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LOUIS FINOCCHIARO, INC., A NEBRASKA CORPORATION, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

351 N.W.2d 761

Filed June 1, 1984. No. 83-255.

1. **Constitutional Law: Statutes.** The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare.
2. _____: _____. Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. Generally speaking, any valid or constitutional exercise of the police power must reasonably embody one of the purposes mentioned. There must be some clear and real connection between the assumed purpose of the law and its actual provisions.
3. **Constitutional Law.** The constitutional guarantees of our Bill of Rights contemplate that every person legally possesses the right of acquiring the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases and to sell it at such price as he can obtain in fair barter.
4. **Constitutional Law: Statutes.** If it becomes apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. The Legislature, under the guise of regulation, may not indulge in arbitrary price-fixing or the destruction of lawful competition.

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

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

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

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

WHITE, J.

Plaintiff, Louis Finocchiaro, Inc., a licensed wholesaler of wine and spirits, filed this action seeking injunctive relief against the enforcement of Neb. Rev. Stat. §§ 53-168, 53-168.03 (Cum. Supp. 1982), 53-168.01, 53-168.02, 53-168.04, and 53-168.05 (Reissue 1978), and a declaration that said statutes are invalid because (1) they constitute a restraint of trade in violation of § 1 of the Sherman Act (15 U.S.C. §§ 1 et seq. (1976)), and (2) the statutes violate Neb. Const. art. I, §§ 3 and 25. The trial court found that the statutory scheme did not violate either the Nebraska Constitution or the Sherman Act. Plaintiff appeals, and we reverse and remand with directions to enter a judgment in accordance with this opinion.

Sections 53-168.01 through 53-168.05 invoke a statutory scheme commonly known in the liquor industry as "post and hold" laws. These sections will be referred to as either post and hold laws or price-posting statutes. All manufacturers, distributors, and wholesalers initially starting business are required to file a schedule of prices under § 53-168.04.

After filing their initial price schedules, only wholesalers of wines and spirits remain subject to the post and hold laws. Pursuant to the statutory scheme, all Nebraska wholesalers are required to post their resale prices each month with the Nebraska Liquor Control Commission. All prices posted with the commission become public information and are thus available for the inspection of competing wholesalers as well as liquor retailers. Initial prices on new items being introduced to the market become effective immediately upon posting, and all prices filed with the commission must remain in effect for a minimum of 30 days. In order to change the price of any item, the wholesaler is required to post a new price with the commission at least 35 days prior to the first of the month in which the changed price is to become effective. There is no

limit on the number of monthly price increases that may be made.

Price reductions, however, are treated differently. Because a minimum of 150 days must elapse between the end of a price reduction period and the beginning of a subsequent price reduction period, the statutory scheme effectively limits wholesalers to two price reductions per item in any year. In addition, under § 53-168.03 wholesalers are prohibited from amending their price schedules to reflect quantity discounts, and under the provisions of § 53-168 wholesalers are prohibited from giving quantity discounts, and retailers are also prohibited from receiving quantity discounts.

As its first assignment of error, plaintiff contends that the price-posting statutes are unconstitutional under Neb. Const. art. I, §§ 3 and 25.

The aforementioned portions of our Bill of Rights provide: "No person shall be deprived of life, liberty, or property, without due process of law." Neb. Const. art. I, § 3. "There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property. . . ." Neb. Const. art. I, § 25.

The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare. *State v. Geest*, 118 Neb. 562, 225 N.W. 709 (1929). Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. *United States Brewers' Assn., Inc. v. State*, 192 Neb. 328, 220 N.W.2d 544 (1974). Generally speaking, any valid or constitutional exercise of the police power must reasonably embody one of the purposes mentioned. *Schaffer v. City of Omaha*, 197 Neb. 328, 248 N.W.2d 764 (1977). There must be

some clear and real connection between the assumed purpose of the law and its actual provisions. *United States Brewers' Assn., Inc. v. State, supra.*

The constitutional guarantees of our Bill of Rights contemplate that every person legally possesses the right of acquiring the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it at such price as he can obtain in fair barter. *State, ex rel. English, v. Ruback*, 135 Neb. 335, 281 N.W. 607 (1938); *Terry Carpenter, Inc. v. Nebraska Liquor Control Com.*, 175 Neb. 26, 120 N.W.2d 374 (1963); cf., *Gillette Dairy, Inc. v. Nebraska Dairy Products Board*, 192 Neb. 89, 219 N.W.2d 214 (1974); *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960).

In the case of *Golden v. Bartholomew*, 140 Neb. 65, 72-73, 299 N.W. 356, 359-60 (1941), this court stated:

> "The legislature cannot, under the guise of police regulation, arbitrarily invade private property or personal rights. The test when such regulations are called in question is whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained." . . . "In order that a statute may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals or general welfare; that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof; and that the latter do in some plain, appreciable and appropriate manner tend toward the accomplishment of the object for which the power is exercised. * * * Measures adopted by the legislature to protect

> the public health and secure the public safety and welfare must have some relation to those proposed ends. If it is apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety or welfare, it is unconstitutional . . . ."

If it becomes apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. *Gillette Dairy, Inc. v. Nebraska Dairy Products Board, supra.* The Legislature, under the guise of regulation, may not indulge in arbitrary price-fixing or the destruction of lawful competition. *Terry Carpenter, Inc. v. Nebraska Liquor Control Com., supra*; *Nelsen v. Tilley*, 137 Neb. 327, 289 N.W. 388 (1939); *Lincoln Dairy Co. v. Finigan, supra.*

The question to be answered is whether there is "some clear and real connection" between the stated purposes of the law and its actual provisions. *United States Brewers' Assn., Inc. v. State, supra.*

The legislative declaration of purpose for the price-posting statutes is contained in § 53-168.01. The first purpose of the price-posting statute is to foster "temperance" in the consumption of alcoholic liquor and "respect for and obedience to the law." At oral argument counsel conceded that the price-posting act has not served its purpose in fostering temperance in the consumption of alcoholic beverages. In addition, evidence before the trial court indicates that consumption has increased dramatically since the price-posting law arguably has been in effect. While it cannot be gainsaid that all laws arguably foster "respect for and obedience to the law," such is not a clearly articulated reason which, on its strength alone, would allow a court to uphold the constitutionality of a questioned statute.

The next declared purpose of the act is to "pro-

mote an orderly marketing of alcoholic liquor." Assuming, arguendo, that the price-posting law actually promotes the orderly marketing of alcoholic liquor, the inquiry to be answered is whether it concomitantly promotes the public health, safety, or welfare. The state has not suggested and we cannot conceive of any reason that price-fixing promotes the public health, safety, or welfare, or, for that matter, orderly marketing of liquor.

The last declared relevant purpose of the price-posting statutes is to "implement section 53-168." Section 53-168 prohibits any discounts, rebates, and inducements of any kind by a wholesaler to a retailer. It further prohibits a wholesaler from giving and a retailer from receiving quantity discounts. Along the same line, § 53-168.03 also prohibits the amendment of price schedules to reflect quantity discounts. It is significant that the post and hold laws do not serve any purpose embodied in § 53-168 other than its prohibition of quantity discounts. The statutory scheme is so intertwined that the post and hold laws would not be severable from the provisions affecting the prohibition of quantity discounts of § 53-168 under the test of severability set forth in *Nelsen v. Tilley, supra.* See, also, *State ex rel. Douglas v. Sporhase*, 213 Neb. 484, 329 N.W.2d 855 (1983). Because the Legislature has chosen to enact the provisions of § 53-168 together with the price-posting laws as a comprehensive and integrated statutory scheme designed to prohibit all quantity discounts, the statutes must, therefore, be construed and either stand or fall in unison under the provisions of the Constitution. Although the trial court's findings regarding § 53-168 are not specifically assigned as error, we shall consider the constitutionality of that section only insofar as it prohibits quantity discounts.

In *Central Markets West, Inc. v. State*, 186 Neb. 79, 180 N.W.2d 880 (1970), this court considered the constitutionality of the prohibitions of discounts affecting

quantity purchases as contained in § 53-168. The court, in a 4-to-3 decision, upheld the constitutionality of the entirety of § 53-168, and said: "It would indeed be ironical if a legislative body with authority to completely do away with a certain type of business were found to be lacking in authority to promulgate reasonable regulations for its control." *Id.* at 85, 180 N.W.2d at 884.

In *Central Markets* the court took a new tack and departed from its long and carefully plotted course of protecting the property rights of the populace from unreasonable interference by their elected representatives. See, e.g., *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960); *City of Scottsbluff v. Winters Creek Canal Co.*, 155 Neb. 723, 53 N.W.2d 543 (1952); *Nelsen v. Tilley*, 137 Neb. 327, 289 N.W. 388 (1939); *Carolene Products Co. v. Banning*, 131 Neb. 429, 268 N.W. 313 (1936); *Golden v. Bartholomew*, 140 Neb. 65, 299 N.W. 356 (1941); *State v. Geest*, 118 Neb. 562, 225 N.W. 709 (1929); *Iler v. Ross*, 64 Neb. 710, 90 N.W. 869 (1902). We must not hesitate to reexamine the rationale of *Central Markets* and determine whether it is equally convincing today.

In *Burns Baking Co. v. McKelvie*, 108 Neb. 674, 189 N.W. 383 (1922), we upheld the validity of a law which set both the maximum and minimum allowable weights of bread. The U.S. Supreme Court reversed, holding that the law was both unreasonable and unnecessary in that it prevented not only the fraud accompanying underweight loaves but it also prevented the benefit of overweight bread. The Court said: "[A] State may not, under the guise of protecting the public, arbitrarily interfere with private business . . . or impose unreasonable and unnecessary restrictions upon them." *Rev'd sub nom. Burns Baking Co. v. Bryan*, 264 U.S. 504, 513, 44 S. Ct. 412, 68 L. Ed. 813 (1924). The situation in *Burns* is analogous to the case at bar. If the state has no valid interest in preventing overweight bread

—a benefit which would ultimately inure to the consuming public—can the state possess a valid interest in preventing discounts which are not intended to destroy competition? We think not. In both situations the Legislature has acted not to promote the public welfare but has, instead, imposed arbitrary regulations which impede the welfare of the populace. In this case the Legislature has thrown the protective economic cloak of the police power over the inefficient liquor retailers of this state "at the expense of the purchasing public." *Central Markets West, Inc. v. State*, 186 Neb. 276, 280, 182 N.W.2d 898, 900 (1971) (supp. op.; McCown, Spencer, and Boslaugh, JJ., dissenting).

"A statute designed for the private welfare of one class of licensed liquor retailers, which bears no real or substantial relationship to the general health, morals, or welfare of the public is unconstitutional. At best, it arbitrarily disregards the realities of fair competition in a free enterprise system." *Central Markets West, Inc. v. State*, *supra* at 88, 180 N.W.2d at 886 (McCown, Spencer, and Boslaugh, JJ., dissenting).

Since the statutory scheme invokes a blanket prohibition of all discounts, regardless of whether they are designed to destroy competition or merely an accommodation to a retailer purchasing a larger quantity with resultant savings to the consumer, the prohibition is not substantially related to the furtherance of the public welfare.

We hold that § 53-168, only insofar as it purports to prohibit wholesalers from giving and retailers from accepting quantity discounts, and the provisions of § 53-168.03, which prevent amendment of price schedules to reflect discounts, "[bear] no real or substantial relationship to the general health, morals, or welfare of the public," and are, therefore, unconstitutional and void. *Central Markets West, Inc. v. State*, *supra* at 280, 182 N.W.2d at 900. To the extent that *Central Markets* conflicts with

this opinion, it is expressly overruled. The remainder of § 53-168, which does not relate to quantity discounts, is severable from the invalid portion. See *State ex rel. Douglas v. Sporhase*, 213 Neb. 484, 329 N.W.2d 855 (1983).

In *Terry Carpenter, Inc. v. Nebraska Liquor Control Com.*, 175 Neb. 26, 120 N.W.2d 374 (1963), this court considered the constitutionality of a rule promulgated by the commission. The rule, being almost identical to the post and hold laws currently in effect, required distributors to file their prices with the commission and make all sales at those prices until changed upon application and with the consent of the commission, and limited the amount of permissible discounts. The rule was held to be promulgated without legislative authority. " 'This court has said that in the absence of appearance of public interest the Legislature may not itself impose prices. Boomer v. Olsen, 143 Neb. 579, 10 N.W.2d 507. May it constitutionally confer upon others a right which it does not itself possess?' " *Terry Carpenter, Inc. v. Nebraska Liquor Control Com.*, *supra* at 39, 120 N.W.2d at 381.

> Rule 46 in the instant case is subject to the same objection heretofore mentioned. The manufacturer, distributor, or wholesaler is given complete and absolute power to fix prices in the first instance, without regard to reasonableness. Those prices so fixed are then wholly immunized from the forces of competition by the commission's rule. The rule precludes a retailer from the exercise of free bargaining with respect to the prices he will pay. And the rule even prevents the manufacturer, wholesaler; or distributor from revising prices from time to time in view of situations caused by competition, except by justifying the change on the basis of cost, experience that the price previously charged was insufficient or excessive, etc., supported by proper data. In essence, the buyer is

> precluded from having any voice in making contracts for the goods it is to buy.
>
> The conclusion must be reached that Rule 46 is a price-fixing rule pure and simple, and doubtless the purpose of the rule was to protect the little retailer from the volume dealer, in other words, to favor the small dealer over the volume seller by nullifying the natural competitive advantage of volume sales.

Id. at 39-40, 120 N.W.2d at 381-82.

In essence, the only real difference between Rule 46 and the post and hold laws is that the latter do not require one to prove the need for a discount, but, rather, limit any discounts to no more than two a year, separated by 150 days between the end of the preceding discount period and the start of a new discount period. Our opinion in *Terry Carpenter, Inc.*, foreshadows a result of today's decision. It can hardly be called a decisional denouement that we would reach the conclusion that the post and hold laws, §§ 53-168.01 through 53-168.05, are unconstitutional, since they bear no real or substantial relationship to the furtherance of the public health, safety, or welfare. Indeed, because the evidence shows a 70-percent increase in consumption of alcoholic beverages since the price-fixing laws were enacted, it is far too late to equate higher prices with reduced consumption and a concomitant promotion of the public health. Since plaintiff makes no complaint about § 53-168.01 as it relates to the regulation of advertising, we have determined that *only* that portion is severable under the test of *State ex rel. Douglas v. Sporhase*, *supra*.

While this decision may destroy large profits derived from the public in a state-implemented price-fixing scheme, it will also foster free competition among wine and spirits wholesalers in Nebraska, thereby affording the people a more efficient allocation of resources in this society.

The judgment of the trial court is reversed and

the cause is remanded with directions to enter a judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

EDITH M. CIRCO, APPELLEE, V. TRANSIT AUTHORITY OF THE CITY OF OMAHA, DOING BUSINESS AS METRO AREA TRANSIT, APPELLANT, AND AETNA CASUALTY & SURETY COMPANY, A CORPORATION, APPELLEE.

348 N.W.2d 908

Filed June 1, 1984. No. 83-406.

1. **Motor Vehicles: Negligence.** The failure to look at a time when looking would have been effective was negligence as a matter of law, and the court was in error in not so holding and instructing the jury.
2. _____: _____. Although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nevertheless keep a proper lookout and watch where he is driving.
3. _____: _____. Users of the highway are required to exercise reasonable care. What is reasonable care must, in each case, be determined by its own peculiar facts and circumstances.

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

Richard L. Walentine of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellant.

Peter C. Bataillon of Sodoro, Daly & Sodoro, for appellee Circo.

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

KRIVOSHA, C.J.

The appellant, Transit Authority of the City of Omaha, doing business as Metro Area Transit (MAT), appeals from a judgment entered by the district court for Douglas County, Nebraska, which found MAT liable for negligence and awarded judg-

ment in favor of the appellee, Edith M. Circo, in the amount of $21,501.47. Because we believe the trial court erred as a matter of law, we reverse and remand with directions to dismiss the action.

The evidence discloses that on April 21, 1981, Circo, while in the employment of Omaha Public Schools, was operating a van for the purpose of transporting children to and from the Omaha Public Schools. At approximately 9 a.m. Circo's van was struck by a bus owned by MAT and driven by its employee, Larry Conner, while Circo was turning left onto Douglas Street from Turner Boulevard at the intersection of those streets in Omaha, Douglas County, Nebraska.

Turner Boulevard has three lanes running one way in a southerly direction, while Douglas Street, also a one-way street, has four lanes which run in an easterly direction. The intersection of Turner Boulevard and Douglas Street is controlled by a traffic light. The van which Circo was operating on the day in question was a 10-passenger van. It had a wheelbase longer than that of an ordinary passenger car, was slightly wider than an ordinary passenger car, and was some 20 feet long. As Circo approached the intersection of Turner and Douglas, she observed that the traffic signal controlling Turner was red, and she stopped the van in the left lane on Turner Boulevard in anticipation of making a left turn onto Douglas. At nearly the same time the MAT bus, which was then being operated in a southerly direction on Turner Boulevard, arrived at the intersection. The MAT bus also intended to make a left turn onto Douglas Street, and either pulled up beside Circo's van or was approaching the intersection in the middle lane on Turner Boulevard as the light turned green.

As the light on Turner Boulevard turned green, Circo testified that she checked oncoming traffic from her right on Douglas Street, looked into her rearview mirror, and, observing no traffic, including

the MAT bus, began her turn onto Douglas Street. Because of the length of her van, she did not turn into the lane nearest to her on Douglas Street but, rather, into a portion of the second line. Circo testified that as she initiated her turn, she perceived a motion to the right of her vehicle, which was the MAT bus turning from the center lane of Turner Boulevard into the third or fourth lane of Douglas Street. Before Circo could discover the source and nature of the motion, which was nearly simultaneous with the start of her turn, a collision occurred. Circo testified that she intended to turn into the second lane away from the north curb of Douglas Street because the length of the van made it difficult to turn into the first lane. She also testified she did not see the bus until just before the impact occurred. She further testified that she probably did turn the front of the van slightly to the right to avoid the curb.

MAT has appealed and assigns several errors. We need, however, only consider one; that is, whether the court erred in failing to find Circo guilty of contributory negligence sufficient to bar her recovery. As we have already indicated, we believe the trial court did err in this regard.

While there is some dispute about the facts, certain material facts are without dispute. Those facts are that Circo knew that the van she was driving was of such length that she could not make a left turn by moving from her lane of traffic into the first lane of traffic on Douglas Street. She recognized that, in order to negotiate the turn, it would be necessary for her to move beyond what would be the normal lane of traffic for such a left turn and to travel into the second lane of traffic. With that knowledge Circo knew, or should have known, that the movement she was about to make was somewhat out of the ordinary and required her to pay greater attention to any other traffic which may have then been on the street. It is further undisputed that

Circo did not look to see if there was any traffic immediately to her right on Turner which also might have been turning left onto Douglas Street. It is clear beyond dispute that had Circo looked to her right, she would have seen the bus.

There is no question that the driver of the MAT bus was negligent in the manner in which he turned left from Turner onto Douglas. His negligence, however, is not the end of the question. We must also determine whether Circo's failure to look for the MAT bus and see it, and to take appropriate steps, constituted contributory negligence sufficient to bar her right of recovery as a matter of law. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence on the part of the defendant, contributes to the injury. See, *Mundy v. Davis*, 154 Neb. 423, 48 N.W.2d 394 (1951); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984).

Here, Circo failed to look and failed to see what was clearly observable. Had she looked and seen the turning bus, no accident would have occurred. In *Zeiger v. Farmers Co-op Assn.*, 212 Neb. 933, 936, 327 N.W.2d 43, 45 (1982), we recently said: "The failure to look at a time when looking would have been effective was negligence as a matter of law, and the court was in error in not so holding and instructing the jury." " 'A motorist must see what is in plain sight.' " *Burrows v. Jacobsen*, 209 Neb. 778, 780, 311 N.W.2d 880, 882 (1981). And although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nevertheless keep a proper lookout and watch where he is driving. See, *Nichols v. McArdle*, 170 Neb. 382, 102 N.W.2d 848 (1960); *Hayes v. Anderson Concrete Co., Inc.*, 186 Neb. 771, 186 N.W.2d 477 (1971).

In *Murray v. Pearson Appliance Store*, 155 Neb. 860, 866, 54 N.W.2d 250, 255 (1952), we said: " ' "Users of the highway are required to exercise reasonable care. What is reasonable care must, in each case, be determined by its own peculiar facts and circumstances.". . .' "

> The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way or is driving on the side of the highway where he has a lawful right to be. He must keep a lookout ahead or in the direction of travel or in the direction from which others may be expected to approach and is bound to take notice of the road, to observe conditions along the way, and to know what is in front of him for a reasonable distance.

Murray v. Pearson Appliance Store, *supra* at 867, 54 N.W.2d at 255. See, also, *Kendall v. Hongsermeier*, *ante* p. 109, 347 N.W.2d 855 (1984).

Had Circo looked and seen the bus, and waited for the bus to turn left, no accident would have occurred, notwithstanding the bus driver's negligence in turning left from the middle of Turner Boulevard onto Douglas Street. The trial court was in error in not recognizing this fact. The case should have been dismissed.

Having thus disposed of the appeal on this basis, we need not consider any of the other assignments of error raised by the appellant. The judgment of the trial court is reversed and the cause is remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WHITE, J., dissenting.

I disagree with the conclusion of the majority, that Circo was more than slightly negligent as a matter of law. The issue was considered and decided otherwise by the trier of fact. I am unable to conclude

that the trial judge was clearly wrong.

SHANAHAN, J., joins in this dissent.

BOBBIE W. CURTIS, APPELLEE AND CROSS-APPELLANT, V. MILLARD SCHOOL DISTRICT NO. 17, A CORPORATE GOVERNMENTAL BODY, APPELLANT AND CROSS-APPELLEE.

349 N.W.2d 379

Filed June 1, 1984. No. 83-423.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

P. Shawn McCann of Sodoro, Daly & Sodoro, for appellant.

Patrick W. Kennison of Kutak Rock & Huie, for appellee.

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

HASTINGS, J.

The defendant, Millard School District No. 17, has appealed from an order of the district court finding it to be in contempt of court. It had failed to comply with the court's earlier order to produce the written narrative statement taken from a witness to an accident. The assignments of error examine the status of investigative statements taken by insurance claims adjusters under the rules relating to the attorney-client privilege and the work product doctrine. The plaintiff-appellee cross-appeals, contending that the sanctions imposed were so insignificant as to be totally inefficacious.

According to the plaintiff's petition, his minor son Paul was injured on January 6, 1981, while participating in a mandatory physical education class held at the school operated by the defendant. He alleged that the injuries and damages resulted from the negligence of the defendant by and through its agents

and employees. After complying with the Political Subdivisions Tort Claims Act, suit was filed by the plaintiff in district court on December 14, 1982.

The facts are gathered from the affidavit of plaintiff's counsel filed in the discovery proceedings. The minor child had just moved to Millard from out of state and had attended classes but 1 day. Therefore, he knew no one in this particular class and was unable to learn the names of witnesses to his accident or the names of his teachers or supervisors.

On December 16, 1981, plaintiff's counsel requested of the insurance claims representative the names and addresses of the students attending and the teachers supervising his class. The insurance investigator represented to counsel in a telephone conversation that the information would be furnished. However, this same representative, on January 4, 1982, took a statement from Jack Lawson, the instructor in charge, but did not disclose his identity at that time. On January 26, 1982, written request for this same information was made upon the insurance adjuster, who promised to contact counsel as soon as he had what was given to him, perhaps in a couple of weeks. A third request was made for the information on February 15, 1982, which did not meet with any success.

On January 18, 1983, after the lawsuit was filed, plaintiff's counsel served a request for production of certain documents, including the previously sought information, which request was refused by the defendant. Plaintiff filed a motion to compel discovery on February 22, 1983. Finally, and for the first time, plaintiff learned the names of Lawson and a Skip Olds, which information was furnished by the defendant in answer to interrogatories served on the plaintiff on March 18, 1983. By this time Lawson was residing in Loogootee, Indiana, and Olds lived in Alliance, Nebraska.

The affidavit of counsel also alleged that because of the defendant's unreasonable delay in furnishing

the names of witnesses, the plaintiff had been deprived of access to the witnesses, and had the defendant's response been made in a timely fashion, the plaintiff could have interviewed the witness Lawson while he still lived in Millard. However, by now plaintiff would be put to unreasonable delay, hardship, and expense in order to interview this witness.

The trial court sustained the motion to require the defendant to produce Lawson's statement, and upon its refusal to comply with the court's order, and in response to a motion for sanctions, the court found the defendant to be in willful contempt of court, fined the defendant $300, and assessed attorney fees against the defendant totaling $1,000.

The defendant relies on *Brakhage v. Graff*, 190 Neb. 53, 206 N.W.2d 45 (1973), to support its claim that the statement taken in this instance by an insurance investigator was a privileged communication between attorney and client. We distinguish *Brakhage* on two grounds. Its holding, in the first instance, was based on the fact that the statement was taken from an insured, and, secondly, the insurance company owed to that person a duty to defend through its attorneys. Those factors are not present in this case.

We also raise the question, but need not decide, whether an insurance claims adjuster, in the first instance, is a "representative of the lawyer" who has been "employed to assist the lawyer" as required by Neb. Rev. Stat. § 27-503(1)(c) (Reissue 1979).

It is also contended by the defendant that under Neb. Ct. R. 26(b)(3) (Rev. 1983) of the Nebraska Discovery Rules, work product documents may be discovered "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means," and, says the defendant, such showing was not made in this instance. We disagree.

The plaintiff was forced to endure the expense of filing this litigation as the only means by which he could determine whether the facts of the case supported his claim. Had the insurance company complied with his initial request for the name of the teacher in charge, he could have made that determination at an early date and with a minimum of time and expense. The company had at least inferentially promised that information, only to later engage in delaying games to deny him that information. Such tactics will not be tolerated. However, as an aside, we are curious as to whether plaintiff's counsel, in an effort to reasonably serve the interests of the client, has made an attempt to interview the witnesses by telephone.

We review this case in the same manner that we review a criminal case. *In re Contempt of Liles*, *ante* p. 414, 349 N.W.2d 377 (1984). We do not decide the questions anew. We cannot say that the sanctions imposed by the trial court were so insignificant as to amount to an abuse of discretion or to constitute error as a matter of law.

The judgment of the district court is affirmed. The plaintiff is awarded an attorney fee in this court of $1,000, to be paid by the defendant.

AFFIRMED.

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

CAPORALE, J., dissenting.

I dissent. Although the record establishes that defendant has engaged in considerable gamesmanship, it does not establish what efforts, if any, have been made by plaintiff to interview the witness Jack Lawson. In the absence of such a showing I cannot conclude that the "substantial need" and "undue hardship" required by Neb. Ct. R. 26(b)(3) (Rev. 1983) of the Nebraska Discovery Rules for production of Lawson's statement have been met, even if the statement is "otherwise discoverable" under rule 26(b)(1), a question we need not address in the present posture of this case.

If we were to take instruction from the cases interpreting and applying Fed. R. Civ. P. 26, the progenitor of our rule 26, we would learn that the substantial need and undue hardship burdens are not met by a mere desire to learn what kind of case the opposing party has. In *United States v. Chatham City Corp.*, 72 F.R.D. 640 (S.D. Ga. 1976), the court concluded that since the defendant landlords in a civil rights action could obtain the substantial equivalent of witness statements given to government agents by personal interviews, depositions, or by written interrogatories, the defendants had not shown sufficient undue hardship or need for production of the statements obtained by the government. Stated another way, the record must make a "strong showing of need." *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 90 F.R.D. 45 (N.D. Ill. 1981). No showing of need in any degree exists in this case. It is not supplied by our pique at defendant's craftiness. Accordingly, I would reverse with directions to dismiss the contempt citation.

HIEGEL FARMS CORPORATION, APPELLANT, V. KYLE CASSELMAN ET AL., APPELLEES.

349 N.W.2d 382

Filed June 1, 1984. No. 83-463.

1. **Equity: Appeal and Error.** An action in equity is reviewed de novo without reference to the findings of fact made by the trial court, but where the testimony or evidence is in irreconcilable conflict, we take into consideration that the trial court observed the witnesses.
2. _____: _____. In a de novo review the Supreme Court will also give weight to the fact that an inspection of the premises was made by the trial court, where such inspection was given consideration by the court in its decision and judgment.
3. **Waters.** It is the general rule that where surface waters concentrate and gather in volume, so as to lose their character as diffused surface waters and flow into a natural depression, draw, swale, or

other natural drainageway, the flow may not be arrested or interfered with to the injury of neighboring proprietors.

4. _____. As a general rule, a lower landowner who builds a structure across a natural drainageway must provide for the natural passage through such obstruction of all the water which reasonably may be anticipated to drain therein.

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

R. L. Gilbert, for appellant.

Christine J. Law of Atkins, Ferguson, Zimmerman, Carney & Law, and John F. Simmons of Wright, Simmons & Selzer, for appellees.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

The plaintiff, Hiegel Farms Corporation, appeals the dismissal of its petition to obtain an injunction to remove an embankment which is alleged to obstruct the natural flow of surface waters. The district court determined that although both the plaintiff's and defendants' lands are within a watershed area, there is no natural depression, draw, swale, or watercourse upon either of the premises.

The trial court also found that the accumulation of floodwaters from the land of the plaintiff was caused primarily by a low spot in the southeast corner of the plaintiff's land, and additionally by the concentration and funneling of floodwaters by a concrete irrigation lateral running east and southeast on the plaintiff's land. We affirm.

Plaintiff, Hiegel Farms Corporation, owns a tract of land described as the southeast quarter of Section 18, Township 23 North, Range 55 West, of the 6th P.M., in Scotts Bluff County, Nebraska. The defendants Casselman are the personal representatives, trustees, and heirs of Kyle Casselman, and own the land directly to the south of the plaintiffs, the northeast quarter of Section 19 in the same area.

On the common boundary line between the parties' property is a county road running east and west, while to the east is a hard-surfaced road running north and south. In its natural state the water generally flows from the northwest to the southeast. Four culverts pass water from the plaintiff's farm under the county road between the plaintiff's and defendants' property. One culvert is part of the Pathfinder Irrigation District lateral on the far west edge of the properties involved. Two culverts are in the middle of the property and drain excess runoff water, while the fourth lies at the southeast corner of the plaintiff's farm and runs north and south along the west side of the intersection of the county road and the oiled road.

There is a borrow pit on the south side of the county road. The dikes or embankment complained of are the south and west banks of the borrow pits located on the defendants' land. The defendants raised the level of the south bank in 1970 and again in 1979 by rolling up excess dirt left over from the beet harvest. Plaintiff alleges the higher embankment caused increased ponding in the area directly north of the middle two culverts.

Although there is some conflict in the evidence, the record shows the plaintiff's land slopes slightly downward, running generally north and south near the right center of the tract. Surface water drains south toward the defendants' land, where it eventually collects in a depression generally at the southeast corner of the plaintiff's land. The water gradually flows through the culverts under the county road and along the drainage ditches or borrow pits adjacent to the defendants' land.

Since 1977, when the plaintiff took possession of the property, it has added an underground tile drain and changed an irrigation lateral from an earthen ditch to a concrete ditch. In 1979, after the dike was last built up, an impoundment of water would be created on the plaintiff's land after heavy rains, inun-

dating an area of 4 to 5 acres for a period of 12 to 24 hours, resulting in the damaging of soil and crops.

In an action in equity we review the matter de novo without reference to the findings of fact made by the trial court, but where the testimony or evidence is in irreconcilable conflict, we take into consideration that the trial court observed the witnesses. *Grint v. Hart*, 216 Neb. 406, 343 N.W.2d 921 (1984). In a review de novo this court will also give weight to the fact that an inspection of the premises was made by the trial court, where such inspection was given consideration by the court in its decision and judgment. *Kluck v. Mentzer*, *ante* p. 8, 347 N.W.2d 306 (1984).

It is the general rule that where surface waters concentrate and gather in volume, so as to lose their character as diffused surface waters and flow into a natural depression, draw, swale, or other natural drainageway, the flow may not be arrested or interfered with to the injury of neighboring proprietors. *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962).

In *Eunice Harrington Investments, Ltd. v. Wallace*, 207 Neb. 373, 299 N.W.2d 174 (1980), we applied the rule that a lower landowner who builds a structure across a natural drainageway must provide for the natural passage through such obstruction of all the water which reasonably may be anticipated to drain therein.

The first issue before the court is whether a natural drainageway existed across the plaintiff's land and onto the defendants' property which the defendants had unreasonably obstructed. In resolving the conflicts in the evidence surrounding this question, we will give proper weight to the fact that the trial court saw and heard the witnesses who testified, and twice viewed the premises, once when ponding of water was present on the plaintiff's land.

It is uncontested that the land in issue, shown on a contour map, consists of approximately 2,700 acres,

and the areas 1 mile to the east and west of the plaintiff's ground are 50 to 75 feet higher. Although the contour map reveals a wide, slightly depressed area, there is no evidence to show a well-defined channel or course cut in the soil. In fact, Meredith C. Schaff, a consulting civil engineer, testified that "there were no natural drainage ways or water courses, eroded areas that would prescribe like a creek or anything that would collect this water. Basically, the bulk of the water flows over land." The alleged drainageway is described as 900 feet wide and 1 foot deep.

From previous testimony it had been shown that a certain amount of water ponded on the plaintiff's land before the embankments were built up. Even the plaintiff admits the area was low and water gathered in the southeast corner of Section 18. Although culverts were present to drain the runoff water, some of this ponding was attributed to the buildup of the county road in 1970. As a matter of fact, the evidence disclosed that the road had a higher elevation than the so-called dike. Witnesses for both parties testified that water would sometimes pond on the plaintiff's land to an extent sufficient to flow over the top of the raised area before and after the county road was built up.

Further evidence presented at trial indicated a concentration and funneling of floodwater occurred as a result of having lined with concrete the previous earthen irrigation lateral. Rinard Goss, an area farmer who previously farmed the land of the plaintiff, stated the concrete ditch resulted in more water draining away faster from the north part of plaintiff's field.

Upon our review of the entire record we find that the trial court was correct in its findings of fact and conclusions of law. The de novo review of the record showed occasional surface water caused by heavy rain would collect in low areas on plaintiff's land north of the county road. Two culverts drained

this area. The amount of ponding in the low area has increased somewhat since 1977, but due to the plaintiff's restructuring of its own land, it has caused this increase in ponding.

The plaintiff has not proven that a natural depression, draw, swale, or drainageway exists on the premises. Plaintiff not having proven a natural waterway exists, we do not have to determine whether the embankment on the defendants' land blocked the natural passageway of water to the injury of the plaintiff.

The judgment of the trial court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., participating on briefs.

ROBERT DEAN WOOD AND GERTRUDE WOOD, APPELLANTS, V. FARWELL IRRIGATION DISTRICT ET AL., APPELLEES.

349 N.W.2d 633

Filed June 1, 1984. No. 83-495.

1. **Irrigation Districts: Damages: Liability.** Irrigation districts organized under the laws of the State of Nebraska are liable for seepage damage under Neb. Const. art. I, § 21, without regard to negligence, even though legal title to the project is vested in someone other than the irrigation district, if the irrigation district is responsible for its operation and maintenance.
2. **Irrigation Districts: Property: Damages: Proof.** The mere fact that property abutting a district is damaged does not entitle the property owner to recover for such damages, absent proof that the damages realized by the owner were proximately caused by the seepage from the irrigation district.
3. **Irrigation Districts: Property: Damages.** An owner of property allegedly damaged by seepage may, among other available rights, file a direct suit for damages against an irrigation district responsible for such alleged damages.

Appeal from the District Court for Howard County: RICHARD L. DEBACKER, Judge. Reversed and remanded for further proceedings.

John S. Mingus of Mingus & Mingus, for appellants.

Michael J. Shaughnessy of Shaughnessy, Shaughnessy & Shaughnessy, for appellees.

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

KRIVOSHA, C.J.

This case involves the question of whether owners of property allegedly damaged by seepage from an irrigation works may recover for such damages from the operators of the irrigation works, or may only recover, if at all, from the holders of the title to the irrigation works. The trial court concluded that such a suit could not be maintained, and the court dismissed the suit. We believe that the trial court was in error, and for that reason we reverse and remand.

The appellants, Robert Dean Wood and Gertrude Wood, alleged in a petition filed in the district court for Howard County, Nebraska, that they were owners of certain real estate located in Howard County, Nebraska. Their petition further alleged that the defendants, Farwell Irrigation District (Farwell) and Loup Basin Reclamation District (Loup), operated and maintained an irrigation works and that seepage from the works had caused damage to the Woods' real property and buildings. Farwell and Loup filed a demurrer to the petition on the ground that the irrigation distribution system was not owned by either Farwell or Loup, but, instead, by the United States of America. The trial court overruled the demurrer, and both Farwell and Loup filed answers generally denying the allegations of the plaintiffs' petition.

Thereafter, the trial court granted a motion to add a third-party defendant, the United States of America. The third-party complaint alleged that the United States owned the distribution works and

that, in case of recovery, the United States must indemnify Farwell and Loup. A demurrer filed by the United States of America was sustained by the trial court, and the action proceeded against Farwell and Loup alone.

Thereafter, Farwell and Loup filed a motion for summary judgment. Following a hearing on the motion for summary judgment, the trial court sustained the motion and entered judgment for Farwell and Loup and against the plaintiffs. The court's journal entry recited in part as follows:

> Upon arguments of Counsel and Briefs submitted, the Court finds that there is no genuine issue as to any material fact; that the United States of America is the designer, constructor and owner of the distribution and supply works comprising the system operated by the Defendant Districts and the Defendant Districts are granted Summary Judgment against Plaintiffs Robert Dean Wood and Gertrude Wood.

It is from this order granting summary judgment to the defendants Farwell and Loup that the Woods appeal.

The evidence, as presented in support of the motion for summary judgment, discloses that both Farwell and Loup are political subdivisions of the State of Nebraska, formed under and pursuant to the provisions of Neb. Rev. Stat. §§ 46-101 et seq. and 46-501 et seq. (Reissue 1978). In 1957 Loup and Farwell entered into contracts with the United States of America which essentially provided that the United States of America would construct an irrigation system and that, following construction, Farwell and Loup would operate and maintain the system. Title to the system was to remain in the United States of America even though Farwell was to pay the construction costs in 40 annual installments. Following the construction of the system, the operation and maintenance was turned over to Farwell and Loup. Generally, Loup operates the system's irrigation ca-

nals and Farwell operates the irrigation laterals.

Our review of this case, of course, involves the rules concerning the granting of a summary judgment. A party is entitled to summary judgment only when there is no genuine issue as to any material fact, the ultimate inference to be drawn from the facts is clear, and the moving party is entitled to judgment as a matter of law. Additionally, 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. *McHenry v. First Nat. Bank*, 216 Neb. 580, 344 N.W.2d 652 (1984); *McFarland v. King*, 216 Neb. 92, 341 N.W.2d 920 (1983); *Cummings v. Kirby*, 216 Neb. 314, 343 N.W.2d 747 (1984).

Therefore, the question which we must first determine is whether, under the facts as alleged, both Farwell and Loup are relieved of liability as a matter of law and cannot, under the facts alleged, be held accountable for damages if, in fact, any have occurred. We think that this question must be answered in the negative. It is true that for many years the owner of an irrigation ditch or canal was held not to be liable to anyone whose land was injured by seepage unless the owner was negligent. See *Spurrier v. Mitchell Irrigation District*, 119 Neb. 401, 229 N.W. 273 (1930). Neb. Const. art. I, § 21, however, provides that "[t]he property of no person shall be taken *or damaged* for public use without just compensation therefor." (Emphasis supplied.) And the *Spurrier* rule was changed by this court in *Halstead v. Farmers Irr. Dist.*, 200 Neb. 314, 318-19, 263 N.W.2d 475, 478 (1978), when this court said:

> The plaintiff's right to damages is grounded upon the provisions of Article I, section 21, of the Constitution of Nebraska, and it is a right which the Legislature could not destroy. . . .
>
> We hold that irrigation districts organized

under Chapter 46 of the Nebraska statutes are liable for seepage damages under Article I, section 21, of the Constitution of Nebraska, without regard to negligence.

We recently reaffirmed that position in *Lindgren v. City of Gering*, 206 Neb. 360, 366, 292 N.W.2d 921, 925 (1980), when we said: "[A]n irrigation district is liable for seepage damage under Neb. Const. art. I, § 21, without regard to negligence." Therefore, unless the fact that the system involved in this action is owned by the United States of America and only *operated and maintained* by Farwell and Loup exempts Farwell and Loup from the general rule regarding the liability of an irrigation district, the decision of the trial court was obviously in error.

We see little justification, in light of Neb. Const. art. I, § 21, and our holdings in *Halstead* and *Lindgren*, to hold that the owners of an irrigation district may be strictly liable for seepage caused by the construction of an irrigation district and to exempt the operators or maintainers of a district from liability related to the operation or maintenance of the district simply because legal title may be elsewhere. If, in fact, the damage alleged to have occurred has been caused while the irrigation district was under the supervision and control of Farwell and Loup, then the question of where title to the system was is of no moment. We see little purpose in suggesting that where the damage is due to seepage, liability cannot be imposed simply because the district does not hold title, even though the district is responsible for its operation and maintenance. To do so would be, in our view, to create a distinction without a difference. Irrigation districts organized under the laws of the State of Nebraska are liable for seepage damage under Neb. Const. art. I, § 21, without regard to negligence, even though legal title to the project is vested in someone other than the irrigation district, if the irrigation dis-

trict is responsible for its operation and maintenance.

We should, however, be quick to point out that the mere fact that the Woods may maintain a suit against Farwell and Loup, even under our holdings to the effect that a district is liable for seepage damage without regard to negligence, does not eliminate the requirement to prove causation. The mere fact that property abutting a district is damaged does not entitle the property owner to recover for such damages, absent proof that the damages realized by the owner were proximately caused by the seepage from the irrigation district. That issue raises questions of fact yet to be resolved.

One final point which is raised by Farwell and Loup perhaps deserves comment. Farwell and Loup maintain that this is in effect an inverse condemnation action brought by the Woods. We do not believe this to be the case. While it is true that a property owner could bring an inverse condemnation action pursuant to Neb. Rev. Stat. § 76-705 (Reissue 1981) for damages of this type, see *Krambeck v. City of Gretna*, 198 Neb. 608, 254 N.W.2d 691 (1977), or might bring a claim for damages under the Political Subdivisions Tort Claims Act, see *Lindgren v. City of Gering*, *supra*, it is also clear that the Legislature has not prescribed a specific procedure, and, therefore, a claimant is not limited as to how a cause of action may be brought. In *Schmutte v. State*, 147 Neb. 193, 198, 22 N.W.2d 691, 694 (1946), we said:

> [L]egislative enactment is not necessary to give effect to section 21, article I, of the Constitution. It is a self-executing provision. Nine Mile Irrigation District v. State, 118 Neb. 522, 225 N.W. 679; Bordy v. State, 142 Neb. 714, 7 N.W.2d 632. It prohibits the state from damaging property for public use without compensation. It protects property rights from invasion by the state as well as the subdivisions of the state and corpo-

> rations. Nine Mile Irrigation District v. State, *supra*. Likewise, it is established that, in the absence of a statute granting the right, damages cannot be recovered against the state for negligence of any of its officers, agents, or employees. Shear v. State, 117 Neb. 865, 223 N.W. 130. However, the fact that the state is not liable for the negligence of its officers, agents, and employees does not excuse it from liability for the taking or damaging of property which was or could have been done under its powers of eminent domain. [Citations omitted.] It likewise is settled that one whose property is damaged without actual taking is entitled to just compensation. [Citation omitted.]

While it might be desirable for the Legislature to consider establishing a procedure whereby one may sue for seepage damage, until such action is taken the property owner is not limited to any one available remedy, but may select from one of several. An owner of property allegedly damaged by seepage may, among other available rights, file a direct suit for damages against an irrigation district responsible for such alleged damages. We believe that the trial court erred in granting summary judgment. There are a number of questions of fact which must yet be resolved, and, under proper facts, liability may be imposed upon either Farwell or Loup. Therefore, this action should be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED
FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., concurs in the result.

THE GOVERNORS OF THE KNIGHTS OF AK-SAR-BEN, APPELLANT, V. DEPARTMENT OF REVENUE, STATE OF NEBRASKA, ET AL., APPELLEES.

349 N.W.2d 385

Filed June 1, 1984. No. 83-535.

1. **Statutes.** Where the language of a statute is plain, direct, and unambiguous, no interpretation is needed to ascertain its meaning and no resort to rules of construction and interpretation is required.
2. **Gaming: Taxation: Licensee.** Neb. Rev. Stat. § 2-1208 (Reissue 1983), which prohibits the imposition of any license tax, permit tax, occupation tax, or excise tax, or racing fee upon a licensee of the State Racing Commission, except as provided in the statutes, does not exempt a purchaser of an admission ticket from the state sales tax, and the licensee is required to collect the sales tax from the purchaser and remit the tax collected to the state.

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

C. E. Heaney, Jr., and William R. Johnson of Kennedy, Holland, DeLacy & Svoboda, for appellant.

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

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

BOSLAUGH, J.

The Governors of the Knights of Ak-Sar-Ben (Ak-Sar-Ben) appeals from the order of the district court affirming the determination of the Tax Commissioner of the State of Nebraska that Ak-Sar-Ben was not entitled to a refund of sales tax paid on gate admissions in 1981.

Ak-Sar-Ben operates a horseracing track in Omaha, Nebraska, under a license from the State Racing Commission. During the 1981 racing season, Ak-Sar-Ben collected $1,195,043 from patrons for gate admissions. Ak-Sar-Ben paid $53,776.94 to the Tax Commissioner, which amount represented a state sales tax of 3 percent and an Omaha sales tax

of 1.5 percent upon the total gate receipts. On April 21, 1982, Ak-Sar-Ben filed a claim for a refund of the $53,776.94 paid to the state. The claim was denied by the Tax Commissioner, and this action was commenced in the district court under Neb. Rev. Stat. § 77-27,127 (Reissue 1981).

Ak-Sar-Ben contends that Neb. Rev. Stat. § 2-1208 (Reissue 1983) prohibits the collection of a sales tax upon admissions to a racetrack operated by a licensee of the State Racing Commission. Section 2-1208 imposes a tax of 30 cents per admission, and further provides in pertinent part: "No other license tax, permit tax, occupation tax, or excise tax, or racing fee, except as provided in this section and in sections 2-1203 and 2-1208.01, shall be levied, assessed or collected from any such licensee . . . ."

The sales tax at issue was imposed pursuant to Neb. Rev. Stat. §§ 77-2701 et seq. (Reissue 1981). Subsections 77-2703(1)(a) and (b) provide:

> (a) The tax imposed by the provisions of this section shall be collected by the retailer from the consumer. It shall constitute a part of the purchase price and until collected shall be a debt from the consumer to the retailer and shall be recoverable at law in the same manner as other debts. The tax required to be collected by the retailer from the consumer constitutes a debt owed by the retailer of this state;
>
> (b) It is unlawful for any retailer to advertise or to hold out or to state to the public or to any customer, directly or indirectly, that the tax or part thereof will be assumed or absorbed by the retailer or that it will not be added to the selling, renting, or leasing price of the property sold, rented, or leased, or that, if added, it or any part thereof will be refunded. The provisions of this subdivision shall not apply to a public utility.

Subsection 77-2703(2)(d) provides:

> (d) All persons designated to collect the use

> tax and all persons required to collect the use tax shall forward the total of such collections to the Tax Commissioner at such time and in such manner as the Tax Commissioner may prescribe. Such collectors of the use tax shall deduct and withhold from the amount of taxes collected three per cent thereof as reimbursement for the cost of collecting the tax, but such deduction shall be forfeited to the State of Nebraska if such collector violates any rule, regulation, or directive of the Tax Commissioner.

The district court, in denying the claim for refund, held that Ak-Sar-Ben is a retailer charged by statute with the duty of collecting the sales tax and remitting it to the state. The district court held that the purchaser of the admission ticket is the actual taxpayer, and, thus, the sales tax is not levied upon Ak-Sar-Ben.

The language of § 77-2703 clearly states that the purchaser must pay the tax on the cost of his purchase to the retailer, who must then remit the tax to the state. Moreover, the retailer is entitled to 3 percent of the tax collected as reimbursement for the cost of collecting this tax. It is clear that for purposes of the sales tax statutes the purchaser of the admission ticket is the taxpayer. On the other hand, under § 2-1208 the admission tax of 30 cents per person is imposed directly upon the licensee.

The language of the statutes is clear and unambiguous, and the statutes are not inconsistent with one another. Thus, no resort to rules of construction or interpretation is necessary. See *City of Grand Island v. County of Hall*, 196 Neb. 282, 242 N.W.2d 858 (1976).

We note that courts have treated similar statutory schemes as we do in the present case. See, e.g., *McCarroll, Commissioner of Revenues v. Ozarks Rural Electric Cooperative Corporation*, 201 Ark. 329, 146 S.W.2d 693 (1940), in which the court held that a statutory provision exempting from excise

taxes a cooperative corporation which sold electricity did not relieve the cooperative corporation from the statutory duty of collecting and remitting the sales tax levied upon purchasers of electricity.

Ak-Sar-Ben further contends that even though the sales tax is imposed upon the purchaser of an admission ticket, § 2-1208 prohibits the *collection* of a sales tax from a licensee. We think the clear meaning of the statute is that it is the collection of a tax imposed upon a licensee that is prohibited. It would be an absurdity to hold that Ak-Sar-Ben is required to collect the sales tax from each purchaser of an admission ticket but that the Legislature intended to impose no duty upon Ak-Sar-Ben to remit the tax collected from the patrons to the state.

The judgment of the district court is affirmed.

AFFIRMED.

AL MOUDRY AND LOUIS PARKOS, APPELLEES AND CROSS-APPELLANTS, V. VIRGINIA PARKOS, APPELLANT AND CROSS-APPELLEE.

349 N.W.2d 387

Filed June 1, 1984. No. 83-550.

1. **Leases: Landlord and Tenant.** Where lands are leased to a tenant for 1 year for a stipulated rent reserved, and after the expiration of the lease the tenant, without further contract, remains in possession and is recognized as a tenant by the landlord in the receipt of rent for another year, this will create a tenancy from year to year; and, in such case, the tenancy can only be terminated by an agreement of the parties, express or implied, or by notice given, 6 calendar months ending with the period of the year at which the tenancy commenced.
2. _____: _____. Generally, in this state, in the absence of any different agreement, a yearly lease of farm lands begins on March 1 and ends on February 28 of the succeeding year, and the rental becomes due at the expiration of the term.
3. **Evidence: Proof.** The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery.

4. _____: _____. Evidence from which a conclusion can be arrived at only by guess or conjecture does not sustain one's burden of proof.
5. **Property: Leases.** As a matter of law, one takes property subject to the rights of persons in possession.

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

Curtis A. Sikyta, for appellant.

Robert E. Wheeler of Stowell & Wheeler, P.C., for appellees.

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

KRIVOSHA, C.J.

The appellant, Virginia Parkos, appeals from an order entered by the district court for Valley County, Nebraska, determining that Virginia Parkos did not have any rights as a tenant in and to certain real estate legally described as the southwest quarter of Section 13 and the southeast quarter of Section 14, all in Township 19 North, Range 16 West, of the 6th P.M., Valley County, Nebraska. For reasons more particularly set out in this opinion, we reverse and remand the case with directions.

The record discloses that on June 27, 1980, Louis Parkos (owner), the owner of the real estate in question, entered into a farm lease with Virginia Parkos (tenant) and her husband, Elmer Parkos. The lease was for a period of 1 year from the 1st day of March 1980 to the 28th day of February 1981. This was not the first time the parties had had such an arrangement. In fact, owner had leased the land to tenant since 1950, and the parties had had, over the years, what the record would describe as a stormy relationship, but one which had continued from year to year since 1950. The record is unclear but leaves the impression that in most years there was not a written lease executed, though in certain years, including

1980, a formal lease was signed. This action was commenced on May 31, 1983, and the plaintiffs initially sought a permanent injunction against Virginia Parkos alone, her husband, Elmer, having died. At some later time an amended petition was filed abandoning the request for an injunction and, instead, seeking declaratory relief. Owner maintains that tenant has no interest in the real estate because of the fact that the written lease executed by the parties terminated in February of 1981, and further because in July of 1981 owner served notice on tenant that the lease was to terminate. Additionally, owner maintains that on July 28, 1982, he filed suit in the county court for Valley County, Nebraska, against tenant, seeking to have her declared a trespasser, thereby terminating any carryover of the 1980 lease. Unfortunately, however, for owner, none of these purported acts are of any legal significance in this case. The expiration of the farm lease term on February 28, 1981, did not itself terminate the lease. It merely converted the lease to a tenancy from year to year.

In *Fisher v. Stuckey*, 201 Neb. 439, 445, 267 N.W.2d 768, 772 (1978), we said:

> It has long been the law in this jurisdiction that where lands are leased to a tenant for 1 year for a stipulated rent reserved, and after the expiration of the lease the tenant, without further contract, remains in possession, and is recognized as a tenant by the landlord in the receipt of rent for another year, this will create a tenancy from year-to-year; and in such case the tenancy can only be terminated by an agreement of the parties, express or implied or by notice given, 6 calendar months ending with the period of the year at which the tenancy commenced.

See, also, *Critchfield v. Remaley*, 21 Neb. 178, 31 N.W. 687 (1887); *Barnes v. Davitt*, 160 Neb. 595, 71 N.W.2d 107 (1955).

Once a farm tenancy from year to year is created,

it does not automatically terminate by the mere passage of time. In *Sempek v. Minarik*, 200 Neb. 532, 534, 264 N.W.2d 426, 428 (1978), we said:

> A tenancy from year-to-year " 'can only be terminated by agreement of the parties, express or implied, or by notice given, six calendar months ending with the period of the year at which the tenancy commenced.' " [Citation omitted.]
>
> The year-to-year tenancy of Walsh would have expired March 22, 1973, if he had received notice of termination 6 months before; similarly, the Sempek tenancy could have been terminated May 29, 1973, by 6 months previous notice. Defendants admit that no such notice of termination was given to either Walsh or Sempek prior to the 1973 renewal dates. The oral leases therefore were in effect for the respective years ending March 22, 1974 (Walsh) and May 29, 1974 (Sempek).

We have also had occasion to establish certain rules as to when a farm lease begins and ends, absent an express agreement of the parties to the contrary. In *Holtman v. Lallman*, 122 Neb. 183, 239 N.W. 820 (1931), we said: "Generally in this state, in the absence of any different agreement, a yearly lease of farm lands begins on March 1 and ends on February 28, of the succeeding year, and the rental becomes due at the expiration of the term." (Syllabus of the court.) Therefore, whether we consider the lease year in this case as beginning and ending in accordance with the period referred to in the lease originally executed by the parties for the year 1980-81, or simply the general law, it is clear that after the lease of 1980-81 expired on February 28, 1981, tenant continued on a year-to-year tenancy until owner gave proper notice 6 months prior to February 28 of any year in which the lease was to terminate. Owner concedes that he did not give notice for the 1981-82 year, but argues that he did give such

notice for the 1982-83 year. We believe that the evidence fails in this regard.

