omaha and Lincoln for each of the three legislative sessions and that meal expenses were not constitutionally allowed.

We disagree with the district court's interpretation of those constitutional provisions.

We first address the issue of whether § 50-201 violates article II, § 1, of the Nebraska Constitution. Section 50-201 is, in essence, a statement by the Legislature that it has assessed the Nebraska Constitution and concluded that § 50-202 is a constitutional exercise of its power. Assessing the limits of consti-

tutionally permitted conduct is an activity commonly engaged in by many persons or entities other than the judges and courts of this state. Ideally, whenever a police officer, without obtaining a warrant, makes an arrest or conducts a search, that officer has determined the activity is constitutionally permissible. In a similar manner, when the Legislature enacts a law, it has determined that the enactment abides with the Constitutions creating the state and federal governments. While it appears that, in the usual case, a law created by the Legislature is not accompanied by a specific finding that the law is a constitutional exercise of its power, we see no reason to treat the Legislature's expression of its assessment of the limits of its constitutional power as an encroachment upon the powers granted to the judiciary. Section 50-201 in no way encroaches upon the powers commonly exercised by the courts of this state to interpret and enforce their interpretations of the state Constitution. It in no way infringes upon the power of this court, with the concurrence of five of its judges, to declare this act of the Legislature unconstitutional, if such it were. The finding by the district court that the enactment of § 50-201 is a violation of the separation of powers required by article II, § 1, of the Nebraska Constitution is erroneous.

In turning our attention to the question of whether § 50-202 violates article III, § 7, of the Nebraska Constitution, it is well to remind ourselves that constitutional provisions are not open to construction as a matter of course. *Gaffney v. State Department of Education*, 192 Neb. 358, 220 N.W.2d 550 (1974). Before rules of construction become available in regard to a constitutional provision, it must be demonstrated that the meaning of the provision is not clear and that the intent of the people in adopting the provision can be determined only by construction. *State ex rel. School Dist. of Scottsbluff v. Ellis*, 168 Neb. 166, 95 N.W.2d 538 (1959). The words and

terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense. *State ex rel. Caldwell v. Peterson*, 153 Neb. 402, 45 N.W.2d 122 (1950).

The first two sentences of the relevent portion of article III, § 7, address themselves only to what members of the Legislature shall mandatorily receive. The first sentence requires that each member of the Legislature receive a salary. The second sentence requires that, in addition to salary, the member receive "an amount equal to his actual expenses in traveling by the most usual route once to and returning from each regular or special session . . . ." We encounter no limiting language until we reach the third sentence, which in relevent part reads: "Members of the Legislature shall receive no pay nor perquisites other than said salary and expenses . . . ." At this point the question becomes whether the adjective "said" preceding the words "salary and expenses" modifies only the word "salary" or modifies both the word "salary" and the word "expenses." Stating the question another way, Is it the direction of the third sentence that the members of the Legislature receive nothing other than the "salary" and "actual expenses" mandated by the first and second sentences, respectively; or is it that solons shall receive no "pay nor perquisites" other than the mandated "salary," but may receive other "expenses" in addition to the mandated "actual expenses"?

Webster's Third New International Dictionary, Unabridged (1968), tells us that "pay," as a noun, in an archaic sense, means "something given in return by way of reward or retaliation"; that it is wages, salary, or remuneration. Black's Law Dictionary 1016 (5th ed. 1979) defines the noun "pay" as meaning compensation, wages, salary, commissions, or fees. *In re Appeal of Wilkins*, 116 Neb. 748, 219

N.W. 9 (1928), presents an illustration of impermissible "pay." Therein, a legislator, who was a professional accountant, billed the state for accounting services rendered in the course of a legislative investigation. It was held that article III, § 7, limited a legislator's compensation to the amount of the salary or per diem then specified in the Constitution; therefore, he could not receive a fee for the professional services he rendered.

"Perquisite" is defined in Webster's Third New International Dictionary, Unabridged (1968), as casual income or profits; a privilege, gain, or profit incidental to an employment in addition to regular salary or wages; a gratuity or tip; something held or claimed as an exclusive right or possession. Black's Law Dictionary 1027 (5th ed. 1979) defines the word as meaning emoluments, fringe benefits, or other incidental profits or benefits attaching to an office or position. We have previously, in *State v. Sheldon*, 78 Neb. 552, 111 N.W. 372 (1907), defined perquisite as a gain or profit incidentally made from employment in addition to regular salary or wages. In that case we held that a residence provided by the state for occupancy by the Governor, at the place he was required by law to live, was not a "perquisite" within the meaning of a constitutional provision that the Governor might not receive any "perquisites of office or other compensation" in addition to his salary. We concluded that perquisite meant a compensation or reward for the performance of an official duty. See, also, *Louisiana State C. S. Com'n v. Louisiana Dept. of Cor.*, 251 So. 2d 524 (La. App. 1971); *Co. Aud. McKean Co. v. Anderson*, 133 Pa. Super. 475, 3 A.2d 28 (1938); *Christopherson v. Reeves*, 44 S.D. 634, 184 N.W. 1015 (1921); *Harris County v. Hammond*, 203 S.W. 445 (Tex. Civ. App. 1918).

Therefore, the first 14 words of the third sentence of the constitutional provision in question, "Members of the Legislature shall receive no pay nor perquisites other than said salary," given their

most natural and obvious meaning, say that Nebraska's legislators shall receive no wages, remuneration, compensation, fees, profit, or gain incidental to their office other than the salary mandated in the first sentence of the section.

We now address the meaning of the next two words, "and expenses."

In *Bartling v. Wait*, 96 Neb. 532, 148 N.W. 507 (1914), we had occasion to determine that the cost of erecting a building was not an "expense" within the meaning of the constitutional phrase "making appropriations for the expenses of state government, and state institutions." *In re Appeal of Wilkins, supra*, does not help resolve the question, for, although this court permitted payment of the expenses, no real issue was presented concerning the propriety of doing so. The posture of the law in this jurisdiction at this point is that while one case has declared what is not an expense, no definition exists of what is an expense. We must now adopt such a definition.

An "expense" is something expended in order to secure a profit or bring about a result. Expenses are the charges incurred by an employee in connection with the performance of his duties, and typically include transportation, meals, and lodging while traveling. Expenses are the money given to an employee as reimbursement for such charges. Webster's Third New International Dictionary, Unabridged (1968). Black's Law Dictionary 518 (5th ed. 1979) defines an expense as that which is "expended, laid out or consumed. An outlay; charge; cost; price." It has been held that the words "salary" and "expense," as used in relation to the compensation of municipal officers, are separate and distinct terms which connote entirely different concepts; "salary" is a fixed periodical compensation paid for services rendered, whereas an "expense" is a charge incurred in performing those services. *Geyso v. Cudahy*, 34 Wis. 2d 476, 149 N.W.2d 611 (1967).

The word "expenses" is not modified in the third sentence by the adjective "said"; that adjective modifies only the word "salary." Consequently, the "salary" mentioned in the third sentence can only be the "salary" named in the first sentence. Such, however, is not the case with the term "expenses" in the second and third sentences. Neither is "expenses" in the third sentence modified by the word "actual," as it is in the second sentence. We conclude, therefore, that the "expenses" in the third sentence are something different than the "actual expenses" mentioned in the second sentence. These other expenses are the charges incurred by a legislator in connection with the performance of his or her duties as a member of the Legislature.

The meaning of the third sentence, interpreting the terms and words used in their natural and obvious senses, is: Members of the Legislature shall receive no wages, remuneration, compensation, fees, profit, or gain other than the salary mandated in the first sentence above and reimbursement for expenses incurred in connection with the performance of their duties.

The effect of the relevant portion of article III, § 7, is that legislators must receive their salary and actual expenses in traveling by the most usual route once to and returning from each regular or special session. They may, in addition, receive reimbursement for other expenses incurred in connection with the performance of their duties as authorized by the Legislature through the appropriation of funds. The enactment of L.B. 206 does no more than implement the constitutionally permitted reimbursement of the aforesaid expenses.

There exists a variety of cases from a number of our sister states on the general question of the circumstances under which expenses are payable to state officers. As might be expected, these cases are not uniform in their analyses, holdings, or rationales. See, e.g., *Spearman v. Williams*, 415 P.2d

597 (Okla. 1966); *Van Hart v. deGraffenried*, 388 So. 2d 1196 (Ala. 1980); and *Opinion of the Justices*, 152 Me. 302, 140 A.2d 762 (1957), holding expenses payable. On the other hand, see, *Gipson v. Maner, Judge*, 225 Ark. 976, 287 S.W.2d 467 (1956), and *State ex rel. O'Connell v. Yelle*, 51 Wash. 2d 594, 320 P.2d 1079 (1958), holding otherwise. Because each of the Constitutions of the sovereign states of our nation use relatively unique combinations of language, none of these cases are particularly helpful. Nonetheless, we find the reasoning of *State ex. rel. Payne v. Reeves*, 44 S.D. 568, 184 N.W. 993 (1921), sound. It holds that a lump sum advance to judges moving to the state capital, where they were not required to live, was merely the payment of expenses incident to the discharge of their duties and did not violate a constitutional provision which fixed their salary and made it unlawful for them to receive any "compensation, perquisite or emoluments" except for such salary. See, also, *McCoy v. Handlin, State Auditor*, 35 S.D. 487, 153 N.W. 361 (1915).

Even if we were to assume arguendo that the constitutional section in question is ambiguous, and for that reason subject to construction, the same result would obtain.

Each of the parties hereto urges upon us a rule of constitutional construction supporting his interpretation of the subject language.

On the one hand, the Attorney General contends that executive construction of a constitutional provision, long acquiesced in by the Legislature, is entitled to substantial weight in determining the meaning of the provision. In support of that contention the Attorney General introduced into evidence a copy of a 1937 opinion letter issued in response to an inquiry from the Auditor of Public Accounts concerning the constitutionality of compensating members of the Legislative Council for their actual expenses incurred in the performance of their duties as members of the council. The Legislative Council,

established in 1937, consists of members of the Legislature and is charged with the consideration of legislative policies between sessions of the Legislature. Neb. Rev. Stat. § 50-401 (Reissue 1978). The then Attorney General opined that it was constitutionally permissible to reimburse legislators for their actual expenses incurred while attending to council business if the expenses were incurred while the Legislature was not in session. The opinion also concluded that the compensation for expenses incurred by a council member while the Legislature was in session was not permitted by article III, § 7. The Attorney General contends that the Legislature's acquiescence to that interpretation, at least until the passage of L.B. 206 in 1981, and to others consistent with the 1937 opinion, see, Op. No. 60, Report of the Attorney General of the State of Nebraska 102 (1959-1960); Op. No. 164, Report of the Attorney General of the State of Nebraska 250, and Op. No. 178, Report of the Attorney General of the State of Nebraska 272 (1977-1978); Att'y Gen. Op. No. 17 (Feb. 3, 1981); Att'y Gen. Op. No. 50 (Mar. 13, 1981); and Att'y Gen. Op. No. 141 (Sept. 22, 1981), should be determinative of the meaning of article III, § 7. *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 37 N.W.2d 502 (1949); 16 C.J.S. *Constitutional Law* § 33 (1956). The constitutional support for an opinion that legislators may be reimbursed expenses while performing legislative duties when the Legislature is not in session but may not be reimbursed expenses while the Legislature is in session is not apparent to us.

On the other hand, the Secretary of State directs us to another tenet of constitutional construction which holds that a presumption of constitutionality attaches to legislative enactments and that a reasonable legislative interpretation of a constitutional provision which has a doubtful meaning should be adopted by this court. *Otto v. Hahn*, 209 Neb. 114, 306 N.W.2d 587 (1981); *American Fed. of S., C. & M.*

Emp. v. Dept. of Public Institutions, 195 Neb. 253, 237 N.W.2d 841 (1976).

The collision of these two principles of constitutional construction destroys their utility in lending us guidance in finding the meaning of article III, § 7. As such, we find neither helpful in this inquiry.

The touchstone in determining the meaning of ambiguous constitutional language is to discover and give effect to the intent of the framers of the Constitution and the people in adopting it. *State ex rel. Western Technical Com. Col. Area v. Tallon*, 196 Neb. 603, 244 N.W.2d 183 (1976); *State ex rel. Meyer v. County of Lancaster*, 173 Neb. 195, 113 N.W.2d 63 (1962); *Ramsey v. County of Gage*, 153 Neb. 24, 43 N.W.2d 593 (1950).

The Nebraska Constitution has had a salary and expense provision since 1867. The Nebraska Constitutional Convention of 1919-1920 proposed, and the people adopted, the following salary and expense amendment: "Senators and representatives . . . shall each receive the sum of eight hundred dollars for attendance at each regular biennial session of the Legislature and ten dollars for each day in actual attendance at special sessions; but in no case shall compensation for attendance at any one special session exceed one hundred dollars. They shall also be paid ten cents per mile for each mile traveled in once going to and returning from each regular or special session of the Legislature by the most usual route. Members of the Legislature shall receive no pay nor perquisites other than their mileage and salary or per diem, as the case may be, nor shall employees receive any other compensation than their salary or per diem." Neb. Const. art. III, § 7 (Comp. Stat. 1922).

In 1934 the people, by initiative petition, proposed, and by election adopted, the constitutional amendment providing for a unicameral instead of the former bicameral system of Legislature. The salary and expense provision of that amendment pro-

vided: "The aggregate salaries of all the members shall be $37,500 per annum, divided equally among the members and payable in such manner and at such times as shall be provided by law. In addition to his salary, each member shall receive an amount equal to his actual expenses in traveling by the most usual route once to and returning from each regular or special session of the Legislature. Members of the Legislature shall receive no pay nor perquisites other than said salary and expenses, and employees of the Legislature shall receive no compensation other than their salary or per diem." Neb. Const. art. III, § 7 (Comp. Stat. Supp. 1935).

While the salary provision of article III, § 7, has been frequently amended since 1934 to increase a legislator's salary, the expense provision we are now considering remains as adopted in 1934.

The Attorney General urges us to consider statements by the members of the constitutional convention of 1919-1920 in order to determine the meaning of the 1934 amendment. In that convention statements were made to the effect that the salary paid legislators was to reimburse them for the expenses of holding office. See 1 Journal of the Nebraska Constitutional Convention 1049-61 (1919-1920). As we have previously noted, the salary and expense provisions adopted by the 1919-1920 convention are different than those proposed by the initiative petition and adopted by the people in 1934. In *Bodie v. Pollock*, 110 Neb. 844, 195 N.W. 457 (1923), we were called upon to determine whether then § 7 of article XII, which provided that stockholders of banking corporations be personally liable to the bank's creditors, and § 4 of article XII, which provided that personal liability of stockholders would arise after the exhaustion of corporate assets, were in conflict with an enactment of the Legislature. In that case this court was asked not to follow previous opinions which were decisive of the issue, on the theory that the constitutional changes adopted by the people

after the 1919-1920 constitutional convention changed the law. In that connection we stated: "Not only did the late constitutional convention not change the constitutional provisions in question, but it reenacted them. These constitutional provisions had received a construction which had become the settled law of the state and that construction had been read into and become a part of the said provisions. It is well settled in many, if not most, of the jurisdictions of the country that, where a construction of constitutional provisions has been adopted and a constitutional convention thereafter reenacts such provisions, it reenacts not only the language of the provisions but the construction which has attached to the same." *Id.* at 848, 195 N.W. at 458.

The foregoing language is clearly inapposite to this case. The language of the constitutional provision concerning legislative salaries and expenses was changed in 1934; and while the 1919-1920 convention proceedings make interesting reading, they are not relevant in interpreting a different provision adopted by the people 14 years later, after being placed on the ballot by initiative petition.

Lastly, the rejection by the electorate of certain constitutional amendments is pointed to as establishing the intent of the people in adopting the 1934 language. Those amendments would variously have changed the salary provision, allowed per diem payments, and specifically allowed for the reimbursement of expenses incurred while in session. 1971 Neb. Laws, L.B. 889; 1972 Neb. Laws, L.B. 311; 1982 Neb. Laws, L.B. 531. Although some of that history is cited to us, we are not told how language rejected in 1972 and 1982 helps us determine what the voters intended in 1934. Those rejections tell us what voters were not willing to adopt in those later years, but can no more tell us what was meant in 1934 than they can tell us what the electorate might do in the years 2010 or 2020.

The Attorney General argues, however, that at the

least the rejected proposals tell us how the Legislature itself interpreted the language in question. In part, this observation has been dealt with earlier. In addition, it is noted the fact that the Legislature, faced with the 1937 opinion of the then Attorney General, and perhaps out of an excess of caution, sought a change in the constitutional language does not bear upon the intention of those who had earlier adopted the language.

In summary, there is no showing of the relevant history concerning the intention of those adopting the language proposed by the 1934 initiative petition with respect to the issue at hand. In such a circumstance we can only revert to a study of the language itself. Such a study has been made, with the result detailed earlier in this opinion.

We note that the petition, in addition to seeking a declaration of unconstitutionality, prays for "such other further or different relief as shall be just and equitable." Assuming, but not deciding, the propriety of equitable relief in the context of this case, the record is such that a determination of whether the expenses claimed by Senator Chambers are "necessary expenses incurred while performing in the official capacity as a member of the Legislature," as contemplated by § 50-202, cannot be made.

In addition, the parties have not addressed the issue of the compensability of expenses incurred during, and claimed for, the 1981 regular legislative session, which was adjourned prior to August 30, 1981, the effective date of L.B. 206. We therefore offer no opinion with respect thereto.

REVERSED AND REMANDED.

JOSEPH M. SASICH ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

347 N.W.2d 93

Filed March 30, 1984. No. 83-156.

1. **Ordinances: Injunction: Equity.** An action to enjoin enforcement of a city ordinance is one in equity.
2. **Equity: Appeal and Error.** A case in equity is reviewed de novo on the record, 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.
3. **Ordinances: Zoning: Presumptions.** The validity of a zoning ordinance is to be presumed in the absence of clear and satisfactory evidence to the contrary.
4. **Zoning: Words and Phrases: Statutes.** The term "comprehensive plan" in the zoning statutes and the term "city plan" are not synonymous.
5. **Municipal Corporations: Zoning: Words and Phrases.** The term "comprehensive plan" is used with respect to a metropolitan city in its generic sense and does not refer to any special document.
6. **Ordinances: Zoning.** A zoning ordinance which recognizes and legitimizes a nonconforming use is not objectionable upon that basis alone.
7. **Ordinances: Municipal Corporations.** If an ordinance in question is a valid exercise of the power granted to a city, courts will not inquire into the motives or reasons of the city council in enacting it.
8. **Expert Witnesses: Rules of Evidence.** Generally, expert testimony concerning the status of the law is not admissible.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Donald A. Roberts, P.C., of Lustgarten & Roberts, for appellants.

Herbert M. Fitle, Omaha City Attorney, and Charles K. Bunger, and J. Thomas Rowen of Miller, Carpenter, Rowen, Fitzgerald and Coe, P.C., for appellees.

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

CAPORALE, J.

Plaintiffs-appellants, Joseph M. and Kim L. Sasich

and other homeowners, hereinafter sometimes collectively referred to as Sasich, residing in the Fountain Hills subdivision of Douglas County, Nebraska, appeal from the district court's denial of their request that the defendant-appellee City of Omaha be enjoined from effectuating certain zoning ordinances enacted by its council. We affirm the judgment of the district court.

In 1965 Parks Construction Company erected a building upon a 10-acre parcel of land which is south of but fronts upon Pacific Street at 158th Street in Douglas County, Nebraska. The building and land are used as the headquarters of a construction company and yard for the storage of materials and equipment. At the time Parks bought the land and erected the building, the land was zoned M-1 by Douglas County. This land use classification generally allows for light industrial uses, of which Parks' use was a permitted one.

In 1967 the Parks land and the then undeveloped lands now owned by Sasich and the other homeowners were brought within the zoning authority of the City of Omaha, which classified the major portion of these lands as Second Suburban. This municipal zoning classification allows the land to be used for, among other things, single-family dwellings, agricultural purposes, churches, colleges, schools, libraries, parks, fire stations, hospitals, horticultural nurseries, stables, dog kennels, day care centers, and sanitary landfills.

In early 1982 Parks requested a change of zoning from the Omaha City Council. Its request was prompted by Parks' recent discovery that the zoning of the property had been changed in 1967, Parks' attention having been drawn to this fact by a potential buyer for the 10-acre parcel. The city planning department recommended to the city planning board that Parks' request be denied. The planning board nevertheless voted to recommend to the city council that the zoning be changed. The city council agreed

with the planning board, and by a 5-to-2 vote enacted four ordinances zoning certain portions of Parks' property First Industrial, First Industrial (Flood Plain), Parking One, and Parking One (Flood Plain). Sasich and other residents of the Fountain Hills subdivision, which is situated on the north side of Pacific Street between 156th and 160th Streets and extends north from Pacific Street to Howard Street, protested the proposed zoning ordinances, to no avail.

Sasich's 10 assignments of error arrange themselves into three issues: (1) Whether the action of the Omaha City Council in adopting the questioned zoning ordinances is arbitrary, capricious, unreasonable, an abuse of discretion, and in excess of its statutory zoning authority; (2) Whether the ordinances impermissibly perpetuate a nonconforming use; and (3) Whether the district court erred by refusing to receive in evidence the depositions of certain city council members who voted for the ordinances.

An action to enjoin enforcement of a city ordinance is one in equity. *Speier's Laundry Co. v. City of Wilber*, 131 Neb. 606, 269 N.W. 119 (1936). As such, in addressing the issues presented we review the record 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. *Grint v. Hart*, *ante* p. 406, 343 N.W.2d 921 (1984); *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 560 (1983).

We recognize that the homeowners wish to frame the first issue as one involving impermissible "spot zoning" such as that found in *Weber v. City of Grand Island*, 165 Neb. 827, 87 N.W.2d 575 (1958). In that case an ordinance changed the residential zoning of a half-block area to a business zoning in order that a chain store could be located thereon. The property was surrounded by residences. This court found

that zoning ordinance to be impermissible spot zoning, as there was no evidence that the ordinance was designed to promote the health, safety, morals, or general welfare, and was also not in accord with the city's comprehensive plan. As will be shown later, these factors are considered in determining the validity of a zoning ordinance, whether the issue is framed as one involving spot zoning or otherwise. The case of *Keller v. City of Council Bluffs*, 246 Iowa 202, 66 N.W.2d 113 (1954), leads to our decision not to consider the ordinances in this case as presenting a spot zoning question. In that case lots in a residential neighborhood, which for many years had been the site of a nonconforming convalescent home, were rezoned to a less restrictive classification which permitted convalescent home use. The Iowa court found that issues raised by the spot zoning cases from other jurisdictions, including Nebraska, were not dispositive, since the ordinance merely recognized a previous nonconforming use. See, also, *Chayt v. Maryland Jockey Club*, 179 Md. 390, 18 A.2d 856 (1941); *Goddard v. Stowers*, 272 S.W.2d 400 (Tex. Civ. App. 1954).

In the present case Parks had been using the 10-acre parcel in a manner incompatible with the surrounding suburban-zoned property for approximately 17 years prior to the enactment of the city ordinances. Those ordinances did not allow the introduction of a new and unknown use of the property surrounding the homeowners' property. Accordingly, the question of spot zoning is not at issue here. This, however, does not end our inquiry. We must still determine if the zoning ordinances were a proper exercise of Omaha's statutorily granted zoning powers.

In making such a determination we are bound by the rule that the validity of a zoning ordinance is to be presumed in the absence of clear and satisfactory evidence to the contrary. *Weber v. City of Grand Island, supra*; *Davis v. City of Omaha*, 153 Neb. 460,

45 N.W.2d 172 (1950). We have also stated: " ' "It is difficult, if not impossible, to lay down any general rules describing the exact field of operation of such [a municipality's zoning] power that will fit cases arising in the future. Each must be controlled by the special conditions and circumstances surrounding it." ' " *Weber v. City of Grand Island*, *supra* at 831, 87 N.W.2d at 578.

Chapter 14 of the Nebraska Revised Statutes deals with the powers granted cities of the metropolitan class, of which Omaha is the only member. Among those is the power to enact zoning regulations. Neb. Rev. Stat. § 14-402 (Reissue 1977). Neb. Rev. Stat. § 14-403 (Reissue 1977) provides: "Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to secure safety from flood; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements, and to promote convenience of access. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. Whenever the city council shall determine that the use or contemplated use of any building, structure or land will cause congestion in the streets, increase the danger from fire or panic, imperil public safety, cause undue concentration or congregation of people, or impede transportation, the council may include in such regulations requirements for alleviating or preventing such conditions when any change in use or zoning classification is requested by the owner."

Sasich claims that the ordinances were not in ac-

cordance with a comprehensive plan. In support of this claim Sasich introduced the testimony of an employee of the city planning department who testified that the future land use plan adopted in 1977, a portion of the city's master plan, indicated that the Parks property is to be used for residential purposes. Sasich is satisfied that the term "comprehensive plan" in § 14-403 refers to the future land use plan. We are not.

The term "comprehensive plan" is also contained in the zoning statutes covering cities of the primary class. Neb. Rev. Stat. § 15-901 (Reissue 1977). The term is defined and the requirements of a comprehensive plan for a city of the primary class are detailed at Neb. Rev. Stat. § 15-1102 (Reissue 1977). No such definition of the term is offered by the statutes covering cities of the metropolitan class, although Neb. Rev. Stat. § 14-373 (Reissue 1977) authorizes and requires such a city to develop a "city plan." In light of the fact that the Legislature saw fit to define the term "comprehensive plan" for cities of the primary class and not for cities of the metropolitan class, combined with the use of the term "city plan" and not "comprehensive plan" in § 14-373, we are drawn to conclude that the term "comprehensive plan" in the zoning statutes and the term "city plan" are not synonymous. Simply because a document prepared by the city planning department indicates that in 1977 it was envisioned that the Parks property would be used as residential property, regardless of the fact that it was then and for 12 years prior to that time used for industrial purposes, does not lead us to mechanically conclude that the questioned ordinances are not in accordance with a comprehensive plan.

In *Davis v. City of Omaha*, 153 Neb. 460, 45 N.W.2d 172 (1950), a zoning ordinance which would allow high rise apartments in a residential area previously limiting apartment complexes to six units was found invalid. In that case this court found that the zoning

action did not follow a comprehensive plan. Therein, it was shown that the area surrounding the subject property was of essentially the same character and zoning. We stated at 469, 45 N.W.2d at 177: "By way of application of section 14-403, R.S. 1943, to the disclosed situation this zoning action clearly did not follow a comprehensive plan. It applied to only one block among several whose condition, position, and relation to each other was the same or similar." It is apparent from this opinion that the term "comprehensive plan" is used with respect to a metropolitan city in its generic sense and does not refer to any special document. The essence of the term "comprehensive plan" implies that not just the subject property but other similarly situated property is considered in the zoning decision. It requires rationality and some degree of consistent treatment. Applying this definition to the situation at hand, Sasich has not shown that the rezoning of the Parks property is not in accordance with a comprehensive plan. The future land use plan shows that almost all of the land which abuts on or lies near the main rail line of the Union Pacific, as it crosses the length of the city, is designated as industrial and that industrial zoning lies between the rail tracks and a major street, serving as a buffer to the residential areas. A nearly identical situation is present here. The Parks property corners on the Union Pacific right-of-way, and the residential areas to the north are buffered by a major street. Other than pointing to the fact that the zoning does not jibe with the future land use plan, Sasich makes no other showing that the zoning is not in accordance with a comprehensive plan. As such, the burden to produce clear and satisfactory evidence that the ordinances are not in accordance with a comprehensive plan has not been met on this point.

Sasich further contends that the city has not stayed within its statutory guidelines as found in § 14-403, in that the zoning regulation does not lessen

congestion in the streets or promote public safety, health, and general welfare. The city presented evidence that the zoning would promote the general welfare by encouraging economic development and creating jobs. We do not read § 14-403 to require that each zoning ordinance achieve each of the beneficial purposes listed by the statute. It is hard to imagine any restriction on the use of land which could possibly promote each of those diverse interests. The last sentence of § 14-403 implicitly supports this interpretation. It provides: "Whenever the city council shall determine that the use or contemplated use of any building, structure or land will cause congestion in the streets, increase the danger from fire or panic, imperil public safety, cause undue concentration or congregation of people, or impede transportation, the council may include in such regulations requirements for alleviating or preventing such conditions when any change in use or zoning classification is requested by the owner."

The subject property which is zoned P-1 is required to be landscaped. The P-1 zoning designation completely surrounds the industrial-zoned portion of Parks' property, and a plan for the planting of trees and shrubs around the property has been filed with the city planning department.

In short, it appears that the zoning ordinances were enacted with due regard to the health, safety, and general welfare of the community, and within statutorily granted powers as enumerated in § 14-403.

The second issue raised by Sasich's appeal is whether the zoning ordinances impermissibly perpetuate a nonconforming use. Sasich's theory seems to be that a zoning ordinance which recognizes and legitimizes a nonconforming use is objectionable upon that basis alone. In support of this somewhat mysterious theory, we are cited to *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964). In that case the plaintiff operated a dog kennel at his

residence, an operation which predated a city ordinance forbidding such activity. The ordinance was later amended to provide that any nonconforming use would cease as of a certain date. The owner of the kennel sought a ruling that the amendment was unconstitutional. We held that it was not. We do not understand how a case which allows the city to eliminate a nonconforming use by banning a prior use can be said to support the proposed theory. While we did state in *Wolf*, citing from another jurisdiction, " 'It was not and is not contemplated that pre-existing nonconforming uses are to be perpetual,' " *id.* at 566, 129 N.W.2d at 513, the applicability of that statement to the present facts does not support Sasich's theory. The ordinances in question herein do not perpetuate a nonconforming use, they destroy that characterization of Parks' use of the property. The ordinances make Parks' present use a conforming and lawful one.

The last issue raised by Sasich's assignments of error involves an evidentiary question. The district court refused to accept into evidence depositions of certain Omaha City Council members who voted for the zoning ordinances. The depositions would show, Sasich contends, the reasons that these council members voted for the ordinances. Sasich argues that those depositions are relevant because they would show that those council members did not believe the zoning change would promote the health, safety, morals, or general welfare of the community.

In determining whether the exercise of legislative authority by a city council is within its statutorily granted powers, we are not concerned with the motives, purposes, or personal beliefs of an individual city council member. If an ordinance in question is a valid exercise of the power granted to a city, courts will not inquire into the motives or reasons of the city council in enacting it. *Dundee Realty Co. v. City of Omaha*, 144 Neb. 448, 13 N.W.2d 634 (1944). See, also, *Angle v. Chicago, St. Paul &c.*

Railway, 151 U.S. 1, 14 S. Ct. 240, 38 L. Ed. 55 (1894). In this case it was incumbent upon Sasich to show that the zoning ordinances did not meet the requirements of the relevent zoning statutes. That burden must be met without involving the judicial branch of government in a probe of the reasons motivating a particular elected official's vote on the matter. We are concerned here with the question of whether the city council had the legitimate power to do what it did, not with the mental machinations of the persons exercising that power. The trial court correctly excluded the depositions of the council members.

An additional matter presents itself upon our review of the record, which neither party addresses in the briefs, but which merits comment. A member of the legal academic community was allowed to testify, over objection, concerning his review and analysis of our opinions in cases involving zoning disputes. Such testimony is irrelevant and inadmissible. 32 C.J.S. *Evidence* § 546(86) (1964). The general rule is that relevant evidence is admissible. Neb. Rev. Stat. § 27-402 (Reissue 1979). Relevant evidence is that which has a tendency to make the existence of a *fact* of consequence to the determination of an action more probable or less probable. Neb. Rev. Stat. § 27-401 (Reissue 1979). While our rules of evidence allow for expert testimony, that testimony must be such as to assist the trier of fact to understand the evidence or to determine a fact issue. Neb. Rev. Stat. § 27-702 (Reissue 1979). Expert testimony concerning the status of the law generally accomplishes neither of these goals. While we do not underestimate the value of legal scholars in providing the judiciary of this state with stimulating and often persuasive commentaries on the state of our law, how particular cases fit, or do not fit, within a body of law, the better reasoned view of a particular rule, even the perceived future direction of the law, and a host of other matters, their scholarship should not reach a judge's attention by way of

the witness stand. When a judge considers the works of legal academicians to be of potential aid in the exercise of his judicial function, he will seek that help in the published treatises and journals. If a party fears that a judge may neglect to consider a valuable and persuasive opinion of a legal scholar, his attention may be directed to the work in an appropriate brief.

AFFIRMED.

MICHAELINE K. WALTON, APPELLANT, V. DAVID J. WALTON, APPELLEE.

346 N.W.2d 401

Filed March 30, 1984. No. 83-198.

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

E. Terry Sibbernsen of Welsh, Sibbernsen & Roach, for appellant.

Joseph P. Caniglia of Seminara, Caniglia, Turco, McCarthy & Sacoman, for appellee.

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

PER CURIAM.

The instant appeal involves a domestic relations matter.

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

AFFIRMED.

RITA ERICKSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF LOYAL D. ERICKSON, DECEASED, ET AL., APPELLANTS AND APPELLEES, V. MONARCH INDUSTRIES, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS AND APPELLEES, SORGEL ELECTRIC CORPORATION, A WISCONSIN CORPORATION, ET AL., APPELLEES.

347 N.W.2d 99

Filed March 30, 1984. No. 83-308.

1. **Negligence.** It is not necessary for an actor to foresee the exact risk which occurred in order to support a finding of negligence.
2. **Contractors and Subcontractors: Negligence.** A contractor cannot delegate its duty to provide safe electrical wiring by employing a subcontractor to perform the electrical work.
3. _____: _____. A contractor who creates a dangerous condition which is latent and not discoverable by reasonable inspection is not relieved of liability by acceptance of the work by the owner.
4. **Jury Instructions: Appeal and Error.** Instructions must be considered and construed together, and if they adequately present the issue to the jury, it is not error for the court to fail to give a more specific instruction.
5. **Jury Instructions.** If a more specific instruction is desired, it is the duty of counsel to request it.
6. **Products Liability: Strict Liability.** Misuse of the product is a defense to strict liability.
7. _____: _____. A supplier who fails to test or inspect a product before sale is not liable in an action for negligence if he does not know or have reason to know that the product is likely to be dangerous.
8. _____: _____. A supplier has a right to rely upon the inspection and tests performed by the manufacturer.
9. _____: _____. Warning is unnecessary where the supplier of the product has reason to believe that those who use it will have such special experience as will enable them to perceive the danger.
10. _____: _____. The seller is entitled to have his due warnings and instructions followed; and when they are disregarded, and injury results, he is not liable.
11. _____: _____. A seller is not liable when he delivers a product in a safe condition and subsequent mishandling or other causes make it harmful by the time it is consumed.
12. **Products Liability: Words and Phrases.** "Unreasonably dangerous" is defined as meaning 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.
13. **Products Liability: Strict Liability.** A plaintiff who seeks to im-

pose strict liability upon a defendant for defective product design must prove there was some practicable way the product could have been made safer.

14. **Strict Liability.** Strict liability is not a no-fault system of compensation.

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

William A. Wieland of Healey, Brown, Wieland, Kluender, Atwood & Jacobs, and John Heitz, for appellant and appellee Erickson.

Jewell, Otte, Gatz & Collins, for appellant Walters-Heiliger.

John H. Cotton and David D. Ernst of Gaines, Otis, Haggart, Mullen & Carta, for appellant and appellee Monarch Industries.

Waldine H. Olson of Schmid, Ford, Mooney & Frederick, for appellees Sorgel Electric and Square D.

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

BOSLAUGH, J.

This is an action by the personal representative of Loyal D. Erickson to recover damages for his wrongful death. Erickson died as the result of injuries sustained in an accident at a grain drying facility near Bassett, in Rock County, Nebraska. There were no witnesses to the accident.

Erickson was found dead at the facility at about 6:30 a.m. on October 5, 1977. The facility was owned by LaVern Krieger, who had contracted with Sandhills Grain, Inc., to operate the facility during the corn harvest in 1977. Erickson was employed by Sandhills Grain, Inc., as the night operator at the time he was killed. Sandhills Grain, Inc., was joined as a plaintiff for workmen's compensation subrogation purposes.

The defendants are Monarch Industries, Inc. (Monarch); Walters-Heiliger Electric, Inc.

(Walters-Heiliger); Sorgel Electric Corporation (Sorgel); and Square D Company (Square D).

The facility consisted of four large bins or tanks for storing dry grain, a tank for holding wet grain, two large dryers, and other equipment for weighing, handling, and moving the grain.

The electric service to the facility was 3-phase 480-volt service. The large horsepower motors of the facility were served directly by the 480-volt current. Two fractional horsepower motors and the control systems on the dryers, together with the lighting, required 120-volt current. The 120-volt current was supplied from a 2kVA transformer installed in the electrical control cabinet.

The plaintiffs' theory of the case was that the 2kVA transformer installed in the electric cabinet failed, causing an explosion. The explosion blew open the doors of the cabinet, which struck Erickson on the forehead, causing his death.

Monarch was the general contractor which constructed the facility. Walters-Heiliger was a subcontractor which performed some of the electrical work and furnished and installed the 2kVA transformer at the facility. The transformer, which had been manufactured by Westinghouse, was supplied to Walters-Heiliger by Sorgel, a subsidiary or division of Square D.

The plaintiffs alleged that Walters-Heiliger was negligent in that it failed to install a transformer of proper capacity; that the transformer was improperly connected; that it failed to give adequate warning of the risks involved with overloading the transformer; that Monarch was responsible for the negligent acts of Walters-Heiliger; and that Sorgel and Square D were negligent in failing to test the transformer, in supplying a defective transformer, and in failing to give adequate warnings. The plaintiffs also sought recovery against Sorgel and Square D on theories of strict liability.

The jury returned a verdict in the amount of

$300,000 in favor of the plaintiffs against Monarch and Walters-Heiliger, and in favor of Sorgel and Square D. Monarch and Walters-Heiliger appeal from the judgment against them. The plaintiffs appeal from the judgment in favor of Sorgel and Square D.

The evidence shows that the leads from the secondary coils of the 2kVA transformer installed by Walters-Heiliger could be connected in several different ways. If wired or connected as a 2kVA transformer, the current supplied by the secondary windings would be 16.66 amperes. When wired as two 1kVA transformers, the current supplied by each winding was only 8.33 amperes. The plaintiffs' evidence was that the transformer was wired so that it was in effect two 1kVA transformers. The result was that there was approximately a 50-percent overload on the transformer when the facility was operating. As installed, the circuits connected to the secondary coils were protected by a 15-ampere fuse.

The evidence further shows that the coils of the 2kVA transformer were surrounded by a fill material consisting of a resin and sand. The resin was an organic material which would give off flammable gases when heated. The jury could find that the transformer became overheated as a result of the overload, and flammable gases were released into the cabinet. When the main disconnect switch was thrown, the arc from the switch ignited the gases in the cabinet and caused the explosion.

Walters-Heiliger and Monarch contend that the trial court should have found as a matter of law that the production of combustible gases by the transformer was not foreseeable. These appellants argue that since the production of the gases was not reasonably foreseeable, there could be no finding of negligence.

The issue presented by the evidence and the pleadings was not whether Monarch and Walters-Heiliger were negligent in failing to foresee the specific risk that flammable gases would be produced, but, rather, whether they should have known that the

method used in installing and wiring the transformer presented an unreasonable risk of harm.

In *Lorence v. Omaha P.P. Dist.*, 191 Neb. 68, 214 N.W.2d 238 (1974), we held that it is not necessary for an actor to foresee the exact risk which occurred in order to support a finding of negligence; rather, it is sufficient that he knew or should have known that substantial injury would result from his act or omission. "It suffices to charge a person with liability for a negligent act if some injury to another ought reasonably to have been foreseen as the probable result thereof by the ordinarily intelligent and prudent person under the same circumstances, even though the specific injury might not be foreseeable." *Gillotte v. Omaha Public Power Dist.*, 185 Neb. 296, 302, 176 N.W.2d 24, 28 (1970). We conclude that the issues as to whether Walters-Heiliger and Monarch were negligent in failing to install a transformer of the proper size, in failing to properly connect the transformer, and in failing to adequately warn of the risks involved were properly submitted to the jury.

Monarch contends that it cannot be held liable for the negligence of Walters-Heiliger. Monarch relies on the general rule that the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. *Sullivan v. Geo. A. Hormel and Co.*, 208 Neb. 262, 303 N.W.2d 476 (1981). There are exceptions to this rule of nonliability. The general contractor remains liable for the negligence of the subcontractor "if he retains 'control' of the work—or if, by rule of law or statute, the duty to guard against the risk is made 'nondelegable'." *Funk v General Motors Corp*, 392 Mich. 91, 101, 220 N.W.2d 641, 645 (1974).

In the present case Monarch had a nondelegable duty to provide a facility which was safely wired. "The nondelegable duty exception is based upon the theory that certain responsibilities of a principal are so important that the principal should not be per-

mitted to bargain away the risks of performance." *Arsand v. City of Franklin*, 83 Wis. 2d 40, 54, 264 N.W.2d 579, 586 (1978), at n.8.

The nondelegable duty exception to the rule of nonliability was described by the court in *Witucke v Presque Isle Bank*, 68 Mich. App. 599, 610, 243 N.W.2d 907, 912 (1976): "[W]e believe that an essential element of the doctrine is the failure of the principal to see that all appropriate precautions are taken by the one to perform the inherently dangerous task. The doctrine, in short, says that the principal is negligent, and hence liable, because it has allowed the independent contractor to be negligent in performing the job. There is a nondelegable duty to see that the work is done with the requisite degree of care; when the contractor fails in fulfilling its duty of care, the principal has breached its own precautionary duty.

In *Rose v. Buffalo Air Service*, 170 Neb. 806, 104 N.W.2d 431 (1960), we held that an air service employed to spray a crop of beets with Toxaphene could not delegate its obligation to use due care or depend upon anyone else to take precautionary measures in that regard. We quoted at 834, 104 N.W.2d at 447, the following from *Hickman v. Parks Construction Co.*, 162 Neb. 461, 76 N.W.2d 403 (1956): " 'The person on whom the duty devolves is not excused from taking the necessary precautions by contracting with or relying on others to take necessary precautionary measures.' " In *Hickman*, *supra*, the defendant had entered into a contract with an officers' club to improve its facility. Plaintiff was injured when he fell into an open excavation. Defendant argued that it was not liable, as it had left the matter of protecting the site to the officer in charge of the club. We held the duty to protect against the danger to be nondelegable.

In *Hammond v. The Nebraska Nat. Gas Co.*, 204 Neb. 80, 281 N.W.2d 520 (1979), we held that the duty owed to the public to install pipes and fittings of

good material and workmanship and to maintain them in good condition could not be delegated. We held that any negligence on the part of the pipe manufacturer did not serve to relieve the gas company of liability for an explosion which occurred when the pipe pulled out of a coupling, thereby allowing gas to escape. See, also, *Crosswhite v. City of Lincoln*, 185 Neb. 331, 175 N.W.2d 908 (1970), in which we held that a city cannot delegate its duty to construct and maintain a reasonably safe waterworks system, as the city acts in a proprietary capacity.

In the present case Monarch entered into an agreement to construct the grain drying facility. Monarch employed Walters-Heiliger to perform the necessary electrical wiring. Walters-Heiliger was required to exercise utmost care and skill in providing the proper components and in wiring the facility, as it was providing a dangerous commodity. See, *Roos v. Consumers Public Power Dist.*, 171 Neb. 563, 106 N.W.2d 871 (1961); *Lorence v. Omaha P.P. Dist.*, 191 Neb. 68, 214 N.W.2d 238 (1974). Monarch could not delegate its duty to provide a facility that was wired safely.

Monarch and Walters-Heiliger contend that after the facility was completed and accepted by Krieger, the contractor and subcontractor cannot be held liable for defects which injure third persons. The general rule was stated in *Stover v. Ed Miller & Sons, Inc.*, 194 Neb. 422, 425, 231 N.W.2d 700, 703 (1975): " 'A construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed and accepted by the owner.' "

The exception to this rule was described in *Florida Freight Terminals, Inc. v. Cabanas*, 354 So. 2d 1222, 1225 (Fla. App. 1978): "An independent contractor

is not liable for injuries to third parties after the contractor has completed his work and turned the project over to the owner or employer and it has been accepted by him *unless* the parties were dealing with inherently dangerous elements or the defect at issue was latent and could not have been discovered by the owner or employer."

In *Simmons v. Owens*, 363 So. 2d 142, 143 (Fla. App. 1978), the court said: "The general rule . . . is subject to the exception that a contractor is not relieved of liability where he creates a dangerous condition or unreasonable risk which is latent and not discoverable by reasonable inspection." See, also, *Slavin v. Kay*, 108 So. 2d 462 (Fla. 1959).

In the present case the defect in the wiring of the transformer was latent and not reasonably discoverable by the owner, Krieger. Moreover, the installation of the electrical transformer was an inherently dangerous task such that the law will not relieve the contractors' liability for their negligence merely because Krieger accepted the facility.

It was clearly foreseeable that danger and harm could result if the transformer was undersized, improperly wired, and improperly fused. Walters-Heiliger, as skilled electricians, was chargeable with knowledge that an overloaded transformer will become overheated and may cause a fire or other dangerous condition. It was not essential that the precise happening in this case be foreseeable.

Monarch and Walters-Heiliger further contend that the trial court should have instructed the jury that certain instructions which applied only to Sorgel and Square D were inapplicable to Monarch and Walters-Heiliger. In the absence of a specific instruction limiting applicability, these appellants object to the giving of the instructions pertaining to strict liability.

Instructions must be considered and construed together, and if they adequately present the issue to the jury, it is not error for the court to fail to give a

more specific instruction. *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981). If a more specific instruction is desired, it is the duty of counsel to request it. *Smith v. Wrehe*, 199 Neb. 753, 261 N.W.2d 620 (1978); *Fisher v. Gate City Steel Corp.*, 190 Neb. 699, 211 N.W.2d 914 (1973).

In instruction No. 2 the jury was advised that the plaintiffs alleged that Sorgel and Square D were liable for decedent's death under a strict liability theory. All of the other instructions objected to clearly applied only to Sorgel and Square D. Instructions Nos. 8, 33, and 34 stated that they were applicable only to Sorgel and Square D. Instructions Nos. 26, 27, 28, 29, 30, 31, and 32, by their specific terms, applied only to the *manufacturer*. Instruction No. 21 was a negligence instruction which was applicable to all defendants and could not be a basis for this assignment of error. Instruction No. 25 defined "unreasonably dangerous," a term used only in the strict liability cause of action against Sorgel and Square D.

We conclude that the instructions, when read as a whole, fairly presented the issues to the jury and were not erroneous. In the absence of a request for a more specific instruction, Monarch and Walters-Heiliger cannot predicate error on the court's failure to give a more specific instruction.

The plaintiffs contend the trial court erred in refusing to give the plaintiff's requested instruction No. 24 and in giving instructions Nos. 23, 24, 29, 30, 33, and 34 over the plaintiff's objections. The instructions involved related to the plaintiffs' claims against Sorgel and Square D based upon theories of negligence and strict liability. From our examination of the record we have concluded that the assignments of error are without merit.

Instruction No. 24 requested by the plaintiffs related to foreseeability, and stated that it is sufficient if some injury is reasonably foreseeable even though

the specific injury might not be foreseeable. Instruction No. 24 given by the trial court related to foreseeability, and advised the jury that an actor is responsible for a consequence which is probable according to ordinary and usual experience. Under the circumstances of this case we believe the failure to give the requested instruction in the exact form in which it was submitted was not prejudicially erroneous.

As to the other instructions given by the trial court and objected to, instruction No. 23 on intervening cause was taken from NJI 3.43. Instruction No. 34 related to use of the product and was taken from 3 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 82.10 (3d ed. 1977). It advised the jury that the defendants Sorgel and Square D were liable for a misuse of the transformer only if it was being used in a manner for which it was adapted and which was *reasonably* foreseeable by the defendants.

In *Edwards v. Sears, Roebuck and Company*, 512 F.2d 276, 289 (5th Cir. 1975), the court stated: "In Mississippi and most jurisdictions, however, the doctrine of strict liability stops short of declaring liability in all cases where both injury and defect are proved, for '[a] product is not in a defective condition when it is safe for *normal* handling and consumption.' Restatement of Torts Second, Section 402A, Comment *h* (emphasis added). Notions of foreseeability and proximate cause have been injected, in a limited way, into strict liability in order to avoid imposing excessive liability on manufacturers. Professor Prosser has noted that 'the seller is entitled to expect a normal use of his product, and is not liable when it is put to an abnormal use.' Thus, the seller is not liable when the product is mishandled, or used in some unusual and unforeseeable way. 'The seller is entitled to have his due warnings and instructions followed; and when they are disregarded, and injury results, he is not liable.' Pros-

ser, *supra*, § 102, at 668-669." In *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), and *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979), we noted that misuse of the product is a defense to strict liability.

Instruction No. 29 advised the jury that compliance with standardized tests was *evidence* of due care. Instruction No. 30 advised the jury that a manufacturer has a right to assume that its instructions will be followed. Instruction No. 33 related to the "state of the art" defense, and advised the jury that it might consider evidence as to the practices followed by other manufacturers but that such evidence was not controlling, and the question was whether the evidence disclosed that anything more could reasonably and economically be done. We find no error in any of these instructions.

We further conclude that the evidence was not sufficient to support a finding of liability against Sorgel and Square D on either theory. Accordingly, any alleged error in the instructions was not prejudicial. *McClellen v. Dobberstein*, 189 Neb. 669, 204 N.W.2d 559 (1973).

The plaintiffs alleged that Sorgel and Square D were negligent in failing to test the insulation material in the transformer; in failing to require Westinghouse to test it; in failing to warn the user of the danger it presented; and in supplying a dangerous product.

The record shows that the transformers had been tested by a number of agencies, including Underwriters Laboratories, and that Westinghouse performs all of the tests required by Underwriters Laboratories and the National Electrical Manufacturers Association on all of the transformers it manufactures. In addition to all of the tests prescribed by these agencies, Westinghouse performs all of the tests prescribed by the Institute of Electronic and Electrical Engineers, the American National Standards Institute, and the tests which other manufac-

turers perform. A supplier has a right to rely upon the inspection and tests performed by the manufacturer. See, *Chandler v. Northwest Engineering Co.*, 111 Misc. 2d 433, 444 N.Y.S.2d 398 (1981); *Zesch v. The Abrasive Co. of Philadelphia*, 353 Mo. 558, 183 S.W.2d 140 (1944); *Henkel v. R and S Bottling Co.*, 323 N.W.2d 185 (Iowa 1982).

None of the tests conducted indicated that the fill material was dangerous at temperatures to which the transformer might conceivably be exposed before the transformer would fail. In the absence of evidence from which it could be concluded that Sorgel and Square D should not in the exercise of due care have relied upon the tests performed by the manufacturer, Sorgel and Square D could not be held liable for failing to test or requiring the manufacturer to further test the transformer.

There was no evidence from which it could be concluded that Sorgel and Square D were negligent in failing to warn a user of any danger presented by the product. The transformer was not a product intended for use by persons unskilled in the installation and wiring of electrical equipment. The manufacturer included directions for wiring with the transformer and referred the user to the National Electrical Code for proper fusing.

In *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 465 (5th Cir. 1976), the court said: "Comment *k* to this provision [Restatement (Second) of Torts § 388 (1965)] adds that warning of a product's defects is unnecessary where the supplier of the product has 'reason to believe that those who will [sic] use it will have such special experience as will enable them to perceive the danger . . . .' "

The court went on to hold that the supplier of a chemical product used in stripping a barge was not liable for negligent failure to warn. "In view of the limited marketing of Hytrol-D to industrial users, DuPont could reasonably anticipate that only professionals familiar with the precautions necessary for

safe handling of benzene and similar petrochemical substances would come in contact with or otherwise handle the cargo of the B-29. The Wilsco stripping crew was in fact composed of such professionals, and the crew had been made aware of the nature of the liquid residue to be stripped from the barge. At least with regard to individuals having such expertise, the warnings provided by DuPont in the form of the benzene warning card and the product identification card should have been adequate to apprise crew members of the hazards . . . ." *Id.* at 465. A seller has a right to expect that his instructions are followed. " 'The seller is entitled to have his due warnings and instructions followed; and when they are disregarded, and injury results, he is not liable.' Prosser, *supra*, § 102, at 668-669." *Edwards v. Sears, Roebuck and Company*, 512 F.2d 276, 289 (5th Cir. 1975).

In light of the fact that the manufacturer's instructions for proper wiring were included with the transformer, and the supplier knew that those to whom it would be sold would have special knowledge as to how to install the transformer, we conclude that the supplier had no additional duty to warn. It was only because of improper wiring and installation that the transformer could cause any hazard.

Under these circumstances Sorgel and Square D had a right to assume that Walters-Heiliger would follow the instructions. It is not reasonably foreseeable that a consumer of particular expertise would fail to follow directions. See *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542 (Iowa 1980).

A manufacturer or supplier is not required to warn about every conceivable danger that might arise from the misuse of the product. *Westerberg v. School District No. 792*, 276 Minn. 1, 148 N.W.2d 312 (1967). Failure to follow plain and unambiguous instructions is a misuse of the product. *Procter & Gamble Manufacturing Co. v. Langley, on rehearing* 422 S.W.2d 773 (Tex. Civ. App. 1967).

Sorgel and Square D merely supplied a 2kVA transformer to Walters-Heiliger, with no information as to how it would be installed and wired by the purchaser. If the transformer had been installed, wired, and fused in accordance with the directions and instructions supplied by Sorgel and Square D, there would not have been an accident. Neither the manufacturer nor the supplier was under a duty to anticipate such improper use and warn against possible dangers. *Westerberg, supra.*

There was no evidence in this case that the transformer was defective at the time it was supplied to Walters-Heiliger by Sorgel and Square D. A seller is not liable when he delivers a product in a safe condition and subsequent misnandling or other causes make it harmful by the time it is consumed.

The transformer was considered to be one of the safest manufactured because the coils of the transformer were embedded in the fill material. From 1971 through 1977 Sorgel and Square D sold more than 148,000 transformers containing the fill material. From 1970 to 1976 Westinghouse sold approximately 508,000 such transformers. Examination of failed transformers disclosed virtually no burned or scorched fill material. No witness, including the expert witnesses called by the plaintiffs, had ever heard of this type transformer emitting flammable gases so as to cause an explosion.

Sorgel and Square D in this case occupied the same relationship to Monarch and Walters-Heiliger as Winger Boss Company, Inc., did to Iowa Beef Processors, Inc., in *Moon v. Winger Boss Company, Inc.*, 205 Neb. 292, 287 N.W.2d 430 (1980). In that case Winger Boss was held not liable to an injured party where the machinery supplied by Winger Boss had been manufactured to specifications established by Iowa Beef.

The plaintiffs failed to prove that Sorgel and Square D should be held strictly liable. There was no proof that the transformer provided by Sorgel

and Square D was unreasonably dangerous if properly wired. "Unreasonably dangerous" is defined as meaning that " 'the product had 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, 484, 283 N.W.2d 25, 37 (1979).

There is no evidence from which it could be concluded that the product was negligently designed. The transformer was designed so that it would fail when severely overloaded.

The wire in the windings of the transformer was insulated with enamel. The layers of coil wire were separated by Kraft paper. The enamel was expected to fail at 200° C, and the Kraft paper at 233° C, resulting in short circuits in the transformer. In one of the tests performed by Underwriters Laboratories in which the transformer was subjected to a 200-percent overload, the transformer burned out and failed in 27 minutes.

In the laboratory experiments conducted by the plaintiffs' expert witness, temperatures in excess of 300° C were required to produce flammable gas in appreciable quantities from the fill material.

A manufacturer has a duty to use reasonable care in the design of goods to protect the consumer from unreasonable risk of harm while the goods are being used for their intended purpose or any purpose which could reasonably be expected. *Friedrich v. Anderson*, 191 Neb. 724, 217 N.W.2d 831 (1974). As noted earlier, the failure of Walters-Heiliger to follow the wiring instructions was not a use which could reasonably be expected. The manufacturer was not obligated to design a product safe for an unforeseeable misuse.

The transformer was designed to be used with proper fusing, a safety apparatus which would prevent overheating due to overloading. In the absence

of any evidence that the safety device was not a reasonable preventative of injury under proper use, it cannot be concluded that the transformer was negligently designed. See, *Westerberg v. School District No. 792*, 276 Minn. 1, 148 N.W.2d 312 (1967); *Rogers v. Unimac Co., Inc.*, 115 Ariz. 304, 565 P.2d 181 (1977).

In a case, such as the present one, where a plaintiff seeks to impose strict liability upon a defendant for defective product design, the plaintiff must prove there was some practicable way the product could have been made safer. *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983). See, also, *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978), in which the court held that the plaintiff must demonstrate that a useful and desirable product could have been made safer without significant impact on product effectiveness and manufacturing cost. In that case the court stated, "[S]trict liability is not a no-fault system of compensation." *Id.* at 806, 395 A.2d at 845-46.

In the present case there was no proof that a safer, practicable, and economically feasible method of insulating a transformer was available.

The judgment of the district court in favor of the plaintiffs and against the defendants Monarch and Walters-Heiliger is affirmed; and the judgment against the plaintiffs and in favor of the defendants Sorgel and Square D is affirmed.

AFFIRMED.

JEFFREY A. JOHNSON AND RONNI JOHNSON, APPELLEES, V. RUBY MAYS, APPELLANT.

346 N.W.2d 401

Filed March 30, 1984. No. 83-311.

1. **Equity: Appeal and Error.** In an equity action it is the duty of the

Supreme Court to try the issues de novo upon the record and reach an independent conclusion without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the facts that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief of the matters at issue in the case.

2. **Easements.** An easement of necessity does not arise from an express grant, but is an easement arising either by implied grant or reservation. Such implied easements ordinarily arise in cases where land owned by one entity is divided by sale of a portion and the beneficial use of one tract or the other depends on an easement for ingress or egress or other purpose.

3. _____. One who purchases land with knowledge or with actual, constructive, or implied notice that it is burdened with an easement in favor of other property ordinarily takes the estate subject to the easement.

4. **Parties.** 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 interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

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

Bump, Howland & Watson, for appellant.

Michael T. Varn, for appellees.

KRIVOSHA, C.J., CAPORALE, and GRANT, JJ., and CAMP, D.J., and COLWELL, D.J., Retired.

CAMP, D.J.

This is an action in equity brought in the district court for Sheridan County, Nebraska, by Jeffrey A. Johnson and Ronni Johnson, plaintiffs-appellees, hereinafter referred to as Johnsons, against Ruby Mays, individually, defendant-appellant, hereinafter referred to as Mays. The purpose of the action was to enjoin Mays from interfering with Johnsons' ingress and egress to their land. The trial court found that the driveway in question was a way of necessity. The court also found the existence of the driveway had been apparent to any casual observer since

the property was owned by a Kenneth Robbins.

Mays raises in her appeal three assignments of error. The first is that the trial court erred in not including all necessary parties. Her second assignment is that the ruling of the lower court results in the taking of property without due process or just compensation. And her final assignment is that the Johnsons failed to prove necessity, and failed to prove the location or extent of a way of necessity.

The record shows that the land involved is located in the south half of the northeast quarter of Section 34, Township 32 North, Range 44 West, of the 6th P.M., in Sheridan County, Nebraska, which was formerly subdivided as Block 43, Nelson's Addition to the City of Rushville, Nebraska. For purpose of clarity we will refer to the land in dispute by description of lots as formerly platted. The disputed land is Lots 11 and 12, owned by the Johnsons, and Lot 13 and the south 30 feet of Lot 14, owned by Mays, all in Block 43, Nelson's Addition. This land was originally subdivided on April 21, 1886, with an alleyway between two tiers of lots, and with Emmert Street on the west side of the lots and Seventh Street on the north side of the lots. Seventh Street connects with Main Street, which is located to the east side of the two tiers of lots. The record further shows that on January 23, 1904, a deed of vacation was filed, vacating the alleyway, Emmert Street, and Seventh Street. The alleyway is now the disputed driveway, Emmert Street is a fence, trees, and a field, and Seventh Street is a roadway connecting onto Main Street. The driveway in question has a sewerline running approximately through the middle of it, a gasline running on the west side, a telephone line over the top of the sewerline, and overhead powerlines and cable TV lines. There is a waterline crossing the driveway.

On October 24, 1972, Essie Case and Bessie A. Wolf acquired ownership of Lots 1, 2, the north 44 feet of Lot 3, the south half of Lot 6, and Lots 7, 8, 9, 10, 11,

12, 13, and 14 of Block 43, Nelson's Addition. Case and Wolf subsequently traded quitclaim deeds between themselves so that Case was the eventual owner of Block 43 except for the south 16 feet of Lot 3, Lots 4 and 5, and the north half of Lot 6, which were owned by a Sibyl Sager. The vacated alleyway to the south and east of Lot 11 is owned by Case and Sager and is used by Case for the placement of a trailer home. Case subsequently conveyed to the city of Rushville a piece of what used to be Seventh Street so as to provide a Roland Molitar access to and from his property to Main Street. Molitar lives on property just north of Mays. In August of 1974 Case sold Lots 11, 12, 13, and 14 to a Kenneth Robbins. Robbins placed a trailer home on Lots 11 and 12 and built a driveway about 10 to 15 feet wide over Lots 13 and 14 in order to get to Seventh Street and then on down to Main Street. In September of 1974 Robbins sold Lots 13 and 14 to Molitar, and had an agreement with Molitar that Robbins would have access across Molitar's property to Seventh Street. In August of 1977 Robbins then sold Lots 11 and 12 to a Lloy Freese, and Freese used the driveway for his ingress and egress. Molitar testified that he had an oral agreement with Freese for Freese to use the roadway across Molitar's land for ingress and egress. In November of 1979 Molitar sold the south 30 feet of Lot 14 and all of Lot 13 to Mays. At the time of the sale the parties had an oral agreement for Mays to cross Molitar's land for her ingress and egress. Freese continued to utilize the driveway across Mays' land and also across Molitar's land until September of 1980 when Freese sold Lots 11 and 12 to a Don Schwarting. During the time Schwarting owned the property, he did not live on the property, but kept old cars on the property. Schwarting sold Lots 11 and 12 to the Johnsons in June of 1982. Prior to the date of the sale, the Johnsons had moved a trailer onto Lots 11 and 12 and were living in the trailer, using the driveway for

their ingress and egress, which would have been across the property of Mays and across the property of Molitar. Prior to the date of the deed from Schwarting to the Johnsons, Mays had made several attempts to block the driveway from her property to Seventh Street so that the Johnsons would not be able to use it, but law enforcement officials had the barricades taken down. The Johnsons secured a deed to the property, and then started this action for a permanent injunction when Mays placed a fence down the middle of the driveway.

In this equity action it is our duty to try the issues de novo upon the record and reach an independent conclusion without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the facts that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief of the matters at issue in the case. *Sturm v. Mau*, 209 Neb. 865, 312 N.W.2d 272 (1981).

Where a conveyance is made of realty separated from the highway by other realty of the grantor or surrounded by his realty or by his and that of a third person, there arises, by implication, in favor of the grantee, a way of necessity across the premises of the grantor to the highway. *Hansen v. Smikahl*, 173 Neb. 309, 113 N.W.2d 210 (1962).

"An easement of necessity does not arise from an express grant, but is an easement arising either by implied grant or reservation. Such implied easements ordinarily arise in cases where land owned by one entity is divided by sale of a portion and the beneficial use of one tract or the other depends on an easement for ingress or egress or other purpose." *Graves v. Gerber*, 208 Neb. 209, 215, 302 N.W.2d 717, 720 (1981).

In *Badura v. Lyons*, 147 Neb. 442, 450, 23 N.W.2d 678, 683 (1946), this court said: " 'A way of neces-

sity is an easement arising from an implied grant or implied reservation; it is the result of the application of the principle that whenever a party conveys property, he conveys whatever is necessary for the beneficial use of that property and retains whatever is necessary for the beneficial use of land he still possesses. A way of necessity usually arises where there is a conveyance of a part of a tract of land of such nature and extent that either the part conveyed or the part retained is entirely surrounded by the land from which it is severed or by this land and the land of strangers. It is a universally established principle that where a tract of land is conveyed which is separated from the highway by other lands of the grantor or surrounded by his lands or by his and those of third persons, there arises, by implication, in favor of the grantee, a way of necessity across the premises of the grantor to the highway. In other words, if one grants a piece of land in the midst of his own, he thereby impliedly grants a way to reach it.' "

"A way of necessity is dependent on unity of ownership of the dominant and servient estates, followed by a severance thereof. A way of necessity cannot be claimed over the land of a third person, and it cannot exist where neither the party claiming the way nor the owner of the land over which it is claimed, nor anyone under whom they or either of them claim, was ever seised of both tracts of land at the same time. Moreover, there must have been an absolute ownership of both tracts." 25 Am. Jur. 2d *Easements and Licenses* § 35 at 448-49 (1966). "Necessity does not of itself create a way of necessity, but it is said to furnish evidence of the intention of the parties that a right of way is to be conveyed or retained, thereby raising an implication of a grant or reservation." 25 Am. Jur. 2d, *supra* § 36 at 450.

Robbins held the unity of ownership of Lots 11, 12, 13, and 14. When he sold Lots 13 and 14, he reserved a right-of-way across Molitar's property for his

ingress and egress. This was a way of necessity retained for the beneficial use of land that he, Robbins, still possessed. There was no other way of ingress or egress for Lots 11 and 12. To the west was farmland; to the east and south, residential land. This way of necessity continued through subsequent conveyances of Lots 11 and 12 from Robbins to Freese to Schwarting and to the Johnsons. When Mays secured Lot 13 and the south 30 feet of Lot 14, she knew of the right-of-way over her land by Freese and Schwarting. The pictures introduced into evidence graphically display a driveway that the trial court found by an on-site inspection was apparent to any casual observer since the property was owned by Kenneth Robbins.

"A person who purchases land with knowledge or with actual, constructive, or implied notice that it is burdened with an easement in favor of other property ordinarily takes the estate subject to the easement." 25 Am. Jur. 2d, *supra* § 97 at 502. One who purchases land burdened with an open and visible easement is charged with notice of the same, and the estate he purchases is servient to the easement. *Arterburn v. Beard*, 86 Neb. 733, 126 N.W. 379 (1910); *De Conly v. Winter Creek Canal Company*, 110 Neb. 102, 193 N.W. 157 (1923).

The record establishes a way of necessity across Mays' land. The trial court directed Mays not to fence or obstruct Lots 13 and 14 any further than 142 feet east of their west lines. The trial court viewed the scene and observed the exact location of the driveway, and from the record herein we cannot say that the trial court erred in its location of the way of necessity.

Mays raises one other assignment, and that is the trial court erred in not including all necessary parties. Mays argues that Molitar, Case, a Greg Hunter, who owns the property to the west of the lots, and Sibyl Sager, who owns the lots to the east of those in the dispute, should all have been made par-

ties to this action. In addition, Mays argues that Lewis Veit, coowner of Lot 13 and the south 30 feet of Lot 14, had a vested interest in the litigation.

Neb. Rev. Stat. § 25-323 (Reissue 1979) provides that "[t]he court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in."

" '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 interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. . . .' " *Burke Lumber & Coal Co. v. Anderson*, 162 Neb. 551, 561, 76 N.W.2d 630, 638 (1962). The record shows that the only person interfering with the right-of-way was Mays. It was not necessary for the determination of the case to involve those who were not threatening or performing acts of obstruction to the use of the driveway by the Johnsons. We do not believe the trial court erred in not ordering in additional parties. The decision of the trial court is affirmed.

AFFIRMED.

DOROTHY SHALD, APPELLANT, V. PATRICK J. SHALD, APPELLEE.

346 N.W.2d 406

Filed March 30, 1984. No. 83-320.

1. **Divorce: Property Division.** When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual re-

ceiving the inheritance or gift and is not considered a part of the marital estate. An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property after receiving it by way of inheritance or gift, or the spouse not receiving the inheritance or gift has significantly cared for the property during the marriage.

2. **Divorce: Appeal and Error.** While in a divorce action the case is tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
3. **Divorce: Property Division.** The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. The court will consider all pertinent facts in reaching an award that is just and equitable.
4. _____: _____. Generally speaking, awards in actions involving dissolution of marriage vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so when the marriage is of long duration and the parties are the parents of all the children involved.
5. **Property Division: Alimony.** The ultimate test for division of marital property and an award of alimony is one of reasonableness.
6. **Child Support.** It is in the best interests of the children that the amount set for child support in the decree remain constant without reduction based on supposition of an event that may or may not take place in the future.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed as modified.

James A. Lane and R. Kevin O'Donnell of McGinley, Lane, Mueller, O'Donnell & Merritt, P.C., for appellant.

Michael V. Smith of Smith, King & Waite, for appellee.

KRIVOSHA, C.J., CAPORALE, and GRANT, JJ., and CAMP, D.J., and COLWELL, D.J., Retired.

CAMP, D.J.

Dorothy Shald (Dorothy), petitioner-appellant herein, has appealed to this court from a decree en-

tered by the district court for Sheridan County, Nebraska, dissolving the marriage of Dorothy and Patrick J. Shald (Patrick), the respondent-appellee. In its decree entered on April 11, 1983, the trial court found that the marriage between the parties was irretrievably broken, and dissolved the marital relationship. The court found both parties to be suitable custodians for the minor children, and in the best interests of the children awarded the physical custody to Dorothy, with reasonable rights of visitation to Patrick, and ordered Patrick to pay child support of $667.03 per month beginning on May 1, 1983, and continuing on the first day of each month thereafter through October 1, 1985, at which time child support would be in the sum of $467.03 per month until the youngest child of the parties has attained the age of 19 years, dies, marries, or becomes emancipated. Patrick is to provide health and accident insurance on the minor children of equal benefit to the coverage levels in effect on March 3, 1983, and is to pay all reasonable medical expenses incurred by the children or on their behalf through November of 1985. After November 1, 1985, respondent is to have no medical expense obligation except to provide health and accident insurance of equal benefits to the amount of coverage in effect on March 3, 1983. Dorothy was further awarded a cash sum of $6,900, and awarded the sum of $1,000 per month for 121 months as alimony. Dorothy was awarded the family home and specific items of personal property and household items which she desired, and was also awarded a Chevrolet van.

In its decree the court awarded Patrick the Shald's Market—a grocery store—including the real estate, building, inventory, equipment, and accounts receivable; awarded him the insurance policies and all personal property that he requested; and directed that Patrick would assume and pay the Gordon State Bank of Gordon, Nebraska, the balance due on the note owed to it secured by the lien against

the Chevrolet van, and all debts owed the First National Bank of Gordon and the Shald Land and Cattle Company on the grocery store debt. Dorothy was directed to assume and pay the balance due the First National Bank of Gordon for its mortgage on the family home. Finally, Patrick was directed to pay the sum of $3,050 for Dorothy's use in paying her attorney fees.

In her brief on appeal Dorothy makes the following assignments of error: (1) That the court erred in its division of property; (2) That the court erred in the amount of alimony awarded, in that it is wholly inadequate considering the income of Patrick; and (3) That the court erred in the amount of child support in light of the circumstances of the parties.

The factual background of this appeal, as revealed in the record, indicates that the parties have lived in Gordon, Nebraska, since their marriage on July 27, 1968. As a result of the marriage, three children were born: Jason, born February 5, 1971, Temple, born June 17, 1974, and Sharon, born August 17, 1980. Prior to the marriage, Dorothy had attended Chadron State College from 1963 to 1966. She then worked as a telephone operator and as a teacher, and then went back to school in 1968 for a semester. She still needs 43 hours to obtain her B.S. degree. Dorothy attained a teaching certificate immediately after they were married, and taught 2 years at a country school until she was pregnant with their first child. Patrick, at the time of the marriage, had 2 years of college at Chadron. After the marriage Patrick worked for his brother in a grocery store for 5 years, and then worked for his father, selling hides and furs, until he built a grocery store in 1974. Patrick secured the funds to build the grocery store by borrowing from his father, who was the owner of the Shald Land and Cattle Company, and also borrowed money from the First National Bank of Gordon.

Dorothy's first argument on the division of property is the trial court's setting off to Patrick $63,500

as nonmarital property. The record shows that Patrick received from his father stock in the family corporation, the Shald Land and Cattle Company, which Patrick later sold for the sum of $28,500, and which he applied to indebtedness on the family grocery store. There is no evidence in the record to contradict this gift. This gift was set off by the court to Patrick. In addition, Patrick's father sold to Patrick 15 acres of land for $1. The parties sold one parcel for $2,000. A second parcel was sold for $3,000. On the third parcel was located a home into which Patrick and Dorothy moved. The home was eventually sold for $35,000, which went to pay off a note that the parties had at the First National Bank for their present home. The trial court held that the land transaction was a gift to Patrick of $40,000, together with the $28,500 stock sale, deducted $5,000 as Dorothy's share of $10,000 which had been used to remodel the home, and set off a total of $63,500 to Patrick as nonmarital property.

In *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 733, 325 N.W.2d 832, 834 (1982), we provided an exception to the general rule that inherited property acquired by one of the parties is ordinarily set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate, by stating: "An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage. See *Rhodes v. Rhodes*, 210 Neb. 373, 314 N.W.2d 271 (1982)."

While we are ever reluctant to disturb the division of property as ordered by the trial court, an examination of the evidence in this case discloses that the exception to the general rule on setting off gift or inherited property should be applied. Patrick testi-

fied the house was remodeled by putting $10,000 into the home, and by him and Dorothy physically doing all of the work themselves. The parties lived in the home until 1978, when their new home was built. Dorothy testified that it was her recollection that the land was given to both of them by Patrick's father. We have no way of determining from the record that Patrick's father did not intend that the land be a gift to both parties. We believe that the $40,000 received from the sale of the land should not have been set aside to Patrick as nonmarital property. Dorothy should be awarded an additional $15,000 payable to her by Patrick in three equal annual installments.

Dorothy's other argument on the division of property is that the court did not fairly value the business of Shald's Market. Both parties had a qualified expert or experts testify on their behalf as to the value of the property. There was no dispute over the inventory, equipment, or accounts receivable. The dispute comes as to the value of the real estate and the value of Shald's Market as a going concern. Of the three appraisers who testified, each came up with a different value for the property. The court arrived at a figure between the high figure, as presented by the testimony on Dorothy's behalf, and the low figure, as presented by Patrick's witnesses.

While in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. *Cole v. Cole*, 208 Neb. 562, 304 N.W.2d 398 (1981); *Witcig v. Witcig*, 206 Neb. 307, 292 N.W.2d 788 (1980). We cannot say that the court erred in the value it placed on the real estate and Shald's Market.

Dorothy further argues in her brief that she is entitled to a larger share of the marital estate. The trial court found the gross value of assets of the parties to be $547,699.78. The total liabilities of the parties, both on the business and against the family

home and van, amounted to $208,339.60. The net worth of the parties was established at $339,360.18, from which was deducted the $63,500 to Patrick as nonmarital property. The net value of the property that Dorothy received in the order of the trial court amounts to the sum of $94,989.65. In addition, Patrick is required to pay $1,000 per month to Dorothy for 121 months and to pay child support of $667.03 per month for 2½ years, and $467.03 per month thereafter, and is to maintain health and accident insurance on the minor children of the parties.

We have held that there is no mathematical formula by which property awards can be precisely determined; they are to be determined by the facts in each case. *Matlock v. Matlock*, 205 Neb. 357, 287 N.W.2d 690 (1980). Generally speaking, awards in cases of this kind vary from one-third to one-half the value of the property involved, depending upon the facts and circumstances of the particular case. *Ragains v. Ragains*, 204 Neb. 50, 281 N.W.2d 516 (1979). See, also, *Johnson v. Johnson*, 209 Neb. 317, 307 N.W.2d 783 (1981). This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record. *Ritter v. Ritter*, 205 Neb. 668, 289 N.W.2d 526 (1980).