Turning first to the question of whether owner gave actual notice to tenant for the 1982-83 year, the evidence offered by owner in support of that position is a return of service executed by the Valley County sheriff reciting that on July 27 and July 29, 1981, he served a "Notice to Quit." We are not, however, provided with a copy of that "Notice to Quit" and do not know the terms thereof, or if, indeed, it was a proper notice directing tenant that the lease was to terminate at the expiration of the current lease period. On the other hand, the notice may have been nothing more than a 3-day notice to quit, the exact type of which the record reflects that owner served on tenant in 1978 when owner attempted once before to evict tenant. The county court for Valley County, Nebraska, in 1978, found that this 3-day notice was ineffective to terminate the lease, and denied relief to owner. In the instant case we are asked to guess whether the notice that was served was proper and adequate.

The fact that the sheriff, in 1981, served a paper entitled "Notice to Quit" and the fact that the paper was served upon Virginia and Elmer Parkos are not sufficient evidence to sustain the burden of proof imposed upon owner to prove that he gave proper notice to terminate. It is elementary that the burden of proof is upon the plaintiff to prove those things which constitute the necessary elements of his cause of action, and a defendant bears the burden of proving those things which constitute affirmative defenses. In *Empire State Building Co. v. Bryde*, 211 Neb. 184, 191-92, 318 N.W.2d 65, 69 (1982), we said: " ' "The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery." ' " Merely introducing in evidence a sheriff's return, without a copy of the notice and with no testimony as to what the notice said, does not satisfy the

plaintiff's burden. Evidence from which a conclusion can be arrived at only by guess or conjecture does not sustain one's burden of proof. See *Everett v. Hening*, 174 Neb. 573, 118 N.W.2d 639 (1962). We must therefore disregard the purported "notice."

Owner argues further, however, that even if the notice served by the sheriff was somehow ineffective, then the suit he filed against tenant in the county court for Valley County, Nebraska, on July 28, 1982, was sufficient and should be considered an appropriate notice to terminate. We need not decide whether the filing of a lawsuit seeking to have one declared a trespasser does in fact satisfy the requirement for giving notice to terminate a year-to-year farm lease, because the evidence, again, is insufficient to even raise the question. The record does not disclose that any summons was issued to or served on the tenants. Tenant testified that she was never served with summons, and there is nothing in the record to dispute or contradict her position. The suit was simply ineffective to serve as notice.

And, finally, owner argues that, in any event, on March 10, 1983, he entered into a farm lease with Al Moudry for this property for a period beginning March 1, 1983, and ending March 1, 1985, and that Moudry recorded the farm lease and entered into the lease without knowledge of the Parkos tenancy. While the evidence would dispute whether in fact Moudry did not know about the existence of the tenant, as a matter of law, one takes property subject to the rights of persons in possession. See *Gregory v. Pribbeno*, 143 Neb. 379, 9 N.W.2d 485 (1943). Where, as here, the evidence discloses that tenant had machinery on the property and was in possession of the property at the time that the lease with Moudry was executed, Moudry took subject to the rights of tenant, and his recording of a document does not deprive tenant in possession of any lawful rights she might otherwise possess.

This is an example of a relatively simple and

straightforward matter which has become complicated and confused. The owner is entitled to terminate a lease of his property with a tenant so long as he does it in accordance with law and in a timely fashion. This means that 6 months in advance of when the owner wishes to terminate the lease, he should prepare and send to the tenant a notice indicating that the owner intends to terminate the tenancy on February 28 and demands possession of his property. And if the tenant fails to give up possession, the owner may then file suit and, in attempting to prove the termination of the lease, can offer in evidence a copy of the notice supported by evidence of its service upon the tenant. Owner's having failed to do any of these things, the trial court was in error in declaring that tenant had no right to remain in possession. Unless and until the owner properly terminates the lease, the tenant may continue under a lease from year to year, subject of course to all of the continuing obligations of the tenant, including the requirement to pay the rent. For these reasons, therefore, the judgment of the trial court is reversed and the cause remanded with directions to declare that the lease of the property involved in this action is subject to the rights of the tenant, Virginia Parkos, until properly terminated.

Having thus disposed of the case, we need not consider the cross-appeal filed by Moudry, except to set aside that portion of the court's order which required Moudry to pay to tenant the cost of her seed; she is entitled instead to the proceeds of the planting.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF S.R., A CHILD UNDER THE AGE OF 18 YEARS.
STATE OF NEBRASKA, APPELLEE, V. D.R., APPELLEE. L.R. AND S.R., APPELLANTS.

352 N.W.2d 141

Filed June 1, 1984. No. 83-631.

1. **Parental Rights.** Public policy requires the severing of all family ties, including those of grandparents, with respect to a child whose parents have had their parental rights terminated.
2. **Parental Rights: Appeal and Error.** Grandparents of a child as to whom parental rights have been terminated do not have standing, as grandparents, to appeal from juvenile court orders for placement and custody of the child with appropriate entities for adoption.
3. **Juvenile Courts: Appeal and Error: Words and Phrases.** The right to appeal from orders of a county court sitting as a juvenile court, insofar as that right is vested in the child's custodian, is vested only in individuals or entities having legal custody of such a child, and not in those persons having only possession of the child.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Appeal dismissed.

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

Barry Waid, Deputy Scotts Bluff County Attorney, for appellee State.

Jerold Gilbert of Robert Gilbert Law Office, guardian ad litem.

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

GRANT, J.

On September 18, 1981, the county attorney of Scotts Bluff County filed a petition in the county court for that county, seeking an adjudication of that court, acting as a juvenile court, that S.R., born December 4, 1980, was a child within the provisions of Neb. Rev. Stat. § 43-202(2) (Reissue 1978)—a statute repealed effective July 1, 1982, and replaced gen-

erally by Neb. Rev. Stat. § 43-247 (Cum. Supp. 1982) —in that S.R. was a child who lacked proper parental care by reason of the fault or habits of D.R., S.R.'s mother, or her neglect or refusal to provide proper care for the child, or that S.R. was in a situation dangerous to life or limb, or injurious to his health or morals. The petition also alleged that S.R.'s father was unknown and that S.R., since his birth, had been cared for by his grandparents, L.R. and S.R.

After hearing on November 19, 1981, S.R. was adjudged to be a child within the meaning of § 43-202(2). Pending a dispositional hearing, S.R. was placed in the temporary custody of his grandparents, S.R. and L.R.

On July 1, 1982, a dispositional hearing was held. After the hearing the court continued the dispositional portion of the hearing and placed the care, custody, and control of S.R. in the Scotts Bluff County Division of Social Services, with placement of S.R. in the home of his grandparents, S.R. and L.R. The court ordered S.R.'s mother to abide by certain conditions, including orders to refrain from drug and alcohol use, to maintain stable housing, to attend parenting classes at the Child Family Resource Program, and to obtain regular outpatient treatment for alcoholism.

On February 2, 1983, the office of the Scotts Bluff County attorney filed a motion to terminate the parental rights of D.R. on the grounds that she had not abided by any of the conditions imposed on her by the court on July 1, 1982, and that she was unfit "by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which is seriously detrimental to the health, morals, and well being of the juvenile."

Pursuant to this motion, the court issued a summons to L.R. and S.R., as "the present custodians" of S.R., to appear personally at the hearing to be

held on March 10, 1983. D.R. was notified of this hearing also.

On April 8, 1983, the court held a hearing to terminate parental rights. S.R.'s guardian ad litem was present, D.R. was present with counsel, and L.R. was present with counsel. Evidence was adduced by the State and by D.R. No other evidence was presented. At the conclusion of the hearing the court ordered "that the parental rights of [D.R.] with regard to [S.R.] are terminated. It is further ordered that a dispositional hearing be held with regard to placement of [S.R.] for adoption on the 19th day of May, 1983." No appeal was taken by anyone from this order.

On May 19, 1983, the "dispositional hearing" was held. At the hearing were S.R.'s guardian ad litem, L.R. and her attorney, the attorney for D.R., and the State's attorney. Evidence was adduced by S.R.'s guardian ad litem and by counsel for L.R. On ruling of the court that D.R. had no further interest in the proceeding, since the parental rights termination order of April 8, 1983, had become final, D.R.'s counsel presented no evidence. The court took the matter under advisement. On June 13, 1983, the court entered its order finding "that it is in the best interests of the child, [S.R.], to be removed from the temporary custody of [L.R. and S.R.], the child's grandparents, and placed for adoption with the Nebraska Children's Home Society," and so ordering.

From this order of the county court sitting as a juvenile court, "the custodian of [S.R.], [L.R.]," timely appealed to the district court. In connection with this appeal L.R. signed an affidavit stating that she is "the grandmother and legal custodian of [S.R.]."

Hearing was held on this appeal in the district court for Scotts Bluff County on July 8, 1983. At this hearing, apparently through the inadvertence of all counsel, it appears that the district court was misinformed. At this time, Paul Rehurek was repre-

senting, as he stated, the grandmother, but we presume that the representation was also for S.R., the grandfather. The record is in confusion on this point. The appeal from county court to district court was taken on behalf of L.R. The notice of appeal to this court was filed for L.R. and S.R. The briefs submitted are on behalf of "Appellant [L.R.]." We are not informed that S.R. did not intend to pursue the appeal he requested by the notice of appeal herein, and if we were to believe that S.R. had ceased his efforts to appeal, L.R.'s position would be further weakened in that she could be promoting a home for S.R. wherein one of the custodians was not in favor of the relief sought.

At the July 8 district court hearing the following discussion was held:

> THE COURT: Who appealed?
>
> MR. GILBERT [guardian ad litem for S.R.]: Rehurek. The grandparents he represents, they were given temporary custody during the proceedings and the lower court awarded custody to the Department of Public Welfare for adoption.
>
> THE COURT: The appearances are State by Barry Waid, Deputy County Attorney, Guardian Ad Litem for [S.R.] is Jerold Gilbert, and he is present.
>
> Mr. Rehurek, who are your clients?
>
> MR. REHUREK: My client is [L.R.].
>
> THE COURT: That's the grandmother of the child?
>
> MR. REHUREK: That's correct, Your Honor, and custodian.
>
> THE COURT: And at one time custodian?
>
> MR. REHUREK: Well, she's been custodian for about two years now, year and a half.

No one corrected the impression conveyed to the court that L.R. was the "custodian" of S.R. Careful examination of the record discloses that that was not the fact. At the time of the hearing of October 8, 1981, temporary custody of S.R. was placed in the

Scotts Bluff County Division of Social Services with "placement in the home of the child's grandparents, Mr. & Mrs. [R.]." On November 19, 1981, the court ordered that, pending the dispositional hearings, "the child shall be in the temporary custody of his grandparents, [S.R. and L.R.]"; but at the next hearing on July 1, 1982, the court ordered that, pending the dispositional order, S.R. was to be "placed in the home of his grandparents, [S.R. and L.R.]," and specifically that "[t]he juvenile shall be in the care, custody and control of the Scotts Bluff County Division of Social Services . . . ." This order as to custody was reaffirmed on March 10, 1983.

On July 26, 1983, the district court found that "though the propriety of the termination of parental rights was not questioned by the appellant, the termination . . . was proper." The court further found that "placement for purposes of adoption is proper after such a termination and that the Nebraska Children's Home is a proper placement in order to facilitate the adoption," and that "the specific identity of the adoptive parents is not a question to be determined upon this appeal and is a question to be determined by the Court presiding over the adoption proceeding." The district court affirmed the judgment of the juvenile court and remanded the cause to the juvenile court to effectuate its order.

It is from this order that appellants, the grandparents of S.R., have timely appealed. Appellants assign as error the finding of the district court affirming the juvenile court's determination that the best interests of S.R. required removing him from the physical custody of the grandparents and placing S.R. in the physical custody of the Nebraska Children's Home Society for adoption. The briefs of the parties address that question. Appellant's brief states at 3 that "[t]he essential determination for this Court to make is what should be done with [S.R.] following the termination of his mother's parental rights."

We have examined the record in detail, and while we generally would agree with the district court and the juvenile court as to the findings as to the best interests of S.R., we do not reach that question. The threshold question presented is the standing of the grandparents to challenge that order. There was no appeal from the order terminating the parental rights of S.R.'s mother. We hold that the grandparents of S.R. have no standing to challenge the order of placement for adoption. The appeal must be dismissed and the cause remanded to the juvenile court to implement its order of June 13, 1983.

With regard to the question of the standing of the grandparents to challenge the order directing that S.R. be placed for adoption, we are given guidance by our holding in *In re Interest of Ditter*, 212 Neb. 855, 326 N.W.2d 675 (1982). In that case we held at 859, 326 N.W.2d at 677, "that once parental rights of a child have been terminated as to a natural parent, the natural parents of such parent whose rights have been terminated are not entitled to continue visitation as a matter of right." In reaching that conclusion we stated at 856-57, 326 N.W.2d at 676:

> [W]e believe that the general scheme regarding termination compels us to hold that once the natural parent's rights to a child have been terminated pursuant to the provisions of Neb. Rev. Stat. § 43-292 (Cum. Supp. 1982), formerly § 43-209 (Reissue 1978), the parents of the parent whose rights have been terminated likewise lose any legal right to visitation which might otherwise exist. To hold otherwise would seem to defeat the purpose of terminating parental rights.
>
> Under the provisions of Neb. Rev. Stat. § 43-293 (Cum. Supp. 1982) "An order terminating the parent-juvenile relationship shall divest the parent and juvenile of all legal rights, privileges, duties, and obligations with respect to each other and the parents shall have no rights of inheritance with respect to such juve-

> nile." It appears to us that if we are principally concerned with the best interests of the child (see, *In re Interest of J.L.L.*, 209 Neb. 76, 306 N.W.2d 175 (1981); *State v. A.H.*, 198 Neb. 444, 253 N.W.2d 283 (1977)), and by terminating parental rights we intend to divest any tie between the parent and child so that we may, as quickly as possible, find an adoptive family for the child and permit the child to begin anew, then little purpose would be served in continuing family ties between the grandparents and the child to be adopted. While that view is not unanimous throughout the country, it is the generally accepted view.

To give effect to that overall scheme it is mandatory to procedurally start the adoption proceeding by placing custody and placement of the juvenile with an appropriate entity that can oversee, and give legal consent to, the ultimate adoption. The grandparents in this case have no rights beyond the rights of any foster parents utilized to take physical possession of a juvenile while the courts attempt to, first, rehabilitate the natural parents so that they may become fit parents, and, second, if that rehabilitation effort fails and the natural parents' rights are terminated, to place the child in a home where the child may be adopted and thus regain parents to aid the child in his course through life. To argue custody as against adoption is to miss the whole point of the statutes providing for termination of parental rights and then the establishment of new parents through adoption in an effort to give the abandoned child real parents. We hold that grandparents, as such, do not have standing to interfere with the process of termination of parental rights and the adoptive procedures provided by our statutes. In so holding we do not in any way say or intimate that in appropriate circumstances and after appropriate legal consents and pursuant to proper court hearings and orders grandparents may not legally adopt their

grandchildren. See *Matter of Fox*, 567 P.2d 985 (Okla. 1977).

The question remains as to the grandparents' right to a statutory appeal, as "custodians" of S.R. Neb. Rev. Stat. § 24-541.01(3) (Cum. Supp. 1982) provides: "In cases of appeals from proceedings in the county court sitting as a juvenile court an appeal may be taken by: . . . (b) The child's parent, custodian, or guardian." It is clear that the child's custodian may appeal, but we now hold that "custodian" for purposes of § 24-541.01(3)(b) means legal custodian, that is, the person or entity given custody of a child by appropriate court order. Mere "placement with" a person, or "possession of" a child, does not constitute the persons given such placement or possession as custodians. The distinction between custody and possession has been recognized by our statutes in the area of juvenile law. As an example, in Neb. Rev. Stat. § 43-263 (Cum. Supp. 1982), the statutes require service of summons on "the person who has custody of the juvenile or with whom the juvenile may be staying . . . ."

The grandparents, appellants in this case, are not such custodians, and therefore do not have standing to prosecute this appeal either due to their status as natural grandparents of the child in question or as the persons having the physical possession of the child.

The appeal is dismissed and the cause returned to the district court for remand to the juvenile court for implementation of that court's order of June 13, 1983.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. MAX SCHACHTER, APPELLANT.

348 N.W.2d 911

Filed June 1, 1984. No. 83-652.

1. **Criminal Law: Ordinances: Proof.** A prosecution for disturbing the peace under a city ordinance for which there is a possibility of incarceration is a criminal offense, and, as such, the prosecutor has the burden of proving all elements of the charge beyond a reasonable doubt.
2. _____: _____: _____. When, in a criminal prosecution, all elements of the offense are not proven beyond a reasonable doubt, the defendant is entitled to a dismissal of the charge.

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

Max Schachter, pro se.

Leonard G. Tabor, for appellee.

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

PER CURIAM.

Appellant, Max Schachter, was convicted in the county court for Scotts Bluff County, Nebraska, of a violation of the city code of Gering, Nebraska, No. 6-1-9, disturbing the peace.

Unlike many such ordinances using only general language, the ordinance attempts to define the offense with some particularity. The complete section is as follows:

> It shall be unlawful for any person, wilfully, maliciously, intentionally or unnecessarily, to disturb the peace and quiet of another or of any neighborhood or family or religious congregation or other assembly by loud or unusual noises or indecent behavior or by offensive or unbecoming conduct or for any person to threaten, quarrel, fight or provoke an assault or battery or curse or swear or utter any obscene or vulgar or indecent language in the presence of another.

Max Schachter was assessed a fine of $10 and ordered to pay costs of $85.76. On appeal to the district court the judgment and sentence were affirmed. Schachter appeals pro se to this court.

While not entirely clear, the principal assignments of error seem to be (1) that there was not sufficient evidence to sustain the conviction, and (2) that the arrest was illegal.

A short discussion of the facts is necessary. It appears that appellant was, at least until a short time before the incident for which he was arrested, a member in good standing of the local chapter of the Veterans of Foreign Wars (VFW). A dispute arose between Schachter and some members of the chapter concerning the operation of the VFW hall. Schachter protested what he termed illegal gaming activities operating at the club. Shortly before the incident, Schachter was notified by letter that he was suspended as a member and was definitely persona non grata at the hall. The propriety of the letter of suspension by the commander of the post, rather than suspension by charges and trial by court-martial, is argued by the parties. We will not enter the thicket of the VFW suspension procedures, content to deal with those of our own in a reasonably lucid and, we hope, a consistent fashion.

On March 10, 1983, after his suspension, Schachter presented himself at the club and requested admittance. The commander informed Schachter that he had been suspended and that the suspension was still in effect. The commander asked Schachter to leave. Schachter refused to leave and two members of the Gering Police Department were called. On arrival the policemen were directed to a basement room, where they asked Schachter to come out to a hallway and discuss the matter with them.

Schachter complied with each request, and the conversation was conducted in a civil manner. All agree that voices were not raised nor any threats uttered. There is no evidence that Schachter used

obscenities or made vulgar statements. The reason for the arrest is well summarized in the complaint filed in the county court, that Max Schachter did "I. disturb the peace and quiet by refusing to leave the premises at VFW Hall when requested to do so by the manager and a Gering Police Officer." When placed under arrest, Schachter peacefully accompanied the officer.

It is elementary that the city had the burden to prove the elements of the charge filed beyond a reasonable doubt, since a possible incarceration could result from a conviction of the charges. See, *State v. Kolosseus*, 198 Neb. 404, 253 N.W.2d 157 (1977); *State v. Knoles*, 199 Neb. 211, 256 N.W.2d 873 (1977); *State v. Coomes*, 170 Neb. 298, 102 N.W.2d 454 (1960).

It also appears that the ordinance defines how a person may disturb the peace in Gering, Nebraska. One may do so by (1) loud or unusual noises, or (2) indecent behavior, or (3) offensive or unbecoming conduct, or (4) threatening, quarreling, or fighting, or (5) provoking an assault or battery, or (6) cursing or swearing, or (7) uttering any obscene or vulgar or indecent language in the presence of another.

It is not disputed that Schachter did not commit the offense in the manner specified by (1), (2), (4), (5), (6), or (7). By a process of elimination, if the charge can be sustained, it must be that the dignified assertion of one's right to remain in a club of which one is a member (albeit suspended—correctly or incorrectly) is "offensive or unbecoming."

It is fairly obvious that Schachter may have appropriately been charged with failing to obey a *lawful* order of a police officer, or even trespassing. We are not prepared to say that a refusal to obey an order of a policeman, made to the policeman, alone is somehow offensive or unbecoming. Therefore, we need not address the related question of whether the terms "offensive or unbecoming" are not so vague as to be constitutionally suspect.

The city of Gering having failed to prove the ele-

ments of the offense, the conviction of the appellant must be reversed and the charge dismissed.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. ROBERT E. WILLIAMS, APPELLANT.

352 N.W.2d 538

Filed June 8, 1984. No. 82-448.

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

Dennis R. Keefe, Lancaster County Public Defender, Richard L. Goos, Lancaster County Special Deputy Public Defender, and Michael D. Gooch, and Patrick W. Healey and Douglas L. Kluender, for appellant.

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

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

PER CURIAM.

Robert E. Williams appeals the order of the district court for Lancaster County, Nebraska, denying relief under the post conviction act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). A jury found Williams guilty of the first degree murders of Catherine M. Brooks and of Patricia A. McGarry and one count of first degree sexual assault. The crimes occurred on August 10, 1977. Williams was sentenced to death for each of the murders and to an indeterminate sentence for sexual assault. See *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). We have reviewed the record, conclude the trial court was correct in denying post conviction relief, and affirm the judgment of the district court.

> "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."

State v. Hochstein, 216 Neb. 515, 517, 344 N.W.2d 469, 472 (1984).

Although Williams has assigned 33 errors allegedly committed by the trial court, Williams' claims of error fall into three general categories—the sentencing process, selection and instruction of the jury, and assistance of counsel. These errors assigned could have been raised on direct appeal. Therefore, in order to grant post conviction relief to Williams, the court must find that on account of the errors alleged the judgment of conviction would be "void or voidable under the state or federal Constitution." *State v. Hochstein*, *supra* at 517, 344 N.W.2d at 472.

Williams claims the statutory sentencing procedure was not followed in his case, because the sentencing

court considered nonstatutory aggravating circumstances, namely, Williams' violent activities in Iowa and Minnesota after the murders and sexual assault in Nebraska. The records and files in this case clearly show that the sentencing court did not consider any nonstatutory aggravating circumstances, when the sentencing court expressly stated:

> [T]he Court has not considered the evidence of the crimes alleged to have been committed by the defendant subsequent to the crimes charged in the Information, in any of the statutory aggravating circumstances herein, except as the same may relate to the intent, sanity, motive, or absence of mistake or accident in the particular acts charged.

Williams' claim concerning nonstatutory aggravating circumstances has no basis in the record.

Williams contends that the use of a presentence report in the sentencing process violated his constitutional rights, for example, due process, confrontation, self-incrimination, and assistance of counsel.

Neb. Rev. Stat. § 29-2521 (Reissue 1979) authorizes a trial court to receive and consider any evidence which is deemed relevant to sentencing in a capital case. Neb. Rev. Stat. § 29-2261 (Reissue 1979) authorizes a presentence investigation in felony cases for the purpose of sentencing and is not restricted to noncapital cases. Williams' argument concerning use of a presentence report is similar to the argument made in *State v. Reeves*, 216 Neb. 206, 221, 344 N.W.2d 433, 444 (1984), and is disposed of by the opinion in *Reeves*:

> Defendant asserts that Neb. Rev. Stat. §§ 29-2519 et seq. (Reissue 1979) set out the exclusive sentencing procedure in homicide cases and that because these statutes do not specifically mandate the use of a presentence investigation, the sentencing panel was in error in doing so. If defendant's interpretation was correct, a trial court could make use of a presen-

tence investigation for a conviction of a Class IV felony such as pandering, but may not consider a presentence investigation after a first degree murder conviction. It is readily apparent that this assignment is without merit. As stated in *State v. Anderson and Hochstein*, *supra* at 72, 296 N.W.2d at 453: "[T]he traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence." See, also, *State v. Stranghoener*, 208 Neb. 598, 304 N.W.2d 679 (1981); *State v. Kramer*, 203 Neb. 658, 279 N.W.2d 634 (1979); *State v. Holzapfel*, 192 Neb. 672, 223 N.W.2d 670 (1974).

Before the sentencing hearing, Williams and his attorney reviewed the presentence report. At the sentencing hearing Williams' attorney made objections concerning various aspects of the presentence report. It is, therefore, obvious that the sentencing court fully complied with the requirement of due process regarding Williams' presentence report. See *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). While overruling Williams' objections regarding the presentence report, the sentencing court assured Williams that any irrelevant information contained in the presentence investigation would be disregarded: "The Court can screen out those matters which are not relevant to the sentence of the Court." The sentencing court sustained Williams' objection to the use of his 66-page statement concerning Williams' violent activities in Iowa and Minnesota after the murders and sexual assault in Nebraska. Under the circumstances, use of the presentence report at the sentencing hearing did not violate Williams' right to confrontation or any other constitutional right required to be protected in the course of a sentencing hearing. See *State v. Reeves*, *supra*. No constitutional rights of Williams were violated by use of the presentence report.

Williams contends that Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979), "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence," is unconstitutionally vague. "Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979), as interpreted by the decisions of this court, is not unconstitutionally vague." (Syllabus of the court.) *State v. Reeves, supra.* Williams makes much of the fact that the sentencing court found and stated that the murders were "totally bereft of any regard for human life," whereas the phrase "totally *and senselessly* bereft of any regard for human life" has been previously used by this court in reference to § 29-2523(1)(d). (Emphasis supplied.) (Syllabus of the court.) See, *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977); *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982). In Williams' case the sentencing court found beyond a reasonable doubt that each of the murders committed by Williams "was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." Subsection (1)(d) requires a court to find by evidence beyond a reasonable doubt that the aggravating circumstance exists in the light of the statutory standard. The word "senselessly," utilized by the court in *Holtan* and *Moore*, was illustrative language for construing the statutory standard imposed by subsection (1)(d). If Williams' acts were bereft of any regard for human life, such acts were simultaneously and senselessly bereft of any regard for human life. When the court specifically found and expressly stated that the murders were committed under the aggravating circumstance described in § 29-2523(1)(d), the sentencing court did not commit error by omitting the word "senselessly" in characterizing the murders committed by Williams.

Williams' contention that the trial court should have required the State to prove the absence of any

mitigating circumstances is disposed by *State v. Moore*, *supra* at 480, 316 N.W.2d at 46: "If there were any mitigating factors other than those shown, the defendant is in the best position to know and reveal those factors." Whether mitigating factors existed was a question at the sentencing hearing and a matter for a direct appeal rather than proceedings for post conviction relief. Williams' contention regarding the absence of mitigating circumstances is without merit.

Williams argues that his constitutional rights were violated because a jury did not participate in his sentencing. "Jury sentencing in capital cases is not constitutionally required." (Syllabus of the court.) *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). See, also, *State v. Moore*, *supra*. There is no merit in Williams' argument that a jury should have participated in the sentencing process.

Williams asserts that the sentencing court "overlapped" statutory aggravating circumstances subsection (1)(b), "The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime," and subsection (1)(e), "At the time the murder was committed, the offender also committed another murder." Williams relies on *State v. Stewart*, 197 Neb. 497, 522, 250 N.W.2d 849, 864 (1977), "that subsections (1)(b) and (1)(c) are separate and distinct circumstances and should be construed so as not to overlap." The record before us demonstrates that the aggravating circumstances described by subsections (1)(b) and (e) were not comprised of the same facts and did not overlap. The aggravating circumstance of subsection (1)(b) existed because "the murder of Catherine M. Brooks was committed in an apparent effort to conceal the identity of the perpetrator of a crime," while the aggravating circumstance of subsection (1)(e) existed because Williams killed *both* Catherine M. Brooks and Patricia A. McGarry "at or about the same time." The

statutory aggravating circumstances indicated in subsections (1)(b) and (e) were distinct from each other. The existence of the aggravating circumstance described in subsection (1)(b) had no mutuality to the aggravating circumstance described in subsection (1)(e). Such independent existence of aggravating circumstances in this case prevents an overlapping of the statutory aggravating circumstances. Williams' claim of overlapping aggravating circumstances has no merit.

Williams next contends that the two death sentences constitute cruel and unusual punishment. Williams cites no authority for this proposition. This court has previously determined that the death penalty is not unconstitutional in all circumstances as constituting cruel and unusual punishment. See *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982). See, also, *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). Consequently, imposition of the death penalty for each of the contemporaneous murders occurring on August 10, 1977, was not error on the part of the sentencing court.

Williams next contends that § 29-2523(1)(a), "The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity," is unconstitutionally vague. This issue was raised and resolved adversely to Williams in his direct appeal. See *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). Furthermore, this question was answered in *State v. Rust*, 197 Neb. 528, 535, 250 N.W.2d 867, 873 (1977), "[T]he definition of aggravating circumstance (a) is clear." See, also, *State v. Moore*, *supra*; *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981).

Williams asserts that this court applied Neb. Rev. Stat. §§ 29-2519 et seq. (Reissue 1979) in an ex post

facto manner. At the time the homicides were committed, Nebraska law prohibited murder in the first degree (see Neb. Rev. Stat. § 28-401 (Reissue 1975); cf. Neb. Rev. Stat. § 28-303 (Reissue 1979)) and permitted the death penalty as punishment on conviction of the crime of murder in the first degree. The offense charged and the penalty permissible upon conviction existed at all times pertinent to disposition of the charges against Williams. The standards imposed by 1978 Neb. Laws, L.B. 711 (§§ 29-2521.01 et seq.), did not enhance the penalty which might attach upon conviction of first degree murder. Williams' claim of ex post facto application of §§ 29-2519 et seq. is without merit.

Williams contends that the comparative analysis employed by this court, as required by L.B. 711 (§§ 29-2521.01 et seq.), must include a review of all penalties imposed for convictions of criminal homicide. This issue was decided adversely to Williams in his direct appeal. See *State v. Williams*, *supra*. Because the post conviction act cannot be used to "secure a further review of issues already litigated," this assignment of error is also without merit. See, *State v. Peery*, 208 Neb. 639, 640, 305 N.W.2d 354, 355 (1981); *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980).

Williams alleges the sentencing court restricted and prevented him from presenting nonstatutory mitigating circumstances of an unspecified nature. All evidence offered by Williams at the sentencing hearing was admitted. This assignment of error is without merit.

The second general category of error alleged by Williams relates to jury selection and instructions.

Williams contends voir dire examination by "death qualifying" the jury leads to an unconstitutional, conviction-prone jury and argues the death qualification procedure for voir dire examination of a jury, as approved by the U.S. Supreme Court in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770,

20 L. Ed. 2d 776 (1968), cannot be applied in first degree murder trials in Nebraska. In *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), we said:

> 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 the defendant contended that the questioning led to a conviction-prone jury.

(Syllabus of the court.) The voir dire examination of prospective jurors did not violate any constitutional right of Williams, and Williams' assignment of error in this regard cannot be sustained.

The trial court refused to instruct the jury about the consequence of a verdict of not guilty by reason of insanity. Williams claims such refusal on the part of the trial court constitutes error. This question was raised and disposed of in Williams' direct appeal. See *State v. Williams*, *supra*. See *State v. Reitenbaugh*, 204 Neb. 583, 284 N.W.2d 19 (1979): "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." (Syllabus of the court.) See, also, *State v. Reeves*, *supra*. This assignment of error regarding the refused instruction is without merit.

The third and last category of alleged error claimed by Williams relates to assistance and effectiveness of counsel.

At trial, on direct appeal, and during the post conviction proceedings, Williams was represented by members of the Lancaster County public defender's office. Williams contends that the trial court in the post conviction proceedings should have granted the public defender's motion to withdraw so that counsel outside the public defender's office might be substituted for more effective pursuit of Williams' claim regarding ineffective counsel on the part of the

public defender. Although the public defender's motion was not granted, counsel outside the public defender's office has been appointed for the purpose of this appeal. Error, if any, regarding counsel in the post conviction proceedings has been cured by appointment of substitute counsel outside the public defender's office for the purpose of Williams' appeal in the post conviction proceedings. Williams' assignment of error regarding assistance of counsel in the proceedings before the district court is overruled.

Williams claims ineffective appellate counsel, because all possible issues on appeal were not argued. Williams believes he has a constitutional right to control issues to be raised on appeal and claims that he has not waived such right to control appellate issues.

In *Jones v. Barnes*, ____ U.S. ____, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983), the U.S. Supreme Court held that an indigent defendant has no constitutional right to control the matters argued by counsel on appeal.

> Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years, stated: "One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one." Jackson, *Ad-*

> *vocacy Before the Supreme Court*, 25 Temple L.Q. 115, 119 (1951). Justice Jackson's observation echoes the advice of countless advocates before him and since. An authoritative work on appellate practice observes: "Most cases present only one, two, or three significant questions. . . . Usually, . . . if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones." R. Stern, Appellate Practice in the United States 266 (1981).
>
> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts—often to as little as 15 minutes—and when page limits on briefs are widely imposed. See, *e.g.*, Fed.Rules App.Proc. 28(g); McKinney's 1982 New York Rules of Court §§ 670.17(g)(2), 670.22. . . . A brief that raises every colorable issue runs the risk of burying good arguments—those that, in the words of the great advocate John W. Davis, "go for the jugular," Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 897 (1940)—in a verbal mound made up of strong and weak contentions. See generally, *e.g.*, Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 Sw.L.J. 801 (1976).

Jones v. Barnes, *supra* at ____, 103 S. Ct. at 3312-13. "Absent exceptional circumstances, [the defendant] is bound by the tactics used by his counsel at trial and on appeal." *Id.* at ____, 103 S. Ct. at 3316-17 (Brennan and Marshall, JJ., dissenting), citing *Henry v. Mississippi*, 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1963).

There is no doubt that a waiver has occurred, but the question to be determined is whether such waiver demonstrates ineffectiveness on the part of Williams' appellate counsel. We agree with the opinion expressed by the U.S. Supreme Court in *Jones v. Barnes*, *supra*, where the defendant asserted that his counsel was ineffective because the defendant was not permitted to select the issues to be argued for appellate review of the defendant's conviction. In the case before us Williams proclaims 13 self-styled "things" to be considered in appellate review of his conviction and sentence during his direct appeal. Reviewing the 33 errors now raised in this appeal involving Williams' claim for post conviction relief, and, further, reviewing the 12 assignments of error presented by Williams in his direct appeal, we conclude that Williams' counsel has selectively and effectively argued all material questions pertinent to Williams' conviction and sentence.

Regarding Williams' general contention that all counsel have been ineffective, we recognize that the test of effective assistance of counsel requires that a defendant's attorney perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area and that counsel conscientiously protect the interests of his client. See *State v. Beans*, 212 Neb. 31, 321 N.W.2d 72 (1982). Based on the record before us, we are satisfied that Williams had effective assistance of counsel in every proceeding against or involving him.

If an examination of the files and records discloses that a defendant is not entitled to relief, the trial court may overrule a motion for post conviction relief without an evidentiary hearing. See, *State v. Woods*, 180 Neb. 282, 142 N.W.2d 339 (1966); *State v. Reyes*, 192 Neb. 153, 219 N.W.2d 238 (1974); *State v. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982). Findings of a district court in denying post conviction relief will not be disturbed on appeal unless they are clearly erroneous. *State v. Paulson*, *supra*;

Marteney v. State, 210 Neb. 172, 313 N.W.2d 449 (1981). The record before us does not disclose any clearly erroneous finding by the district court in denying post conviction relief to Williams. The district court did not commit error in denying an evidentiary hearing before overruling Williams' motion for post conviction relief. The judgment of the district court is affirmed in all respects.

AFFIRMED.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

With the exception of that portion of the majority opinion which affirms the imposition of the death penalty, I concur in all that the majority has said, and believe that, but for the issue involving the imposition of the death penalty, Williams' claim for post conviction relief is without merit. However, because of my view regarding the imposition of the death penalty and its constitutional implications, as more particularly set out in my dissent in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), I must again dissent from that portion of the majority opinion which, by affirming the trial court's denial of post conviction relief, affirmed the imposition of the death penalty in this case.

LARRY CREASON, APPELLEE, V. GARY MYERS, APPELLANT.

350 N.W.2d 526

Filed June 8, 1984. No. 83-039.

1. **Verdicts: Demurrer: Appeal and Error.** A defendant's verdict cures error, if any, in a court's failure to dismiss a pleaded action vulnerable to a demurrer.
2. **Causes of Action: Alienation of Affections.** A cause of action for alienation of affections still exists in the State of Nebraska.

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

Gwyer Grimminger and Lynn B. Lamberty of Grimminger, Milner and Lamberty, for appellant.

Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellee.

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

SHANAHAN, J.

Larry Creason's amended petition against Gary Myers contained two causes of action—the first for alienation of affections and the second for criminal conversation. Myers demurred, claiming the amended petition did not state facts sufficient to constitute a cause of action. After the district court overruled Myers' demurrer, there was a trial in which the jury returned a verdict in favor of Creason for alienation of affections and a verdict in favor of Myers regarding criminal conversation. We affirm.

Myers' only assignment of error concerns his overruled demurrer. Myers contends that alienation of affections and criminal conversation as causes of action should be judicially abolished and recovery denied for such causes of action.

The jury's verdict in this case absolved Myers from liability for criminal conversation. "The right of review is restricted to persons or parties aggrieved by the decision below." 4 C.J.S. *Appeal & Error* § 183 at 554 (1957). In overruling Myers' demurrer regarding criminal conversation, the trial court's error, if any, was rendered harmless by the verdict favorable to Myers on the cause of action for criminal conversation. See, *Walser v. Missouri Pac. R. Co.*, 6 S.W.2d 632 (Mo. App. 1928); *Dennis v. Smith*, 186 Kan. 539, 352 P.2d 405 (1960); cf. *Prell v. Murphy*, 178 Neb. 278, 133 N.W.2d 5 (1965) (overruling a defendant's motion for directed verdict cannot be claimed as error on appeal when there is a defendant's verdict). The rationale for the rule,

namely, a defendant's verdict cures error, if any, in a court's failure to dismiss a pleaded action vulnerable to a demurrer, is the fact that the jury has produced what was sought by the defendant's pleading (no recovery by the plaintiff), and, therefore, the defendant has sustained no prejudice as a result of the court's ruling on the demurrer.

Because the district court's ruling on Myers' demurrer concerning criminal conversation has not resulted in harm, the absence of prejudice or harm to Myers prevents reversal of any ruling on the demurrer. Consequently, we do not decide any question about the existence of criminal conversation as a cause of action in Nebraska. See, however, *Kremer v. Black*, 201 Neb. 467, 268 N.W.2d 582 (1978).

Before we address the remaining question, whether alienation of affections should be retained as a cause of action in Nebraska, a review of the nature of marriage under Nebraska law and the elements of alienation of affection is helpful.

Marriage results in a status. *University of Michigan v. McGuckin*, 64 Neb. 300, 89 N.W. 778 (1902); *Willits v. Willits*, 76 Neb. 228, 107 N.W. 379 (1906); *Collins v. Hoag & Rollins*, 122 Neb. 805, 241 N.W. 766 (1932). Status means a legal relationship. See, *Sun Oil Company v. Guidry*, 99 So. 2d 424 (La. App. 1957); *Calhoun v. Bryant et al.*, 28 S.D. 266, 133 N.W. 266 (1911).

Alienation of affections consists of a third person's wrongful conduct intruding upon or interfering with the marital relationship between husband and wife and causing a loss of consortium. See, *Baltzly v. Gruenig*, 127 Neb. 520, 256 N.W. 4 (1934); *Sonneman v. Atkinson*, 121 Neb. 752, 238 N.W. 532 (1931); *Larsen v. Larsen*, 115 Neb. 601, 213 N.W. 971 (1927); *Hansen v. Strohschein*, 178 Neb. 367, 133 N.W.2d 598 (1965); *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 61 N.W. 577 (1895).

"Consortium" means comfort, society, love, and

protection. See, *Sowle v. Sowle*, 115 Neb. 795, 215 N.W. 122 (1927); *Larsen v. Larsen*, *supra*.

The cause of action for alienation of affections is available to either spouse—wife (*Hodgkinson v. Hodgkinson*, *supra*) or husband (*Sonneman v. Atkinson*, *supra*). Alienation of affections does not necessarily involve an amorous intruder. See *Lane v. Spence*, 70 Neb. 204, 97 N.W. 299 (1903) (husband's suit against his father-in-law for alienation of the affections of the plaintiff's wife); *Hodgkinson v. Hodgkinson*, *supra* (wife's suit against her husband's parents, who induced plaintiff's husband to abandon the plaintiff).

Myers urges us to abolish the common-law right to recover for alienation of affections, and directs our attention to states in which such recovery has been barred. Although legislatures in some states have abolished the right to recover for alienation of affections, we find that only two courts have nullified alienation of affections as a cause of action. See, *Wyman v. Wallace*, 94 Wash. 2d 99, 615 P.2d 452 (1980); *Fundermann v. Mickelson*, 304 N.W.2d 790 (Iowa 1981). We also note that the Supreme Court of South Dakota in August 1981 preserved the common-law right to sue for alienation of affections. See *Hunt v. Hunt*, 309 N.W.2d 818 (S.D. 1981). Such rather sparse judicial activity affecting the status of alienation of affections as a cause of action cannot be characterized as the advent of an abolitionary avalanche burying alienation of affections. Although an appreciable number of legislatures have abolished the right to recover for alienation of affections, we nevertheless realize that alienation of affections, as a court-originated cause of action, must be evaluated by this court rather than deferred for legislative action. Cf. *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968) (court abolition of immunity for governmental subdivisions and local public bodies regarding tort liability for ownership, use, and operation of motor vehicles).

Suggested abolition of alienation of affections, as expressed by the court in *Wyman v. Wallace*, *supra*, is based on the following: (1) The underlying assumption of preserving marital harmony is erroneous; (2) Abuse of litigation to recover damages; (3) Difficult standards for assessing damages; and (4) A successful plaintiff's apparent "forced sale" of a spouse's affections.

Denouncing preservation of marital harmony as a reason to retain the action for alienation of affections is based on a somewhat cynical argument, that is, there could be no alienation if the spouses had mutual affection in an otherwise shaky marriage. This argument falls under the weight of its own self-contradiction, namely, acknowledgment that a marital relationship does indeed exist but in a condition less than optimal. Because there is an existing relationship, such relationship deserves protection under our system of law lest we find ourselves acknowledging a right—the relationship—and injury to that right without affording a remedy. See *Heck v. Schupp*, 394 Ill. 296, 68 N.E.2d 464 (1946). Prudence dictates that marital stability bear upon damages and not bar recovery. A marriage teetering on the brink of domestic disaster should nevertheless be spared a shove over the precipice.

A feared abuse of litigation involving alienation of affections is dispelled by examination of our adversarial process. "First, the very purpose of courts is to separate the just from the unjust causes; secondly, if the courts are to be closed against actions for . . . alienation of affections on the ground that some suits may be brought in bad faith, the same reason would close the door against litigants in all kinds of suits, for in every kind of litigation some suits are brought in bad faith; the very purpose of courts is to defeat unjust prosecutions and to secure the rights of parties in just prosecutions . . . ." *Wilder v. Reno*, 43 F. Supp. 727, 729 (M.D. Pa. 1942). The foregoing statement from *Wilder* applies not

only to an action for alienation of affections but equally as well to other types of actions too numerous to mention. Excluding the present case, we note that there have been reported in this court 30 cases involving alienation of affections. That relatively small number of cases rebuts any assertion that alienation of affections is a frequently abused cause of action. Accordingly, we are confident that our adversarial process, comprised of juries, judges, and counsel, will provide adequate safeguards for the rights of litigants involved in a suit for alienation of affections, and we will continue to depend on that adversarial process to ferret out the nonmeritorious or unjust claim.

A jury's difficulty in assessing damages is no justification for abolishing the cause of action for alienation of affections. In *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973), this court recognized that damages for the death of a minor child should be extended to include the loss of the society, comfort, and companionship of the child, and we entrusted juries with the responsibility of ascertaining such damages. There has been no hue and cry that juries have run amuck in awarding damages in cases involving a minor child's death. It would be infinite irony that we recognize damages for the death of a child who is a part of a home but deny damages for the death of the marriage of spouses who have made the home. Where the legal right to damages exists, computation of damages with mathematical certainty is not required. See, *Delp v. Laier*, 205 Neb. 417, 288 N.W.2d 265 (1980); *Robert E. McKee General Con., Inc. v. Insurance Co.*, 269 F.2d 195 (10th Cir. 1959). The size of an award for alienation of affections has been an issue in eight cases reported in this court, and in three of those eight cases we have said the award was excessive. Those figures need no further comment. It is the height of hypocrisy that a wrongdoer complain about inaccuracies or uncertainty in a jury system. One

whose actions hurt another is in an extremely poor position to demand precision in measuring damages, and will have to bear whatever risk of uncertainty exists in our system of settling differences. See, *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544 (1931); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652 (1946); *Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310 (7th Cir. 1982); *Cook Associates, Inc. v. Warnick*, 664 P.2d 1161 (Utah 1983). Although critics may assail a jury as a weakness of our system, perhaps that alleged weakness is the very strength of our adversarial process. Today's sophisticated juries, under proper instruction, are eminently qualified with a wealth of experience to determine appropriate damages in a case of alienation of affections.

Those who characterize recovery in an action for alienation of affections as a "forced sale of the spouse's affections" can do so only by reverting to an archaic view that marriage results in a property right in a spouse rather than a personal relationship with a human being. Whatever may have been the musty origin of the cause of action for alienation of affections, today's special and substantial relationship through marriage demands a remedy for an injury to that relationship.

It is manifest and undeniable that the people of Nebraska still hold the marital relationship in high regard. Such public esteem is demonstrated in Rule 505 of the Nebraska Evidence Rules, Neb. Rev. Stat. § 27-505 (Reissue 1979), where the marital relationship affects the availability of evidence when one spouse is called to testify against the other. The Nebraska Evidence Rules have been in effect as a part of Nebraska statutes since 1975. By 1984 Neb. Laws, L.B. 696, enacted by the Eighty-eighth Legislature, Second Session, and approved by the Governor on February 24, 1984, Rule 505(3)(b) of the Nebraska Evidence Rules provides that interspousal privilege

may not be claimed "[i]n any case brought by either husband or wife against a third person relating to their marriage relationship or the interruption of or interference with such relationship." This statutory provision permits only one conclusion—the people of Nebraska still recognize the relationship of husband and wife as something of value to be protected by and in the courts.

As Wilde observed, a cynic is one "who knows the price of everything, and the value of nothing." We believe the marital relationship has value as a special and substantial right recognized as a part of the public policy of Nebraska to be protected in the courts of this state. We hold that a cause of action for alienation of affections still exists in Nebraska.

The judgment of the district court in all respects is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority's opinion in this case. I believe that if, indeed, a cause of action for alienation of affections ever had its place in the judicial process, that time has now long since passed and the cause of action should be eliminated. My basis for reaching this conclusion is, to a large extent, based upon the very same arguments made by the majority for permitting its continued existence. The majority suggests that "[i]t is manifest and undeniable that the people of Nebraska still hold the marital relationship in high regard." While some of the people of Nebraska may still hold marriage in high regard, for a large number their behavior decries such statements. In 1982, for example, there were 14,081 marriages entered into in the State of Nebraska. During that same period of time, there were 6,508 dissolutions of marriage granted by our courts. To therefore suggest that the cause of action for alienation of affections should exist solely on the basis of the sanctity of marriage is to simply disregard reality. It is a nice thought, but

simply not very realistic in light of the facts. While I completely agree with the majority as to how the public should view marriage, and I would support any program intended to ensure the continuation of marriage, I simply must recognize the facts as they exist.

The problems which a cause of action for alienation of affections can create in a society in which many outside influences affect the way we live are numerous. The majority has properly noted that a cause of action for alienation of affections does not necessarily involve an amorous intruder. See, *Lane v. Spence*, 70 Neb. 204, 97 N.W. 299 (1903); *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 61 N.W. 577 (1895). One could easily envision a situation in which an employer may be sued for alienation of affections because one of the spouses believes that the other one has left the marriage to seek a career at the inducement of the employer. With nearly half of all marriages ending in divorce, the potential for alleged causes of action for alienation of affections is, in my mind, unlimited and has no relation to the realities of life. People are motivated today to leave marriages for reasons of their own and not because of some inducement by another. The independence of spouses today perhaps plays the greatest role in loss of affection and the destruction of a marriage. To encourage independence and freedom among the sexes and then to permit one of the spouses to sue because of the spouse's inability to hold the marriage together seems to me to be totally inconsistent.

Nor am I unmindful of the fact, noted by the majority, that in most jurisdictions where the cause of action has been abolished, it has been done so by the legislature. However, where, as here, the cause of action is one created by the court, it is one which should be abolished by the court, in the same fashion as we abolished interspousal immunity. See *Imig v. March*, 203 Neb. 537, 279 N.W.2d 382 (1979). As ob-

served by the Iowa court in *Fundermann v. Mickelson*, 304 N.W.2d 790, 794 (Iowa 1981),

> In the last analysis we think the action should be abolished because spousal love is not property which is subject to theft. We do not abolish the action because defendants in such suits, need or deserve our protection. We certainly do not do so because of any changing views on promiscuous sexual conduct. It is merely and simply because the plaintiffs in such suits do not deserve to recover for the loss of or injury to "property" which they do not, and cannot, own.

I believe that the cause of action should be abolished, and the sooner the better.

HAVELOCK BANK OF LINCOLN, A CORPORATION, APPELLEE, V. WESTERN SURETY COMPANY, A SOUTH DAKOTA CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, ROGER SUGHROUE, AND UNITED AUTO SALES, INC., A CORPORATION, APPELLEES, FRED C. EBERHARDT, JR., ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

UNITED AUTO SALES, INC., DOING BUSINESS AS CLASSIC COACH, LTD., ET AL., APPELLEES, V. ROGER SUGHROUE, APPELLANT.

352 N.W.2d 855

Filed June 8, 1984. No. 83-192.

1. **Declaratory Judgments: Appeal and Error.** This court has treated the determination of factual issues in a declaratory judgment action which would otherwise be an action at law in the same manner as if a jury had been waived. The findings of the trial court therefore have the effect of the verdict of a jury and will not be set aside unless clearly wrong.
2. **Banks and Banking: Bonds.** A bank, if it can prove a loss occasioned by a statutory motor vehicle dealer's breach of one of the conditions outlined in Neb. Rev. Stat. § 60-1419 (Reissue 1978), is entitled to recover on the dealer's statutory bond.
3. **Attorney Fees.** It is the general practice in this state to allow the

recovery of attorney fees and expenses only in those cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery.

4. _____. Attorney fees can be allowed upon recovery on a statutory motor vehicle dealer's bond.
5. **Contracts.** A written contract that is clear and unambiguous is not subject to interpretation or construction by this court.
6. **Uniform Commercial Code: Revocation.** Under Neb. U.C.C. § 2-608 (Reissue 1980), a buyer may revoke acceptance of a lot or commercial goods only if there is some defect or nonconformity in the article that substantially impairs its value.
7. **Parties: Causes of Action: Stipulations.** A party who voluntarily agrees by stipulation to consolidate several causes of action cannot later be heard to complain of the ramifications of such an agreement.

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

William L. Walker and Earl Ludlam of Walker & Ludlam, for appellant Western Surety Company.

Ronald Rosenberg of Rosenberg & Taute, for appellant Roger Sughroue.

Edward F. Carter, Jr., and Dana Baker of Barney, Carter & Johnson, P.C., for appellee Havelock Bank.

Crosby, Guenzel, Davis, Kessner & Kuester, for appellees United Auto Sales and Carol Norquist.

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

WHITE, J.

This appeal involves two cases which were consolidated for both trial in the district court for Lancaster County, Nebraska, and for the purpose of this appeal. The first case is a declaratory judgment action brought by appellee Havelock Bank of Lincoln (Bank), a corporation, against Western Surety Company (Surety), a South Dakota corporation, Roger Sughroue (Sughroue), and United Auto Sales, Inc. (UAS), a corporation. The purpose of the action was to enforce the provisions of the statutory bond

of UAS, a licensed new and used car dealer, upon which Surety was the surety. The case also included a third-party complaint in which Surety was permitted to file against third-party defendants, Fred C. Eberhardt, Jr., Christa M. Eberhardt, and Carol Norquist, individually and as the personal representative of the estate of Clayton E. Norquist, deceased, for subrogation and indemnity under an indemnity agreement for the statutory bond. The second case, brought by UAS, doing business as Classic Coach, Ltd., and Fred C. Eberhardt, Jr., against Sughroue, is an action to recover the sale price of an automobile.

The district court held: (1) That Surety was liable, under its bond to the Bank, for $14,500, plus interest and costs, under Neb. Rev. Stat. § 60-1419 (Reissue 1978). (2) That the third-party defendants were liable to Surety under their indemnity agreement in the same amount as Surety was liable to the Bank. (3) That Sughroue did not revoke his acceptance of the automobile and was consequently liable to UAS in the amount of $24,500, plus interest. Surety appeals the decision of the first case; Sughroue appeals the decision of the second case. We affirm.

At the outset it is best to note that while the two cases have some common parties, they are totally independent of each other and should not have been consolidated. For some inscrutable reason the parties agreed to do so, however. Clarity requires that we discuss the cases separately.

In the first case, *Havelock Bank of Lincoln v. Western Surety Company*, the record discloses that in January 1979 the Bank entered into a security agreement and floor-plan agreement with UAS through Fred C. Eberhardt, Jr., the president of UAS. Pursuant to the floor-plan agreement, the Bank provided funds to UAS through Eberhardt. The funds were evidenced by note and trust receipts transferring title and right of possession of certain

automobiles to the Bank under the floor-plan agreement. The certificates of title for the floor-plan automobiles were also held by the Bank as security.

At the time of trial on August 2, 1982, the principal amount due the Bank from UAS was $14,500, with interest accrued from July 17, 1981, at the rate of 12 percent per annum. This indebtedness was upon a note No. 23506, and was secured by the security agreement and certificate of title to a 1979 Classic Coach automobile, VIN 1H57U7K584825 (Car I).

UAS was a licensed new and used car dealer in Lancaster County, Nebraska. Pursuant to the statutory requirements for obtaining a motor vehicle dealer's license, UAS had obtained the required statutory bond from Surety. See § 60-1419. On November 7, 1979, while in California for an auto show, Eberhardt met Sughroue in Glendale, California. Sughroue indicated that he was interested in purchasing Car I, and the sale was consummated on the same day by Sughroue's giving Eberhardt a $14,500 check. Eberhardt drafted all but the signature of Sughroue's check and made it payable to "Classic Coach." Eberhardt conceded that Classic Coach, Ltd., never became an operating entity. Sughroue took possession of the automobile. When asked about the title to Car I, Eberhardt told Sughroue that he would deliver the title to Sughroue when the check cleared the bank. Eberhardt admitted that he did not inform Sughroue that the automobile was subject to a security claim of the Bank, saying he told Sughroue the title was "in our Bank" without saying anything more, although Eberhardt was aware that the automobile was floor-planned with the Bank and that the Bank held title to the automobile. On November 9, 1979, Eberhardt deposited the check in a newly opened checking account in Glendale, California, in the name of Fred C. Eberhardt, Jr.