Dorothy's final assignment is that the court erred in not awarding her sufficient alimony and child support considering the entire circumstances of the parties. Regarding the question of child support, the trial court has reduced the amount of child support of $667.03 per month to $467.03 per month beginning November 1, 1985. The record is bare from which this court can determine a reason for the reduction of child support, unless it is upon a supposition that Dorothy will complete her college education, secure a job as a teacher, and have her own source of income. We believe it is more proper that the child support should remain at the sum of $667.03 per month until the youngest child of the parties attains 19 years of age, dies, marries, or becomes other-

wise emancipated, or until the further order of the court.

Dorothy is additionally arguing for an increased alimony award by pointing out to the court that Patrick's income from the Shald Market has increased dramatically within the last several years. The record reflects that in 1978 the adjusted gross income of the parties was $62,600; in 1979 it was $51,900; in 1980, $48,500; in 1981, $80,100; and in 1982, $145,100. An accountant called on behalf of Patrick explained that the inventory for the grocery store, which was used in completing the balance sheet at the end of 1982, showed an increase of $46,000. He also testified that the accounts receivable in 1982 showed an increase of $10,000. The increased inventory and accounts receivable contributed to the profits that the grocery store realized, and are part of the income on which the parties have to pay federal and state taxes. This is not cash available to pay current expenses. In addition, both Dorothy and Patrick made charges to the store for items purchased, and this was added to the income of the grocery store and counted in the adjusted gross income for 1982 on which taxes are owed. Full liability for 1982 federal tax was $59,979.86, with a credit for $20,000 paid in installments. Their state tax liability was $10,255.49, with a credit of $140 based on food tax credit. The accountant further testified that at the end of 1982 the checking account of the Shald Market was overdrawn and that the only cash on hand was in the cash registers to do the next day's business, in the amount of $4,086.51. Patrick explained that the increase in income, in addition to the inventory and accounts receivable, was due to the fact that his main competitor had business which was going to the Shald Market, and in fact the other market failed and had been reassumed by the former owner. In addition to that failed grocery store, there was one other grocery store in the city. When the former owner of the grocery store reopened in the

fall of 1982, Patrick noticed that his volume had decreased. Other than the grocery store, the parties had no cash or savings in personal accounts.

In determining whether alimony should be awarded, the ultimate test is one of reasonableness. *Baird v. Baird*, 196 Neb. 124, 241 N.W.2d 543 (1976). The total obligation imposed upon the party and that party's ability to make the payments required must be considered in determining whether the award made was erroneous. *Watkins v. Watkins*, 209 Neb. 14, 305 N.W.2d 894 (1981). The ability of Patrick to pay the debts of the business, the debts of the family, the alimony, and the child support is dependent upon the continuing operation of the grocery store.

The fixing of alimony or distribution of property rests in the sound discretion of the district court, and in the absence of an abuse of discretion will not be disturbed on appeal. *Phillips v. Phillips*, 200 Neb. 253, 263 N.W.2d 447 (1978). As we view the record, the determination of the value of the business, the real estate, the award of alimony, and property division, except as modified for child support and property set off as property received by gift, was adequate and reasonable under all the facts and circumstances.

The decree of the district court is affirmed as modified. Dorothy is awarded the sum of $1,000 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

IN RE INTEREST OF C.P., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. C.P., APPELLANT.

346 N.W.2d 421

Filed March 30, 1984. No. 83-437.

Juvenile Courts: Jurisdiction. The juvenile court has exclusive original jurisdiction as to any child who is habitually truant from

school, regardless of whether the truancy is with or without the permission of the parent or guardian.

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

Lawrence W. Stunkel, for appellant.

Patrick Kelly, Sarpy County Attorney, and Lawrence D. Gendler, for appellee.

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

PER CURIAM.

This is an appeal from an adjudication order of the separate juvenile court of Sarpy County, Nebraska. The court found that the child in question, the appellant C.P., was between 7 and 16 years of age, was habitually truant from a school approved by the State of Nebraska, and was a child described in Neb. Rev. Stat. § 43-247(3)(b) (Cum. Supp. 1982).

The appellant contends that the finding of the juvenile court was erroneous because the child was being withheld from school by his parents.

Our decision in *In re Interest of K.S.*, *post* p. 926, 346 N.W.2d 417 (1984), decided today, is controlling here. In that case we held that the juvenile court has exclusive original jurisdiction as to any child who is habitually truant from school, regardless of whether the truancy is with or without the permission of the parent or guardian.

It is unnecessary to consider the other assignments of error. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JUAN DEJESUS, ALSO KNOWN AS CHRIS DEJES, ALSO KNOWN AS JUAN SETTE, ALSO KNOWN AS CHRIS SETTE, APPELLANT.

347 N.W.2d 111

Filed March 30, 1984. No. 83-467.

1. **Preliminary Hearings: Waiver.** The right of a defendant to a preliminary hearing may be waived.
2. **Constitutional Law: Search and Seizure: Probable Cause.** In appropriate circumstances the Constitution allows a properly limited search and seizure on facts that do not constitute probable cause to arrest or to search for contraband or evidence of a crime.
3. **Police Officers and Sheriffs: Investigative Stops.** In appropriate circumstances a police officer may demand of a person involved in a traffic accident that person's name and address.
4. **Police Officers and Sheriffs: Search and Seizure.** Where the facts are such that they would justify a reasonably prudent man in believing that his safety or that of others is in danger, a police officer may conduct a "pat-down" search of a defendant to look for weapons.
5. **Juror Qualifications.** Where jurors agree that they will follow the law given to them by the judge in his instructions, there is no need to remove such jurors for cause from a jury panel.

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

E. Dean Hascall of Hascall, Jungers & Garvey, for appellant.

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

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

GRANT, J.

The defendant, Juan DeJesus, also known as Chris Dejes, also known as Juan Sette, also known as Chris Sette, was initially charged by complaint filed in the county court for Sarpy County on October 29, 1981, with carrying a concealed weapon on or about October 28, 1981. Preliminary hearing was set for November 19, 1981. Defendant posted bond and was released. He did not appear for the preliminary hearing.

On January 18, 1982, an information was filed in the district court charging defendant, in two counts, with carrying a concealed weapon on or about October 28, 1981, and with failing to appear for the preliminary hearing on November 19, 1981. The record is not clear, but apparently defendant had been rearrested on December 29, 1981. On January 16, 1982, the record shows, defendant had posted 10 percent of a $35,000 bond and was released on that bond, conditioned that defendant appear and "answer the charge of Capias; Failure to Appear - Doc. 48 Page 242 . . . ." Arraignment was set for February 5, 1982. Defendant's counsel, an assistant public defender, appeared at that arraignment, but defendant did not. Another capias was issued on February 5, 1982.

On February 26, 1982, an "Amended Information" was filed. This amended information charged defendant, in three counts, of (1) carrying a concealed weapon on October 28, 1981; (2) failure to appear for the preliminary hearing on the weapons charge on November 19, 1981; and (3) failure to appear at the arraignment on the information filed January 18, 1982, which arraignment had been set for February 5, 1982.

Defendant appeared before the district court for Sarpy County on March 3, 1983. Again the record is not precise on the dates of various happenings, but it appears from a letter written by defendant, under date of July 10, 1982, to the county attorney of Sarpy County (and immediately forwarded by that attorney to the public defender) that defendant was in jail in California. This letter was received in evidence in the trial and indicates that defendant, because of outstanding warrants in California, had not appeared as ordered in the Sarpy County District Court but had returned to California and was arrested and jailed there. Other exhibits indicate that defendant was sentenced in San Mateo County, California, on August 2, 1982, to a 2-year term, plus an

additional year as an enhancement, and that on September 8, 1982, he was sentenced in Marin County, California, to a term concurrent with his earlier California sentence. Defendant was returned to Sarpy County on March 1, 1983, for proceedings there.

On March 3, 1983, the defendant appeared without counsel in district court, specifically waived counsel for his arraignment, was arraigned, and entered pleas of not guilty to all three of the above charges. The defendant desired to represent himself pro se, with a public defender appointed as an "adviser" in further hearings.

Defendant appeared before the trial court again on March 25 and April 4 and 6, 1983. At that time it appeared that the public defender might well be a witness as to defendant's various failures to appear, and the trial court therefore appointed a private attorney to represent defendant or to act as defendant's legal adviser. The defendant was found guilty of all three charges after a jury trial in May 1983. Defendant was sentenced to a term of 18 months to 5 years on the weapons charge (with this term to be served concurrently with a term defendant was then serving in California) and to consecutive 1-to-3-year and 3-year terms on the failure to appear charges. Defendant appeals, alleging in his assignments of error that the trial court committed three errors. For the reasons hereafter set out we affirm.

First, the defendant alleges the trial court erred in conducting the arraignment of the defendant without having had a preliminary hearing pursuant to Neb. Rev. Stat. § 29-1607 (Reissue 1979). The record shows that on March 3, 1983, the defendant was brought before the trial court for arraignment on the amended information. The record contains no transcript of a preliminary hearing on any of the three charges in the amended information. The defendant stated to the court that he had been incarcerated in California and was returned to Nebraska. The trial

judge explained the arraignment procedure to the defendant, and apprised him of his right to counsel. The following colloquy then took place between the court and defendant: "THE COURT: All right. Now, you'd like to have the public defender as a legal advisor, I take it. MR. SETTE: Yes, Your Honor. THE COURT: Okay, then I'm going to continue the arraignment 'til tomorrow morning. MR. SETTE: You can arraign me now. I don't mind about the arraignment part. You can arraign me now, I'll waive the — I will waive the public defender now to save you time, 'cause it's only an arraignment." The defendant was then arraigned and entered pleas of not guilty to all three charges.

Section 29-1607 provides: "No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, unless such person shall waive his right to such examination . . . ." No preliminary hearings were conducted as to any of the three charges. Again, the record is woefully inadequate as presented to this court as to any waivers of such preliminary hearings. We have gleaned certain facts from the record, however, in the trial cross-examination of James Miller, the public defender of Sarpy County, and in the direct examination of Mr. Miller in an earlier proceeding in the trial court in connection with defendant's motion to dismiss all charges because of the State's failure to afford him a speedy trial. Those facts are that Mr. Miller represented defendant prior to the filing of the last information. Mr. Miller testified that he received notice of a preliminary hearing to be held on January 7, 1982. Mr. Miller testified: "I represented Mr. Sette at the bond hearing and worked out a deal for the bond for him and his wife, and that involved waiving a preliminary hearing on Mr. Sette's part so that his wife's bond could be reduced . . . . Due to the fact that I'd represented him at the bond review and had worked out the deal on the bond for

his wife and had waived a preliminary hearing as part of the deal, my name became his attorney of record of the District Court." Mr. Miller further testified that defendant was personally present "to waive a formal hearing."

By piecing together the times of the filing of the various informations, it is clear that defendant, with counsel, waived any required preliminary hearing on the counts concerning carrying a concealed weapon and the failure to appear for a preliminary hearing on November 19, 1981. Such a waiver, particularly with counsel present, is clearly authorized by § 29-1607.

Further, with that background, the dialogue set out above between defendant and the trial court constitutes a valid waiver of counsel at that point, and a waiver of the right to a preliminary hearing on the third count. The right to a preliminary hearing is waived by entering a plea of not guilty in the district court. See, *Dinsmore v. State*, 61 Neb. 418, 85 N.W. 445 (1901); *Roberts v. State*, 145 Neb. 658, 17 N.W.2d 666 (1945). Defendant's pleas of not guilty on March 3, 1983, were made voluntarily and, in all probability, with as much awareness of what was taking place as any other participant in the plea. This assignment of error is without merit.

Next, the defendant alleges the trial court erred in failing to grant a motion to suppress evidence taken from the defendant as a result of a search and seizure, which defendant alleges was conducted by law enforcement officers without a warrant and without sufficient probable cause. Defendant, in this assignment of error, raises two points. He initially complains of the seizing of a driver's license from a wallet in his hands, and he next complains of an ensuing "pat-down" search.

The record shows that on October 28, 1981, at approximately 6:10 a.m., a Sarpy County deputy sheriff, Sgt. Robert Bruecher, responded to a traffic accident at the intersection of Highway 73-75 and

Harvel Drive. Upon his arrival the officer observed that a Volkswagen had been struck in the rear by a larger Mercury Cougar. It was later determined the accident occurred while the Volkswagen was stopped for a red light.

The defendant was standing near the driver's door of the Mercury. The defendant's clothing was several sizes too large for him, requiring him to hold up the pants with one hand. When Sergeant Bruecher approached the defendant and requested a driver's license, defendant began screaming at him—sometimes in English and sometimes in a language foreign to Sergeant Bruecher—and refused to identify himself. The defendant's behavior prompted Sergeant Bruecher to call for additional police assistance.

Bellevue police officer John Stacey arrived to assist Sergeant Bruecher. Stacey described the defendant as nervous and pacing back and forth. When Officer Stacey arrived, he heard defendant yelling in a loud voice at Sergeant Bruecher. Stacey requested identification from defendant. The defendant finally produced a wallet from the oversized pants he was wearing, and began fumbling through the card section. Officer Stacey observed the defendant pass over what was plainly a Nebraska driver's license as he went through the cards. Defendant removed two cards and handed them to the officer. These cards did not show sufficient identification to satisfy the officer. The officer finally reached over and took the driver's license from the cards. The wallet itself remained in the defendant's hands at all times.

The defendant said to the police officer that the picture on the driver's license "doesn't even look like me, does it?" At this point, based on all that had been observed, the officer testified he was suspicious that the defendant may have stolen the wallet, and a pat-down search was conducted. A

handgun was found in the defendant's right jacket pocket, and he was arrested.

In explanation of this situation at trial, defendant testified that Barry Belmont and his girl friend had spent the prior evening with defendant and his wife at defendant's home in Omaha. In the early morning hours of October 28, 1981, defendant's wife wanted to get some milk for the children and asked Belmont if she could use Belmont's car. Defendant's wife told defendant to get the keys. Belmont said the keys were in his pants, so defendant put the pants on. Mr. Belmont was a significantly bigger person than defendant. The evidence showed that the car, clothing, wallet, driver's license, and gun were the property of Belmont, but all those items were in defendant's possession at the time of defendant's involvement in the traffic accident.

The facts show that when defendant went through the cards from the wallet in such a fashion that the officer could see plainly what the defendant was examining, he showed no expectation of privacy in that connection. Defendant is presumed to know the requirements of Neb. Rev. Stat. § 60-413 (Reissue 1978), which require that every licensed driver of an automobile shall carry a "license card" which "shall be presented by the licensee for examination . . . upon demand" by any police officer. Recognizing the requirements of that statute, and seeing the agitated, "nervous" state of the defendant, the police officer did not violate any privacy which defendant could reasonably expect by removing a "license card" from a number of documents being displayed to him. As a matter of fact, defendant had already handed the officer two pieces of identification—neither of which was a driver's license card and both of these being cards of Barry Belmont.

With regard to the first of defendant's points on the search issue, it has been correctly pointed out by the defendant that the fourth amendment to the U.S.

Constitution guarantees an individual freedom from unreasonable intrusions by police officers. The question is whether the officers in this case acted in an unreasonable manner.

A brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information may be most reasonable in light of the facts known to the officer at the time. *State v. Longa*, 211 Neb. 356, 318 N.W.2d 733 (1982). Neb. Rev. Stat. § 29-829 (Reissue 1979) permits officers to make stops without arrest to determine a person's name, address, and explanation of his actions. In the instant case, of course, the original stop was occasioned by the traffic accident, and the first point raised by defendant concerns the extent of the interrogation and the seizure of the driver's license. We hold that Officer Stacey's actions in seizing the license were proper. As we said in *State v. Longa*, *supra* at 363, 318 N.W.2d at 738, "Neb. Rev. Stat. § 29-829 (Reissue 1979) permits officers to make stops short of an arrest in order to determine the name and address of the person stopped, and receive an explanation of that person's actions. While such 'investigative stops' are governed by the fourth amendment as well, it is clear that 'in appropriate circumstances the Fourth Amendment allows a properly limited "search" or "seizure" on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime.' *United States v. Brignoni-Ponce*, 422 U.S. 873, 881, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975)."

Once the driver's license card was in the officer's hands and the officer saw that it was a license for a "Barry Belmont," with a picture that obviously was not defendant, it is clear that the police officer was fully justified in believing that defendant was a man in possession of another man's wallet and that, in view of all the attendant circumstances, that man should be searched for weapons.

This particular exception of a warrantless search and seizure was adopted by the U.S. Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The Court in that case held that a police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.

As stated in *Terry, supra* at 29: "The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."

The standard is whether a reasonably prudent man under the circumstances would be warranted in the belief that his safety or that of others was in danger, and each case will have to be decided on its own facts.

We find that, under the facts and circumstances present in this case, the officer's conduct in the "pat-down" search was reasonable and the search was valid; it constituted no intrusion on defendant beyond a proper search for weapons. The trial court was correct in overruling defendant's motion to suppress. The weapon in the pocket of the clothing defendant was wearing was properly received in evidence.

The final assignment of error involves the court's failure at voir dire to sustain the defendant's motion to strike for cause all prospective jurors who indicated they would expect the defendant to testify during the trial.

During examination of the jury panel by defense counsel, the following exchange occurred: "MR. HASCALL: . . . Okay. Let me go to Mr. Adair. Mr. Adair, after the prosecution tells its side of the story, as a fair minded person, would you then want Mr. Sette to tell his side of the story? MR. ADAIR:

I'd sure want both of them to tell it. MR. HASCALL: If he didn't tell his side of the story, would you feel he was hiding something? MR. ADAIR: Well, you would always wonder. MR. HASCALL: As a fair minded person, would you want him to explain what his version of the facts were? MR. ADAIR: Yes. MR. HASCALL: And if he didn't tell his side of the story . . . would you kind of wonder subconsciously . . . what's he trying to hide? MR. ADAIR: You always wonder."

Defense counsel then addressed the panel as a whole and requested a show of hands of all those who would be suspicious if the defendant did not testify. Apparently, some jurors did raise their hands. The court then admonished the panel regarding the defendant's right to remain silent, and then addressed the individual juror and the panel questioned by the defense as follows: "THE COURT: . . . if Mr. Sette chooses to exercise his right to remain silent, my instruction will be that you're not to take that into consideration at all in determining his guilt or innocence . . . . Now, if that's my instruction, can you follow that? MR. ADAIR: Yes, sir, I would. THE COURT: And you'd disregard the fact he's not testified? MR. ADAIR: That's right. THE COURT: Are there any of the 20 of you, besides Mr. Adair, that would not be able to do that, to put it aside, any of the 20 of you? I see no response. Okay."

A juror who cannot subordinate his personal views on an issue of law and obey the law in deciding the case must be excused for cause. *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982). In this case it appears the trial court's questioning was sufficient to explain to the jury panel its duty to abide by the instructions of law given by the court. All the jurors indicated they could and would follow the court's instructions as to defendant's absolute right to remain silent. It so happened that defendant did testify at the trial, but the court's admonition and explanation

was necessary and proper, and totally removed any possible error in this regard. Defendant's third assignment of error is without merit.

The judgments and sentences of the trial court are affirmed.

AFFIRMED.

VANCE A. TEEGERSTROM, PERSONAL REPRESENTATIVE OF THE ESTATE OF DANIEL W. TEEGERSTROM, DECEASED, APPELLEE, V. H. J. JEFFRIES TRUCK LINE, INC., A CORPORATION, AND RAYMOND E. MANSFIELD, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLANTS AND CROSS-APPELLEES, WARREN L. CARLSON, THIRD-PARTY DEFENDANT AND COUNTERCLAIMANT, APPELLEE AND CROSS-APPELLANT.

346 N.W.2d 411

Filed March 30, 1984. No. 83-553.

1. **Tort-feasors: Contribution.** There can be no contribution between a host driver and the driver of the other vehicle where the guest statute would preclude a judgment in favor of the guest passenger against the host driver.
2. **Motions to Dismiss.** The party against whom a motion for dismissal is directed is entitled to have all material and relevant evidence submitted on its behalf treated as true, to have every controverted fact resolved in its favor, and to have the benefit of every inference which can reasonably be deduced from the evidence.
3. **Negligence.** In an action for gross negligence under the automobile guest statute, where there is adequate proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence.
4. **Negligence: Words and Phrases.** Gross negligence, within the meaning of the guest statute, means negligence in a very high degree, or the absence of even slight care in the performance of a duty.
5. **Negligence: Proof.** In order to recover upon a negligence claim, the claimant must not have been contributorily negligent in a degree more than slight when compared to the negligence of the defendant.

Appeal from the District Court for Polk County: WILLIAM H. NORTON, Judge. Reversed and remanded for a new trial.

Kenneth R. Lang and Vincent Valentino of Angle, Murphy, Lang & Valentino, for appellants H. J. Jeffries Truck Line and Mansfield.

James A. Beltzer of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee Carlson.

No appearance for appellee Teegerstrom.

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

CAPORALE, J.

The estate of Daniel W. Teegerstrom, deceased, brought a wrongful death action against appellants, H. J. Jeffries Truck Line, Inc., and Raymond E. Mansfield. Jeffries Truck Line and Mansfield filed a third-party claim for indemnity or contribution from the decedent's host driver, appellee and cross-appellant Warren L. Carlson. Carlson in turn filed a counterclaim against Jeffries Truck Line and Mansfield. At the close of all the evidence the trial court dismissed both the third-party claim and the counterclaim. We reverse and remand for a new trial.

On May 19, 1978, Daniel Teegerstrom was a passenger on a motorcycle owned and operated by Carlson. As they were traveling southbound on U.S. Highway 81, and at a point approximately a mile south of Stromsburg, Nebraska, the motorcycle was involved in a collision with a tractor-trailer type truck. Teegerstrom was killed instantly, while Carlson escaped with relatively minor injuries.

The personal representative of Teegerstrom's estate instituted a suit against Jeffries Truck Line of Oklahoma City, Oklahoma, and against the owner and driver of the truck, Mansfield, who had leased his vehicle to Jeffries Truck Line. Jeffries Truck Line and Mansfield filed a third-party action against

Carlson, alleging that Carlson's negligent operation of the motorcycle was either the sole or a concurrent proximate cause of the accident, and asked that if a judgment were entered against them in favor of the Teegerstrom estate, a judgment of indemnity or contribution be entered against Carlson in their favor. Carlson counterclaimed against Jeffries Truck Line and Mansfield for his medical expenses, pain and suffering, loss of earnings, and the value of his motorcycle.

Prior to trial, Jeffries Truck Line and Mansfield consented to the entry of a $30,000 judgment against them in favor of the Teegerstrom estate. The case then proceeded to trial on the claims of Jeffries Truck Line and Mansfield for indemnity or contribution from Carlson, and on Carlson's counterclaim against Jeffries Truck Line and Mansfield.

At trial each party presented evidence, including expert testimony, to support its respective theories of how the collision occurred. Jeffries Truck Line contended that Mansfield followed the Carlson motorcycle out of Stromsburg, and as Mansfield was in the process of overtaking the motorcycle while traveling southbound in the northbound lane of the two-lane highway, Carlson attempted to change lanes or make a left turn, running under the trailer the truck tractor was pulling.

Carlson contended that as he was approaching the intersection at which he intended to turn left, he signaled his turn and pulled into the northbound lane in order to allow the truck to pass him on the right. He then noticed the truck in the same lane and tried unsuccessfully to avoid it. Carlson claimed the truck struck the motorcycle from the rear.

At the conclusion of the evidentiary presentation by all parties, the trial court dismissed each party's action.

The issues presented by the claimed errors assigned and discussed in the brief filed by Jeffries Truck Line and Mansfield are (1) whether the then

guest statute, Neb. Rev. Stat. § 39-6,191 (Reissue 1978), applies to an action for indemnity or contribution from the host driver, (2) whether, even if the gross negligence standard is applicable, the degree of Carlson's negligence and the apportionment of damages presented jury questions, and (3) whether the trial court erred by paraphrasing for the jury the contents of the consent judgment instead of allowing a copy of the judgment into evidence.

Although Jeffries Truck Line and Mansfield devote a portion of their brief to the question of whether application of the guest statute to an action for indemnity or contribution from the host driver constitutes an unconstitutional denial of equal protection of the laws as guaranteed by the federal and state Constitutions, the issue was not properly raised in the trial court. It is, and has long been, the rule that for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If it has not been raised in the trial court, it will be considered to have been waived. *State v. Hiross*, 211 Neb. 319, 318 N.W.2d 291 (1982); *Lucas v. Board of Equalization*, 165 Neb. 315, 85 N.W.2d 638 (1957), *cert. denied* 356 U.S. 938, 78 S. Ct. 780, 2 L. Ed. 2d 813 (1958). That question is therefore not properly before us and will not be considered.

The sole issue presented by Carlson's assignment of error on the cross-appeal concerning his counterclaim is whether the issue of his contributory negligence was for the jury.

As to the first issue presented by Jeffries Truck Line and Mansfield, it appears that most, if not all, courts which have considered the matter have rejected a claim for contribution where the guest statute would preclude recovery by the guest from the host. The reasoning generally has been that in such a case the common liability required to support contribution does not exist between the host and other driver or that one not directly liable to his passenger

should not be liable by indirection. See cases collected in Annot., 26 A.L.R.3d 1283 (1969), which uniformly hold that where a guest statute precludes recovery by the guest from the host, contribution will not lie. We have previously determined that, generally, a common liability must exist in order for there to be contribution. That is to say, each party must be liable to the same person. *Rawson v. City of Omaha*, 212 Neb. 159, 322 N.W.2d 381 (1982); *Royal Ind. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975).

Although Jeffries Truck Line and Mansfield cite no case which departs from the holdings collected in Annot., 26 A.L.R.3d, *supra*, they attempt to analogize this situation to those presented in cases wherein the doctrine of interspousal tort immunity is held not to bar contribution from a negligent spouse. *Smith v. Southern Farm Bureau Casualty Ins. Co.*, 247 La. 695, 174 So. 2d 122 (1965); *Wirth v. City of Highland Park*, 102 Ill. App. 3d 1074, 430 N.E.2d 236 (1981). While the analogy may, at first glance, seem appropriate, an examination of the policies supporting our guest statute and the doctrine of interspousal tort immunity belies the suggested parallelism. While both policies have as their ostensive aim the prevention of collusive lawsuits, *Botsch v. Reisdorff*, 193 Neb. 165, 226 N.W.2d 121 (1975), and *Imig v. March*, 203 Neb. 537, 279 N.W.2d 382 (1979) (abrogating the common-law doctrine of interspousal tort immunity), the guest statute has as a central purpose the encouragement of hospitality by preventing a nonpaying guest passenger from collecting damages from a nongrossly negligent host. *Botsch v. Reisdorff*, *supra*. On the other hand, the doctrine of interspousal immunity, which had its roots in the now discredited common-law notion that the " 'husband and wife were one person, and that person was the husband,' " *Imig v. March*, *supra* at 542, 279 N.W.2d at 385, has as its present-day central purpose the prevention of marital discord. *Id.* In a

suit for contribution against one spouse, the marital partners are not pitted against each other; the possibility that a suit for contribution would likely occur was foreseeable when the injured spouse initiated suit against a third party. Moreover, there is the strong likelihood that any contribution the negligent spouse must make to the nonspouse tort-feasor will be paid from the damages awarded to the injured spouse. In short, allowing contribution actions against a negligent spouse does not strongly promote marital discord. Such cannot be said for the policy of promoting hospitality if contribution actions were held to lie against a less than grossly negligent host driver. The host driver would be penalized for his hospitality, whether compelled to pay damages directly to the guest or indirectly by way of being required to contribute to the payment of a judgment obtained against another who was only ordinarily negligent.

We conclude, therefore, that there can be no contribution between a host driver and the driver of the other vehicle where the guest statute would preclude a judgment in favor of the guest passenger against the host driver.

Jeffries Truck Line and Mansfield next contend that even if Carlson is entitled to the guest statute's requirement that his liability be based on a finding of gross negligence, the trial court erred in dismissing their petition, because the question of whether Carlson was grossly negligent was one for the jury. This issue must be tested in accordance with the rule that the party against whom a motion for dismissal is directed is entitled to have all material and relevant evidence submitted on its behalf treated as true, to have every controverted fact resolved in its favor, and to have the benefit of every inference which can reasonably be deduced from the evidence. See, *Cullinane v. Interstate Iron & Metal*, *ante* p. 245, 343 N.W.2d 725 (1984); *Bank of Valley v. Mattson*, 215 Neb. 596, 339 N.W.2d 923 (1983). The

evidence most favorable to Jeffries Truck Line and Mansfield is that Carlson failed to look to the rear at a time when he could have avoided the accident, and turned left far in advance of the intersection. Jeffries Truck Line presented evidence that the truck was in the process of overtaking Carlson when Carlson turned his motorcycle under the truck.

In *Robinson v. Hammes*, 173 Neb. 692, 697-98, 114 N.W.2d 730, 733 (1962), we stated: " 'In an action for gross negligence under the automobile guest statute, where there is adequate proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence.' [Citations omitted.]

"A general definition by this court is the following: 'Gross negligence, within the meaning of section 39-740, R. S. 1943, means negligence in a very high degree, or the absence of even slight care in the performance of a duty.' [Citations omitted.]"

In light of the fact that Carlson was operating a relatively small motorcycle of limited power while carrying a helmetless passenger upon a major highway, it cannot be said as a matter of law, if the facts are viewed most favorably to Jeffries Truck Line and Mansfield, that Carlson was not grossly negligent in failing to look to the rear sooner than he did and in turning left as soon as he did. The trial court therefore erred by dismissing the third-party claims of Jeffries Truck Line and Mansfield.

This is an appropriate place to consider Carlson's contention that the trial court erred by dismissing his counterclaim for damages from Jeffries Truck Line and Mansfield.

In viewing the evidence most favorably to Carlson, he was about three-eighths of a mile from the intersection at which he intended to turn left when he

viewed the truck in his rearview mirrors. He waited for oncoming traffic to clear and, when about 500 feet from the intersection, signaled a left turn and moved into the oncoming traffic lane in order not to impede the speed of the traffic behind him. At this time the truck was still in its proper traveling lane. When Carlson was 200 feet from the intersection, he noticed the truck was right behind him, and his subsequent evasive maneuvering proved unsuccessful. In order to recover upon a negligence claim, the claimant must not have been contributorily negligent in a degree more than slight when compared to the negligence of the defendant. Neb. Rev. Stat. § 25-1151 (Reissue 1979); *Davis v. Phillips*, 215 Neb. 184, 337 N.W.2d 754 (1983).

Jeffries Truck Line and Mansfield have cited no case supporting their contention that Carlson's presence in the left-hand, oncoming traffic lane in preparation for a left turn at the approaching intersection constitutes negligent conduct as a matter of law under Carlson's version of the facts.

The cases cited to us by Jeffries Truck Line and Mansfield in support of the trial court's dismissal of Carlson's counterclaim concern left turns off highways at places other than intersections and are therefore not applicable. *Zeiger v. Farmers Co-op Assn.*, 212 Neb. 933, 327 N.W.2d 43 (1982); *Mazankowski v. Harders*, 206 Neb. 583, 293 N.W.2d 869 (1980); *Petersen v. Schneider*, 153 Neb. 815, 46 N.W.2d 355 (1951).

While Carlson's maneuver, under his version of the facts, may strike one as something less than the most cautious conduct, the question of whether he was more than slightly negligent is for the jury.

Therefore, the second assignment of error urged by Jeffries Truck Line and Mansfield is well taken, as is the assignment of error urged by Carlson. The questions as to the degree of Carlson's negligence and as to his contributory negligence are for the jury, as would be the matter of apportioning dam-

ages, should Carlson be found by the jury to have been grossly negligent.

We quite frankly do not understand the complaint made by the third assignment of error urged by Jeffries Truck Line and Mansfield with respect to the trial court's treatment of the consent judgment between them and the Teegerstrom estate. Although it appears that a request was made to have the judgment document itself marked as an exhibit, we do not understand that it was offered. First of all, Carlson's answer to the third-party complaint admitted all relevant facts concerning the consent judgment. Thus, there existed no issue among the parties as to that matter. It is not error to reject documentary evidence of an admitted fact. *Thompson v. Colfax County*, 106 Neb. 351, 183 N.W. 571 (1921). All that was required was an instruction to the jury advising it as to facts in that regard. In any event, the comments of the trial judge to the jury and the evidence adduced concerning the matter fully informed the jury that Jeffries Truck Line and Mansfield jointly agreed to compromise and settle the estate's claim against them for $30,000. An employee for Jeffries Truck Line testified that the truckline paid $30,000 in accordance with that agreement. Had the matter been submitted to the jury, there would have existed no prejudicial error in this connection.

The cause is remanded for a new trial both as to the third-party complaint of Jeffries Truck Line and Mansfield and as to Carlson's counterclaim, and as to the apportionment of damages, should Jeffries Truck Line and Mansfield prove Carlson to have had a joint liability to the Teegerstrom estate.

REVERSED AND REMANDED FOR A NEW TRIAL.

IN RE INTEREST OF K.S., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. K.S., APPELLEE.

346 N.W.2d 417

Filed March 30, 1984. No. 83-559.

1. **Juvenile Courts: Minors: Words and Phrases.** A "truant" is a child who stays away from school without the permission of one having authority to grant such permission.
2. **Juvenile Courts: Minors: Parental Duties.** A child is a truant if his parent fails to cause the child to attend school as required by a compulsory attendance statute, at least where there is not a valid excuse for the absence from school even though the parent consents to the absence.
3. **Juvenile Courts: Minors: Jurisdiction.** The juvenile court has exclusive original jurisdiction as to a child who is habitually truant from school, regardless of whether the truancy is with or without the permission of the parent or guardian of the child.

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

George Rhodes, Custer County Attorney, for appellant.

Lawrence W. Stunkel, for appellee.

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

KRIVOSHA, C.J.

This appeal presents to the court the single, narrow question of whether a child under 18 years of age may be habitually truant from school under the provisions of Neb. Rev. Stat. § 43-202(4)(b) (Reissue 1978) when such habitual truancy is at the direction of the child's parents. We should note, at the outset, that § 43-202(4)(b) was repealed in 1981 and may now be found as Neb. Rev. Stat. § 43-247(3)(b) (Cum. Supp. 1982). Our determination, however, is unaffected. The county court for Custer County, Nebraska, sitting as the juvenile court, found that a child could be truant within the meaning of § 43-202(4)(b)

even if the child were withheld from school by the parent. In so finding, the juvenile court determined that it had jurisdiction over the child and entered an appropriate order. On appeal the district court for Custer County found to the contrary and dismissed the action. We believe that the county court was correct and the district court in error, and for that reason the decision of the district court dismissing the petition is reversed and the matter is remanded with instructions to reinstate the petition and the order of adjudication.

The facts disclose that the child involved in this case was 7 years of age at the time the petition was filed in the juvenile court and that he had completed the first grade at a public school in the area. While attending the second grade, his parents withdrew him from school because, according to the parents, boys were not emotionally ready for school until possibly age 10, and because the child allegedly suffered from a form of enuresis which caused the child embarrassment and humiliation while at school. Pursuant to the provisions of Neb. Rev. Stat. § 79-202 (Reissue 1981), the parents requested that their child be excused from the requirements of the compulsory education laws of Nebraska. Neb. Rev. Stat. § 79-201 (Reissue 1981). The school board denied the parents' request, but the child was nevertheless removed from school by the parents. The action of the parents in removing the child from school was clearly a violation of § 79-201. Pursuant to the provisions of Neb. Rev. Stat. § 79-211 (Reissue 1981), the parents were given notice of the child's truancy, and when the child continued to remain away from school, the county attorney caused a petition to be filed in the juvenile court for Custer County, Nebraska. The petition alleged that the child was "a child within the provisions of Section 43-202(2)(c) *and* (4)(b) of the Juvenile Act," and prayed that the minor child be so adjudicated and that he be "corrected, cared for and disciplined according to the

law and the duty of The State of Nebraska." (Emphasis supplied.) The county court, after trial, found that the provisions of § 43-202(2)(c) of the juvenile act did not apply but that the provisions of § 43-202(4)(b) applied, and the court ordered that the minor child be determined to be within the jurisdiction of the juvenile court. No further orders have yet been entered with regard to the disposition of the child. The county court's adjudication, however, was appealed to the district court, and, after hearing, the district court determined that the child was not habitually truant within the meaning of § 43-202(4)(b) because the truancy was caused by the action of the parents and not the intentional or affirmative action of the child.

While neither the compulsory education law of Nebraska nor the Nebraska Juvenile Code defines "truancy" within the meaning of § 43-202(4)(b), we believe that the word is one of common knowledge and may be interpreted for our purposes as defined by the dictionary. We do this in keeping with our previously declared rules concerning appropriate construction of statutes. In *Freese and Johnson v. County of Douglas*, 210 Neb. 521, 526, 315 N.W.2d 638, 641 (1982), we said: " 'The court, in considering the meaning of its statute, should, if possible, discover the legislative intent from the language of the act and give it effect. . . .' " See, also, *Otto v. Hahn*, 209 Neb. 114, 306 N.W.2d 587 (1981). "In construing a statute the court must look to the object to be accomplished, the evils and mischiefs sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it." *School District of Murray v. Lancaster*, 203 Neb. 109, 115-16, 277 N.W.2d 558, 562 (1979). See, also, *West Nebraska General Hospital v. Hanlon*, 208 Neb. 173, 302 N.W.2d 694 (1981); *Mitchell v. County of Douglas*, 213 Neb. 355, 329 N.W.2d 112 (1983); *State ex rel. Bouc v. School Dist. of City of Lincoln*, 211

Neb. 731, 320 N.W.2d 472 (1982). And, finally, courts should give statutory language its plain and ordinary meaning. See *Little Blue N.R.D. v. Lower Platte North N.R.D.*, 206 Neb. 535, 294 N.W.2d 598 (1980).

The plain meaning of the statute gives no support to the position of the parents in this case. The dictionary defines "truant" as being "a pupil who stays away from school without permission." Webster's New Universal Unabridged Dictionary 1961 (2d ed. 1983). A child is no less truant if permission were obtained from one without the authority to grant permission. Under Nebraska compulsory attendance law only school authorities have the authority to grant permission to be absent. The fact that the parent grants permission cannot change the meaning of the act. Section 79-201 specifically provides that the compulsory attendance law is violated by a child who does not attend in accordance therewith "except when excused by school authorities." There is no allegation nor evidence in this case that the child has been excused by school authorities, and, quite to the contrary, the evidence is that the child was not excused by authorities. In 79 C.J.S. *Schools and School Districts* § 471 at 396 (1952), it is noted: "A child is a truant if his parent fails to cause him to attend school as required by a compulsory attendance statute, at least where there is not a valid excuse for the absence from school, even though the parent consents to the absence." In *De Lease v. Nolan*, 185 A.D. 82, 84, 172 N.Y.S. 552, 554 (1918), the New York court, after determining that the child was truant, though excused by its parent, said: "The consent of the parent to the absence of the child has no effect upon this lawful dominion of the state." See, also, *F. & F. v. Duval County*, 273 So. 2d 15 (Fla. App. 1973); *In Interest of E.B.*, 287 N.W.2d 462 (N.D. 1980); *In re Alley*, 174 Wis. 85, 182 N.W. 360 (1921); *Simmons v. State*, 175 Ind. App. 333, 371 N.E.2d 1316 (1978); *Sheehan v. Scott*, 520 F.2d

825 (7th Cir. 1975). The source of the truancy seems to be irrelevant to the statutory grant of jurisdiction over a child who is truant.

While § 43-202(2) repeatedly addresses the neglect of a child resulting from the fault of the parent, § 43-202(4) makes no such distinction between an act by the child or an act by the parent. Rather, it simply looks at what the fact of the matter is. That is, the court can acquire exclusive jurisdiction as to any child under the age of 18, under the provisions of § 43-202(4), whenever the facts disclose that the child is uncontrolled by his parent, guardian, or custodian, or deports himself so as to injure or endanger seriously the morals or health of himself or others, or is habitually truant from school or home. For example, the juvenile court may acquire jurisdiction over a child who is endangering seriously the morals or health of himself or others, whether with or without his parents' permission. The question is not whether the parent has permitted the child to engage in immoral activity, but whether the child is in fact immoral and therefore in need of supervision. Likewise, the child may be truant from home because at home the parent abuses the child physically or sexually, yet no one would seriously argue that because a child is truant from home in order to avoid abuse, the juvenile court could not acquire jurisdiction. To hold otherwise would be to completely ignore the purpose and function of the juvenile act, which specifically provides in part that the purpose of the act is "[t]o assure the rights of all children to care and protection and to development of their capacities for a healthy personality, physical well-being and useful citizenship and to protect the public interest." See Neb. Rev. Stat. § 43-201.01(1) (Reissue 1978).

The cause of the truancy seems to be insignificant. In adjudicating a child within the provisions of the juvenile act, we are not concerned with the cause of the problem. What we are concerned with is the

best interests of the child regardless of the cause of the child's problem.

The parents argue that our decision in *State v. Rice*, 204 Neb. 732, 285 N.W.2d 223 (1979), supports their position. We believe that they are in error. In *Rice* we simply held that parents withholding a child from school in violation of the compulsory education laws does not, in and of itself, constitute an act under § 43-202(*2*)(*c*) and that before the juvenile court can acquire jurisdiction of a child under *that* section, proof must be presented to show that the child is not receiving a proper education. In the *Rice* case the evidence only disclosed the child was truant, and the child may in fact have been receiving a proper education. We cannot fault the county attorney in this case, who carefully read our decision in *Rice* and to avoid the pitfalls of *Rice* added a second arrow to his bow in the form of § 43-202(4)(b), instead of attempting to establish jurisdiction solely under the provisions of § 43-202(2)(c). While the facts in this case, as presented to us, may not be sufficient to establish jurisdiction under § 43-202(2)(c), the mere fact that the child is not complying with the compulsory education laws without being first excused by school authorities establishes truancy, and therefore the court has jurisdiction under § 43-202(4)(b). What the juvenile court does with the child may be affected by who is causing the problem, but that does not affect whether the juvenile court can acquire jurisdiction.

The parents further argue to us that it is unfair to stigmatize the child by reason of the acts of the parents. This argument simply fails to recognize both the provisions of the juvenile act and its intended purpose. The act is designed and required to be applied in order to prevent the child from in any way being stigmatized by reason of either the acts of the parents or the action of the court. Contrary to the parents' claim, the act is designed to eliminate any stigma which may fall upon the child by reason of

the acts of the parents. Neb. Rev. Stat. § 43-206.03(5) (Reissue 1978) specifically provides that "[n]o adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction. The adjudication and the evidence given in the court shall not operate to disqualify such child in any future civil or military service application or appointment. Any admission, confession, or statement made by the child, in court and admitted by the court, in a proceeding under this section, shall be inadmissible against such child in any criminal or civil proceeding . . . ." Furthermore, except for limited purposes, the records of the juvenile court are confidential and unavailable for public scrutiny. See Neb. Rev. Stat. § 43-206.04(2) (Reissue 1978).

What the court will order in this case is yet unknown. All that is at issue is whether the juvenile court may acquire jurisdiction over the child and, by reason thereof, prescribe requirements which will be in the child's best interests. The juvenile court, under the juvenile act, has a number of alternatives, including permitting the child to remain in the home conditioned upon the parents' taking proper steps to ensure the child's regular school attendance. See Neb. Rev. Stat. § 43-210.04(4) (Reissue 1978). We are not, in these cases, concerned with fault. Rather, we are concerned with effect. It is the best interests of the child with which we must deal, and to therefore suggest that the child may not be truant from school simply because the parents require the child not to attend would be to give consideration to form over substance and to abandon the best interests of the child. It is for that reason that we declare that the juvenile court has exclusive original jurisdiction as to any child under the age of 18 years who is habitually truant from school, regardless of whether the truancy is with or without the permission of the parent or guardian. The judgment of the

district court must be reversed and the cause remanded with directions to reinstate the order of the county court and return the matter to the county court for appropriate disposition.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DAN FERRIN, APPELLANT.

346 N.W.2d 422

Filed March 30, 1984. No. 83-626.

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

Donald B. Fiedler, Deborah R. Pred, and Marie L. Kulawik of Fiedler Law Offices, 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.

Defendant was sentenced to a term of 3 to 6 years in the Nebraska Penal and Correctional Complex upon pleading guilty to a charge of delivery of a controlled substance, to wit, hashish, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1982).

He appeals and assigns as error only the excessiveness of the sentence. After a review of the record we agree. Defendant was 22 years old with no previous felony convictions and a minor juvenile record. His codefendant received a sentence of 18 months to 3 years.

Defendant's sentence is modified to provide for a sentence of 18 months to 3 years. Defendant is to receive credit for all time served.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. PHILLIP J. MCKAY, APPELLANT.

346 N.W.2d 423

Filed March 30, 1984. No. 83-894.

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

Don J. Sixta of Krafta & Sixta, P.C., for appellant.

No appearance for appellee.

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

PER CURIAM.

Defendant was sentenced to a term of 2 to 4 years in the Nebraska Penal and Correctional Complex on burglary charges.

He appeals and assigns as error only the excessiveness of the sentence. After a review of the record we agree. Defendant was 21 years old with no previous felony convictions and a minor juvenile record. His codefendant was 19 years old with no previous felony convictions and a worse juvenile record than the defendant. The codefendant received a sentence of 18 months to 3 years.

Defendant's sentence is modified to provide for a sentence of 18 months to 3 years.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. CEDRIC D. JOHNSON, APPELLANT.

346 N.W.2d 423

Filed March 30, 1984. No. 83-903.

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

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

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

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

PER CURIAM.

The defendant was sentenced to concurrent terms of 1 to 2 years in the Nebraska Penal and Correctional Complex on November 4, 1983, on charges of receiving stolen property and carrying a concealed weapon.

He appeals and assigns as the sole error the excessiveness of the sentences. After a review of the record, including the presentence report, we agree.

The sentences are modified to provide for concurrent terms of 1 year each.

AFFIRMED AS MODIFIED.

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1. The requirement of Neb. Rev. Stat. § 77-2407 (Reissue 1981) to furnish a proper appeal bond in any appeal from an order of the Director of Administrative Services is mandatory and essential to confer jurisdiction of the proceedings on the district court, and the failure to do so may be objected to at any time during the course of the proceedings. Gesman v. State 126
2. The Commission of Industrial Relations is an administrative agency within the purview of the Administrative Procedures Act. Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln 274
3. Our review of an order of an administrative agency, including the Commission of Industrial Relations, is generally restricted to considering whether the commission's order is supported by substantial evidence, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln 274
4. For purposes of Neb. Rev. Stat. § 49-301 (Reissue 1978), an administrative proceeding is a pending action when the agency's final order is rendered. In re Application of Ochsner 480
5. To satisfy the requirement of due process, a notice in proceedings before an administrative agency must reasonably provide information regarding the accusation levied. In re Appeal of Bonnett 587
6. Charges in administrative proceedings must be specific enough to allow a party to prepare a defense, but the charges need not be drawn with the same refinements, strictness, exactitude, and subtleties as pleadings for judicial proceedings. In re Appeal of Bonnett 587
7. Notice of an accusation in administrative proceedings must sufficiently inform a party about the nature of the proceedings in order to avoid surprising or misleading the accused. In re Appeal of Bonnett 587
8. A proceeding becomes a "contested case," within the meaning of Neb. Rev. Stat. § 84-901(3) (Reissue 1981),

when a hearing is required. Central Park Pharm. v. Nebraska Liq. Cont. Comm. 676
9. Administrative agency classifications are constitutional where no constitutionally protected right of status is significantly impaired, and where the classification bears a rational relationship to a legitimate state interest. Haven Home, Inc. v. Department of Pub. Welfare 731
10. A rebuttable presumption of validity attaches to actions of administrative agencies; the burden of proof rests with the party or parties challenging the action of an administrative agency. Haven Home, Inc. v. Department of Pub. Welfare 731

Adverse Possession.

1. On appeal to this court of an order quieting title by adverse possession, we review the record de novo without reference to the factual findings made in the lower court, giving weight to the fact, when the facts are in dispute, that the trial judge had the opportunity to experience the demeanor of the witnesses and had the opportunity to view the premises in dispute. Martin v. Kozuszek 705
2. In order to prevail in a suit to quiet title based upon adverse possession, the party claiming such title is required to prove by a preponderance of the evidence that the possession has been actual, continuous, exclusive, notorious, and adverse under a claim of right for at least a 10-year period. Martin v. Kozuszek 705
3. The placement of a fence within one's boundary line does not lead to the relinquishment of ownership of lands outside the fence, without an additional showing that those lands outside the fence have been used by the neighboring landowner under a claim of ownership for the requisite period of time. Martin v. Kozuszek 705

Affidavits.

1. Under Neb. Rev. Stat. § 86-705(1)(c) (Reissue 1981), the "full and complete statement" required by the statute refers to a factual statement regarding investigative procedures. State v. Golter 36
2. An affidavit in support of an application for a wiretap order must include sufficient facts upon which a judge can independently determine whether a wiretap is a necessary investigative technique to be used by a law enforcement agency. State v. Golter 36
3. A court can authorize a wiretap only on a factual basis of necessity and not on factually unsupported and con-

clusory expressions of the affiant regarding investigative procedures. State v. Golter 36
4. An affidavit based upon a tip from an informant is sufficient if the magistrate is informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible. State v. Sims 569
5. An affidavit made to obtain a search warrant is presumed valid, and the defendant has the burden to establish that the affidavit was false. State v. Sims 569
6. If the allegations remaining, after statements shown to be false are removed from the affidavit, are sufficient to support the issuance of a warrant, the affidavit and warrant are valid. State v. Sims 569
7. In a summary judgment proceeding, affidavits of a lay witness attempting to interpret medical testimony and to arrive at conclusions as to the possible negligence of a physician and surgeon generally are insufficient to meet the burden of a party refuting a prima facie showing of no negligence by the movant. Hanzlik v. Paustian 575
8. An affidavit opposing the rendition of a summary judgment, to be effective, must be made on personal knowledge, must set forth such facts as would be admissible in evidence in detail and with precision, and must show affirmatively that the affiant is competent to testify to the matters stated therein. Hanzlik v. Paustian 575

Agents.

An agent is personally liable to third persons for the agent's misfeasances or positive wrongs. Morfeld v. Bernstrauch 234

Aggravating and Mitigating Circumstances.

1. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979), as interpreted by the decisions of this court, is not unconstitutionally vague. State v. Reeves 206
2. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979) has been interpreted by this court to include murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering. State v. Reeves 206
3. The facts relied upon to prove the aggravating circumstances of Neb. Rev. Stat. § 29-2523(1) (Reissue 1979) must be proven beyond a reasonable doubt. State v. Reeves 206

Alimony.

1. A material change in circumstances, not within the reasonable contemplation of the parties at the time of the alimony award, and not accomplished by the mere passage of time, may constitute good cause for modification of a decree; our determination as to whether such good cause has been shown is made de novo on the record. Sholl v. Sholl 289
2. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion under Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982) is one of reasonableness. Pittman v. Pittman 746
   Shald v. Shald 897

Appeal and Error.

1. On remand by this court the trial court has no alternative but to follow the directions given. Jameson v. Nelson 26
2. In the absence of any evidence that the relief ordered by the trial court's judgment on the mandate is in excess of that necessary to accomplish this court's directions, the judgment on the mandate must be affirmed. Jameson v. Nelson 26
3. The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor. Juniata Feedyards v. Nuss 29
4. Appeals from action taken by the county superintendent in cases involving the dissolution and merging of Class I school districts are tried de novo in the district court and heard de novo on the record in this court. In re Dissolution of School Dist. No. 22 89
5. A foreclosure of a mechanic's lien is an action in equity which is heard on appeal in this court de novo on the record, with weight being given to the findings of the trial court when credible evidence is in conflict on material questions of fact. Kustom Kreations v. Duxbury 99
6. The denial of a motion for summary judgment is not a final order and therefore is not appealable to the Supreme Court. Bryant Heating v. United States Nat. Bank 107
7. 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, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be affirmed

if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Thielen 119
State v. Miner 309
8. Findings that certain portions of a testamentary document are the products of undue influence are determinations of fact. As such, the standard of review is whether the findings are supported by sufficient evidence, which are not to be disturbed unless clearly wrong. In re Estate of Marsh 129
9. The finding that a partially valid testamentary document is or is not to be given dispositive effect is equitable in nature and, on appeal, reviewed de novo on the record. In re Estate of Marsh 129
10. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside unless clearly wrong. Paris v. J. A. Baldwin Mfg. Co. 151
Wilson Concrete Co. v. Rork 447
Moore v. The Sisk Co. 451
Ceco Corp. v. Crocker 692
11. In testing the sufficiency of evidence to support findings of the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Paris v. J. A. Baldwin Mfg. Co. 151
Moore v. The Sisk Co. 451
Ceco Corp. v. Crocker 692
12. On appeal to this court an action in equity is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another, as well as the fact that the trial court viewed the premises. O'Keefe Elevator v. Second Ave. Properties 170
Gerberding v. Schnakenberg 200
Grint v. Hart 406
Jackson v. Clemens 641
Knudtson v. Trainor 653
Sasich v. City of Omaha 864
Johnson v. Mays 890
13. Appeals from the district court under the Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-668 (Reissue 1978), are reviewed by the Supreme Court de novo on the record made in the district court, with the duty to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof. School Dist. No. 21 v. Ochoa 191

14. The trial judge is in the best position to measure the atmosphere at trial and gauge the probable impact an improper comment has on a jury. As such, the trial court's determination concerning the comment will not be overruled unless it is clearly erroneous. State v. Reeves 206
15. Where a jury is waived in a replevin action, the findings of the trial court will have the effect of a jury verdict. Morfeld v. Bernstrauch 234
16. In considering the sufficiency of the evidence to sustain a judgment, an appellate court must view the evidence in the light most favorable to the successful party. Morfeld v. Bernstrauch 234
17. Our review of an order of an administrative agency, including the Commission of Industrial Relations, is generally restricted to considering whether the commission's order is supported by substantial evidence, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln 274
IBEW Local 1536 v. City of Fremont 357
18. It has long been the rule of this court that we will not consider errors not properly assigned. The rules of this court require that each error relied upon for reversal must be separately stated in concise language. Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln 274
19. A material change in circumstances, not within the reasonable contemplation of the parties at the time of the alimony award, and not accomplished by the mere passage of time, may constitute good cause for modification of a decree; our determination as to whether such good cause has been shown is made de novo on the record. Sholl v. Sholl 289
20. An appeal from a county board of equalization is tried in this court de novo as in an equity proceeding. Kearney Convention Center v. Board of Equal. 292
21. Unless an error can be considered prejudicial to the rights of a defendant, it may not be considered as ground for reversal. State v. Masters 304
22. The question of the competency of a child witness is measured by such child's capabilities, intelligence, and understanding of the difference between truth and falsehood, and the determination of such competency rests largely in the discretion of the trial court and its determination in that regard will not be overturned absent a clear abuse of discretion. State v. Miner 309
23. The ruling of a trial court in receiving or excluding an

expert opinion will be reversed on appeal only when a clear abuse of discretion is shown. State v. Miner 309
24. A sentence in a criminal case imposed within statutory limits will not be overturned on appeal absent an abuse of discretion by the trial judge. State v. Miner 309
State v. Reuter 325
25. Error in the admission of evidence is not grounds for reversal of a judgment when no prejudice results from such error; if properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal. State ex rel. Douglas v. Morrow 317
26. Determinations made by the Commission of Industrial Relations in accepting or rejecting claimed comparables are within the field of expertise of the commission and should be given due deference. IBEW Local 1536 v. City of Fremont 357
27. Guidelines used by the Commission of Industrial Relations to be followed in using the "key job classification," in a proceeding to determine compensation for public employees are not statutory requirements and failure of evidence to strictly comply with guidelines does not require the Supreme Court to find that the action of the commission in developing the "key job classification" was arbitrary and capricious. IBEW Local 1536 v. City of Fremont 357
28. In determining the sufficiency of jury instructions on appeal to this court, such instructions are to be read as a whole; and when they fairly submit the case and the jury could not have been misled, there is no prejudicial error. Kresha v. Kresha 377
Erickson v. Monarch Indus. 875
29. Neither the district court nor this court is entitled to review the record de novo to make those enumerated findings required by Neb. Rev. Stat. § 53-132 (Cum. Supp. 1982). Rather, such reviewing courts are entitled to determine whether the findings of the Nebraska Liquor Control Commission are supported by substantial evidence or whether such findings were arbitrary or capricious. McChesney v. City of No. Platte 416
30. The failure of the Nebraska Liquor Control Commission to make the findings of fact and conclusions of law provided for in Neb. Rev. Stat. § 53-132 (Cum. Supp. 1982) does not make its order void, but only irregular, which requires a reviewing court to remand the case to the commission with directions to make such findings in

support of any order to be made. McChesney v. City of No. Platte 416
31. Ordinarily, the Nebraska Supreme Court will dispose of a case on appeal on the theory on which it was presented in the lower court. Lincoln Grain v. Coopers & Lybrand 433
32. The appropriate standard of review for an assignment of error directed at the exclusion of evidence is one of abuse of discretion, as the admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, which must determine the relevancy and possible prejudicial effect of the proffered evidence. Lincoln Grain v. Coopers & Lybrand 433
33. In determining whether and to what extent discipline should be imposed, it is necessary that we consider the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. State ex rel. NSBA v. Doerr 504
34. A motion for post conviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Hochstein 515
35. A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal unless the questions are such that they would make the judgment of conviction void or voidable under the state or federal Constitution. State v. Hochstein 515
36. One seeking post conviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed on appeal unless they are clearly erroneous. State v. Hochstein 515
37. In a post conviction case the person challenging the competency of counsel has the burden of proof to establish the incompetency of counsel, and the findings of the district court denying relief will not be disturbed on appeal unless clearly erroneous. State v. Hochstein ... 515
38. When there is evidence in the record to support the Nebraska Workmen's Compensation Court's finding of fact, we are bound by that finding. Spulak v. Estep ... 523
39. 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. City of Hastings v. Peter Ellis Farms 550
40. The general rule is that when evidence is improperly

received but immediately ordered stricken and the jury is instructed to disregard it, any error is cured. City of Hastings v. Peter Ellis Farms 550
41. The review in this court of an order of the Tax Commissioner imposing a deficiency assessment for the franchise or income tax of a corporation is de novo on the record. PMD Investment Co. v. State 553
42. Such an order may be reversed or modified only if it is (a) in violation of constitutional provisions; (b) in excess of the statutory authority or jurisdiction of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) unsupported by competent, material, and substantial evidence; or (f) arbitrary or capricious. PMD Investment Co. v. State 553
43. A divorce decree will not be modified as to custody 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. Richey v. Richey 565
44. Although an award of custody is subject to review de novo, the determination of the trial court will not ordinarily be disturbed on appeal unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Richey v. Richey 565
45. An order of the district court reversing a judgment of the county court in a criminal case, vacating the sentence, and remanding the cause for imposition of sentence may be reviewed under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1982). State v. Ziemba 612
46. The findings of fact of the trial court in a proceeding under the Political Subdivisions Tort Claims Act will not be disturbed unless they are clearly wrong. Rodgers v. Chimney Rock P.P. Dist. 666
47. The judgment of the trial court in a law action where a jury has been waived has the effect of a jury verdict and will not be set aside unless clearly wrong. Pioneer Enterprises v. Edens 672
48. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it. Pioneer Enterprises v. Edens 672
49. A finding with regard to causation of an injury is one for determination by the fact finder; it will not be set aside unless clearly wrong. Ceco Corp. v. Crocker 692
50. 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. Ceco Corp. v. Crocker 692
51. This court is not bound by the appellant's assignments of error, but can, at its option, address issues presented by plain error on the part of the trial court. State v. Ellis 699
52. In the absence of a bill of exceptions it will be presumed that the evidence sustained the findings of the trial court. The only issue that can be considered is whether the pleadings support the judgment. First Nat. Bank v. Lehl 704
53. On appeal to this court of an order quieting title by adverse possession, we review the record de novo without reference to the factual findings made in the lower court, giving weight to the fact, when the facts are in dispute, that the trial judge had the opportunity to experience the demeanor of the witnesses and had the opportunity to view the premises in dispute. Martin v. Kozuszek 705
54. Questions not presented or passed upon by the trial court will not be considered by this court on appeal. Hasenauer v. Durbin 714
55. Assumed error in the ruling on the admission of evidence which did not injuriously affect the substantial rights of the accused is not grounds for reversal. State v. Plymate 722
56. This court may not substitute its judgment for that of the Nebraska Department of Public Welfare in determining which method is preferable to determine a reasonable cost-related basis for reimbursing long-term health care facilities. Haven Home, Inc. v. Department of Pub. Welfare 731
57. An action for dissolution of marriage is reviewed de novo in this court, although weight is given to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Pittman v. Pittman ... 746
Shald v. Shald 897
58. The findings of fact as to the voluntariness of a search will not be set aside on appeal unless they are clearly wrong. In making that determination a reviewing court will take into consideration the advantage of the trial court in having heard the oral testimony. State v. Garcia 769
59. Where the alleged defect is not apparent on the face of the petition, the defect becomes an affirmative matter which must be raised by the party seeking the benefit of the defect. Smick v. Langvardt 778

60. Before this court can consider evidence bearing upon an issue of fact, evidence must have been offered at the trial court and embodied in the bill of exceptions filed with this court. Smick v. Langvardt 778
61. This court will not consider questions not presented to or passed on by the district court, and upon appeal will dispose of the case upon the theory on which it was tried in the district court. Ingerslew v. Bartholomew . 836

Appeal Bonds.

The requirement of Neb. Rev. Stat. § 77-2407 (Reissue 1981) to furnish a proper appeal bond in any appeal from an order of the Director of Administrative Services is mandatory and essential to confer jurisdiction of the proceedings on the district court, and the failure to do so may be objected to at any time during the course of the proceedings. Gesman v. State 126

Attorney and Client.

The possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his sixth amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. State v. Heathman 609

Attorney Fees.

In an action for dissolution of marriage the award of an attorney fee rests in the discretion of the trial court, taking into consideration the division of property, alimony awarded, the earning capacity of the parties, and the general equities of the case. Pittman v. Pittman .. 746

Banks and Banking.

1. When a bank accepts a deposit of funds it knows to be of a trust nature, and also knows that the depositor is without authority to deal with those funds, it distributes the funds to the depositor at its peril, with liability to the true owner of those funds. McHenry v. First Nat. Bank 580
2. A national bank is a body corporate brought into existence under federal legislation, and is an instrumentality of the federal government. Cattle Brokers v. Billings 845

Blood, Breath, and Urine Tests.

A motorist's subsequent offer to take the blood alcohol test previously refused does not nullify or cure such

driver's initial refusal to take the test requested by the arresting officer. Hoyle v. Peterson 253

Boundaries.

The placement of a fence within one's boundary line does not lead to the relinquishment of ownership of lands outside the fence, without an additional showing that those lands outside the fence have been used by the neighboring landowner under a claim of ownership for the requisite period of time. Martin v. Kozuszek 705

Breach of Warranty.

1. To establish a breach of the implied warranty of merchantability arising under Neb. U.C.C. § 2-314 (Reissue 1980), there must be proof that there was a deviation from the standard of merchantability at the time of sale and that such deviation caused the plaintiff's injury both proximately and in fact. O'Keefe Elevator v. Second Ave. Properties 170
2. To establish a breach of the implied warranty of fitness for a particular purpose arising under Neb. U.C.C. § 2-315 (Reissue 1980), there must be proof that the seller had reason to know of the buyer's particular purpose; that the seller had reason to know the buyer was relying on the seller's skill or judgment to furnish appropriate goods; and that the buyer did, in fact, rely upon the seller's skill or judgment. O'Keefe Elevator v. Second Ave. Properties 170

Burglary.

Evidence of any act of physical force, however slight, by which the obstruction to entering is removed is sufficient to prove a breaking. State v. Classen 323

Cases Disapproved.

State v. Feagin, 196 Neb. 261, 242 N.W.2d 124 (1976), and *State v. Prichard*, 215 Neb. 488, 339 N.W.2d 748 (1983), disapproved in part. State v. Ziemba 612

Child Custody.

1. A divorce decree will not be modified as to custody 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. Richey v. Richey 565
2. Although an award of custody is subject to review de novo, the determination of the trial court will not ordinarily be disturbed on appeal unless there is a clear

abuse of discretion or it is clearly against the weight of the evidence. Richey v. Richey 565

3. Although it is generally sound public policy to keep children together in the custody of one parent when possible, considerations of public policy do not, in all cases, prevent dividing of custody so that each parent may have custody of a child or children. Richey v. Richey 565
4. Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. Friedrichsen v. Koehn 628

Child Support.

1. The remarriage of a father does not relieve him of child support obligations fixed by a divorce decree. State v. Reuter 325
2. Article I, § 20, of the Nebraska Constitution, which provides that one shall not be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud, does not prohibit the imprisonment of one who refuses to obey a court order to support his children. State v. Reuter 325
3. A sentence of imprisonment for the failure to support one's children as ordered by a court does not violate the eighth amendment to the U.S. Constitution and article I, § 9, of the Nebraska Constitution, both of which prohibit the infliction of "cruel and unusual" punishment. State v. Reuter 325
4. It is in the best interests of the children that the amount set for child support in the decree remain constant without reduction based on supposition of an event that may or may not take place in the future. Shald v. Shald 897

Claims.

1. Prejudgment interest is recoverable upon the foreclosure of a mechanic's lien if the claim is liquidated. O'Keefe Elevator v. Second Ave. Properties 170
2. A claim is liquidated when there is no reasonable controversy as to either the right to recover or as to the amount of such recovery. O'Keefe Elevator v. Second Ave. Properties 170

Collateral Attack.

A judgment is not subject to collateral attack unless that

attack rests upon a lack of jurisdiction over the parties or of the subject matter. State v. Reuter 325

Collateral Estoppel.

Collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with the party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior litigation. State ex rel. Douglas v. Morrow .. 317

Commission of Industrial Relations.

1. In selecting employment units in reasonably similar labor markets for the purpose of comparison as to wage rates and other benefits, the question is whether, as a matter of fact, the units selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate. Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln 274
2. There are strong policies in favor of using an array of comparable Nebraska employers rather than using employers from outside the State of Nebraska, when an appropriate array for that purpose within the state exists. Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln 274
3. Where it is alleged that economic dissimilarities exist which have a bearing on prevalent wage rates, the burden is on the party making that allegation to establish the bearing of any such economic dissimilarities on prevalent wage rates. Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln 274
4. The Commission of Industrial Relations is an administrative agency within the purview of the Administrative Procedures Act. Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln 274
5. Our review of an order of an administrative agency, including the Commission of Industrial Relations, is generally restricted to considering whether the commission's order is supported by substantial evidence, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln 274
   IBEW Local 1536 v. City of Fremont 357
6. The burden is on the moving party in a Neb. Rev. Stat. § 48-818 (Cum. Supp. 1982) case to demonstrate that ex-

isting wages are not comparable to the prevalent wage rate. IBEW Local 1536 v. City of Fremont 357
7. Determinations made by the Commission of Industrial Relations in accepting or rejecting claimed comparables are within the field of expertise of the commission and should be given due deference. IBEW Local 1536 v. City of Fremont 357
8. With regard to a determination of conditions of employment under Neb. Rev. Stat. § 48-818 (Cum. Supp. 1982), the Commission of Industrial Relations will enter an order either adjusting the condition of employment or find a subject city's condition to be lesser or greater than the prevalent, and adjust the overall compensation accordingly, if, in the compared-to cities, the exact content of a condition of employment is clear from the total evidence. IBEW Local 1536 v. City of Fremont .. 357
9. Experience and longevity are proper matters to be considered in determining the wages to be paid to employees within the same job classification. IBEW Local 1536 v. City of Fremont 357
10. Where the employer has a large number of job classifications, but established lines of progression and established relationships between lines of progression, "key classifications" may be utilized to establish wages for all classes, provided reasonable requirements of prevalence and relevance are met. IBEW Local 1536 v. City of Fremont 357
11. Guidelines used by the Commission of Industrial Relations to be followed in using the "key job classification," in a proceeding to determine compensation for public employees are not statutory requirements and failure of evidence to strictly comply with guidelines does not require the Supreme Court to find that the action of the commission in developing the "key job classification" was arbitrary and capricious. IBEW Local 1536 v. City of Fremont 357
12. In a proceeding before the Commission of Industrial Relations, the hearing performs a truth-seeking function in settling controversies between the parties. It runs contrary to that function to suggest that unfavorable evidence in the form of an expert's opinion may be kept from either party in the interest of justice and to prevent prejudice. IBEW Local 1536 v. City of Fremont 357
13. The authority of the Commission of Industrial Relations is limited to that granted to it by legislative act, and such authority, when granted, must be narrowly

construed. Transport Workers v. Transit Auth. of Omaha 455

14. In an appropriate case the Commission of Industrial Relations may enter temporary orders affecting the wages, hours, and terms and conditions of employment of an employee pending the resolution of a labor dispute, and its authority under the act is not limited to preventing the discharge of an employee by the employer. Transport Workers v. Transit Auth. of Omaha 455

Complaints.

A complaint charging second or third offense driving while intoxicated should allege the facts upon which the State relies to establish that the offense charged is a second or third offense. State v. Ziemba 612

Confessions.

1. To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any direct or implied promises or inducements, however slight. State v. Mayhew 761
2. A promise by a county attorney to an accused to recommend a concurrent sentence if an accused gives a statement or makes a confession is such an improper inducement as to render the resulting statement or confession inadmissible. State v. Mayhew 761

Conflict of Interest.

The possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his sixth amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. State v. Heathman 609

Consideration.

1. There is a sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, whether or not there is any actual loss or detriment to him or actual benefit to the promisor. Hasenauer v. Durbin .. 714
   Hyde v. Shapiro 785
2. A valuable consideration to support a contract need not be one translatable into dollars and cents; it is sufficient if it consists of the performance, or promise

thereof, which the promisor treats and considers of value to him. Hyde v. Shapiro 785

Constitutional Law.

1. A litigant who invokes the provisions of a statute in appealing the action of a county superintendent in dissolving and merging a Class I school district may not challenge that statute's validity nor seek the benefit of such statute and in the same action and at the same time question its constitutionality. In re Dissolution of School Dist. No. 22 89
2. By the very nature of a presentence investigation, it is necessary to rely to a great extent upon hearsay information, and it is not constitutionally required that the person convicted be allowed to confront all those who might give information to be used by the sentencing court. State v. Reeves 206
3. Jury sentencing in capital cases is not constitutionally required. State v. Reeves 206
4. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979), as interpreted by the decisions of this court, is not unconstitutionally vague. State v. Reeves 206
5. A privately owned automobile may not be removed from private property without the consent of its owner by order of a police officer unless there are exigent circumstances requiring removal, or the officer has a search warrant. Morfeld v. Bernstrauch 234
6. The Nebraska Constitution requires that taxes must be levied by valuation uniformly and proportionately on all tangible property. Kearney Convention Center v. Board of Equal. 292
7. Article I, § 20, of the Nebraska Constitution, which provides that one shall not be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud, does not prohibit the imprisonment of one who refuses to obey a court order to support his children. State v. Reuter 325
8. A sentence of imprisonment for the failure to support one's children as ordered by a court does not violate the eighth amendment to the U.S. Constitution and article I, § 9, of the Nebraska Constitution, both of which prohibit the infliction of "cruel and unusual" punishment. State v. Reuter 325
9. Where a statute is susceptible of two constructions, under one of which the statute is valid, while under the other it is unconstitutional or of doubtful validity, that construction which gives it validity should be adopted. Doak v. Milbauer 331

10. Constitutional or statutory provisions, absent an infirmity in the law itself, govern what is the public policy. Where the lawmaking power speaks on a particular subject, over which it has constitutional authority to speak, the public policy in such a case is what the statute provides. Haakinson & Beaty Co. v. Inland Ins. Co. 426
11. As a general rule, courts cannot declare agreements or acts authorized by statute to be contrary to public policy unless the courts are first prepared to determine that the statute authorizing the act is itself unconstitutional. Haakinson & Beaty Co. v. Inland Ins. Co. 426
12. The possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his sixth amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. State v. Heathman 609
13. Administrative agency classifications are constitutional where no constitutionally protected right of status is significantly impaired, and where the classification bears a rational relationship to a legitimate state interest. Haven Home, Inc. v. Department of Pub. Welfare 731
14. Nebraska's franchise tax, Neb. Rev. Stat. § 77-2734(2) (Cum. Supp. 1982), insofar as it is a tax on interest from federal obligations, is a discriminatory tax, contrary to federal law, and, therefore, invalid. State ex rel. Douglas v. Karnes 750
15. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of Nebraska or the Constitution of the United States. State v. Pierce .. 792
16. As a general rule, retroactive operation of a decision overruling a prior case is not required by constitutional provisions. State v. Pierce 792
17. Decisions of this court, although later overruled, may nonetheless remain the law for intermediate transactions. State v. Pierce 792
18. Under the provisions of the Constitution of the United States or the State of Nebraska, the right of a speedy trial is relative and depends upon circumstances, and is not denied where delay is satisfactorily explained by government and the defendant was brought to trial as soon as was reasonably possible. State v. McNitt 837
19. Neb. Rev. Stat. § 50-201 (Cum. Supp. 1982) does not violate the constitutionally mandated separation of legislative, executive, and judicial powers found in article II,

§ 1, of the Nebraska Constitution. State ex rel. Douglas v. Beermann 849
20. A legislative statement that an enactment is within the constitutional exercise of the Legislature's power does not violate the constitutionally mandated separation of legislative, executive, and judicial powers found in article II, § 1, of the Nebraska Constitution. State ex rel. Douglas v. Beermann 849
21. Neb. Rev. Stat. § 50-202 (Cum. Supp. 1982) does not violate article III, § 7, of the Nebraska Constitution. State ex rel. Douglas v. Beermann 849
22. Constitutional provisions are not open to construction as a matter of course. State ex rel. Douglas v. Beermann 849
23. Before rules of construction become available in regard to a constitutional provision, it must be demonstrated that the meaning of the provision is not clear and that the intent of the people in adopting the provision can be determined only by construction. State ex rel. Douglas v. Beermann 849
24. The words and terms of a constitutional provision are to be interpreted and understood in their most natural and obvious meaning, unless the subject indicates or the text suggests that they have been used in a technical sense. State ex rel. Douglas v. Beermann 849
25. The word "pay," as used in article III, § 7, of the Nebraska Constitution, means wages, remuneration, compensation, or fees. State ex rel. Douglas v. Beermann 849
26. The word "perquisite," as used in article III, § 7, of the Nebraska Constitution, means a gain or profit made incidentally from the office of legislator, in addition to regular salary. State ex rel. Douglas v. Beermann 849
27. Ordinarily, executive construction of a constitutional provision, long acquiesced in by the Legislature, is entitled to substantial weight in determining the meaning of the provision. State ex rel. Douglas v. Beermann ... 849
28. A presumption of constitutionality attaches to legislative enactments, and a reasonable legislative interpretation of a constitutional provision which has a doubtful meaning should be adopted by this court. State ex rel. Douglas v. Beermann 849
29. The touchstone in determining the meaning of ambiguous constitutional language is to discover and give effect to the intent of the framers of the Constitution and the people in adopting it. State ex rel. Douglas v. Beermann 849
30. In appropriate circumstances the Constitution allows a properly limited search and seizure on facts that do not

constitute probable cause to arrest or to search for contraband or evidence of a crime. State v. DeJesus 907

Constitutional Rights.