On November 26, 1979, Eberhardt received a receipt in the mail from the bank in Glendale advising

him that the funds from Sughroue's account had been collected and deposited to his account. However, Eberhardt made no arrangements to deliver the title to Sughroue. The money was not paid to the Bank and the Bank continued to hold title to the automobile. In early 1980 Eberhardt telephoned the Bank and informed them of the sale of Car I. When asked about the proceeds from the sale, Eberhardt indicated that a second automobile was to be sold and the Bank would be paid after the sale of that car. The Bank never received payment for Car I, and it still holds the title. Sughroue has physical possession of Car I.

Surety's four assignments of error can be summarized as follows: (1) The trial court erred in entering judgment against Surety on the basis that the Bank suffered a loss due to fraud on the part of UAS. (2) The district court erred in not allowing Surety to recover attorney fees on the judgment taken against the indemnitors (third-party defendants) as provided in the indemnity agreement.

The applicable scope of review for the purpose of the first case was recently set forth in *Quinn v. Godfather's Investments*, 213 Neb. 665, 330 N.W.2d 921 (1983), citing *Larutan Corp. v. Magnolia Homes Manuf. Co.*, 190 Neb. 425, 433, 209 N.W.2d 177, 182 (1973), wherein we stated that

> this court has treated the determination of factual issues in a declaratory judgment action which would otherwise be an action at law in the same manner as if a jury had been waived. The findings of the trial court therefore have the effect of the verdict of a jury and will not be set aside unless clearly wrong.

The Bank contends, and the district court found, that Surety was liable to the Bank on its statutory bond because the Bank came within the provisions of § 60-1419, which provides in pertinent part:

> Applicants for a motor vehicle dealer's license . . . shall, at the time of making application, fur-

> nish a corporate surety bond . . . in the penal sum of twenty thousand dollars . . . on a form to be prescribed by the Attorney General of the State of Nebraska. The bond shall provide (1) that the applicant will faithfully perform all the terms and conditions of said license, (2) that the licensed dealer will fully indemnify any person or other dealer by reason of any loss suffered because of (a) the substitution of any motor vehicle or trailer other than the one selected by the purchaser, (b) the dealer's failure to deliver to the purchaser a clear and marketable title, (c) the dealer's misappropriation of any funds belonging to the purchaser, (d) any alteration on the part of the dealer so as to deceive the purchaser as to the year model of any motor vehicle or trailer, and (e) any false and fraudulent representations or deceitful practices whatever in representing any motor vehicle or trailer, and (3) that the motor vehicle, motorcycle, motor vehicle auction, or trailer dealer or wholesaler shall well, truly, and faithfully comply with all the provisions of his license and the acts of the Legislature relating thereto. The aggregate liability of the surety shall in no event exceed the penalty of said bond.

The statutory bond in question contained many of the same conditions as set forth in § 60-1419.

This court has previously held, and Surety does not dispute, that the Bank, if it can prove a loss caused by UAS's breach of one of the conditions in § 60-1419, is entitled to recover. See *Sun Ins. Co. v. Aetna Ins. Co.*, 169 Neb. 94, 98 N.W.2d 692 (1959).

Surety relies on *Sterner v. Lehmanowsky*, 173 Neb. 401, 113 N.W.2d 588 (1962), for the proposition that UAS's failure to pay the Bank the proceeds of Car I does not amount to willful fraud as contemplated by § 60-1419(2)(e). However correct Surety's position may be, we need not pass on that issue because § 60-1419 sets out other grounds upon which the

Bank may rely to recover under the dealer's bond, specifically § 60-1419(2)(c), the dealer's misappropriation of any funds belonging to the purchaser. It is also apparent from the lower court's order that the court, in finding for the Bank, relied on several of the conditions outlined in § 60-1419(2).

It is undisputed that Sughroue purchased Car I for $14,500 and that Fred C. Eberhardt, Jr., knew the Bank had a security interest in the car which required him to remit to the Bank the balance of the secured loan before he could obtain the title from the Bank. It is also undisputed that UAS never paid the balance due and that Sughroue never received the title to Car I. In order to deliver title to Sughroue, UAS would have to have paid the Bank $14,500. Because the Bank was never paid, title remains in it. At this point the Bank had at least two options open to it. First, it could attempt repossession of Car I from Sughroue, a bona fide purchaser for value. Second, the Bank could attempt, as it did, to recoup its loss under § 60-1419. The $14,500 check received by Eberhardt was, obviously, funds belonging to a purchaser. Proper use of those funds would have entailed payment to the Bank in order to obtain title for the purchaser. UAS, in violation of the security agreement, failed to do so; thus, the Bank suffered a $14,500 loss by reason of this misappropriation of the purchaser's funds. The district court was correct in its determination that the Bank suffered a loss within the meaning of § 60-1419.

Surety next contends the district court erred in not allowing it attorney fees on the judgment obtained against the indemnitors, as provided by the indemnity agreement.

It is the general practice in this state to allow the recovery of attorney fees and expenses only in those cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery. *Anderson Mktg. Associates v. Roberts*, 215 Neb. 670, 340 N.W.2d 384 (1983). There is no

statutory provision providing for attorney fees in an indemnity agreement. Surety's reliance on *Beshaler v. Helberg*, 187 Neb. 584, 193 N.W.2d 261 (1971), is misplaced. In *Beshaler* the recovery was pursuant to a surety bond, not an indemnity agreement. However, the Bank is entitled to an attorney fee in this court of $750. See, Neb. Rev. Stat. § 44-359 (Reissue 1978); *Beshaler v. Helberg, supra*; *Sun Ins. Co. v. Aetna Ins. Co., supra.*

With respect to the second action, *United Auto Sales, Inc. v. Sughroue*, we find that this suit also concerns an automobile purchased by Sughroue from UAS. On November 26, 1979, Sughroue and UAS, through Fred C. Eberhardt, Jr., entered into a written contract which was signed by Sughroue for the purchase of a 1979 Classic Coach, VIN 1HK57H5401969 (Car II). Sughroue took possession of Car II on the same day, falsely informing Eberhardt that he had left his checkbook at his son's apartment and would return with the check for $24,500, the purchase price of Car II. Sughroue did not pay for Car II, but subsequently drove the car to his home in Yuma, Arizona. Clayton Norquist, a corporate officer of UAS, had possession of the title for Car II. Approximately 3 weeks after signing the purchase agreement, Sughroue had Car II returned to an acquaintance of Eberhardt's in California. UAS brought suit for the purchase price of Car II. The district court found that Car II was accepted by Sughroue and that there was no effective revocation of acceptance. The district court entered judgment for $24,500, plus interest, in favor of UAS. The court further ordered that when Sughroue has paid in full the judgment of the second action, he is to receive the titles to both Car I and Car II. Sughroue appeals, contending that the court erred in not finding that he had revoked acceptance under Neb. U.C.C. § 2-608 (Reissue 1980). Sughroue further contends that the district court erred in ordering the title of Car I held in escrow until he

satisfied the judgment concerning Car II. We affirm.

It was undisputed that Sughroue signed a purchase agreement for Car II and that he drove that car for approximately 3 weeks before, without consent of UAS, he decided to have the car returned to Eberhardt's acquaintance in California. Sughroue contends that the contract for Car II was conditional upon some final decision to purchase the car. The contract, however, refutes this contention. The contract is clear and unambiguous, and as such is not subject to interpretation or construction by this court. *Kansas-Nebraska Nat. Gas Co. v. Swanson Bros.*, 215 Neb. 398, 338 N.W.2d 774 (1983).

Sughroue next relies on § 2-608, claiming that he had effectively revoked his acceptance of Car II. Section 2-608 states in part that

> (1) The buyer may revoke his acceptance of a lot or commercial unit *whose nonconformity substantially impairs its value to him* if he has accepted it
>
> (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured . . . .
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it . . . .

(Emphasis supplied.)

A prerequisite to any revocation of acceptance under § 2-608 is that the buyer must, at minimum, prove some defect or nonconformity in the article that substantially impairs its value. *Countryside Mobile Homes of Lincoln, Inc. v. Schade*, 204 Neb. 209, 281 N.W.2d 756 (1979); *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981). The record in the instant case is completely devoid of such proof, and as such Sughroue is not afforded protection under § 2-608. The district court held, and we agree, that "any secret reservations or schemes

of Defendant's are irrelevant" as to whether Car II was accepted by Sughroue.

Sughroue next contends that the district court erred in holding both titles of Car I and Car II in escrow until Sughroue fully satisfied the judgment against him in the second action. Sughroue contends that the actions are not sufficiently linked to allow the district court to condition delivery of Car I's title upon the payment for Car II.

As we noted at the outset, these cases should not have been, but were, consolidated for purposes of trial. Neb. Rev. Stat. §§ 25-701 to 25-704 (Reissue 1979) set out the relevant provisions applicable to a consolidation of several causes of action. Section 25-701(1) allows consolidation when "[t]he same transaction or transactions [are] connected with the same subject of action." Sughroue, having voluntarily agreed to consolidate the cases, cannot now be heard to complain of the ramifications of such an agreement. See, 1 C.J.S. *Actions* § 115 (1936); *Bryant Heating v. United States Nat. Bank*, 216 Neb. 107, 342 N.W.2d 191 (1983).

The judgment of the district court being correct, it is affirmed.

AFFIRMED.

STRELSA LEE LANGNESS, APPELLEE, V. THE "O" STREET CARPET SHOP, INC., A NEBRASKA CORPORATION, APPELLEE, HERBERT J. FRIEDMAN, APPELLANT.

353 N.W.2d 709

Filed June 8, 1984. No. 83-215.

1. **Parties: Rules of the Supreme Court.** A party to a case who has been served with a copy of the notice of appeal and who is not an appellant is an appellee in this court.
2. **Accounting: Equity: Appeal and Error.** An action for an accounting between partners is grounded in equity; as such, the scope of our review is de novo on the record.
3. **Partnerships.** A partner who contributes only services to the part-

nership is not deemed to have made a capital contribution to the partnership such as to require capital repayment upon dissolution unless the parties have agreed to the contrary.

4. _____. Amounts owing to partners to reimburse them for capital contributions are liabilities of the partnership and take priority over amounts owing to partners in respect to profits.
5. **Accord and Satisfaction.** A condition that a check be considered as full satisfaction must either be recited upon the check or otherwise declared.
6. **Partnerships.** Upon dissolution each partner impliedly consents that his copartners receive their appropriate shares of the partnership assets; anything one partner receives over his appropriate share is deemed to have been obtained without the consent of the other partners.
7. **Rules of the Supreme Court: Records.** Once filed with the clerk of the district court, the bill of exceptions as prepared by the reporter becomes the official bill of exceptions in the case and shall not be altered or marked in any fashion by any person.
8. **Records: Appeal and Error.** The bill of exceptions is the only vehicle for bringing evidence to this court.
9. **Rules of the Supreme Court: Records.** A document entitled "Bill of Exceptions," but which is not prepared in accordance with this court's rules, is not such a bill.
10. **Records: Appeal and Error.** The filing of an improperly prepared bill of exceptions may result in a case being treated as if no bill had been filed.

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

Earl J. Witthoff of Perry, Perry, Witthoff, Guthery, Haase, and Gessford, P.C., for appellant.

Rodney J. Rehm of Rehm & Bartling, for appellee Langness.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an action for an accounting among partners. Defendant-appellant, Herbert J. Friedman, appeals from the decree adjudging that he and a second partner jointly and severally owe the third partner, plaintiff-appellee Strelsa Lee Langness, the sum of $7,290.42. We affirm as modified.

On August 23, 1973, Friedman, The "O" Street Carpet Shop, Inc., through its president, Gerald Neva, and Langness formed a partnership known as NFL Associates. At that time "O" Street Carpet contributed to the partnership a $56,000 purchase agreement on a piece of rental property valued at $65,000. Langness contributed $14,000 in cash, and Friedman contributed his legal services, upon which no value was placed by the articles of partnership. Of Langness' $14,000, $8,000 went to "O" Street Carpet and $6,000 was used for the downpayment on the purchase agreement and to otherwise fund the partnership operations. The articles of partnership provided that Langness was to receive payments of $116.66 per month. Neva executed a personal guarantee by which he agreed to make the $116.66 monthly payments to Langness if the income of the partnership proved insufficient.

Langness never paid income tax on the monthly payments, nor did the partnership take expense deductions for those payments on its tax return. The partnership's accountant treated the payments as a return to Langness of her capital.

In October of 1978 the partnership sold the rental property which was the subject of the purchase agreement contributed by "O" Street Carpet, and realized $52,001.20 on that transaction. The partnership was wound up; whereupon Neva and Friedman calculated the final distribution of the $48,824.41 in assets remaining, after payment of the $3,176.79 in debts owed by the partnership, to be:

Langness	$16,792.01
"O" Street Carpet	26,808.58
Friedman	5,223.82

Friedman delivered a check for $16,792.01 to Langness, which, although unhappy about the distribution, she cashed.

Langness then brought this action, claiming that she is entitled to a larger share of the partnership assets. The district court found that her final share of

the partnership should be $24,082.43, and entered judgment against both Friedman and "O" Street Carpet for $7,290.42, declaring them to be jointly and severally liable thereon.

Since only Friedman appealed from the trial court's decree, "O" Street Carpet, having been served with a copy of the notice of appeal, is an appellee herein. Neb. Ct. R. 1C (Rev. 1983).

Friedman's assignments of error are that the trial court erred in (1) misconstruing the partnership agreement; (2) determining the amount of each partner's capital contributions; (3) finding that the payments made to the plaintiff during the existence of the partnership constituted a return on capital; (4) finding that there had been no accord and satisfaction between the parties; and (5) finding that Friedman and "O" Street Carpet were jointly and severally liable.

Friedman correctly characterizes an action for an accounting between partners to be one grounded in equity. Accordingly, as in all matters of equity, the scope of our review is de novo on the record. *Badran v. Bertrand*, 214 Neb. 413, 334 N.W.2d 184 (1983); *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982); *Barthuly v. Barthuly*, 192 Neb. 610, 223 N.W.2d 429 (1974).

Friedman's first three assignments of error are best analyzed by reviewing the capital contributions made by the parties, the nature of the payments made to Langness, and the distributions made to each of the three partners upon the winding up of the partnership.

As stated earlier, at the time the partnership was formed, "O" Street Carpet contributed a $56,000 purchase agreement on property with a fair market value of $65,000, for a contribution of property worth $9,000. However, $8,000 of the $14,000 contributed by Langness went to "O" Street Carpet, thereby reducing its capital contribution at that time to $1,000. During the life of the partnership, "O" Street Carpet

contributed an additional $4,005 in capital. Thus, "O" Street Carpet's total capital contribution is $5,005.

Friedman contributed no money or property. It is the general rule that a partner who contributes only services to the partnership is not deemed to have made a capital contribution to the partnership such as to require capital repayment upon dissolution unless the parties have agreed to the contrary. *Badran v. Bertrand*, *supra*; *Baum v. McBride*, 152 Neb. 152, 40 N.W.2d 649 (1950); 68 C.J.S. *Partnership* § 391 (1950).

Friedman argues that since, by the agreement, he was given 10 percent of the partnership, he was entitled to be credited with a like amount of the partnership capital upon dissolution. While the agreement specifically states that Friedman is entitled to 10 percent of the partnership profits, it mentions nothing concerning his rights to partnership capital upon dissolution. We see nothing in the agreement which indicates the general rule is not to apply. Therefore, Friedman made no capital contribution to the venture.

We next address the nature of the payments made to Langness. The articles of partnership called for the partnership to pay to Langness $116.66 per month for the life of the partnership. While this provision of the articles is found under a section labeled "Distribution of Profits and Losses," the agreement does not state whether it is to be treated as an advance on profits or a capital withdrawal. The personal guarantee executed by Neva labeled it a "return on the $14,000.00 investment." Both accountants who testified at the trial stated that the payments were treated as capital withdrawals. Langness treated the payments as such when preparing her tax returns. The tax returns of the partnership did not treat them as expenses. Although Friedman argues that they should be treated as advances against Langness' future profits, we do not see any

reason to do so when the partnership itself treated them otherwise.

From our review of exhibit 27, a ledger of the payments made by checks issued by NFL Associates, we find that Langness was issued 47 checks for $116.66, 3 checks for $233.32, and 1 check for $117.32. We calculate her total capital withdrawals as $6,300.30, a figure different than that urged upon us by the parties or found by the district court. This $6,300.30 reduced her capital in the partnership to $7,699.70.

We now reach the question of the appropriate amounts of the distribution to each of the partners. The partnership agreement provides: "Upon the dissolution of the partnership after settlement of all of it's [sic] debts, liabilities, and other obligations, the partners are entitled to all remaining assets of the partnership in equal proportions in liquidation of all of their respective interests in the partnership." Amounts owing to partners to reimburse them for capital contributions are liabilities of the partnership and take priority over amounts owing to partners in respect to profits. Neb. Rev. Stat. § 67-340 (Reissue 1981).

Of the $48,824.41 in assets remaining after payment of the partnership's debts, $7,699.70 is to be paid to Langness for her capital contribution and $5,005 to "O" Street Carpet for its capital contribution. The remaining $36,119.71 is to be divided according to the partners' share in the profits, which is on a 45-45-10 basis. This calculation requires $16,253.87 to be paid to Langness for profit, the same amount to "O" Street Carpet, and $3,611.97 to Friedman. At the time of the winding up of the partnership, the distributions should have been as follows:

	Return of Capital	+	Share of Profits	=	Total
Langness	$ 7,699.70		$16,253.87		$23,953.57
"O" Street Carpet	5,005.00		16,253.87		21,258.87
Friedman	0.00		3,611.97		3,611.97
	$12,704.70		$36,119.71		$48,824.41

Since Langness was paid only $16,792.01, she is entitled to an additional $7,161.56.

Friedman argues in his fourth assignment of error that no matter what Langness might have been entitled to receive, his delivery and Langness' acceptance and cashing of the check for $16,792.01 discharged the debt owing by the partnership to Langness. Friedman cites language from *Growers Cattle Credit Corp. v. Swanson*, 184 Neb. 612, 169 N.W.2d 692 (1969), which he believes supports his position that there was an accord and satisfaction.

> Here applicable is a well-settled principle of Nebraska law that where a certain sum of money is tendered by a debtor to a creditor on condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the creditor must either refuse the tender or accept it as made subject to the condition. If *he accepts* it, *he accepts the condition also, notwithstanding any protest he may make to the contrary.*

Id. at 615-16, 169 N.W.2d at 695.

The problem with Friedman's contention is that neither Langness' nor Friedman's testimony establishes that the check was offered only upon the condition that it be considered as full satisfaction. Friedman asks that we infer such a condition. We think the better rule is that such condition must either be recited upon the check or otherwise declared. See *Fremont Foundry & Machine Co. v. Norton*, 3 Neb. (Unoff.) 804, 92 N.W. 1058 (1902).

In his fifth assignment Friedman argues that the district court erred in finding that he and "O" Street Carpet were jointly and severally liable to Langness. We agree with Friedman that his liability should be no more than the excess he received over his proper share. While it is true, as Langness contends, that partners are in a fiduciary relationship, that proposition does not lead to the imposition of automatic joint liability of the defendant partners to the plaintiff partner for debts owing by the partnership to the

plaintiff partner. Neb. Rev. Stat. § 67-321(1) (Reissue 1981) provides:

> (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

Upon dissolution each partner impliedly consents that his copartners receive their appropriate shares of the partnership assets. Anything one partner receives over his appropriate share is obtained without the consent of the other partners. Therefore, Friedman holds any amount he received over his appropriate share in trust for the partnership, which in turn owes it to Langness. The same is true for the excess amount received by "O" Street Carpet. We note that this is not a case where it was pled or proved that Friedman and "O" Street Carpet engaged in a concerted fraud upon their partner Langness.

Therefore, the judgment of the district court is modified as follows: Langness shall have judgment against and recover from Friedman the sum of $1,611.85, the difference between the amount he received, $5,223.82, and the amount he should have received, $3,611.97. Further, Langness shall have judgment against and recover from "O" Street Carpet the amount of $5,549.71, the difference between the amount it received, $26,808.58, and the amount it should have received, $21,258.87.

Lastly, we call attention to a matter which regrettably, to the disadvantage of the court, is widespread and occurs with increasing frequency. The bill of exceptions filed in this case was not prepared in accordance with our rules. It is, among other things, in violation of Neb. Ct. R. 5F(3) (Rev. 1983), which provides in pertinent part as follows:

> Exhibits are to be marked in numerical order,

> irrespective of the party producing them. Ordinarily, exhibits or papers contained in the bill of exceptions should be placed in the record immediately following where they are ruled on by the court. If exhibits are frequently referred to in the testimony, they should be inserted in the record in such a manner as to be easily removed; for instance, by placing them in an attached envelope. If the exhibits are of such character or so numerous that to insert them in any volume containing testimony would make the volume cumbersome and difficult to handle while reading, then such exhibits should be contained in a separate volume. If exhibits are of such character that they cannot be inserted in a bound volume, then they should separately accompany the record. Whether in separate volumes or separately accompanying the record, all exhibits should be properly identified as part of the record in the reporter's certificate. Counsel shall substitute photographs or mechanical drawings and descriptions for any large or cumbersome exhibits where such would fairly present such exhibits to the appellate court.

The bill of exceptions certifies that it contains "Exhibit Nos. 1 to 25, and 27," all in a separate volume. That "separate volume" is an envelope into which these exhibits have been placed in an unbound condition. Since there is an exhibit 25 among them, we assume the reporters (in this case there were, for reasons unknown to us, two) intended the certificate to read Exhibit Nos. 1 to 25, inclusive, and 27. Had we found no exhibit 25, the certificate as phrased would have led us to wonder whether such an exhibit should have been a part of the bill.

As presented to us, there was no exhibit 2, the articles of partnership, contained in the bill. It took the special effort of our clerk's office to locate and obtain a facsimile of that exhibit, which counsel advised at oral argument was a true and accurate sub-

stitution for the actual exhibit. This omission delayed the court's review of the evidence and preparation for hearing the oral arguments. The fact that exhibit 2 may have been in the bill of exceptions when it left the reporters' hands is no answer, for if the exhibit had been placed and bound as the above-cited rule contemplates, it is less likely that it would have been removed from the bill and misplaced during the period the bill was being used by counsel to prepare their briefs. On the other hand, counsel are reminded that once filed with the clerk of the district court, the bill of exceptions as prepared by the reporter becomes the official bill of exceptions in the case and is not to be altered or marked in any fashion by any person. Neb. Ct. R. 5C(5) (Rev. 1983).

In addition to the above-described problems, the fact that multiple exhibits were placed in a single envelope unattached to any volume of the bill of exceptions permitted them to arrive here in helter-skelter condition, thereby again unnecessarily complicating our review and adding to the time our reporter's office must spend working with the record.

Documents of the number and type involved here are neither of such character nor so numerous as to justify the expedient of placing them loosely in an envelope rather than physically attaching them to a bound volume of the bill of exceptions. Indeed, it is a rare document which is of such a character as to justify departure from the usual placement contemplated by the rule of this court, and an even rarer one which justifies its not being physically attached as described previously.

We call attention to the fact that appellant is responsible for filing the bill of exceptions in this court and that the bill of exceptions is the only vehicle for bringing evidence to this court. *Flood v. Keller*, 214 Neb. 797, 336 N.W.2d 549 (1983); *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983); *Hanson v. Han-*

son, 198 Neb. 675, 254 N.W.2d 699 (1977); Neb. Ct. R. 5C(5) (Rev. 1983). No matter how entitled, a document which does not comply with our rules as to the preparation of bills of exceptions is not such a bill. In the future the filing of an improperly prepared bill of exceptions may result in a case being treated as if no bill had been filed. The fact that this court's staff undertook to search out a missing piece of evidence is not to be taken as an indication that such will be done in the future.

The cause is remanded to the trial court for modification of its judgment in accordance with this opinion.

AFFIRMED AS MODIFIED.

KRIVOSHA, C.J., not participating.

PETER J. McGINN, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

352 N.W.2d 545

Filed June 8, 1984. No. 83-405.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** 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.
2. **Municipal Corporations: Negligence: Liability.** A municipal corporation is ordinarily liable for injuries to travelers resulting from the fall of a tree growing on or overhanging the street or way, provided it had actual or constructive notice of its dangerous condition.
3. **Ordinances: Negligence: Evidence.** Violation of an ordinance may be evidence of negligence.
4. **Constructive Knowledge: Words and Phrases.** Constructive knowledge is that knowledge which one would possess if through the exercise of reasonable care he would have known such facts.
5. **Negligence.** Negligence must be measured against the particular set of facts and circumstances present in each case.

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

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

John P. Miller of Miller Carpenter Rowen Fitzgerald & Coe, P.C., and Warren C. Schrempp and Peter J. Hoagland of Schrempp, Hoagland & Gray, and Melvin M. Belli, for appellee.

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

PER CURIAM.

This is an action under the Nebraska Political Subdivisions Tort Claims Act against the City of Omaha, Nebraska, to recover damages for the personal injuries sustained by the plaintiff, Peter J. McGinn, when a silver maple tree located upon a city right-of-way fell upon his car during a severe storm. Following judgment for McGinn, the city appeals.

On June 12, 1980, at about 4:15 p.m., the plaintiff was driving in the vicinity of 32d and Center Streets. It was raining very hard and the wind was blowing. McGinn testified that he could barely see the stop lights. He decided to park, as he feared he might "rear end" somebody or that he would be "rear ended." As he slowed down to park on 32d Street, he saw a tree fall in front of his car. His only thought at that moment was to back up and park, but before he was able to do so he blacked out. A limb from a silver maple tree had fallen upon his car, rendering McGinn unconscious and pinning him inside the vehicle. He suffered severe injuries resulting in his present state of quadriplegia. Photographs taken after the accident revealed that the trunk of the tree was extensively decayed.

The petition alleged that the city was negligent in failing to inspect the tree for disease, decay, and structural defects, and in violating a city ordinance making it unlawful for a landowner to permit a dangerous tree to stand. The answer alleged that McGinn was contributorily negligent and that the

storm, which could not have been reasonably anticipated, caused the tree to fall. The trial court rendered judgment in favor of McGinn and awarded $5 million in damages.

On appeal the city assigns as error the findings of the trial court that the city knew or should have known of the condition of the tree and that the city failed to properly maintain the tree.

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. *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984); *Studley v. School Dist. No. 38*, 210 Neb. 669, 316 N.W.2d 603 (1982).

It is generally recognized that governmental units are liable under ordinary negligence principles for injuries or damages which result from a tree falling onto a public road from land in possession of the governmental unit. The rule is stated in *Pietz v. City of Oskaloosa*, 250 Iowa 374, 377, 92 N.W.2d 577, 579 (1958):

> The duty and liability of the City would seem to be the same as to any faulty street condition, i.e., reasonable care and diligence. 25 Am. Jur., Highways, section 490, states the rule to be, "A municipal * * * corporation * * * is ordinarily liable for injuries to travelers resulting from the fall of a tree growing on or overhanging the street or way, * * * provided it had actual or constructive notice of the dangerous condition and failed to take proper measures to remove."

The Nebraska rule with regard to street conditions is set forth in *Doht v. Village of Walthill*, 207 Neb. 377, 379, 299 N.W.2d 177, 178 (1980): "The Village is not an insurer of the safety of those using its public ways, but has the duty to use reasonable diligence to keep sidewalks in reasonably safe condition for the use of persons passing over them." See, also, Neb. Rev. Stat. §§ 23-2410 and 23-2411 (Reissue 1977).

McGinn appears to rely upon the following ordi-

nance as imposing a form of strict liability upon the city:

> It shall be unlawful for any property owner or occupant to permit to stand upon his property any dead tree, any dead part of a tree, any stump, any totally diseased or structurally weak tree, any structurally weak part of a tree, or any healthy tree or part of such tree which is a menace to public safety or which endangers any building or other property.

Omaha Mun. Code § 37-11 (1980).

McGinn has not shown that this ordinance is applicable to the city. At most, a violation of the ordinance would be evidence of negligence. *Whitcomb v. State Fed. Sav. & Loan Assn.*, 190 Neb. 26, 205 N.W.2d 652 (1973).

There was no evidence that the city had actual knowledge of the condition of the tree. Therefore, the plaintiff was required to prove that the city had constructive notice or knowledge of the condition of the tree. Constructive knowledge is that knowledge which one would possess if through the exercise of reasonable care he would have known such facts. Black's Law Dictionary (5th ed. 1979). See, *Acom v. Ziegler*, 102 Neb. 410, 167 N.W. 461 (1918); *Commonwealth v. Callebs*, 381 S.W.2d 623 (Ky. App. 1964). Under the plaintiff's theory of the case he had the burden of proving that if the city had carried out a reasonable inspection of the tree, it would have known of the defect in the tree and removed it. See, *Mosher v. State of New York*, 191 Misc. 804, 77 N.Y.S.2d 643 (1948); *Hosford v. Doherty*, 198 Neb. 211, 252 N.W.2d 154 (1977).

The uncontroverted evidence shows that the City of Omaha had instituted an inspection program to detect and remove hazardous trees from the city's streets. The department entrusted with the program was headed by a city forester and staffed by 26 field personnel and 1 secretary.

The department is responsible for the care and

management of all trees and woody ornamentals in the city, including programs for tree removal, maintenance, and planting. The area encompassed consists of the 90 to 95 square miles which make up the city and the 6,000 acres of parkland contained therein.

There are 59,610 street trees which are under the care of the department, as well as 153,000 trees which are located in city parks. The department also handles about 10,000 calls a year from owners of trees on private property who are seeking advice with regard to their trees or who seek to complain about hazardous trees.

An annual inspection program to check for hazardous trees is carried out each fall by five members of the department staff who are trained in forestry. Each member is given a map and assigned to an area of the city. Every street in the city is included in the program and inspection is made on a "street-by-street," "tree-by-tree" basis. Staffers check the trees for signs of a hazard while driving by in their cars. If problems are spotted, the inspector will get out of his car and walk around the tree, examining it for defects. Trees requiring removal are marked. A file card is prepared for that tree, and the tree is then listed as part of the contract package for tree removal. Such trees are cut down sometime during a period from November through March.

The members of the department also look for hazardous trees on a continuing basis throughout the year as they are performing their various field duties. Dr. Terry Tattar, a professor of plant pathology at the University of Massachusetts, testified that he was aware of few cities which had an inspection program such as Omaha's, and stated that Omaha's program was one of the best he had seen.

In June through October 1979 a census was taken of all street and park trees. The census was conducted by paid, part-time helpers trained and as-

sisted by the assistant city forester. The number of trees in each area of the city was recorded in a plat book. Trees were listed by groups, indicating approximate size, species, and condition.

The trial court found that the "windshield inspections" carried out by the city were a rather cursory attempt to fulfill its duty to inspect. A review of the evidence discloses no evidence that the inspection program conducted by the city was negligently designed or that the city was negligent as a matter of law in the way it carried out the program.

Dr. Harold McNabb, a forest pathologist employed by Iowa State University, testified as an expert witness for the plaintiff. He testified that silver maple trees are particularly susceptible to disease and decay and that, in his opinion, the city should implement a program to remove every silver maple 50 years of age or older. He estimated the age of the tree involved in the present case to be more than 50 years. He also testified that each silver maple should be examined every 5 years and that 15 to 30 minutes should be spent examining each silver maple. McNabb knew of no city in the United States with such a program of inspection. At one point Dr. McNabb testified that half of the city's street shade trees should be removed.

There are 17,500 silver maples on the streets of Omaha, which are valued as shade trees by residents of the city. The city forester estimated that 10,000 of these silver maples are over 50 years of age. The city forester stated that it would take six men working full time approximately 1 year to spend just 12 minutes examining each silver maple. The city forester and the city's expert witness, Dr. Tattar, each testified that the programs suggested by Dr. McNabb were unreasonable and that a 5-year interval between inspections was too long. Dr. McNabb conceded that the cities of Ames, Iowa, and Kansas City, Missouri, do not have hazardous tree inspection programs.

Negligence must be measured against the particular set of facts and circumstances present in each case. *Miles v. School Dist. No. 138*, 204 Neb. 105, 281 N.W.2d 396 (1979). Where the reasonable character of an actor's conduct is in question, its utility is to be weighed against the magnitude of the risk involved. *Anderson v. Davis*, 183 Neb. 326, 160 N.W.2d 94 (1968). In determining whether an action constitutes negligence, the custom of the industry may be considered; however, the custom employed by the industry is not determinative of due care. See *Tite v. Omaha Coliseum Corporation*, 144 Neb. 22, 12 N.W.2d 90 (1943). In that case at 28, 12 N.W.2d at 94, we quoted the rule expressed in *Texas & Pacific Ry. Co. v. Behymer*, 189 U.S. 468, 23 S. Ct. 622, 47 L. Ed. 905 (1903): " 'What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.' "

A program whereby the city would be required to cut down 10,000 or more silver maples, or as much as half of all shade trees in the city, simply because of age would impose a great burden on the city and would deprive the residents of the city of many valued, and healthy, shade trees. We conclude that this is an unreasonable standard and that it would be unreasonable to require the city to conduct lengthy, individual tree inspections.

In *Albin v. National Bk. of Commerce*, 60 Wash. 2d 745, 748-49, 375 P.2d 487, 489 (1962), the court dealt with the issue of prophylactic removal of healthy trees.

> It can, of course, be foreseen that trees will fall across tree-lined roads; but short of cutting a swath through wooded areas, having a width on each side of the traveled portion of the road equivalent to the height of the tallest trees adjacent to the highway, we know of no way of safeguarding against the foreseeable danger. At the present time this is neither practicable nor de-

> sirable. The financial burden would be unreasonable in comparison with the risk involved.

In *Harris v Vil of East Hills*, 41 N.Y.2d 446, 450, 362 N.E.2d 243, 246, 393 N.Y.S.2d 691, 694 (1977), the court stated: "Under the facts in this case we cannot say that the procedure of inspecting the roadway from the patrol car was unreasonable as a matter of law." In that case the facts disclosed that the county inspected the trees through use of windshield inspections by scheduled police patrols. The jury found such inspection to be reasonable.

In *Warren v. City of Tupelo*, 187 Miss. 816, 194 So. 293 (1940), the court held that there was no duty to have a regular or continued inspection of street trees and that there is no duty to inspect that which presents no visible signs of defects or danger.

In *Commonwealth v. Callebs*, 381 S.W.2d 623 (Ky. App. 1964), the court held that it could not find as a matter of law that the state had a duty to conduct a "walk-around" inspection of trees near the highway.

The plaintiff did not demonstrate that the city was negligent in implementing the program of inspection nor the manner in which it was carried out.

The case turns on the question as to whether the city, through the exercise of reasonable diligence, should have known of the defective condition of the tree. The fact that the tree fell does not, by itself, prove negligence. *Burrows v. Jacobsen*, 209 Neb. 778, 311 N.W.2d 880 (1981).

The Iowa Supreme Court stated in *Pietz v. City of Oskaloosa*, 250 Iowa 374, 379, 92 N.W.2d 577, 580 (1958):

> It cannot be said that trees do not break and fall except when there is negligence upon the part of the one having control thereof. Trees live and grow to considerable height and size and are, year in and year out, naturally exposed to the elements, including winds. Common experience tells us that for a tree to be broken during a storm or high wind is not such an unusual occur-

> rence in itself as to raise an inference of lack of due care upon the part of the one having control thereof. It just does not speak for itself, at least to that extent.

It is generally held that the plaintiff must prove that the defendant failed to observe visible signs of decay and that if the defendant had made a careful inspection upon observance of these signs, he should have known that the extent of decay warranted removal of the tree.

In *Carver v. Salt River Valley Water Users' Ass'n*, 104 Ariz. 513, 517, 456 P.2d 371, 375 (1969), the court said:

> There is no testimony that the rot was apparent from the outside or that it was not confined to the internal portion of the trunk. Accordingly, there was no evidence which would support a theory that an inspection would disclose the infirmity and that defendants would have known by the exercise of ordinary care of the rotten condition of the tree.

In *Branch v. State of New York*, 284 A.D. 825, 132 N.Y.S.2d 409, 410 (1954), it was stated: "It has not been shown that the tree was so weakened that the court was required to find that the State in the exercise of reasonable care should have observed the weakness and removed it."

In *Swope v. City of Wichita*, 141 Kan. 388, 41 P.2d 987 (1935), it was held that negligence could not be found by a jury when, in response to special questions, the jury could not state that a careful inspection would have revealed the actual condition of the tree.

In *Mosher v. State of New York*, 191 Misc. 804, 77 N.Y.S.2d 643 (1948), the court said:

> We have concluded, however, that the statements that it [the limb] was decayed were too broad in the light of evidence. The only observation supporting them was of one hollow spot or hole. This might fairly lead to the conclusion

> that there was an area of decay in the limb, but the testimony is vague as to how large an area and as to the progress of the decay. Apparently, it would not have been visible or, at least, noticeable from the ground when the limb was still attached to the tree.

In *Cody v. North Adams*, 265 Mass. 65, 164 N.E. 83 (1928), the court held that it must be shown that the decay was visible before negligence can be found.

In *Warren v. City of Tupelo*, 187 Miss. 816, 194 So. 293 (1940), the court held that a city has no duty to inspect a tree which presents no visible signs of defect. The court stated at 826, 194 So. at 295:

> "[I]f the defect or danger be such as not to be observable by those who constantly pass day by day or who for years have lived and labored at the location in question, constructive notice cannot be charged upon the municipality unless the danger was the result of faulty work by the municipality itself. . . ." . . . "No witness saw it [the defect] before the accident, and there was no evidence that any one had seen it, or that any city officer knew of it, or could by reasonable diligence have seen it, before the accident. . . ."

See, also, *Harris v Vil of East Hills*, 41 N.Y.2d 446, 362 N.E.2d 243, 393 N.Y.S.2d 691 (1977); *Berkshire Mut. Fire Ins. Co. v. State of New York*, 9 A.D.2d 555, 189 N.Y.S.2d 333 (1959).

The evidence in the present case shows that the tree was a large silver maple estimated to be between 35 and 100 years old. One witness estimated its diameter at breast height to be about 35 inches. The branch which fell on McGinn's car was about 20 inches in diameter. It is undisputed that at the time of the accident the tree was alive and had leaves. The plaintiff's expert witness characterized it as a "healthy hazard tree." The tree had a V-crotch, and the limb which fell was one side of this V.

The expert witnesses who testified agreed that a

living tree can be a hazardous tree, as decay may render a tree structurally unsound. They also agreed that a hollow tree could be a live tree and structurally sound, depending upon the conditions. Both expert witnesses stated that an inspector must rely upon external indicators when inspecting for decay, as other, more reliable methods for detecting internal decay are semidestructive and impractical. Expert witnesses stated that a tight V-crotch is more likely to present structural problems than one with a wider angle.

The plaintiff's expert witness, Dr. McNabb, testified that he examined the stump of the tree and photographs taken by a newspaper photographer immediately after the tree had fallen. From these sources he stated that there were several external indicators or symptoms of decay. Dr. McNabb testified that, on the photographs, he saw three swollen knots or calluses and a broken branch on the portion of the tree that fell. He testified that his examination of the stump cut close to ground level revealed what he terms an "involution" or the beginning of a cavity. It does not appear that this amounted to an open wound upon the tree.

Dr. McNabb testified that in a study of 845 soft maple trees in Iowa in 1962, 28 percent of the trees in which decay was present had swollen knots. A swollen knot is a place where a branch healed over after the branch fell or was pruned. The size of the knot is an indicator of the length of time that was required for the healing process, during which fungi might become involved in the tree. Dr. McNabb was of the opinion that these factors, when considered together with the species, age, size, and configuration of this tree, warranted its removal. It is apparent from Dr. McNabb's testimony that he considered species and age to be the most important criteria in this determination.

However, Dr. McNabb testified that he would give the tree a rating of three, based upon a scale which

gives a five rating to a solid and sound tree and a one rating to a hollow tree. A rating of three is given where a tree is showing early signs of decay. Dr. McNabb testified that he did not see a "conk" on this particular tree. A conk is a fruiting body of fungi, the presence of which indicates decay.

Dr. McNabb testified that he was aware of the fact that when a tree is injured, decay can enter the tree. He stated that a tree has a mechanism termed compartmentalization, whereby the tree walls off the area of decay and prevents its spread. Dr. McNabb testified that apparently this tree was not successful at compartmentalization.

Vincent Carroll, the owner of the home in front of which the tree was located, testified that he had never seen any cracks, breaks, or holes in the bark of the tree. Carroll testified that following the accident, he arranged for Marshall's Nursery to appraise the tree. The employee of Marshall's Nursery told Carroll that the tree was a good tree. A value of $9,000 was placed on the whole tree; and the loss sustained as a result of the fallen limb was estimated to be $4,600.

The city forester and the assistant city forester testified for the defendant. They listed what they look for when conducting an inspection for hazardous trees. They are: deadwood in the crown, possible cut roots as a result of nearby construction, conks, cankers, oozing sap, trunk damage, splits, and holes or cavities which break to the outside and can be probed. They also look at the number and color of the leaves, the configuration and branching habits, the bark, and the crotch. The city forester testified that swollen knots or calluses did not indicate extensive decay. The city forester stated that the tree appeared, upon an external examination, to be an excellent tree without symptoms which would have required his department to take action. The assistant city forester stated that the tree did not show any external indication of serious internal de-

cay. The assistant city forester testified that the swollen knots were not an indication of serious decay because a tree usually compartmentalizes and thus limits the area of decay.

Dr. Tattar, the plant pathologist from the University of Massachusetts who testified for the defendant, also examined the photographs of the tree and stump. He testified that there was nothing indicative in the calluses or swollen knots on this tree which would lead him to suspect that the tree had an internal condition that would constitute a safety hazard. Dr. Tattar stated that the tree had an encased bark and that the stump showed no opening to the heartwood. Dr. Tattar stated that age, species, size, and configuration, whether considered alone or together, are not a sufficient basis to determine that a tree should be removed. Dr. Tattar stated that an investigator should look at the foliage, the bark, and the roots. He testified that an inspector should look for the presence of a conk or fungus structure and the oozing of any type of product. Dr. Tattar testified that, based upon the external indications, he would not call this a living hazardous tree.

It is undisputed that the tree was the subject of annual windshield inspections, and the evidence indicates the tree was walked around as part of the 1979 census. There was no indication that the tree was found to be hazardous as a result of any inspection made by the city.

From our review of the evidence we conclude that the plaintiff did not prove that the city failed to inspect the tree and that the city failed to observe visible signs of substantial decay and that the city failed to conduct a reasonable investigation prompted by the presence of indications of decay which would have revealed the extent of the decay.

The testimony does not show that the indicators of decay as testified to by Dr. McNabb were readily visible from an on-street inspection. Carroll, the owner of the home in front of which the tree was lo-

cated, never saw any indication of decay. Except for his investigation of the stump, Dr. McNabb's impressions of the tree were based upon black and white photographs taken after the tree had fallen.

Dr. McNabb testified that an external examination of the tree would reveal signs of early decay. No other conclusion can be drawn from the evidence but that the external symptoms did not reveal the extent of decay present and that a careful examination would not indicate the extent of the decay. There is no testimony in the record which would support a finding that a reasonable investigation would have revealed the extent of the decay present in the tree. All of the expert witnesses agreed that means of external investigation other than visual examination were destructive and/or impractical.

Dr. McNabb's testimony that the tree was dangerous was based primarily upon his opinion that once a tree reaches a certain age and height, statistics, the probabilities of which he did not reveal, warranted removal. The city forester, the assistant city forester, and Dr. Tattar testified that removal based upon such statistics is unreasonable, as it serves to deprive the residents of the city of more healthy shade trees than the risk warrants. The cost of removal and replacement would be extremely burdensome. We conclude that such prophylactic removal is unreasonable, and testimony that this tree was dangerous based upon such conditions cannot support a finding of negligence.

While we conclude that the plaintiff did not sustain his burden of proof on the issue of negligence, we note that when a tree falls in weather conditions similar to those in the present case, some courts impose a higher burden of proof upon the plaintiff. In *Turner v. City of Wichita*, 143 Kan. 808, 809, 57 P.2d 79, 80 (1936), it was stated:

> "In case a high and more or less unusual wind is blowing, and it need not be a tornado, nor even of unprecedented velocity, and it is obvious

> to a person of ordinary intelligence traveling upon the street that limbs and branches, either decayed, rotted or living, from trees standing in the highway, may be thrown down, there is no libability [sic], unless the condition of the tree or the limbs or branches thereof is so patently bad and has existed for such length of time that permitting them to remain is equivalent to an utter disregard of the safety of the traveler in the street."

The evidence shows that the storm of June 12, 1980, was a severe one. A meteorologist estimated that the winds at the site of the accident at the time it occurred were between 75 and 100 miles per hour. The meteorologist stated that except for the 1975 Omaha tornado, this was the second worst storm in the area in a 26-year period. Vincent Carroll stated that the storm was one of the most intense that he could remember. He stated he could not remember winds of that intensity. After the storm Carroll went about the neighborhood and took pictures of various trees which had been broken or uprooted by the storm. Carroll testified that another tree just north of his property had been broken in the storm.

The plaintiff did not demonstrate that the condition of the limb was so patently bad and had existed for so long a period of time as to warrant a finding that the city acted with utter disregard for his safety.

In *Pietz v. City of Oskaloosa*, 250 Iowa 374, 92 N.W.2d 577 (1958), the factual situation was similar to that presented herein. In denying liability the court said at 377-78, 92 N.W.2d at 579:

> The tree in question, an ash, was located in the park some twenty-five feet west of where the car was parked. It was some two feet in diameter at the butt and about fifty feet in height. All parties are agreed that it was a live tree and, on the day in question, an unusually strong wind was blowing. There is testimony of gusts up to

> sixty-five miles per hour. The entire top of the tree broke off at a place some twenty-eight feet above the ground, splitting the trunk down some fifteen feet before it broke clear. There is a dispute in the record as to whether or not the break was at a fork in the tree, but it is clear that after the break no limbs or branches remained on the stump left standing. While it is disputed, there is testimony, based upon an examination of the broken part of the tree, that it was decayed at the place of the break and was deteriorated. There is not however a word of testimony that prior to the break this tree in any way appeared, or was thought to be, decayed or unsafe. It also appears in the record that in October or November 1955 a competent firm of tree repairmen, employed by the City, inspected the trees in the park including the one in question, which was found and reported to be in good condition.
>
> Viewing this record in the light most favorable to appellant we are unable to find even a scintilla of evidence tending to show a breach of duty upon the part of defendants as is charged in Count I of the petition.

We think the following statements from *Roos v. Consumers Public Power Dist.*, 171 Neb. 563, 571-72, 106 N.W.2d 871, 876-77 (1961), have some application here:

> A failure to anticipate and guard against a happening which would not have arisen except under exceptional or unusual circumstances is not negligence. Frerichs v. Eastern Nebraska Public Power Dist., 154 Neb. 777, 49 N.W.2d 619. "The law does not require impossibilities of such companies in avoiding accidents and resulting injuries. In the erection and maintenance of their poles, wires, and other appliances, they are bound to anticipate only such combinations of circumstances and accidents and injuries therefrom as they may reasonably forecast as

likely to happen, taking into account their own past experience and the experience and practice of others in similar situations, together with what is inherently probable from the condition of their appliances as they relate to the conduct of their business." 18 Am. Jur., Electricity, § 53, p. 448.

. . . .

We point out also that there is no evidence that the defendant had any reasonable or practical means of locating the defective place in the line prior to its break, or that it had any knowledge of the defect. It is not shown that any special equipment existed that is of general use in the trade, which would have revealed the defect, the nonuse of which would amount to a failure to properly maintain the line in the exercise of due care.

It is unnecessary to consider the other assignments of error.

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

REVERSED AND REMANDED WITH DIRECTIONS.

SHANAHAN, J., dissenting.

The majority opinion paints a picture in hues of a herculean task involving the city's trees. However, the crux of this case is not inspection of 10,000 silver maples, but the city's inspection of just one tree.

The majority opinion is predicated on two premises: (1) There is no evidence that the city was negligent regarding inspection of trees; and (2) It is unreasonable to require the city to conduct lengthy, individual tree inspections.

As roots for its opinion, the majority states: "The assistant city forester stated that the tree did not show any external indication of serious internal decay"; "The testimony does not show that the indicators of decay as testified to by Dr. McNabb were readily visible from an on-street inspection"; and "There is no testimony in the record which would

support a finding that a reasonable investigation would have revealed the extent of the decay present in the tree."

If that were the extent of the record, one might wonder how the district court ever found the city negligent.

Without objection from the city, McGinn's expert, Dr. McNabb, expressed his opinion that the tree in question manifested signs or symptoms observable to the trained eye of a city forester, namely, signs or symptoms indicating an advanced state of decay within the tree in question. Dr. McNabb further testified about several other important factors. Signs or symptoms of advanced decay in the tree were manifested at least 5 to 10 years before the accident. A thorough inspection of the 85-year-old tree would have taken between 15 minutes and ½ hour. Indication of the advanced state of decay in the tree, "heartrot," was apparent to the "naked eye" of any tree inspector.

The city had an "ongoing" inspection of trees to determine which trees should be removed. If inspection disclosed external evidence of a tree's rotten interior, steps were taken to ascertain the extent of interior decay and determine whether the decayed condition warranted immediate or deferred removal of the tree. In September 1979, approximately 10 months before the accident, the assistant city forester inspected the tree in question. As reflected in the majority opinion, to the city employees "the tree appeared . . . to be an excellent tree without symptoms which would have required" the city to take any further action. However, as testified by Dr. McNabb, the telltale indicators were readily observable when the tree was "walked around" and inspected by the city's forester in the fall of 1979. The city's tree expert testified that examination after the accident revealed "approximately half the volume of the tree" appeared to be decayed and "fifty percent of the total volume [of the tree]" was gone. In

such state the evidence presented a question of fact about the presence or absence of care regarding the city's inspection of the tree which crushed McGinn.

After receiving evidence that there was a manifest indication of rot or decay in the tree, the trial court made a specific finding:

> The testimony revealed that the inspection of late 1979 (with none in 1980 prior to the accident) was part of a tree-census taking by the regular personnel of the Forestry Division and some temporary help. It was a rather cursory inspection as far as attempting to fulfill the City's obligation toward maintaining its trees in a safe condition. There is no evidence that a proper inspection was made.

Thus, the trial court found the city failed to use reasonable care in inspecting the tree and such failure was the proximate cause of McGinn's injury.

Any problematical question about the city's duty in formulating an inspection program became irrelevant when the city actually undertook an inspection of the particular tree in this case and failed to see the readily observable and manifest signs of advanced decay in the tree. When one under no obligation to act does undertake action, one must act with reasonable care. The preceding principle is not novel, and is based on law much older than the tree which fell on McGinn. " 'If a party undertake[s] to perform work, and proceed[s] on the employment, he makes himself liable for any misfeasance in the course of that work . . . .' " See *Hart v. Ludwig*, 347 Mich. 559, 562, 79 N.W.2d 895, 896-97 (1956), citing and quoting from *Elsee v. Gatward*, 5 Durnform & East's 143, 101 Eng. Rep. 82 (1793).

The oft-quoted rule was aptly and simply expressed by Judge Benjamin Cardozo in *Glanzer v. Shepard*, 233 N.Y. 236, 239-40, 135 N.E. 275, 276 (1922):

> It is ancient learning that one who assumes to

> act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all (*Coggs* v. *Bernard*, 2 Ld. Raymond, 909; *Shiells* v. *Blackburne*, 1 H. Bl. 158; Willes, J., in *Skelton* v. *L. & N. W. Ry. Co.*, L. R. 2 C. P. 631, 636; Kent, Ch. J., in *Thorne* v. *Deas*, 4 Johns. 84, 96).

Judge Cardozo later paraphrased the rule in *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 167, 159 N.E. 896, 898 (1928): "The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all." A governmental or political subdivision as well as a private individual must act with reasonable care in reference to action undertaken without an obligation to act. See *Barnum v. Rural Fire Protection Company*, 24 Ariz. App. 233, 537 P.2d 618 (1975); accord *Wolf v. City of New York*, 39 N.Y.2d 568, 349 N.E.2d 858, 384 N.Y.S.2d 758 (1976). See, also, *Wulf v. Rebbun*, 25 Wis. 2d 499, 131 N.W.2d 303 (1964). The very word *inspection* used by the city to describe its actions required the city to see the manifest and externally observable signs or symptoms of advanced decay in the tree—a situation which called for further protective measures by the city, including possible removal of the tree. To fail to see the obvious in plain view constituted a breach of the duty undertaken by the city.

When the city's employee inspected the tree, there was clearly observable and external evidence of advanced decay within the tree. The exact extent of the tree's interior decay before the accident was never actually known to the city only because the city did not see what was in plain sight and there to be seen. Failure to observe what was in plain view prevents the city's inspection from being characterized as even remotely reasonable. There was evidence before the trial court that the city had constructive knowledge of the tree's interior decay.

[The Political Subdivisions Tort Claims Act]

> [s]ection 23-2406, R.R.S. 1943, requires that actions of this nature shall be heard without a jury but otherwise determined in the same manner as other suits. The action is similar to a law action in which a jury has been waived and is governed by the same rules.
>
> "It is not within the province of this court in a law action to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence, this court will review the judgment rendered, will presume that controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly wrong. * * *
>
> "The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury and will not be disturbed on appeal unless clearly wrong."

Buttner v. Omaha P. P. Dist., 193 Neb. 515, 517-18, 227 N.W.2d 862, 864 (1975).

> "In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence." [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).

The disturbing features of the majority opinion culminate in the quiet alteration of our standard of review in cases under the Political Subdivisions Tort Claims Act. The majority neither suggests nor concludes Dr. McNabb's testimony was incredible. Consequently, Dr. McNabb's opinion was credible

evidence before the trier of fact. The majority provides no standard or reason for appellate annulment of evidence and findings of the trial court, but ignores or disregards the evidence before the trial court. As a result of the majority opinion, our review of governmental tort claims is transformed to de novo on the record, that is, under the Political Subdivisions Tort Claims Act we now substitute our judgment for that of the trial court and make an independent determination of facts apart from the findings made by the trial court. Even in a de novo review of the record, where there is a conflict on a material issue of fact, we give consideration to a judge's observation of witnesses in the trial court's accepting one version of facts over another.

In the present case there is evidence to support the trial court's findings, and those findings are not clearly wrong. The judgment of the trial court should have been affirmed.

KRIVOSHA, C.J., and WHITE, J., join in this dissent.

TERRY W. PITT, APPELLEE, V. CHECKER CAB COMPANY, A NEBRASKA CORPORATION, APPELLANT.

350 N.W.2d 507

Filed June 8, 1984. No. 83-407.