Defendants are entitled to be informed of the nature of the charges against them, the right to assistance of counsel, the right to confront witnesses against them, the right to a jury trial where otherwise authorized, and the privilege against self-incrimination. State v. Neal 709

Construction Contracts.

1. Substantial performance is shown in a building contract when all of the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete performance that the owner obtains substantially what is called for by the contract. Pioneer Enterprises v. Edens 672
2. In building and construction contracts, in the absence of an express agreement to the contrary, it is implied that the building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose. Pioneer Enterprises v. Edens 672

Contempt.

1. One who is in privity with an enjoined party and also has knowledge of the injunction, or one who aids and abets the violation of the injunction, is subject to the contempt powers of the court. In re Contempt of Liles 531
2. A contempt sanction which aims to compel future obedience to the court's orders and decrees is conditioned upon the contemner's continued noncompliance and is coercive in nature. In re Contempt of Liles 531
3. A punitive contempt sanction is absolute and not subject to mitigation if the contemner alters his future conduct toward the court. In re Contempt of Liles 531
4. A coercive contempt sanction is not final and therefore not appealable; it is subject to collateral attack by habeas corpus. In re Contempt of Liles 531
5. A punitive contempt sanction takes on the aspects of a final order or an order affecting a substantial right issued in a special proceeding and is appealable. In re Contempt of Liles 531
6. One committed to jail in order to coerce compliance with a court order is entitled neither to have the sanction stayed nor to bail pending the outcome of his attack on the order. In re Contempt of Liles 531

Contractors and Subcontractors.

1. A contractor cannot delegate its duty to provide safe electrical wiring by employing a subcontractor to perform the electrical work. Erickson v. Monarch Indus. 875
2. A contractor who creates a dangerous condition which is latent and not discoverable by reasonable inspection is not relieved of liability by acceptance of the work by the owner. Erickson v. Monarch Indus. 875

Contracts.

1. Substantial performance must be shown before an action on the contract can be brought. Lange Bldg. & Farm Supply v. Open Circle "R" 1
2. There is substantial performance of a building contract where all of the essential elements necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete strict performance that the owner obtains substantially what is called for by the contract. Lange Bldg. & Farm Supply v. Open Circle "R" 1
3. Where one is claiming the estate of a deceased person under an alleged oral contract, the evidence of the agreement and its terms must be clear, satisfactory, and unequivocal. In re Estate of Nicholson 400
4. Evidence of declarations of a deceased person concerning a parol contract does not amount to direct proof of the facts claimed to have been admitted by those declarations. Such evidence, when not supported by other evidence, is generally entitled to but little weight. In re Estate of Nicholson 400
5. As a general rule, courts cannot declare agreements or acts authorized by statute to be contrary to public policy unless the courts are first prepared to determine that the statute authorizing the act is itself unconstitutional. Haakinson & Beaty Co. v. Inland Ins. Co. 426
6. It has long been the law, in both this jurisdiction and elsewhere, that the law of the state is an inherent part of every contract and that every contract is made with reference to and subject to the existing law, and every law affecting the contract is read into and becomes a part thereof. Haakinson & Beaty Co. v. Inland Ins. Co. 426
7. A third-party beneficiary's rights depend upon, and are measured by, the terms of the contract between the promisor and promisee. The right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, which must affirmatively appear from the language of the instrument when prop-

erly interpreted or construed; and the liability so appearing cannot be extended or enlarged on the ground alone that the situation and circumstances of the parties justify or demand further or other liability. It has been said that before the beneficiary may accept the benefits of the contract, he must accept all of its implied, as well as express, obligations. Haakinson & Beaty Co. v. Inland Ins. Co. 426

8. If negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. Sederstrom v. Burge 512

9. Oral testimony is not admissible under the ambiguity exception to the parol evidence rule to establish an understanding at variance with the plain terms of the written instrument. Sederstrom v. Burge 512

10. Where a written contract between the claimant and alleged employer exists, which not only denominates the relationship as that of independent contractor but also describes that kind of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workmen's compensation statutes. Spulak v. Estep 523

11. There is implied in every contract for work or services a duty to perform it skillfully, carefully, diligently, and in a workmanlike manner. Pioneer Enterprises v. Edens 672

12. A contract complete in itself will be conclusively presumed to supersede and discharge another one made prior thereto between the same parties concerning the same subject matter where the terms of the latter are inconsistent with those of the former so that they cannot subsist together. Hasenauer v. Durbin 714

13. There is a sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, whether or not there is any actual loss or detriment to him or actual benefit to the promisor. Hasenauer v. Durbin 714
Hyde v. Shapiro 785

14. A valuable consideration to support a contract need not

be one translatable into dollars and cents; it is sufficient if it consists of the performance, or promise thereof, which the promisor treats and considers of value to him. Hyde v. Shapiro 785

Contribution.

There can be no contribution between a host driver and the driver of the other vehicle where the guest statute would preclude a judgment in favor of the guest passenger against the host driver. Teegerstrom v. H. J. Jeffries Truck Line 917

Controlled Substances.

1. Evidence that a defendant had constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession and to sustain a conviction for unlawful possession. State v. Garcia 769
2. Constructive possession may be proved by direct or circumstantial evidence and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance. State v. Garcia 769
3. Constructive possession may be proven by ownership, dominion, or control over the contraband itself, coupled with the intent to exercise control over the same. State v. Garcia 769

Conversion.

1. Two parties can convert the same property if both wrongfully exercise dominion over it which is inconsistent with the rights of the true owner. Bryant Heating v. United States Nat. Bank 107
2. A negotiable instrument can be the subject of conversion. Bryant Heating v. United States Nat. Bank 107
3. One who takes possession of the personal property of another by purchase from a person having no authority from the true owner to dispose of it commits conversion. Bryant Heating v. United States Nat. Bank 107
4. A conversion of goods is any unauthorized or wrongful act of dominion exerted over another's personal property which deprives the owner of his property permanently or for an indefinite period of time. B. E. Implement Co. v. Valley Farm 269

Convictions.

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, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be affirmed if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Thielen 119
State v. Miner 309

Corporations.

1. Pursuant to the provisions of Neb. Rev. Stat. § 77-2734(2) (Reissue 1981), there is imposed a franchise tax on each corporation doing business in this state, measured by its entire net income which, for purposes of this section, is determined by taking the taxpayer's federal taxable income derived from sources within the State of Nebraska as determined pursuant to statute, which is then apportioned in accordance with Neb. Rev. Stat. §§ 77-2735 to 77-2749 (Reissue 1981). Kellogg Company v. Herrington 138
2. In computing a taxpayer's property values, payroll, and sales for purposes of computing its franchise tax under Neb. Rev. Stat. §§ 77-2735 to 77-2749 (Reissue 1981), the state must consider the values of the taxpayer's property worldwide, as well as its worldwide payroll and sales. Kellogg Company v. Herrington ... 138
3. For purposes of Neb. Rev. Stat. § 77-2743 (Reissue 1981), the taxpayer's entire taxable income must be as defined by Neb. Rev. Stat. § 77-2734(2) (Reissue 1981), which limits it to the taxpayer's federal taxable income. This includes dividends and interest and fees paid to it by its foreign subsidiaries, but does not include the income of its foreign subsidiaries. The property factor, payroll factor, and sales factor must include the taxpayer's worldwide items. Kellogg Company v. Herrington 138
4. The review in this court of an order of the Tax Commissioner imposing a deficiency assessment for the franchise or income tax of a corporation is de novo on the record. PMD Investment Co. v. State 553
5. Such an order may be reversed or modified only if it is (a) in violation of constitutional provisions; (b) in excess of the statutory authority or jurisdiction of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) unsupported by competent, material, and substantial evidence; or (f) arbitrary or capricious. PMD Investment Co. v. State 553
6. The purpose of the combined or unitary apportionment method of reporting is to permit a fair determination of the portion of business income that is attributable to

business activity within the state by the reporting member of the unitary group. PMD Investment Co. v. State 553
7. A unitary business operation is one in which there is a high degree of interrelationship and interdependence between, typically, one corporation, which generally is a parent corporation, and its corporate subsidiaries or otherwise associated corporations, which group is usually engaged in multistate, and in some cases in international, business operations. PMD Investment Co. v. State 553
8. The Nebraska Revenue Act of 1967, as amended, Neb. Rev. Stat. §§ 77-2701 et seq. (Reissue 1981), authorizes the use of the combined or unitary apportionment method of reporting to determine the income of a corporation engaged in a unitary business operation. PMD Investment Co. v. State 553
9. The fact that a taxpayer uses a method of separate accounting is not binding on the state if in fact the taxpayer is engaged in a unitary business operation. PMD Investment Co. v. State 553
10. Neb. Rev. Stat. § 25-408 (Reissue 1979) requires, with certain exceptions, that an action against a foreign corporation be brought in any county in which there may be property of or debts owing to said defendant, or where said defendant may be found. Cattle Brokers v. Billings 845

Courts.

1. On remand by this court the trial court has no alternative but to follow the directions given. Jameson v. Nelson 26
2. A district court has no authority or power to vacate a judgment after term except for the reasons and within the time limited in Neb. Rev. Stat. § 25-2001 (Reissue 1979). State ex rel. Birdine v. Fuller 86
3. The common law is inseparably identified with the decisions of the courts and can be determined only from such decisions in former cases bearing upon the subject under inquiry, and absent controlling decisions from state courts, precedents in other jurisdictions become persuasive. Kresha v. Kresha 377
4. A trial court may modify or vacate its judgments within the term, but the power to do so rests in the sound legal discretion of the court and may not be done arbitrarily. Sargent Feed & Grain v. Anderson 421
5. The discretion of a trial court to modify or vacate its judgments within the term is a judicial discretion

which is subject to review. Sargent Feed & Grain v. Anderson 421
6. A party which has secured a judgment is entitled to retain that judgment, and it may not be set aside in the absence of a sound legal reason for doing so. Sargent Feed & Grain v. Anderson 421
7. It is the duty of the courts to prevent abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice. Sargent Feed & Grain v. Anderson 421
Aetna Cas. & Surety Co. v. Dickinson 660
8. This court will not tolerate or reward a course of conduct deliberately designed to disrupt the orderly administration of justice. Sargent Feed & Grain v. Anderson 421
Aetna Cas. & Surety Co. v. Dickinson 660
9. As a general rule, courts cannot declare agreements or acts authorized by statute to be contrary to public policy unless the courts are first prepared to determine that the statute authorizing the act is itself unconstitutional. Haakinson & Beaty Co. v. Inland Ins. Co. 426
10. The powers of the court in a divorce action are statutory. Unless the source of the power is found in the statute, a court is without authority to exercise it. Randall v. Randall 541
11. An order of the district court reversing a judgment of the county court in a criminal case, vacating the sentence, and remanding the cause for imposition of sentence may be reviewed under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1982). State v. Ziemba 612
12. The provisions of Neb. Rev. Stat. § 25-2002 (Reissue 1979) apply only to a modification of a judgment entered at a *subsequent* term. The law is clear that during the term the trial court has the inherent power to modify its judgment and no petition or summons is required. Hyde v. Shapiro 785
13. Our law is clear that, absent an abuse of discretion, a court has the inherent power to vacate or modify its own judgment at any time during the term at which those judgments are pronounced and such power exists entirely independent of any statute. Hyde v. Shapiro 785
14. Neb. Rev. Stat. §§ 25-408 and 25-409 (Reissue 1979) require the court in which an action has been improperly brought under the venue provisions of those statutes to transfer the case upon timely motion by a defendant. Cattle Brokers v. Billings 845

Criminal Law.

1. Unless there is specific material in a document necessary to the presentation of a defense or helpful to a defendant in mitigating his sentence, such a document need not be disclosed to a defendant personally, if harm to others is a possible result. State v. Clark 49
2. The refusal by the trial court to permit the introduction of cumulative evidence is not error and does not entitle a defendant to a new trial, absent a showing of an abuse of discretion. State v. Lee 63
3. The kidnapping statute, Neb. Rev. Stat. § 28-313 (Reissue 1979), and the false imprisonment in the first degree statute, Neb. Rev. Stat. § 28-314 (Reissue 1979), define separate offenses. State v. Miller 72
4. When an act violates more than one criminal statute, the State may prosecute under either criminal statute so long as it does not discriminate against any class of defendants. State v. Miller 72
5. The "evidence of other crimes" rule is one of relevance. State v. Coca 76
6. As a general proposition, evidence of crimes committed by the accused other than that with which he is charged is not admissible. State v. Coca 76
7. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that he committed other crimes. State v. Coca 76
8. Evidence of other crimes is admissible where there are unique, almost "signature-like" similarities between them and the offense charged or the evidence is otherwise so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the guilt of the accused. State v. Coca 76
9. Balancing the need for "other-crimes" evidence against the possible prejudice to the accused is within the discretion of the trial court. State v. Coca 76
10. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found. State v. Coca 76
11. To possess a narcotic drug means to have actual control, care, and management of, and not a passing control, fleeting and shadowy in its nature. State v. Coca 76
12. In criminal law, motive is that which leads or tempts the mind to indulge in a criminal act. State v. Coca ... 76

13. The intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant viewed in the light of the surrounding circumstances. State v. Thielen 119
14. Where there are other viable methods available to the defendant for the introduction of evidence, the court should not allow defendant's counsel to raise the possibility of calling the prosecutor as a witness merely to disqualify the prosecutor from the trial of the case. State v. Reeves 206
15. To prove unlawful possession of a controlled substance, the evidence must show that the accused had physical or constructive possession with knowledge of the presence of the drug and its character as a controlled substance. State v. Masters 304
16. Unless an error can be considered prejudicial to the rights of a defendant, it may not be considered as ground for reversal. State v. Masters 304
17. As a general rule, whether a physical act committed by a person responsible for the general care and supervision of a minor is a justifiable act, as referred to in Neb. Rev. Stat. § 28-1413 (Reissue 1979), or constitutes an unlawful assault is a question of fact to be decided by the trier of fact. State v. Miner 309
18. When insanity has not been pled as a defense and evidence concerning the defendant's mental condition is introduced solely to establish that he lacked the ability to intend the obvious and probable consequences of his voluntary act, and thus is offered to rebut the presumption which flows from his act, it is not appropriate to instruct the jury as to the elements of the insanity defense. State v. Vosler 461
19. A trial court may not require a psychiatric examination of a criminal defendant when he puts his mental condition in issue solely to support his claim that he lacked the mental ability to form the intent required as an element of the crime with which he is charged. State v. Vosler 461
20. It would not be proper as a matter of right for a trial judge to permit the withdrawal of a plea of guilty or nolo contendere which was knowingly, intelligently, and voluntarily made unless such withdrawal is necessary to correct a manifest injustice. State v. Holtan .. 594
21. In an action to withdraw a plea of guilty or nolo contendere, the burden is on the defendant to establish the

manifest injustice by clear and convincing evidence. State v. Holtan 594
22. Withdrawal of a plea of guilty or nolo contendere is necessary to correct a manifest injustice whenever the defendant proves that (1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule; (2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf; (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or (4) he did not receive the charge or sentence concessions contemplated by the plea agreement, and the prosecuting attorney failed to seek or not to oppose those concessions as promised in the plea agreement. State v. Holtan 594
23. In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea. State v. Holtan 594
24. An order of the district court reversing a judgment of the county court in a criminal case, vacating the sentence, and remanding the cause for imposition of sentence may be reviewed under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1982). State v. Ziemba 612
25. One exception to the exclusionary rule is the "inevitable discovery" rule, which allows illegally obtained evidence to be admitted into evidence if the illegal act merely contributed to the discovery of the allegedly tainted information and such information would have been acquired lawfully even if the illegal act had never transpired. State v. Poit 635
26. Not all illegally obtained evidence can be admitted simply because law enforcement officials assert that it would have been inevitably discovered. The mere assertion of inevitable discovery must fail. After the accused has challenged the legality of the witness' acquisition and of the use of the witness' testimony, the police must show that when the illegality occurred they possessed and were actively pursuing the evidence or leads that would have led to the discovery of the challenged witness and that there was a reasonable probability that that witness would have thereby been dis-

covered. The prosecution must bear the burden of proof on this issue. The court then must find that reasonable probability of subsequent discovery existed, based on this showing and the record generally. State v. Poit 635

27. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Plymate 722
28. Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused. The balancing of the need for "other-crimes" evidence against the possible prejudice to the defendant is within the appropriate discretion of the trial court. State v. Plymate .. 722
29. Assumed error in the ruling on the admission of evidence which did not injuriously affect the substantial rights of the accused is not grounds for reversal. State v. Plymate 722
30. Testimony of a witness in a suppression hearing, as in a preliminary hearing, is admissible at trial, where the defendant has had the opportunity for cross-examination at the suppression hearing and the witness is unavailable at the trial on the merits of the case. State v. Neal 796

Damages.

1. Under Neb. Rev. Stat. § 25-10,105 (Reissue 1979), where a plaintiff in a replevin action recovers his property, the finder of fact must assess damages to the plaintiff, including damages for loss of use of the wrongfully withheld property, if such property has value for use. Morfeld v. Bernstrauch 234
2. The measure of damages in the taking or injury of a leasehold is the difference between the rental value of the remainder of the term and the rent reserved in the lease. City of Hastings v. Peter Ellis Farms 550
3. 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. City of Hastings v. Peter Ellis Farms 550
4. With respect to the matter of loss of future earnings,

the determination as to the appropriate amount is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry. Schaefer v. McCreary 739
5. Future loss of earnings is not necessarily measured by the plaintiff's calling or income at the time of the injury. Schaefer v. McCreary 739
6. There is no mathematical formula for the translation of pain and suffering and permanent disability into terms of dollars and cents. It is a matter left largely to the discretion of the jury, which saw the witnesses and heard the evidence. Schaefer v. McCreary 739

Death Penalty.

1. Jury sentencing in capital cases is not constitutionally required. State v. Reeves 206
2. Under the provisions of Neb. Rev. Stat. §§ 29-2519 et seq. (Reissue 1979), the Nebraska Supreme Court is required, before imposing the death sentence, to not only consider the presence or absence of aggravating and mitigating circumstances but also to review death sentences and determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. State v. Reeves 206
3. This court's review and analysis of death penalty cases is not confined to a mere counting process of aggravating and mitigating circumstances but, rather, to a reasoned judgment as to what factual situations require the imposition of death and which of those can be satisfied by life imprisonment in light of the totality of the circumstances present. State v. Reeves 206

Debtors and Creditors.

1. To toll the statute of limitations and to remove the bar of that statute, Neb. Rev. Stat. § 25-205 (Reissue 1979), a debtor must unqualifiedly acknowledge an existing liability. Kotas v. Sorensen 648
2. A mere reference to a promissory note, although consistent with its existing validity and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an "acknowledgment" as contemplated by Neb. Rev. Stat. § 25-216 (Reissue 1979). Kotas v. Sorensen 648
3. Because part payment can result in a debtor's waiver or relinquishment of the defense afforded by the statute of limitations, a creditor must prove by clear and con-

vincing evidence that there has been a part payment of the debt in order to enforce a claim barred by the statute of limitations. Castellano v. Bitkower 806

Decedents' Estates.

1. Where one is claiming the estate of a deceased person under an alleged oral contract, the evidence of the agreement and its terms must be clear, satisfactory, and unequivocal. In re Estate of Nicholson 400
2. Evidence of declarations of a deceased person concerning a parol contract does not amount to direct proof of the facts claimed to have been admitted by those declarations. Such evidence, when not supported by other evidence, is generally entitled to but little weight. In re Estate of Nicholson 400

Declaratory Judgments.

1. The granting of declaratory relief is discretionary. Sim v. Comisky 83
2. Declaratory relief will not be entertained if there is pending, at the commencement of the declaratory action, another action or proceeding to which the same persons are parties and in which are involved, and may be adjudicated, the same issues involved in the declaratory action. Sim v. Comisky 83

Demurrer.

A petition alleging a cause of action not commenced within the time prescribed by the appropriate statute of limitations is subject to a demurrer. S.I.D. No. 145 v. Nye 354

Directed Verdict.

1. A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the verdict is sought, and the party must be given the benefit of every inference which can reasonably be drawn therefrom. Lange Bldg. & Farm Supply v. Open Circle "R" 1
   Cullinane v. Interstate Iron & Metal 245
   Kresha v. Kresha 377
   Lincoln Grain v. Coopers & Lybrand 433
   May v. Hall Co. L'stock Improvement Assn. 476
2. Where reasonable minds may differ as to the conclusions or inferences to be drawn from the evidence, such issue must be submitted to the jury. Lange Bldg. & Farm Supply v. Open Circle "R" 1

3. A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for a directed verdict. Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln 274
4. Where the facts presented to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury. May v. Hall Co. L'stock Improvement Assn. 476

Disciplinary Proceedings.

1. In determining whether and to what extent discipline should be imposed, it is necessary that we consider the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law. State ex rel. NSBA v. Doerr 504
2. Cumulative acts of misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions. State ex rel. NSBA v. Doerr .. 504
3. An attorney who neglects a matter entrusted to him has failed to act competently. State ex rel. NSBA v. Doerr 504

Divorce.

1. An agreement between husband and wife, if executed to control the disposition of the marital assets of the parties during a later dissolution action, is a written property settlement within the intendment of Neb. Rev. Stat. § 42-366 (Cum. Supp. 1982), and is binding on the court unless the agreement is found to be unconscionable. Dobesh v. Dobesh 196
2. The powers of the court in a divorce action are statutory. Unless the source of the power is found in the statute, a court is without authority to exercise it. Randall v. Randall 541
3. An action for dissolution of marriage is reviewed de novo in this court, although weight is given to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Pittman v. Pittman ... 746
Shald v. Shald 897
4. Generally speaking, awards in actions involving dissolution of marriage vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case, and

particularly so when the marriage is of long duration and the parties are the parents of all the children involved. Pittman v. Pittman 746
Shald v. Shald 897
5. In an action for dissolution of marriage the award of an attorney fee rests in the discretion of the trial court, taking into consideration the division of property, alimony awarded, the earning capacity of the parties, and the general equities of the case. Pittman v. Pittman .. 746
6. When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property after receiving it by way of inheritance or gift, or the spouse not receiving the inheritance or gift has significantly cared for the property during the marriage. Shald v. Shald . 897
7. The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. The court will consider all pertinent facts in reaching an award that is just and equitable. Shald v. Shald 897

Drunk Driving.

1. An accused being arraigned for driving while intoxicated must be advised whether he is charged with a first, second, or third offense and the maximum penalties applicable to the offense charged. State v. Ziemba 612
2. A complaint charging second or third offense driving while intoxicated should allege the facts upon which the State relies to establish that the offense charged is a second or third offense. State v. Ziemba 612
3. The record of an enhancement proceeding for second or third offense driving while intoxicated must show that the requirements set out in *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), and Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982) were satisfied. State v. Ziemba 612
4. A defendant charged with second or third offense driving while intoxicated may waive proof of a prior conviction by a transcript of the judgment, and may waive the rights provided in Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982) in regard to prior convictions. State v. Ziemba 612

Due Process.

To satisfy the requirement of due process, a notice in proceedings before an administrative agency must reasonably provide information regarding the accusation levied. In re Appeal of Bonnett 587

Easements.

1. A suit to confirm a prescriptive easement is one grounded in the equitable jurisdiction of the district court. Gerberding v. Schnakenberg 200
2. The law treats with disfavor a claim of a prescriptive right, and, accordingly, such a claim requires that the elements of such adverse user be clearly, convincingly, and satisfactorily established. Gerberding v. Schnakenberg 200
   Grint v. Hart 406
3. A party claiming a prescriptive easement must show that his user was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period. Gerberding v. Schnakenberg 200
4. As a general rule, a showing that the use has been open, visible, continuous, and unmolested for the prescriptive period raises a presumption that the use was under a claim of right and not permissive. Gerberding v. Schnakenberg 200
5. When the claimed use is over unenclosed lands, the presumption is that the use is permissive. Gerberding v. Schnakenberg 200
6. When the claimed right-of-way entails use over a way opened by the landowner for his own purposes, the presumption is that the use is permissive. Gerberding v. Schnakenberg 200
7. A highway may be established by prescription when used adversely by the public continuously for a period of 10 years or more. Sellentin v. Terkildsen 284
8. In order to establish the requisite public prescriptive easement, the public must show that the use and enjoyment of the land was exclusive, adverse, continuous, uninterrupted, open and notorious, and under a claim of right for the full 10-year prescriptive period. Sellentin v. Terkildsen 284
9. In order to establish a roadway in favor of the public by prescriptive easement, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular defined line of travel, and the use must be uninterrupted and without substantial change for 10 years or more, the period of time

necessary to bar an action to recover the land. Sellentin v. Terkildsen 284
10. Once a claimant shows open, visible, continuous, and unmolested use of the land for the necessary period, the use will be presumed to be under a claim of right, and once so established this presumption may be rebutted by the owner of the servient estate only by proving by a preponderance of the evidence that the use was by license, agreement, or permission. Sellentin v. Terkildsen 284
11. In the case of public roads the fact that only a few members of the public still use the road does not mean that the road has been abandoned. Sellentin v. Terkildsen 284
12. An easement gives no title to the real estate on which the servitude is imposed. Voltmer Family Farms v. Board of Equal. 396
13. An easement is not an estate in land, and the estate in fee simple from which an easement is granted is not reduced to a lesser estate as a result of the easement. Voltmer Family Farms v. Board of Equal. 396
14. An easement is an interest in real estate, an incorporeal hereditament, which permits use of another's land for a specific purpose. Voltmer Family Farms v. Board of Equal. 396
15. 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. Grint v. Hart 406
16. Abandonment of a prescriptive easement must be pled and proved, the burden of proof being on the party alleging it. Grint v. Hart 406
17. An easement of necessity does not arise from an express grant, but is an easement arising either by implied grant or reservation. Such implied easements ordinarily arise in cases where land owned by one entity is divided by sale of a portion and the beneficial use of one tract or the other depends on an easement for ingress or egress or other purpose. Johnson v. Mays 890

18. One who purchases land with knowledge or with actual, constructive, or implied notice that it is burdened with an easement in favor of other property ordinarily takes the estate subject to the easement. Johnson v. Mays .. 890

Effectiveness of Counsel.

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. State v. Hochstein 515
2. In a post conviction case the person challenging the competency of counsel has the burden of proof to establish the incompetency of counsel, and the findings of the district court denying relief will not be disturbed on appeal unless clearly erroneous. State v. Hochstein ... 515
3. The test for determining the competency or effectiveness of trial counsel is that he perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area and that he conscientiously protect the interests of his client. State v. Heathman . 609
4. The person alleging ineffective assistance of counsel has the burden of proof of establishing the incompetency of counsel and, further, demonstrating how the inadequacy was prejudicial. State v. McNitt 837

Election of Remedies.

A party cannot, either in the course of litigation or in dealings in pais, occupy inconsistent positions or proceed on irreconcilable claims of right. Bryant Heating v. United States Nat. Bank 107

Electricity.

1. One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself into contact with it, as by touching it with conductors of electricity, is guilty of negligence. Rodgers v. Chimney Rock P.P. Dist. 666
2. A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines. The degree of care varies with the circumstances, but it must be commensurate with the dangers involved; and where wires are designed to carry electricity of high voltage, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the

practical operation of its business to avoid injury to persons and property. Rodgers v. Chimney Rock P.P. Dist. 666
3. Electric companies are not insurers of the safety of the public and hence are not liable for injuries unless guilty of some wrongful act or omission. Rodgers v. Chimney Rock P.P. Dist. 666
4. Power companies engaged in the transmission of electricity, especially electricity of high voltage, are charged with the duty of exercising a very high degree of care to safeguard those whose lawful activities expose them to the risk of inadvertent contact with the electric lines, but they are not insurers and not liable for damages in the absence of negligence. Rodgers v. Chimney Rock P.P. Dist. 666

Eminent Domain.

1. The measure of damages in the taking or injury of a leasehold is the difference between the rental value of the remainder of the term and the rent reserved in the lease. City of Hastings v. Peter Ellis Farms 550
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. City of Hastings v. Peter Ellis Farms 550

Employment Security Law.

1. Appeals from the district court under the Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-668 (Reissue 1978), are reviewed by the Supreme Court de novo on the record made in the district court, with the duty to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof. School Dist. No. 21 v. Ochoa 191
2. "Regular terms" as used in the educational sense and as found in Neb. Rev. Stat. § 48-628(h)(2) (Cum. Supp. 1982) of the Employment Security Law refers to a definite period representing a regular division of an academic year during which instruction is regularly given to students of a particular school, college, or university. School Dist. No. 21 v. Ochoa 191

Equity.

1. Equity will not vacate a judgment after term where there is an adequate remedy at law. State ex rel. Birdine v. Fuller 86

2. To be entitled to vacate a judgment after term by an action in equity, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under Neb. Rev. Stat. § 25-2001 (Reissue 1979). State ex rel. Birdine v. Fuller 86
3. On appeal to this court an action in equity is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another, as well as the fact that the trial court viewed the premises. O'Keefe Elevator v. Second Ave. Properties 170
Gerberding v. Schnakenberg 200
Grint v. Hart 406
Jackson v. Clemens 641
Knudtson v. Trainor 653
Sasich v. City of Omaha 864
4. A suit to confirm a prescriptive easement is one grounded in the equitable jurisdiction of the district court. Gerberding v. Schnakenberg 200
5. Where the relationships of the parties to a partnership are intertwined with other business relationships of the parties, an adequate remedy in an accounting case is available only within the equitable jurisdiction of the court. Jackson v. Clemens 641
6. An action to enjoin enforcement of a city ordinance is one in equity. Sasich v. City of Omaha 864
7. In an equity action it is the duty of the Supreme Court to try the issues de novo upon the record and reach an independent conclusion without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the facts that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief of the matters at issue in the case. Johnson v. Mays 890

Estoppel.

The essential elements of equitable estoppel are: As to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or

influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. Osmera v. School Dist. of Seward 261

Evidence.

1. Unless there is specific material in a document necessary to the presentation of a defense or helpful to a defendant in mitigating his sentence, such a document need not be disclosed to a defendant personally, if harm to others is a possible result. State v. Clark 49
2. Error in the admission of evidence is not grounds for reversal if no substantial miscarriage of justice occurred. State v. Lee 63
3. To qualify as an excited utterance the following conditions must exist: (1) There must have been a startling event. (2) The statement must relate to the event. (3) The statement must have been made by the declarant while under the stress of the exciting event. State v. Lee 63
4. A determination as to the admissibility of an excited utterance generally rests within the sound discretion of the trial court. State v. Lee 63
5. The refusal by the trial court to permit the introduction of cumulative evidence is not error and does not entitle a defendant to a new trial, absent a showing of an abuse of discretion. State v. Lee 63
6. As a general proposition, evidence of crimes committed by the accused other than that with which he is charged is not admissible. State v. Coca 76
7. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that he committed other crimes. State v. Coca 76
8. Evidence of other crimes is admissible where there are unique, almost "signature-like" similarities between them and the offense charged or the evidence is otherwise so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the guilt of the accused. State v. Coca 76

9. Balancing the need for "other-crimes" evidence against the possible prejudice to the accused is within the discretion of the trial court. State v. Coca 76
10. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found. State v. Coca 76
11. The intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant viewed in the light of the surrounding circumstances. State v. Thielen 119
12. An exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified, it is immaterial in how many or in whose hands it has been. State v. Thielen 119
13. Where there are other viable methods available to the defendant for the introduction of evidence, the court should not allow defendant's counsel to raise the possibility of calling the prosecutor as a witness merely to disqualify the prosecutor from the trial of the case. State v. Reeves 206
14. There are strong policies in favor of using an array of comparable Nebraska employers rather than using employers from outside the State of Nebraska, when an appropriate array for that purpose within the state exists. Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln 274
15. To prove unlawful possession of a controlled substance, the evidence must show that the accused had physical or constructive possession with knowledge of the presence of the drug and its character as a controlled substance. State v. Masters 304
State v. Garcia 769
16. Error in the admission of evidence is not grounds for reversal of a judgment when no prejudice results from such error; if properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal. State ex rel. Douglas v. Morrow 317
17. Evidence of any act of physical force, however slight,

by which the obstruction to entering is removed is sufficient to prove a breaking. State v. Classen 323
18. The burden is on the moving party in a Neb. Rev. Stat. § 48-818 (Cum. Supp. 1982) case to demonstrate that existing wages are not comparable to the prevalent wage rate. IBEW Local 1536 v. City of Fremont 357
19. Determinations made by the Commission of Industrial Relations in accepting or rejecting claimed comparables are within the field of expertise of the commission and should be given due deference. IBEW Local 1536 v. City of Fremont 357
20. With regard to a determination of conditions of employment under Neb. Rev. Stat. § 48-818 (Cum. Supp. 1982), the Commission of Industrial Relations will enter an order either adjusting the condition of employment or find a subject city's condition to be lesser or greater than the prevalent, and adjust the overall compensation accordingly, if, in the compared-to cities, the exact content of a condition of employment is clear from the total evidence. IBEW Local 1536 v. City of Fremont .. 357
21. Experience and longevity are proper matters to be considered in determining the wages to be paid to employees within the same job classification. IBEW Local 1536 v. City of Fremont 357
22. Where the employer has a large number of job classifications, but established lines of progression and established relationships between lines of progression, "key classifications" may be utilized to establish wages for all classes, provided reasonable requirements of prevalence and relevance are met. IBEW Local 1536 v. City of Fremont 357
23. Guidelines used by the Commission of Industrial Relations to be followed in using the "key job classification," in a proceeding to determine compensation for public employees are not statutory requirements and failure of evidence to strictly comply with guidelines does not require the Supreme Court to find that the action of the commission in developing the "key job classification" was arbitrary and capricious. IBEW Local 1536 v. City of Fremont 357
24. In a proceeding before the Commission of Industrial Relations, the hearing performs a truth-seeking function in settling controversies between the parties. It runs contrary to that function to suggest that unfavorable evidence in the form of an expert's opinion may be kept from either party in the interest of justice and to prevent prejudice. IBEW Local 1536 v. City of Fremont 357

25. Where different minds may draw different conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined. Kresha v. Kresha 377
26. Where one is claiming the estate of a deceased person under an alleged oral contract, the evidence of the agreement and its terms must be clear, satisfactory, and unequivocal. In re Estate of Nicholson 400
27. Evidence of declarations of a deceased person concerning a parol contract does not amount to direct proof of the facts claimed to have been admitted by those declarations. Such evidence, when not supported by other evidence, is generally entitled to but little weight. In re Estate of Nicholson 400
28. A failure to appropriately respond within the time allotted to a properly served request for admission of facts constitutes an admission of the facts sought to be elicited. Sargent Feed & Grain v. Anderson 421
29. The appropriate standard of review for an assignment of error directed at the exclusion of evidence is one of abuse of discretion, as the admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, which must determine the relevancy and possible prejudicial effect of the proffered evidence. Lincoln Grain v. Coopers & Lybrand 433
30. If negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. Sederstrom v. Burge 512
31. The general rule is that when evidence is improperly received but immediately ordered stricken and the jury is instructed to disregard it, any error is cured. City of Hastings v. Peter Ellis Farms 550
32. Where a motion for new trial is based on newly discovered evidence, the rule is well established that the newly discovered evidence must be of such a nature that, if offered and admitted at the former trial, it probably would have produced a substantial difference in the result. State v. Ferris 606
33. One exception to the exclusionary rule is the "inevitable discovery" rule, which allows illegally obtained evidence to be admitted into evidence if the illegal act merely contributed to the discovery of the allegedly tainted information and such information would have been acquired lawfully even if the illegal act had never transpired. State v. Poit 635
34. Not all illegally obtained evidence can be admitted

simply because law enforcement officials assert that it would have been inevitably discovered. The mere assertion of inevitable discovery must fail. After the accused has challenged the legality of the witness' acquisition and of the use of the witness' testimony, the police must show that when the illegality occurred they possessed and were actively pursuing the evidence or leads that would have led to the discovery of the challenged witness and that there was a reasonable probability that that witness would have thereby been discovered. The prosecution must bear the burden of proof on this issue. The court then must find that reasonable probability of subsequent discovery existed, based on this showing and the record generally. State v. Poit 635

35. In determining the sufficiency of the evidence to sustain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it. Pioneer Enterprises v. Edens 672

36. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Plymate 722

37. Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused. The balancing of the need for "other-crimes" evidence against the possible prejudice to the defendant is within the appropriate discretion of the trial court. State v. Plymate .. 722

38. Assumed error in the ruling on the admission of evidence which did not injuriously affect the substantial rights of the accused is not grounds for reversal. State v. Plymate 722

39. A violation of a statute or ordinance enacted in the interest of public safety, while not negligence per se, is evidence of negligence. Schaefer v. McCreary 739

40. Constructive possession may be proved by direct or circumstantial evidence and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance. State v. Garcia 769

41. Constructive possession may be proven by ownership, dominion, or control over the contraband itself, coupled with the intent to exercise control over the same. State v. Garcia 769
42. Before this court can consider evidence bearing upon an issue of fact, evidence must have been offered at the trial court and embodied in the bill of exceptions filed with this court. Smick v. Langvardt 778
43. Even where the evidence is received by stipulation, it must be offered in evidence and incorporated in a bill of exceptions. Smick v. Langvardt 778
44. One seeking enforcement of a lost promissory note must by clear and convincing evidence establish (1) ownership of the instrument, (2) an explanation for absence or loss of the instrument, and (3) the terms of the instrument. Castellano v. Bitkower 806
45. Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. Castellano v. Bitkower 806

Expert Witnesses.