1. **Trial: Judges.** A fair trial requires at a minimum an impartial judge, an impartial jury, and an atmosphere of judicial calm.
2. **Trial: Judges: Attorneys at Law.** Counsel owe to the judge, because of the position he occupies, the utmost deference and respect, and the judge owes to counsel an equal obligation of courtesy, patience, and consideration.
3. _____: _____: _____. It is the duty of the judge, as well as the attorneys, to endeavor to surround the trial with an atmosphere of fairness, undisturbed by prejudice, passion, or ill will.
4. **Trial: Judges.** During the course of a trial, the judge should refrain from making remarks which may have a tendency to influence the jury.
5. _____: _____. While there is no impropriety in a trial judge's interrogating a witness when the tendency is only to develop the truth

and is not calculated to influence the jury, save as the testimony will assist it to arrive at a correct conclusion on the question at issue, the practice is one which should be very sparingly employed.

6. **Trial: Attorneys at Law.** Generally, counsel for the parties should be relied on to manage and bring out their own cases.
7. **Trial: Judges.** The actions of the trial judge should never be such as to warrant any assertion that he assisted one or the other party.
8. **Trial: Judges: Attorneys at Law: Appeal and Error.** Counsel does not have the license to quarrel with a trial judge's evidentiary ruling; if the ruling is prejudicially erroneous, and is properly preserved and presented to this court, an appropriate correction will be made on appeal.
9. **Trial: Judges: Appeal and Error.** A claim of improper conduct on the part of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection.
10. **Trial: Judges.** It is prejudicially erroneous for a judge to comment in such a manner as to discredit a witness.
11. **Verdicts: Appeal and Error.** A verdict may be set aside as excessive when, and not unless, it is so exorbitant as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Frost & Meyers, for appellant.

Richard J. Rensch of Hansen, Engles & Locher, P.C., for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

The defendant below, Checker Cab Company, seeks reversal of the judgment entered pursuant to the jury's verdict in favor of the plaintiff-appellee, Terry W. Pitt, on the grounds that the trial judge's mistreatment of Pitt's counsel and misstatement of certain evidence deprived Checker Cab of a fair trial and resulted in an excessive verdict. We affirm.

This lawsuit arose out of an accident which occurred near 22d Street and Chandler Road in Bellevue. Both the vehicle driven by Pitt and the cab owned by Checker Cab were traveling east on Chandler Road, the cab following Pitt. There came

a time when the driver of the cab attempted to pass Pitt, Pitt made a left turn, and the vehicles collided. There was a dispute in the evidence as to whether Pitt had signaled his intention to turn left. There also were issues as to control, lookout, speed, and whether an attempt was being made by the cab driver to pass too close to or at an intersection.

Checker Cab's assignments of error are that the misconduct of the trial judge in (1) mistreating Pitt's trial counsel and (2) misstating Pitt's testimony during cross-examination by Checker Cab's trial counsel deprived Checker Cab of a fair and impartial trial. As a third assignment of error, Checker Cab claims the verdict is excessive and the result of passion and prejudice.

In connection with its first assignment of error, Checker Cab details the following exchanges made in the presence of the jury between the trial judge and Pitt's trial counsel:

> [Pitt's trial counsel]: Do you recall being asked how the accident happened by Mr. Engles who was the lawyer taking your deposition that date?
>
> [Witness]: Yes, I recall that.
>
> [Pitt's trial counsel]: And do you recall your answer being —
>
> [Judge]: All right. If you are going to use it, you are going to do it properly in this court. Was he asked this question and did he give this answer with no paraphrasing on behalf of counsel, and give the opposing counsel the page and line that you are reading from.

Again:

> [Witness]: I recall that she did come to the scene of the accident and there may have been a conversation, but I do not recall any particular things that were discussed, except for the fact that she was concerned about her children.
>
> [Pitt's trial counsel]: Do you specifically recall making the statement that —

[Checker Cab's trial counsel]: Your Honor, I am going to object.

[Judge]: Sustained.

[Pitt's trial counsel]: All I am trying to do is set a foundation.

[Judge]: I know what you are trying to do. The objection is sustained. Do you understand? S-u-s-t-a-i-n-e-d, sustained.

[Pitt's trial counsel]: Your Honor, may I ask at this time that you declare him a hostile witness?

[Judge]: I will not declare him a hostile witness, because there is no cause for it now. There is nothing that the Court views that is hostile about him.

[Pitt's trial counsel]: Just based on the fact that he was an employee of the defendant?

[Judge]: No, that doesn't declare him a hostile witness. You called him as your witness. You knew that before you called him.

[Pitt's trial counsel]: All right, your Honor.

Once again:

[Pitt's trial counsel]: Do you have a specific recollection as to whether or not Terry on those prior occasions used a left-hand turn signal?

[Checker Cab's trial counsel]: Your Honor, I will object.

[Judge]: The objection is sustained.

[Pitt's trial counsel]: Your Honor —

[Judge]: The objection is sustained.

[Pitt's trial counsel]: Have I not laid enough foundation?

[Judge]: The objection is sustained. It's totally immaterial.

[Pitt's trial counsel]: Your Honor, may I make an offer of proof?

[Judge]: You may do want [sic] you want to. It doesn't change the ruling of the Court.

Yet again:

> [Pitt's trial counsel]: And then did you feel him slow down —
>
> [Witness]: Yes.
>
> [Pitt's trial counsel]: — before the turn?
>
> [Witness]: Yes.
>
> [Judge]: Would you let the witness testify, please?
>
> [Pitt's trial counsel]: Excuse me, your Honor.
>
> [Judge]: Don't apologize to me. The jury and I are going to have to rely on facts we hear from witnesses and what you say I pay no attention to.

And then again:

> [Pitt's trial counsel]: Do you remember those being hospital expenses for the injuries?
>
> [Judge]: They are all in evidence now. Why are you going into it?
>
> [Pitt's trial counsel]: Judge, I just want to have him —
>
> [Judge]: The jury can total them. There is an amount on them.
>
> [Pitt's trial counsel]: All right, your Honor. That will be fine.
>
> [Judge]: They are not incompetent. They can figure it out.
>
> [Pitt's trial counsel]: I didn't say that they were, your Honor. No further questions.

Checker Cab's claim is that the numerous mistreatments of Pitt's trial counsel evoked sympathy for Pitt and deprived Checker Cab of a fair trial.

Whatever else a fair trial may demand, it requires at a minimum an impartial judge, an impartial jury, and an atmosphere of judicial calm. *Sunderland v. United States*, 19 F.2d 202 (8th Cir. 1927). To help achieve the calm required, counsel owe to the judge, because of the position he occupies, the utmost deference and respect, and the judge owes to counsel an equal obligation of courtesy, patience, and consideration. See *Sunderland v. United States*, *supra*.

Checker Cab correctly argues that the mistreatment of a lawyer by a judge may evoke in the jury sympathy for that lawyer and his client. *Apple v. State*, 190 Md. 661, 59 A.2d 509 (1948); *State v. Ahlfs*, 164 Minn. 110, 204 N.W. 564 (1925); *State v. Townley*, 149 Minn. 5, 182 N.W. 773 (1921), *cert. denied* 257 U.S. 643, 42 S. Ct. 54, 66 L. Ed. 413. This court has stated it is the duty of the judge, as well as the attorneys, to endeavor to surround the trial with an atmosphere of fairness, undisturbed by prejudice, passion, or ill will. *Langdon v. Loup River Public Power District*, 144 Neb. 325, 13 N.W.2d 168 (1944). We have pointed out that during the course of a trial, the judge should refrain from making remarks which may have a tendency to influence the jury. *Jones v. Foutch*, 203 Neb. 246, 278 N.W.2d 572 (1979); *Coyle v. Stopak*, 165 Neb. 594, 86 N.W.2d 758 (1957); *Moore v. State*, 147 Neb. 390, 23 N.W.2d 552 (1946). While we have recognized that there is no impropriety in a trial judge's interrogating a witness when the tendency is only to develop the truth and is not calculated to influence the jury, save as the testimony will assist it to arrive at a correct conclusion on the question at issue, we have admonished that the practice is one which should be very sparingly employed. Generally, counsel for the parties should be relied on to manage and bring out their own cases. The actions of the trial judge should never be such as to warrant any assertion that he assisted one or the other party. *Coyle v. Stopak, supra.*

As will be seen from the discussion which follows, this record does not present the question Checker Cab asks us to decide in connection with this assignment of error. We do observe, however, that whatever may be said of the trial judge's conduct, some of his comments were not entirely unprovoked. Counsel does not have the license to quarrel with a trial judge's evidentiary ruling. If the ruling is prejudicially erroneous, and is properly preserved

and presented to this court, an appropriate correction will be made on appeal.

The question as to whether the trial judge's conduct prejudiced Checker Cab's right to a fair trial is not before us for the reason that Checker Cab did not object to the conduct during the trial. *Steffen v. Ainsworth*, 211 Neb. 291, 318 N.W.2d 278 (1982), is the most recent restatement of the rule, which goes back at least to *Pittenger v. Salisbury & Almquist*, 125 Neb. 672, 251 N.W. 287 (1933), that a claim of improper conduct on the part of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection. A party ought not be allowed to gamble that the judge's conduct will inure to his benefit, and then complain that he guessed wrong. See *Wisnieski v. Coufal*, 191 Neb. 598, 216 N.W.2d 736 (1974), holding that a party could not complain of opposing counsel's known misconduct where he did not ask for a mistrial but, rather, consented to take the chance of a favorable verdict. See, also, *State v. Archbold*, *ante* p. 345, 350 N.W.2d 500 (1984), holding that failure to make a timely objection to testimony precluded review of its admissibility and justified denial of mistrial.

We conclude that the record does not sustain Checker Cab's first assignment of error.

With respect to its second assignment, Checker Cab calls our attention to the following testimony by Pitt during direct examination by his trial attorney in the presence of the jury:

> [Pitt's trial counsel]: Do you recall whether or not you stopped at 22nd Street or you slowed down or anything like that to wait for the traffic?
>
> [Pitt]: The best of my knowledge is I stopped and/or I was going slow, you know, or, you know, I stopped and then I started up again going slow to make the turn to 22nd Street.
>
> [Pitt's trial counsel]: If you stopped, how long would you say that you stopped for —

[Pitt]: *Seconds.*

(Emphasis supplied.)

During the cross-examination of Pitt by Checker Cab's trial counsel, the following dialogue took place in the presence of the jury:

> [Checker Cab's trial counsel]: So as you approached 22nd you said you stopped for a short time? I think in direct examination you said for *a few seconds.*
>
> [Judge]: No, he said *one second.*
>
> [Pitt]: Well, I'm sorry —
>
> [Judge]: If you lawyers repeat testimony you should repeat it correctly.
>
> [Checker Cab's trial counsel]: I may have been wrong.
>
> [Judge]: I sat here and listened to it the same as the jury.

(Emphasis supplied.)

Checker Cab claims the trial judge's misstatement of Pitt's direct examination testimony constituted prejudicial error.

Checker Cab argues, citing *Hammock v. Sims*, 313 Mich. 248, 21 N.W.2d 118 (1946), that even the inadvertent misstatement by the trial judge of testimony regarding an important question of fact is reversible error. In *McCulley v. Anderson*, 119 Neb. 105, 227 N.W. 321 (1929), we held it was prejudicially erroneous for a judge to comment, concerning an objection made after the witness had answered, as follows: " 'Why did not you object to it at the time that it was admitted? The court would not have allowed this boy to testify on that subject if there had been any objection made.' " *Id.* at 114, 227 N.W. at 325. The court reasoned that the comment discredited the witness, a matter for the jury to determine, not the court.

Once again, however, the record does not present the issue Checker Cab wishes resolved. Not only did Checker Cab not object to the trial judge's misstatement of Pitt's testimony, it seemingly adopted the

judge's mistaken recollection. Checker Cab's second assignment fails for the same reason as did the first assignment.

In its last assignment Checker Cab urges that the $34,000 verdict is so excessive as to warrant reversal. To the extent that Checker Cab relies upon the conduct of the trial judge in so arguing, the matter is controlled by our rulings on the previous assignments of error and is resolved against its contention.

Before we need proceed to any other consideration, we must determine whether the verdict is in fact excessive. There was evidence from which the jury could find that the force of impact was such that the Pitt vehicle spun around twice and was quite extensively damaged. Pitt crashed into the door on the driver's side, bounced forward, and cracked the windshield. As a result, he injured his back and suffered a 20- to 25-percent permanent impairment to his body as a whole. He was 31 years old at the time of trial. He has received medical treatment, was unable to work for 2 weeks, has experienced difficulty sleeping and carrying on his duties as a chef, and has been restricted in other activities because of the pain in his back.

As we recently said in *Schaefer v. McCreary*, 216 Neb. 739, 345 N.W.2d 821 (1984), there is no formula for computing damages in a case such as this. In view of the evidence it cannot be said the verdict is so exorbitant as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. It is only when, and not unless, those factors are present that a verdict may be set aside as excessive. *Caradori v. Fitch*, 200 Neb. 186, 263 N.W.2d 649 (1978).

The verdict in this case falls far short of meeting the test of excessiveness. Thus, Checker Cab's third and last assignment of error is without merit.

AFFIRMED.

KRIVOSHA, C.J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, v. CAREY DEAN MOORE, APPELLANT.

350 N.W.2d 14

Filed June 8, 1984. No. 83-428.

Post Conviction: Appeal and Error. A defendant seeking post conviction relief has the burden of establishing a basis for such relief, and the findings of the district court in denying relief will not be disturbed on appeal unless they are clearly erroneous.

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

Lathrop, Albracht & Lathrop, for appellant.

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

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

GRANT, J.

This is a post conviction action following defendant's conviction of two counts of first degree murder, each in the perpetration or attempted perpetration of a different robbery. On June 20, 1980, defendant was sentenced to death on each count. The matter proceeded to this court for automatic review, and both judgment and sentence were affirmed in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982).

The present proceedings were initiated on June 29, 1982, by the filing of a motion to vacate and set aside defendant's conviction and sentence, pursuant to the Nebraska Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). The motion filed may be summarized as follows: (1) Trial counsel was inadequate and incompetent; (2) Defendant was not accorded adequate notice of the aggravating and mitigating circumstances relied upon as a basis for imposing the death penalty; and (3) The Nebraska death penalty procedures are violative of the U.S. Constitution.

A change in counsel occurred between the filing of

the above motion and the time it was heard February 24 and April 27, 1983. No evidence was adduced at the hearings in support of the specific allegations set out in the motion, nor were those issues addressed in defendant's brief. This court is limited in its consideration to those assignments of error discussed in defendant's brief. *Flakus v. Schug*, 213 Neb. 491, 329 N.W.2d 859 (1983). Moreover, allegations (2) and (3) above were taken up on direct appeal, thus precluding any further review by this court. See, *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984); *State v. Ohler*, 215 Neb. 401, 338 N.W.2d 776 (1983).

Although the question of adequacy of counsel is not discussed in defendant's brief, we have examined the record and find no evidence to support the charge of inadequate counsel. Defendant himself testified that he thought trial counsel "did a fine job." The evidence that was presented at the two hearings pertained to allegations that the defendant, as a result of being under the influence of tranquilizers, was not competent at the time of trial and did not knowingly and intelligently waive his right to a jury trial. No amended motion was filed containing these allegations which were presented for the first time, on the record, at the February 24, 1983, hearing. The district court found defendant failed to establish error which would render his conviction void or voidable under either the Nebraska or U.S. Constitution. Having reviewed the record, we affirm the lower court's order denying defendant's motion for post conviction relief.

We have stated on many occasions that a person seeking post conviction relief has the burden of establishing a 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*, *supra*; *State v. Beans*, 212 Neb. 31, 321 N.W.2d 72 (1982). The evidence presented showed that defendant's trial counsel, Lawrence Corrigan, arranged for

a psychiatrist, Dr. Margaret Twiddle, to determine defendant's competency to stand trial. Both Dr. Twiddle and Dr. Mitchell, a psychologist, indicated to Corrigan that defendant was competent to stand trial. Neither Drs. Twiddle nor Mitchell testified at the post conviction proceedings. Medical records pertaining to the defendant are in the record. Defendant had been diagnosed by Dr. Twiddle as having "situational anxiety" due to stress and nervousness prior to the trial. On April 2, 1980, defendant began taking an antipsychotic medication, Mellaril, frequently referred to as a major tranquilizer. Defendant continued taking Mellaril until April 24, 1980, when Dr. Twiddle changed his prescription to a similar medication, Thorazine, which he took until June 20, 1980. Defendant waived his right to a jury trial at a hearing on April 7, 1980, 5 days after he started the medication.

Dr. Stan Moore, a psychiatrist, testified at the April 27, 1983, hearing for defendant, after reviewing the medical records and having interviewed defendant on March 11, 1983. He had no contact with defendant during the time he was under Dr. Twiddle's care. Dr. Moore described the possible side effects which one may incur, while taking Mellaril, as sedation, lethargy, blurry vision, dry mouth, stuffy nose, constipation, and dry skin. Thorazine exhibits basically the same side effects, according to the doctor's testimony, with the addition of such other rare side effects as skin discoloration, stiffness or shakiness, and an unusual effect on the liver. Dr. Moore testified that during the time defendant was under these medications, the only side effects documented were complaints of a dry mouth and congested nose. Dr. Moore further testified, in answer to a question from the court at the post conviction hearing, as follows:

> THE COURT: Those are the only documented side effects outside of what the defendant told you in the spring of this year, and it's my under-

> standing — I don't have a copy of the medical report, but it's — I mean, I realize it's going to be introduced in evidence, but I haven't had it in front of me during this testimony, but it is my understanding that you are not at this time able to give an opinion with reasonable medical certainty that the defendant was incompetent at the time of trial.
>
> THE WITNESS: That's correct.

In addition to the documented complaints of a dry mouth and congested nose, the defendant testified that while taking the medications he was unaware of many things going on around him, and did not remember much of the trial or sentencing at all. He also stated the medication made him feel the same way he did when he sniffed glue as a child. Defendant did not lodge any complaints regarding his condition to trial counsel, and testified he first brought up this issue 3 to 4 weeks before the February 24, 1983, hearing.

According to defendant's own testimony, a jury was waived in the belief the trial court would be more lenient and not impose the death penalty. Defendant admitted on cross-examination that this strategy was a calculated move which ultimately did not reach fruition. The testimony also contains an opinion by defendant that his trial counsel, Mr. Corrigan, had done all he could for defendant, and upon questioning by the court, defendant could present nothing that would result in a different outcome should his case be retried.

Corrigan testified that he and defendant had approximately 15 conferences prior to the trial. At least three conferences dealt with waiving a jury trial in addition to strategy discussions on whether the defendant should take the stand and what other witnesses, if any, might be called to testify.

The record contains a transcript of a dialogue between defendant and counsel on April 11, 1980, during a break in the proceedings. The transcript indi-

cates the discussion occurred after the State had rested its case. In that discussion counsel explained to defendant his right to testify, and defendant indicated he understood. There was also a discussion on not putting on any evidence and resting after moving to dismiss. Counsel also reaffirmed the previous decision of waiving a jury, and the defendant agreed that it had been his (defendant's) decision and he wished to stick to it. Finally, the defendant responded in the negative when specifically asked by counsel if he had any complaints regarding his legal representation.

Corrigan testified that defendant appeared nervous prior to the trial and that he was aware defendant was on medication, but unaware of what specific medication. However, counsel's testimony is that defendant's ability to comprehend discussion between them had not changed from their first contact in the fall of 1979 to after sentencing in June of 1980. Defendant was instructed on more than one occasion by trial counsel to inform his psychiatrist or nurse if defendant was having any problems.

In reviewing the testimony from the two hearings, we are unable to agree with defendant that the trial court was clearly wrong in its finding. The treating physician was not called to testify, and Dr. Moore certainly was at a disadvantage in attempting to base his opinion on the medical records and an interview nearly 3 years after the fact, as evidenced by the cited dialogue above. The defendant himself states that other than the dry mouth and congested nose, the complaints of not remembering or "being out of it" were not made until shortly before the post conviction hearing. These complaints also could have been brought on direct appeal. Mr. Corrigan's testimony indicates that as far as he was concerned, defendant understood waiving the jury and knew what was occurring during the trial.

In determining the sufficiency of the evidence to sustain a denial of post conviction relief, this court

does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the trial court's decision must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. The defendant has the burden of establishing a basis for relief in a post conviction proceeding. *Marteney v. State*, 210 Neb. 172, 313 N.W.2d 449 (1981).

A review of the record before us leads this court to conclude that the trial court was not clearly wrong in determining defendant had not met the burden of establishing any error which would make his conviction void or voidable under either the Nebraska or U.S. Constitution. The trial court's order denying post conviction relief is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

With the exception of that portion of the majority opinion which affirms the imposition of the death penalty, I concur in all that the majority has said, and believe that, but for the issue involving the imposition of the death penalty, Moore's claim for post conviction relief is without merit. However, because of my view regarding the imposition of the death penalty and its constitutional implications, as more particularly set out in my dissent in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), I must again dissent from that portion of the majority opinion which, by affirming the trial court's denial of post conviction relief, affirmed the imposition of the death penalty in this case.

LINDA JOSEPHINE MAREZ, APPELLANT, V. ANTHONY MIKE MAREZ, APPELLEE.

350 N.W.2d 531

Filed June 8, 1984. No. 83-786.

1. **Child Custody: Visitation.** Custody and visitation of minor children shall be determined on the basis of their best interests.
2. **Child Custody.** In determining with which of the parents the children, or any of them, shall remain, the court shall consider the best interests of the children, which shall include, but not be limited to, the desires and wishes of the children if of an age of comprehension regardless of their chronological age, when such desires and wishes are based on sound reasoning.
3. **Child Custody: Words and Phrases.** The phrase "change of circumstances" should not be mechanically construed. The children's happiness, their psychological adjustment, their own wishes, are as much entitled to consideration as changes in material environment.
4. **Trial: Child Custody: Waiver: Appeal and Error.** It is the general rule that where the parties have given consent or acquiescence to private interviews with the children and the court conducts an in camera hearing, such consent waives any objections which might be raised on appeal.
5. **Constitutional Law: Appeal and Error: Waiver.** Error may be waived at both the trial and appellate levels, and constitutional rights may likewise be waived.

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

Clark G. Nichols of Winner, Nichols, Douglas and Kelly, for appellant.

John W. Ballew, Jr., of Raymond, Olsen, Ediger & Ballew, for appellee.

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

BRODKEY, J., Retired.

This appeal involves an order entered by the district court for Scotts Bluff County, Nebraska, modifying a decree of dissolution of marriage between the parties, entered by the court on October 26, 1976, and in which decree the court placed the custody of the three minor children of the parties in the legal

custody of the court for such time as it deemed fit and proper, and further granted temporary physical custody to the mother, Linda Josephine Marez, at whose residence they were to reside. The court also granted the respondent, Anthony Mike Marez, the right of visitation with his children. Subsequent to the entry of the original divorce decree, and after many years of protracted litigation between the parties, each of the parties filed a separate application with the court for modification of the original divorce decree because of change in circumstances. The application of Linda requested that the court place permanent custody of the children with her, and also requested an order specifically allowing petitioner, who had remarried, to remove the children from the State of Nebraska to Colorado. The application of the father requested a modification of the decree, alleging there had been a change of circumstances in that the petitioner desired to move herself and the children to Fort Morgan, Colorado, and that the children preferred to live with him and his new wife. Each party alleged it was in the best interests of the three minor children that their permanent care, custody, and control be placed with that party, subject to the rights of reasonable visitation with the other party. Neither party claimed that the other was unfit to have custody of the children.

The matter came on for hearing on August 25, 1983, approximately 6 years after the entry of the original decree, and both parties introduced evidence and rested.

At the conclusion of the evidence the court stated as follows:

> I will take a 10-minute recess and I would like to see the children in my chambers. I will interview the children on the record in camera. Counsel will not be there. There will be a record made, of course, and then I'll come in and listen to your comments, gentlemen. Why don't

> you check with me in about 10 minutes and then the boys can come in to chambers.

At this point it is appropriate to note that during the oral argument of this case to the court, it was stated that at the pretrial conference on this matter counsel for both parties agreed that the court might interview the three minor children in camera.

Following a short recess after the reception of evidence, the court did interview the three minor children, Anthony Michael Marez, Jr., born February 12, 1972, Ricardo Ralph Marez, born March 20, 1973, and Raul John Marez, born April 15, 1974, in chambers. A record of what was said at the meeting was made. Immediately following the interview with the children, the court held a conference with the counsel for both parties, and also the parties themselves. During the course of the conference, the court stated:

> These children look forward to staying here. They look forward to going to school at McKinley with all of their cousins and relatives. They named them off for me. They want that. I see no difference in the kind of care that both parents professed to have and both parents professed to be providing for those kids. And I don't think the record shows that there is a great deal of difference, although the children's testimony will shed some other light on that, perhaps.
>
> . . . I don't prefer one over the other. But when I look at these children in this community, and the fact that the petitioner talks about frequent visits back here, I think it's going to be easier for her to come back and visit these children, and my decision here is based on all of this evidence of the strong ties in this community, with all of the grandparents and all of the other relatives, the up-rooting of these three boys, and they do talk together, they talk together about what they want to do. And I asked them indi-

> vidually and as a group how they made up their mind and what they wanted and why they wanted it. And I think their best interest is served in staying with their father, in staying with their family here in this valley, in this area, in their present church, in the school where they know people, although it's a new school. And I make no differentiation between the kind of care that would be provided by either party, I simply think these children should remain here and I am going to deny the motion for transportation of the children to Colorado and I retain jurisdiction of the children in the court and I will give physical custody to the respondent Anthony Mike Marez.

So far as the record reveals, at no time did counsel for either party or the parties themselves ever object to the court's having interviewed the children, nor as to the fact that the court refused to reveal the specifics of the conversation with the children; nor at any time, so far as the record discloses, did they ever request that they be permitted to introduce rebuttal testimony with reference to whatever was told the court by the children, and as contained in the record; nor did they request to have the record typed up prior to the court's entering its judgment.

The court entered its judgment of modification on October 31, 1983, stating in part as follows:

> The court, having heard the evidence presented in Court and having discussed this matter with the parties' three minor children in chambers, finds as follows:
>
> 1. The Petitioner's desire to move to the State of Colorado with her new husband constitutes a material and significant change in circumstances affecting the original Decree of Dissolution entered herein on October 26, 1976.
>
> 2. Based upon the evidence presented in Court, both Petitioner and Respondent are found to be fit and proper persons to have the custody

> of their three minor children, Anthony Michael Marez, Jr., born February 12, 1972, Ricardo Ralph Marez, born March 20, 1973, and Raul John Marez, born April 15, 1974 but, based upon the evidence presented to the Court, the Court is of the opinion that the best interests of the minor children would be best served by placing their permanent care, control and custody with Respondent. Accordingly, the Decree entered herein on October 26, 1976 which provided that legal custody of the parties' three minor children was to remain with the Court and that Petitioner was to have temporary physical custody of the children is so modified.

The court also granted petitioner reasonable rights of visitation.

In her appeal of that order to this court, the appellant, Linda Josephine Marez, alleges certain assignments of error, the principal one being that the court erred in failing to disclose to the parties the substance of its in camera interview with the minor children of the parties prior to its decision so as to afford the appellant an opportunity for rebuttal, and also that the court erred in basing its decision as to custody primarily on what the court learned at the in camera interview with the minor children. She contends that the trial court erred in relying upon the in camera testimony of the three minor children without disclosing its nature to the appellant and giving her a chance to rebut it. She also contends that the court erred in denying her request for permission to remove herself and the three children to Fort Morgan, Colorado, and also erred in finding that there was a change in circumstances and that the best interests of the children would be served by placing them with their father. We have reviewed the record and applicable law and have concluded that the action of the trial court was correct and should be affirmed.

We first comment briefly on the contention of the

appellant that her desire to move to the State of Colorado with her new husband, where he had obtained employment, was not a material and significant change of circumstances warranting a modification of the custody provisions of the original divorce decree. We agree that merely moving out of the state of domicile to another state does not ipso facto constitute a change of circumstances, for the reason, as has been stated, mobility is a fact of life; nevertheless, when considered in conjunction with other evidence, such a move may well be a change of circumstances which would warrant a modification of the decree. In *Cook v. Cook*, 135 F.2d 945, 947 (D.C. Cir. 1943), that court stated:

> A custodial order is conclusive as to all matters prior to its promulgation. But the doctrine of res judicata cannot settle a question of a child's welfare for all time to come; it cannot prevent a court at a subsequent time from determining what is best for the children at that time. The usual way of expressing this rule is to say that "circumstances have changed" when the order is no longer in the children's interest. But the phrase "change of circumstances" should not be mechanically construed. The children's happiness, their psychological adjustment, their own wishes, are as much entitled to consideration as changes in material environment. As was said in Boone v. Boone, the trial court should constantly keep in mind the ultimate question, which is "whether the welfare of the children now requires a change in the custody previously provided by the court of their domicile."

From the testimony given by witnesses other than the children at the trial, and also by virtue of the express preferences and reasons therefor given by the children in their in camera interview with the court, it is clear that the court reached the right conclusion in stating that the move to Colorado under

the facts of this case constituted a material and significant change in circumstances.

We also call attention to the case of *Read v. Read*, 103 Cal. App. 2d 721, 230 P.2d 46 (1951). In that case the court held that the fact that the children and the father were all living in the same county, where the father could frequently see the children without difficulty, when the order fixing custody of the children of divorced parents was made and that the children had since been removed to a distant part of the state by the mother, rendering frequent visits with their father impracticable, constituted a sufficient "change in circumstances" to justify an order modifying the custody provisions.

It is conceded in this case that the trial court properly interviewed the children of the parties, either by outright consent of the parties at the pretrial hearing or by their failure to object thereto at any time.

The record reveals clearly that appellant and her counsel knew in advance that there was going to be an in camera hearing, knew that a record would be taken, knew that the judge was going to ask questions, but did not check, did not ask to see, the record afterwards, and neither at that time nor by a motion for a new trial made any effort to contradict what was said. Under these circumstances any error in the trial court's procedure, a question we do not decide, has been waived. In 24 Am. Jur. 2d *Divorce and Separation* § 985 at 976 (1983), it is stated:

> Assuming that it may be improper for the trial court to interview a child privately, a party to a divorce action may consent to such an interview or waive objections to the informal procedure, in which event the court may not only interview the child *but also weigh what the child said as a basis for its order.*

(Emphasis supplied.)

There appears to be uniformity in the opinions of

courts which have considered the issue, that where the parties have given consent or acquiescence to such interview and the court conducts an in camera hearing, such consent waives any objections which might be raised on appeal. These cases are collected in Annot., 99 A.L.R.2d 954 at 962 et seq. (1965). See, also, *Bunting v. Oak Creek Drainage District*, 99 Neb. 843, 157 N.W. 1028 (1916), stating that where defendant's attorney failed to complain of a known irregularity in a jury view before the verdict was reached could not complain of the irregularity on appeal.

We have also examined the other assignments of error contended for by appellant and, under the facts contained in the record of this case, conclude that they are without merit and that the trial court was correct in its judgment.

AFFIRMED.

STATE OF NEBRASKA EX REL. FRANK MARSH, STATE TREASURER, APPELLEE, V. NEBRASKA STATE BOARD OF AGRICULTURE, APPELLANT.

350 N.W.2d 535

Filed June 15, 1984. No. 83-194.

1. **Gaming: Parimutuel Tickets: Unclaimed Property Act.** Under the parimutuel system of wagering, the licensee authorized to accept such bets is in possession of the sum of money wagered as a custodian, depositary, or administrative agent, out of which it is obligated to pay unknown bettors the amount of their winnings.
2. **Gaming: Unclaimed Property Act: Words and Phrases.** The Nebraska State Board of Agriculture, while operating parimutuel betting, is a "business association," as contemplated by the Uniform Disposition of Unclaimed Property Act, Neb. Rev. Stat. §§ 69-1301 et seq. (Reissue 1981).
3. **Gaming: Parimutuel Tickets.** A parimutuel wagering ticket is an instrument payable on demand.
4. **Escheat: Unclaimed Property Act.** Under the Uniform Disposition of Unclaimed Property Act, Neb. Rev. Stat. §§ 69-1301 et seq. (Reissue 1981), the rights of the state are strictly derivative.

5. **Administrative Law.** Administrative rules which seek to extinguish ownership rights without statutory authority generally are null and void.
6. _____. An administrative agency is limited in its rule-making authority to powers granted to the agency by the statutes which it is to administer.
7. **Limitations of Actions: Waiver.** The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived, and will be unless pleaded.
8. **Pleadings.** A general denial to a claim is insufficient to raise a specific affirmative defense contained within a statute.
9. **Laches.** The defense of laches is not a favored one, and it will be sustained only if the litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary.

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

Hal Bauer of Bauer, Galter & Geier, for appellant.

Paul L. Douglas, Attorney General, and John Boehm, for appellee.

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

HASTINGS, J.

Nebraska State Board of Agriculture, defendant, has appealed an order of the district court granting the plaintiff's motion for summary judgment.

The State of Nebraska brought suit against the Nebraska State Board of Agriculture to recover a total of $40,165.62, representing unclaimed winning parimutuel tickets for the years 1960 to 1972. The plaintiff claims the money under the provisions of the Nebraska Uniform Disposition of Unclaimed Property Act, Neb. Rev. Stat. §§ 69-1301 to 69-1329 (Reissue 1981), passed in 1969. We affirm the judgment of the district court.

The case was submitted to the court on a stipulation of facts. Nebraska State Board of Agriculture is a nonprofit organization licensed by the Nebraska State Racing Commission to conduct horseracing and parimutuel wagering at the state fairgrounds in Lincoln.

Prior to each horserace, wagers are placed on the outcome of the race, and the bettors are issued a ticket which reflects the amount and nature of the wager. The bettor is not identified on the ticket, no record is kept of the identity of the bettor, and a winning ticket may be cashed by any person in possession of a ticket.

From 1960 to 1972 some of the winning tickets sold had never been presented for redemption, and have remained unsurrendered and unpaid. Various reasons exist for unpaid tickets. The most likely is that persons failed to recognize they held a winning ticket and subsequently destroyed or lost their claim to money. Defendant kept records disclosing the net amount of unpaid winnings and reported the amounts to both the State Racing Commission and the Nebraska Department of Administrative Services.

For the time period relevant to this action, rule 23(1)(l) of the State Racing Commission provided: "After the lapse of one full year immediately following date of purchase, no parimutuel ticket shall be eligible for redemption or payment by any Association."

Rule 23(1)(i) provided: "Any claim by a person that a wrong ticket has been delivered to him must be made before leaving the mutuel ticket window. No claims need to be considered thereafter, and no claim need be considered for tickets thrown away, lost, changed, mutilated or destroyed."

Here we note that neither the Nebraska statutes nor the State Racing Commission determines the ownership of the unclaimed winnings. The practice has been for the defendant to transfer the funds to its general operating budget 1 year after the date of purchase, to be used to defray operating costs and to contribute to 4-H and other nonprofit youth and state agricultural activities.

The Uniform Disposition of Unclaimed Property Act (UDUPA), as earlier noted, was passed in Ne-

braska in 1969. It provides generally that property held by a person which remains unclaimed by the owner for more than 7 years is presumed abandoned and shall be turned over to the State Treasurer by the person holding the property. The plaintiff relies on this act to make its claim for the uncollected winnings.

In 1980 the Nebraska Legislature enacted Neb. Rev. Stat. § 2-1223 (Reissue 1983) to exempt licensed corporations or associations conducting horseracing by the parimutuel method from the provisions of the UDUPA, effective April 24, 1980.

The defendant assigns as error: (1) The trial court's determination that the UDUPA was applicable to unclaimed parimutuel winnings; (2) The finding that rules 23 (1)(i) and 23(1)(l) of the Nebraska rules of racing were null and void; (3) The finding that the UDUPA was applicable to all unclaimed parimutuel winnings between 1960 and 1972; (4) The court erred in giving a retroactive effect to its ruling voiding the rules of racing; and (5) The court erred by overruling the defendant's motion for summary judgment.

Before analyzing whether unclaimed parimutuel winnings are subject to the unclaimed property act, the relationship between the parties in a parimutuel transaction should be made clear.

Neb. Rev. Stat. § 2-1207 (Reissue 1977) provides that the "licensee may receive wagers of money from any person present at such race . . . and the person so wagering shall acquire an interest in the total money so wagered . . . ." It goes on to state that the licensee may deduct from the total sum wagered on all horses a certain percentage, with the balance remaining on hand to be paid out to the holders of certificates on the winning horse in proportion to the amount wagered. The State receives its moneys by imposing a tax on the gross sum wagered by the parimutuel method at each race meeting.

Between the licensee and bettors, the relationship has been held to be in the nature of a contract. *Racing Com. v. Multnomah Kennel Club*, 242 Or. 572, 411 P.2d 63 (1966); *Wise v. Dela. Steeplechase & Race Ass'n*, 28 Del. Ch. 532, 45 A.2d 547 (1945).

The licensee is merely an agent, legally created by statute, for taking, holding, and distributing the money wagered by the participants who are the parties to the wagering transaction. *Holberg v. Westchester Racing Assn.*, 184 Misc. 581, 53 N.Y.S.2d 490 (1945). The result is that the defendant is in possession of a sum of money as a custodian, depositary, or administrative agent, out of which it is obligated to pay unknown bettors the amount of their winnings, but which can be paid only by presentation of their tickets.

The plaintiff contends that when unclaimed winnings are held for more than 7 years from the date of the issuance of their corresponding winning tickets, they are presumed abandoned by operation of the UDUPA, and are reportable and deliverable to the State Treasurer. The plaintiff argues that § 69-1302(c), which applies to a banking or financial organization or business association, and § 69-1308, the miscellaneous, or omnibus, provision, apply to the facts of this case.

Section 69-1301(b) defines a business association as "any corporation (other than a public corporation), joint stock company, business trust, partnership, or any association for business purposes of two or more individuals."

The Nebraska State Board of Agriculture was statutorily created, Neb. Rev. Stat. §§ 2-101 to 2-130 (Reissue 1983), and would appear to be within the exception for public corporations. However, in *Crete Mills v. Nebraska State Board of Agriculture*, 132 Neb. 244, 271 N.W. 684 (1937), this court held that the Nebraska State Board of Agriculture was essentially a private corporation, possessing no exemption from suit or liability.

In *Crete Mills*, where the Nebraska State Board of Agriculture, a nonprofit corporation, purchased grain and in turn sold it for profit to other parties using the fairgrounds, the nature of the corporation became private. In the same sense, we believe that the Nebraska State Board of Agriculture, engaging in parimutuel betting, is a "business association" as contemplated by the UDUPA.

Section 69-1302(c) defines abandoned property as follows:

> Any sum payable . . . on written instruments issued in this state on which a banking or financial organization or business association is directly liable . . . that . . . has been outstanding for more than seven years from the date it was payable, or from the date of its issuance if payable on demand . . . unless the owner has within seven years . . . corresponded in writing with the banking or financial organization or business association concerning it, or otherwise indicated an interest as evidenced by a memorandum on file with the banking or financial organization or business association.

"A pari-mutuel ticket is an instrument payable on demand when the demand is accompanied by presentation of the ticket." *Racing Com. v. Multnomah Kennel Club*, *supra* at 584, 411 P.2d at 68.

Having made the determination that the defendant is a "business association" and that the unclaimed winnings have resulted from payable-on-demand instruments outstanding for more than 7 years from the date of issuance, the UDUPA is applicable unless the rules and regulations eliminate the property from the act.

Both parties agree that the State's rights under the UDUPA are strictly derivative, and therefore the uniform act is distinct from escheat laws and the State acquires no greater property right than the owner. The State may assert the rights of the owners, but it has only a custodial interest in property

delivered to it under the act. *Insurance Co. of North America v. Knight*, 8 Ill. App. 3d 871, 291 N.E.2d 40 (1972); *S. C. Tax Comm. v. Metropolitan Life Ins. Co.*, 266 S.C. 34, 221 S.E.2d 522 (1975).

The contention of the defendant is that the sums from unclaimed parimutuel tickets are not "held" or "owing" and are not outstanding, because the rules of racing extinguished the claim holders' interest, and any subsequent derivative claim by the plaintiff is also extinguished. This argument is dependent upon whether rules 23(1)(i) and (l) of the State Racing Commission are valid, the second assignment of error.

The defendant contends that the trial court erred in finding rules (23)(1)(i) and (l) null and void for lack of statutory authority. It points as authority to make such rule to Neb. Rev. Stat. § 2-1203 (Reissue 1977), which provides in part as follows: "The commission shall have power to prescribe and enforce rules and regulations governing horse races and race meetings, licensed as hereinafter provided."

It further insists that a presumption of validity exists and that such regulations of an administrative agency are binding as if they were statutes enacted by the Legislature.

The plaintiff contends that the rules are invalid because there is no statutory authority to allow the State Racing Commission to enact rules and regulations extinguishing the rights of ticketholders, nor is there any statutory authority which authorizes the defendant to convert the winnings to its own organizational uses.

In its decision the trial court found that these rules were null and void for lack of statutory authority, *to the extent* that they purported to extinguish the rights of winning parimutuel wagerers to make claims against winning parimutuel pools for their share of the winnings. The trial court also found that no authority exists under the statutes of the State of Nebraska or the rules and regulations of the

State Racing Commission entitling the defendant to convert to its own use and expend for its own purposes sums of money retained by it as unclaimed winnings.

We agree with the trial court that to the extent the rules are used to extinguish ownership rights, which the defendant has no authority to do, they are null and void. Although previous practice and rule 23(1)(l) imply that the defendant may be permitted to take the money, no Nebraska statute entitles the defendant to the money in controversy. In fact, except for the UDUPA, no statute exists to determine what disposition should be made of unclaimed winnings.

The State Racing Commission, which enacted the rules in question, established a regulation governing more than a horserace; the rule attempted to terminate ownership interests. An administrative agency is limited in its rule-making authority to powers granted to the agency by the statutes which it is to administer. *Bond v. Nebraska Liquor Control Comm.*, 210 Neb. 663, 316 N.W.2d 600 (1982); *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960).

In particular, § 2-1207 (Reissue 1977) declares that "the person so wagering shall acquire an interest in the total money so wagered" and that of the total sum wagered in each race, the licensee is entitled to deduct a certain percentage, after which the balance remaining on hand shall be paid out to the holders of the certificates on the winning horse. This statute by definition does not give the licensee an interest in the money wagered.

Since both parties agree that the rights of the State to custody of the unclaimed property under the UDUPA derive from the rights of the original owners, abrogation of rules (23)(1)(i) and (l) would subject the unclaimed parimutuel winnings to the provisions of the act.

The defendant next argues that the court erred by

finding the UDUPA was applicable to all unclaimed parimutuel winnings between 1960 and 1972, because certain claims are barred by § 69-1315. This provision provides that "holders shall not be required to report or to pay or to deliver abandoned property or unclaimed funds as to which the statute of limitations applicable to the enforcement of any claim to such property shall have expired prior to December 25, 1969."

The defendant contends that the applicable statute of limitations for the enforcement of rights created by the racing statutes is Neb. Rev. Stat. § 25-206 (Reissue 1979). Defendant uses this statute as an affirmative defense.

In regard to the statute of limitations, this court has said: "The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded." *Vielehr v. Malone*, 158 Neb. 436, 439, 63 N.W.2d 497, 501 (1954).

When it is not apparent from the face of the petition that the action is barred, the statute of limitations, as a defense, must be raised by answer. *Vielehr v. Malone*, *supra*. A general denial to the claim that the UDUPA was applicable to the moneys is insufficient to raise a specific affirmative defense contained within a statutory section.

The defendant also argues that § 69-1302, as originally enacted and as it existed at all times prior to its amendment by L.B. 305 in 1977, made the UDUPA inapplicable to claims involving property less than $50. The defendant further argues that the plaintiff failed to prove that any of the moneys claimed relate to tickets in excess of $50.

This court rejects these arguments, because the statute, as it existed in June of 1980 when this suit was filed, contained no such limitation on the amount of unclaimed property required to be reported to the State Treasurer, and the claim here is

against the unclaimed pool and not each outstanding ticket.

In *S. C. Tax Comm. v. York Electric Coop., Inc.*, 275 S.C. 326, 270 S.E.2d 626 (1980), the Supreme Court of South Carolina held a similar provision of the UDUPA, which exempted "any property in an amount less than twenty-five dollars," applicable to the aggregate of property or funds held by the holder (electric cooperative) representing unclaimed money or cash credits for former customers, even though each of the accounts was less than $25.

In the fourth assignment of error the defendant asks that in the event the rules of racing are invalid, then a decision should have a prospective effect only, and the State should be estopped from recovering any amount, under the equitable theory of laches. The defendant argues that it relied on the rules of racing during the years in question, could not have foreseen the decision of the lower court, points out there was a long delay between the passage of the UDUPA in 1969 and the commencement of this suit in June of 1980, and believes it would be inequitable to require payment to the State of sums of money which have long been expended.

Despite this alluring argument, we are not persuaded to hold for the defendant. Any loss to be sustained by the defendant is a direct result of its own action in expending the moneys without proper authorization. Furthermore, this is not a case where a new liability was created or where the State seeks to enforce a liability created by the Legislature with the adoption of the UDUPA.

"The defense of laches is not a favored one and it will be sustained only if the litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary." *Campbell v. Ohio National Life Ins. Co.*, 161 Neb. 653, 671, 74 N.W.2d 546, 558 (1956). It is not applicable in this case.

Having decided the first four assignments of error

in favor of the plaintiff, it is apparent the last assignment has no merit.

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

AFFIRMED.

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

STATE OF NEBRASKA EX REL. CLAYTON BRANT ET AL., RELATORS, V. ALLEN J. BEERMANN, SECRETARY OF STATE OF THE STATE OF NEBRASKA, RESPONDENT.

350 N.W.2d 18

Filed June 15, 1984. No. 83-834.

1. **Constitutional Law: Statutes: Initiative and Referendum.** Generally, a measure seeking an advisory vote of the electorate or a nonbinding expression of public opinion on a question is not a proper subject for the initiative.
2. **Statutes: Words and Phrases.** A law is a rule of conduct prescribed by the lawmaking power of a sovereign.

Original action. Writ of mandamus denied.

Thomas J. Walsh of Walsh, Walentine, Miles, Fullenkamp & O'Toole, and Stephen E. Gehring of Cline, Williams, Wright, Johnson & Oldfather, for relators, and, on brief, Timothy F. Shaw.

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

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

PER CURIAM.

Relators, by leave of this court, filed an original action seeking a writ of mandamus requiring that the Secretary of State of the State of Nebraska file relators' initiative petition and that the subject of the initiative petition, as a proposed law, be placed on the ballot for the general election in November 1984.

Anticipating relators' filing their proposed initiative petition, and equipped with a copy of the proposed petition, the Secretary of State sought advice from the Attorney General of the State of Nebraska, that is, whether the Secretary of State was required to file the copy of the relators' petition sought to be circulated for signatures of registered voters.

In a written opinion dated June 3, 1983, the Attorney General advised the Secretary of State that the initiative process could not be used for the creation of a resolution or for conducting advisory votes on questions of public policy. In an additional written opinion on August 25, 1983, the Attorney General informed the Secretary of State that there existed "no statutory authority for utilizing the initiative process to obtain an advisory vote on [the] question" contained in relators' petition.

On August 31, 1983, relators presented to the Secretary of State a copy of the initiative petition pursuant to Neb. Rev. Stat. § 32-704 (Reissue 1978).

The copy and form of the proposed initiative petition are as follows:

INITIATIVE PETITION

THE OBJECT OF THIS INITIATIVE PETITION IS TO STATE THE POSITION OF THE PEOPLE OF NEBRASKA IN FAVOR OF A BILATERAL NUCLEAR WEAPONS FREEZE INCLUDING OPPOSITION TO DEPLOYMENT OF MX MISSILES IN NEBRASKA, FOLLOWED BY PROMPT NEGOTIATIONS TO REDUCE THE NUMBER OF NUCLEAR WEAPONS AND TO CAUSE THE TRANSMISSION OF THAT STATEMENT OF POSITION TO CERTAIN PERSONS AND GROUPS IN THE GOVERNMENTS OF THE UNITED STATES AND THE SOVIET UNION.

TO THE HONORABLE ALLAN [sic] J. BEERMANN, SECRETARY OF STATE FOR THE STATE OF NEBRASKA:

We, the undersigned legal voters of the State

of Nebraska and the County of _____, being severally qualified to sign this petition, respectfully demand that the following proposed law shall be submitted to the voters of the State of Nebraska for their approval or rejection at the general election to be held on the 6th day of November, 1984:

BILATERAL NUCLEAR WEAPONS FREEZE INCLUDING DEPLOYING OF MX MISSILES IN NEBRASKA

FOR AN ACT to provide for a statement of position of the people of the State of Nebraska in favor of a bilateral nuclear weapons freeze including opposition to deployment of MX missiles in Nebraska followed by prompt negotiations to reduce the number of nuclear weapons and to provide for the transmission of such statement of position to certain persons and groups in the Government of the United States and the Soviet Union.

Be it enacted by the people of the State of Nebraska.

Section 1. The people of the State of Nebraska hereby adopt the following statement of position as to a bilateral nuclear weapons freeze including deploying of MX missiles in Nebraska:

> The People of the State of Nebraska, do hereby oppose deployment of the MX missile in Nebraska and urge that the governments of the United States and the Soviet Union agree to a bilateral halt to the testing, production and further deployment of all nuclear weapons, missiles and delivery systems in a manner that can be checked and verified by both countries; and further urge that this bilateral agreement be followed by prompt negotiations to reduce the present number of nuclear weapons possessed by both countries.

Section 2. The Governor of Nebraska shall, within ten (10) days of the operative date of this

> Act, transmit a written communication to the President of the United States, the Secretary of Defense of the United States, the Secretary of State of the United States, all members of the United States Congress and to the Chairman of the Presidium of the Supreme Soviet declaring the passage of this Act and containing the Statement of Policy designated in Section 1 of this Act.
>
> Section 3. Upon the completion of the transmission of the written communication designated in Section 2 of this Act, this Act shall be of no further force and effect.

On September 1, 1983, the Secretary of State found that relators' petition was without statutory authority and should not be filed because the measure contained in the proposed initiative petition was "advisory in nature." By his "order" issued on September 1, 1983, the Secretary of State refused to file a copy of relators' proposed initiative petition, although the Secretary of State did stamp "RECEIVED" on the copy of the petition for identification of that document.

The Secretary of State admits that relators' proposed initiative petition satisfies statutory prescriptions regarding the form of an initiative petition. See Neb. Rev. Stat. §§ 32-703 (Cum. Supp. 1982), 32-703.01, and 32-704 (Reissue 1978).

Neb. Const. art. III, § 1, provides in part:

> The people reserve for themselves, however, the power to propose laws, and amendments to the constitution, and to enact or reject the same at the polls, independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature.

Further, Neb. Const. art. III, § 2, provides in part: "The first power reserved by the people is the initiative whereby laws may be enacted and constitu-

tional amendments adopted by the people independently of the Legislature."

By the foregoing constitutional provisions the people of the State of Nebraska have reserved the power to propose and enact laws independent of the Legislature. Consequently, the Legislature and the electorate are concurrently equal in rank as sources of legislation. Provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual. See, *Klosterman v. Marsh*, 180 Neb. 506, 143 N.W.2d 744 (1966); *State ex rel. Morris v. Marsh*, 183 Neb. 521, 162 N.W.2d 262 (1968); *Adams v. Bolin*, 74 Ariz. 269, 247 P.2d 617 (1952). Such right reserved in the people of Nebraska is so precious and jealously guarded that the Governor cannot veto measures initiated by the people. See Neb. Const. art III, § 4.

"The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." *McFadden v. Jordan*, 32 Cal. 2d 330, 332, 196 P.2d 787, 788 (1948). "To preserve the full spirit of the initiative the submission of issues to the voters should not become bogged down by lengthy litigation in the courts . . . ." *Perry v. Jordan*, 34 Cal. 2d 87, 91, 207 P.2d 47, 49 (1949).

Provisions concerning the initiative, the legislative power reserved to the people, should receive liberal construction to effectuate the policy proposed and adopted by the initiative as a part of the democratic process. See *State v. Davis*, 418 S.W.2d 163 (Mo. 1967); cf. *State ex rel. Boyer v. Grady*, 201 Neb. 360, 269 N.W.2d 73 (1978) (powers of the initiative and referendum regarding municipalities are to be liberally construed to permit, rather than restrict, the power and to attain, rather than prevent, its object).

This case presents two questions: (1) Whether the Secretary of State was required to file the copy of relators' initiative petition as directed in § 32-704;

and (2) Whether the measure contained in the proposed initiative petition was a law within the meaning of Neb. Const. art. III, § 2, and § 32-703.

Concerning the relators' proposed initiative petition, the following principles are applicable:

(1) Unless the subject of the proposed petition on its face is invalid or unconstitutional, the Secretary of State cannot pass upon the validity or construction of any proposed law, when the proposed petition is presented for filing pursuant to § 32-704. An example of the Secretary of State's determining the validity of an initiative measure would be found in an initiative petition proposing a statutory abolition of a constitutional office.

(2) The Secretary of State cannot pass upon the merit, wisdom, or policy of the law to be initiated.

(3) The Secretary of State is required to perform promptly all the ministerial duties imposed by law, except the Secretary of State may determine whether the subject of the petition has the semblance of a law or whether the subject is legally appropriate for the initiative. For example, the Secretary of State may exercise discretion and refuse to file a petition for something which would merely be an advisory vote on an issue or which would not have the characteristics of a law. See *White et al. v. Welling, Secretary of State*, 89 Utah 335, 57 P.2d 703 (1936).

Generally, a measure seeking an advisory vote of the electorate or a nonbinding expression of public opinion on a question is not a proper subject for the initiative. See, *City of Litchfield v. Hart*, 306 Ill. App. 621, 29 N.E.2d 678 (1940); *Kimble v. Swackhamer*, 94 Nev. 600, 584 P.2d 161 (1978); *State ex rel. Cleveland City Council v. Bd. of Elections*, 40 Ohio App. 2d 299, 318 N.E.2d 889 (1974); *Paisner v. Attorney General*, 390 Mass. 593, 458 N.E.2d 734 (1983).

The Supreme Judicial Court of Massachusetts considered a similar question in *Opinion of the Justices*

to the House of Representatives, 262 Mass. 603, 160 N.E. 439 (1928). The Massachusetts House of Representatives had inquired of the justices whether a "proposed law" introduced by an initiative petition, providing for a vote to determine the will of the people with reference to a repeal of the eighteenth amendment, was a law within the meaning of the initiative provisions of the Constitution. In holding that it was not a law, the opinion stated at 605-06, 160 N.E. at 440:

> Without undertaking to frame a definition of "law" as used in this Amendment sufficiently accurate and comprehensive to meet all the conditions of the future, reference may be made to two definitions given in other jurisdictions in discussing the force and effect of statutes. In *American Banana Co. v. United Fruit Co.* 213 U. S. 347, 356 [29 S. Ct. 511, 53 L. Ed. 826 (1909)], it was said by Mr. Justice Holmes: "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts." In *Opinion of the Justices*, 66 N. H. 629, 632 [33 A. 1076, 1078 (1891)], occurs this: "Law 'is a rule: not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal . . . .' " *The word "law" imports a general rule of conduct with appropriate means for its enforcement declared by some authority possessing sovereign power over the subject; it implies command and not entreaty; it is something different in kind from an ineffectual expression of opinion possessing no sanction to compel observance of the views announced.* The text of the proposed law accompanying this initiative petition does not prescribe a general rule of conduct. It merely invites a declaration of opinion by voters on a subject over which the people of the Commonwealth possess no part of the sovereign power. Amend-

> ment of the Constitution of the United States and repeal of Amendments thereof constitute Federal functions derived in every particular entirely from the Constitution of the United States. That instrument transcends all provisions sought to be enacted by the people or by the legislative authority of any State. The voters of the several States are excluded by the terms of art. 5 of the Constitution of the United States from participation in the process of its amendment. By that article all power over the subject is vested exclusively in the Legislatures of the several States. *Hawke v. Smith*, 253 U. S. 221, 227 [40 S. Ct. 495, 64 L. Ed. 871 (1920)]. *Leser v. Garnett*, 258 U. S. 130, 137 [42 S. Ct. 217, 66 L. Ed. 505 (1922)]. *The result of the vote as proposed in this initiative petition would be lacking in any effective force. The proposed law is wanting in features essential to constitute its provisions a law within any permissible conception of the meaning of that word.* Superficial appearances cannot clothe with the attributes of law something in substance vain and inoperative. *The mandate to the Secretary of the Commonwealth in § 2 to tabulate the returns of the votes and to "transmit copies . . . to each senator and representative in congress from this commonwealth" is subsidiary and incidental to the main purpose of the proposed law; it relates to a matter which standing alone possesses no legal force; it cannot convert into a law something in itself ineffectual.*

(Emphasis supplied.)

Government should be spared the burdensome cost of election machinery as a straw vote on the electorate's opinions, sentiments, or attitudes on public issues. This includes lawmaking through the Legislature or the initiative.

We hold that the initiative petition proposed by the relators is nothing more than a nonbinding expres-

sion of public opinion and not a proper subject for the initiative in Nebraska.

WRIT OF MANDAMUS DENIED.

SHANAHAN, J., dissenting.

The majority concludes that the measure in relators' petition is not a law.

A law is a rule of civil conduct (see *Leymel v. Johnson*, 105 Cal. App. 694, 288 P. 858 (1930)), a rule of action prescribed by authority (see *Insurance Co. v. Industrial Com.*, 71 Colo. 495, 208 P. 465 (1922)), and a rule of civil conduct prescribed by the lawmaking power in a state (see *Public Service Commission v. N. Y. Central R. R. Co.*, 193 A.D. 615, 185 N.Y.S. 267 (1920)). Regarding the issues before the court in this case, a law is a rule of conduct prescribed by the lawmaking power of a sovereign. Although relators' proposed initiative petition does reflect approval of a bilateral nuclear freeze and disapproval of locating MX missiles in Nebraska, the subject of the petition includes more than expressions of public opinion about nuclear weapons. Within 10 days of the operative date of the proposed law, the Governor of Nebraska must take action, that is, send a written communication to certain officials of the U.S. Government and to the Chairman of the Presidium of the Supreme Soviet. The communication from Nebraska's Governor shall contain the "Statement of Policy" set forth in § 1 of relators' proposed measure. If relators' initiative petition receives a favorable vote, then Nebraska's Governor is required to take definite action—the obligatory written communication transmitted to the designated governmental officials. The duty imposed and the specific action dictated as consequences of the proposed initiative petition, if approved, provide the subject of the petition with the attributes of a law and distinguish the relators' initiative petition from mere expressions of nonbinding public opinion.

The initiative is an integral and vital part of Nebraska's democratic process. Courts should not

weigh the wisdom or social propriety of a measure sought in an initiative petition, for such matters are public policy and politics—arenas or thickets in which courts should be conspicuously absent.

The writ of mandamus should have been granted.

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

OSCAR F. WAY, APPELLANT, V. DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA AND HARRY "PETE" PETERSON, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, APPELLEES.

351 N.W.2d 46

Filed June 22, 1984. No. 83-129.

1. **Administrative Orders: Appeal and Error: Proof.** In a proceeding in the district court to review an order of the Department of Motor Vehicles under the Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. §§ 60-501 et seq. (Reissue 1978 and Cum. Supp. 1982), the burden is upon the plaintiff to show that the order of the department was invalid.
2. **Bonds: Statutes.** A bond required by statute will be construed in light of the purpose for which it is required as expressed in the statute.
3. **Bonds: Statutes: Motor Vehicles.** The security deposit required by statute to insure that any judgment against the uninsured motorist will be paid must be in an amount adequate for that purpose.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

James H. Monahan, for appellant.

Paul L. Douglas, Attorney General, and Henry M. Grether III, for appellee.

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

BOSLAUGH, J.

The plaintiff, Oscar F. Way, appeals from the order of the district court affirming the order of the Department of Motor Vehicles suspending his

driver's license for failure to comply with the provisions of the Nebraska Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. §§ 60-501 et seq. (Reissue 1978 and Cum. Supp. 1982). The review in the district court was pursuant to § 60-503 (Reissue 1978).

While operating his pickup truck on December 22, 1981, Way was involved in a collision with another vehicle at the intersection of 30th and McKinley Streets in Omaha, Nebraska. Way was not insured. Reports filed with the department following the accident indicate that approximately $1,000 in property damage resulted to the other vehicle and that the driver of that vehicle struck his head on the windshield at the time of the collision.

From a review of the reports made in connection with the accident, the department determined there was a reasonable possibility that it could be found that Way failed to yield the right-of-way and that a judgment could be rendered against Way as a result of the accident. In accordance with the provisions of the Motor Vehicle Safety Responsibility Act, the department required Way either to post a security deposit in the amount of $16,000 to satisfy any judgment against him or to comply with the other alternatives which are set out in the statute. Way failed to post the deposit and his license was suspended pursuant to § 60-507 (Reissue 1978).

On appeal Way contends that his right to due process was violated because he was required to bear the burden in the district court proceeding of showing the invalidity of the department's action. In *Hehn v. State*, 206 Neb. 34, 36-37, 290 N.W.2d 813, 815 (1980), where the same issue was raised, we said:

> The next assignment of error we shall consider is the plaintiff's contention that the court erred in placing the burden on the plaintiff to attack the validity of the order. Plaintiff argues that, unless the director has the burden of showing that there is a reason to believe recovery can

be had against a licensee, due process will be violated. Plaintiff does not specifically cite any cases which hold directly on that point. We merely note that the U.S. Supreme Court in *Jennings v. Mahoney*, 404 U.S. 25, 26 (1971), said: "We held that, although a determination that there was a reasonable possibility that the motorist was at fault in the accident sufficed, 'before the State may deprive [him] of his driver's license and vehicle registration,' the State must provide 'a forum for the determination of the question' and a 'meaningful . . . "hearing appropriate to the nature of the case." ' " The court did not indicate that the State must bear the burden of proof; indeed, the body of law seems to indicate that the burden is on the licensee. In *Mackey v. Director of Department of Motor Vehicles*, 194 Neb. 707, 235 N.W.2d 394 (1975), this court noted that the appealing licensee had the burden of pleading and proving the specific grounds on which he relied to establish a claim of invalidity of a license revocation under the former "points" statute, Neb. Rev. Stat. § 39-7,129 (Reissue 1968). See, also, *Lutjemeyer v. Dennis*, 186 Neb. 46, 180 N.W.2d 679 (1970); 73 C.J.S. *Public Administrative Bodies and Procedure* § 206 (1951). We hold that the procedure specified by the District Court placing on the plaintiff the burden of proving the invalidity of the order of the director of the Department of Motor Vehicles was correct and does not violate the due process rights of plaintiff.

Way next contends that the amount of the bond was unreasonable in light of the evidence presented. A bond required by statute will be construed in light of the purpose for which it is required as expressed in the statute. *State Surety Co. v. Peters*, 197 Neb. 472, 249 N.W.2d 740 (1977). In *Berg v. Pearson*, 199 Neb. 390, 392-93, 259 N.W.2d 275, 277 (1977), we dis-

cussed the rationale behind the Motor Vehicle Safety Responsibility Act:

> [I]n Jennings v. Mahoney, 26 Utah 2d 128, 485 P. 2d 1404, affirmed 404 U.S. 25, 92 S. Ct. 180, 30 L. Ed. 2d 146 . . . the court said: "It should be emphasized that the procedure provided under the Financial Responsibility Act is to determine whether security is required to assure financial responsibility and not to determine ultimate liability."

The security deposit required by statute to insure that any judgment against the uninsured motorist will be paid must be in an amount adequate for that purpose.

In *Wroblewski v. Pearson*, 210 Neb. 82, 313 N.W.2d 231 (1981), we upheld the suspension of Wroblewski's driver's license when he failed to post a security deposit of $30,750 after he was involved in an accident involving property damage to two other vehicles. We said:

> The issue in cases of this nature is not whether a judgment should be entered against the licensee but, rather, whether there is "a reasonable possibility" of a judgment being rendered against the licensee as a result of the accident. See § 60-507; *Schetzer v. Sullivan*, 193 Neb. 841, 229 N.W.2d 550 (1975). As we noted in *Berg*, *supra* at 392, 259 N.W.2d at 276-77: ". . . An order of suspension should not be set aside unless there is *no* reasonable possibility of a judgment being rendered against the operator in question." (Emphasis supplied.) The issue in cases of this nature is not whether the driver is actually liable in the accident; instead, the issue is only whether the evidence before the Department of Motor Vehicles supports its finding that there is a reasonable possibility of a judgment. The scope of review in cases of this nature is a review of the department's determination that there is a reasonable possibility of a judgment

rather than an unlimited new trial on the issue of liability.

Id. at 85-86, 313 N.W.2d at 233.

In *Hehn*, 206 Neb. 34, 38, 290 N.W.2d 813, 816 (1980), we said: "It is not the function of the director to weigh the alleged negligence or contributory negligence of the parties involved but to make, on the basis of a report, a determination of whether a reasonable possibility of liability exists."

In the present case the director reviewed the reports made in connection with the accident as is required by § 60-507(3) (Reissue 1978). Those reports indicated that property damage resulted to the second vehicle and that the other driver hit his head on the windshield upon impact. The reports also indicate that Way may be found negligent. The evidence presented to the district court did not disclose any further information regarding the extent of damage and injury which may have been suffered by the other driver.

The reports filed with the department indicated that there was a reasonable possibility that Way might be found liable for damages caused by the accident. The security deposit required to assure financial responsibility in the event of a finding of liability was not unreasonable in light of the indication of both property damage and personal injury.

The judgment of the district court is affirmed.

AFFIRMED.

CAPORALE, J., participating on briefs.

JAMES T. JERSHIN, APPELLANT, v. ROY F. BECKER, APPELLEE.

351 N.W.2d 48

Filed June 22, 1984. No. 83-157.

1. **Motor Vehicles: Highways: Rules of the Road.** A motorist approaching a highway protected by stop signs must stop before

going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection.

2. _____: _____: _____. A motorist is not only obligated to look for approaching vehicles but also must see any vehicle within the radius which denotes the limit of danger.
3. **Motor Vehicles: Evidence: Trial.** Whether one failed to look or looked and failed to see a vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching vehicle was within the limit of danger that reasonable minds could not differ thereon.
4. _____: _____: _____. Before a verdict can be properly directed in a case where one failed to look or looked and failed to see a vehicle when it was within the limit of danger, the position of the oncoming vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger; otherwise, the question becomes one for the jury.
5. **Motor Vehicles: Highways: Rules of the Road.** The right of a motorist on a favored street to assume that a vehicle on a nonfavored street will be brought to a stop before it enters the intersection and will not proceed until the motorist has passed neither permits the motorist on the favored street to claim the right-of-way when he is too distant from the intersection to be entitled to it nor relieves him of the duty of exercising due care to avoid an accident.
6. **Trial: Negligence: Evidence.** In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury.

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

James T. Gleason of Swarr, May, Smith & Andersen, for appellant.

Thomas J. Walsh of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellee.

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

BRODKEY, J., Retired.

The plaintiff, James T. Jershin, filed suit to recover damages for injuries sustained when his motorcycle collided with the automobile operated by defendant, Roy F. Becker. The jury returned a verdict in favor of the defendant, and the plaintiff has appealed.

The accident took place at approximately 4:30 p.m. on June 8, 1980, at the intersection of U.S. Highway 73-75, which runs in a north-south direction, and U.S. Highway 34, which runs in an east-west direction, in Cass County, Nebraska.

There are several traffic islands around the intersection. The island located south of the intersection on Highway 73-75, dividing the northbound and southbound lanes, is approximately 900 feet long, and is constructed in such a manner as to create a left-turn lane for traffic turning west onto Highway 34. The island north of the intersection is constructed to provide a merge lane for traffic turning northbound onto Highway 73-75 from Highway 34.

West of the intersection on Highway 34 there is a narrow island between the eastbound and westbound lanes of travel. There are also triangular-shaped islands which guide traffic either entering Highway 34 from the north or exiting Highway 34 to proceed south on Highway 73-75.

Eastbound traffic on Highway 34 is controlled by a stop sign. There are no traffic signals for the northbound and southbound traffic on Highway 73-75. It appears from the record that on the day of the accident James Jershin was operating his motorcycle traveling north on Highway 73-75, with a passenger riding on the rear of his motorcycle. He was traveling approximately 55 miles per hour and had the cruise control in operation while he was driving.

Sometime before the accident, he came upon another motorcycle traveling north, operated by Frederick E. Kerns, whose wife was a passenger on the rear of that motorcycle. The parties traveled

north, nearly side by side, with the Jershin motorcycle slightly ahead and to the right of the Kernses' motorcycle.

Jershin testified that when he was approximately at the beginning of the island located south of the intersection, he observed the defendant's car approach the stop sign on Highway 34 and that he then released the cruise control and hit his brakes slightly. He continued to observe the car while also watching the Kernses' motorcycle behind him. When Jershin was just beyond the *beginning* of the left-turn lane, he observed the defendant's car commence to "crawl" away from the stop sign into the intersection. Jershin then applied his brakes. Defendant continued east, blocking much of the northbound lane. Jershin moved his motorcycle to the left of the northbound lane, but was unable to go around the vehicle, and collided with the right rear quarter panel of the automobile. He estimated his speed at the time of the impact at 15 to 20 miles per hour.

Defendant Becker, age 84 at the time of trial, testified that he was traveling east on Highway 34 and stopped at the stop sign at the intersection of Highways 34 and 73-75. His wife was a passenger in the automobile. He testified that he looked both ways and saw no one coming, so he proceeded to cross the highway. He stated that there was nothing to obstruct the view to the south and that a person could see approximately 80 rods, or one-quarter mile, to the south. He did not see anyone until he was hit, although he again looked to the south and north while crossing. He testified that his car was completely on the gravel road east of the intersection when he was hit by plaintiff.

Both parties moved for a directed verdict at the end of the plaintiff's case, and renewed their motions at the close of the defendant's case. The court overruled the motions and submitted the case to the

jury on the issues of defendant's negligence, comparative negligence, proximate cause, and damages.

The plaintiff has argued that the trial court should have directed a verdict of liability against the defendant, or at least should have instructed the jury that the defendant was negligent as a matter of law.

The law is well established that a motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection. *Nichols v. McArdle*, 170 Neb. 382, 102 N.W.2d 848 (1960); *Nistor v. Therkildsen*, 181 Neb. 817, 151 N.W.2d 443 (1967).

A motorist is not only obligated to look for approaching vehicles but also must see any vehicle within the radius which denotes the limit of danger. *Nichols, supra*; *Nistor, supra*. While it is true that one who fails to see an approaching vehicle that is favored over him is negligent as a matter of law, in this case whether or not the plaintiff was in a favored position is a question of fact to be determined by the trier of facts.

We have held that

> "[w]hether one failed to look or looked and failed to see a vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching vehicle was within the limit of danger that reasonable minds could not differ thereon. * * * The driver of a vehicle is not required to notice every car that happens actually to be within his range of vision, but only those within the radius which denotes the limit of danger. Before a verdict can be properly directed in such a case the position of the oncoming vehicle must be definitely located in a

> favored position, that is, that it was within that radius which denotes the limit of danger, otherwise the question becomes one for the jury."

Hellmeier v. Policky, 178 Neb. 170, 172, 132 N.W.2d 760, 762-63 (1965).

The plaintiff testified that he first noticed the defendant's vehicle pull away from the stop sign when he (plaintiff) was at the point where the left-turn lane begins. The evidence indicates that when the defendant pulled out, the plaintiff was at least 300 feet away to the south. We cannot say, as a matter of law, the defendant was negligent in so doing. Whether the plaintiff was within the radius which denotes the limit of danger was the question upon which the existence of negligence on defendant's part must be determined. That question, and thus the issue of the negligence of defendant, was properly submitted to the jury. We have held that

> [a] person traveling on a favored street protected by stop signs of which he has knowledge may properly assume, until he has notice to the contrary, that motorists about to enter from a nonfavored street will observe the foregoing rules. [Citations omitted.] However, the right of a motorist on a favored street to assume that a vehicle on a nonfavored street will be brought to a stop before it enters the intersection and will not proceed until the motorist has passed *neither permits the motorist on the favored street to claim the right-of-way when he is too distant from the intersection to be entitled to it nor relieves him of the duty of exercising due care to avoid an accident.* [Citation omitted.]

(Emphasis supplied.) *Hartman v. Brady*, 201 Neb. 558, 562, 270 N.W.2d 909, 912 (1978).

In his testimony the plaintiff conceded that had there been a stop sign controlling his direction of travel, he would have had sufficient room to bring his motorcycle to a stop. This is not a case where a vehicle suddenly pulled out in front of another ve-

hicle on a favored street, giving the favored vehicle no time or room to react and avoid the accident. On the contrary, the plaintiff first saw the defendant at a distance of around 900 feet, and then, when at a distance of 300 feet he saw him pull forward, he began to slow down. While plaintiff was entitled to assume that the defendant would yield the right-of-way until he had notice to the contrary, under the evidence in this case, as reflected by the record, whether he should have realized that the defendant was not going to yield the right-of-way and whether he could or should have avoided the accident were questions for determination by the jury.

> "In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury."

Moats v. Lienemann, 188 Neb. 452, 454, 197 N.W.2d 377, 379 (1972).

The jury, after trial, decided these fact questions. The trial court properly overruled the motion for directed verdict prior to submission of the case to the jury.

The plaintiff has also argued that the jury should have been instructed on the doctrine of "last clear chance."

The doctrine of last clear chance does not apply where the negligence of the party seeking to invoke it was active and continuing as a contributing factor at the time of injury. *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983).

It is clear that if in this case the plaintiff was not negligent, the doctrine, by its definition, would have

no application. Moreover, if the actions of the plaintiff in this case did amount to negligence, it was clearly active and continuing up to the time of the collision, and therefore the doctrine would be inapplicable. We conclude that the trial court correctly refused the requested instruction.

The plaintiff's final assignment of error relates to the court's refusal to allow the driver of the second motorcycle to testify with regard to the avoidability of the accident. The first two questions asked dealt with whether the plaintiff could have safely avoided the collision, considering the position of the defendant at two different points. The third question dealt with whether the defendant could have done anything to avoid the collision.

We must first point out that the appropriate standard of review for an assignment of error directed at the exclusion of evidence is one of abuse of discretion. *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984).

Opinion testimony by a lay witness is permitted only where it is rationally based on the perception of the witness and it is helpful to a clear understanding of his testimony or the determination of a fact in issue. Neb. Rev. Stat. § 27-701 (Reissue 1979). It is generally admissible where it is necessary and advisable as an aid to the jury, but it should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine. *Brugh v. Peterson*, 183 Neb. 190, 159 N.W.2d 321 (1968).

The questions asked of the witness sought his opinion as to each party's opportunity to avoid the accident. These were the precise issues to be determined by the jury. The testimony would merely have been the witness' conclusions, and would not be helpful to the jury in resolving the issues. There was no abuse of discretion in the exclusion of the opinions.

There being no merit to the errors assigned, we affirm the judgment of the district court.

AFFIRMED.

H & L EQUIPMENT, INC., APPELLEE, V. VERLAND SCHARDT, APPELLANT.

349 N.W.2d 924

Filed June 22, 1984. No. 83-327.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

Lyle J. Koenig and Frank J. Daley, Jr., of Germer, Koenig, Murray, Johnson & Daley, for appellant.

Ted S. Griess of Baird and Griess, and Stephen A. Scherr of Whelan, Foote & Scherr, P.C., for appellee.

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

PER CURIAM.

H & L Equipment, Inc., sued Verland Schardt in an action alternatively seeking replevin of a used truck scale or damages regarding sale of the scale. In addition to his answer to H & L's petition, Schardt counterclaimed, alleging, generally, H & L's nonperformance of the sales contract, and seeking consequential damages regarding the sale. There was evidence adduced by each party in support of their respective contentions. A recital of the conflicting evidence serves no purpose. The trial court resolved the conflict of evidence in favor of H & L, and entered judgment in favor of H & L for replevin and against Schardt on consequential damages regarding the sale. In a law action tried to the court, the findings of the trial court have the effect of a jury

verdict and will not be disturbed on appeal unless clearly wrong. In a nonjury law action the evidence must be considered in the light most favorable to the successful party, with conflicts resolved in favor of the successful party, who is entitled to the benefit of every inference which can be reasonably deduced from the evidence. See *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982). There is evidence to support the trial court's findings. The findings of the trial court are not clearly wrong. The judgment of the trial court is affirmed.

AFFIRMED.

CAROL T. THYNNE, APPELLEE, V. CITY OF OMAHA, APPELLANT.

351 N.W.2d 54

Filed June 22, 1984. No. 83-332.

1. **Pretrial Motions: Appeal and Error.** The granting or denying of a motion to compel a physical or mental examination of a party is grounded in the sound discretion of the trial court; absent an abuse of that discretion, the trial court's ruling must stand.
2. **Pretrial Motions: Words and Phrases.** Clinical psychologists are physicians within rule 35 of the Nebraska Discovery Rules.

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

Herbert M. Fitle, Omaha City Attorney, James E. Fellows, and Thomas O. Mumgaard, for appellant.

Leo A. Knowles and John F. Thomas of McGrath, North, O'Malley & Kratz, P.C., for appellee.

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

CAPORALE, J.

As the result of an automobile accident, appellee, Carol T. Thynne, brought suit against the appellant,

City of Omaha, under the Nebraska Political Subdivisions Tort Claims Act. The city appeals from the $351,385.94 judgment entered against it. We reverse and remand for a new trial solely on the issue of damages.

On Friday evening, January 9, 1981, as Thynne was returning home from work at Bergan Mercy Hospital in Omaha, where she was employed as a nurse anesthetist, the vehicle Thynne was driving was struck from the rear by an Omaha police cruiser. While there are minor discrepancies in their recapitulations of the accident, both Thynne and the police officer agree that Thynne was stopped in the inside westbound lane of Pacific Street because cars in front of her had stopped awaiting an opportunity to turn left onto 97th Street. The police officer attributed the cause of the accident to his following too closely and not being able to stop once he noticed Thynne's vehicle.

When Thynne finally reached her home, after the accident was investigated and it was determined that she could drive her vehicle, she was feeling nauseous and was still suffering from a headache that set upon her shortly after the accident. Upon awaking Saturday morning Thynne still had the headache, and, in addition, her neck, face, and right arm were sore. She made an appointment to see her family physician on Monday.

On Monday Thynne went to work and was informed by the physician in charge to return home and see her family physician before returning to work. Thynne saw her physician that day, and he recommended that she apply heat and take aspirin. He also prescribed pain-relieving drugs, along with instructions that she not return to work. By the next weekend Thynne's pain had increased. She suffered spells of dizziness, diminished hearing, and pain in her jaws. She again called her family physician, but he was unavailable. Thynne's husband then called the family dentist, who made a house call.

The dentist diagnosed Thynne's problem as a temporomandibular joint dysfunction, which involves the main joints of the jaw, and fitted her with a mouthpiece designed to relieve tension on the temporomandibular joint.

On March 5, 1981, Thynne attempted to return to work and was required by her employer to see an orthopedic physician. The orthopedist diagnosed an acute cervical sprain. He advised her to rest, apply heat, and take medication for pain.

Thynne's pain lingered on through the year, and in January of 1982 Thynne's orthopedist sent her to a neurologist, who placed her in the hospital, where tests were conducted and physical therapy was prescribed. In the summer of 1982 Thynne traveled to California, on the advice of her family dentist, to be treated by a specialist in temporomandibular joint dysfunction. The specialist's treatment consisted of, among other things, the use of herbs and acupuncture.

Thynne has not returned to work and continues to complain of pain in her neck and jaws, along with numbness in her right hand. Several physicians who have examined Thynne find no X-ray or other "objective" physical evidence of the cause for her continuing pain. They also opine that Thynne's pain may be the result of a functional overlay, that is to say, the etiology of the pain is emotional rather than physiological. No physician has doubted the existence of Thynne's pain; one physician thought that it would be easier to treat her once the stress of litigation was gone. While several physicians who have examined Thynne expressed the opinion that she should return to work on at least a part-time basis, neither Thynne's family physician nor her orthopedist has recommended that she do so.

On March 9, 1983, 5 days prior to the March 14, 1983, scheduled trial date, the city filed a motion to compel an examination of Thynne on March 11, 1983, by a clinical psychologist. In connection with the

timing of this motion, we note that the parties stipulated on or about September 24, 1982, that all discovery was to be completed on or before December 1, 1982. However, neither party abided by this stipulation. On February 8, 1983, Thynne scheduled the deposition of a medical expert to be taken in Los Angeles, California, on March 8, 1983; on February 18, 1983, Thynne filed supplemental answers to interrogatories which, among other things, added the name of a registered physical therapist as an additional "medical practitioner" who examined or treated her; on February 23, 1983, Thynne scheduled the taking of her orthopedist's deposition on March 3, 1983; and on March 1, 1983, Thynne again supplemented her answers to interrogatories by the addition of another physician as one who had examined or treated her, and listed other witnesses. The city's March 9 motion was denied on March 10, 1983, by a judge other than the one presiding at the trial.

The city assigns six errors to the trial court, none of which is directed to the issue of liability. Since we hold that the failure to grant the city's motion for examination requires a reversal and vacation of the judgment, a discussion of the issues raised by the city's other assignments, which relate to the amount of the judgment, is unnecessary.

Pursuant to Neb. Rev. Stat. § 25-1273.01 (Cum. Supp. 1982), this court adopted the Nebraska Discovery Rules, which govern the conduct of discovery in civil cases. Neb. Ct. R. 35(a) (Rev. 1983) provides:

> Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his or her custody or legal control. The order may be made only on motion for good cause shown and upon notice to

> the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

The city's motion was accompanied by the affidavit of the city's attorney, which stated that Thynne's attorneys had refused to permit the requested examination. It also stated that since the deposition testimony of several of the expert witnesses indicated that there was no evidence of a physiological cause of Thynne's pain, and the pain might be due to emotional factors, such an examination was necessary to determine the nature and extent of Thynne's injuries.

Our review of the denial of the city's motion begins with the observation that the granting or denying of a motion to compel a physical or mental examination of a party is grounded in the sound discretion of the trial court. Absent an abuse of that discretion, the trial court's ruling must stand. *Hoegerl v. Burt*, 215 Neb. 752, 340 N.W.2d 428 (1983); *Moninger v. Moninger*, 202 Neb. 494, 276 N.W.2d 100 (1979).

There is no argument that Thynne's mental condition was in controversy. Several physicians, including some of those personally retained by Thynne, could not point to an objective physiological cause of Thynne's continuing pain. Some of these physicians thought there might be an emotional or psychological component to Thynne's pain. Thynne argues that because of the timing of the city's motion, it should not have been granted. Thynne does not argue that her case would have been unduly prejudiced by her submission to the psychological examination 3 days before trial. Nor does she argue that the examination would have presented undue inconvenience. We think the trier of fact, the trial judge in this case, might well have been aided in his evaluation of Thynne's future pain and prospects for recovery by such an examination conducted at a

point close in time to the trial. We have previously held that such an examination may, in the sound discretion of the trial judge, even be ordered during trial. *Hoegerl v. Burt, supra*; *Ziskovsky v. Miller*, 120 Neb. 255, 231 N.W. 809 (1930); *O'Brien v. Sullivan*, 107 Neb. 512, 186 N.W. 532 (1922). See, also, Annot., 9 A.L.R.3d 1146 (1966).

Accordingly, we conclude that Thynne's mental condition was in controversy, good cause for her psychological evaluation was shown, and the order was not sought at a time when Thynne's case would have been unfairly prejudiced or the start of the trial delayed.

Discovery rule 35 provides that a court-ordered physical or mental examination must be conducted by a "physician." The question becomes whether the term physician includes a licensed clinical psychologist, a matter in which the judge overruling the motion had no prior guidance from this court. Thynne argues that a clinical psychologist does not fit into the definition of physician offered by Neb. Rev. Stat. §§ 71-1,102 et seq. (Reissue 1981), which deal with licensing. While we do not find a definition of the term physician in any of those statutes, § 71-1,102 provides that persons who publicly profess to be physicians are deemed to be engaged in the practice of medicine. Even if it be assumed from a reading of those statutes that the term physician, as used therein, means only someone who practices medicine or surgery, a question we do not decide, we believe that the statutes constituting the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 et seq. (Reissue 1979), provide better guidance.

Section 27-504(1)(b) defines physician, for the purpose of determining when a physician-patient privilege obtains, as including a practicing clinical psychologist who is licensed or certified as such. It seems to us that if the services rendered by a psychologist are of a nature as to give rise to a physician-patient privilege, it follows that a party in

a lawsuit which presents a controversy as to a condition which psychologists investigate or treat ought to be able to employ the services of such practitioners.

Our review of the case law in this relatively untilled legal field discovers only one jurisdiction which has reported cases of any relevance. In *Reuter v. Superior Ct., Cty. of San Diego*, 93 Cal. App. 3d 332, 155 Cal. Rptr. 525 (1979), the question was whether a trial court abused its discretion by ordering that a mother and son, seeking recovery for the wrongful death of their husband and father, submit to psychological tests to be administered by a psychologist. The California court held that a psychologist was not a physician. It reached that conclusion because the order was based upon a statutory discovery provision which provided that such examinations be conducted by physicians and that elsewhere the California statutes define physician as " 'any person holding a valid and unrevoked physician's and surgeon's certificate or certificate to practice medicine and surgery, issued by the Board of Medical Examiners . . . .' " *Id.* at 338, 155 Cal. Rptr. at 529. The reviewing court found the trial court's order proper because that psychological evaluation was to be conducted by a psychologist who was working under the general direction of a psychiatrist. On the other hand, *Browne v. Super. Court for Cty. of Santa Clara*, 98 Cal. App. 3d 610, 159 Cal. Rptr. 669 (1979), held that an order requiring a party to submit to the physical examination of a rehabilitation expert was improperly granted because the expert was not a physician. Since these California cases are based upon a statutory scheme which contains a definition of the term physician, we do not find them persuasive.

Counsel for the city has called our attention to the unreported memorandum and order in *Massey v. Manitowoc Co.*, CV82-2970 (E.D. Pa. Dec. 6, 1983) (order granting examination), which concluded that a licensed psychologist can be treated as a physician

for the purpose of conducting an examination under Fed. R. Civ. P. 35, the parent of our rule 35. In part that court reasoned:

> It is perfectly reasonable to allow qualified psychologists to administer psychological tests once it has been determined psychological testing is appropriate in a particular case. The argument is not mere bootstrapping. Considering their required specialized training and experience, psychologists will in some instances be best qualified to administer examinations that require psychological testing. That is what they have been trained to do. To require that only a medical doctor, who may or may not have received specialized training in psychiatry or psychology, be permitted to administer the tests because Rule 35 permits utilizing only a "physician," would not serve the ends of justice.

The paucity of precedent leaves us free to write upon a clean slate in regard to this issue. Webster's New Collegiate Dictionary (1974) defines the word physician as "a person skilled in the art of healing." Neb. Rev. Stat. § 71-3832 (Reissue 1981) defines clinical psychology as "that branch of psychology concerned with the assessment, diagnosis, and treatment of mental, emotional, and behavioral disorders." In order to practice as a clinical psychologist, one must either hold a doctoral degree in clinical psychology and have at least 1 year of postdoctoral clinical experience or pass an examination. Neb. Rev. Stat. § 71-3835 (Reissue 1981).

The use of the testimony of clinical psychologists has become commonplace in cases involving the best interests of children, and we find it helpful when we exercise our powers as "parens patriae" of minors, incompetents, and other legally disabled persons.

In short, we believe that clinical psychologists, although they, just as medically trained physicians, are not always successful in their treatment efforts,

are skilled at and engage in the art of healing. We therefore now inscribe on our heretofore clean slate that clinical psychologists are physicians within rule 35 of the Nebraska Discovery Rules. The fact that the examination sought was to be conducted by a licensed clinical psychologist afforded the trial court no ground to deny the city's motion.

Nor do we find any merit in Thynne's suggestion that the city, having already had her examined by an orthopedist, could not require a second examination. It desired an examination by an expert trained in a discipline not within its first expert's area of expertise on a matter in issue and was entitled to pursue that line of inquiry.

Our review of the record leads us to conclude that the denial of the city's motion for an order compelling Thynne to be examined prejudiced the city's presentation of its case and was an abuse of discretion.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

FRED CHALUPA, APPELLANT, V. HARTFORD FIRE INSURANCE COMPANY, APPELLEE.

350 N.W.2d 541

Filed June 22, 1984. No. 83-386.

1. **Trial: Hearsay: Rules of Evidence.** The foundational requirements for the admission of evidence under the business records exception to the hearsay rule are threefold. First, the activity recorded must be a type which regularly occurs in the course of the business' day-to-day activity. Second, the record must have been made as a part of a regular business practice at or near the time of the event recorded. Third, the record must be authenticated by a custodian or other qualified witness.
2. **Contracts: Restitution: Proof.** The general rule is that all payments made under a contract are presumed to be voluntary, and the party seeking to recover payment has the burden to prove that it was involuntary.

3. **Contracts: Insurance: Restitution.** An insurer who has made a payment under a mistake of fact that the terms of an insurance contract require such payment is entitled to restitution, at least where the payee has not so changed his position that it would be inequitable to require him to make full payment.

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

Robert G. Simmons, Jr., of Wright, Simmons & Selzer, for appellant.

Winner, Nichols, Douglas and Kelly, for appellee.

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

WHITE, J.

This is a declaratory judgment action brought by the plaintiff-appellant, Fred Chalupa, to determine whether an insurance policy issued by the defendant-appellee, Hartford Fire Insurance Company (Hartford), provided water damage coverage for a dwelling on Chalupa's premises. The district court for Scotts Bluff County, Nebraska, held that no coverage existed under the policy in question for the loss sustained and that Hartford is entitled to recover $15,277.99, the amount mistakenly paid by Hartford to Chalupa. We affirm.

Fred Chalupa, a farmer-rancher, owned property located in Nebraska and Wyoming near the border of the two states. Chalupa applied for and received a farmowners-ranchowners insurance policy through Hartford's agent, the Marron Agency, Inc., located in Morrill, Nebraska. The policy covers approximately 27 buildings situated at four different locations. In February 1982 Chalupa suffered water damage due to a ruptured water pipe at a dwelling insured under the policy. On June 4, 1982, Chalupa signed a proof of loss claim which stated that the dwelling which suffered the water damage was insured for $70,000 and that the total damage was $15,377.99. Hartford subsequently sent a check for

$15,277.99 to Chalupa. On August 26, 1982, Hartford advised Chalupa's attorney that the dwelling in which the water damage occurred was not covered for this type of peril. Hartford explained payment was mistakenly made under the belief that the damage occurred to the "main dwelling," the house in which Mr. Chalupa resided, which was insured for $70,000. The main dwelling, which would have been covered for water damage, and the dwelling in which the damage occurred, which is insured for $50,000, are located within 200 feet of each other. Hartford asked that the money be returned. Chalupa refused. This declaratory judgment action was then brought by Chalupa to construe the insurance policy.

At trial it was not contested that the dwelling which suffered the water damage was covered under the insurance policy. The question was the extent or type of coverage for that dwelling. The trial court held that the dwelling was not insured for damage caused by a ruptured water pipe, and further held that Hartford was entitled to recover $15,277.99, the amount previously paid by Hartford to Chalupa under a mistake of fact. Chalupa appeals, and contends that the trial court erred in (1) admitting into evidence Hartford's "file" concerning Chalupa's insurance coverage, (2) allowing Hartford's witness to testify concerning the conclusions to be drawn from the file, (3) finding that the dwelling in question was not insured for damage caused by a ruptured water pipe, and (4) allowing Hartford to recover the voluntary payment previously paid to Chalupa.

Concerning the trial court's admission of the insurance file into evidence, Chalupa contends that because he never signed the application of insurance which was contained in the file and because there was inadequate foundation, the trial court erred in receiving the file into evidence. Hartford contends, and we agree, that the evidence was admissible under Neb. Rev. Stat. § 27-803(5) (Reissue 1979), the

business records exception to the hearsay rule.

The foundational requirements of § 27-803(5) are set forth within the statute and have previously been construed by this court. The foundational requirements for this exception are threefold. First, the activity recorded must be a type which regularly occurs in the course of the business' day-to-day activity. Second, the record must have been made as a part of a regular business practice at or near the time of the event recorded. Third, the record must be authenticated by a custodian or other qualified witness. *Bobbie Brooks, Inc. v. Hyatt*, 195 Neb. 596, 239 N.W.2d 782 (1976); *Transport Indemnity Co. v. Seib*, 178 Neb. 253, 132 N.W.2d 871 (1965). See, generally, M. Graham, Handbook of Federal Evidence § 803(6) (1981).

Christopher J. Leliaert, an underwriter for Hartford, testified that the file, including the application for insurance and the photographs attached thereto, was prepared by Marron Agency, Inc. Leliaert testified that it was common practice to label the photographs in the manner in which the Marron Agency, Inc., had done, that the file was made and kept in the regular course of business, and that he was the supervisor of the file. This testimony laid sufficient foundation under § 27-803(5), unless "the source of information or method or circumstances of preparation indicate lack of trustworthiness." The district court has broad discretion in making this determination, and the trial court's decision will not be overruled on appeal absent an abuse of discretion. *Bobbie Brooks, Inc. v. Hyatt, supra*; *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984).

The foundational requirements having been met by Hartford, along with no indicia that the file's contents were untrustworthy, we hold that the file was properly admitted into evidence.

Concerning Leliaert's interpretation or conclusion that the dwelling in question was not afforded pro-

tection for damages caused by a ruptured pipe, the insurance application speaks for itself. The application, which contains pictures of most of the buildings insured under the policy, included a picture of the main dwelling, the house in which Chalupa resided; it also included a picture of the dwelling which suffered the water damage. The picture of the house in which Chalupa resided was marked "Main Dwg." The picture of the house which suffered the water damage was marked "Dwg #1." By correlating the pictures and their markings with the insurance policy, one can easily ascertain that the owner-occupied main dwelling is insured under form FR 00 02 "BROAD FORM" for $70,000 and that water damage caused by a ruptured pipe would have been covered. One can also ascertain that the dwelling which suffered water damage was insured under form FR 00 08 "COVERAGE F" for $50,000 and that water damage caused by a ruptured pipe is excluded from coverage. The application shows beyond any doubt that the dwelling was not covered for this peril. Consequently, any oral testimony in that regard was not only cumulative but also harmless.

Chalupa next contends that the district court erred in allowing Hartford to recover the payment voluntarily made to him. The general rule, applicable here, is that all payments made under a contract are presumed to be voluntary, and the party seeking to recover payment has the burden to prove that it was involuntary. *Hersch Buildings, Inc. v. Steinbrecher*, 198 Neb. 486, 253 N.W.2d 310 (1977). An insurer who has made a payment under a mistake of fact that the terms of an insurance contract require such payment is entitled to restitution, at least where the payee has not so changed his position that it would be inequitable to require him to make full payment. *Federated Mut. Ins. Co. v. Good Samaritan Hospital*, 191 Neb. 212, 214 N.W.2d 493 (1974). See, also, 6 J. Appleman, Insurance Law and Practice § 4010 (1972); Annot., 167 A.L.R. 470 (1947).

The application of insurance, which was admitted into evidence, left no doubt that Hartford's payment to Chalupa was due to a mistake of fact. As to Chalupa so changing his position so that it would be unjust to require a refund, Mrs. Shirley Chalupa stated that the damage would have been fixed with or without the insurance payments. She also testified that the repair work was "almost completed" before Chalupa received the insurance payment. Nothing in the record indicates that Chalupa has so changed his position as to make a refund unjust.

In conclusion, we find that although the insurance policy itself that was issued to Chalupa did not detail what buildings were afforded what coverage, the application for the insurance policy, which was properly admitted into evidence, proved beyond a doubt that the building which suffered the damage was not insured for that peril. Hartford having made payment under a mistake of fact and Chalupa's position not so changing as to make a refund inequitable, we hold that the trial court was correct and that the judgment should be affirmed.

AFFIRMED.

DAVID SIGNOR AND CAROLYN SIGNOR, APPELLANTS, V. NATIONAL TRANSPORTATION, INC., A NEBRASKA CORPORATION, AND LANNY N. FAUSS, APPELLEES.

351 N.W.2d 58

Filed June 22, 1984. No. 83-419.

Summary Judgment. Summary judgment may be properly granted where there exists no genuine issue as to any material fact, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to a judgment as a matter of law.

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

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellants.

Jeffrey D. Toberer of Kennedy, Holland, DeLacy & Svoboda, for appellees.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

This was an action for breach of contract. The plaintiffs have appealed from an order of the district court which sustained the defendants' motion for summary judgment and dismissed the plaintiffs' petition. Plaintiffs set forth six assignments of error, but they may be condensed into the one claim that the court erred in concluding that there was no genuine issue of material fact.

Because David Signor was the only active participant in the transactions leading up to this lawsuit, and apparently Carolyn Signor was made a party because, as David's wife, she signed one security agreement, we will refer to David Signor as the plaintiff throughout this opinion. Also, as Cargo Leasing Corporation, an original defendant, has been merged into National Transportation, and plaintiff has conceded that Lanny N. Fauss at all times acted purely in a representative capacity as president and agent of National, we will refer to National as the defendant.

Plaintiff alleged in his petition that on or about March 13, 1974, he entered into both written and oral contracts with the defendant, National, whereby the plaintiff bought a 1974 Diamond Reo truck tractor with the credit assistance of National, and the defendant agreed to lease the truck tractor from the plaintiff and employ him as the driver for a specified sum per mile of travel.

During the month of August 1974, certain problems arose in the relationship of the parties. The plaintiff claimed that the defendant neglected to furnish him

with the opportunity to do as much hauling as he felt he should have, and the defendant claimed that the plaintiff refused to accept the runs offered. In any event, on August 30, 1974, the defendant, by self-help, took possession of the truck tractor, claiming that the plaintiff had breached the hauling and security contract.

The plaintiff filed this action for breach of contract on August 24, 1979. Both parties seem to agree that defendant's motion for summary judgment was sustained by the trial court on the basis of the statute of limitations.

Although the plaintiff alleged four different grounds in support of his claim for breach of contract, he apparently is relying upon but one; i.e., the defendant, by taking possession of the plaintiff's truck tractor on August 30, without authority and over the protestations of the plaintiff, effectively and wrongfully prevented the continuation of the written contract. Because this was a suit on a written instrument, the statute of limitations is 5 years. Neb. Rev. Stat. § 25-205 (Reissue 1979). This being the case, the petition here was filed in time.

The defendant set forth as a defense that the plaintiff himself breached the contract and cannot recover. This, of course, is a question of fact which, together with plaintiff's claim that the repossession of the truck tractor was without justification, must be decided on a trial on the merits.

Summary judgment may be properly granted where there exists no genuine issue as to any material fact, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to a judgment as a matter of law. *Cillessen Constr. v. Scotts Bluff Co. Hous. Auth.*, *ante* p. 39, 348 N.W.2d 418 (1984). That has not been established in this case, and the judgment of the district court must be reversed and the cause remanded for

further proceedings consistent with this opinion.

REVERSED AND REMANDED
FOR FURTHER PROCEEDINGS.

KRIVOSHA, C.J., participating on briefs.

WILSON P. HILL, APPELLANT, V. DONALD E. GERBER, DIRECTOR OF THE NEBRASKA DEPARTMENT OF PUBLIC WELFARE, ET AL., APPELLEES.

350 N.W.2d 545

Filed June 22, 1984. No. 83-451.

1. **Employer and Employee: Termination of Employment: Due Process: Notice.** Any employee who has obtained a property interest in his employment is entitled to both notice in accordance with employment rules as well as notice which affords him constitutional due process.
2. **Due Process: Notice.** 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.

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

Hal W. Anderson of Berry, Anderson, Creager & Wittstruck, for appellant.

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellees.

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

KRIVOSHA, C.J.

The appellant, Wilson P. Hill, appeals from a judgment entered by the district court for Lancaster County, Nebraska, affirming the action of the Nebraska Joint Merit System Council, which had earlier upheld the Nebraska Department of Public Welfare's (department) termination of Hill as an

employee of the department. We believe the judgment of the district court must be reversed.

Hill had been employed by the department as a recreation supervisor at the Nebraska Center for Children and Youth (NCCY) from June of 1978 until his termination on August 25, 1981. The record reflects that sometime on May 31, 1981, Hill took seven residents of NCCY to a minibike course for recreation, and thereafter to Pioneers Park, a local park area. It appears from the record that Hill may have violated the rules of the department by taking the residents to the park without permission, and by failing to provide adequate supervision while at the park. These rules allegedly violated were never offered in evidence, although several employees of NCCY testified that taking the residents to the park without permission and without constant supervision at the park was contrary to the rules. After they returned to NCCY two of the girls who had been with Hill were determined to be under the influence of drugs. After a series of different explanations the girls told their cottage supervisor and other residents that Hill had given them some hashish and had smoked it with them at the park. NCCY officials, after a preliminary investigation, reported the incident to the State Patrol, which further investigated the alleged incident. No formal charges were ever filed against either Hill or the girls.

On August 25, 1981, Hill received a notice from the department, advising him that he was terminated as an employee effective 14 days from receipt of the letter. The termination, according to the letter, was "based on the incident that occurred on May 31, 1981 when you allegedly supplied two of our state ward residents with 'hash' and smoked it with them while you were on duty."

Pursuant to rule 13 of the Nebraska Joint Merit System Council rules and regulations, Hill appealed his dismissal. A hearing was held on February 9, 1982, at which time testimony was offered. The tes-

timony as to whether Hill had in fact provided the girls with the drugs was generally in conflict. The testimony further revealed that Hill had been reprimanded for the unauthorized taking of the residents to the park, as well as for his failure to supervise the youths at the park. Following the hearing, the Joint Merit System Council found that the testimony as to whether Hill had provided the girls with the hashish was inconclusive. Specifically, the findings of the council provided, in part, as follows: "Disregarding testimony implicating the Appellant [Hill] in providing drugs to the residents, the Appellant must still bear responsibility for actions resulting from his disregarding accepted agency procedures." Apparently, it was the opinion of the Joint Merit System Council that, while the evidence was inconclusive concerning whether Hill had provided the drugs to the girls, he had nevertheless violated the agency's rules, which were not in evidence, with regard to taking residents on excursions without permission and in failing to properly supervise them while on the excursion, and therefore the agency was justified in terminating his employment.

While there may have been sufficient grounds to terminate Hill by reasons of his failure to obtain permission before taking the girls to the park and his failure to supervise them while at the park, the difficulty with this case is that he was not so charged, nor was he given notice of the fact that he was being discharged for the unauthorized taking and the failure to supervise the residents. He was *specifically* charged with supplying two of the state ward residents with a drug and smoking it with them while on duty. The notice of August 25 did not in any manner advise Hill that the basis of his termination was his failure to obtain permission to take the wards on an excursion or his failure to supervise them. In fact, Hill could have reasonably believed that these issues would no longer be raised because, first, he had already received a written reprimand and, second, as

testified to by an agency employee, failing to supervise the residents would be considered in a different light than providing the residents with hashish. While it may very well be that the agency could first reprimand Hill and then, after proper notice and hearing, terminate him for the very same incident, we need not reach that question. It is apparent that the notice given to Hill is inadequate to satisfy the agency's own rules and his constitutional right to due process. Any employee who has obtained a property interest in his employment is entitled to both notice in accordance with employment rules as well as notice which affords him constitutional due process. See, *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

Rule 12(2)(e) of the Nebraska Merit System rules and regulations regarding discharge provides in part as follows: "A written statement setting forth the *specific* cause or causes under which the Appointing Authority has so acted shall be given to the employee within twenty-four (24) hours of the action." (Emphasis supplied.)

Furthermore, the department's own rules require specific notice. Section 6520 of part V of the Nebraska Public Welfare Manual provides in part:

> When the appointing authority finds it necessary to dismiss an employee, the immediate supervisor or a duly designated representative shall discuss the basis for the action and the facts in the situation with the employee prior to dismissal.
>
> The Department shall give notice of dismissal in writing and addressed to the employee. . . . The Department shall state the reason or reasons for the dismissal *specifically in the notice and shall include a statement justifying the action taken.*

(Emphasis supplied.) These rules are simply in accord with that which is required under due process.

In *In re Appeal of Levos*, 214 Neb. 507, 511-12, 335 N.W.2d 262, 266 (1983), we had the occasion to discuss the matter of due process and notice, saying:

> "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. . . . The notice must be of such nature as reasonably to convey the required information . . . ."

We further noted in *Levos*, *supra* at 513, 335 N.W.2d at 266, that what is adequate notice may vary from case to case, saying:

> "The degree of procedural rigor required in a proceeding varies from one case to another and depends upon the particular facts and upon the weight to be afforded to private interests as contrasted to governmental interests in the circumstances. . . . These general observations are applicable to the notice requirements of due process which 'will vary with circumstances and conditions.' The notice requirement of due process cannot be defined with any 'rigid formula.' "

And, recently, in the case of *Irwin v. Board of Ed. of Sch. Dist. No. 25*, 215 Neb. 794, 797, 340 N.W.2d 877, 880 (1983), quoting from *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968), we said that "the 'absence of fair notice as to the reach of the grievance procedure and the precise notice of the charges deprived petitioner of procedural due process.' " We then went on to note in the *Irwin* case at 797, 340 N.W.2d at 880:

> Irwin's sole notice of the charges against him was the vague and conclusory letter that he received from the board of education. Absent

> Irwin being advised of the charges in sufficient detail to fairly enable him to prepare an adequate defense and to show any error that might exist, the subsequent hearing on the termination of his contract was rendered meaningless. The fact that Irwin was advised of an incomplete witness list 2 days before the hearing only compounded the problem of deficient procedural due process.

The department here argues that while the notice to Hill on August 25, 1981, did not specifically advise Hill that the cause of his discharge was the fact that he had failed to obtain permission before taking the wards to the park and that he had likewise failed to supervise them at the park, he nevertheless had adequate notice because the letter of August 25 advised him that termination was "based on the *incident* that occurred on May 31, 1981" (emphasis supplied), and therefore this letter should have been sufficient to advise him of all the facts, even though the sentence goes on to read that the incident was related to the supplying of the drugs. A similar argument was made in *Irwin, supra*. In rejecting that argument we said at 797-98, 340 N.W.2d at 880:

> Appellee contends that Irwin was on "constructive notice" of the specific allegations against him in that he was given access to his personnel file. Because Irwin's personnel file was never made a part of the record, we cannot speculate on whether the contents of the file met the minimum requirements for adequate notice. We are, however, of the belief that in proceedings of this type, where the possible ramifications of the decision of the board of education are severe, it is not an undue burden upon the board of education to attach to the letter of notice, or otherwise divulge, the allegations underlying its action in sufficient detail, as to afford the accused party a reasonal opportunity to prepare a defense.

. . . .

Since the notice given Irwin did not fairly comport with due process, the termination proceeding was a nullity.

We, likewise, are of the opinion that the notice of August 25 specifically charged Hill with supplying two state wards with hashish and smoking it with them. This charge was not sustained by the evidence, and, instead, Hill was discharged because he allegedly violated certain rules and regulations of the department. He was not, however, given notice of this fact, and, in fact, the evidence was all to the contrary. Mrs. McNeil, personnel services supervisor at NCCY, testified on cross-examination that the termination was due to the claim that Hill had given the wards hashish and had smoked it with them. Mr. Beaver, recreational director at NCCY, also testified on cross-examination that Hill was terminated because of the allegations made against him by the wards. To therefore suggest that Hill was ever made aware that his employment was being terminated because he allegedly violated some rules regarding permission and supervision, none of which either was before the Joint Merit System Council or is before this court, is simply to ask too much and to attempt to extend notice and due process beyond any tolerable limits. Were we to permit such action as that taken here, we would effectively eliminate any requirement for notice and due process and would repeal, in effect, the rules of both the Department of Public Welfare and the Joint Merit System Council. This is neither horseshoes nor handgrenades, and "close" does not count.

If, indeed, the charges to the effect that Hill violated agency rules by taking the young people to the park without permission and in failing to supervise them while they were there can be established, the agency may be permitted to discharge Hill. It must, nevertheless, give him proper notice of these charges and afford him an opportunity to defend

himself. One cannot be charged with violating employment rules in one manner, and when the proof fails, be discharged because of the violation of an unspecific charge. While some may suggest that an employee should not be reinstated on a "mere technicality," we are of the opinion that compliance with due process is not a mere technicality. The department is afforded the assistance of counsel, and it can, without any difficulty, provide an employee about to be discharged with adequate and proper notice in accordance with its own rules. Having failed to do so, it must bear the consequences of its acts. For this reason the decision of the district court affirming the termination of Hill is reversed, and the cause is remanded to the district court with directions to vacate the order of the Nebraska Joint Merit System Council and to reinstate the employee.

REVERSED AND REMANDED WITH DIRECTIONS.

FIVE POINTS BANK, A BANKING CORPORATION, APPELLEE, V. SCOULAR-BISHOP GRAIN CO., DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, DUANE STEVENSON, THIRD-PARTY DEFENDANT, APPELLEE.

350 N.W.2d 549

Filed June 22, 1984. No. 83-494.

1. **Uniform Commercial Code: Security Interests: Waiver.** Normally, a factual question is presented as to whether a bank's prior course of dealing with the debtor created an implied agreement amounting to a waiver of the security interest under the "or otherwise" provision of Neb. U.C.C. § 9-306(2) (Reissue 1980).
2. **Waiver: Words and Phrases.** Waiver is defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits; or such conduct as warrants an inference of the relinquishment of such right; or the intentional doing of an act inconsistent with claiming such right.

3. **Waiver: Estoppel.** Ordinarily, to establish waiver of a legal right there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his part.
4. **Directed Verdict: Appeal and Error.** On review we must treat a plaintiff's motion for a directed verdict as an admission of the truth of all competent evidence submitted on behalf of the defendant. The defendant is entitled 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.

Appeal from the District Court for Howard County: RICHARD L. DEBACKER, Judge. Reversed and remanded for a new trial.

Edward D. Hotz of Hotz, Kizer & Jahn, P.C., for appellant.

Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellee Five Points Bank.

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

HASTINGS, J.

Defendant, Scoular-Bishop Grain Co. (Scoular-Bishop), appeals the directed verdict in favor of the plaintiff, Five Points Bank (bank), in an action for conversion involving the sale of grain. At the conclusion of all the evidence the district court granted the bank's motion for directed verdict, entered a judgment for the bank in the sum of $9,100, and discharged the jury.