1. The opinion of an expert witness is properly admitted into evidence where the basis of the opinion and the facts on which it is based are before the jury, and the defendant has an opportunity to cross-examine such witness as to the basis of such opinion and the facts on which it is based. State v. Miner 309
2. The ruling of a trial court in receiving or excluding an expert opinion will be reversed on appeal only when a clear abuse of discretion is shown. State v. Miner 309
3. Expert testimony should not be received, or if received should be stricken, if it appears that 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. Fletcher v. State 342
4. In a proceeding before the Commission of Industrial Relations, the hearing performs a truth-seeking function in settling controversies between the parties. It runs contrary to that function to suggest that unfavorable evidence in the form of an expert's opinion may be kept from either party in the interest of justice and to prevent prejudice. IBEW Local 1536 v. City of Fremont 357
5. An expert witness should not be allowed to express an opinion where the evidence showed there was no adequate basis for the opinion. IBEW Local 1536 v. City of Fremont 357

6. Generally, expert testimony concerning the status of the law is not admissible. Sasich v. City of Omaha 864

False Imprisonment.

The kidnapping statute, Neb. Rev. Stat. § 28-313 (Reissue 1979), and the false imprisonment in the first degree statute, Neb. Rev. Stat. § 28-314 (Reissue 1979), define separate offenses. State v. Miller 72

Fees.

The clear meaning of Neb. Rev. Stat. § 37-1008 (Reissue 1978) is that in order to constitute a charge, any moneys paid must be paid for the right to enter the facility. Garreans v. City of Omaha 487

Final Orders.

1. The denial of a motion for summary judgment is not a final order and therefore is not appealable to the Supreme Court. Bryant Heating v. United States Nat. Bank 107
2. An order vacating a summary judgment is not a final order. Sargent Feed & Grain v. Anderson 421
3. For purposes of Neb. Rev. Stat. § 49-301 (Reissue 1978), an administrative proceeding is a pending action when the agency's final order is rendered. In re Application of Ochsner 480

Fireman's Rule.

A fireman or individual fighting a fire on the premises of an owner or occupant is a bare licensee to whom the owner or occupant owes no greater duty than to refrain from injuring him by willful or wanton negligence or a designed injury, except in certain cases where there may be the duty to warn of hidden danger or peril known to the owner or occupant but unknown to or unobservable by the fireman in the exercise of ordinary care. Moravec v. Moravec 412

Foreclosure.

1. A foreclosure of a mechanic's lien is an action in equity which is heard on appeal in this court de novo on the record, with weight being given to the findings of the trial court when credible evidence is in conflict on material questions of fact. Kustom Kreations v. Duxbury 99
   O'Keefe Elevator v. Second Ave. Properties 170
2. Prejudgment interest is recoverable upon the foreclosure of a mechanic's lien if the claim is liquidated. O'Keefe Elevator v. Second Ave. Properties 170

Fraud.

1. In the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity, cannot avoid the effect of his signature merely because he was not informed of the contents of the document. Day v. Kolar 47
2. Article I, § 20, of the Nebraska Constitution, which provides that one shall not be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud, does not prohibit the imprisonment of one who refuses to obey a court order to support his children. State v. Reuter 325

Habeas Corpus.

1. Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. Friedrichsen v. Koehn 628
2. A writ of habeas corpus is not available to persons lawfully convicted if the court imposing the sentence had jurisdiction of the offense and of the person charged with the crime and if the sentence was within the power of the court. State v. McNitt 837

Hearsay.

1. To qualify as an excited utterance the following conditions must exist: (1) There must have been a startling event. (2) The statement must relate to the event. (3) The statement must have been made by the declarant while under the stress of the exciting event. State v. Lee 63
2. A determination as to the admissibility of an excited utterance generally rests within the sound discretion of the trial court. State v. Lee 63

Highways.

1. A highway may be established by prescription when used adversely by the public continuously for a period of 10 years or more. Sellentin v. Terkildsen 284
2. In order to establish a roadway in favor of the public by prescriptive easement, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular defined line of travel, and the use must be uninterrupted and without substantial change for 10 years or more, the period of time necessary to bar an action to recover the land. Sellentin v. Terkildsen 284

3. In the case of public roads the fact that only a few members of the public still use the road does not mean that the road has been abandoned. Sellentin v. Terkildsen 284

Homicide.

1. No specific intention is required to constitute felony murder, other than the intent to do the act which constitutes the felony during which the killing occurred. State v. Reeves 206
2. Where an information charges a defendant with a killing committed in the perpetration of or attempt to perpetrate one of the specific felonies set out in Neb. Rev. Stat. § 28-303(2) (Reissue 1979), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested. State v. Reeves 206
3. The Supreme Court's review and analysis under Neb. Rev. Stat. § 29-2521.03 (Reissue 1979) shall include all first degree murder convictions for offenses committed on or after April 20, 1973, including cases presently pending in this court on appeal. State v. Reeves 206
4. If there is at least some evidence which would permit the jury to find a defendant charged with first degree murder guilty of manslaughter, the court is required to charge the jury concerning the elements of manslaughter. State v. Vosler 461
   State v. Drew 685
5. Manslaughter is the killing of another without malice, either upon a sudden quarrel or unintentionally while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305(1) (Reissue 1979). State v. Drew 685
6. A killing resulting from the accidental discharge of a gun during a scuffle, while the gun is being used in an attempt to strike the other party, is excused only if the force used was justified under the circumstances. State v. Drew 685
7. In order to prove the requisite mental state for murder in the first degree, the State is required to show a condition of the mind which was manifested by intentionally doing a wrongful act without just cause or excuse and which is defined as any willful or corrupt intention of the mind. State v. Krimmel 825
8. In a homicide case photographs of the victim are admissible, even if gruesome, if a proper foundation is laid and they are received for purposes of identifica-

tion, to show the nature and extent of the wounds, and to establish malice or intent. State v. Krimmel 825

Impeachment.

When a nonparty witness admits making earlier statements contradicting his testimony at trial, the earlier statements are not admissible for purposes of impeachment. State v. Drew 685

Implied Consent Law.

A motorist's subsequent offer to take the blood alcohol test previously refused does not nullify or cure such driver's initial refusal to take the test requested by the arresting officer. Hoyle v. Peterson 253

Independent Contractor.

1. Where a written contract between the claimant and alleged employer exists, which not only denominates the relationship as that of independent contractor but also describes that kind of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workmen's compensation statutes. Spulak v. Estep 523
2. Control or the right of control is the chief criterion in the determination of whether one acts as an independent contractor. Spulak v. Estep 523

Indictments and Informations.

1. The district court in its discretion may before trial permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged. State v. Thielen 119
2. Correcting an erroneous statutory reference in an amended information does not amount to a change in the offense charged, where the body of the information in both the original and amended informations remains essentially the same. State v. Thielen 119
3. The office of an information is to inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and be able to plead the judgment rendered thereon as a bar to a later prosecution for the same crime. State v. Reuter 325

Injunction.

1. Everyone has the right to any beneficial use of owned property if the benefit sought is not out of all reasonable proportion to the injury caused to another. Lieb v. Pitsch 136
2. An injunction is an extraordinary remedy available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury. The threatened action must be based upon a real apprehension that the acts for which the injunction is sought are not only threatened but will in all probability be committed. Grein v. Board of Education 158
3. A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle it to relief. Grint v. Hart 406
4. An action to enjoin enforcement of a city ordinance is one in equity. Sasich v. City of Omaha 864

Insanity.

When insanity has not been pled as a defense and evidence concerning the defendant's mental condition is introduced solely to establish that he lacked the ability to intend the obvious and probable consequences of his voluntary act, and thus is offered to rebut the presumption which flows from his act, it is not appropriate to instruct the jury as to the elements of the insanity defense. State v. Vosler 461

Insurance.

Where the fact of insurance is relevant to some issue in the case, it cannot properly be excluded, but where not relevant to any such issue, evidence of the existence of insurance coverage is inadmissible. Kresha v. Kresha 377

Intent.

1. The intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant viewed in the light of the surrounding circumstances. State v. Thielen 119
2. No specific intention is required to constitute felony murder, other than the intent to do the act which constitutes the felony during which the killing occurred. State v. Reeves 206
3. The cardinal rule in construing wills is to ascertain and effectuate the intention of the testator if that intention is not contrary to law. Anderjaska v. Anderjaska 527

4. When there are definite and unambiguous expressions in a will, other expressions that are capable of more than one construction must be construed, if reasonably practicable, so as to harmonize with the plain provisions of the will. Anderjaska v. Anderjaska 527

Investigative Stops.

In appropriate circumstances a police officer may demand of a person involved in a traffic accident that person's name and address. State v. DeJesus 907

Invitor-Invitee.

1. A possessor of land is not an insurer of the safety of business invitees on its land. May v. Hall Co. L'stock Improvement Assn. 476
2. A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (1) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (2) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (3) fails to exercise reasonable care to protect them against the danger. May v. Hall Co. L'stock Improvement Assn. 476
3. While the owner of premises owes the duty to exercise ordinary care to have the premises in a reasonably safe condition for use consonant with the purposes of the invitation, generally, there is no duty on the part of an invitor owner to protect the invitee against hazards which are known to the invitee or are so apparent that he may reasonably be expected to discover them and protect himself. Bruyninga v. Nuss 801
4. Generally, the invitee, who has knowledge of a dangerous condition on the premises or where the dangerous condition is obvious, is negligent as a matter of law if he fails to use reasonable care to avoid injury. Bruyninga v. Nuss 801

Issue Preclusion.

1. For the theory of issue preclusion to bar further litigation on a specific issue, the issue concluded must be identical, must have been raised or could have been raised and litigated in the prior action, must have been material and relevant to the disposition of the prior action, and the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. Flobert Industries v. Stuhr ... 389

2. Although an issue is actually litigated and determined by a final and valid judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded where a new determination of the issue is warranted by factors relating to the allocation of jurisdiction or venue among the courts of the state. Flobert Industries v. Stuhr 389

Judgments.

1. In the absence of any evidence that the relief ordered by the trial court's judgment on the mandate is in excess of that necessary to accomplish this court's directions, the judgment on the mandate must be affirmed. Jameson v. Nelson 26
2. A district court has no authority or power to vacate a judgment after term except for the reasons and within the time limited in Neb. Rev. Stat. § 25-2001 (Reissue 1979). State ex rel. Birdine v. Fuller 86
3. Equity will not vacate a judgment after term where there is an adequate remedy at law. State ex rel. Birdine v. Fuller 86
4. To be entitled to vacate a judgment after term by an action in equity, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under Neb. Rev. Stat. § 25-2001 (Reissue 1979). State ex rel. Birdine v. Fuller 86
5. Several actions may be brought and several judgments recovered against several wrongdoers, although but one satisfaction can be had. Bryant Heating v. United States Nat. Bank 107
6. The partial payment of a judgment against one of several wrongdoers is not a satisfaction which will prevent the maintenance of an action against another. Bryant Heating v. United States Nat. Bank 107
7. Findings that certain portions of a testamentary document are the products of undue influence are determinations of fact. As such, the standard of review is whether the findings are supported by sufficient evidence, which are not to be disturbed unless clearly wrong. In re Estate of Marsh 129
8. The finding that a partially valid testamentary document is or is not to be given dispositive effect is equitable in nature and, on appeal, reviewed de novo on the record. In re Estate of Marsh 129
9. In considering the sufficiency of the evidence to sustain a judgment, an appellate court must view the evidence

in the light most favorable to the successful party. Morfeld v. Bernstrauch 234
10. An acquittal or dismissal in a prior criminal prosecution is no bar to the prosecution of a later civil action, and such acquittal or dismissal concludes no issues in a later civil action. State ex rel. Douglas v. Morrow 317
11. A judgment is not subject to collateral attack unless that attack rests upon a lack of jurisdiction over the parties or of the subject matter. State v. Reuter 325
12. Although an issue is actually litigated and determined by a final and valid judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded where a new determination of the issue is warranted by factors relating to the allocation of jurisdiction or venue among the courts of the state. Flobert Industries v. Stuhr 389
13. A trial court may modify or vacate its judgments within the term, but the power to do so rests in the sound legal discretion of the court and may not be done arbitrarily. Sargent Feed & Grain v. Anderson 421
14. The discretion of a trial court to modify or vacate its judgments within the term is a judicial discretion which is subject to review. Sargent Feed & Grain v. Anderson 421
15. A party which has secured a judgment is entitled to retain that judgment, and it may not be set aside in the absence of a sound legal reason for doing so. Sargent Feed & Grain v. Anderson 421
16. Generally, the neglect or fault of counsel for the adverse party is not a basis for vacating a judgment against that party. Sargent Feed & Grain v. Anderson 421
17. An order of the district court reversing a judgment of the county court in a criminal case, vacating the sentence, and remanding the cause for imposition of sentence may be reviewed under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1982). State v. Ziemba 612
18. Under Neb. Rev. Stat. § 25-2001 (Reissue 1979), an "unavoidable casualty" is not of itself ground for the granting of a new trial at a subsequent term of court. The "casualty," to be available for that purpose, must be one "preventing the party from prosecuting or defending." Aetna Cas. & Surety Co. v. Dickinson 660
19. The judgment of the trial court in a law action where a jury has been waived has the effect of a jury verdict and will not be set aside unless clearly wrong Pioneer Enterprises v. Edens 672
20. In determining the sufficiency of the evidence to sus-

tain a judgment in a law action, it must be considered most favorably to the successful party, every controverted fact must be resolved in that party's favor, and he must have the benefit of any inferences reasonably deducible from it. Pioneer Enterprises v. Edens 672

21. The provisions of Neb. Rev. Stat. § 25-2002 (Reissue 1979) apply only to a modification of a judgment entered at a *subsequent* term. The law is clear that during the term the trial court has the inherent power to modify its judgment and no petition or summons is required. Hyde v. Shapiro 785
22. Our law is clear that, absent an abuse of discretion, a court has the inherent power to vacate or modify its own judgment at any time during the term at which those judgments are pronounced and such power exists entirely independent of any statute. Hyde v. Shapiro .. 785

Juries.

1. Ordinarily, when a motion to strike inadmissible evidence is sustained and the jury is instructed to disregard it, such action by the court is deemed sufficient to prevent prejudice, and therefore the defendant is not entitled to a mistrial. State v. Lee 63
2. The trial judge is in the best position to measure the atmosphere at trial and gauge the probable impact an improper comment has on a jury. As such, the trial court's determination concerning the comment will not be overruled unless it is clearly erroneous. State v. Reeves 206
3. Remarks of the prosecutor in final summation which do not mislead and unduly influence the jury do not rise to a level sufficient to require the granting of defendant's motion for mistrial. State v. Reeves 206
4. Where different minds may draw different conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined. Kresha v. Kresha 377

Jurisdiction.

1. The absence of subject matter jurisdiction may be raised by demurrer, or may be decided on a motion for summary judgment, or by trial on the merits. Blitzkie v. State 105
   Nelson v. Sioux City Boat Club 484
2. The requirement of Neb. Rev. Stat. § 77-2407 (Reissue 1981) to furnish a proper appeal bond in any appeal from an order of the Director of Administrative Services is mandatory and essential to confer jurisdiction of

the proceedings on the district court, and the failure to do so may be objected to at any time during the course of the proceedings. Gesman v. State 126
3. A judgment is not subject to collateral attack unless that attack rests upon a lack of jurisdiction over the parties or of the subject matter. State v. Reuter 325
4. The authority of the Commission of Industrial Relations is limited to that granted to it by legislative act, and such authority, when granted, must be narrowly construed. Transport Workers v. Transit Auth. of Omaha 455
5. In an appropriate case the Commission of Industrial Relations may enter temporary orders affecting the wages, hours, and terms and conditions of employment of an employee pending the resolution of a labor dispute, and its authority under the act is not limited to preventing the discharge of an employee by the employer. Transport Workers v. Transit Auth. of Omaha 455
6. The jurisdiction of the Nebraska Public Service Commission over public grain warehouses is limited to the functions specifically set out in Neb. Rev. Stat. §§ 88-501 to 88-524 (Reissue 1981). In re Complaint of Fecht 535
7. The powers of the court in a divorce action are statutory. Unless the source of the power is found in the statute, a court is without authority to exercise it. Randall v. Randall 541
8. The juvenile court has exclusive original jurisdiction as to any child who is habitually truant from school, regardless of whether the truancy is with or without the permission of the parent or guardian. In re Interest of C.P. 905
In re Interest of K.S. 926

Juror Qualifications.

1. The trial court did not err in allowing the questioning of jurors as to whether their scruples against the death penalty would prevent them from returning a verdict of guilty regardless of the evidence, even though the jury was not to impose punishment and even though defendant contended that the questioning led to a conviction-prone jury. State v. Reeves 206
2. A juror who has indicated an inability to fairly and impartially determine guilt may be excused for cause. State v. Reeves 206
3. Where jurors agree that they will follow the law given to them by the judge in his instructions, there is no need to remove such jurors for cause from a jury panel. State v. DeJesus 907

Jury Instructions.

1. Jury instructions must be considered together, and if when considered as a whole they state the law correctly, they are not erroneous. In the framing of jury instructions it is not necessary that the trial court follow the exact language used by this court in stating a rule of law. Lange Bldg. & Farm Supply v. Open Circle "R" 1
2. It is the duty of the trial court, whether requested to do so or not, to submit to and properly instruct the jury on all material issues presented by the pleadings and supported by the evidence. Juniata Feedyards v. Nuss ... 29
   Bussell v. Western Diesel Power 822
3. An instruction which misstates the issues or defenses and has a tendency to mislead the jury is erroneous. Conflicting instructions are erroneous and prejudicial unless it appears that the jury was not misled. Juniata Feedyards v. Nuss 29
   Bussell v. Western Diesel Power 822
4. It is not error to refuse to give a requested instruction if the substance of the request is in the instructions actually given. State v. Thielen 119
5. Where an information charges a defendant with a killing committed in the perpetration of or attempt to perpetrate one of the specific felonies set out in Neb. Rev. Stat. § 28-303(2) (Reissue 1979), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested. State v. Reeves 206
6. It is the duty of the court upon request of the accused to instruct the jury upon any valid defense which the evidence supports. The court is not required to give instructions where there is not sufficient evidence to prove the facts claimed. State v. Reeves 206
7. All jury 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. Reeves 206
   Erickson v. Monarch Indus. 875
8. It is not error to refuse to instruct a jury in a criminal case of the consequences of a verdict of not guilty by reason of insanity. State v. Reeves 206
9. In determining the sufficiency of jury instructions on appeal to this court, such instructions are to be read as a whole; and when they fairly submit the case and the

jury could not have been misled, there is no prejudicial error. Kresha v. Kresha 377
10. It is not error for the trial court to refuse a request for additional instructions where it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case. Kresha v. Kresha 377
11. Trial court's instructions to jury in this case examined and found sufficient. Kresha v. Kresha 377
12. The true meaning of a set of instructions is to be determined from a consideration of all that is said in them and not from picking out and emphasizing one errant word. Lincoln Grain v. Coopers & Lybrand 433
13. An instruction should be couched in neutral and nonargumentative language. Lincoln Grain v. Coopers & Lybrand 433
14. If there is at least some evidence which would permit the jury to find a defendant charged with first degree murder guilty of manslaughter, the court is required to charge the jury concerning the elements of manslaughter. State v. Vosler 461
State v. Drew 685
15. When insanity has not been pled as a defense and evidence concerning the defendant's mental condition is introduced solely to establish that he lacked the ability to intend the obvious and probable consequences of his voluntary act, and thus is offered to rebut the presumption which flows from his act, it is not appropriate to instruct the jury as to the elements of the insanity defense. State v. Vosler 461
16. If a more specific instruction is desired, it is the duty of counsel to request it. Erickson v. Monarch Indus. 875

Juvenile Courts.
1. The juvenile court has exclusive original jurisdiction as to any child who is habitually truant from school, regardless of whether the truancy is with or without the permission of the parent or guardian. In re Interest of C.P. 905
In re Interest of K.S. 926
2. A "truant" is a child who stays away from school without the permission of one having authority to grant such permission. In re Interest of K.S. 926
3. A child is a truant if his parent fails to cause the child to attend school as required by a compulsory attendance statute, at least where there is not a valid excuse for the absence from school even though the parent consents to the absence. In re Interest of K.S. 926

Kidnapping.

The kidnapping statute, Neb. Rev. Stat. § 28-313 (Reissue 1979), and the false imprisonment in the first degree statute, Neb. Rev. Stat. § 28-314 (Reissue 1979), define separate offenses. State v. Miller 72

Larceny.

The term "steal," as used in a municipal ordinance, includes all the elements of larceny at common law. State v. Richard 832

Leases.

1. A lease which may be terminated at any time at the will of either party is a tenancy at will. Day v. Kolar . 47
2. In the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity, cannot avoid the effect of his signature merely because he was not informed of the contents of the document. Day v. Kolar 47
3. The measure of damages in the taking or injury of a leasehold is the difference between the rental value of the remainder of the term and the rent reserved in the lease. City of Hastings v. Peter Ellis Farms 550

Legislature.

1. The Legislature can shorten the period of limitation for commencement of a cause of action so long as a reasonable time is allowed to bring such action. Macku v. Drackett Products Co. 176
2. Neb. Rev. Stat. § 50-202 (Cum. Supp. 1982) allows legislators reimbursement for expenses incurred in connection with the performance of their duties. State ex rel. Douglas v. Beermann 849

Lesser-Included Offenses.

1. Where an information charges a defendant with a killing committed in the perpetration of or attempt to perpetrate one of the specific felonies set out in Neb. Rev. Stat. § 28-303(2) (Reissue 1979), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested. State v. Reeves 206
2. When, in a prosecution for murder, the evidence will support a finding of manslaughter, the trial court is required to give such an instruction. State v. Drew 685

Liability.

1. Where the facts present no conflict and furnish the basis for but a single inference, and that favorable to the master, his freedom from liability is to be determined by the court as a matter of law. Strong v. K & K Investments 370
2. The doctrine that an intervening act cuts off the liability of a tort-feasor comes into play only when the intervening cause is not foreseeable. Lincoln Grain v. Coopers & Lybrand 433
3. Under the Nebraska Recreation Liability Act the owner of a recreational facility is not liable for ordinary negligence unless a fee was charged for the right to enter the facility. Garreans v. City of Omaha 487
4. Under the Nebraska Recreation Liability Act the owner of a recreational facility may be liable for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity even though no charge was made to enter or go upon the land. Garreans v. City of Omaha 487
5. When a bank accepts a deposit of funds it knows to be of a trust nature, and also knows that the depositor is without authority to deal with those funds, it distributes the funds to the depositor at its peril, with liability to the true owner of those funds. McHenry v. First Nat. Bank 580

Libel and Slander.

1. Absolute privilege attaches to all statements, even allegedly defamatory statements, made by an attorney and made incident to and in the course of a judicial proceeding, if the statements have some relation to the proceedings. Cummings v. Kirby 314
2. In determining whether material is pertinent or relevant to the issues in a defamation action against an attorney, the privilege embraces anything that may possibly be pertinent, and all doubts should be resolved in favor of its relevancy or pertinency. Cummings v. Kirby 314

Limitations of Actions.

1. Regarding an infant's cause of action for product liability, Neb. Rev. Stat. § 25-213 (Reissue 1979) tolls the statute of limitations contained in Neb. Rev. Stat. § 25-224(4) (Reissue 1979). Macku v. Drackett Products Co. 176
2. The Legislature can shorten the period of limitation for commencement of a cause of action so long as a rea-

sonable time is allowed to bring such action. Macku v. Drackett Products Co. 176
3. Suspension of the statute of limitations in accordance with Neb. Rev. Stat. § 25-213 (Reissue 1979) inures to the exclusive and personal benefit of an infant and not to the benefit of the infant's parent. Macku v. Drackett Products Co. 176
4. The 4-year period of limitations embodied in Neb. Rev. Stat. § 13-111 (Reissue 1977) bars an adult mother, through a cause of action brought on her own behalf, from establishing the paternity of her child born out of lawful wedlock to recover her own damages; however, such period of limitations does not operate to bar a cause of action brought on such a minor child's behalf by a guardian or next friend to secure the child's rights. Doak v. Milbauer 331
5. A petition alleging a cause of action not commenced within the time prescribed by the appropriate statute of limitations is subject to a demurrer. S.I.D. No. 145 v. Nye 354
6. If a petition alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute. S.I.D. No. 145 v. Nye 354
7. To toll the statute of limitations and to remove the bar of that statute, Neb. Rev. Stat. § 25-205 (Reissue 1979), a debtor must unqualifiedly acknowledge an existing liability. Kotas v. Sorensen 648
8. A mere reference to a promissory note, although consistent with its existing validity and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an "acknowledgment" as contemplated by Neb. Rev. Stat. § 25-216 (Reissue 1979). Kotas v. Sorensen 648
9. Because part payment can result in a debtor's waiver or relinquishment of the defense afforded by the statute of limitations, a creditor must prove by clear and convincing evidence that there has been a part payment of the debt in order to enforce a claim barred by the statute of limitations. Castellano v. Bitkower 806

Liquor Licenses.

1. Under the provisions of Neb. Rev. Stat. § 53-132 (Cum. Supp. 1982), the arbitrary recommendation of denial of the issuance of a liquor license made by a local governing body, based only on the belief that there are sufficient licenses in existence, does not, standing alone,

justify the denial of an otherwise valid application. McChesney v. City of No. Platte 416
2. The Nebraska Liquor Control Commission may deny a retail liquor license to a qualified applicant only if it finds that one or more of the requirements of Neb. Rev. Stat. § 53-132 (Cum. Supp. 1982), including public convenience and necessity, are not present. McChesney v. City of No. Platte 416
3. Neither the district court nor this court is entitled to review the record de novo to make those enumerated findings required by Neb. Rev. Stat. § 53-132 (Cum. Supp. 1982). Rather, such reviewing courts are entitled to determine whether the findings of the Nebraska Liquor Control Commission are supported by substantial evidence or whether such findings were arbitrary or capricious. McChesney v. City of No. Platte 416
4. The failure of the Nebraska Liquor Control Commission to make the findings of fact and conclusions of law provided for in Neb. Rev. Stat. § 53-132 (Cum. Supp. 1982) does not make its order void, but only irregular, which requires a reviewing court to remand the case to the commission with directions to make such findings in support of any order to be made. McChesney v. City of No. Platte 416
5. The relocation of an existing liquor license is not the issuance of a new one. Central Park Pharm. v. Nebraska Liq. Cont. Comm. 676

Marriage.

The general rule is that the validity of a marriage is determined by the law of the place where it was contracted; if valid there it will be held valid everywhere, and, conversely, if invalid by the lex loci contractus, it will be invalid wherever the question may arise. Randall v. Randall 541

Master and Servant.

1. In order to sustain a recovery under the doctrine of respondeat superior, the relationship of master and servant must be shown to exist at the time of the injury and with respect to the particular transaction resulting in the alleged tort, and the servant must be shown to be acting within the scope of his employment. Strong v. K & K Investments 370
2. The conduct of a servant is within the scope of employment if, but only if, it is of the kind he is employed to perform, it occurred substantially within the authorized time and space limits, and it is actuated, at least in

part, by a purpose to serve the master. Strong v. K & K Investments 370
3. A master, in selecting an employee, must exercise a degree of care commensurate with the nature and danger of the business in which he is engaged and the nature and grade of service for which the servant is intended, but is required to hire employees possessing only such skill as is ordinarily and reasonably commensurate with the work to be performed by them. Strong v. K & K Investments 370
4. Where the facts present no conflict and furnish the basis for but a single inference, and that favorable to the master, his freedom from liability is to be determined by the court as a matter of law. Strong v. K & K Investments 370

Mechanics' Liens.

1. A foreclosure of a mechanic's lien is an action in equity which is heard on appeal in this court de novo on the record, with weight being given to the findings of the trial court when credible evidence is in conflict on material questions of fact. Kustom Kreations v. Duxbury 99
O'Keefe Elevator v. Second Ave. Properties 170
2. Prejudgment interest is recoverable upon the foreclosure of a mechanic's lien if the claim is liquidated. O'Keefe Elevator v. Second Ave. Properties 170

Medical Assistance.

1. In enacting the amendment to the Social Security Act which requires that a state's plan for long-term health care assistance provide for payment of skilled nursing facilities' and intermediate care facilities' services on a reasonable cost-related basis, Congress intended that the states have freedom both to define allowable cost items and to set a value on the reasonable cost of such items. Haven Home, Inc. v. Department of Pub. Welfare 731
2. This court may not substitute its judgment for that of the Nebraska Department of Public Welfare in determining which method is preferable to determine a reasonable cost-related basis for reimbursing long-term health care facilities. Haven Home, Inc. v. Department of Pub. Welfare 731
3. A state is not obligated to participate in the medicaid program; however, once it has voluntarily elected to participate, the state must comply with federal standards. Haven Home, Inc. v. Department of Pub. Welfare 731

Mental Competency.

In order to prove the requisite mental state for murder in the first degree, the State is required to show a condition of the mind which was manifested by intentionally doing a wrongful act without just cause or excuse and which is defined as any willful or corrupt intention of the mind. State v. Krimmel 825

Mental Health.

A trial court may not require a psychiatric examination of a criminal defendant when he puts his mental condition in issue solely to support his claim that he lacked the mental ability to form the intent required as an element of the crime with which he is charged. State v. Vosler 461

Minors.

1. Generally, injury to a minor results in two causes of action—one on behalf of the minor and the other on behalf of the minor's parent. Macku v. Drackett Products Co. 176
2. At common law an infant could sue only by a guardian or next friend, because an infant lacked legal capacity to act for oneself. Neb. Rev. Stat. § 25-307 (Reissue 1979) is Nebraska's recognition of the common law regarding prosecution of an infant's claim. Macku v. Drackett Products Co. 176
3. Regarding an infant's cause of action for product liability, Neb. Rev. Stat. § 25-213 (Reissue 1979) tolls the statute of limitations contained in Neb. Rev. Stat. § 25-224(4) (Reissue 1979). Macku v. Drackett Products Co. 176
4. Suspension of the statute of limitations in accordance with Neb. Rev. Stat. § 25-213 (Reissue 1979) inures to the exclusive and personal benefit of an infant and not to the benefit of the infant's parent. Macku v. Drackett Products Co. 176
5. If the actor is a child, the standard of care to which he must conform to avoid being contributorily negligent is that of a reasonable person of like age, intelligence, and experience under the same circumstances. Cullinane v. Interstate Iron & Metal 245
   Garreans v. City of Omaha 487
6. The question of the competency of a child witness is measured by such child's capabilities, intelligence, and understanding of the difference between truth and falsehood, and the determination of such competency rests largely in the discretion of the trial court and its

determination in that regard will not be overturned absent a clear abuse of discretion. State v. Miner 309
7. As a general rule, whether a physical act committed by a person responsible for the general care and supervision of a minor is a justifiable act, as referred to in Neb. Rev. Stat. § 28-1413 (Reissue 1979), or constitutes an unlawful assault is a question of fact to be decided by the trier of fact. State v. Miner 309
8. A "truant" is a child who stays away from school without the permission of one having authority to grant such permission. In re Interest of K.S. 926
9. A child is a truant if his parent fails to cause the child to attend school as required by a compulsory attendance statute, at least where there is not a valid excuse for the absence from school even though the parent consents to the absence. In re Interest of K.S. 926
10. The juvenile court has exclusive original jurisdiction as to a child who is habitually truant from school, regardless of whether the truancy is with or without the permission of the parent or guardian of the child. In re Interest of K.S. 926

Modification of Decree.

A material change in circumstances, not within the reasonable contemplation of the parties at the time of the alimony award, and not accomplished by the mere passage of time, may constitute good cause for modification of a decree; our determination as to whether such good cause has been shown is made de novo on the record. Sholl v. Sholl 289

Motions for Continuance.

The denial of a continuance of a trial is a matter to be determined on the discretion of the trial court, and in the absence of an abuse of discretion such a denial will not be disturbed on appeal. State v. Clark 49

Motions for Mistrial.

1. Where plaintiff's counsel on cross-examination of defendant's witness propounds a question which calls for proper evidence, the fact that an irresponsive or inadvertent answer includes reference to insurance will not be grounds for declaring a mistrial. Lange Bldg. & Farm Supply v. Open Circle "R" 1
2. A party to an action cannot be heard to complain if reference to insurance is interjected by his own witness and the other party's counsel is in no way responsible for it. Lange Bldg. & Farm Supply v. Open Circle "R" 1

3. Remarks of the prosecutor in final summation which do not mislead and unduly influence the jury do not rise to a level sufficient to require the granting of defendant's motion for mistrial. State v. Reeves 206

Motions for New Trial.

1. The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor. Juniata Feedyards v. Nuss 29
2. Where a motion for new trial is based on newly discovered evidence, the rule is well established that the newly discovered evidence must be of such a nature that, if offered and admitted at the former trial, it probably would have produced a substantial difference in the result. State v. Ferris 606

Motions to Dismiss.

1. A motion to dismiss is not allowable as a pretrial pleading. Blitzkie v. State 105
   Nelson v. Sioux City Boat Club 484
2. There is no pretrial pleading in Nebraska known as a "Motion to Dismiss." Smick v. Langvardt 778
3. The party against whom a motion for dismissal is directed is entitled to have all material and relevant evidence submitted on its behalf treated as true, to have every controverted fact resolved in its favor, and to have the benefit of every inference which can reasonably be deduced from the evidence. Teegerstrom v. H. J. Jeffries Truck Line 917

Motions to Strike.

Ordinarily, when a motion to strike inadmissible evidence is sustained and the jury is instructed to disregard it, such action by the court is deemed sufficient to prevent prejudice, and therefore the defendant is not entitled to a mistrial. State v. Lee 63

Motions to Vacate.

1. Generally, the neglect or fault of counsel for the adverse party is not a basis for vacating a judgment against that party. Sargent Feed & Grain v. Anderson 421
2. Under Neb. Rev. Stat. § 25-2001 (Reissue 1979), an "unavoidable casualty" is not of itself ground for the granting of a new trial at a subsequent term of court. The "casualty," to be available for that purpose, must be

one "preventing the party from prosecuting or defending." Aetna Cas. & Surety Co. v. Dickinson 660

Motor Vehicles.

1. A driver emerging from a driveway has the duty to look for approaching traffic and to see what is in plain sight within the radius which denotes danger. McFarland v. King 92
2. A driver of a vehicle must maintain such lookout and control as will avoid collision with others exercising due care. He has a right to assume that others, children and adults, will do likewise. McFarland v. King 92
3. A vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way. McFarland v. King 92
4. Where the evidence shows without dispute that the proximate cause of a collision is the failure of the driver of a vehicle entering a highway from a private road to look for approaching vehicles, the failure to look constitutes such negligence as will bar recovery as a matter of law. McFarland v. King 92
5. A privately owned automobile may not be removed from private property without the consent of its owner by order of a police officer unless there are exigent circumstances requiring removal, or the officer has a search warrant. Morfeld v. Bernstrauch 234
6. Testimony that an officer smelled marijuana is sufficient to furnish probable cause to search a vehicle without a warrant where there is sufficient foundation as to the expertise of the officer. State v. Masters 304
7. The statutory rules of the road in Nebraska are not applicable to the operation of motor vehicles on private property unless specifically so provided. Neb. Rev. Stat. § 39-603 (Reissue 1978). Kresha v. Kresha 377
8. In the absence of statutory regulation common-law rules apply. Kresha v. Kresha 377
9. An operator, in backing a vehicle at places other than a public street or highway, must exercise ordinary care. The situation may require the keeping of a lookout and, under some circumstances, an effective warning signal of the intention to back. Generally speaking, the backing does not constitute negligence where the operator does everything that a reasonably prudent person can do to avoid injury to others. Kresha v. Kresha 377

Municipal Corporations.

1. The term "comprehensive plan" is used with respect to a metropolitan city in its generic sense and does not refer to any special document. Sasich v. City of Omaha 864
2. If an ordinance in question is a valid exercise of the power granted to a city, courts will not inquire into the motives or reasons of the city council in enacting it. Sasich v. City of Omaha 864

Negligence.