The bank brought suit against Scoular-Bishop for grain purchased from Duane Stevenson subject to a recorded security interest in favor of the bank. In May 1981 Stevenson, who had a marginal operation, had pledged certain crops grown on leased land as security for a farm operating loan. The loan and security payment were the result of preliminary discussions held in February 1981 regarding his financial needs for the upcoming crop year.

During the preliminary financing discussions, Stevenson was encouraged by William Marshall,

president of the bank, to obtain his fertilizer by a credit or open account, if possible, to minimize the operating loan. As a consequence, Stevenson approached Scoular-Bishop for financing, and Scoular-Bishop gave Stevenson the fertilizer needed for the 1981 crop in the spring, with the understanding that the cost would be deducted from the purchase price of the grain in the fall.

In the fall of 1981 Scoular-Bishop also advanced Stevenson $800 for repairs on Stevenson's combine, which had broken down in the field during harvest. This amount was also added to the open account. The money for combine repairs was advanced by Scoular-Bishop after Stevenson had first asked the bank for the money and was refused. According to Duane Stevenson, William Marshall, who normally took care of the Stevenson account, was absent and Ed O'Boyle, another bank employee, refused to loan him the money. O'Boyle acknowledged that another advance on the corn crop would have to be taken.

At the time of the sale of the crop, $9,100 was withheld from Stevenson's crop proceeds and the balance was paid to the bank and Stevenson. The amount received by the bank was not sufficient to pay the note, and the note was in default.

Scoular-Bishop defends, claiming that the bank knew or should have known about the oral agreement for furnishing the fertilizer; that the practice of setoff against the proceeds of grain sales for the payment of fertilizer accounts is the course of dealing and usage of trade of the farm industry and local area; and that the bank expressly or impliedly acquiesced in the right of setoff by the defendant.

In this appeal Scoular-Bishop claims the trial court erred by directing a verdict in favor of the bank and not submitting to the jury the issue of authorization to sell collateral to Scoular-Bishop.

Under Neb. U.C.C. § 9-201 (Reissue 1980), a security agreement is effective according to its terms between the parties, against purchasers of the col-

lateral and against creditors, except as otherwise provided in the act. One exception is Neb. U.C.C. § 9-307 (Reissue 1980), which provides in part: "A buyer in ordinary course of business . . . other than a person buying farm products from a person engaged in farming operations takes free of a security interest . . . ." This exception permits secured parties to follow farm products into the hands of a good faith purchaser unless consent to sell has been given pursuant to Neb. U.C.C. § 9-306(2) (Reissue 1980), which states:

> Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement *or otherwise*, and also continues in any identifiable proceeds including collections received by the debtor.

(Emphasis supplied.)

It is clear the security agreement in question did not grant authorization. The security agreement does not authorize the sale of collateral except by written consent, which was not obtained. Scoular-Bishop relies on the "or otherwise" authorization to argue that a factual question of waiver exists and should be presented to the jury.

We have recently considered the "or otherwise" term of § 9-306(2) where there was a claim of waiver of written consent in *State Bank v. Scoular-Bishop Grain Co.*, *ante* p. 379, 349 N.W.2d 912 (1984). In that case we held it was a factual question whether a bank's prior course of dealing with the debtor might create an implied agreement amounting to a waiver of the security interest, when we reversed a directed verdict in favor of the bank.

Although this court has previously considered and does consider the "or otherwise" term of § 9-306(2) on a case-by-case basis, the recent decision in *State Bank* is helpful to the court in the present case.

Waiver has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits; or such conduct as warrants an inference of the relinquishment of such right; or the intentional doing of an act inconsistent with claiming it. *State Bank, supra.*

We have held that, ordinarily, to establish waiver of a legal right there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his part. *Farmers State Bank v. Edison Non-Stock Coop. Assn.*, 190 Neb. 789, 212 N.W.2d 625 (1973).

This case is before us on appeal from a directed verdict. In reviewing the action of the trial court, we must treat the plaintiff's motion for a directed verdict as an admission of the truth of all competent evidence submitted on behalf of the defendant. Such being the case, Scoular-Bishop (defendant) is entitled 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. *B. E. Implement Co. v. Valley Farm, Inc.*, 216 Neb. 629, 343 N.W.2d 892 (1984).

By applying this rule we believe that the action of the trial court was incorrect. In the case before us the discussion and conduct between the bank and Stevenson raise a question of fact whether the "or otherwise" authorization occurred.

The case before us is similar to *State Bank* and distinguishable from *Farmers State Bank*, a conversion case with similar facts, because, after considering the evidence as a whole and giving Scoular-Bishop the benefit of every inference which can

reasonably be deduced, a question of implied authorization arises for the jury.

In *Farmers State Bank* there was evidence that prior to grain sales, the president of the plaintiff bank had discussed disposition of certain crops with the debtor, Nelson, during the growing season and that the bank did not at any time waive any rights to the security, nor was there authorization for any sale except a sale within the limits authorized by the written security and financing statement. In the present case we have evidence of the opposite. Here, we have the testimony of Stevenson stating the bank president was told that the fertilizer account would be set off from the grain sales.

In conclusion, we would refer to the statement of caution expressed in *State Bank*, and emphasize that such an implied agreement should be found with extreme hesitancy and that in these cases the standard of proof must be by clear and convincing evidence.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA EX REL. CREIGHTON UNIVERSITY, APPELLEE, V. HENRY D. SMITH, M.D., DIRECTOR OF HEALTH OF THE STATE OF NEBRASKA, ET AL., APPELLANTS.

353 N.W.2d 267

Filed June 22, 1984. No. 83-514.

1. **Legislature: Constitutional Law.** A state legislature may generally pass any act, because legislative capacity not constitutionally inhibited or prohibited is retained in the people and exercised in the legislature by representatives of the people.
2. **Words and Phrases.** To appropriate means to set apart, or assign to a particular person or use in exclusion of others, to use or employ for a particular purpose, or in a particular case.
3. **Constitutional Law: Public Purpose.** Neb. Const. art. VII, § 11, does not prohibit the state from doing business or contracting with private institutions in fulfilling a governmental duty and furthering a public purpose.

4. **Administrative Law: Mandamus.** Departmental or administrative decisions contrary to law or based on a mistaken view of the law are not within the exercise of discretion lying outside the remedy of mandamus. By mandamus a court can correct such mistake of law and compel the proper application of law, thereby converting an otherwise discretionary act into a purely ministerial duty.

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

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

Thomas R. Brown of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee.

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

SHANAHAN, J.

Creighton University (Creighton) sought a writ of mandamus compelling Dr. Henry D. Smith, Director of Health of the State of Nebraska (director), to receive and consider Creighton's "Contract Proposal" for cancer research to be conducted by Creighton. The Attorney General of the State of Nebraska (Attorney General) was a party to the suit because Nebraska law (Neb. Rev. Stat. § 84-905.01 (Reissue 1981)) requires the Attorney General to review rules and regulations of state agencies with respect to authority for and constitutionality of an agency's rules and regulations. The director and Attorney General (respondents) appeal the judgment of the district court for Lancaster County granting the requested writ of mandamus. We affirm.

As a university and a Nebraska nonprofit corporation, Creighton includes a college of medicine located in Nebraska. Before the Nebraska Legislature passed the statutes in question, Creighton's college of medicine was engaged in cancer research.

In 1981 the Nebraska Legislature enacted L.B. 506, Neb. Rev. Stat. §§ 81-637 through 81-640 (Reissue

1981) (act), authorizing grants and contracts for research of cancer and smoking diseases. L.B. 506 specified certain considerations of the director in making grants and contracts for the research of cancer and smoking diseases (§ 81-639), and required the director to adopt and promulgate rules and regulations governing an application for a grant or contract and providing criteria for acceptable programs of research.

When L.B. 506 was enacted, article VII, § 11, of the Nebraska Constitution did, and still does, provide in part: "Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof . . . ."

After the Legislature passed the act the director sent to the Attorney General "RULES AND REGULATIONS GOVERNING GRANTS AND CONTRACTS FOR RESEARCH OF CANCER OR SMOKING DISEASE OR BOTH" for review pursuant to § 84-905.01. The rules and regulations submitted by the director contained provisions in part as follows:

CONTRACTS FOR RESEARCH

. . . .

> 007.01F Contract shall mean an agreement between the Department and the contractor in which in return for consideration of funding, the contractor shall carry out a specified project or program in a specified manner.
>
> . . . .
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> 007.01H Contractor shall mean the University of Nebraska or any other postsecondary institution having a college of medicine located in the State of Nebraska.
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> . . . .
>
> 011.01 . . . . Any contract funds awarded shall be expended solely for the purposes for which the funds were awarded in accordance with the approved contract proposal or application and

budget, these Regulations, and the terms and conditions of the contract award.

. . . .

012.01 . . . . Contract funds may be utilized for the payment of the salaries of personnel participating in the contract project, but not for the payment of overhead. The Director may require that a time and effort report or reports be submitted by a contractor. Contract funds shall be subject to audit by the Department at the discretion of the Director.

In a written opinion dated December 4, 1981, the Attorney General disapproved the rules and regulations submitted by the director. In that opinion the Attorney General required that the application forms "ask whether the postsecondary institution having a college of medicine located in Nebraska is public or nonpublic," and referred to article VII, § 11, of the Nebraska Constitution.

A second draft of rules and regulations was submitted by the director to the Attorney General. This second draft included certain revisions, namely: "007.01H Contractor shall mean the University of Nebraska or any other *public* postsecondary institution having a college of medicine located in the State of Nebraska." (Emphasis supplied.)

In response to the director's second draft of rules and regulations, the Attorney General, in a written opinion dated January 7, 1982, stated that certain "changes should be made before we can approve" the director's second draft. Among the required changes was a specific "criterion" in a contract proposal or application—"that the applicant is the University of Nebraska or any other public postsecondary institution" with a medical college in Nebraska. The changes required by the Attorney General were made in the draft of rules and regulations finally adopted and promulgated by the director. On March 22, 1982, the Department of Health issued a "NOTICE OF EFFECTIVE RULES AND REGULA-

TIONS RE GRANTS AND CONTRACTS FOR RESEARCH OF CANCER OR SMOKING DISEASE OR BOTH" which included the statement: "During the course of the review and approval process it was determined by the Attorney General that contracts for research can be awarded only to the University of Nebraska or any other public postsecondary institution having a college of medicine located in the State of Nebraska."

On September 28, 1982, Creighton sent its contract proposal entitled "Breast Cancer Genetics in Nebraska." In his letter of November 18, 1982, the director notified Creighton that he was unable to "file and process" the contract proposal submitted by Creighton

> since it has been determined by the Attorney General that, pursuant to the provisions of Article VII, [§ 11], of the Nebraska Constitution, a contract for cancer or smoking disease research cannot be made by the State of Nebraska with any school or institution of learning not owned or exclusively controlled by the State of Nebraska or a political subdivision thereof.

The director returned Creighton's contract proposal and enclosed a copy of the Attorney General's opinions dated December 4, 1981, and January 7, 1982.

Creighton filed its petition for a writ of mandamus. In answer to Creighton's petition, the respondents, among other matters, alleged that the Nebraska Constitution prohibits appropriation of state funds to private institutions and therefore, insofar as L.B. 506 would permit appropriation of state funds to private institutions, L.B. 506 was unconstitutional.

At the hearing regarding the mandamus there was testimony that Creighton had several people on its staff to do cancer research under the supervision of a physician whose "subspeciality in cancer research [was] in the genetics of cancer familial relationships." If the state awards a contract for cancer

research, Creighton will supply additional and expanded cancer research "into the actual individual people in the State of Nebraska" regarding the incidence of breast cancer and "targeting familial or family relationships in breast cancer among people in the State of Nebraska." Creighton's cancer research would be focused on people in Nebraska.

After the hearing the district court issued a writ of mandamus which required (1) the director to "promulgate rules and regulations which will permit private postsecondary educational institutions having a college of medicine [in Nebraska] to qualify for contracts" described in the act; (2) the Attorney General "to consider L.B. 506, 1981 legislative session, constitutional insofar as it applies to private institutions designated" in the act; and (3) the Attorney General "not to reject any rules and regulations of the State Health Department [under the act] on the grounds" that the act violates article VII, § 11, of the Nebraska Constitution.

The question on appeal is whether article VII, § 11, of the Nebraska Constitution prohibits the state from contracting with a private university regarding research of cancer in the university's college of medicine. Because the answer to that question turns on construction of the Nebraska Constitution, it is necessary to review the function of a state constitution.

Initially, the people have all legislative power. Unlike the federal Constitution, a state constitution is not a grant of power but a limitation of power. The widely accepted doctrine is that a state legislature may generally pass any act, because legislative capacity not constitutionally inhibited or prohibited is retained in the people and exercised in the legislature by representatives of the people. See, *State ex rel. Meyer v. County of Lancaster*, 173 Neb. 195, 113 N.W.2d 63 (1962); *Earhart v. Frohmiller*, 65 Ariz. 221, 178 P.2d 436 (1947); *Americans United v.*

Rogers, 538 S.W.2d 711 (Mo. 1976); *Adams v. Bolin*, 74 Ariz. 269, 247 P.2d 617 (1952).

Nebraska recognizes that the Legislature has vast authority, limited only by the state and federal Constitutions. See, *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (1981); *Orleans Education Assn. v. School Dist. of Orleans*, 193 Neb. 675, 229 N.W.2d 172 (1975). Such authority extends to and includes a state's power to enter contracts. See *Butler v. Hatfield*, 277 Minn. 314, 152 N.W.2d 484 (1967). As an illustrative constitutional prohibition concerning a contract, Nebraska's Constitution, article III, § 16, provides in part:

> No member of the Legislature or any state officer shall have a conflict of interest, as defined by the Legislature, directly in any contract, with the state or any county or municipality thereof, authorized by any law enacted during the term for which he shall have been elected or appointed, or within one year after the expiration of such term.

Consequently, unless there is some constitutional provision to the contrary, the collective people, calling themselves the state, have the right to make contracts through their government acting pursuant to representative authority. Courts can recognize and enforce only those limitations or restrictions constitutionally imposed. See *United Community Services v. The Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956). "Implied restrictions on the legislative power are not to be inferred unless the restriction is one that is clearly implied." *Lenstrom v. Thone*, *supra* at 790, 311 N.W.2d at 888.

Regarding appropriation of public funds, to appropriate means to set apart, or assign to a particular person or use in exclusion of others, to use or employ for a particular purpose, or in a particular case. See *McCombs v. Dallas County*, 136 S.W.2d 975 (Tex. Civ. App. 1940). Unless restricted by some constitutional provision, either state or federal, a

state's legislature can enact laws and appropriate funds for any public purpose. See *Lenstrom v. Thone*, *supra*.

In *Lenstrom v. Thone*, *supra* at 788, 311 N.W.2d at 888, this court held that a scholarship program for financial assistance to students in eligible post-secondary educational institutions in Nebraska did not violate article VII, § 11, of the Nebraska Constitution because the effect of the "literal language [of the constitutional provision] is to prohibit appropriations made 'to' a nonpublic school."

Shortly after *Lenstrom*, we decided *State ex rel. Bouc v. School Dist. of City of Lincoln*, 211 Neb. 731, 320 N.W.2d 472 (1982). *Bouc* involved a Nebraska statute requiring bus transportation for children attending approved nonprofit private schools when a public school district provided transportation of public school students. In *Bouc*, after approving the constitutional construction found in *Lenstrom*, we stated at 737, 320 N.W.2d at 476:

> The record in the present action does not reflect that this is an instance involving a direct appropriation of public funds to a nonpublic institution. . . . [A]ny benefit that may inure to the nonprofit private institution is merely incidental and certainly cannot be deemed to be an "appropriation . . . to" that institution. Under *Lenstrom* such an incidental benefit is insufficient to render [the transportation statute] violative of article VII, § 11.

Section 81-638 recognizes the state's ability to contract with Creighton for services to be rendered by an acceptable program of research in certain aspects of public health. The Nebraska Constitution does not prohibit the state from doing business or contracting with private institutions in fulfilling a governmental duty and furthering a public purpose. Cf. *Pennsylvania Ass'n, Etc. v. Com.*, 63 Pa. Commw. 307, 437 A.2d 1297 (1981) (payment of public funds to a private medical college pursuant to a

contract for management of the state's psychiatric institute did not violate Pennsylvania's constitutional prohibition: "No appropriation shall be made to any charitable or educational institution not under the absolute control of the Commonwealth . . . ." Pa. Const. art. III, § 30.) Some might contend that by a state-contracted program of cancer research the Legislature is doing indirectly what it cannot do directly. Cf. *Schade v. Allegheny County Inst. Dist.*, 386 Pa. 507, 126 A.2d 911 (1956). That overworked expression about circumvention by indirectness, if subjected to the test of ultimate application, would necessitate that a fire in a nonpublic school be extinguished by a nonpublic bucket brigade, not by a publicly funded fire department. Common sense and the Constitution abhor such an impractical conclusion.

We do not rule out the possibility that Creighton may derive an indirect benefit from a research contract with the state, but possible indirect benefit does not transform payments for contracted services into an appropriation of public funds proscribed by article VII, § 11, of the Nebraska Constitution. Benefit is distinguished from purpose. The primary purpose and principal objective of the state's contract regarding cancer research is improved public health in Nebraska. In the case before us, public funds are used for a public purpose—the promotion and search for good health as a benefit to all citizens of Nebraska, simultaneously related to the function of state government. See, *Lennox v. Housing Authority of City of Omaha*, 137 Neb. 582, 290 N.W. 451 (1940); *Lott, et vir, v. City of Orlando, et al.*, 142 Fla. 338, 196 So. 313 (1939); *Pack v. Southern Bell T. & T. Co.*, 215 Tenn. 503, 387 S.W.2d 789 (1965).

The act, §§ 81-637 through 81-640, does not set aside state money for Creighton's special use and does not vest in Creighton any right to receive state funds. Under these circumstances there is no appropriation of public funds to Creighton. The act does properly

recognize and acknowledge the state's constitutional authority to contract for a public purpose. We hold that the act (§§ 81-637 through 81-640) is constitutional.

Respondents contend that mandamus is not a proper remedy, because adopting and reviewing the rules and regulations of the department involve discretionary acts rather than ministerial duties.

A statutory duty is imposed on the director to promulgate his adopted rules regarding the act. See § 81-640. The Attorney General has the statutory duty to review the rules and regulations of the Nebraska Department of Health, that is, the rules and regulations adopted by the director in this case. Upon an examination of the various drafts of the rules and regulations, the Attorney General's opinions, and the correspondence from the director to Creighton, it is absolutely clear that validity of the act is the only question raised by the Attorney General's review for constitutionality of the director's rules and regulations. Before the rules were promulgated there may have been discretion involved—determination whether the foundational act for the rules and regulations was constitutional. It is obvious that the director's rules and regulations as well as the Attorney General's review and opinions are predicated on the unconstitutionality of the act. By our holding the act constitutional, the director's and Attorney General's predicate of unconstitutionality is incorrect. Consequently, constitutionality of the act removes from the province of the director and the Attorney General any discretionary action in making a judgment about constitutionality affecting the rules and regulations under the act. As expressed in *Industrial Develop. Auth. of Cty. of Pinal v. Nelson*, 109 Ariz. 368, 377, 509 P.2d 705, 714 (1973): "There is no question of discretion involved when the problem is one of applying law to established facts, and an officer who must in the first instance pass upon the question may be required to take an-

other course after the court reaches a different conclusion upon the legal issue."

Departmental or administrative decisions contrary to law or based on a mistaken view of the law are not within the exercise of discretion lying outside the remedy of mandamus. By mandamus a court can correct such mistake of law and compel the proper application of law, thereby converting an otherwise discretionary act into a purely ministerial duty. See, *Industrial Develop. Auth. of Cty. of Pinal v. Nelson, supra*; *Mahoney v. Sup. of Elections*, 205 Md. 325, 108 A.2d 143 (1954); *Tanenbaum, Aplnt., v. D'Ascenzo et al.*, 356 Pa. 260, 51 A.2d 757 (1947); *Board of Com'rs of Seminole County v. State ex rel. Cobb, County Judge*, 31 Okla. 196, 120 P. 913 (1912); *Hammond v. Love*, 187 Md. 138, 49 A.2d 75 (1946); *Marland v. Hoffman*, 184 Okla. 591, 89 P.2d 287 (1939).

> We have held that where a specific duty is provided by statute, mandamus may be invoked to enforce it if denied; and the party entitled to such relief will not be forced to pursue his remedy by circuitous and dilatory action at law. State ex rel. Agricultural Extension Service v. Miller, 182 Neb. 285, 154 N.W.2d 469 (1967); State ex rel. Herman v. City of Grand Island, 145 Neb. 150, 15 N.W.2d 341 (1944).

State ex rel. Simpson v. Vondrasek, 203 Neb. 693, 701-02, 279 N.W.2d 860, 866 (1979).

The case before us clearly and conclusively shows that the relator, Creighton, is entitled to the relief requested and that the respondents have a legal obligation to act. See, *State ex rel. Newbold v. County of Buffalo*, 202 Neb. 813, 277 N.W.2d 246 (1979); *State ex rel. Bouc v. School Dist. of City of Lincoln*, 211 Neb. 731, 320 N.W.2d 472 (1982).

The judgment of the district court is affirmed in all respects.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, v. JIMMEY A. SAILORS, APPELLANT.

352 N.W.2d 860

Filed June 22, 1984. No. 83-540.

1. **Statutes: Due Process: Constitutional Law.** Neb. Rev. Stat. § 28-512(1) (Reissue 1979) affords due process and is constitutional.
2. **Pleadings: Evidence: Appeal and Error.** When a court overrules a motion in limine, it is incumbent upon the movant to make an objection to the particular evidence sought to be adduced or offered by the State. A defendant cannot predicate error on the admission of evidence to which no objection was made at the time the evidence was adduced.

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

Clyde F. Starrett, for appellant.

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

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

SHANAHAN, J.

Jimmey A. Sailors was convicted as the result of a jury trial on the charge of theft by deception regarding property valued in excess of $1,000. See Neb. Rev. Stat. § 28-512(1) (Reissue 1979). The district court for Hayes County, Nebraska, sentenced Sailors to an indeterminate term of 18 months to 3 years in the Nebraska Penal and Correctional Complex. We affirm.

Sailors, a self-employed trucker doing business as "Truckin' Dollars," was engaged in hauling farm commodities as well as buying and selling grain. On October 11, 1982, Sailors and a farmer, Curtis Leffler, contracted for Sailors' purchase of 5,000 bushels of Leffler's wheat at $3.25 per bushel with the wheat deliverable to Sailors at Leffler's farm. On October 12 and 13 Leffler's wheat was loaded by Sailors on his truck, but Sailors did not pay Leffler

for the wheat loaded. Sailors hauled the wheat to the elevator at Beverly, Nebraska, which had already paid Sailors in anticipation of his delivering Leffler's wheat. There was no further contact between Sailors and Leffler until the week of October 25, when Sailors came to Leffler's farm and told Leffler that payment for the hauled wheat would be delayed. According to Sailors, funds to pay Leffler were unavailable because Sailors' source of funds, another customer's check, had been dishonored by the bank. Actually, the Beverly elevator had stopped payment on its check for a grain contract with Sailors.

In any event, Sailors testified he needed the money from the unpaid check of the Beverly elevator "[t]o keep the flow going." Sailors further acknowledged that his grain transactions could be described as "taking from Peter to pay Paul."

Without payment to Leffler, Sailors filed bankruptcy in November 1982. After Sailors filed bankruptcy an information was filed charging Sailors with theft by deception in violation of § 28-512(1), which, in its applicable part, provides:

> A person commits theft if he obtains property of another by deception. A person deceives if he intentionally:
>
> (1) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise . . . .
>
> The word deceive does not include falsity as to matters having no pecuniary significance, or statements unlikely to deceive ordinary persons in the group addressed.

In a pretrial motion Sailors requested that the information be quashed on the claim that § 28-512(1) was unconstitutionally vague and deprived Sailors of due process. In a motion in limine before trial

Sailors asked that the county attorney be ordered not to introduce evidence of Sailors' grain purchases from his unpaid customers other than Leffler. The district court overruled Sailors' pretrial motions.

At trial prosecution witnesses testified about grain transactions in which Sailors contracted for and obtained grain but never paid for the grain received pursuant to such contracts made near the time of the Leffler transaction.

The jury found Sailors guilty of theft by deception concerning the Leffler transaction.

Sailors contends that § 28-512(1) is unconstitutionally vague, and, therefore, Sailors' conviction cannot stand.

" '[B]efore a law can be determined unconstitutional, the express provision of our constitution which the law contravenes must be pointed out.' " *Metropolitan Utilities Dist. v. City of Omaha*, 171 Neb. 609, 613, 107 N.W.2d 397, 401 (1961).

Statutes are presumed to be constitutional, and unconstitutionality must be clearly established.

> The test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . . A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding. . . . In determining whether a statute is vague and therefore does not give a defendant adequate notice that his conduct is proscribed, the statute must be examined in light of the conduct with which the defendant is charged. . . .
>
> . . . The prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision. The test is whether the defendant could reasonably understand that his conduct was proscribed by the statute.

(Citations omitted.) *State v. Sprague*, 213 Neb. 581, 587-88, 330 N.W.2d 739, 744 (1983). "[E]ven in criminal statutes the language adopted need not afford an interpretation approaching mathematical certainty. In determining the sufficiency of notice, a statute must of necessity be examined in light of the conduct with which a defendant is charged." *State v. A.H.*, 198 Neb. 444, 449, 253 N.W.2d 283, 286 (1977).

We note that § 28-512(1) is patterned on the Model Penal Code § 223.3 (1980), which in part provides:

> A person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely:
>
> (1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise . . . .
>
> The term "deceive" does not, however, include falsity as matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed.

In *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972), the U.S. Supreme Court declared the standard to be used in determining whether a statute is void for vagueness is when it

> "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617 [74 S. Ct. 808, 98 L. Ed. 989 (1954)], and because it encourages arbitrary and erratic arrests and convictions. *Thornhill v. Alabama*, 310 U.S. 88 [60 S. Ct. 736, 84 L. Ed. 1093 (1940)]; *Herndon v. Lowry*, 301 U.S. 242 [57 S. Ct. 732, 81 L. Ed. 1066 (1937)].

Statutes substantially similar to § 28-512(1) involv-

ing the crime of theft by deception have been upheld at state and federal levels.

In *Com. v. Linder*, 284 Pa. Super. 327, 425 A.2d 1126 (1981), the court considered the constitutionality of 18 Pa. Cons. Stat. Ann. § 3922 (Purdon 1973), which provides:

> (a) Offense defined.—A person is guilty of theft if he intentionally obtains or withholds property of another by deception. A person deceives if he intentionally:
>
> (1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;
>
> . . . .
>
> (b) Exception.—The term "deceive" does not, however, include falsity as to matters having no pecuniary significance, or puffing by statements unlikely to deceive ordinary persons in the group addressed.

After applying the *Papachristou* standard, the court in *Com. v. Linder*, *supra*, stated at 425 A.2d at 1129-30:

> Section 3922 of the Crimes Code clearly gives a person of ordinary intelligence notice that it is unlawful for that person to intentionally create a false impression in the mind of another and then use the other person's reliance on the false impression to obtain someone else's property. This statute does not penalize a person for what is in his mind, as appellant argues, but rather it punishes a person for his actions in creating the false impression and thereby obtaining another's property. The phrase "or other state of mind" was used in subsection (a)(1) of section 3922 because the legislature recognized that a person could create other potentially harmful false impressions besides ones of law, value, and

> intention. We conclude that the first prong of the test for vagueness is satisfied.
>
> The second prong of the test for vagueness requires the determination of whether section 3922 encourages arbitrary and erratic arrests and convictions. This determination "focuses not on the actor's perception of the statutes' wording, but rather on the enforcement method of the police and the court's disposition of the indictment before it." *Commonwealth v. DeFrancesco, supra* [481 Pa. 595], at 608, 393 A.2d [321] at 328 [1978]. Having carefully reviewed section 3922, we conclude that the wording of the statute does not encourage the police and the courts to exercise unfettered discretion.

Constitutionality of Arkansas statutes regarding theft by deception was upheld by the court of appeals in *Hixson v. Housewright*, 642 F.2d 242 (8th Cir. 1981). Ark. Stat. Ann. § 41-2203 (repl. 1977) contained in part the following: "(1) A person commits theft of property if he: . . . (b) knowingly obtains the property of another person, by deception or by threat, with the purpose of depriving the owner thereof." Ark. Stat. Ann. § 41-2201 (repl. 1977) read in part as follows:

> (3) "Deception" means:
>
> (a) creating or reinforcing a false impression, including false impressions of fact, law, value or intention or other state of mind that the actor does not believe to be true . . . .
>
> Deception as to a person's intention to perform a promise shall not be inferred solely from the fact that he did not subsequently perform the promise. Deception does not include falsity as to matters having no pecuniary significance or puffing by statements unlikely to deceive ordinary persons in the group addressed.

In *Hixson* the eighth circuit held at 246-47:

> However, deception as to a person's intention to perform a promise cannot be inferred solely

> from the fact that he did not subsequently perform the promise. There has to be an intent to deceive and in so doing to deprive another of his property. That is what the statute says and is what the jury found to have happened in this case. This criminal intent is in no way limited to present or past events. It is also aimed squarely at the sort of thing appellant was convicted of here. The Supreme Court has held that if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague. Also, if the general class of offenses can be made constitutionally definite by a reasonable construction of the statute, the court is under a duty to give it that construction. . . .
>
> Here, the general class of offenses, theft by deception or false pretenses, is within the terms of the Arkansas statute and we are duty bound to give it a construction which upholds its constitutionality in the circumstances present. The statute promotes a long-standing state interest in prohibiting deceptive schemes and confidence games. The crucial element of intent to deceive may be proven in many ways, such as has been done here, by showing the nature of the false impressions or misrepresentations, by showing the deceiving party lacked present or future ability to make good his representations, and by demonstrating an ongoing scheme or pattern of deception. That statute is not constitutionally infirm, as alleged.

Constitutionality of a statute prohibiting theft by deception is generally maintained by the indispensable element of criminal intention and required proof of the perpetrator's guilty knowledge about the transaction which is the subject of the criminal charge. It is the required element of guilty knowledge, criminal intent, which distinguishes a civil breach of contract from theft by deception—a per-

son's knowingly creating a false impression in order to obtain another's property. Consequently, we hold that § 28-512(1) is not unconstitutionally vague; does give reasonable notice regarding the conduct prohibited; and is not susceptible to enforcement or application in a discriminatory manner. In other words, § 28-512(1), theft by deception, affords due process required by the Constitutions, both state and federal.

Concerning Sailors' claim that his acts outside the Leffler transaction are inadmissible, the only question regarding adduction of evidence about other acts was raised by Sailors' motion in limine.

When a court overrules a motion in limine, it is incumbent upon the movant to make an objection to the particular evidence sought to be adduced or offered by the State. A defendant cannot predicate error on the admission of evidence to which no objection was made at the time the evidence was adduced. *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983). Because Sailors, during trial, did not object to testimony from prosecution witnesses regarding other grain transactions, we cannot consider any question about the admissibility of other transactions or acts outside the Leffler transaction for which Sailors was prosecuted.

Finally, Sailors contends that his sentence of 18 months to 3 years is excessive. Sailors was charged with theft by deception of property valued in excess of $1,000 in violation of § 28-512(1). Violation of § 28-512(1) is a Class III felony, punishable by 1 to 20 years' imprisonment, $25,000 fine, or by both such imprisonment and fine. See Neb. Rev. Stat. §§ 28-518(1) and 28-105(1) (Reissue 1979).

The sentence imposed in this case is within the statutory limits. A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion on the part of the sentencing court. See *State v. Robish*, 214 Neb. 190, 332 N.W.2d 922 (1983). See, also, *State v. Parks*, 212

Neb. 635, 324 N.W.2d 673 (1982); *State v. Neal*, 216 Neb. 796, 346 N.W.2d 221 (1984). Although Sailors has no prior felony conviction, under the circumstances in this case we cannot conclude that there was an abuse of discretion on the part of the trial court imposing the sentence as it did.

The judgment of the trial court is affirmed in all respects.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY KINNEY, APPELLANT.

350 N.W.2d 552

Filed June 22, 1984. No. 83-608.

1. **Criminal Law: Testimony.** Opinion testimony is sufficient to support a finding of guilt in a criminal case, if the opinion is based on facts enabling the witness to express a reasonably accurate opinion.
2. **Sentences.** A sentence validly imposed takes effect from the time it is pronounced, and a subsequent, different sentence is a nullity.
3. **Sentences: Probation and Parole: Appeal and Error.** Probation is a sentence, and an order of probation is a final order from which an appeal may be taken.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed in part, and in part reversed and remanded with directions.

Dennis R. Keefe, Lancaster County Public Defender, and Coleen J. Sindelar, for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

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

GRANT, J.

Defendant was charged in the municipal court of

Lincoln, Nebraska, with a violation of a city ordinance in that he did "[o]perate or be in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs or when he/she had ten-hundredths of one percent or more by weight of alcohol in his/her body fluid as shown by chemical analysis of his/her blood, breath, or urine." Defendant was found guilty only of being in control of his vehicle while under the influence of alcoholic liquor. He appealed to the district court, where his conviction was affirmed, and now appeals to this court, alleging that the evidence was insufficient to convict. We affirm defendant's conviction but, for reasons hereinafter stated, vacate the sentence and reverse and remand the cause for further proceedings.

The bill of exceptions of defendant's trial consists partially of the testimony at a hearing on defendant's motion to suppress all evidence obtained as a result of the traffic stop and arrest of defendant. Defendant and the arresting officer both testified at this hearing. Their evidence was limited to the explanation of defendant's operation of his vehicle during the time immediately preceding his arrest. This evidence showed that defendant had emerged from a drive in the downtown Lincoln area to go south and that he pulled out in front of a car also going south. Defendant testified the car was six or seven car lengths, or more, to the north of the drive from which defendant emerged, while the officer testified the approaching car was only one car length north of the drive, so that the driver of the approaching car had to brake immediately, with a screeching of tires, to avoid striking defendant's vehicle. Defendant's further driving to the south was uneventful. The officer arrested him some eight blocks later and was prepared to issue defendant a ticket for failure to yield the right-of-way, when the officer, after observing and talking to defendant, issued him the citation on which he was tried.

Based on this testimony, the trial judge overruled defendant's motion to suppress, and by specific agreement the parties immediately proceeded to trial on the merits. Defendant executed a consent to trial by stipulation, and the matter was submitted to the court on the testimony of defendant and the arresting officer at the suppression hearing and on "the facts as reflected in the official law enforcement report . . . ." In his consent defendant specifically waived various rights, including the rights to cross-examine the witnesses testifying against him and to testify in his own behalf.

The stipulation of facts, as read to the court, included the following: "The defendant exibited [sic] a very strong odor of alcoholic beverage on his breath, slurred speech, bloodshot and watery eyes. Defendant was observed to have trouble getting his license out of his wallet when he was asked for it." Further stipulated facts were that the arresting officer had been a police officer for 8 years, had received formal training in the detection of persons who are under the influence of intoxicants, and had observed over 1,000 individuals under the influence of alcoholic liquors; that another officer who observed the defendant from the time of his arrest through the time of the completion of the breath testing had been a police officer for 7 years, had received formal training in detecting persons under the influence of alcoholic beverages, and had observed 700 persons "under the influence"; and that another officer who administered the breath test (the court excluded the results of the breath test for lack of proper foundation) had been an officer for 3½ months, had received formal training, and had observed over 100 persons under the influence of alcoholic liquor. It was further stipulated that each of these officers, based on the very strong odor of alcoholic beverage on defendant's breath, on his slurred speech, on his bloodshot and watery eyes, and, in the case of two of the officers, on defendant's loss of

dexterity and his difficulty in retrieving his driver's license from his wallet, had an opinion that defendant was "under the influence of an alcoholic liquor."

The trial judge then inquired if the opinions of the officers, as stipulated, meant that the three officers had concluded that "the defendant was under the influence to such an extent to — as to have lost to an appreciable degree the normal control of his bodily and mental faculties." The parties so stipulated.

It was further stipulated that no balance or sobriety tests were conducted because of "defendant's physical impairment" and "that the defendant's physical impairment is based upon shrapnel lodged in his spine which was sustained in Vietnam. Further, that the defendant has a — sustained at some point — point in his life — a gunshot wound completely through the right palm. . . . Also in Vietnam."

The trier of fact then was faced with evidence where three officers, two of whom had had at least 7 years' experience and had had at least 50 minutes to observe defendant (from arrest to the time of taking the Intoxilyzer test), testified that in their opinion defendant was under the influence of an alcoholic beverage, and testified to some facts supporting that opinion. While this type of evidence is not strong or overwhelming, it is sufficient to support the trial court's determination—particularly when the trier of fact is not presented any evidence to the contrary. The only evidence put forward by defendant is that he is a wounded Vietnam veteran, and while that evidence might support a conclusion that his hand injuries might be responsible for the difficulty defendant had in retrieving his license from his wallet, the fact finder is not required to draw that inference, particularly where there is no direct evidence on the question. As presented, the evidence, although weak, is sufficient to support the trial court's finding of guilt. There was evidence beyond that presented by the State in *State v. Johnson*, 215 Neb. 391, 338

N.W.2d 769 (1983), and the evidence, as presented, was not rebutted as was the State's evidence in *Johnson, supra*. Defendant's conviction is affirmed.

After defendant's conviction a presentence investigation was conducted, and defendant returned for sentencing at a later date. At that hearing the judge signed and entered an order of probation. Defendant's counsel then indicated to the court that defendant was going to appeal, and said, "[W]hy don't we just decline the probation and — at this point in time." The court responded, "[W]hat I will do, and I had already signed the order, and what I'm going to do is show that the defendant advised the Court, after the order of probation was entered, that he was giving notice of appeal, and therefore declined the offer of probation. The order of probation which had been signed is therefore nullified . . . ." The court then sentenced defendant to 7 days' imprisonment, fined him $200, and suspended his driver's license for 6 months.

Defendant does not assign any error in this procedure, but this court has the right to notice and correct plain error. Neb. Rev. Stat. § 25-1919 (Reissue 1979); *Weiss v. Union Ins. Co.*, 202 Neb. 469, 276 N.W.2d 88 (1979). The procedure was in error. First of all, as defined in Neb. Rev. Stat. § 29-2246(4) (Reissue 1979), probation is a *sentence*. It is not a part of a quasi-contract where the court offers something and defendant is free to accept or reject. Secondly, it is clear that an order placing a defendant on probation is a final and appealable order. See *State v. Williams*, 194 Neb. 483, 233 N.W.2d 772 (1975). Finally, our law is settled that a sentence validly imposed takes effect from the time it is pronounced, and a subsequent, different sentence is a nullity. In *State v. Sliva*, 208 Neb. 647, 305 N.W.2d 10 (1981), a sentence that had been imposed was later on the same day set aside, and an appeal was then taken from a later sentence. This court said at 648, 305 N.W.2d at 11:

> The difficulty with all of this, however, is that the sentence which was originally imposed on February 22, 1980, was a final judgment and one which the trial court was not at liberty to vacate. We recently held in the case of *State v. Cousins*, *ante* p. 245, 247, 302 N.W.2d 731, 732 (1981): " 'The rule is that a sentence validly imposed takes effect from the time it is pronounced and that a subsequent sentence fixing a different term is a nullity.' " The rule is not new, having previously been declared by this court in *State v. Snider*, 197 Neb. 317, 248 N.W.2d 342 (1977).

See, also, *State v. Christiansen*, *post* p. 740, 351 N.W.2d 67 (1984).

It is clear that the trial court's sentence to probation was validly imposed, and could not be vacated and a different sentence imposed.

With regard to a sentence of probation, it is clear that in some situations such a sentence may be more onerous than an alternative sentence. That may have been the case here. While a defendant may so conduct himself as to require that his probation may have to be set aside and the defendant be sentenced to another penalty because of his violation of probation, the fact remains that a convicted defendant is not free to accept or reject a valid sentence to probation. And, of course, this is not to say that based on a defendant's statements made before a sentence of probation is ordered, a court could not withhold such a sentence that the court had previously decided to impose—so long as the sentence was not actually imposed.

We further note, and specifically disapprove, the remarks made by the district court probation officer in his presentence investigation report for the district court. In the summary of that report it is stated: "In view of the defendant's attitude towards this matter and his continued involvement in criminal behavior, it is felt that the sentence of the Mu-

nicipal Court should be affirmed, *because regardless of what happens he intends to appeal the case.*" (Emphasis supplied.) It is absolutely clear that the incidental fact that a defendant intends to appeal a conviction is not a reason for denying probation.

Accordingly, the judgment of conviction is affirmed and the matter remanded to the district court with directions to remand the cause to the municipal court for further proceedings consistent with this opinion.

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

WHITE, J., dissenting.

The alleged failure to yield the right-of-way, resulting in a stop eight blocks later, is given as an articulable reason in the stopping of the appellant's car. During the eight blocks the officer followed the appellant's car, as stated by the majority, the driving was "uneventful."

The interval between the perceived violation and the stop gives rise to the inescapable inference that the reason given was pretextual. Both the stop and the arrest were illegal. Therefore, any evidence arising from the unlawful conduct ought to have been suppressed, including the officer's observations of this war-wounded veteran's limited physical dexterity which formed the basis for the opinion of intoxication. See *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).

LLOYD DALE POWELL, APPELLANT, V. W. G. PAULEY LUMBER CO. ET AL., APPELLEES.

350 N.W.2d 556

Filed June 22, 1984. No. 83-679.

1. **Workmen's Compensation: Appeal and Error.** In a workmen's compensation case the findings of the compensation court must be given the same force and effect as a jury verdict. Such findings will not be set aside unless clearly wrong.

2. **Workmen's Compensation: Evidence: Proof.** The plaintiff must establish by a preponderance of the evidence that his injury arose out of and in the course of his employment and is the proximate cause of the disability for which benefits are sought.
3. **Workmen's Compensation: Evidence: Expert Witnesses.** Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony.
4. _____: _____: _____. For medical testimony to be the basis for an award, it must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between the accident and the disability.
5. **Expert Witnesses.** The value of an opinion of an expert is no stronger than the facts upon which it is based.

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

Thomas A. Wagoner, for appellant.

Joni R. Kerr of Kennedy, Holland, DeLacy & Svoboda, for appellees.

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

PER CURIAM.

This is an appeal in a proceeding under the Workmen's Compensation Act. The plaintiff, Lloyd Dale Powell, alleged that he suffered a back injury in the course of his employment by the defendant which resulted in a herniated intervertebral disc. He required surgery and sustained a permanent disability.

After the hearing before a single judge, and after the rehearing before a three-judge panel, the compensation court found that there was a failure of proof as to a causal connection between the plaintiff's employment and his injury. The plaintiff has appealed to this court.

The plaintiff testified that on April 2, 1981, during the course of his employment as a truckdriver for the defendant employer, W. G. Pauley Lumber Co., he was using a forklift, on the defendant's premises, to load a trailer. When he attempted to step from

the forklift to the trailer, he slipped off the forklift and injured his right leg when his knee struck the forklift. Two days after the accident, the plaintiff consulted Dr. Smith and reported that his right leg had swollen such that he could not bend it. Powell testified that he did not experience any unusual back pain following the accident.

Dr. Smith initially diagnosed the problem as thrombophlebitis. The plaintiff was hospitalized on May 2 and discharged on May 6, 1981. The final diagnosis listed in the hospital record was "[p]ain right lower leg due to compression of sural nerve." He returned to work after a 13-day absence.

The plaintiff testified that he continued to experience pain in his leg and reported this to Dr. Smith during a routine ICC physical examination in February 1982. Dr. Smith then referred Powell to an orthopedic specialist, Dr. Chingren.

Powell was seen by Dr. Chingren on March 24, 1982. Dr. Chingren determined that Powell had a herniated disc. He performed a laminectomy on Powell in August 1982. Powell testified that after this surgery the pain in his leg was relieved.

In a workmen's compensation case the findings of the compensation court must be given the same force and effect as a jury verdict. Such findings will not be set aside unless clearly wrong. *Erving v. Tri-Con Industries*, 210 Neb. 339, 314 N.W.2d 253 (1982); *Randall v. Safeway Stores*, 215 Neb. 877, 341 N.W.2d 345 (1983).

The plaintiff must establish by a preponderance of the evidence that his injury arose out of and in the course of his employment and is the proximate cause of the disability for which benefits are sought. *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 (1980); *Randall v. Safeway Stores*, *supra*.

Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testi-

mony. *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981); *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 308 N.W.2d 734 (1981); *Caradori v. Frontier Airlines*, 213 Neb. 513, 329 N.W.2d 865 (1983). For medical testimony to be the basis for an award, it must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between the accident and the disability. *Husted, supra*; *Randall v. Safeway Stores, supra.*

Although Powell testified at the rehearing that he fell on his back as a result of the accident, he did not mention this fact at the initial hearing. Dr. Smith, the physician who treated Powell two days after the accident, did not testify. The records of Powell's hospitalization for leg pain, shortly after the accident, contain nothing from which it could be concluded that a causal relationship exists between the accident and subsequent disability.

Dr. Chingren testified that Powell had some preexisting degenerative changes in his back. Powell's medical records indicate that he consulted an orthopedic specialist for back pain in 1976.

The testimony of Dr. Chingren did not establish a causal connection with the requisite degree of certainty and definiteness. Dr. Chingren, who first examined Powell almost a year after the accident occurred, testified that Powell informed him that his back and right leg had hurt since a fall from a forklift at work in June 1981. When asked what caused the disc to bulge, Dr. Chingren stated, "There could be several things. In no particular order, either the injury that he sustained the year before or the wear-and-tear process." When asked if he could not say one way or the other what caused the disc to bulge, he answered, "That's right." Later, Dr. Chingren stated, "I presumed more-or-less from the beginning that he was injured at work."

When asked if he had an opinion based upon a reasonable degree of medical certainty whether the

herniated disc was a result of the accident, Dr. Chingren responded, "[I]f he had no pain in his leg before and he now has pain, and it's right after the accident, I have to blame the accident." Then, when asked if he had an opinion based upon a reasonable degree of medical certainty whether the bulging disc was a result of the accident, Dr. Chingren answered, "If it's yes or no, it has to be yes."

This testimony did not compel a finding for the plaintiff on the issue of causation. It does not possess the requisite definiteness and certainty, and is not based on facts sufficient to lead to a conclusion that as a matter of law the disability was caused by the accident. The value of an opinion of an expert is no stronger than the facts upon which it is based. *Randall v. Safeway Stores, supra.*

The judgment of the compensation court is supported by the record and is affirmed.

AFFIRMED.

JERRY D. PETERSEN, APPELLANT, V. JOHN R. HANLON, COMMISSIONER OF LABOR, STATE OF NEBRASKA, AND MERCY FONTENELLE CENTER, APPELLEES.

350 N.W.2d 23

Filed June 22, 1984. No. 83-701.

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

Garrett Law Office, for appellant.

Paul D. Kratz, for appellee Commissioner of Labor.

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

PER CURIAM.

We have reviewed this matter de novo on the rec-

ord and have found no error concerning the judgment of the district court. The judgment of the district court is affirmed.

AFFIRMED.

LOREN K. NUSSBAUM, APPELLANT, V. LYLE F. WRIGHT ET AL., APPELLEES.

350 N.W.2d 559

Filed June 22, 1984. No. 83-707.

1. **Workmen's Compensation: Appeal and Error.** The findings of fact of the Workmen's 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. **Workmen's Compensation: Master and Servant.** The general test in determining whether an employee is a servant of his original master, or of the party to whom he has been furnished, is whether in the particular service which he is engaged to perform he continues to be liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired.
3. _____: _____. It is quite generally agreed that in order to transfer liability from the general employer to the one to whom the employee is loaned, there must be some consensual relationship between the loaned employee and the employer whose service he enters, sufficient to create a new employer-employee relationship. Where an employee enters the service of another at the command and pursuant to the direction of the master, no new relationship is created. While the employee may be subject to the direction of the temporary master, he is there in obedience to the command of his employer; and in doing what the new master directs him to do, he is performing his duty to the employer who gave the order. Consent cannot be inferred merely from the fact that the employee obeyed the commands of his master in entering the services of another.
4. _____: _____. Before the new master and servant relationship can be made effective, the servant must understand that he is submitting himself to the control of the new master.
5. **Workmen's Compensation: Employer and Employee.** Before an employer to whom the injured employee is loaned can be found liable for injuries to the loaned employee, the employee must show that he has made a contract of hire, express or implied, with the special employer, that the work being done is essentially that of the special employer, and that the special employer has the right to control the details of the work.

6. **Workmen's Compensation: Statutes.** The "statutory employer" provisions of Neb. Rev. Stat. § 48-116 (Reissue 1978) do not supersede the exemption provisions of Neb. Rev. Stat. § 48-106(2) (Reissue 1978).
7. **Workmen's Compensation.** Employment which is both casual and which is not in the usual course of the trade, business, profession, or occupation of the employer is exempt from coverage under the Nebraska Workmen's Compensation Act.

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

Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellant.

Geoffrey V. Pohl and R. Kevin O'Donnell of McGinley, Lane, Mueller, O'Donnell & Merritt, for appellee Wright.

Reddish, Curtiss, Moravek & Danehey, for appellee Hinton.

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

WHITE, J.

This is an appeal from the order of a three-judge panel of the Nebraska Workmen's Compensation Court denying relief to the appellant, Loren K. Nussbaum. The three errors assigned are that the Workmen's Compensation Court was clearly wrong in (1) finding that appellant was not, at the time of his injury, a loaned employee of Bartt S. Hinton, (2) failing to find that Lyle F. Wright was a statutory employer of appellant, Neb. Rev. Stat. § 48-116 (Reissue 1978), and (3) failing to find that a previous judgment of the compensation court finding that appellant, at the time of his injury, was the employee of one Darrell Carlton Hinton, also known as "Jeff" Hinton (Jeff), did not bar the action against Lyle F. Wright and Bartt S. Hinton under the doctrine of res judicata. The lower court found against appellant on the first two assignments and thus did not rule on the issue raised by the third assignment.

We review the decision of the compensation court for error only, keeping in mind that findings of fact will not be set aside unless clearly wrong. *Niesen v. Logan County Co-op Oil Assn.*, 215 Neb. 587, 340 N.W.2d 146 (1983).

A brief recitation of the facts is necessary. Jeff Hinton and Bartt Hinton are father and son. Each is engaged in a general contracting business. No evidence was presented that the two were associated in a partnership or joint undertaking; rather, the evidence shows that each undertook separate general construction tasks as an individual proprietor. For approximately 2 months prior to the accident of July 31, 1981, appellant was the full-time employee of Jeff Hinton, generally engaged in erecting fences and corrals for local ranchers. Shortly before July 31, 1981, Bartt Hinton called his father, and the two agreed upon, or Bartt requested, the assistance of Jeff and the appellant in the completion of a painting project at the ranch of Lyle Wright near Hyannis, Nebraska. The project consisted of painting the home and ranch buildings, and the cost was agreed to between Wright and Bartt Hinton on a bid amount. Wright did not supervise the work nor exercise any control over who performed the work. The evidence discloses that Wright is engaged in the occupation of a rancher and has no other occupation. It is also established that neither Bartt Hinton nor Lyle Wright has workmen's compensation coverage.

On the day of the accident appellant rode out to the Wright ranch with Jeff Hinton. Jeff directed appellant to mix paint, directed his work, asked if appellant wished to take a break, and received the report of the injury. The injury happened when appellant, who was spray painting the roof of a garage, slipped and impaled his palm on a nail in the roof. Later, at lunchtime, the spray equipment was cleaned with diesel fuel, and that afternoon the hand began to swell. Appellant went to a hospital and underwent a long and painful treatment for the result-

ing inflammation and infection. Ultimately, one finger and a portion of another were required to be amputated. That appellant suffered a severe and permanent disability is not disputed.

Appellant filed suit in the Workmen's Compensation Court and secured a judgment against Jeff Hinton. Jeff responded by filing a petition of voluntary bankruptcy.

Appellant then filed this suit against Bartt Hinton, claiming that he was an employee of Bartt, and against Lyle Wright, claiming that Wright was a statutory employer.

As stated previously, there was no evidence that the Hintons operated as a partnership in the painting of the Wright farm. The negotiating took place between Wright and Bartt Hinton, and Wright looked to Bartt only for completion of the project. Rather, the evidence appears that appellant was a "loaned employee."

In *Mid-America Pipeline Co. v. Warren*, 187 Neb. 710, 713-14, 193 N.W.2d 749, 751-52 (1972), we quoted with approval from *Shamburg v. Shamburg*, 153 Neb. 495, 45 N.W.2d 446 (1950):

> "* * * the general test in determining whether an employee is a servant of his original master, or of the party to whom he has been furnished, is whether in the particular service which he is engaged to perform he continues to be liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired. * * *
>
> "* * * 'It is quite generally agreed that in order to transfer liability from the general employer to the one to whom the employee is loaned, there must be some consensual relationship between the loaned employee and the employer whose service he enters, sufficient to create a new employer-employee relationship. Where an employee enters the service of another at the command and pursuant to the direc-

> tion of the master, no new relationship is created. While the employee may be subject to the direction of the temporary master, he is there in obedience to the command of his employer, and in doing what the new master directs him to do he is performing his duty to the employer who gave the order. * * * Consent cannot be inferred merely from the fact that the employee obeyed the commands of his master in entering the services of another.'
>
> "* * * 'Before such new relationship can be made effective the servant must understand that he is submitting himself to the control of the new master.' "

Larson, in his book on workmen's compensation, lists three necessary conditions before the employer to whom the employee is loaned can be found liable for injuries to the loaned employee:

> (a) the [loaned] employee has made a contract of hire, express or implied, with the special employer;
>
> (b) the work being done is essentially that of the special employer; and
>
> (c) the special employer has the right to control the details of the work.

1C A. Larson, The Law of Workmen's Compensation § 48.10 at 8-317 (1983).

As there was evidence to support the finding of the compensation court that no contract was entered into or could be implied between appellant and Bartt Hinton and that appellant remained under the control of Jeff Hinton, we must affirm the decision of the three-judge panel denying recovery as against Bartt Hinton. The first assignment is without merit.

As to the alleged liability of Lyle Wright, the appellant, in the words of the compensation court, is "on the horns of a dilemma."

If, on the one hand, the work of painting is within the usual scope of Wright's business activity as a rancher, Wright was exempt from the act as an em-

ployer "of farm or ranch laborers." Neb. Rev. Stat. § 48-106(2) (Reissue 1978).

The question as to whether the "scheme" and "artifice" statute, § 48-116, impliedly amends the exemption statute, § 48-106(2), has not been directly ruled on by this court. In *Keith v. Wilson*, 165 Neb. 58, 84 N.W.2d 192 (1957), Peter Kiewit, an employer of farm labor, was held liable for injuries to an employee of a contractor engaged in the cutting and stacking of hay. However, the basis of that liability was stated as follows: "In the case at bar Kiewit had a statutory duty, *since he had elected to come under the workmen's compensation law*, to require Wilson to procure workmen's compensation insurance which he failed to perform." (Emphasis supplied.) *Id.* at 63, 84 N.W.2d at 196. That case does not control here.

In the Colorado case of *Hefley v. Morales*, 197 Colo. 523, 595 P.2d 233 (1979), Hefley hired Ochoa and a crew employed by Ochoa (including Morales) to cut corn ensilage. Ochoa did not procure workmen's compensation insurance, and Morales was injured. Colo. Rev. Stat. § 8-48-101 (1973) is analogous to § 48-116 and imposes liability when a person contracts out any part of his business work to a contractor's employees who are engaged in such work while in the employ of the contractor. In considering whether the section superseded the exemption under the act for certain farm and ranch laborers, the Colorado court said:

> Here, we must evaluate the interaction of the contracting out provisions and the exemption for farm and ranch labor. The terms of the exemption provide guidance inasmuch as the statute says "Articles 40 to 54 of this title are not intended to apply to employers of farm and ranch labor. . . ." The wording indicates that the General Assembly did not intend for the contracting out provisions to apply to exempted employers of farm and ranch labor. Further, the limiting

> language contained in the contracting out provision reinforces the conclusion that it is not intended to apply to employers otherwise exempted. It states that a person or company contracting out all or part of its work "shall be construed to be an employer *as defined in Articles 40 to 54 of this title* and shall be liable as provided in said articles." (Emphasis added.)
>
> The purpose of the contracting out provision is to prevent employers from avoiding financial responsibility by contracting out their regular work to uninsured independent contractors. In the exemption provision, the General Assembly clearly intended to exempt persons who directly employed farm and ranch labor on a limited scale.
>
> We conclude that the contracting out provision does not modify the exemption for farm and ranch labor.

Id. at 525-26, 595 P.2d at 234-35. We conclude similarly that the provisions of § 48-116 do not supersede the exemption provisions of § 48-106(2).

On the other hand, if the painting was not in the usual course of Wright's business, the provisions of Neb. Rev. Stat. § 48-115 (Reissue 1978) would bar any recovery by appellant from Wright. Section 48-115 provides in part:

> The terms employee and workman are used interchangeably and have the same meaning throughout this act. The same terms include the plural and all ages and both sexes, and shall be construed to mean:
>
> . . . .
>
> (2) Every person in the service of an employer who is engaged in any trade, occupation, business, or profession as described in section 48-106, under any contract of hire, expressed or implied, oral or written . . . .
>
> . . . .
>
> The said terms shall not be construed to in-

clude any person whose employment is not in the usual course of the trade, business, profession or occupation of his employer.

Obviously, under the facts of the instant case, the work of painting ranch buildings is occasional only, and not regular; thus, it was casual. See, *McConnell v. Johnston*, 139 Neb. 619, 298 N.W. 346 (1941); *Guse v. Wessels*, 132 Neb. 41, 270 N.W. 665 (1937).

The decision of the Workmen's Compensation Court was in all respects correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALFRED S. LOPEZ, APPELLANT.

350 N.W.2d 563

Filed June 22, 1984. No. 83-730.

1. **Criminal Law: Constitutional Law: Sentences.** Neither double jeopardy nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction or resentencing. A trial judge is not constitutionally precluded from imposing a new sentence, even though greater than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities, which information may have come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's recent prison record, or possibly from other sources.
2. **Sentences.** Whenever a judge imposes a more severe sentence upon a defendant after a new trial or upon resentencing, the reasons for doing so must affirmatively appear from the record and be based upon objective information occurring after the time of the original sentencing.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Remanded with directions.

Kent E. Florom, Lincoln County Public Defender, for appellant.

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

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

WHITE, J.

This is the second appearance of this case in this court. In *State v. Lopez*, 215 Neb. 65, 337 N.W.2d 130 (1983), we affirmed the conviction of Lopez for the offenses of second degree sexual assault, Neb. Rev. Stat. § 28-320(1)(a) (Reissue 1979), and of second degree assault, Neb. Rev. Stat. § 28-309(1) (Reissue 1979). However, we determined that the flat sentence of 10 years was an improper application of the enhanced penalty statute, Neb. Rev. Stat. § 29-2221 (Reissue 1979), and remanded for resentencing. See *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983). On remand, the district court sentenced Lopez to a term of from 5 to 15 years for the sexual assault and a consecutive term of from 1 to 3 years for second degree assault.

Lopez appeals, and assigns a single error: "The District Court of Lincoln County, Nebraska, erred in resentencing the Appellant to a *potentially* longer term of imprisonment." (Emphasis supplied.) Brief for Appellant at 2.

The propriety of imposing an increased sentence after an appeal has been considered by this court recently in *State v. Beach*, 215 Neb. 213, 221-22, 337 N.W.2d 772, 777-78 (1983), where we said:

> Under the decision in *Pearce* it is clearly improper for a trial court to sentence a defendant to a greater sentence after appeal and retrial simply because the defendant exercised his right to appeal.
>
> It must be pointed out that the Court in *Pearce* also stated: "We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in other words, from imposing a new sentence,

whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' *Williams v. New York*, 337 U.S. 241, 245 [69 S. Ct. 1079, 93 L. Ed. 1337 (1949)]. Such information may come to the judge's attention from *evidence adduced at the second trial* itself, from a *new presentence investigation*, from the defendant's prison record, or possibly from other sources." (Emphasis supplied.) *Id.* at 723.

And, finally: "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.* at 726.

It seems, by the decision in *Pearce*, the trial court in its discretion could increase the defendant's sentence without violating his due process rights, if such action was justified by reasons affirmatively appearing in the record.

It is apparent from the record, and not disputed by the parties, that no new or additional information concerning either the facts of the offenses or adverse information concerning other past offensive conduct was presented to the trial judge at the resentencing hearing. Therefore, under *State v. Beach*, *supra*, the court erred when resentencing Lopez if the term to which he was resentenced was longer than that originally imposed. We conclude

that it was, and remand for the imposition of a new sentence.

We first observe that § 29-2221, under which Lopez was originally sentenced, does not create a new offense, but is designed to enhance penalties for repetitive criminal behavior. *Davis v. O'Grady*, 137 Neb. 708, 291 N.W. 82 (1940). We further observe that under § 29-2221 the range of sentence allowed is "not less than ten nor more than sixty years." The difficulty arises due to the fact that Lopez was convicted of two felonies, second degree sexual assault and second degree assault, but he was sentenced to only one 10-year term of imprisonment. The trial court's order does not detail to which of the two felony convictions the sentence applies. We assume that the trial court sentenced Lopez to 10 years on each count, with the sentences to run concurrently. As such, the 10-year term originally imposed on Lopez constituted both the minimum and maximum terms for the purposes of parole eligibility and mandatory release date. Neb. Rev. Stat. § 83-1,107 (Reissue 1981).

Under the consecutive sentences imposed by the trial court upon resentencing, the maximum term is 18 years. This is an increased sentence, prohibited by *State v. Beach*, *supra*, and must be set aside. The sentences are vacated and the cause is remanded to the district court for the imposition of any lawful sentence wherein the maximum term does not exceed 10 years, with credit for time served awaiting or serving the previous sentences.

REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. KENNETH EUGENE TEATER, APPELLANT.

351 N.W.2d 60

Filed June 22, 1984. No. 83-753.

1. **Mental Competency: Trial.** The test of mental competency to stand trial is whether the defendant has the present capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.
2. **Mental Competency: Appeal and Error.** The determination of the finder of fact on the issue of competency will not be disturbed unless there is insufficient evidence to support the findings.
3. **Mental Competency: Pleas.** The test of mental capacity to plead or stand trial is the same.
4. **Appeal and Error.** Consideration of assignments of error is limited to those discussed in the brief.
5. **Judgments: Sentences: Appeal and Error.** A judgment denying probation and imposing a sentence which is within statutory limits will not be modified absent an abuse of discretion by the sentencing judge.

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

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

Paul L. Douglas, Attorney General, and John Boehm, for appellee.

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

WHITE, J.

This is a criminal action in which the Lancaster County District Court accepted a plea of no contest from the defendant, Kenneth Eugene Teater, to one count of attempted first degree sexual assault on a child, as defined by Neb. Rev. Stat. §§ 28-201 and 28-319(1)(c) (Reissue 1979). The district court sentenced Teater to the Nebraska Penal and Correctional Complex for a term of not less than 6⅔ years nor more than 15 years. The court further found that Teater was a treatable, mentally disordered sex

offender and committed him to the Lincoln Regional Center until such time as the court has determined that Teater is no longer mentally disordered or until he has received the maximum benefit of treatment. On appeal we affirm Teater's conviction and sentence.

The facts which are relevant to the disposition of this appeal will be discussed as needed throughout the opinion.

The first issue raised by Teater is that the district court erred in finding that he was mentally competent to stand trial. On August 26, 1982, the district court ruled that Teater was incompetent to stand trial. Teater was committed to the Lincoln Regional Center, pursuant to Neb. Rev. Stat. § 29-1823 (Reissue 1979), for further evaluation. Six months later, and after extensive evaluation by psychiatrists and psychologists, the district court determined that Teater was mentally competent to stand trial. In *State v. Guatney*, 207 Neb. 501, 509, 299 N.W.2d 538, 543-44 (1980), we stated:

> The question of whether the appellant is now competent to stand trial is separate and distinct from the question of whether the appellant may be responsible for the commission of the crime. The test to determine whether an accused is competent to stand trial is not the same test applied to determine whether the accused may be not guilty by reason of insanity. The test of mental competency to stand trial is whether the defendant now has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense. See, *State v. Crenshaw*, 189 Neb. 780, 205 N.W.2d 517 (1973); *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); *State v. Klatt*, 187 Neb. 274, 188 N.W.2d 821 (1971).
>
> Competency is, to some extent, a relative mat-

ter arrived at by taking into account the average level of ability of criminal defendants. We cannot, however, exclude from trial all persons who lack the intelligence or legal sophistication to participate actively in their own defense. That is not the standard by which we measure competency. Should we do so, we would preclude the trial of a number of people who are, indeed, competent to stand trial as understood in the law. The accused need not understand every legal nuance in order to be competent. He need only meet the standards as established by us in *Crenshaw* and *Klatt* and set out above.

The district court's finding that Teater was mentally competent to stand trial will not be disturbed unless there is insufficient evidence to support that finding. The test of mental capacity to plead or stand trial is the same. *State v. Quarrels*, 211 Neb. 204, 318 N.W.2d 76 (1982). Based on the current evaluations of Teater, the record reveals that two of the four doctors, one of whom reversed his prior position, found that Teater was mentally competent to stand trial. Only one of the doctors concluded that Teater was incompetent to stand trial; the other doctor gave no conclusion. As a basis for their evaluations, three of the four doctors relied on the 20 factors outlined in the concurring opinion in *State v. Gautney*, *supra*.

Since there is substantial evidence in the record to support the trial court's determination that Teater was, in fact, mentally competent to stand trial, we will not disturb the district court's ruling.

Teater next assigns as error that the district court erred in overruling his motion to withdraw his plea of no contest. Because this assignment of error is not discussed in the brief, we shall not consider it. See *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983). We do pause to note, however, that if the issue were discussed, it would be without merit, based

on the criteria recently outlined in *State v. Holtan*, 216 Neb. 594, 344 N.W.2d 661 (1984).

For his third assignment of error Teater contends that the district court erred in accepting his "plea of no contest and finding him guilty in that the Court failed to establish by proper inquiry that the plea was made knowingly, intelligently, and voluntarily." Brief for Appellant at 5. The record does not support this argument.

Prior to acceptance of his plea, the court advised the defendant, who was represented by counsel, of the nature of the charge against him, the statutory penalty limits, and his constitutional rights to confrontation, jury trial, and privilege against self-incrimination. The court also determined that there was a factual basis for the guilty plea and that the defendant voluntarily waived all of his rights. In short, the record reveals that the district court complied with the requirements of *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), and *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971). When asked by the court, Teater's counsel stated that he had thoroughly discussed the plea with Teater and that his client's plea was consistent with the law and the facts.

Although not discussed in the brief, Teater next alleges that the district court violated "his rights to the notice requirements of the Due Process Clauses of the Federal and State Constitutions," in that the court failed to arraign him "in a timely fashion." Brief for Appellant at 5.

Any delays in the instant case were the result of the proceedings to determine Teater's competency to stand trial and the continuance granted at the request of Teater's counsel. Both of these factors tolled the defendant's right to a speedy trial. See Neb. Rev. Stat. § 29-1207(4)(a) and (b) (Reissue 1979).

Finally, Teater argues that the district court abused its discretion in sentencing him. Teater

contends that probation would have been a more appropriate sentence.

Neb. Rev. Stat. § 29-2260(2)(a) (Cum. Supp. 1982) provides that probation should not be granted if "[t]he risk is substantial that during the period of probation the offender will engage in additional criminal conduct." The various evaluations describe Teater as a mildly mentally retarded pedophiliac who, if given the opportunity, would continue to engage in sexual misconduct with young children. Dr. James K. Cole, a clinical psychologist, stated in his report:

> Perhaps the single most important point, however, is that despite the meaning of the concept of pedophilia in Mr. Teater's case, Mr. Teater has a history of sexual involvement with young prepubescent children; this activity has been sexually rewarding, and given the opportunity he is likely to continue to attempt to engage children in sexual acts. Therefore it is wholely inappropriate to place Mr. Teater in a situation where he has the opportunity to be alone with young children.

Concerning the length of Teater's sentence, we note that attempted first degree sexual assault on a child is a Class III felony, punishable by a maximum of 20 years' imprisonment or a $25,000 fine, or both. Teater's sentence of 6⅔ to 15 years' imprisonment was within the statutory guidelines. We further note that Teater was originally charged with two counts of first degree sexual assault on a child. Pursuant to a plea bargain, Teater pled no contest to one count of attempted first degree sexual assault on a child. The district court was aware, as are we, that Teater's conduct which led to his charges was not an isolated occurrence. Having thoroughly reviewed the record, we cannot conclude that the district court abused its discretion in sentencing Teater, and therefore his sentence will not be modified on appeal. See *State v. Cooley, ante* p. 90, 348 N.W.2d 433 (1984).

The conviction and sentence of Kenneth Eugene Teater are hereby affirmed.

AFFIRMED.

XEROX CORPORATION, APPELLANT AND CROSS-APPELLEE, v. DONNA KARNES, TAX COMMISSIONER OF THE STATE OF NEBRASKA, ET AL., APPELLEES AND CROSS-APPELLANTS.

350 N.W.2d 566

Filed June 22, 1984. No. 83-781.

1. **Declaratory Judgments: Statutes.** An action for a declaratory judgment is an appropriate remedy to determine the validity, construction, or interpretation of a statute.
2. **Constitutional Law: Taxation: Valuation.** Under the provisions of Neb. Const. art. VIII, § 1, the taxation of personal property must be uniform not only as to the rate of taxation but as to the valuation of the property as well.
3. **Taxation: Valuation.** The uniform method for valuing property for tax purposes which the Legislature has provided is to tax property at its "actual value."
4. _____: _____. For purposes of taxation the terms actual value, market value, and fair market value mean exactly the same thing.
5. **Constitutional Law: Taxation: Valuation.** Neb. Rev. Stat. § 77-1301 (Reissue 1981), which provides for valuation of real and personal property for tax purposes only in odd-numbered years, held unconstitutional.

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

John K. Boyer and Amy S. Bones of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

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

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

BOSLAUGH, J.

Xerox Corporation (Xerox) brought this action for

a declaratory judgment to determine the constitutionality of Neb. Rev. Stat. § 77-1301 (Reissue 1981) and its interpretation by the Tax Commissioner and the Nebraska Department of Revenue. Prior to its amendment in 1980, the statute provided for annual assessment of all real and personal property. The 1980 amendment provides for valuation in odd-numbered years only. Section 77-1301(1) now provides:

> All real and personal property in this state subject to taxation shall be valued as of January 1 at 12:01 a.m. of 1981 and every odd-numbered year thereafter, *which valuation shall be used as a basis of assessment and taxation until the next regular valuation.*

(Emphasis supplied.)

Xerox manufactures, markets, and leases various types of business and medical diagnostic equipment. It owns and maintains such leased equipment in 61 counties within Nebraska. Pursuant to the terms of the leases, Xerox is obligated to pay the applicable personal property taxes on the leased equipment. The evidence shows that this equipment depreciates annually because of physical deterioration and obsolescence.

The Tax Commissioner and the Department of Revenue interpret and construe § 77-1301 as amended to mean that a change in value of personal property due to depreciation cannot be recognized in an even-numbered year. They rely upon an opinion of the Attorney General that in even-numbered years additional increments of depreciation may not be considered when valuing personal property for tax purposes.

The district court found that a declaratory judgment action was a proper remedy but that Xerox failed to show that the interpretation given § 77-1301 was unconstitutional. Xerox has appealed.

The defendants contend that an action for declaratory judgment did not lie and the action should

have been dismissed. The defendants argue that Xerox had an adequate statutory remedy in Neb. Rev. Stat. § 77-1503 (Reissue 1981). See *Zarybnicky v. County of Gage*, 196 Neb. 210, 241 N.W.2d 834 (1976).

Section 77-1503 provides that a taxpayer who claims that the assessment of his property is excessive may have the assessment reviewed by the county board of equalization. In support of this argument the defendants cite *Riha Farms, Inc. v. Dvorak*, 212 Neb. 391, 322 N.W.2d 801 (1982). In that case we said at 393, 322 N.W.2d at 803:

> This court has consistently held that relief from the overassessment of property for tax purposes is by appeal to the District Court from the order of the county board of equalization fixing the assessed value of the property, and that the remedy thus given is full, adequate, and exclusive. The claim that property is assessed too high for taxation purposes cannot be made in the first instance by direct application to any other body or by a collateral attack in law or equity in the event of failure to bring the matter before the county board of equalization and to appeal therefrom in case of an adverse determination. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment, or some part thereof, is wholly void. See, *Jones v. Valley County Board of Equalization*, 208 Neb. 559, 304 N.W.2d 396 (1981); *Scudder v. County of Buffalo*, 170 Neb. 293, 102 N.W.2d 447 (1960); *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 489 (1954).

This rule is inapplicable to the present case. The issue in this case is not the actual value of any particular item or items of equipment. The issue is whether actual value may be determined only at 2-year intervals, so that the lessor is liable to taxation in even-numbered years upon a value which may be purely artificial due to physical deteriora-

tion and obsolescence that has occurred but which the defendants say may not be recognized.

The clear language of § 77-1301, and the interpretation given it by the defendants, prohibits a taxpayer from obtaining a change in his property value during even-numbered years. The statute provides that the "valuation [made in every odd-numbered year] *shall* be used as a basis of assessment and taxation until the next regular valuation." (Emphasis supplied.) In *Pelzer v. City of Bellevue*, 198 Neb. 19, 24, 251 N.W.2d 662, 665 (1977), we stated:

> "As a general rule, in the construction of statutes, the word 'shall' is considered as mandatory and it is particularly so considered when the statute is addressed to public officials." State ex rel. Smith v. Nebraska Liquor Control Commission, 152 Neb. 676, 42 N.W.2d 297 (1950). See, also, Trobough v. State, 120 Neb. 453, 233 N.W. 452 (1930). Generally, the word "shall" appearing in a statute implies that whatever "shall" be done is mandatory. Minden Beef Co. v. Cost of Living Council, 362 F. Supp. 298 (D.C. Neb., 1973). See, also, Thomas v. Sternhagen, 178 Neb. 578, 134 N.W.2d 237 (1965).

An action for a declaratory judgment is an appropriate remedy to determine the validity, construction, or interpretation of a statute. *Armstrong v. Board of Supervisors*, 153 Neb. 858, 46 N.W.2d 602 (1951).

The statute precluded any meaningful review by the county board of equalization during an even-numbered year because it provides that the value must remain the same for a 2-year period. There was not an adequate statutory remedy available to Xerox. It would have necessitated litigation in 61 counties. An action for a declaratory judgment was a proper remedy in this case.

The principal issue to be determined is whether the statute as interpreted is unconstitutional. Xerox argues that the interpretation given § 77-1301 by the

defendants, which requires property values to remain unchanged for 2 years and prohibits consideration in even-numbered years of actual depreciation when valuing personal property for tax purposes, violates the Nebraska Constitution. Xerox contends that since its leased equipment depreciates on an *annual* basis, the property is valued in excess of its actual value in those years in which the value cannot be reduced by an amount reflecting depreciation.

Article VIII, § 1, of the Nebraska Constitution provides that "[t]he necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct. Taxes shall be levied by valuation uniformly and proportionately upon all tangible property . . . ." In *State ex rel. Meyer v. Peters*, 191 Neb. 330, 338, 215 N.W.2d 520, 526 (1974), we said, "Under the provisions of Article VIII, section 1, of the Constitution of Nebraska, the taxation of personal property . . . must be uniform not only as to the rate of taxation, but as to the valuation of the property as well."

The uniform method for valuing property for tax purposes which the Legislature has provided is to tax property at its "actual value." Neb. Rev. Stat. § 77-201 (Reissue 1981). "Actual value" is defined in Neb. Rev. Stat. § 77-112 (Reissue 1981):

> Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; (6) market value in the ordinary course of trade; and (7) existing zoning of the property.

In *Richards v. Board of Equalization*, 178 Neb. 537, 540, 134 N.W.2d 56, 58 (1965), we stated: "For purposes of taxation, the terms actual value, market value, and fair market value mean exactly the same

thing. Many elements enter into a determination of actual value, some of which are set out in the statute." In that case we held that the actual value of property for taxation purposes is to be determined by using the applicable elements of actual value, including those specified in the statute.

In the present case the effect of the statute and the interpretation given it by the defendants is that in even-numbered years no change may be made in the value of personal property subject to taxation. Thus, such property is subject to a tax levy in even-numbered years without any determination of its actual value for that year. In *State ex rel. Meyer v. McNeil*, 185 Neb. 586, 177 N.W.2d 596 (1970), we determined the constitutionality of a statute which provided a different method of valuing certain types of property than the actual value standard embodied in § 77-112. We held that the statute "does not purport to determine actual value of farm machinery and equipment at any given time and is wholly unrelated to actual value for taxation purposes required by the law of this state. . . . It is violative of the uniformity provisions of Article VIII, section 1, of the Constitution." *Id.* at 589-90, 177 N.W.2d at 599.

We conclude that § 77-1301(1) is violative of Neb. Const. art. VIII, § 1, in that it directs that taxes be levied upon personal property in even-numbered years without regard to the uniform method of valuing property at actual value as provided in § 77-201 and as that statute has been interpreted by this court.

It is unnecessary to consider the other assignments of error.

The judgment of the district court is reversed and the cause remanded with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. CHARLES J. HAMILTON, APPELLANT.

351 N.W.2d 63

Filed June 22, 1984. No. 83-795.

1. **Blood, Breath, and Urine Tests: Evidence.** Whether a law enforcement officer refused a request for a second test is a foundational requirement for the admission of evidence as to results of a breath test.
2. **Blood, Breath, and Urine Tests: Evidence: Juries.** The jury may not consider the question of an alleged refusal once the trial court has determined that all foundational requirements for admission of the results of the breath test have been met.
3. **Criminal Law: Blood, Breath, and Urine Tests: Motions to Suppress.** In a criminal case the proper method to challenge the admissibility of evidence as to the results of a chemical test for intoxication is to file a motion to suppress.
4. **Motions to Suppress: Appeal and Error.** The findings of fact by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong.
5. **Jury Instructions: Appeal and Error.** A defendant may not predicate error on an instruction that is more favorable to him than is required by law.

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

Paul Korslund of Everson, Noble, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellant.

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

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

BOSLAUGH, J.

The defendant, Charles J. Hamilton, was convicted of first offense driving while under the influence of alcoholic liquor and sentenced to probation for a period of 9 months. The county court also fined Hamilton $100 and suspended his driver's license for a period of 60 days. Upon appeal to the district court the judgment was affirmed.

The assignments of error relate to jury instruc-

tions given and refused by the county court.

The record shows that at about 1 a.m. on February 17, 1983, Hamilton, while operating his pickup truck, crossed the centerline of the highway and collided with an oncoming semitrailer truck. Hamilton, suffering from facial lacerations and a concussion which he received in the accident, was taken to a hospital. While at the hospital, Hamilton was arrested by Gage County Deputy Sheriff Daniel Cripe, who had reason to believe that Hamilton was intoxicated. A breath test conducted at the sheriff's office shortly after the arrest disclosed that Hamilton's blood alcohol level was .213 percent.

Hamilton filed a motion to suppress the results of the breath test, alleging that the test had been obtained in violation of Neb. Rev. Stat. § 39-669.09 (Reissue 1978). After an evidentiary hearing the motion to suppress was overruled. No error is assigned and no issue was raised in the district court as to the ruling on the motion to suppress. The result of the breath test was admitted without objection at the trial in the county court.

Section 39-669.09 provides:

> The law enforcement officer who requires a chemical blood, breath, or urine test pursuant to section 39-669.08 may direct whether the test shall be of blood, breath, or urine; *Provided*, that when the officer directs that the test shall be of a person's blood or urine, such person may choose whether the test shall be of his blood or urine. The person tested shall be permitted to have a physician of his choice evaluate his condition and perform or have performed whatever laboratory tests he deems appropriate in addition to and following the test administered at the direction of the law enforcement officer. *If the officer shall refuse to permit such additional test to be taken, then the original test shall not be competent as evidence.* Upon the request of the person tested, the results of the test taken at the

> direction of the law enforcement officer shall be made available to him.

(Emphasis supplied.)

Hamilton contends that his request to have an additional blood test performed was refused by the deputy sheriff. At the hearing on the motion to suppress, the deputy sheriff testified that Hamilton asked him at the time of the arrest at the hospital, "I can't just take a blood test here and get it over with?" The deputy sheriff replied, "No, you'll have to come to the sheriff's office for a breath test." The deputy sheriff testified that defendant made no other request for an additional test.

Hamilton's daughter testified regarding the request made by Hamilton as follows:

> Well, my dad asked him, Charles asked him — told him he had to go down and get a breath test and my dad said well, you know, he said he thought he'd rather go — just have a blood test while he was there at the hospital, and stuff. And then the officer said, you know, he didn't have a choice. He'd have to come down there.

The defendant testified as follows:

> Q. [By Mr. Korslund] Okay. Mr. Hamilton, I'm going to ask you about this conversation that we're all talking about. Do you recall Deputy Cripe, that night at the hospital on the 17th of February of this year, asking you or talking to you about taking a test?
>
> A. Yes, sir.
>
> Q. What's your best recollection of what he said?
>
> A. Well, he said I had to go down to the sheriff's office and take a breath test.
>
> Q. Okay.
>
> A. And I said, "While I'm here at the hospital," I said, "I'd rather take a blood test."
>
> Q. Okay. What did he say?
>
> A. He said, "You don't have a choice."
>
> Q. Okay.

A. He said, "You'll have to come down to the sheriff's office with us."

Q. Okay. And that's pretty much what Deputy Cripe said, as you understand?

A. Yeah. And then - - -

Q. And was — Do you recall some further conversation beyond that?

A. Well, yeah, Then I asked him — I said, "Well, are we going to have to come back up here," — I said, "Then we'll have to come back up here after the breath test for the blood test," and he said, "No, that won't be necessary."

. . . .

A. Well, after the test I said, "Now" — I said, "Now do we go back up to the hospital?" He said, "No." . . .

Defendant was released to his family on bond shortly after the breath test. Defendant further testified:

Q. Okay. Is there any reason after that that you, yourself, didn't go back up to the hospital on your own?

A. Well, I felt it wouldn't do any good because of the way it was kind of explained to me, that it was - - -

Q. You had asked about it twice before already?

A. Yeah. There wasn't any need of it. I wouldn't even think it would be legal without an officer being present for the test, anyway. I don't know.

Q. Okay. You figured it was all over at that point?

A. Yeah.

In overruling the motion to suppress, the county court stated that "although [the defendant] would have preferred to have a blood test over a breath test, [he] did not request a second test. . . . [H]e was advised of his right — excuse me, he was advised of his obligation to take a breath test and . . .

the state did nothing to keep him from getting a second test if he wanted to do it."

Hamilton contends that it was error for the county court not to instruct the jury that if it found that the deputy sheriff had refused Hamilton's request for an additional test, then the results of the breath test conducted by the deputy sheriff should be disregarded. The court did instruct the jury that any refusal by the deputy sheriff of a request for an additional test was to be considered as bearing upon the weight and credibility to be accorded the breath test.

Neither the requested instruction nor the one given was correct. Whether a law enforcement officer refused a request for a second test is not a question for the jury, but it is a foundational requirement for the admission of evidence as to results of a breath test. The jury may not consider the question of an alleged refusal once the trial court has determined that all foundational requirements for admission of the results of the breath test have been met. In *State v. West*, *ante* p. 389, 401, 350 N.W.2d 512, 520 (1984), we held that requirements for the admissibility of the results of a urine test are foundational and are not a question for the jury. We said:

> Once the court, however, determines that the foundational requirements have been met and the evidence admitted, the jury has no function other than to determine the credibility and weight to be given the evidence. The jury is to consider the weight and credibility only of the test results, and not whether the foundational requirements necessary for admission of the tests were met. As a general rule, it is the province of the trial court in a jury case to determine the admissibility of the evidence offered by the parties at trial. See 75 Am. Jur. 2d *Trial* § 345 (1974). Neb. Rev. Stat. § 27-104(1) (Reissue 1979) specifically provides: "Preliminary ques-

tions concerning the . . . admissibility of evidence shall be determined by the judge . . . ." The court, and not the jury, is the arbitrator as to the admissibility of the evidence. See, *Garcia v. State*, 159 Neb. 571, 68 N.W.2d 151 (1955); *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 275 N.W.2d 77 (1979); *State v. Suggett*, 200 Neb. 693, 264 N.W.2d 876 (1978). The jurors are the judges of the credibility of the witnesses and of the weight to be given their testimony, once it is determined by the court that the evidence is admissible. *State v. Meadows*, 203 Neb. 197, 277 N.W.2d 707 (1979).

In a criminal case the proper method to challenge the admissibility of evidence as to the results of a chemical test for intoxication is to file a motion to suppress. See, Neb. Rev. Stat. §§ 29-822 and 29-823 (Reissue 1979); *State v. Bevins*, 198 Neb. 761, 255 N.W.2d 284 (1977).

In the present case Hamilton filed a motion to suppress the results of the breath test. The court found that the deputy sheriff had not denied a request by Hamilton for a second test. The findings of fact by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983). The record supports the finding of the trial court on the motion to suppress.

The instruction given by the trial court, although erroneous, was harmless error. The situation is similar to that in *State v. West*, *supra* at 402, 350 N.W.2d at 521: "West received an instruction far more favorable than he was entitled to receive . . . ." In the present case the jury was instructed that it could consider any refusal of the deputy sheriff as bearing upon the weight and credibility to be given the breath test. In the present case the instruction was more favorable to Hamilton than a proper instruction. A defendant may not predicate error on an instruction that is more favorable to him

than is required by law. *Stump v. State*, 132 Neb. 49, 271 N.W. 163 (1937).

There being no error, the judgment is affirmed.

AFFIRMED.

CAPORALE, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. GEROLD D. CHRISTIANSEN, APPELLANT.

351 N.W.2d 67

Filed June 22, 1984. No. 83-800.

1. **Criminal Law: Appeal and Error.** In determining the sufficiency of evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.
2. **Sentences.** A sentence validly imposed takes effect from the time it is pronounced; a subsequent sentence fixing a different term is a nullity.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Joseph J. Vance, for appellant.

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

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

PER CURIAM.

In his sole assignment of error defendant-appellant, Gerold D. Christiansen, challenges the sufficiency of the evidence to support his conviction of third offense drunk driving. While we reject that assignment and affirm the conviction, we must, on the basis of plain error not assigned, vacate the sen-

tence and reverse and remand the cause for further proceedings.

In the early morning hours of February 13, 1983, an Omaha police officer was driving his cruiser southbound on Interstate 480 approaching the Leavenworth Street freeway entrance ramp. The officer noticed a vehicle on the ramp entering the freeway, the driver apply the brakes upon entering the traffic flow, proceed for a half block in the right-hand lane, and then, without signaling its intention, swerve into the center lane, nearly colliding with the officer. The officer turned on his overhead lights to stop the vehicle, and as the vehicle was being stopped, watched a woman climb from the rear seat and take the driver's position in the car.

Christiansen, whom the police officer testified he saw operating the vehicle at the time of the near collision, was given field sobriety tests and transported to the police station, where a breath test revealed a .197 percent alcohol content.

Christiansen was charged with negligent driving, "fourth" offense driving while intoxicated, and improper display of plates. During a bench trial before a judge of the Omaha Municipal Court, Christiansen and the three other persons riding in his vehicle testified that he was not driving the vehicle at any time during the encounter with the police officer.

The municipal court judge found Christiansen guilty of driving while intoxicated, and also found that he had been convicted on at least two prior occasions of drunk driving when represented by counsel.

Christiansen attacks the sufficiency of the evidence with the lone contention that his testimony and that of the three passengers in the automobile, that he was not driving the vehicle when it nearly collided with the police officer, created a reasonable doubt as to his guilt. The three persons testifying were his wife, his niece, and the niece's husband.

The police officer specifically testified that Christiansen was operating the vehicle and that he saw Christiansen's niece climb from the back seat and place herself behind the steering wheel.

> In determining the sufficiency of evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.

State v. Miner, 216 Neb. 309, 313, 343 N.W.2d 899, 902 (1984).

Taking the view of the evidence most favorable to the State, there is sufficient evidence to support the trial court's finding that Christiansen was operating the motor vehicle.

We now move on to the matter of plain error, which we can, at our option, note. Neb. Rev. Stat. § 25-1919 (Reissue 1979); *State v. Ellis*, 216 Neb. 699, 345 N.W.2d 323 (1984); Neb. Ct. R. 9D(1)d (Rev. 1983).

At the sentencing hearing the following dialogue took place:

> [Judge]:
>
> All right. This is a third conviction, Mr. Christiansen, and they, obviously, proposed, the Probation Office, are very extensive, the conditions of probation. And they are outlined in this order. You understand, as I told you, when you appeared before the Court originally, that you were facing a mandatory 90 days in the County Jail, and a $500.00 fine, and a lifetime suspension of your driving privilege. You had a lot of chances. You keep coming back, Gerald [sic], but my understanding is that the Probation Officer, Mr. Cassler, in this case, feels that you do have the possibility,

and hopefully, the attitude to comply with the probation and do what you are supposed to. This is your last shot, you understand that. If you don't follow this, the Court will not hesitate to violate you, and take your license, and I can put you in jail for six months, you understand that. So, this is your break, and I realize, you know, it's not easy, but you are going to have to go through all these restrictions and follow them to the letter. In the long run, Gerald [sic], it's a penalty to you, but it's for your benefit, but if you can try to get this whipped because if you don't, eventually you are going to kill someone. And then you are going to end up in the penitentiary, or you are going to kill yourself. You understand that, don't you?

Mr. Christiansen:

Yeah, I do.

[Judge]:

All right. Well, as I said, the conditions required by law, you have to serve mandatory seven days in County Jail. And what we've done, is, the Defendant is sentenced to 90 days in the Douglas County Jail, to be served 30 days to be served at the time of sentencing, which is now. You will have to serve the 30, and the 60 days will be on a show cause basis, to handle your probation and do what you are supposed to be doing. Then, that will take care of that, and your driving privilege, of course, as required by law, is suspended for at least one year, and you are going to be placed on probation for a period of three years. Now, if you agree to those conditions, you should sign it at the bottom where it says, "Defendant."

[Christiansen's trial attorney]:

Would you set an appeal bond, Your Honor?

[Judge]:

Oh, sure, well, I'll just sentence him, and we won't have to place him on probation, because that way, okay, what I will do, then, is sentence you to a $500.00 fine. You were so courteous, Joe, you should have said that in the first place, and I wouldn't have had to gone through all that, 90 days in County Jail, and lifetime suspension of driver's, driving privilege.

. . . .

[Judge]:

Okay. All right, that will be the order, then, 90 days in the County Jail, $500.00 fine, and lifetime suspension. I'll set the appeal bond at $300.00.

[Christiansen's trial attorney]:

I wonder, could you make it $200.00, Judge. He showed up here.

[Judge]:

$200.00.

Once the municipal court judge had placed Christiansen on probation, as we find he did by his pronouncement, the effort to sentence him otherwise was a nullity.

In *State v. Snider*, 197 Neb. 317, 248 N.W.2d 342 (1977), the defendant was sentenced, upon violation of his probation, to a term of 1 to 2 years' imprisonment, with credit for time spent in jail awaiting the sentencing hearing. On his way out of the courtroom the defendant slammed a door. The judge, obviously unhappy with such conduct, called the defendant back and resentenced him to a term of 1 to 2 years *without* jail credit. We held the latter sentence ineffectual, and stated: "The rule is that a sentence validly imposed takes effect from the time it is pronounced and that a subsequent sentence fixing a different term is a nullity." *Id.* at 319, 248 N.W.2d at 343. See, also, *State v. Kinney*, *ante* p. 701, 350 N.W.2d 552 (1984); *State v. Sliva*, 208

Neb. 647, 305 N.W.2d 10 (1981); *State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981).

Accordingly, the judgment of conviction is affirmed and the matter remanded to the district court with directions to remand the cause to the municipal court for further proceedings consistent with this opinion.

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

CAPORALE, J., participating on briefs.

DON PERSON, APPELLANT, V. RED LION INN, INC., APPELLEE.

350 N.W.2d 570

Filed June 22, 1984. No. 83-825.

Workmen's Compensation: Appeal and Error. Findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same effect as a jury verdict in a civil case, and an award may not be set aside where the findings are supported by the evidence.

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

Garrett Law Office, for appellant.

Rodney G. Gnuse of Schmid, Ford, Mooney & Frederick, for appellee.

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

WHITE, J.

This is an appeal by the employee, Don Person, from a judgment of a three-judge panel of the Nebraska Workmen's Compensation Court, finding that Person suffered a 5-percent permanent partial disability to the body as a whole and denying Person vocational rehabilitation benefits.

Six errors are assigned. Taken together, they relate to three areas: (1) The finding of a minimal disability was not supported by the weight of the evidence. (2) The denial of rehabilitative benefits was not supported by the weight of the evidence. (3) The court erred in not awarding future medical benefits.

Appellant also requests an attorney fee in this court and for services rendered before the three-judge panel.

Person, while in the employ of Red Lion Inn, Inc., on July 30, 1982, slipped and fell as he was carrying dishes and landed on his left elbow and buttocks. He incurred medical and hospital expenses, and he was temporarily totally disabled for a period of 30 5/7 weeks, until March 2, 1983, when the temporary total benefits ceased. The degree of disability thereafter is the issue in this case.

We again observe that findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same effect as a jury verdict in a civil case, and an award may not be set aside where the findings are supported by the evidence. *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983). This court does not reweigh the facts.

The judgment is supported by the evidence. Two physicians, Drs. Patrick W. Bowman and Edward M. Schima, who extensively examined Person, testified that they found no objective signs of injury and that disability due to soft-tissue injury did not exceed 5 percent. Another physician, Dr. J. Whitney Kelley, gave a somewhat contrary opinion.

Person urges us to reject the evidence of Drs. Bowman and Schima and accept that of Dr. Kelley. Even if we were so inclined, we are not free to do so. The weight and credibility of expert testimony is for the trier of fact, and, if supported, a finding thereon is binding on us. *Novotny v. Electric Hose & Rubber Co.*, 214 Neb. 216, 333 N.W.2d 406 (1983). The first assignment is without merit.

The three-judge panel could have determined that

rehabilitative training was not indicated as the injuries were so minimal as to not constitute a barrier to employment. That finding is inherent in the failure to award such benefits and is supported by the evidence. The second assignment is also without merit.

There was no evidence presented as to possible future medical expenses, and Person is not entitled under the statute, Neb. Rev. Stat. § 48-125 (Reissue 1978), to an attorney fee either in this court or the court below.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT E. TONGE, APPELLANT.

350 N.W.2d 571

Filed June 22, 1984. No. 83-856.

1. **Trial: Evidence: Records.** Where counsel for a party specifically states in the trial court that he has no objection to the introduction of certain documents, he cannot on appeal urge that they were improperly certified or authenticated and, for that reason, not admissible.
2. _____: _____: _____. A judicial record of this state, or of any other federal court of the United States, may be proved by the producing of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one.

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

James P. Miller and Owen A. Giles, for appellant.

Paul L. Douglas, Attorney General, and Dale A. Comer, for appellee.

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

KRIVOSHA, C.J.

The appellant, Robert E. Tonge, appeals from a

judgment and order entered by the district court for Sarpy County, Nebraska, finding Tonge guilty of driving while intoxicated, third offense. The trial court sentenced Tonge to imprisonment for a term not to exceed 5 years, a 1 year's suspension of his driving privileges, and ordered him to pay the costs of the action. Tonge assigns two errors. First, he maintains that the trial court failed to advise him of his right to challenge the constitutional validity of his prior convictions for driving while intoxicated and, second, that the trial court erred by accepting as evidence the two prior conviction "checklists" which had been prepared by the trial judges in each of the two earlier matters. We believe that the assignments are without merit and that the judgment and sentence of the trial court should be affirmed.

On June 11, 1982, a complaint was filed in the county court for Sarpy County, Nebraska. The complaint charged that on May 29, 1982, Tonge was operating a motor vehicle while under the influence of alcohol, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1978). The complaint further charged that Tonge had been convicted of similar offenses on January 9, 1978, and November 22, 1979, and therefore the offense charged in the complaint was the third offense of driving while intoxicated. Tonge waived preliminary hearing in the county court and was bound over for trial in the district court. An information was filed in the district court for Sarpy County, Nebraska, on April 28, 1983, charging that on May 29, 1982, Tonge was operating a motor vehicle in violation of § 39-669.07. The information further charged that Tonge had previously been convicted at least twice of driving while intoxicated, in violation of § 39-669.07.

On May 20, 1983, Tonge appeared for arraignment in the district court with counsel and, after the court explained to Tonge all of his constitutional rights, including the nature of the offense and the possible punishment then in effect, entered a plea of not

guilty, and the case was set for trial. On July 12, 1983, Tonge again appeared in district court with his counsel and withdrew his plea of not guilty and entered a plea of guilty. Before entering his plea of guilty, Tonge was again informed by the trial court of the possible maximum penalty and the consequences of being a convicted felon, as well as all of his constitutional rights. Following Tonge's guilty plea, the trial court once again inquired as to whether Tonge understood that by entering a plea of guilty he was waiving any technical defenses, as well as waiving his constitutional rights to a trial, to confront and cross-examine witnesses, to remain silent, his presumption of innocence, and the obligation of the State to prove guilt beyond a reasonable doubt. The trial court also explained again to Tonge the possible sentences for the crime. The prosecution was then asked to set forth a factual basis. The prosecution provided the court with the factual basis for the conviction, including the fact that when arrested Tonge had a blood alcohol content of .294. Because of some concern as to whether the test was correct, a second test was performed sometime later, producing a test result of .249, both of which are far in excess of the legal limits. The prosecutor then introduced in evidence certified copies of the two prior convictions relied upon for enhancement purposes. The court asked Tonge's counsel if he was satisfied with the plea. Tonge's counsel responded affirmatively. The court then asked Tonge if there had been any promises, threats, or force persuading him to plead. Tonge responded, "No, sir." The court then accepted the plea and found Tonge guilty of third offense driving while intoxicated, a Class IV felony, punishable by up to 5 years' imprisonment.

Exhibit 1, offered in evidence, consisted of three pages certified to by the deputy clerk of the county court for Sarpy County, Nebraska. The first page was a criminal complaint showing that Tonge had

been charged on January 9, 1978, with driving while intoxicated. The second sheet was a checklist filled in and signed by the trial judge. The checklist indicates that at the initial hearing held on September 20, 1978, defendant was present and that the court explained to him his right to counsel. The checklist indicated that he did not request counsel because, according to the checklist, Tonge "has funds to hire own attorney." Notwithstanding an explanation of his constitutional rights, the checklist discloses that at the arraignment he waived counsel. The checklist further indicates that he entered a plea of guilty to the charge and was placed on probation. Exhibit 2 also consists of three pages certified to by the deputy clerk of the county court. The first page consists of a criminal complaint charging Tonge with driving while intoxicated on November 22, 1979. The checklist, which is the second page, indicates that the defendant was represented by counsel.

Before proceeding to consider the assignments of error, it is necessary for us to determine the statutory law to be applied in this case, § 39-669.07 as it existed before July 17, 1982, or on and after July 17, 1982. The incident leading to Tonge's conviction occurred on May 29, 1982, and the complaint was filed on June 11, 1982. Changes in § 39-669.07, altering the penalty for driving while intoxicated, third offense, became effective on July 17, 1982. Therefore, the statute became effective after the incident occurred. In *State v. Peiffer*, 212 Neb. 864, 326 N.W.2d 844 (1982), this court dealt with this precise question and held that the new penalties were not applicable to offenses committed prior to the effective date of the act. For this reason we believe that the provisions of § 39-669.07, as they were prior to July 17, 1982, are applicable in this case.

Turning, then, to Tonge's first assignment of error, that the court erred in not advising him that he had a right to challenge the constitutional validity of his prior convictions, we point out that prior to

July 17, 1982, the statute did not grant to a defendant the right to challenge the validity of prior convictions. Furthermore, it would appear that even after July 17, 1982, one's right to challenge the validity of a prior conviction is somewhat limited. Section 39-669.07 (Cum. Supp. 1982) provides in part: "The 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." In *State v. Ziemba*, 216 Neb. 612, 620, 346 N.W.2d 208, 214 (1984), we said that under the amended provisions of § 39-669.07 "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." We note, however, that prior to July 17, 1982, the statute made no such provision, and the court, therefore, was not required to so advise the defendant. In *State v. Ziemba*, *supra* at 620, 346 N.W.2d at 214, we said further:

> 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.

Prior to July 17, 1982, the defendant did not have the right to be advised of his opportunity to bring mitigating facts to the attention of the court or to object to the validity of a prior conviction. Therefore, the trial court's failure to so advise did not constitute error. We would note, however, that while § 39-669.07, prior to July 17, 1982, did not impose upon the trial court the obligation to advise the defendant of his right to object, that, in fact, in the instant case

the trial court inquired of Tonge's counsel whether he was satisfied with the plea. Furthermore, both exhibits were offered in evidence without objection in the presence of both Tonge and his counsel and objected to for the first time on appeal to this court. The record clearly establishes that Tonge was repeatedly advised of his constitutional rights and, with such knowledge and under the advice of counsel, waived those rights and knowingly, intelligently, and freely entered a plea of guilty.

Tonge argues to this court that in *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), we adopted the rule set out by the U.S. Supreme Court in *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980). With that we have no quarrel, for, indeed, we have held that the defendant may not be subject to enhanced punishment by the use of constitutionally invalid prior convictions. However, an examination of the record in this case fails to disclose any such constitutionally invalid conviction. Therefore, even if Tonge was entitled to be advised of his right to contest the prior convictions, the record establishes such contest would have been without merit. With regard to one of the two prior convictions, the record is clear that Tonge was represented by counsel and cannot now collaterally attack and relitigate the former conviction. See *State v. Smith, supra.* And with regard to the second conviction it is likewise clear from the record that Tonge was advised of his rights and knowingly, freely, and voluntarily waived those rights and entered a plea of guilty. As we earlier noted, the checklist prepared by the trial court provides that at the initial hearing held on September 20, 1978, Tonge was present, the complaint was read to him, and he was advised of his right to counsel. The record then reads, "Requested counsel no . . . has funds to hire own attorney." Again, at the arraignment, also held on September 20, 1978, the checklist clearly indicates that the defendant's constitutional rights

were explained, that he understood his rights, and that he waived right to counsel. The checklist then sets out in the court's own hand, "Oct. 20, 1978 - Sentencing - Defendant appeared personally, waived counsel and presence of Co. Atty - P.O. Frank Reavis appeared - Parties appeared - Probation - See Order." It is difficult to understand how it thus can be said to be a silent record. The checklists in both cases fully comport with the requirements established in *State v. Ziemba*, *supra*, and were not in any manner invalid. The failure of the trial court to specifically advise Tonge that he had a right to challenge the validity of the previous convictions was not error, and the first assignment must be overruled.

Tonge's second assignment of error is to the effect that the court erred by accepting the checklists because, although they bore a docket and page number and the signature of a judge of that court and a certificate authenticating the validity of the document, signed by a deputy clerk of the county court, the copies introduced in evidence did not bear a filing stamp of the clerk. We may easily dispose of this contention. No objection was made at trial to the introduction of the documents. When these exhibits were introduced, not only did counsel fail to object, but the trial judge asked defense counsel if there were any objections, to which counsel responded, "No." In order for a defendant to contend that a trial court erred in the admission of evidence, he must object to the admission at the time the evidence is introduced at trial. See, *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983); *State v. Holland*, 213 Neb. 170, 328 N.W.2d 205 (1982). More specifically, where counsel for a party specifically states in the trial court that he has no objection to the introduction of certain documents, he cannot on appeal urge that they were improperly certified or authenticated and, for that reason, not admissible. See *State v. Bundy*, 181 Neb. 160, 147 N.W.2d 500 (1966).

Furthermore, even if we were to consider the absence of the filing stamp, the document as prepared would not be inadmissible in evidence. Neb. Rev. Stat. § 25-1285 (Reissue 1979) provides:

> A judicial record of this state, or of any other federal court of the United States, may be proved by the producing of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one.

Tonge has cited us to no authority, nor are we able to find any authority, to the effect that the absence of the filing stamp on the certified document offered in evidence renders the document inadmissible. The fact that a clerk may be required to place a filing stamp upon an original document does not mean that a copy prepared and certified for introduction in evidence must also bear the filing stamp. The second assignment must be overruled.

We make mention of one other fact. During the course of oral argument before this court, counsel for Tonge kept referring to the fact that Tonge was incarcerated for a period of 5 years. In fact, the sentence imposed by the trial court is imprisonment for a period not to *exceed* 5 years. Under the provisions of Neb. Rev. Stat. § 83-1,105 (Reissue 1981), where a definite term of years is imposed as a sentence, "the maximum term of the sentence shall be the term imposed by the court and the minimum term shall be the minimum sentence provided by law." A Class IV felony has a maximum of 5 years and no minimum. Therefore, the moment that Tonge entered the penitentiary, he was eligible for parole, and the sentence imposed is a sentence of 0 to 5 years. In view of the fact that the assignments of error have been overruled, the judgment and sentence of the trial court must be affirmed.

AFFIRMED.

CAPORALE, J., participating on briefs.

STEPHEN E. CATHCART, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARCIA JEAN JONES, DECEASED, APPELLANT, V. LINDA K. BLACKETER ET AL., APPELLEES.

351 N.W.2d 70

Filed June 29, 1984. No. 82-816.

1. **Negligence: Motor Vehicles.** To recover as a guest from a host driver in an accident occurring before August 30, 1981, the guest must prove either (1) that the host driver was intoxicated and was also guilty of some ordinary negligence proximately causing or contributing to cause the accident; or (2) that the host driver was guilty of gross negligence proximately causing or contributing to cause the accident.
2. **Drunk Driving: Proof.** The fact that the driver of a motor vehicle has .10 percent of alcohol in his body fluids does not, of itself, establish as a matter of law that the driver is under the influence of intoxicating liquor.
3. _____: _____. The operator of a motor vehicle is under the influence of intoxicating liquor if he has, due to the consumption of intoxicating liquor, so lost the control of his body or his mental faculties as to impair to any appreciable degree his ability to operate his motor vehicle in the manner that an ordinarily prudent and cautious man in the full possession of his faculties would operate it.
4. **Expert Witnesses.** The opinions of expert witnesses are not binding on the finder of fact.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Ronald H. Stave of Stave, Cavel & Coffey, P.C., for appellant.

Robert G. Fraser and Joseph E. Jones of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee Patrick.

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

GRANT, J.

On June 22, 1980, at about 1:30 a.m., Marcia Jean Jones was riding as a passenger on a motorcycle driven by defendant Lynn B. Patrick (Patrick) west on Fort Street in Omaha, Nebraska, approaching the

intersection of Fort Street and 105th Plaza. The motorcycle had just passed the crest of a hill east of 105th Plaza and had started down a slight grade. At the same time, defendant Linda K. Blacketer (Blacketer) was driving an automobile east on Fort Street and was approaching the same intersection. Blacketer turned her automobile to the left to enter 105th Plaza in front of the motorcycle, and a collision occurred. Marcia Jones was killed as a result of this collision, and this action was brought by the personal representative of her estate, her brother. Marcia Jones and her brother will be referred to herein as plaintiff.

Plaintiff sued both Blacketer and Patrick, alleging that Blacketer was negligent in the operation of her automobile in various respects, including failure to keep a proper lookout and failure to yield the right-of-way to the motorcycle on which plaintiff was riding by turning left in front of the cycle; and alleging that Patrick was liable to plaintiff, his guest, both because of Patrick's intoxication and because of Patrick's gross negligence, which gross negligence included intoxication as a separate element of the alleged gross negligence.

After jury trial the jury returned a verdict in favor of plaintiff and against Blacketer, and fixed plaintiff's damages at $68,583.25, and a verdict in favor of defendant Patrick on plaintiff's petition against Patrick. Plaintiff timely filed a motion for judgment against defendant Patrick notwithstanding the verdict in his favor, and for an additur to the amount of damages assessed by the jury, which damages were alleged to be inadequate; and, in the alternative, for a new trial in the event the motion for judgment N.O.V. or for additur was denied. Plaintiff's motions were denied, and this appeal followed.

Plaintiff's assignments of error, as argued in the brief, may be summarized as error of the trial court in (1) failing to sustain plaintiff's motion for directed verdict against defendant Patrick, and (2)

failing to sustain plaintiff's motion for additur or, in the alternative, in failing to grant plaintiff's motion for new trial because of the inadequacy of damages awarded. For the reasons hereinafter set out we affirm.

It must be noted that this case is being decided pursuant to Neb. Rev. Stat. § 39-6,191 (Reissue 1978), as existing before that statute was amended effective August 30, 1981. The case, therefore, is a typical "guest" case under our statute above referred to, as in effect on June 22, 1980. Plaintiff's first assignment of error is premised on the proposition, as stated in plaintiff's brief, that "[i]f the plaintiff has proven the intoxication of the defendant, he has proven gross negligence." Brief for Appellant at 17. We cannot subscribe to that proposition. In *Kaufman v. Tripple*, 180 Neb. 593, 597, 144 N.W.2d 201, 205 (1966), we stated:

> The foregoing provision of the guest statute [Neb. Rev. Stat. § 39-740 (Reissue 1960)—the predecessor to, and identical with, § 39-619 in effect in this case] provides for two distinct grounds of recovery. One exists if the host driver is under the influence of intoxicating liquor in which event such driver is liable to a guest for ordinary negligence. The other exists only if the host is guilty of gross negligence.

Similarly, in *Hansen v. Hasenkamp*, 192 Neb. 530, 533, 223 N.W.2d 44, 47 (1974), we said, "Under that [guest] statute, if the host driver is not under the influence of intoxicating liquor, a guest can recover only where there is gross negligence; while if the host driver is under the influence of intoxicating liquor, only ordinary negligence need be proved."