1. Where the evidence shows without dispute that the proximate cause of a collision is the failure of the driver of a vehicle entering a highway from a private road to look for approaching vehicles, the failure to look constitutes such negligence as will bar recovery as a matter of law. McFarland v. King 92
2. If the actor is a child, the standard of care to which he must conform to avoid being contributorily negligent is that of a reasonable person of like age, intelligence, and experience under the same circumstances. Cullinane v. Interstate Iron & Metal 245
   Garreans v. City of Omaha 487
3. Where reasonable minds might draw different conclusions from the evidence, the question as to negligence or contributory negligence under the circumstances is a matter for determination by the jury. Cullinane v. Interstate Iron & Metal 245
4. In order to sustain a recovery under the doctrine of respondeat superior, the relationship of master and servant must be shown to exist at the time of the injury and with respect to the particular transaction resulting in the alleged tort, and the servant must be shown to be acting within the scope of his employment. Strong v. K & K Investments 370
5. The conduct of a servant is within the scope of employment if, but only if, it is of the kind he is employed to perform, it occurred substantially within the authorized time and space limits, and it is actuated, at least in part, by a purpose to serve the master. Strong v. K & K Investments 370
6. A master, in selecting an employee, must exercise a degree of care commensurate with the nature and danger of the business in which he is engaged and the nature and grade of service for which the servant is intended, but is required to hire employees possessing only such skill as is ordinarily and reasonably commensurate with the work to be performed by them. Strong v. K & K Investments 370

7. An operator, in backing a vehicle at places other than a public street or highway, must exercise ordinary care. The situation may require the keeping of a lookout and, under some circumstances, an effective warning signal of the intention to back. Generally speaking, the backing does not constitute negligence where the operator does everything that a reasonably prudent person can do to avoid injury to others. Kresha v. Kresha 377
8. A fireman or individual fighting a fire on the premises of an owner or occupant is a bare licensee to whom the owner or occupant owes no greater duty than to refrain from injuring him by willful or wanton negligence or a designed injury, except in certain cases where there may be the duty to warn of hidden danger or peril known to the owner or occupant but unknown to or unobservable by the fireman in the exercise of ordinary care. Moravec v. Moravec 412
9. Under the rescue doctrine it is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value to be realized from meeting the danger and attempting to remove or eliminate the hazard; that is, the less the danger to the third party, the less the risk the volunteer is justified in taking. Moravec v. Moravec 412
10. The assumption of risk doctrine is predicated upon an implied consent to be treated negligently, and generally relates to one voluntarily undertaking a known risk even though he is otherwise in the exercise of reasonable care. Lincoln Grain v. Coopers & Lybrand ... 433
11. A plaintiff who voluntarily assumes a risk of harm arising from the negligent conduct of the defendant cannot recover for such harm. Lincoln Grain v. Coopers & Lybrand 433
12. The contributory negligence of the client is a defense in an accountant malpractice action only where such negligence has contributed to the accountant's failure to perform his contract and to report the truth. Lincoln Grain v. Coopers & Lybrand 433
13. The doctrine that an intervening act cuts off the liability of a tort-feasor comes into play only when the intervening cause is not foreseeable. Lincoln Grain v. Coopers & Lybrand 433
14. A possessor of land is not an insurer of the safety of

business invitees on its land. May v. Hall Co. L'stock Improvement Assn. 476
15. A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (1) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (2) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (3) fails to exercise reasonable care to protect them against the danger. May v. Hall Co. L'stock Improvement Assn. 476
16. Under the Nebraska Recreation Liability Act the owner of a recreational facility is not liable for ordinary negligence unless a fee was charged for the right to enter the facility. Garreans v. City of Omaha 487
17. Under the Nebraska Recreation Liability Act the owner of a recreational facility may be liable for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity even though no charge was made to enter or go upon the land. Garreans v. City of Omaha 487
18. In order for an action to be willful or wanton, the evidence must show that the defendant acted with actual knowledge that a danger existed and that the defendant intentionally failed to act to prevent the harm which was reasonably likely to result. Garreans v. City of Omaha 487
19. To constitute willful misconduct there must be actual knowledge, or its legal equivalent, of the peril to be apprehended, coupled with a conscious failure to avert injury. Garreans v. City of Omaha 487
20. An actor cannot act willfully in failing to remove a danger when he has no knowledge of it. Garreans v. City of Omaha 487
21. An actor is contributorily negligent if he breaches the duty imposed upon him by law to protect himself from injury; if his actions concur and cooperate with actionable negligence of the defendant; and if his actions contribute to his injuries as a proximate cause. Garreans v. City of Omaha 487
22. The degree of care required increases when an actor is dealing with a dangerous activity such as exploding firecrackers. Garreans v. City of Omaha 487
23. One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself into contact with it, as by touching

it with conductors of electricity, is guilty of negligence. Rodgers v. Chimney Rock P.P. Dist. 666
24. One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself to the danger assumes the risk of injury from it. Rodgers v. Chimney Rock P.P. Dist. 666
25. One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. Rodgers v. Chimney Rock P.P. Dist. 666
26. A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines. The degree of care varies with the circumstances, but it must be commensurate with the dangers involved; and where wires are designed to carry electricity of high voltage, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business to avoid injury to persons and property. Rodgers v. Chimney Rock P.P. Dist. 666
27. Electric companies are not insurers of the safety of the public and hence are not liable for injuries unless guilty of some wrongful act or omission. Rodgers v. Chimney Rock P.P. Dist. 666
28. Power companies engaged in the transmission of electricity, especially electricity of high voltage, are charged with the duty of exercising a very high degree of care to safeguard those whose lawful activities expose them to the risk of inadvertent contact with the electric lines, but they are not insurers and not liable for damages in the absence of negligence. Rodgers v. Chimney Rock P.P. Dist. 666
29. A violation of a statute or ordinance enacted in the interest of public safety, while not negligence per se, is evidence of negligence. Schaefer v. McCreary 739
30. While the owner of premises owes the duty to exercise ordinary care to have the premises in a reasonably safe condition for use consonant with the purposes of the invitation, generally, there is no duty on the part of an invitor owner to protect the invitee against hazards which are known to the invitee or are so apparent that he may reasonably be expected to discover them and protect himself. Bruyninga v. Nuss 801
31. Generally, the invitee, who has knowledge of a dangerous condition on the premises or where the dangerous condition is obvious, is negligent as a matter of law if

he fails to use reasonable care to avoid injury. Bruyninga v. Nuss 801
32. It is not necessary for an actor to foresee the exact risk which occurred in order to support a finding of negligence. Erickson v. Monarch Indus. 875
33. A contractor cannot delegate its duty to provide safe electrical wiring by employing a subcontractor to perform the electrical work. Erickson v. Monarch Indus. 875
34. A contractor who creates a dangerous condition which is latent and not discoverable by reasonable inspection is not relieved of liability by acceptance of the work by the owner. Erickson v. Monarch Indus. 875
35. In an action for gross negligence under the automobile guest statute, where there is adequate proof of negligence, a verdict should be directed for defendant only where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence. Teegerstrom v. H. J. Jeffries Truck Line 917
36. Gross negligence, within the meaning of the guest statute, means negligence in a very high degree, or the absence of even slight care in the performance of a duty. Teegerstrom v. H. J. Jeffries Truck Line 917
37. In order to recover upon a negligence claim, the claimant must not have been contributorily negligent in a degree more than slight when compared to the negligence of the defendant. Teegerstrom v. H. J. Jeffries Truck Line 917

Negotiable Instruments.

A negotiable instrument can be the subject of conversion. Bryant Heating v. United States Nat. Bank 107

Notice.

1. A failure to object to the form of a notice and acting on the notice generally waives any objection to the form of the notice. Day v. Kolar 47
2. To satisfy the requirement of due process, a notice in proceedings before an administrative agency must reasonably provide information regarding the accusation levied. In re Appeal of Bonnett 587
3. Charges in administrative proceedings must be specific enough to allow a party to prepare a defense, but the charges need not be drawn with the same refinements, strictness, exactitude, and subtleties as pleadings for judicial proceedings. In re Appeal of Bonnett 587

4. Notice of an accusation in administrative proceedings must sufficiently inform a party about the nature of the proceedings in order to avoid surprising or misleading the accused. In re Appeal of Bonnett 587

Ordinances.

1. The term "steal," as used in a municipal ordinance, includes all the elements of larceny at common law. State v. Richard 832
2. An action to enjoin enforcement of a city ordinance is one in equity. Sasich v. City of Omaha 864
3. The validity of a zoning ordinance is to be presumed in the absence of clear and satisfactory evidence to the contrary. Sasich v. City of Omaha 864
4. A zoning ordinance which recognizes and legitimizes a nonconforming use is not objectionable upon that basis alone. Sasich v. City of Omaha 864
5. If an ordinance in question is a valid exercise of the power granted to a city, courts will not inquire into the motives or reasons of the city council in enacting it. Sasich v. City of Omaha 864

Parental Duties.

A child is a truant if his parent fails to cause the child to attend school as required by a compulsory attendance statute, at least where there is not a valid excuse for the absence from school even though the parent consents to the absence. In re Interest of K.S. 926

Parental Rights.

1. An order of the juvenile court terminating parental rights must be supported by clear and convincing evidence. In re Interest of C., E., A., and H. 70
In re Interest of J. and R. 183
2. A 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 J. and R. 183
3. Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent. Friedrichsen v. Koehn 628

Parol Evidence.

Oral testimony is not admissible under the ambiguity exception to the parol evidence rule to establish an under-

standing at variance with the plain terms of the written instrument. Sederstrom v. Burge 512

Parties.

1. A third-party beneficiary's rights depend upon, and are measured by, the terms of the contract between the promisor and promisee. The right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, which must affirmatively appear from the language of the instrument when properly interpreted or construed; and the liability so appearing cannot be extended or enlarged on the ground alone that the situation and circumstances of the parties justify or demand further or other liability. It has been said that before the beneficiary may accept the benefits of the contract, he must accept all of its implied, as well as express, obligations. Haakinson & Beaty Co. v. Inland Ins. Co. 426
2. 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 interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Johnson v. Mays 890

Partnerships.

Where the relationships of the parties to a partnership are intertwined with other business relationships of the parties, an adequate remedy in an accounting case is available only within the equitable jurisdiction of the court. Jackson v. Clemens 641

Paternity.

The 4-year period of limitations embodied in Neb. Rev. Stat. § 13-111 (Reissue 1977) bars an adult mother, through a cause of action brought on her own behalf, from establishing the paternity of her child born out of lawful wedlock to recover her own damages; however, such period of limitations does not operate to bar a cause of action brought on such a minor child's behalf by a guardian or next friend to secure the child's rights. Doak v. Milbauer 331

Perjury.

In a prosecution for perjury, the falsity of the accused's sworn testimony cannot be established by the testimony of one witness alone, but may be established by

testimony of one witness plus corroborative facts and circumstances sufficient to exclude all reasonable doubt of the guilt of the accused. State v. Mayhew 761

Photographs.

In a homicide case photographs of the victim are admissible, even if gruesome, if a proper foundation is laid and they are received for purposes of identification, to show the nature and extent of the wounds, and to establish malice or intent. State v. Krimmel 825

Plea in Abatement.

After trial and conviction any error in the district court's ruling on the plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt. State v. Thielen 119

Pleadings.

1. Normally, a petition seeking to recover upon an express contract may be amended before trial to permit recovery on quantum meruit, in the absence of a showing of prejudice to the defendant. Kustom Kreations v. Duxbury 99
2. If at a pretrial conference it appears there are issues not then within the pleadings, they should be stated plainly in the pretrial order, and, absent objections to the order by the parties, such order should thereafter govern the proceeding in that respect, and evidence may properly be received in support of proof as to such issues. Kustom Kreations v. Duxbury 99
3. A motion to dismiss is not allowable as a pretrial pleading. Blitzkie v. State 105
   Nelson v. Sioux City Boat Club 484
4. An irregular pleading such as a motion to dismiss may sometimes be recognized as a demurrer if the parties by stipulation, or the court by rule of court, permits the same. Blitzkie v. State 105
5. Admissions contained in a defendant's answer are judicial admissions and waive all controversy concerning the matter. State ex rel. Douglas v. Morrow 317
6. A petition alleging a cause of action not commenced within the time prescribed by the appropriate statute of limitations is subject to a demurrer. S.I.D. No. 145 v. Nye 354
7. If a petition alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling

the operation and bar of the statute. S.I.D. No. 145 v. Nye 354
8. The character of an action as one in tort or on contract is determined by the nature of the grievance, not by the form of the pleadings, with consideration being given to the facts which constitute the cause of action. Lincoln Grain v. Coopers & Lybrand 433
9. Where a petition contains a cause of action for breach of contract, additional averments appropriate to a tort action will not change the action from contract to tort. Lincoln Grain v. Coopers & Lybrand 433
10. One may sue in tort when there has been negligence in the performance of a contract. Lincoln Grain v. Coopers & Lybrand 433
11. There is no pretrial pleading in Nebraska known as a "Motion to Dismiss." Smick v. Langvardt 778
12. Where the alleged defect is not apparent on the face of the petition, the defect becomes an affirmative matter which must be raised by the party seeking the benefit of the defect. Smick v. Langvardt 778

Pleas.

1. It would not be proper as a matter of right for a trial judge to permit the withdrawal of a plea of guilty or nolo contendere which was knowingly, intelligently, and voluntarily made unless such withdrawal is necessary to correct a manifest injustice. State v. Holtan .. 594
2. In an action to withdraw a plea of guilty or nolo contendere, the burden is on the defendant to establish the manifest injustice by clear and convincing evidence. State v. Holtan 594
3. Withdrawal of a plea of guilty or nolo contendere is necessary to correct a manifest injustice whenever the defendant proves that (1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule; (2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf; (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or (4) he did not receive the charge or sentence concessions contemplated by the plea agreement, and the prosecuting attorney failed to seek or not to oppose those concessions as promised in the plea agreement. State v. Holtan 594
4. In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a

matter of right once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea. State v. Holtan 594

5. A valid plea of guilty waives all defenses to the charge, whether procedural, statutory, or constitutional. State v. Ziemba 612
6. In order to make an intelligent and voluntary plea at a group arraignment, the defendant must have been present when the court advised those charged of their constitutional rights. The record must disclose that defendant was present at that time. State v. Ziemba 612
7. An accused being arraigned for driving while intoxicated must be advised whether he is charged with a first, second, or third offense and the maximum penalties applicable to the offense charged. State v. Ziemba 612
8. Under certain circumstances a checklist authenticated by the signature or initials of the judge can be considered a part of the record. Such a checklist may serve to affirmatively establish that a defendant made an intelligent and voluntary guilty plea. Such a checklist must comply with *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981). State v. Ziemba 612
9. A verbatim transcript of the rendition of a guilty plea is not constitutionally required, nor does absence of such a transcript require a finding that the plea was invalid. State v. Ziemba 612
10. Defendants are entitled to be informed of the nature of the charges against them, the right to assistance of counsel, the right to confront witnesses against them, the right to a jury trial where otherwise authorized, and the privilege against self-incrimination. State v. Neal 709
11. By entering a plea of guilty, knowingly, voluntarily, and intelligently, the defendant waives every defense of the charge, whether the defense is procedural, statutory, or constitutional. State v. McNitt 837

Police Officers and Sheriffs.

1. Testimony that an officer smelled marijuana is sufficient to furnish probable cause to search a vehicle without a warrant where there is sufficient foundation as to the expertise of the officer. State v. Masters 304
2. In appropriate circumstances a police officer may demand of a person involved in a traffic accident that person's name and address. State v. DeJesus 907

3. Where the facts are such that they would justify a reasonably prudent man in believing that his safety or that of others is in danger, a police officer may conduct a "pat-down" search of a defendant to look for weapons. State v. DeJesus 907

Political Subdivisions Tort Claims Act.

The findings of fact of the trial court in a proceeding under the Political Subdivisions Tort Claims Act will not be disturbed unless they are clearly wrong. Rodgers v. Chimney Rock P.P. Dist. 666

Post Conviction.

1. A motion for post conviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. State v. Hochstein 515
2. A defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal unless the questions are such that they would make the judgment of conviction void or voidable under the state or federal Constitution. State v. Hochstein 515
3. One seeking post conviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed on appeal unless they are clearly erroneous. State v. Hochstein 515
4. 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. State v. Hochstein 515
5. In a post conviction case the person challenging the competency of counsel has the burden of proof to establish the incompetency of counsel, and the findings of the district court denying relief will not be disturbed on appeal unless clearly erroneous. State v. Hochstein ... 515
6. Relief under the Post Conviction Act is limited to cases in which there was a denial or infringement of the rights of the prisoner such as to render the judgment void or voidable under the Constitution of Nebraska or the Constitution of the United States. State v. Pierce 792

Prejudgment Interest.

Prejudgment interest is recoverable upon the foreclosure of a mechanic's lien if the claim is liquidated. O'Keefe Elevator v. Second Ave. Properties 170

Preliminary Hearings.

The right of a defendant to a preliminary hearing may be waived. State v. DeJesus 907

Presentence Reports.

1. Pursuant to Neb. Rev. Stat. § 29-2521 (Reissue 1979), the sentencing court has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed. The sentencing court may consider a presentence investigation. State v. Reeves 206
2. By the very nature of a presentence investigation, it is necessary to rely to a great extent upon hearsay information, and it is not constitutionally required that the person convicted be allowed to confront all those who might give information to be used by the sentencing court. State v. Reeves 206

Presumptions.

1. As a general rule, a showing that the use has been open, visible, continuous, and unmolested for the prescriptive period raises a presumption that the use was under a claim of right and not permissive. Gerberding v. Schnakenberg 200
2. When the claimed use is over unenclosed lands, the presumption is that the use is permissive. Gerberding v. Schnakenberg 200
3. When the claimed right-of-way entails use over a way opened by the landowner for his own purposes, the presumption is that the use is permissive. Gerberding v. Schnakenberg 200
4. Once a claimant shows open, visible, continuous, and unmolested use of the land for the necessary period, the use will be presumed to be under a claim of right, and once so established this presumption may be rebutted by the owner of the servient estate only by proving by a preponderance of the evidence that the use was by license, agreement, or permission. Sellentin v. Terkildsen 284
5. A rebuttable presumption of validity attaches to actions of administrative agencies; the burden of proof rests with the party or parties challenging the action of an administrative agency. Haven Home, Inc. v. Department of Pub. Welfare 731
6. The validity of a zoning ordinance is to be presumed in the absence of clear and satisfactory evidence to the contrary. Sasich v. City of Omaha 864

Pretrial Conferences.

1. If at a pretrial conference it appears there are issues not then within the pleadings, they should be stated plainly in the pretrial order, and, absent objections to the order by the parties, such order should thereafter govern the proceeding in that respect, and evidence may properly be received in support of proof as to such issues. Kustom Kreations v. Duxbury 99
2. The purpose of a pretrial conference is to simplify the issues, to amend pleadings when necessary, and to avoid unnecessary proof of facts at trial. To that end litigants must adhere to the spirit of the procedure and are bound by the pretrial order to which no exception has been taken. Hasenauer v. Durbin 714

Pretrial Motions.

1. The time utilized in the disposition of pretrial motions filed by the defendant is excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 1979). State v. Classen 323
2. A failure to appropriately respond within the time allotted to a properly served request for admission of facts constitutes an admission of the facts sought to be elicited. Sargent Feed & Grain v. Anderson 421

Prior Acts.

1. As a general proposition, evidence of crimes committed by the accused other than that with which he is charged is not admissible. State v. Coca 76
2. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that he committed other crimes. State v. Coca 76
3. Evidence of other crimes is admissible where there are unique, almost "signature-like" similarities between them and the offense charged or the evidence is otherwise so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the guilt of the accused. State v. Coca 76
4. Balancing the need for "other-crimes" evidence against the possible prejudice to the accused is within the discretion of the trial court. State v. Coca 76
5. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan,

knowledge, identity, or absence of mistake or accident. State v. Plymate 722
6. Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused. The balancing of the need for "other-crimes" evidence against the possible prejudice to the defendant is within the appropriate discretion of the trial court. State v. Plymate .. 722

Prior Convictions.

1. An accused being arraigned for driving while intoxicated must be advised whether he is charged with a first, second, or third offense and the maximum penalties applicable to the offense charged. State v. Ziemba 612
2. A complaint charging second or third offense driving while intoxicated should allege the facts upon which the State relies to establish that the offense charged is a second or third offense. State v. Ziemba 612
3. The record of an enhancement proceeding for second or third offense driving while intoxicated must show that the requirements set out in *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), and Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982) were satisfied. State v. Ziemba 612
4. A defendant charged with second or third offense driving while intoxicated may waive proof of a prior conviction by a transcript of the judgment, and may waive the rights provided in Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982) in regard to prior convictions. State v. Ziemba 612
5. In an enhancement proceeding the burden remains with the State to prove the prior convictions, and proof that the prior convictions were obtained in a proceeding wherein the defendant was either afforded counsel or informed of his right to counsel is a necessary part of that burden. State v. Ellis 699
6. Where a record is silent as to a defendant's opportunity for counsel, we may not presume that such rights were respected. State v. Ellis 699

Prior Inconsistent Statements.

When a nonparty witness admits making earlier statements contradicting his testimony at trial, the earlier statements are not admissible for purposes of impeachment. State v. Drew 685

Probable Cause.

1. Testimony that an officer smelled marijuana is sufficient to furnish probable cause to search a vehicle without a warrant where there is sufficient foundation as to the expertise of the officer. State v. Masters 304
2. In appropriate circumstances the Constitution allows a properly limited search and seizure on facts that do not constitute probable cause to arrest or to search for contraband or evidence of a crime. State v. DeJesus 907

Products Liability.

1. Regarding an infant's cause of action for product liability, Neb. Rev. Stat. § 25-213 (Reissue 1979) tolls the statute of limitations contained in Neb. Rev. Stat. § 25-224(4) (Reissue 1979). Macku v. Drackett Products Co. 176
2. Misuse of the product is a defense to strict liability. Erickson v. Monarch Indus. 875
3. A supplier who fails to test or inspect a product before sale is not liable in an action for negligence if he does not know or have reason to know that the product is likely to be dangerous. Erickson v. Monarch Indus. ... 875
4. A supplier has a right to rely upon the inspection and tests performed by the manufacturer. Erickson v. Monarch Indus. 875
5. Warning is unnecessary where the supplier of the product has reason to believe that those who use it will have such special experience as will enable them to perceive the danger. Erickson v. Monarch Indus. 875
6. The seller is entitled to have his due warnings and instructions followed; and when they are disregarded, and injury results, he is not liable. Erickson v. Monarch Indus. 875
7. A seller is not liable when he delivers a product in a safe condition and subsequent mishandling or other causes make it harmful by the time it is consumed. Erickson v. Monarch Indus. 875
8. Unreasonably dangerous is defined as meaning 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. Erickson v. Monarch Indus. 875
9. A plaintiff who seeks to impose strict liability upon a defendant for defective product design must prove there was some practicable way the product could have been made safer. Erickson v. Monarch Indus. 875

Promissory Notes.

1. To toll the statute of limitations and to remove the bar of that statute, Neb. Rev. Stat. § 25-205 (Reissue 1979), a debtor must unqualifiedly acknowledge an existing liability. Kotas v. Sorensen 648
2. A mere reference to a promissory note, although consistent with its existing validity and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an "acknowledgment" as contemplated by Neb. Rev. Stat. § 25-216 (Reissue 1979). Kotas v. Sorensen 648
3. One seeking enforcement of a lost promissory note must by clear and convincing evidence establish (1) ownership of the instrument, (2) an explanation for absence or loss of the instrument, and (3) the terms of the instrument. Castellano v. Bitkower 806
4. Because part payment can result in a debtor's waiver or relinquishment of the defense afforded by the statute of limitations, a creditor must prove by clear and convincing evidence that there has been a part payment of the debt in order to enforce a claim barred by the statute of limitations. Castellano v. Bitkower 806

Proof.

1. Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found. State v. Coca 76
2. The intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant viewed in the light of the surrounding circumstances. State v. Thielen 119
3. To establish a breach of the implied warranty of merchantability arising under Neb. U.C.C. § 2-314 (Reissue 1980), there must be proof that there was a deviation from the standard of merchantability at the time of sale and that such deviation caused the plaintiff's injury both proximately and in fact. O'Keefe Elevator v. Second Ave. Properties 170
4. To establish a breach of the implied warranty of fitness for a particular purpose arising under Neb. U.C.C. § 2-315 (Reissue 1980), there must be proof that the seller had reason to know of the buyer's particular purpose; that the seller had reason to know the buyer was relying on the seller's skill or judgment to furnish ap-

propriate goods; and that the buyer did, in fact, rely upon the seller's skill or judgment. O'Keefe Elevator v. Second Ave. Properties 170

5. The law treats with disfavor a claim of a prescriptive right, and, accordingly, such a claim requires that the elements of such adverse user be clearly, convincingly, and satisfactorily established. Gerberding v. Schnakenberg 200
Grint v. Hart 406

6. A party claiming a prescriptive easement must show that his user was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period. Gerberding v. Schnakenberg 200

7. The facts relied upon to prove the aggravating circumstances of Neb. Rev. Stat. § 29-2523(1) (Reissue 1979) must be proven beyond a reasonable doubt. State v. Reeves 206

8. Where it is alleged that economic dissimilarities exist which have a bearing on prevalent wage rates, the burden is on the party making that allegation to establish the bearing of any such economic dissimilarities on prevalent wage rates. Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln 274

9. A highway may be established by prescription when used adversely by the public continuously for a period of 10 years or more. Sellentin v. Terkildsen 284

10. In order to establish the requisite public prescriptive easement, the public must show that the use and enjoyment of the land was exclusive, adverse, continuous, uninterrupted, open and notorious, and under a claim of right for the full 10-year prescriptive period. Sellentin v. Terkildsen 284

11. In order to establish a roadway in favor of the public by prescriptive easement, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular defined line of travel, and the use must be uninterrupted and without substantial change for 10 years or more, the period of time necessary to bar an action to recover the land. Sellentin v. Terkildsen 284

12. To prove unlawful possession of a controlled substance, the evidence must show that the accused had physical or constructive possession with knowledge of the presence of the drug and its character as a controlled substance. State v. Masters 304
State v. Garcia 769

13. Evidence of any act of physical force, however slight,

by which the obstruction to entering is removed is sufficient to prove a breaking. State v. Classen 323
14. Where a plaintiff fails to prove that a defendant's actions, even if negligent, were the proximate cause, or a proximately contributing cause, of the accident and resulting injuries, the case must be dismissed. Fletcher v. State 342
15. The burden is on the moving party in a Neb. Rev. Stat. § 48-818 (Cum. Supp. 1982) case to demonstrate that existing wages are not comparable to the prevalent wage rate. IBEW Local 1536 v. City of Fremont 357
16. 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. Grint v. Hart 406
17. Abandonment of a prescriptive easement must be pled and proved, the burden of proof being on the party alleging it. Grint v. Hart 406
18. 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. State v. Hochstein 515
19. In a post conviction case the person challenging the competency of counsel has the burden of proof to establish the incompetency of counsel, and the findings of the district court denying relief will not be disturbed on appeal unless clearly erroneous. State v. Hochstein ... 515
20. Not all illegally obtained evidence can be admitted simply because law enforcement officials assert that it would have been inevitably discovered. The mere assertion of inevitable discovery must fail. After the accused has challenged the legality of the witness' acquisition and of the use of the witness' testimony, the police must show that when the illegality occurred they possessed and were actively pursuing the evidence or leads that would have led to the discovery of the challenged witness and that there was a reasonable proba-

bility that that witness would have thereby been discovered. The prosecution must bear the burden of proof on this issue. The court then must find that reasonable probability of subsequent discovery existed, based on this showing and the record generally. State v. Poit .. 635

21. In an enhancement proceeding the burden remains with the State to prove the prior convictions, and proof that the prior convictions were obtained in a proceeding wherein the defendant was either afforded counsel or informed of his right to counsel is a necessary part of that burden. State v. Ellis 699

22. Where a record is silent as to a defendant's opportunity for counsel, we may not presume that such rights were respected. State v. Ellis 699

23. In order to prevail in a suit to quiet title based upon adverse possession, the party claiming such title is required to prove by a preponderance of the evidence that the possession has been actual, continuous, exclusive, notorious, and adverse under a claim of right for at least a 10-year period. Martin v. Kozuszek 705

24. The placement of a fence within one's boundary line does not lead to the relinquishment of ownership of lands outside the fence, without an additional showing that those lands outside the fence have been used by the neighboring landowner under a claim of ownership for the requisite period of time. Martin v. Kozuszek 705

25. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. State v. Plymate 722

26. Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged as to have substantial probative value in determining the guilt of the accused. The balancing of the need for "other-crimes" evidence against the possible prejudice to the defendant is within the appropriate discretion of the trial court. State v. Plymate .. 722

27. A rebuttable presumption of validity attaches to actions of administrative agencies; the burden of proof rests with the party or parties challenging the action of an administrative agency. Haven Home, Inc. v. Department of Pub. Welfare 731

28. In a prosecution for perjury, the falsity of the accused's sworn testimony cannot be established by the testi-

mony of one witness alone, but may be established by testimony of one witness plus corroborative facts and circumstances sufficient to exclude all reasonable doubt of the guilt of the accused. State v. Mayhew 761

29. Constructive possession may be proved by direct or circumstantial evidence and may be shown by the accused's proximity to the substance at the time of the arrest or by a showing of dominion over the substance. State v. Garcia 769

30. Constructive possession may be proven by ownership, dominion, or control over the contraband itself, coupled with the intent to exercise control over the same. State v. Garcia 769

31. One seeking enforcement of a lost promissory note must by clear and convincing evidence establish (1) ownership of the instrument, (2) an explanation for absence or loss of the instrument, and (3) the terms of the instrument. Castellano v. Bitkower 806

32. In order to recover upon a negligence claim, the claimant must not have been contributorily negligent in a degree more than slight when compared to the negligence of the defendant. Teegerstrom v. H. J. Jeffries Truck Line 917

Property.

Everyone has the right to any beneficial use of owned property if the benefit sought is not out of all reasonable proportion to the injury caused to another. Lieb v. Pitsch 136

Property Division.

1. Generally speaking, awards in actions involving dissolution of marriage vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so when the marriage is of long duration and the parties are the parents of all the children involved. Pittman v. Pittman 746
   Shald v. Shald 897

2. When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property after receiving it by way of inheritance or gift, or the spouse not re-

ceiving the inheritance or gift has significantly cared for the property during the marriage. Shald v. Shald 897
3. The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. The court will consider all pertinent facts in reaching an award that is just and equitable. Shald v. Shald 897
4. The ultimate test for division of marital property and an award of alimony is one of reasonableness. Shald v. Shald 897

Property Settlement Agreements.

An agreement between husband and wife, if executed to control the disposition of the marital assets of the parties during a later dissolution action, is a written property settlement within the intendment of Neb. Rev. Stat. § 42-366 (Cum. Supp. 1982), and is binding on the court unless the agreement is found to be unconscionable. Dobesh v. Dobesh 196

Prosecuting Attorneys.

1. As a general rule a prosecutor should withdraw from a case when he testifies at trial on behalf of the State. This general rule does not apply when the defense calls the prosecutor as a witness. State v. Reeves 206
2. A prosecutor need not be disqualified from trying a case absent a showing that he is or will become a necessary witness for the defense. State v. Reeves ... 206
3. Where there are other viable methods available to the defendant for the introduction of evidence, the court should not allow defendant's counsel to raise the possibility of calling the prosecutor as a witness merely to disqualify the prosecutor from the trial of the case. State v. Reeves 206
4. Remarks of the prosecutor in final summation which do not mislead and unduly influence the jury do not rise to a level sufficient to require the granting of defendant's motion for mistrial. State v. Reeves 206
5. A promise by a county attorney to an accused to recommend a concurrent sentence if an accused gives a statement or makes a confession is such an improper inducement as to render the resulting statement or confession inadmissible. State v. Mayhew 761

Prosecutorial Misconduct.

Whether misconduct on the part of a prosecuting attorney

is prejudicial to the defendant depends largely upon the facts of each particular case. State v. Reeves 206

Proximate Cause.

1. Where the evidence shows without dispute that the proximate cause of a collision is the failure of the driver of a vehicle entering a highway from a private road to look for approaching vehicles, the failure to look constitutes such negligence as will bar recovery as a matter of law. McFarland v. King 92
2. Where a plaintiff fails to prove that a defendant's actions, even if negligent, were the proximate cause, or a proximately contributing cause, of the accident and resulting injuries, the case must be dismissed. Fletcher v. State 342

Public Meetings.

1. The Nebraska Public Meetings Laws are a statutory commitment to openness in government. Grein v. Board of Education 158
2. Public meetings laws are broadly interpreted and liberally construed to obtain the objective of openness in favor of the public. Provisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed. Grein v. Board of Education 158
3. The public interest mentioned in Neb. Rev. Stat. § 84-1410 (Reissue 1981) is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities. Grein v. Board of Education 158
4. In civil actions good faith or good intention on the part of the public body is irrelevant to the question of compliance with the provisions of the Public Meetings Laws authorizing a closed session. Grein v. Board of Education 158
5. The prohibition against decisions or formal action in a closed session also proscribes crystallization of secret decisions to a point just short of ceremonial acceptance, and rubberstamping or reenacting by a pro forma vote any decision reached during a closed session. Grein v. Board of Education 158

Public Officers and Employees.

Neb. Rev. Stat. § 50-202 (Cum. Supp. 1982) allows legislators reimbursement for expenses incurred in connection with the performance of their duties. State ex rel. Douglas v. Beermann 849

Public Policy.

1. Constitutional or statutory provisions, absent an infirmity in the law itself, govern what is the public policy. Where the lawmaking power speaks on a particular subject, over which it has constitutional authority to speak, the public policy in such a case is what the statute provides. Haakinson & Beaty Co. v. Inland Ins. Co. 426
2. As a general rule, courts cannot declare agreements or acts authorized by statute to be contrary to public policy unless the courts are first prepared to determine that the statute authorizing the act is itself unconstitutional. Haakinson & Beaty Co. v. Inland Ins. Co. 426

Public Service Commission.

The jurisdiction of the Nebraska Public Service Commission over public grain warehouses is limited to the functions specifically set out in Neb. Rev. Stat. §§ 88-501 to 88-524 (Reissue 1981). In re Complaint of Fecht 535

Public Utilities.

1. A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines. The degree of care varies with the circumstances, but it must be commensurate with the dangers involved; and where wires are designed to carry electricity of high voltage, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business to avoid injury to persons and property. Rodgers v. Chimney Rock P.P. Dist. 666
2. Electric companies are not insurers of the safety of the public and hence are not liable for injuries unless guilty of some wrongful act or omission. Rodgers v. Chimney Rock P.P. Dist. 666
3. Power companies engaged in the transmission of electricity, especially electricity of high voltage, are charged with the duty of exercising a very high degree of care to safeguard those whose lawful activities expose them to the risk of inadvertent contact with the electric lines, but they are not insurers and not liable for damages in the absence of negligence. Rodgers v. Chimney Rock P.P. Dist. 666

Quiet Title.

1. On appeal to this court of an order quieting title by adverse possession, we review the record de novo without

reference to the factual findings made in the lower court, giving weight to the fact, when the facts are in dispute, that the trial judge had the opportunity to experience the demeanor of the witnesses and had the opportunity to view the premises in dispute. Martin v. Kozuszek 705

2. In order to prevail in a suit to quiet title based upon adverse possession, the party claiming such title is required to prove by a preponderance of the evidence that the possession has been actual, continuous, exclusive, notorious, and adverse under a claim of right for at least a 10-year period. Martin v. Kozuszek 705

Records.

1. In the absence of a bill of exceptions it will be presumed that the evidence sustained the findings of the trial court. The only issue that can be considered is whether the pleadings support the judgment. First Nat. Bank v. Lehl 704
2. Before this court can consider evidence bearing upon an issue of fact, evidence must have been offered at the trial court and embodied in the bill of exceptions filed with this court. Smick v. Langvardt 778
3. Even where the evidence is received by stipulation, it must be offered in evidence and incorporated in a bill of exceptions. Smick v. Langvardt 778

Recreation Liability Act.

1. Under the Nebraska Recreation Liability Act the owner of a recreational facility is not liable for ordinary negligence unless a fee was charged for the right to enter the facility. Garreans v. City of Omaha 487
2. The clear meaning of Neb. Rev. Stat. § 37-1008 (Reissue 1978) is that in order to constitute a charge, any moneys paid must be paid for the right to enter the facility. Garreans v. City of Omaha 487
3. Under the Nebraska Recreation Liability Act the owner of a recreational facility may be liable for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity even though no charge was made to enter or go upon the land. Garreans v. City of Omaha 487

Recusal.

The mere fact that a judge has acted previously in a cause does not establish prejudice. State v. McNitt ... 837

Replevin.

1. Where a jury is waived in a replevin action, the findings of the trial court will have the effect of a jury verdict. Morfeld v. Bernstrauch 234
2. Under Neb. Rev. Stat. § 25-10,105 (Reissue 1979), where a plaintiff in a replevin action recovers his property, the finder of fact must assess adequate damages to the plaintiff, including damages for loss of use of the wrongfully withheld property, if such property has value for use. Morfeld v. Bernstrauch 234

Res Judicata.

1. Res judicata bars all those issues which could have been raised in the prior proceeding upon the same facts sought to be presented in the subsequent action. State ex rel. Douglas v. Morrow 317
2. An acquittal or dismissal in a prior criminal prosecution is no bar to the prosecution of a later civil action, and such acquittal or dismissal concludes no issues in a later civil action. State ex rel. Douglas v. Morrow 317

Rescue Doctrine.

Under the rescue doctrine it is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value to be realized from meeting the danger and attempting to remove or eliminate the hazard; that is, the less the danger to the third party, the less the risk the volunteer is justified in taking. Moravec v. Moravec 412

Restrictive Covenants.

1. Covenants restricting the use of property are not favored in the law and, if ambiguous, will be construed in a manner permitting the maximum unrestricted use of the property. Knudtson v. Trainor 653
2. Whether or not a particular use of residential property violates a restrictive covenant is a question of fact. Knudtson v. Trainor 653

Revival.

1. To toll the statute of limitations and to remove the bar of that statute, Neb. Rev. Stat. § 25-205 (Reissue 1979), a debtor must unqualifiedly acknowledge an existing liability. Kotas v. Sorensen 648

2. A mere reference to a promissory note, although consistent with its existing validity and implying no disposition to question its binding obligation, or a suggestion of some action in reference to it, is not such an "acknowledgment" as contemplated by Neb. Rev. Stat. § 25-216 (Reissue 1979). Kotas v. Sorensen 648
3. Because part payment can result in a debtor's waiver or relinquishment of the defense afforded by the statute of limitations, a creditor must prove by clear and convincing evidence that there has been a part payment of the debt in order to enforce a claim barred by the statute of limitations. Castellano v. Bitkower 806

Right to Counsel.

1. The right of an indigent defendant to counsel does not include the right to counsel of the defendant's own choosing. State v. Clark 49
2. A defendant's mere distrust of, or dissatisfaction with, appointed counsel is not sufficient to require the appointment of substitute counsel. State v. Clark 49
3. An indigent defendant who refuses to accept appointed counsel and elects to proceed pro se has not been deprived of his constitutional right to counsel. State v. Clark 49
4. Where a record is silent as to a defendant's opportunity for counsel, we may not presume that such rights were respected. State v. Ellis 699

Rules of Evidence.

1. The "evidence of other crimes" rule is one of relevance. State v. Coca 76
2. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. State v. Coca 76
3. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Neb. Rev. Stat. § 27-403 (Reissue 1979). Kresha v. Kresha 377
4. "Unfair prejudice," in the context of Neb. Rev. Stat. § 27-403 (Reissue 1979), is such prejudice as has a tendency to suggest a decision on an improper basis. Lincoln Grain v. Coopers & Lybrand 433
5. Under some circumstances a plea of guilty entered by a defendant in a criminal action may be used against

him as an admission in a subsequent action involving the same subject matter. Schaefer v. McCreary 739
6. Generally, expert testimony concerning the status of the law is not admissible. Sasich v. City of Omaha 864

Rules of the Road.

1. A driver emerging from a driveway has the duty to look for approaching traffic and to see what is in plain sight within the radius which denotes danger. McFarland v. King 92
2. A driver of a vehicle must maintain such lookout and control as will avoid collision with others exercising due care. He has a right to assume that others, children and adults, will do likewise. McFarland v. King 92
3. A vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way. McFarland v. King 92
4. The statutes comprising the Nebraska Rules of the Road (Neb. Rev. Stat. §§ 39-601 to 39-6,122 (Reissue 1978)) do not apply to private roads or private property. Morfeld v. Bernstrauch 234
5. The statutory rules of the road in Nebraska are not applicable to the operation of motor vehicles on private property unless specifically so provided. Neb. Rev. Stat. § 39-603 (Reissue 1978). Kresha v. Kresha 377
6. In the absence of statutory regulation common-law rules apply. Kresha v. Kresha 377

Schools and School Districts.

1. Under the provisions of Neb. Rev. Stat. §§ 79-603 and 79-420 (Reissue 1981), it is the mandatory duty of the county superintendent to dissolve a Class I school district which for 2 consecutive years contracts for instruction of all of its pupils with a Class II, III, IV, or V district, and to attach its territory to one or more neighboring school districts other than a Class I district. In re Dissolution of School Dist. No. 22 89
2. Appeals from action taken by the county superintendent in cases involving the dissolution and merging of Class I school districts are tried de novo in the district court and heard de novo on the record in this court. In re Dissolution of School Dist. No. 22 89
3. A litigant who invokes the provisions of a statute in appealing the action of a county superintendent in dissolving and merging a Class I school district may not

challenge that statute's validity nor seek the benefit of such statute and in the same action and at the same time question its constitutionality. In re Dissolution of School Dist. No. 22 89
4. "Regular terms" as used in the educational sense and as found in Neb. Rev. Stat. § 48-628(h)(2) (Cum. Supp. 1982) of the Employment Security Law refers to a definite period representing a regular division of an academic year during which instruction is regularly given to students of a particular school, college, or university. School Dist. No. 21 v. Ochoa 191

Search and Seizure.
1. Testimony that an officer smelled marijuana is sufficient to furnish probable cause to search a vehicle without a warrant where there is sufficient foundation as to the expertise of the officer. State v. Masters 304
2. Any consent to a search must be voluntary and not the result of duress or coercion—express, implied, physical, or psychological. State v. Walmsley 336
3. The determination of whether a consent to search is voluntarily given is a question of fact. State v. Garcia 769
4. The voluntariness of a consent to search should be determined from the totality of the circumstances surrounding it. State v. Garcia 769
5. The findings of fact as to the voluntariness of a search will not be set aside on appeal unless they are clearly wrong. In making that determination a reviewing court will take into consideration the advantage of the trial court in having heard the oral testimony. State v. Garcia 769
6. In appropriate circumstances the Constitution allows a properly limited search and seizure on facts that do not constitute probable cause to arrest or to search for contraband or evidence of a crime. State v. DeJesus 907
7. Where the facts are such that they would justify a reasonably prudent man in believing that his safety or that of others is in danger, a police officer may conduct a "pat-down" search of a defendant to look for weapons. State v. DeJesus 907

Search Warrants.
1. A privately owned automobile may not be removed from private property without the consent of its owner by order of a police officer unless there are exigent circumstances requiring removal, or the officer has a search warrant. Morfeld v. Bernstrauch 234
2. An affidavit based upon a tip from an informant is suf-

ficient if the magistrate is informed of (1) some of the underlying circumstances from which the informant concluded that the narcotics were located where he claimed they were, and (2) some of the underlying circumstances from which the officer concluded that the informant was credible. State v. Sims 569

3. An affidavit made to obtain a search warrant is presumed valid, and the defendant has the burden to establish that the affidavit was false. State v. Sims 569
4. If the allegations remaining, after statements shown to be false are removed from the affidavit, are sufficient to support the issuance of a warrant, the affidavit and warrant are valid. State v. Sims 569

Self-Defense.

A killing resulting from the accidental discharge of a gun during a scuffle, while the gun is being used in an attempt to strike the other party, is excused only if the force used was justified under the circumstances. State v. Drew 685

Sentences.

1. An offender's sentence, for the purpose of good time computations, is the sum of all sentences he receives regardless of when incurred. Luxford v. Benson 115
2. The date of an offender's initial incarceration is the date on which service of such consolidated sentence is deemed to begin. Luxford v. Benson 115
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. Luxford v. Benson 115
4. Pursuant to Neb. Rev. Stat. § 29-2521 (Reissue 1979), the sentencing court has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed. The sentencing court may consider a presentence investigation. State v. Reeves 206
5. By the very nature of a presentence investigation, it is necessary to rely to a great extent upon hearsay information, and it is not constitutionally required that the person convicted be allowed to confront all those who might give information to be used by the sentencing court. State v. Reeves 206
6. Neb. Rev. Stat. § 29-2522(3) (Reissue 1979) does not impose the duty on the sentencing court to expressly dis-

tinguish every case cited by the defendant. State v. Reeves 206
7. Jury sentencing in capital cases is not constitutionally required. State v. Reeves 206
8. A sentence in a criminal case imposed within statutory limits will not be overturned on appeal absent an abuse of discretion by the trial judge. State v. Miner 309
State v. Reuter 325
9. A sentence of imprisonment for the failure to support one's children as ordered by a court does not violate the eighth amendment to the U.S. Constitution and article I, § 9, of the Nebraska Constitution, both of which prohibit the infliction of "cruel and unusual" punishment. State v. Reuter 325
10. When sentence is pronounced upon one already serving a sentence from another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise. Harpster v. Benson 776
11. Good time credits may not be arbitrarily taken from a prisoner. Ebert v. Black 814
12. Where an indeterminate sentence has been imposed, a prisoner's earliest possible parole eligibility date under Neb. Rev. Stat. § 83-1,107(1)(a) (Reissue 1981) is to be determined by crediting good behavior time on the basis of the length of his minimum, not his maximum, term. Ebert v. Black 814

Social Security.

1. In enacting the amendment to the Social Security Act which requires that a state's plan for long-term health care assistance provide for payment of skilled nursing facilities' and intermediate care facilities' services on a reasonable cost-related basis, Congress intended that the states have freedom both to define allowable cost items and to set a value on the reasonable cost of such items. Haven Home, Inc. v. Department of Pub. Welfare 731
2. This court may not substitute its judgment for that of the Nebraska Department of Public Welfare in determining which method is preferable to determine a reasonable cost-related basis for reimbursing long-term health care facilities. Haven Home, Inc. v. Department of Pub. Welfare 731
3. A state is not obligated to participate in the medicaid program; however, once it has voluntarily elected to participate, the state must comply with federal stand-

ards. Haven Home, Inc. v. Department of Pub. Welfare 731

Speedy Trial.

1. The time utilized in the disposition of pretrial motions filed by the defendant is excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 1979). State v. Classen 323
2. Under the provisions of the Constitution of the United States or the State of Nebraska, the right of a speedy trial is relative and depends upon circumstances, and is not denied where delay is satisfactorily explained by government and the defendant was brought to trial as soon as was reasonably possible. State v. McNitt 837

Statutes.

1. Under the provisions of Neb. Rev. Stat. §§ 79-603 and 79-420 (Reissue 1981), it is the mandatory duty of the county superintendent to dissolve a Class I school district which for 2 consecutive years contracts for instruction of all of its pupils with a Class II, III, IV, or V district, and to attach its territory to one or more neighboring school districts other than a Class I district. In re Dissolution of School Dist. No. 22 89
2. Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words will be given their ordinary meaning. Kellogg Company v. Herrington 138
Garreans v. City of Omaha 487
3. The Nebraska Public Meetings Laws are a statutory commitment to openness in government. Grein v. Board of Education 158
4. Public meetings laws are broadly interpreted and liberally construed to obtain the objective of openness in favor of the public. Provisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed. Grein v. Board of Education 158
5. The public interest mentioned in Neb. Rev. Stat. § 84-1410 (Reissue 1981) is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities. Grein v. Board of Education 158
6. In civil actions good faith or good intention on the part of the public body is irrelevant to the question of compliance with the provisions of the Public Meetings Laws authorizing a closed session. Grein v. Board of Education 158

7. The prohibition against decisions or formal action in a closed session also proscribes crystallization of secret decisions to a point just short of ceremonial acceptance, and rubberstamping or reenacting by a pro forma vote any decision reached during a closed session. Grein v. Board of Education 158
8. Neb. Rev. Stat. § 29-2522(3) (Reissue 1979) does not impose the duty on the sentencing court to expressly distinguish every case cited by the defendant. State v. Reeves 206
9. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979), as interpreted by the decisions of this court, is not unconstitutionally vague. State v. Reeves 206
10. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979) has been interpreted by this court to include murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering. State v. Reeves 206
11. The facts relied upon to prove the aggravating circumstances of Neb. Rev. Stat. § 29-2523(1) (Reissue 1979) must be proven beyond a reasonable doubt. State v. Reeves 206
12. Under the provisions of Neb. Rev. Stat. §§ 29-2519 et seq. (Reissue 1979), the Nebraska Supreme Court is required, before imposing the death sentence, to not only consider the presence or absence of aggravating and mitigating circumstances but also to review death sentences and determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. State v. Reeves 206
13. The statutes comprising the Nebraska Rules of the Road (Neb. Rev. Stat. §§ 39-601 to 39-6,122 (Reissue 1978)) do not apply to private roads or private property. Morfeld v. Bernstrauch 234
14. 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. Doak v. Milbauer 331
15. Constitutional or statutory provisions, absent an infirmity in the law itself, govern what is the public policy. Where the lawmaking power speaks on a particular subject, over which it has constitutional authority to speak, the public policy in such a case is what the statute provides. Haakinson & Beaty Co. v. Inland Ins. Co. 426
16. As a general rule, courts cannot declare agreements or acts authorized by statute to be contrary to public

policy unless the courts are first prepared to determine that the statute authorizing the act is itself unconstitutional. Haakinson & Beaty Co. v. Inland Ins. Co. 426
17. It has long been the law, in both this jurisdiction and elsewhere, that the law of the state is an inherent part of every contract and that every contract is made with reference to and subject to the existing law, and every law affecting the contract is read into and becomes a part thereof. Haakinson & Beaty Co. v. Inland Ins. Co. 426
18. For purposes of Neb. Rev. Stat. § 49-301 (Reissue 1978), an administrative proceeding is a pending action when the agency's final order is rendered. In re Application of Ochsner 480
19. When a statute is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of lawmakers. Ebert v. Black 814
20. A court will try to avoid, if possible, construction of a statute which leads to absurd, unjust, or unconscionable results. Ebert v. Black 814
21. The term "comprehensive plan" in the zoning statutes and the term "city plan" are not synonymous. Sasich v. City of Omaha 864

Stipulations.

One who is not a party to a stipulation is not bound by its terms. Bryant Heating v. United States Nat. Bank 107

Strict Liability.

1. Misuse of the product is a defense to strict liability. Erickson v. Monarch Indus. 875
2. A supplier who fails to test or inspect a product before sale is not liable in an action for negligence if he does not know or have reason to know that the product is likely to be dangerous. Erickson v. Monarch Indus. ... 875
3. A supplier has a right to rely upon the inspection and tests performed by the manufacturer. Erickson v. Monarch Indus. 875
4. Warning is unnecessary where the supplier of the product has reason to believe that those who use it will have such special experience as will enable them to perceive the danger. Erickson v. Monarch Indus. 875
5. The seller is entitled to have his due warnings and instructions followed; and when they are disregarded, and injury results, he is not liable. Erickson v. Monarch Indus. 875
6. A seller is not liable when he delivers a product in a safe condition and subsequent mishandling or other

causes make it harmful by the time it is consumed. Erickson v. Monarch Indus. 875
7. A plaintiff who seeks to impose strict liability upon a defendant for defective product design must prove there was some practicable way the product could have been made safer. Erickson v. Monarch Indus. 875
8. Strict liability is not a no-fault system of compensation. Erickson v. Monarch Indus. 875

Substantial Performance.
1. Substantial performance must be shown before an action on the contract can be brought. Lange Bldg. & Farm Supply v. Open Circle "R" 1
2. There is substantial performance of a building contract where all of the essential elements necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete strict performance that the owner obtains substantially what is called for by the contract. Lange Bldg. & Farm Supply v. Open Circle "R" 1
Pioneer Enterprises v. Edens 672

Summary Judgment.
1. A party is entitled to summary judgment if (1) he can show there is no genuine issue of material fact, and (2) where, under the facts, he is entitled to judgment as a matter of law. McFarland v. King 92
Bryant Heating v. United States Nat. Bank 107
Cummings v. Kirby 314
McHenry v. First Nat. Bank 580
State ex rel. Kandt v. No. Platte Baptist Ch. 684
Bruyninga v. Nuss 801
Roy v. Morford 818
2. In considering a motion for summary judgment, the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom. McFarland v. King .. 92
McHenry v. First Nat. Bank 580
Bruyninga v. Nuss 801
3. One against whom a motion for summary judgment is invoked must be given at least 10 days from filing the same to respond with counteraffidavits or depositions. Blitzkie v. State 105
4. The denial of a motion for summary judgment is not a final order and therefore is not appealable to the Su-

preme Court. Bryant Heating v. United States Nat. Bank 107
5. The purpose of a summary judgment proceeding is to pierce allegations of pleadings and to show conclusively that the controlling facts are otherwise than alleged and that the moving party is entitled to judgment as a matter of law. Strong v. K & K Investments 370
6. The granting of summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party. Strong v. K & K Investments 370
7. An order vacating a summary judgment is not a final order. Sargent Feed & Grain v. Anderson 421
8. In a summary judgment proceeding, affidavits of a lay witness attempting to interpret medical testimony and to arrive at conclusions as to the possible negligence of a physician and surgeon generally are insufficient to meet the burden of a party refuting a prima facie showing of no negligence by the movant. Hanzlik v. Paustian 575
9. An affidavit opposing the rendition of a summary judgment, to be effective, must be made on personal knowledge, must set forth such facts as would be admissible in evidence in detail and with precision, and must show affirmatively that the affiant is competent to testify to the matters stated therein. Hanzlik v. Paustian 575
10. Upon a motion for summary judgment the court examines the evidence not to decide any issue of fact but to discover if any real issue of fact exists. Roy v. Morford 818

Supreme Court.

1. Under the provisions of Neb. Rev. Stat. §§ 29-2519 et seq. (Reissue 1979), the Nebraska Supreme Court is required, before imposing the death sentence, to not only consider the presence or absence of aggravating and mitigating circumstances but also to review death sentences and determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. State v. Reeves 206
2. The Supreme Court's review and analysis under Neb. Rev. Stat. § 29-2521.03 (Reissue 1979) shall include all first degree murder convictions for offenses committed on or after April 20, 1973, including cases presently pending in this court on appeal. State v. Reeves 206

3. This court's review and analysis of death penalty cases is not confined to a mere counting process of aggravating and mitigating circumstances but, rather, to a reasoned judgment as to what factual situations require the imposition of death and which of those can be satisfied by life imprisonment in light of the totality of the circumstances present. State v. Reeves 206

Taxation.

1. Pursuant to the provisions of Neb. Rev. Stat. § 77-2734(2) (Reissue 1981), there is imposed a franchise tax on each corporation doing business in this state, measured by its entire net income which, for purposes of this section, is determined by taking the taxpayer's federal taxable income derived from sources within the State of Nebraska as determined pursuant to statute, which is then apportioned in accordance with Neb. Rev. Stat. §§ 77-2735 to 77-2749 (Reissue 1981). Kellogg Company v. Herrington 138
2. In computing a taxpayer's property values, payroll, and sales for purposes of computing its franchise tax under Neb. Rev. Stat. §§ 77-2735 to 77-2749 (Reissue 1981), the state must consider the values of the taxpayer's property worldwide, as well as its worldwide payroll and sales. Kellogg Company v. Herrington ... 138
3. For purposes of Neb. Rev. Stat. § 77-2743 (Reissue 1981), the taxpayer's entire taxable income must be as defined by Neb. Rev. Stat. § 77-2734(2) (Reissue 1981), which limits it to the taxpayer's federal taxable income. This includes dividends and interest and fees paid to it by its foreign subsidiaries, but does not include the income of its foreign subsidiaries. The property factor, payroll factor, and sales factor must include the taxpayer's worldwide items. Kellogg Company v. Herrington 138
4. The Nebraska Constitution requires that taxes must be levied by valuation uniformly and proportionately on all tangible property. Kearney Convention Center v. Board of Equal. 292
5. Neb. Rev. Stat. § 77-201 (Reissue 1981) requires that all property be taxed at actual value. Kearney Convention Center v. Board of Equal. 292
6. Authorities charged with the duty of valuing property for taxation purposes may classify different types of property reasonably, and may use appropriate differing methods of assessing actual value in the different classifications, but the results reached by such different methods and reasonable classifications must be

correlated so that the valuations reached shall be uniform and proportionate and do not exceed the actual value of the property. Kearney Convention Center v. Board of Equal. 292
7. An appeal from a county board of equalization is tried in this court de novo as in an equity proceeding. Kearney Convention Center v. Board of Equal. 292
8. A taxpayer is entitled to have its property in a county assessed uniformly and proportionately with other property in the county even though the result may be that it is assessed at less than actual value. Kearney Convention Center v. Board of Equal. 292
9. Nonexempt real estate in Nebraska is subject to taxation at its actual value. Voltmer Family Farms v. Board of Equal. 396
10. The review in this court of an order of the Tax Commissioner imposing a deficiency assessment for the franchise or income tax of a corporation is de novo on the record. PMD Investment Co. v. State 553
11. Such an order may be reversed or modified only if it is (a) in violation of constitutional provisions; (b) in excess of the statutory authority or jurisdiction of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) unsupported by competent, material, and substantial evidence; or (f) arbitrary or capricious. PMD Investment Co. v. State 553
12. The purpose of the combined or unitary apportionment method of reporting is to permit a fair determination of the portion of business income that is attributable to business activity within the state by the reporting member of the unitary group. PMD Investment Co. v. State 553
13. A unitary business operation is one in which there is a high degree of interrelationship and interdependence between, typically, one corporation, which generally is a parent corporation, and its corporate subsidiaries or otherwise associated corporations, which group is usually engaged in multistate, and in some cases in international, business operations. PMD Investment Co. v. State 553
14. The Nebraska Revenue Act of 1967, as amended, Neb. Rev. Stat. §§ 77-2701 et seq. (Reissue 1981), authorizes the use of the combined or unitary apportionment method of reporting to determine the income of a corporation engaged in a unitary business operation. PMD Investment Co. v. State 553
15. The fact that a taxpayer uses a method of separate accounting is not binding on the state if in fact the tax-

payer is engaged in a unitary business operation. PMD Investment Co. v. State 553
16. Nebraska's franchise tax, Neb. Rev. Stat. § 77-2734(2) (Cum. Supp. 1982), insofar as it is a tax on interest from federal obligations, is a discriminatory tax, contrary to federal law, and, therefore, invalid. State ex rel. Douglas v. Karnes 750

Testimony.

Testimony of a witness in a suppression hearing, as in a preliminary hearing, is admissible at trial, where the defendant has had the opportunity for cross-examination at the suppression hearing and the witness is unavailable at the trial on the merits of the case. State v. Neal 796

Tort-feasors.

1. Several actions may be brought and several judgments recovered against several wrongdoers, although but one satisfaction can be had. Bryant Heating v. United States Nat. Bank 107
2. The partial payment of a judgment against one of several wrongdoers is not a satisfaction which will prevent the maintenance of an action against another. Bryant Heating v. United States Nat. Bank 107
3. The doctrine that an intervening act cuts off the liability of a tort-feasor comes into play only when the intervening cause is not foreseeable. Lincoln Grain v. Coopers & Lybrand 433
4. There can be no contribution between a host driver and the driver of the other vehicle where the guest statute would preclude a judgment in favor of the guest passenger against the host driver. Teegerstrom v. H. J. Jeffries Truck Line 917

Torts.

1. Generally, injury to a minor results in two causes of action—one on behalf of the minor and the other on behalf of the minor's parent. Macku v. Drackett Products Co. 176
2. Where a plaintiff fails to prove that a defendant's actions, even if negligent, were the proximate cause, or a proximately contributing cause, of the accident and resulting injuries, the case must be dismissed. Fletcher v. State 342

Trespass.

In order to maintain trespass to land the plaintiff must be the owner of, or in possession of, the land when the acts

complained of were committed. Flobert Industries v. Stuhr 389

Trial.

1. Where plaintiff's counsel on cross-examination of defendant's witness propounds a question which calls for proper evidence, the fact that an irresponsive or inadvertent answer includes reference to insurance will not be grounds for declaring a mistrial. Lange Bldg. & Farm Supply v. Open Circle "R" 1
2. A party to an action cannot be heard to complain if reference to insurance is interjected by his own witness and the other party's counsel is in no way responsible for it. Lange Bldg. & Farm Supply v. Open Circle "R" 1
3. Error in the admission of evidence is not grounds for reversal if no substantial miscarriage of justice occurred. State v. Lee 63
4. To qualify as an excited utterance the following conditions must exist: (1) There must have been a startling event. (2) The statement must relate to the event. (3) The statement must have been made by the declarant while under the stress of the exciting event. State v. Lee 63
5. A determination as to the admissibility of an excited utterance generally rests within the sound discretion of the trial court. State v. Lee 63
6. Normally, a petition seeking to recover upon an express contract may be amended before trial to permit recovery on quantum meruit, in the absence of a showing of prejudice to the defendant. Kustom Kreations v. Duxbury 99
7. If at a pretrial conference it appears there are issues not then within the pleadings, they should be stated plainly in the pretrial order, and, absent objections to the order by the parties, such order should thereafter govern the proceeding in that respect, and evidence may properly be received in support of proof as to such issues. Kustom Kreations v. Duxbury 99
8. The trial judge is in the best position to measure the atmosphere at trial and gauge the probable impact an improper comment has on a jury. As such, the trial court's determination concerning the comment will not be overruled unless it is clearly erroneous. State v. Reeves 206
9. Where reasonable minds might draw different conclusions from the evidence, the question as to negligence or contributory negligence under the circumstances is

a matter for determination by the jury. Cullinane v. Interstate Iron & Metal 245
10. There are strong policies in favor of using an array of comparable Nebraska employers rather than using employers from outside the State of Nebraska, when an appropriate array for that purpose within the state exists. Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln 274
11. It is the duty of the courts to prevent abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice. Sargent Feed & Grain v. Anderson 421
Aetna Cas. & Surety Co. v. Dickinson 660
12. This court will not tolerate or reward a course of conduct deliberately designed to disrupt the orderly administration of justice. Sargent Feed & Grain v. Anderson 421
Aetna Cas. & Surety Co. v. Dickinson 660
13. The appropriate standard of review for an assignment of error directed at the exclusion of evidence is one of abuse of discretion, as the admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, which must determine the relevancy and possible prejudicial effect of the proffered evidence. Lincoln Grain v. Coopers & Lybrand 433
14. Where the facts presented to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury. May v. Hall Co. L'stock Improvement Assn. 476
15. When a nonparty witness admits making earlier statements contradicting his testimony at trial, the earlier statements are not admissible for purposes of impeachment. State v. Drew 685
16. Questions not presented or passed upon by the trial court will not be considered by this court on appeal. Hasenauer v. Durbin 714
17. Under some circumstances a plea of guilty entered by a defendant in a criminal action may be used against him as an admission in a subsequent action involving the same subject matter. Schaefer v. McCreary 739

Trust Funds.

When a bank accepts a deposit of funds it knows to be of a trust nature, and also knows that the depositor is without authority to deal with those funds, it distributes the funds to the depositor at its peril, with liability to the true owner of those funds. McHenry v. First Nat. Bank 580

Uniform Commercial Code.

1. To establish a breach of the implied warranty of merchantability arising under Neb. U.C.C. § 2-314 (Reissue 1980), there must be proof that there was a deviation from the standard of merchantability at the time of sale and that such deviation caused the plaintiff's injury both proximately and in fact. O'Keefe Elevator v. Second Ave. Properties 170
2. To establish a breach of the implied warranty of fitness for a particular purpose arising under Neb. U.C.C. § 2-315 (Reissue 1980), there must be proof that the seller had reason to know of the buyer's particular purpose; that the seller had reason to know the buyer was relying on the seller's skill or judgment to furnish appropriate goods; and that the buyer did, in fact, rely upon the seller's skill or judgment. O'Keefe Elevator v. Second Ave. Properties 170

Usury.

Under Illinois law the question of whether a loan is usurious is a question of fact, and in determining that question equity will look to the substance of the transaction and disregard the form, and will not permit parties to evade the statute by any scheme or expedient. Richards v. Arthaloney 11

Valuation.

1. The Nebraska Constitution requires that taxes must be levied by valuation uniformly and proportionately on all tangible property. Kearney Convention Center v. Board of Equal. 292
2. Neb. Rev. Stat. § 77-201 (Reissue 1981) requires that all property be taxed at actual value. Kearney Convention Center v. Board of Equal. 292
3. Authorities charged with the duty of valuing property for taxation purposes may classify different types of property reasonably, and may use appropriate differing methods of assessing actual value in the different classifications, but the results reached by such different methods and reasonable classifications must be correlated so that the valuations reached shall be uniform and proportionate and do not exceed the actual value of the property. Kearney Convention Center v. Board of Equal. 292
4. A taxpayer is entitled to have its property in a county assessed uniformly and proportionately with other property in the county even though the result may be

that it is assessed at less than actual value. Kearney Convention Center v. Board of Equal. 292
5. Nonexempt real estate in Nebraska is subject to taxation at its actual value. Voltmer Family Farms v. Board of Equal. 396

Venue.

1. Neb. Rev. Stat. § 25-408 (Reissue 1979) requires, with certain exceptions, that an action against a foreign corporation be brought in any county in which there may be property of or debts owing to said defendant, or where said defendant may be found. Cattle Brokers v. Billings 845
2. Neb. Rev. Stat. § 25-409 (Reissue 1979) requires that an action, other than one for tort, against a resident or residents of this state be brought in the county where the defendant, or one of the defendants, resides or may be summoned. Cattle Brokers v. Billings 845
3. Neb. Rev. Stat. §§ 25-408 and 25-409 (Reissue 1979) require the court in which an action has been improperly brought under the venue provisions of those statutes to transfer the case upon timely motion by a defendant. Cattle Brokers v. Billings 845
4. A party is entitled to be tried where the law says it is to be tried. Cattle Brokers v. Billings 845
5. The situs of the offices of a party's attorney does not determine venue. Cattle Brokers v. Billings 845

Wages.

1. In selecting employment units in reasonably similar labor markets for the purpose of comparison as to wage rates and other benefits, the question is whether, as a matter of fact, the units selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate. Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln 274
2. Where it is alleged that economic dissimilarities exist which have a bearing on prevalent wage rates, the burden is on the party making that allegation to establish the bearing of any such economic dissimilarities on prevalent wage rates. Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln 274
3. With regard to a determination of conditions of employment under Neb. Rev. Stat. § 48-818 (Cum. Supp. 1982), the Commission of Industrial Relations will enter an order either adjusting the condition of employment or find a subject city's condition to be lesser or greater than the prevalent, and adjust the overall compensa-

tion accordingly, if, in the compared-to cities, the exact content of a condition of employment is clear from the total evidence. IBEW Local 1536 v. City of Fremont .. 357
4. Experience and longevity are proper matters to be considered in determining the wages to be paid to employees within the same job classification. IBEW Local 1536 v. City of Fremont 357
5. Where the employer has a large number of job classifications, but established lines of progression and established relationships between lines of progression, "key classifications" may be utilized to establish wages for all classes, provided reasonable requirements of prevalence and relevance are met. IBEW Local 1536 v. City of Fremont 357
6. Guidelines used by the Commission of Industrial Relations to be followed in using the "key job classification," in a proceeding to determine compensation for public employees are not statutory requirements and failure of evidence to strictly comply with guidelines does not require the Supreme Court to find that the action of the commission in developing the "key job classification" was arbitrary and capricious. IBEW Local 1536 v. City of Fremont 357

Waiver.

1. A failure to object to the form of a notice and acting on the notice generally waives any objection to the form of the notice. Day v. Kolar 47
2. Admissions contained in a defendant's answer are judicial admissions and waive all controversy concerning the matter. State ex rel. Douglas v. Morrow 317
3. A defendant charged with second or third offense driving while intoxicated may waive proof of a prior conviction by a transcript of the judgment, and may waive the rights provided in Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982) in regard to prior convictions. State v. Ziemba 612
4. The right of a defendant to a preliminary hearing may be waived. State v. DeJesus 907

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 shall be deemed a watercourse. Grint v. Hart .. 406
2. Surface waters are waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordi-

narily result from rainfall or melting snow. Grint v. Hart 406
3. In order to constitute an exception to the general rule that surface water may be repelled, at least some of the distinctive attributes of a watercourse must be demonstrated. Grint v. Hart 406

Wills.

1. Generally, where a part of a will is invalid, the valid bequests should be sustained unless to do so would defeat the testator's intent and interfere with his general scheme of distribution, or work an injustice to other heirs. In re Estate of Marsh 129
2. Findings that certain portions of a testamentary document are the products of undue influence are determinations of fact. As such, the standard of review is whether the findings are supported by sufficient evidence, which are not to be disturbed unless clearly wrong. In re Estate of Marsh 129
3. The finding that a partially valid testamentary document is or is not to be given dispositive effect is equitable in nature and, on appeal, reviewed de novo on the record. In re Estate of Marsh 129
4. The cardinal rule in construing wills is to ascertain and effectuate the intention of the testator if that intention is not contrary to law. Anderjaska v. Anderjaska 527
5. When there are definite and unambiguous expressions in a will, other expressions that are capable of more than one construction must be construed, if reasonably practicable, so as to harmonize with the plain provisions of the will. Anderjaska v. Anderjaska 527

Wiretaps.

1. Under Neb. Rev. Stat. § 86-705(1)(c) (Reissue 1981), the "full and complete statement" required by the statute refers to a factual statement regarding investigative procedures. State v. Golter 36
2. An affidavit in support of an application for a wiretap order must include sufficient facts upon which a judge can independently determine whether a wiretap is a necessary investigative technique to be used by a law enforcement agency. State v. Golter 36
3. A court can authorize a wiretap only on a factual basis of necessity and not on factually unsupported and conclusory expressions of the affiant regarding investigative procedures. State v. Golter 36

Witnesses.

1. Where plaintiff's counsel on cross-examination of defendant's witness propounds a question which calls for proper evidence, the fact that an irresponsive or inadvertent answer includes reference to insurance will not be grounds for declaring a mistrial. Lange Bldg. & Farm Supply v. Open Circle "R" 1
2. A party to an action cannot be heard to complain if reference to insurance is interjected by his own witness and the other party's counsel is in no way responsible for it. Lange Bldg. & Farm Supply v. Open Circle "R" 1
3. Where there are other viable methods available to the defendant for the introduction of evidence, the court should not allow defendant's counsel to raise the possibility of calling the prosecutor as a witness merely to disqualify the prosecutor from the trial of the case. State v. Reeves 206
4. The question of the competency of a child witness is measured by such child's capabilities, intelligence, and understanding of the difference between truth and falsehood, and the determination of such competency rests largely in the discretion of the trial court and its determination in that regard will not be overturned absent a clear abuse of discretion. State v. Miner 309
5. A party has a right to cross-examine a witness with regard to an interest which affects credibility. Kresha v. Kresha 377
6. When a nonparty witness admits making earlier statements contradicting his testimony at trial, the earlier statements are not admissible for purposes of impeachment. State v. Drew 685
7. Testimony of a witness in a suppression hearing, as in a preliminary hearing, is admissible at trial, where the defendant has had the opportunity for cross-examination at the suppression hearing and the witness is unavailable at the trial on the merits of the case. State v. Neal 796

Words and Phrases.

1. Intentionally means "willfully" or "purposely," and not accidentally or involuntarily. State v. Coca 76
2. To possess a narcotic drug means to have actual control, care, and management of, and not a passing control, fleeting and shadowy in its nature. State v. Coca 76
3. In criminal law, motive is that which leads or tempts the mind to indulge in a criminal act. State v. Coca ... 76
4. The public interest mentioned in Neb. Rev. Stat. § 84-1410 (Reissue 1981) is that shared by citizens in

general and by the community at large concerning pecuniary or legal rights and liabilities. Grein v. Board of Education 158
5. For workmen's compensation purposes total disability does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. Krijan v. Mainelli Constr. Co. 186
6. Total and permanent disability contemplates the inability of the workman to perform any work for which he has the experience or capacity to perform. Krijan v. Mainelli Constr. Co. 186
7. "Regular terms" as used in the educational sense and as found in Neb. Rev. Stat. § 48-628(h)(2) (Cum. Supp. 1982) of the Employment Security Law refers to a definite period representing a regular division of an academic year during which instruction is regularly given to students of a particular school, college, or university. School Dist. No. 21 v. Ochoa 191
8. "Unfair prejudice," in the context of Neb. Rev. Stat. § 27-403 (Reissue 1979), is such prejudice as has a tendency to suggest a decision on an improper basis. Lincoln Grain v. Coopers & Lybrand 433
9. A proceeding becomes a "contested case," within the meaning of Neb. Rev. Stat. § 84-901(3) (Reissue 1981), when a hearing is required. Central Park Pharm. v. Nebraska Liq. Cont. Comm. 676
10. Manslaughter is the killing of another without malice, either upon a sudden quarrel or unintentionally while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305(1) (Reissue 1979). State v. Drew 685
11. Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. Castellano v. Bitkower 806
12. The term "steal," as used in a municipal ordinance, includes all the elements of larceny at common law. State v. Richard 832
13. The word "pay," as used in article III, § 7, of the Nebraska Constitution, means wages, remuneration, compensation, or fees. State ex rel. Douglas v. Beermann 849
14. The word "perquisite," as used in article III, § 7, of the Nebraska Constitution, means a gain or profit made incidentally from the office of legislator, in addition to regular salary. State ex rel. Douglas v. Beermann 849
15. "Expenses" are the charges incurred in connection

with the performance of one's duties, and typically include transportation, meals, and lodging while traveling. State ex rel. Douglas v. Beermann 849
16. The term "comprehensive plan" in the zoning statutes and the term "city plan" are not synonymous. Sasich v. City of Omaha 864
17. The term "comprehensive plan" is used with respect to a metropolitan city in its generic sense and does not refer to any special document. Sasich v. City of Omaha 864
18. Unreasonably dangerous is defined as meaning 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. Erickson v. Monarch Indus. 875
19. Gross negligence, within the meaning of the guest statute, means negligence in a very high degree, or the absence of even slight care in the performance of a duty. Teegerstrom v. H. J. Jeffries Truck Line 917
20. A "truant" is a child who stays away from school without the permission of one having authority to grant such permission. In re Interest of K.S. 926

Workmen's Compensation.

1. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside unless clearly wrong. Paris v. J. A. Baldwin Mfg. Co. 151
2. In testing the sufficiency of evidence to support findings of the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Paris v. J. A. Baldwin Mfg. Co. 151
Ceco Corp. v. Crocker 692
3. Whether a plaintiff in a Nebraska Workmen's Compensation Court case is totally and permanently disabled is a question of fact. Paris v. J. A. Baldwin Mfg. Co. 151
Ceco Corp. v. Crocker 692
4. For workmen's compensation purposes total disability does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. Krijan v. Mainelli Constr. Co. .. 186
5. Total and permanent disability contemplates the inability of the workman to perform any work for which

he has the experience or capacity to perform. Krijan v. Mainelli Constr. Co. 186
6. Whether a partial loss or loss of use of two members results in total and permanent disability is to be determined in accordance with the facts. Neb. Rev. Stat. § 48-121(3) (Reissue 1978). Krijan v. Mainelli Constr. Co. 186
7. 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. Wilson Concrete Co. v. Rork .. 447
8. Before recovery may be had for an increase of incapacity due solely to the injury, within the meaning of Neb. Rev. Stat. § 48-141 (Reissue 1978), the applicant must prove by a preponderance of the evidence that his incapacity has been increased; that is, that there now exists a material and substantial change for the worse in the applicant's condition—a change in circumstances that justifies a modification, distinct and different from that for which an adjudication had been previously made. Wilson Concrete Co. v. Rork 447
9. In reviewing findings of fact in workmen's compensation 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. Wilson Concrete Co. v. Rork 447
Ceco Corp. v. Crocker 692
Moore v. The Sisk Co. 451
10. 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. Moore v. The Sisk Co. 451
11. It is the rule in workmen's compensation cases that the course of employment requirement tests work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of employment, and in the course of an activity whose purpose is related to the employment. Moore v. The Sisk Co. 451
12. 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. Moore v. The Sisk Co. 451
13. Where a written contract between the claimant and alleged employer exists, which not only denominates the

relationship as that of independent contractor but also describes that kind of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workmen's compensation statutes. Spulak v. Estep 523

14. When there is evidence in the record to support the Nebraska Workmen's Compensation Court's finding of fact, we are bound by that finding. Spulak v. Estep ... 523
15. Control or the right of control is the chief criterion in the determination of whether one acts as an independent contractor. Spulak v. Estep 523
16. A finding with regard to causation of an injury is one for determination by the fact finder; it will not be set aside unless clearly wrong. Ceco Corp. v. Crocker 692
17. 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. Ceco Corp. v. Crocker 692

Zoning.

1. The validity of a zoning ordinance is to be presumed in the absence of clear and satisfactory evidence to the contrary. Sasich v. City of Omaha 864
2. The term "comprehensive plan" in the zoning statutes and the term "city plan" are not synonymous. Sasich v. City of Omaha 864
3. The term "comprehensive plan" is used with respect to a metropolitan city in its generic sense and does not refer to any special document. Sasich v. City of Omaha . 864
4. A zoning ordinance which recognizes and legitimizes a nonconforming use is not objectionable upon that basis alone. Sasich v. City of Omaha 864