It is therefore settled Nebraska law that in order for a guest plaintiff to recover from a host driver, the plaintiff must prove either (1) that the host driver was intoxicated and was also guilty of some ordinary negligence which proximately caused or contributed to cause the accident or (2) that the

host driver was guilty of gross negligence, which negligence may include the element of intoxication, proximately causing or contributing to cause the accident. Plaintiff generally alleged these elements in the petition.

The facts established at trial showed without dispute, as to the accident itself, that the speed limit at the intersection was 40 miles per hour; that Patrick was operating his motorcycle at either 35 or 40 miles per hour going west; that Blacketer was driving east; that Blacketer turned to her left in front of Patrick's cycle; and that plaintiff died as a result of the ensuing collision.

There was disputed testimony as to the point of impact—defendant's expert witness placing that point in the center of the westbound lane, and plaintiff's expert placing the impact slightly north of the north edge of Fort Street. The two experts and Blacketer estimated the speed of her car at the time of collision at 18 to 20 miles per hour. Patrick remembered seeing the lights of the oncoming car and knew that impact took place, but did not remember anything else until the next day.

There was further conflicting testimony in that while defendant's expert testified there was not enough time for Patrick to apply his brakes before the collision, plaintiff's expert testified that if Patrick had reacted and applied his brakes as he should have the collision would not have happened. In short, with regard to the accident itself, and without regard to the intoxication issue, there was evidence before the jury which, if believed, would support a finding in favor of plaintiff as against defendant Patrick on either ordinary or gross negligence, or, as determined by the jury, in favor of Patrick against plaintiff on both those issues. On the issue of ordinary or gross negligence, the issues were properly submitted to the jury under instructions not complained of.

With regard to the issue of Patrick's intoxication,

it is undisputed that blood samples taken from Patrick some 40 minutes after the accident showed that his blood contained .12 percent blood alcohol content. Based on this undisputed finding, plaintiff contends that the court should have instructed the jury, as a matter of law, that defendant Patrick was intoxicated. Setting aside for the moment the fact that if the jury determined that Patrick was not guilty of even ordinary negligence, his intoxication would be immaterial, it is clear that plaintiff's contention in this regard is also without merit. Plaintiff's position is premised on Neb. Rev. Stat. § 39-669.07 (Reissue 1978), which plaintiff contends "indicates that a person having .10 of 1% or more by weight of alcohol in his body fluid is under the influence of alcoholic liquor." Brief for Appellant at 23. Section 39-669.07 does not so indicate, but instead provides that "[i]t shall be unlawful for any person to operate . . . any motor vehicle . . . when that person has ten-hundredths of one per cent or more by weight of alcohol in his body fluid . . . ." The trial court properly instructed the jury, pursuant to NJI 7.52:

> The operator of a motor vehicle is under the influence of intoxicating liquor if he has, due to the consumption of intoxicating liquor, so lost the control of his body or his mental faculties as to impair to any appreciable degree his ability to operate his motor vehicle in the manner that an ordinarily prudent and cautious man in the full possession of his faculties would operate it.

Plaintiff did not object to this instruction, and indeed could not have complained, since the instruction properly sets out Nebraska law in that regard. There was directly conflicting evidence presented on the question of Patrick's intoxication. Some of this evidence was from persons who observed Patrick during the evening before the accident, and those persons testified that Patrick showed no sign of intoxication. Patrick himself testified that he did not

feel intoxicated and had no difficulty operating his motorcycle.

Two medical doctors testified that a person having .12 percent of alcohol by weight in his body fluid would be suffering an "appreciable impairment" to that person's ability to operate a motor vehicle, and would be "intoxicated." Plaintiff would have us treat the expert opinions as conclusive in this regard. Such is not the law. The fact finder, including a jury, may accept or reject the opinions of an expert witness. See *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445 (1982).

There was no proper basis on which the trial court could have directed a verdict in favor of plaintiff either on the basis of intoxication or of ordinary or gross negligence, and the trial court was correct in refusing to do so.

With regard to the issue of the adequacy of damages, we are faced with the situation where damages were assessed only against defendant Blacketer. As set out above, we have affirmed the jury's verdict and the court's judgment in determining that defendant Patrick is not liable to plaintiff. The issues between plaintiff and Blacketer were settled before trial by agreement of those parties. Any determination we would make as to the adequacy or inadequacy of the sum of $68,583.25 as proper damages for Christian Jones, aged 11, the only child of Marcia Jones and next surviving kin, would be advisory only. We will not undertake such a task.

The judgment of the trial court is affirmed in all respects.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

MARCELLA PAASCH, APPELLEE, v. JULIE BROWN, APPELLANT.

351 N.W.2d 74

Filed June 29, 1984. No. 83-001.

1. **Adverse Possession.** One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years.
2. **Equity: Appeal and Error.** Equity cases are heard de novo by this court. In determining the weight to be given the evidence, however, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.

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

Dennis E. Martin of Dwyer, O'Leary & Martin, P.C., for appellant.

Hurt, Gallant & Flores, for appellee.

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

GRANT, J.

Plaintiff, Marcella Paasch, and defendant, Julie Brown, own adjoining real property in Dodge County, Nebraska. This is the fourth appeal to this court arising out of that relationship since Paasch purchased her land in 1970. The earlier three cases are: (1) *Paasch v. Brown*, 190 Neb. 421, 208 N.W.2d 695 (1973) (*Paasch-Brown I*); (2) *Paasch v. Brown*, 193 Neb. 368, 227 N.W.2d 402 (1975) (*Paasch-Brown II*); and (3) *Paasch v. Brown*, 199 Neb. 683, 260 N.W.2d 612 (1977) (*Paasch-Brown III*).

The physical layout of the parties' land is fully set out in *Paasch-Brown I* and will not be repeated herein.

Paasch-Brown II was an unsuccessful effort by Paasch to recover from Brown for the tort of outrageous conduct. We held that the facts, as pled, did not support the tort of outrageous conduct,

stating in 193 Neb. at 370-71, 227 N.W.2d at 404:

> The conduct of the defendant here consisted of a failure to promptly perform actions which she was directed to perform by a court decree. There are ample means of enforcing compliance with the judgments and decrees of courts, but a mere failure to comply, or to comply promptly, does not give rise to a separate tort liability for outrageous conduct in favor of the person for whose benefit the original court judgment or decree was entered.

In *Paasch-Brown III*, Paasch sought damages from Brown for civil contempt in failing to comply with the mandatory injunction issued in *Paasch-Brown I*. The trial court held that defendant was not in contempt, and we affirmed that narrow holding, stating in 199 Neb. at 690, 260 N.W.2d at 616-17:

> There was sufficient evidence for the trial court to have concluded that the flow of surface waters, as existed at the time of the original decree, was not being obstructed and that defendant was thus in compliance with the order; or that if such was not the case, that defendant's noncompliance with the order was not willful. Where a case is tried to the court, without a jury, the finding of the trial court will be given the same weight as a jury verdict and will not be disturbed on appeal unless clearly wrong. Crane Co. v. Roberts Supply Co., 196 Neb. 67, 241 N.W.2d 516 (1976).

With that background we turn to the evidence in this case. Paasch filed her petition in three causes of action, alleging in her first cause that on or about March 17, 1981, Brown poured concrete, approximately 21 inches wide, 24 inches thick, and 46 feet long, across the floor of the drainage ditch near the junction of the parties' land; that such concrete structure was constructed on Paasch's land and formed a barrier which impeded the flow of surface water from the Paasch land, in violation of the in-

junction in *Paasch-Brown I.* Paasch alleged this was a trespass and sought an injunction requiring removal of the concrete structure and damages. In her second cause of action Paasch alleged that Brown's actions constituted willful contempt of the court's earlier 1973 order (*Paasch-Brown I*) and sought damages for such contempt. In her third count Paasch alleged that on or about November 30, 1979, Brown had entered Paasch's land and erected a fence on Paasch's property along Paasch's east property line, thus damaging Paasch. On her third count Paasch asked that Brown be required to remove the fence, for a permanent injunction forbidding Brown from erecting a new fence on Paasch's land, and for damages.

Brown first answered the Paasch petition by admitting that she, Brown, had poured the concrete complained of, but generally denying all the other allegations of the Paasch petition. In this same pleading Brown counterclaimed for damages occurring when Paasch allegedly came on Brown's land and destroyed a fence with a replacement value of $1,200 and a tree worth $75. Some 9 months later, on May 24, 1982, Brown filed an amended counterclaim, apparently having just discovered that for a time "greatly in excess of 10 years" a fence had existed approximately 5 to 8 feet west of the surveyed boundary line between the parties' properties; that this fence "constituted the actual boundary line between" the properties. Brown asked that title to the land between the fence and the surveyed property line be quieted in her on the theory of adverse possession.

The case went to trial before the court on Paasch's petition, Brown's answer and amended counterclaim, and Paasch's general denial to the amended counterclaim. After trial the trial court entered its judgment, finding for Paasch and against Brown on Paasch's first cause of action in that Brown had

caused concrete to be placed on Paasch's land and that such placement constituted a trespass and that the concrete should be removed; finding for Brown on Paasch's second cause of action (the contempt charge) in that the evidence did not prove the necessary elements of contempt; and finding for Paasch on Paasch's third cause of action regarding Brown's trespass in erecting a fence on Paasch's land. The court ordered the concrete and fence be removed from Paasch's land by Brown, and taxed the costs to Brown. On Brown's amended counterclaim the court found generally in favor of Paasch and against Brown.

Brown timely filed a motion for new trial, and after denial of that motion, timely filed this appeal. No cross-appeal was taken by Paasch.

The same licensed surveyor testified for both parties. His survey shows, without dispute, that the concrete structure and fence built by Brown were built on Paasch's property. Unless Brown had title to that ground under her theory of adverse possession, it is clear that the trial court was correct in its finding and order.

On the adverse possession issue, while the evidence is in dispute, the law is settled and basically agreed upon by the parties. As stated in *Berglund v. Sisler*, 210 Neb. 258, 262, 313 N.W.2d 679, 682 (1981): "We have continuously held that one who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years."

As we have said, the evidence is in dispute. We said in *Rasmussen Farms v. Gove*, 201 Neb. 432, 438, 267 N.W.2d 764, 767 (1978), quoting from *Bailey v. Mahr*, 199 Neb. 29, 255 N.W.2d 866 (1977): " 'Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial

court observed the witnesses and their manner of testifying.' "

With that review standard in mind the words set out in *Paasch-Brown III*, 199 Neb. at 690, 260 N.W.2d at 616, are completely dispositive of this case, and we adopt them:

> Much of the evidence before the District Court was conflicting and contradictory in nature. The trial court had the opportunity to view the parties and the witnesses. This court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor, and will give great weight to the trial court's judgment as to credibility. Donahoo v. Home of the Good Shepherd of Omaha, Inc., 193 Neb. 586, 228 N.W.2d 287 (1975). On August 9, 1976, the trial court personally inspected the area in question. This court will give consideration to the fact that the trial court inspected the premises. Steffen v. County of Cuming, 195 Neb. 442, 238 N.W.2d 890 (1976).

In the present case, as in *Paasch-Brown III*, the court heard contradictory evidence, and the court did view the premises. We do not have to give "great weight to the trial court's judgment as to credibility" to reach the same conclusion as did the trial court. In view of the hotly contested issue between these same two parties as to the boundary between their properties, stretching at least through the three appeals to this court, it seems that defendant Brown has a complete lack of concern for the injunction of the trial court in *Paasch-Brown I*, and for the property rights of Paasch, to install a 46-foot section of concrete, 24 inches thick and 21 inches wide, anywhere near the boundary between the two pieces of property without first surveying the property to determine the boundary line. In this connection, Brown installed the concrete and fence, respectively, in March of 1981 and November of 1979, while

Brown's survey, submitted in evidence at the trial, was dated July 12, 1982.

The evidence clearly supports a finding in favor of Paasch on the adverse possession issue, and fully supports the order as to removal of the fence and concrete. No evidence was adduced on the issue of Paasch's damages on Brown's obvious trespass and no cross-appeal was taken in that regard. The judgment of the trial court is correct in all respects, and is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. HERBERT RITTHALER, APPELLANT, V. EDGAR KNOX, SAUNDERS COUNTY SUPERINTENDENT OF SCHOOLS, APPELLEE.

351 N.W.2d 77

Filed June 29, 1984. No. 83-335.

Collateral Attack: Jurisdiction. When a district court has acquired jurisdiction, it has the right to decide every question which arises in the case, and its judgment, even if erroneous, cannot be collaterally assailed.

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

Lawrence W. Stunkel, for appellant.

Loren L. Lindahl, Saunders County Attorney, for appellee.

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

PER CURIAM.

Herbert Ritthaler (Ritthaler) appeals a summary judgment granted Edgar Knox, county superintendent of schools of Saunders County, Nebraska (Knox), whereby Ritthaler was denied a writ of mandamus. We affirm.

On September 28, 1981, Herbert Ritthaler, Mae

Ritthaler, Douglas Ritthaler, and Mary Ann Ritthaler (Ritthalers), pursuant to Neb. Rev. Stat. § 79-403 (Reissue 1981), obtained a judgment in the district court for Saunders County, Nebraska, permitting Ritthalers to transfer their real estate from school district No. 105 of Saunders County to school district No. 1 of Dodge and Washington Counties. The judgment in favor of Ritthalers provided in part that transfer of Ritthaler real estate was "subject only to the legal requirement that children of [Ritthalers] attend school in School District No. 1 in the fall term 1981." No one appealed that judgment entered in 1981.

A child of Ritthaler's tenant, residing on the transferred real estate at the effective date of the transfer, failed to attend school in district No. 1 but continued to attend school in district No. 105 in the fall term of 1981. On November 10, 1982, Ritthaler filed a petition for a writ of mandamus to compel Knox, as county superintendent, to "set aside" the court-ordered transfer of 1981. Ritthaler refers to one of the statutory requirements for transfer of real estate to another school district, § 79-403(1)(c), "that the land proposed to be attached [to another school district] has children of school age who have resided thereon with their parents or guardians for not less than forty days," and a further provision of § 79-403, "Failure of such children to attend a public school in the district to which the land is attached shall invalidate the transfer from the date of approval." According to Ritthaler, § 79-403 should be construed so that "children of school age" means any school-age children residing on the transferred real estate, and is not restricted to the children of the petitioners seeking transfer to another school district. Ritthaler concludes that a child's failure to attend school in the transferee district automatically invalidates transfer of real estate and that such invalidation necessitates a change of school district boundaries. See Neb. Rev. Stat. § 79-419 (Reissue 1981). How-

ever, Ritthaler does not assert that the 1981 judgment is void.

> Where a judgment is attacked in a way other than a proceeding in the original action to have it vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement, the attack is a "collateral attack." *County of Douglas v. Feenan*, 146 Neb. 156, 18 N.W.2d 740 (1945); *State ex rel. Southeast Rural Fire P. Dist. v. Grossman*, 188 Neb. 424, 197 N.W.2d 398 (1972). Only a void judgment is subject to collateral attack. *Stanton v. Stanton*, 146 Neb. 71, 18 N.W.2d 654 (1945); *Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276*, 204 Neb. 316, 282 N.W.2d 576 (1979).
>
> It is well settled that where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. *State ex rel. Southeast Rural Fire P. Dist.*, *supra*.

Schilke v. School Dist. No. 107, 207 Neb. 448, 451, 299 N.W.2d 527, 529-30 (1980).

"[A] party to a proceeding in the district court, where such court has jurisdiction over the person and subject-matter, will be bound by the judgment in the case when collaterally attacking it, even though the judgment was irregularly or erroneously entered." *School District D v. School District No. 80*, 112 Neb. 867, 874, 201 N.W. 964, 966 (1924). When a district court has acquired jurisdiction, it has the right to decide every question which arises in the case, and its judgment, even if erroneous, cannot be collaterally assailed. See *Fraaman v. Fraaman*, 64 Neb. 472, 90 N.W. 245 (1902).

The correctness of the district court's condition for an effective transfer of real estate under § 79-403 could have been raised in a timely appeal by Ritthaler after entry of the 1981 judgment. Irrespective of the procedural device or label assigned, Ritthaler's present suit is in essence an at-

tempt to question the propriety of the 1981 judgment and review the district court's construction of § 79-403. As an impermissible collateral attack on the 1981 judgment, Ritthaler's suit presents no genuine issue as to any material fact. The district court was correct in granting summary judgment to Knox. See Neb. Rev. Stat. § 25-1332 (Reissue 1979). The judgment of the district court is affirmed. In affirming we do not pass upon the correctness of the district court's construction placed on § 79-403, for that question is not before us.

AFFIRMED.

ANN H. KUHLMAN, APPELLEE AND CROSS-APPELLANT, V. GWYER GRIMMINGER ET AL., APPELLANTS AND CROSS-APPELLEES.

350 N.W.2d 24

Filed June 29, 1984. No. 83-377.

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

Lynn B. Lamberty of Grimminger, Milner & Lamberty, for appellants.

E. H. Powell of Powell & Powell, for appellee.

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

PER CURIAM.

We have reviewed this matter de novo on the record and have found no error concerning the judgment of the district court. Appellee's request for an attorney fee in the cross-appeal is denied. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL THOMAS MEIS, APPELLANT.

351 N.W.2d 79

Filed June 29, 1984. No. 83-382.

1. **Criminal Law: Evidence: Appeal and Error.** In determining on appeal the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury.
2. **Criminal Law: Verdicts: Appeal and Error.** A jury verdict in a criminal case will not be overturned on appeal for lack of evidence unless it is so lacking in probative force that it can be said as a matter of law that the evidence was insufficient to support it.
3. **Criminal Law: Pretrial Motions: Due Process.** Due process of law is violated where the prosecution suppresses evidence after a request by the defense and the evidence is shown to be favorable in character for the defense and is material.
4. **Records: Appeal and Error.** On an appeal to the Supreme Court, it is the responsibility of the party appealing or urging error to have included within the bill of exceptions all matters from the record which it believes material to issues to be presented for review.
5. **Criminal Law: Constitutional Law: Pretrial Motions.** Generally, there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.
6. **Criminal Law: Pretrial Motions: Appeal and Error.** As a general rule, the trial court is vested with broad discretion in considering discovery requests of defense counsel, and error can be predicated only upon an abuse of such discretion.
7. **Criminal Law: Homicide: Evidence: Self-Defense.** It is a general rule in a homicide case that a defendant may show the dangerous and turbulent character of the victim only after laying a foundation by evidence tending to show self-defense.
8. **Criminal Law: Confessions: Impeachment.** A statement made by a defendant, although inadmissible during the State's case in chief due to a failure to comply with *Miranda*, may be admissible for impeachment purposes.

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

Richard E. Shugrue, for appellant, and, on brief, Rodney W. Smith of Peebles & Smith.

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

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

HASTINGS, J.

Following a trial by jury, Daniel Thomas Meis, the defendant, was convicted of the November 24, 1982, first degree murder of Thomas A. Schuchardt, as well as a felony count of use of a firearm in the commission of a felony. He was sentenced to a term of life imprisonment and a consecutive term of 5 years, with credit having been given for all time spent in jail.

He has appealed to this court, and assigns as error: (1) The insufficiency of the evidence; (2) The overruling of certain of his motions for discovery; and (3) The admission for impeachment purposes of a statement obtained in violation of *Miranda* rights. We affirm.

The facts are relatively simple. Following an afternoon and evening of drinking and an earlier altercation with the victim, the defendant shot and killed Thomas A. Schuchardt with one shot from a .357 magnum pistol. The defendant claimed the shooting was accidental. The State, of course, argues to the contrary. After having been properly instructed, as to which there was no complaint, the jury brought in a verdict of guilty on both counts.

The State offered evidence that would support the conclusion that the defendant made several threatening statements in the bar outside of which the fatal shooting occurred. There was also testimony that the defendant, during this same time, was harassing, pestering, and bothering other patrons. There was evidence that the defendant began to wrestle with the victim, and the bartender asked them to leave. The altercation continued outside, and the victim ended up pinning the defendant against a car owned by one of the patrons. After

the owner of the automobile told them to get off her car, they did. The victim then returned to the bar and the defendant went to his car.

A short time later, the testimony of various witnesses would reveal, a gunshot was heard outside the bar, and the defendant then entered the bar and waved a handgun in the direction of several of the patrons. Again, the bartender ordered him out, and, although the defendant pointed the cocked weapon at the bartender, the defendant did leave. The victim left the bar almost immediately thereafter. Shortly thereafter, another gunshot was heard, and the victim was seen kneeling, fatally wounded. The defendant stated that he did not mean to shoot the victim, but the victim took a swing at him and the gun went off.

From our complete examination of the record, we would state that the evidence would support a conclusion of first degree murder as well as an accidental shooting. We need only say that in determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. *State v. Partee*, 199 Neb. 305, 258 N.W.2d 634 (1977). In other words, it is well established that a jury verdict of guilty will not be overturned on appeal unless it is so lacking in probative force that it can be said as a matter of law that the evidence was insufficient to support it. *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983). Such was not the case here.

The trial court overruled motions of the defendant to require the State to furnish copies of all statements taken from every witness whom the State intended to call at the trial, to produce copies of reports of some nine law enforcement officials, and to disclose the prior criminal record of the victim.

Leave was granted the defendant to depose all of the State's witnesses.

The defendant's claim of error as to the so-called suppression of evidence is rooted in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), which held that the suppression by the prosecution of evidence favorable to and requested by an accused violates due process where the evidence is material to the guilt of the defendant. This holding was amplified in *Moore v. Illinois*, 408 U.S. 786, 794-95, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972), in which the Court stated:

> The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.

There is absolutely no showing in the record of the suggested or suspected contents of either the alleged statements or the police reports. These motions were all filed on January 24, 1983, without any recitation that such statements and reports were in fact in existence. The hearing on these motions was held on February 7, 1983. Those proceedings are not included within the bill of exceptions. As authorized by Neb. Rev. Stat. § 25-1140 (Reissue 1979), Neb. Ct. R. 5A(2) (Rev. 1983) provides that is the responsibility of the appellant, or the party urging error, to have included within the bill of exceptions all matters from the record which such "party appealing believes material to issues to be presented to the Supreme Court for review."

The record presented to us does not support a claim that either the favorability or materiality requirement of *Brady* has been met. The defense was granted the right to depose all of the State's wit-

nesses and presumably could have inquired as to the existence of any statements or reports and of their contents. Defendant, in cross-examination of one of the State's witnesses, disclosed that he either knew of or discovered the existence of at least one police report. As stated further in *Moore*, *supra* at 795, "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."

As a general rule, the trial court is vested with broad discretion in considering discovery requests of defense counsel, and error can be predicated only upon an abuse of such discretion. *State v. Fuller*, 203 Neb. 233, 278 N.W.2d 756 (1979). We find no such abuse of discretion here.

We note further that as to the failure to acquire the criminal record of the victim, it is defendant's claim that this was necessary to show that it was the victim who was the aggressor, thereby supporting a defense of self-defense. The problem, however, is that such a defense was entirely contradictory of the defendant's claim throughout the trial, i.e., the shooting was accidental. It is the general rule that in a homicide case a defendant may show the dangerous and turbulent character of the victim only after laying a foundation by evidence tending to show self-defense. *State v. Escamilla*, 195 Neb. 558, 239 N.W.2d 270 (1976).

The defendant's final assignment of error is also without merit. A certain statement made to Deputy Bailey before the giving of *Miranda* warnings was suppressed by the trial court from use as part of the State's case in chief. However, it was utilized on rebuttal for impeachment purposes. There was no claim that the statement was not otherwise voluntary. The jury was properly instructed on that issue, as well as the admonition that such statement was not to be considered as substantive evidence. Relying on *Harris v. New York*, 401 U.S. 222, 91

S. Ct. 643, 28 L. Ed. 2d 1 (1971), this court held that "[a] statement made by a defendant, although inadmissible, due to a failure to comply with *Miranda*, during the state's case-in-chief, is admissible for impeachment purposes." *State v. Bazis*, 190 Neb. 586, 588, 210 N.W.2d 919, 921 (1973).

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

AFFIRMED.

CAPORALE, J., participating on briefs.

ORVILLE D. MORELAND, APPELLEE, V. TRANSIT AUTHORITY OF THE CITY OF OMAHA, DOING BUSINESS AS METRO AREA TRANSIT, APPELLANT.

352 N.W.2d 556

Filed June 29, 1984. No. 83-561.

Contracts. A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Thomas C. Lauritsen of Swarr, May, Smith & Andersen, for appellant.

Robert E. O'Connor, Jr., of Robert E. O'Connor & Associates, for appellee.

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

KRIVOSHA, C.J.

The appellant, Transit Authority of the City of Omaha (MAT), appeals from an order entered by the district court for Douglas County, Nebraska, directing MAT to pay to the appellee, Orville D. Moreland, an employee of MAT and a local member of the Transport Workers Union of America (TWU), short-term disability payments which Moreland

claimed to be entitled to receive under the terms of a collective bargaining agreement entered into between MAT and TWU on July 1, 1975, and effective until June 30, 1977. MAT maintains that the trial court erred in finding that the contract previously entered into by and between MAT and TWU, which expired on June 30, 1977, was extended by a letter from MAT to TWU dated July 27, 1977. MAT further maintains that the trial court erred in finding that the express language of the agreement, even if it was continued in effect, entitled employees of MAT who were members of TWU to receive short-term disability benefits for work-related injuries in addition to workmen's compensation benefits, and in not finding that the general practice, policy, and procedure of MAT was to deny payment and coverage of short-term disability benefits to employees who had received workmen's compensation benefits for the same injury. Our review of the record convinces us that the trial court was clearly correct in its decision, and the judgment of the district court is affirmed.

Moreland was injured in a work-related accident on September 27, 1977. In addition to receiving workmen's compensation benefits, he sought payment from MAT under the provisions of the contract which had been entered into by and between MAT and TWU effective July 1, 1975. The contract had expired by its own terms on June 30, 1977, and, because the parties were involved in a labor dispute, a new, formal contract was not executed between the parties until July 1, 1979.

The first question, then, is whether the terms of the agreement dated July 1, 1975, which expired on June 30, 1977, were in some manner extended beyond June 30, 1977, and were effective during the time that Moreland was injured. We believe that the record supports the finding by the trial court that MAT had voluntarily extended certain portions of the contract, including the provisions for short-

term disability, beyond June 30, 1977, and that the provisions for short-term disability under the contract were in effect on the day that Moreland was injured.

We have recently held that the Commission of Industrial Relations (CIR) may enter temporary orders affecting wages, hours, and terms and conditions of employment during a period of impasse. *Transport Workers v. Transit Auth. of Omaha*, 216 Neb. 455, 344 N.W.2d 459 (1984). Obviously, then, if the CIR may order such matters, the parties can voluntarily enter into such an agreement. We believe that the evidence clearly establishes this is precisely what took place in the instant case.

On July 27, 1977, MAT wrote to the TWU negotiating committee. The letter reminded the negotiating committee

> that as of June 30, 1977, there was a verbal agreement between the negotiation teams of Metro Area Transit and Local 223 to extend the collective bargaining agreement with a provision for retroactivity. The extension of the contract and retroactivity were contingent on obtaining a negotiated settlement within a reasonable period of time or if either party filed in the Court of Industrial Relations, the verbal agreement was terminated.

The letter then advised the negotiating committee that MAT had filed a petition with the CIR and, therefore, the agreement was terminated effective with the MAT filing. The letter went on, however, to advise the negotiating team that, while the contract was terminated, certain provisions would be maintained. Specifically, the letter said, "Please be advised that while the contract is terminated, we will maintain our standard working conditions and general practices, policies and procedures." The meaning of this letter and MAT's position regarding short-term disability benefits were further clarified when, on July 10, 1978, MAT, still unable to reach an

agreement with TWU, wrote to all of its employees concerning "Increases in Wages and Fringe Benefits." The letter, in part, read:

> The Board of Directors understood that going to the Court of Industrial Relations would most likely involve a delay (now about one year) before a decision could be obtained. The Board of Directors also understood that any long delay could cause a financial hardship for you. As a result the Board directed the staff to put *the first year provisions of the final offer into effect.*

(Emphasis supplied.) Thereafter followed a list of the benefits which became effective as of *July 17, 1977*, including item 3, entitled "Insurance Plan." Specifically, item 3.a. read, "Short term disability increased from $12.00/day to $13.50/day." The letter of July 10, 1978, then went on to advise the employees that there had been very little action by the "Court of Industrial Relations in the past year," and stated:

> Therefore, at the regular Board of Directors meeting held on June 29, 1979, the Board authorized the staff to put the provisions of the second year of the final offer into effect.
>
> Benefits effective July 1, 1978, are:
>
> . . . .
>
> 2. . . .
>
> . . . .
>
> c. Short Term Disability increases from $13.50/day to $15.00/day.

Whether one argues that by reason of these various letters the contract entered into on July 1, 1975, which terminated by its own terms on June 30, 1977, was extended during the period of impasse or that by reason of these letters the short-term disability provisions were made a part of the temporary working conditions voluntarily granted by MAT to TWU makes little difference to the result reached in this case. What is clear, beyond question, is that when Moreland was injured on September 27, 1977, MAT

had, as one of its "temporary" working conditions, its previous short-term disability benefit, except that the dollar amounts had been increased pursuant to its last final offer. A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used. See *Bishop Cafeteria Co. v. Ford*, 177 Neb. 600, 129 N.W.2d 581 (1964). See, also, *Kansas-Nebraska Nat. Gas Co., Inc. v. Swanson Bros.*, 215 Neb. 398, 338 N.W.2d 774 (1983); *Bass v. Dalton*, 213 Neb. 360, 329 N.W.2d 115 (1983). Therefore, if Moreland came within the meaning of the short-term disability provisions, he was entitled to compensation.

Not only does MAT argue that the contract is ambiguous but MAT further argues that TWU's position is contrary to MAT's past practices and policies. While we believe that the contract is clear and unambiguous and, therefore, does not require interpretation, we believe that it is important to point out the baselessness of MAT's current position and to point out why this controversy borders nearly on the frivolous.

The record reflects that there have been at least three contracts entered into between MAT and TWU prior to Moreland's injury, all of which contain a provision for short-term disability, and all of which contain substantially the same provisions except for the dollar amounts. The provisions for short-term disability read as follows:

> Section 1. The Authority shall provide a short term disability benefit for *all* participating employees.
>
> Section 2. The benefits will be $10.00 per day beginning with the fourth (4) day of illness, with the first (1) day if injured in an accident or hospitalized for any reason. Maximum benefits will be $1,210.00 drawn in any 181 day period. An employee who exhausts this benefit must work ninety (90) days to have full benefits restored. A

> doctor's statement of illness, injury, hospitalization and diagnosis is required for payment of benefits to commence. Effective July 1, 1976, Benefits shall increase to $12.00 per day. Maximum benefits will be $1,452.00, drawn in any 181 day period. All requirements as stated above shall remain in effect.

(Emphasis supplied.)

MAT argues that under the terms of this agreement only employees who sustain accidents or hospitalization *not* related to work are eligible to receive the benefits of the short-term disability. It argues further that any employee receiving workmen's compensation by reason of an accident arising out of or in the course of his employment is not entitled to this payment because it would constitute what MAT describes as "piggybacking." We believe that the plain language of the contract provision is to the contrary. Section 1 provides that it is a benefit "for all participating employees," without any restrictions or reservations. And, likewise, § 2 provides that one is entitled to these benefits if injured in an accident or hospitalized "for any reason." As we have said on an earlier occasion, there are few words in the English language which are as all-encompassing as "all." *Kellogg Company v. Herrington*, 216 Neb. 138, 343 N.W.2d 326 (1984). Had MAT desired to limit the provisions of the short-term disability benefits, it would have been relatively easy to do so. As a matter of fact, in an earlier provision in the contract providing for permanent disability income, MAT knew exactly how to prevent "piggybacking." Each agreement contained a provision for disability income. Section 3 of that article provided: "No employee shall receive a permanent disability income and at the same time be eligible for normal retirement income benefits." It seems clear that employment-related accidents are not excluded under the clear language of the agreement.

In each contract entered into between MAT and TWU, there has been a provision entitled "Short Term Disability." The provisions in each of the contracts are substantially the same, except for the dollar amounts, which were increased first from $10 to $12, then to $13.50, and finally to $15 per day.

There is another significant difference in the provisions of these contracts. In the contract first entered into between MAT and TWU, effective July 1, 1973, to July 1, 1975, the provision for short-term disability, which was Article XIX, was not entitled "Short Term Disability," but, rather, was entitled "Relief Association." Also in the evidence is the "CONSTITUTION AND BY-LAWS OF THE METRO AREA TRANSIT EMPLOYEES RELIEF ASSOCIATION," which was organized on July 8, 1901, and continued in existence until it was taken over by MAT as part of the employment agreement entered into between MAT and TWU on July 1, 1973, and is what is referred to in Article XIX. A reading of the constitution and bylaws of the Metro Area Transit Employees Relief Association makes it clear that the purpose of the association was to create a self-supporting employees' relief association whereby employees could pay small amounts of money into this relief association and, in the event of injury or illness from whatever cause, receive benefits. The association was not unlike a host of fraternal assessment associations created at the turn of the century to aid and assist workers who were injured on the job or became ill off the job. In any event, it is clear that MAT was attempting to provide short-term disability by taking over the provisions of the relief association, which had no restrictions. This is further supported by the fact that on February 6, 1974, after MAT had entered into the contract with TWU and had taken over the responsibilities of the relief association, it wrote to the president of TWU Local 223 concerning this matter. The letter read in part:

> According to our conversation, it is understood that Mutual of Omaha Short Term Disability Insurance will not cover employees injured in accidents covered by Workmen's Compensation. In the event that this does happen, Metro Area Transit will pay the usual amount as covered by the old Relief Association which was discontinued on January 7, 1974.

MAT argues that it had regularly refused to pay employees short-term disability benefits if they were also receiving workmen's compensation. The fact that MAT may have refused to meet its obligations and has chosen to violate the terms of its agreement does not relieve MAT of its obligations nor entitle it to create a new condition by fiat. During all of the time that MAT has refused to honor these claims, TWU has protested. In a letter dated February 25, 1976, the president of the local union wrote to MAT protesting its refusal to pay. The letter, in part, said: "In the minutes, and tapes of the 1973 contract negotiations it was agreed that Metro Area Transit would pay full cost, and take over administration of the Relief Association, but that benefits would be the same." And, again, on May 17, 1977, the union wrote to MAT objecting to its refusal to pay. And, in fact, TWU sought to enforce this provision by filing a petition with the CIR. It was only because this court later said that the CIR did not have jurisdiction that the matter was not then resolved. See *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979).

Whether one concludes that the language of the short-term disability provisions is clear and unambiguous or one resorts to past practices as evidenced by the background and history of the benefit, one cannot reach any other conclusion but that MAT is obligated to pay its employees short-term disability, regardless of whether they are also receiving workmen's compensation. In view of MAT's letter of

February 6, 1974, one is compelled to wonder why MAT wishes to unnecessarily prolong this dispute with its own employees and to incur costs and expenses of litigation on a matter on which it recognized it had a duty years ago. In any event, the judgment of the district court was correct and is, in all respects, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CALVIN WHITE, APPELLANT.

351 N.W.2d 83

Filed June 29, 1984. No. 83-710.

1. **Lesser-Included Offenses.** The test for determining whether a lesser-included offense exists in this jurisdiction is that a lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
2. _____. The determination of whether an offense is a lesser-included offense is controlled by the elements of the crimes as set forth in the statutes and not by the facts presented in the particular case at issue.
3. _____. The fact that the elements of the lesser-included offense may be present in a case of the greater offense is not sufficient to invoke the lesser-included offense instruction if it is *possible* to commit the greater offense without at the same time committing the lesser offense.
4. **Criminal Law: Lesser-Included Offenses.** Because the crime of child abuse requires that the victim be a child, and third degree assault mandates that the offense must be done "intentionally, knowingly, or recklessly," neither of which element is necessary to establish the crime of manslaughter, such offenses are not lesser-included offenses of manslaughter.

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

Dennis R. Keefe, Lancaster County Public Defender, and Gerald L. Soucie, for appellant.

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

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

HASTINGS, J.

Following a trial by jury, Calvin White, the defendant, was convicted of manslaughter and sentenced to 10 years in prison. He assigns as the only error that the trial court failed to instruct the jury that it could further find the defendant guilty of the lesser-included offenses of child abuse or third degree assault. This court does not agree, and we affirm.

This was a criminal prosecution where the defendant was charged with first degree murder, in violation of Neb. Rev. Stat. § 28-303 (Reissue 1979). The trial court instructed the jury that it could find the defendant guilty of first degree murder, guilty of second degree murder, guilty of manslaughter, or not guilty.

The unlawful act which was a necessary element to support a manslaughter conviction was specified to be child abuse, in violation of Neb. Rev. Stat. § 28-707 (Cum. Supp. 1982), or third degree assault, in violation of Neb. Rev. Stat. § 28-310 (Reissue 1979). After the defense requested the jury be instructed for the additional lesser-included offenses of child abuse and third degree assault, the request was denied by the trial court, and the jury returned a verdict of guilty of manslaughter.

The undisputed evidence revealed the defendant was babysitting his 1-year-old niece, the victim, when she started to cry. The defendant went into her bedroom, closed the door, picked the baby up, and put his hand over her mouth and nose between 30 and 45 seconds until she passed out. He then placed the victim face down on the pillow and covered her up. Some 2 to 3 hours later, when the victim's mother returned home and checked on her, the

mother discovered the victim dead, lying in the same position as the defendant left her.

Testimony from the pathologist who performed the autopsy concluded that the death was caused by asphyxiation. His original diagnosis was that an asphyxial type of death occurred, possibly sudden infant death syndrome, but after receiving more information about the circumstances of the death, the pathologist opined that sudden infant death syndrome was no longer valid.

The test for determining whether a lesser-included offense exists in this jurisdiction is that a lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. *State v. Miller*, 215 Neb. 145, 337 N.W.2d 424 (1983); *State v. Ebert*, 212 Neb. 629, 324 N.W.2d 812 (1982); *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982).

We have also held that the determination of whether an offense is a lesser-included offense is controlled by the elements of the crimes as set forth in the statutes and not by the facts presented in the particular case at issue. *State v. Miller*, *supra*; *State v. Ebert*, *supra*; *State v. Lovelace*, *supra*.

A comparison of the statutes pertaining to the crimes involved in the present case is needed. Neb. Rev. Stat. § 28-305 (Reissue 1979) provides in part: "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."

Section 28-707 provides in part:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> (a) Placed in a situation that endangers his or her life or health; or

(b) Cruelly confined or cruelly punished; or

(c) Deprived of necessary food, clothing, shelter, or care.

Section 28-310 provides in part: "(1) A person commits the offense of assault in the third degree if he: (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; or (b) Threatens another in a menacing manner."

As this court has said before, the fact that the elements of the lesser-included offense may be present in a case of the greater offense is not sufficient to invoke the lesser-included offense instruction if it is *possible* to commit the greater offense without at the same time committing the lesser offense.

Applying this narrow standard, it is possible to commit manslaughter without committing child abuse or third degree assault. A requirement that a minor child be involved is an essential element of child abuse, but not manslaughter. Also, an essential element of third degree assault is that the offense must be done "intentionally, knowingly, or recklessly," whereas manslaughter does not include such an element, although it is possible.

The trial court was not required to instruct the jury that it could further find the defendant guilty of the lesser-included offenses of child abuse or third degree assault. The judgment of the district court is affirmed.

AFFIRMED.

CAPORALE, J., participating on briefs.

GAY L. ROBERTSON, APPELLANT, V. JERRY DAVID ROBERTSON, APPELLEE, JAMES ROBERTSON AND AUDREY ROBERTSON, INTERVENORS-APPELLEES.

350 N.W.2d 576

Filed June 29, 1984. No. 83-813.

1. **Child Custody.** In the determination of custody and visitation matters, the principal concern is the best interests of the children.

2. **Modification of Decree: Child Custody: Appeal and Error.** On appeal of the trial court's determination as to whether such a change in circumstances has occurred which justifies a modification of its prior custody order, this court must review the record de novo and make independent conclusions of fact without reference to the conclusion reached by the trial court. Where evidence is in conflict, however, this court will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite.

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

Knudsen, Berkheimer, Richardson & Endacott, for appellant.

John F. Wright of Wright, Simmons & Selzer, for appellee.

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

COLWELL, D.J., Retired.

This is a modification proceeding in a child custody dispute wherein the mother, Gay L. Robertson, appeals from the order of the trial court placing custody of the parties' minor child with the father, Jerry David Robertson, and continuing the mother's existing visitation schedule.

On April 2, 1982, the marriage of the parties was dissolved. Upon a finding that each parent was unfit to have the care, custody, and control of Christopher Robertson, born on March 23, 1979, such was placed jointly in and with the court and Christopher's paternal grandparents, James Robertson and Audrey Robertson, who were party intervenors. The evidence establishes that the grandparents have performed well their custodial duties toward Christopher.

The mother claims that the trial court erred in (1) finding she was not a credible witness, (2) failing to find a substantial change in circumstances with respect to her and in finding such with respect to the

father, (3) finding that the father was a fit and proper person to have the care, custody, and control of the child, (4) finding that placing the child's care, custody, and control with the father served the child's best interests, and (5) continuing the mother's limited visitation schedule. We affirm.

On March 3, 1983, the mother filed a petition to modify the custody award of the divorce decree, asking the district court to find her a fit person to raise the child, award her the care, custody, and control of the child, and assess child support obligations against the father. The intervenors answered, denying a change of circumstances. The father answered, denying the allegations of the mother's petition, and he filed a petition seeking the child's custody.

At trial each parent introduced evidence. The trial court found that the mother's testimony "is not credible"; that a material change of circumstances had occurred; that the father had shown himself to be a fit person to have the care and custody of the child; and, accordingly, awarded custody to him. The court continued the same visitation provisions of the initial decree, granting the mother visitation rights on the first and third weekends of each month.

> A decree fixing custody of minor children will not be modified unless there has been a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. . . .
>
> In the determination of custody and visitation matters the principal concern is the best interests of the children.

Soukup v. Soukup, 208 Neb. 672, 674, 305 N.W.2d 372, 374 (1981).

> On appeal of the trial court's determination as to whether such a change in circumstances has occurred which justifies the modification of a prior child custody order . . . this court must re-

> view the record de novo and make independent conclusions of fact without reference to the conclusion reached by the trial court[.] [W]here evidence is in conflict, this court will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite.

(Syllabus of the court.) *Krohn v. Krohn*, *ante* p. 158, 347 N.W.2d 869 (1984).

Appellant initially contends that the trial court abused its discretion by finding her testimony not credible. The court's reasons for this finding are not shown; however, the record does show one instance when the question of her worthiness of belief was presented: when she admitted at trial that she lied under oath while being deposed in preparation for trial. In her deposition she said that she had not been drinking on the night she drove an automobile off the road, and luckily escaped serious injury. At trial she admitted, upon questioning by her own attorney, that she had consumed one glass of beer prior to the accident. She claimed that her earlier denial was prompted by the belief that she was not under the influence of alcohol and her fear that such an admission would be "blown completely out of proportion because of this custody suit." A part of the reasons leading the court, in its initial decree, to find the mother unfit was her abuse of alcohol and other intoxicants and her conduct toward the child when she was under such influence. We find neither error nor abuse of discretion by the court's finding on credibility. Further, our independent findings of fact include the weight and credibility of the evidence.

There is corroborated evidence that the mother now has adequate housing for the child; that she is an active and sincere member of a church; that she has successfully completed a parenting class; and that she continues to be steadily employed. Such evidence shows a change of her circumstances and

supports our finding of fitness; however, the question still remains whether the best interests of the child require the placement of the care, custody, and control of the child with her.

This inquiry leads us to consider other errors assigned by the mother, which question the trial court's finding that the father had shown a change of circumstances establishing that he is now a fit person to have, and that the child's best interests require, custody placed in him.

The father presented evidence that he has been recalled to work by Burlington Northern, where he earns $11.90 an hour. He rents a rural home with plenty of room to play. He has made arrangements for the child's care while he works. He appears to have a good relationship with the child, and he now is free of the desire to frequent taverns. The child's placement with his father undoubtedly will result in his having substantial contact with his grandparents, who have cared for him while his parents have attempted to straighten out their lives.

The evidence shows that there has been a change of circumstances on the part of both parties. They have made substantial efforts to arrange their lives so that they can more competently fulfill their parental duties. They are both fit parents to have the care and custody of their child. On the other hand, the parties have shown their inability or unwillingness to jointly execute those duties, leading to the result that one or the other must be given primary responsibility for the child's care. We think the trial court's determination that the child's best interests require that his custody be placed with the father is the correct one.

Terms and conditions of visitation are continually before trial courts for modification and review to promote the best interests of the child and to nurture the parent-child relationship. Although there is favorable evidence here supporting the mother's application to expand her visitations, we cannot say

that the failure of the court to do so was a clear abuse of its discretion against the weight of the evidence.

AFFIRMED.

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

351 N.W.2d 86

Filed June 29, 1984. No. 84-205.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Reversed.

Randy R. Stoll, Seward County Attorney, for appellant.

Kirk E. Naylor, Jr., for appellee.

WHITE, J.

This is an appeal from the decision of the district court for Seward County, Nebraska, ordering that the fruits of an open field, warrantless search be suppressed; in this case, a quantity of marijuana, certain irrigation equipment allegedly used in the cultivation of marijuana, and a palm print of the defendant lifted from an irrigation pump.

The county attorney appeals pursuant to Neb. Rev. Stat. § 29-824 (Reissue 1979), allowing certain appeals to be heard before a member of this court.

Subsequent to the decision of the trial court, and while this matter was on appeal, the U.S. Supreme Court reaffirmed the doctrine of *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924), in *Oliver v. United States*, ____ U.S. ____, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984). Quoting *Hester*, the Court said: " '[T]he special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," is not extended to the open fields.' " 104 S. Ct. at 1740.

The Court concluded that neither probable cause nor a warrant was required to effect a search of open fields.

The trial court was in error in holding that the U.S. Constitution required the evidence be suppressed. The decision must be reversed.

Counsel for appellee also urges that the Nebraska Constitution should be construed to prohibit the search in the instant case and to require the suppression of the evidence seized.

The determination of whether an independent state ground exists ought not properly be made by a single judge of this court. Rather, that decision should be made by the full court when the issue is presented.

REVERSED.

T & S, INC., A NEBRASKA CORPORATION, APPELLANT, V. DARRELL L. PETERSEN AND LAVONNE M. PETERSEN, APPELLEES.

351 N.W.2d 87

Filed July 6, 1984. No. 83-448.

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

Sheldon J. Harris and James E. Harris of Harris, Feldman, Stumpf and Pavel, for appellant.

Loren C. Galvin, for appellees.

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

PER CURIAM.

The sole question in this law action is whether there was sufficient evidence to support the trial court's determination that the defendants had not misrepresented sales figures of a business sold by them to the plaintiff. We have examined the record and

concluded that there is evidence to support the trial court's decision; therefore, we must affirm.

AFFIRMED.

JAMES R. BARKER, APPELLEE, V. HAROLD E. WREHE, APPELLANT.

351 N.W.2d 412

Filed July 6, 1984. No. 83-472.

Pleadings: Proof. A party will not be permitted to plead one cause of action and, upon trial, rely upon proof establishing another. In order that a recovery may be had in an action, the pleadings and the proof must agree.

Appeal from the District Court for Sherman County: DEWAYNE WOLF, Judge. Reversed and remanded.

Thomas A. Gleason, for appellant.

Filbert Cornish, for appellee.

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

BOSLAUGH, J.

This was an action to recover amounts due under an express contract for the sale of irrigation equipment. Two other causes of action for amounts due for dirt moving were dismissed and are not involved in the appeal.

In the first cause of action the plaintiff, James R. Barker, alleged the defendant, Harold E. Wrehe, purchased an "Olson" irrigation pivot system from Loup Valley Irrigation and Construction Company, Inc., on October 9, 1976; that the purchase price was $28,619.83, of which $3,000 was paid by the defendant on the date the contract was made; and that the defendant paid $12,000 to the plaintiff on February 2, 1977, which left a balance due of $13,619.38 [sic]. The plaintiff further alleged that on January 22,

1977, the plaintiff assumed the rights of the corporation under the contract with the defendant and paid the manufacturer the balance due for the pivot system. The pivot system was installed on the defendant's land on June 2, 1977. The petition alleged the defendant was indebted to the plaintiff in the amount of $13,619.38 [sic], the balance due under the contract. The second cause of action was for interest on the amount alleged to be due the plaintiff.

A jury was waived and the case tried to the court. The evidence of the plaintiff supported generally the allegations of the petition, but there was no proof of an assignment of the contract from the corporation or any other evidence of a formal transfer of the rights of the corporation under the contract to the plaintiff. The trial court found that the plaintiff was entitled to recover $9,058.24 from the defendant, together with interest in the amount of $5,812.30. The defendant has appealed.

In announcing its decision the trial court stated:

> You have an interesting case. Except I think perhaps the case is probably arranged probably in the wrong perspective. But in view of the fact the way the evidence came out, there is still some basis to claim by the plaintiff. The plaintiff has failed in the sense to establish transfer of the credit rights or the contract rights of Loup Valley Irrigation and Construction Company to the plaintiff. And there is no showing of a transfer of those rights of the corporation as against this defendant. However, the evidence does disclose another obligation as between the parties to this action. It is not based upon contract which is in evidence but upon a subsequent agreement that the plaintiff would pay the balance due to Olson Irrigation and I find that the plaintiff is entitled to recover against the defendant the amount of that advance less the credits paid with a principal amount of $9,058.24 together with interest at 11% per annum from

> the latter part of June of 1977 to the latter part of April, 1983, at 11% of which interest is $5,895.33. Wrong figure, $5,812.30. For a total judgment of $14,870.54 and costs. Judgment is rendered on that amount against these parties.

The defendant's principal assignments of error are directed at the failure of the evidence to support the plaintiff's right to recover under the theory of the case as alleged in the petition of the plaintiff. The petition alleged, and the evidence related to, a claim based upon an express contract, the contract between the corporation and the defendant. Although the plaintiff alleged that he had "assumed all rights of the Seller on the conditional sales contract," there was no proof of an assignment of the contract from the corporation to the plaintiff.

In *Thompson v. Stetson*, 15 Neb. 112, 17 N.W. 368 (1883), the plaintiff sued upon an account stated. The evidence showed the account was between F. L. Stetson & Co. and the plaintiff in error. This court said at 112-13, 17 N.W. at 368:

> No connection between F. L. Stetson & Co. and the defendant in error respecting this account is shown. By what right the latter seeks to enforce the payment of it does not appear. There is no assignment of the ownership by F. L. Stetson & Co. to David R. Stetson either alleged or shown. For aught that is disclosed by the record, F. L. Stetson & Co. are still the owners of it, and could recover the amount due thereon from the plaintiff in error. Such being the character of the petition it will not support the judgment.

In *Shreves v. D. R. Anderson Constructors, Inc.*, 206 Neb. 433, 440, 293 N.W.2d 106, 110 (1980), we said:

> We have consistently held that a party will not be permitted to plead one cause of action and upon trial rely on proof establishing another. In order that a recovery may be had in an action, the pleadings and the proof must agree. Consequently, a plaintiff may not plead a cause of ac-

tion on an express agreement and then, over objection, prove and recover on a cause of quantum meruit. *Lincoln Service & Supply, Inc. v. Lorenzen*, 171 Neb. 671, 107 N.W.2d 333 (1961).

In *Badran v. Bertrand*, 210 Neb. 747, 750, 316 N.W.2d 763, 765 (1981), we said: " '[P]roof must correspond with the allegations in the pleadings, and relief cannot be granted upon proof of a case substantially different from the case made in the pleadings.' "

The record as presented to us does not support the judgment, and it must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

DEPARTMENT OF BANKING AND FINANCE OF THE STATE OF NEBRASKA, RECEIVER FOR COMMONWEALTH SAVINGS COMPANY, APPELLANT, V. CHRIS R. WILKEN, JR., DOING BUSINESS AS SUITE 9 LOUNGE, APPELLEE.

352 N.W.2d 145

Filed July 6, 1984. No. 83-486.

1. **Contracts: Pleadings.** In order to recover on an action for a breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with the conditions precedent which activate the defendant's duty.
2. **Contracts: Statute of Frauds.** To satisfy the statute of frauds the contract itself must be in writing or, in the event the contract is oral, there must be a written memorandum of the contract, signed or authenticated by the party against whom it is to be enforced.
3. **Statute of Frauds.** A typed or printed name is a signing sufficient to satisfy the statute of frauds, provided the name is recognized as his signature by the party sought to be charged.
4. **Partnerships: Leases.** The payment of rent based on a percentage of sales does not create a partnership between the lessor and lessee.
5. **Laches.** Laches does not grow out of the mere passage of time; it is founded upon the inequity of enforcing a claim where there has been a change in the condition or relations of the property or parties.

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

Baylor, Evnen, Curtiss, Grimit & Witt, for appellant, and, on brief, Kenneth S. Copple and Robert B. Creager.

Richard H. Williams of Ryan & Williams, P.C., for appellee.

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

COLWELL, D.J., Retired.

Plaintiff-appellant, the Department of Banking and Finance of the State of Nebraska, Receiver for Commonwealth Savings Company (Commonwealth), appeals the dismissal of its suit to recover rental payments from defendant-appellee, Chris R. Wilken, Jr., doing business as Suite 9 Lounge. A jury trial was waived. The trial court made a general finding for defendant. We reverse with directions to enter judgment for plaintiff.

There is no dispute of the evidence relevant to the pleadings. In April of 1977 Commonwealth, then known as The Commonwealth Company, entered into a rental agreement with Wilken. The leasehold premises consisted of a restaurant and lounge in the Belmont Plaza Shopping Center, then owned by Commonwealth. The lease, although dated June 15, 1977, was executed in April so that Wilken could submit it to the Nebraska Liquor Control Commission (Commission) in support of his application for a liquor license. At the time the lease was executed, paragraph 6(b), providing additional rental payments based upon a percentage of gross sales, was stricken because Wilken was concerned about its legality and acceptability to the Commission. At that time Sumner Copple, Commonwealth's president and representative in the lease negotiations,

told Wilken that he would refer this legal question to his attorney and that if rental payments based upon a percentage of sales were determined to be lawful, Commonwealth would attach an addendum to the lease requiring such payments. Commonwealth concluded it was a lawful provision; Wilken signed the addendum and filed the lease with the Commission. The addendum provides:

> 6 (b) In addition to such minimum rental, an amount per year equal to 5 (5)% of annual gross sales made on and from the premises in excess of $200,000.00 to be apid [sic] on a quarterly basis on or before the 10th day after the expiration of each three month period of each lease year.

Wilken paid all monthly minimal rentals; however, he paid no rentals for the years 1978, 1979, or 1980 based upon a percentage of sales, and Commonwealth demanded none until 1981 when it received the results of an audit upon the businesses in the Belmont Plaza Shopping Center. The audit showed that Wilken's establishment had gross sales of $362,523.50 in 1978, $412,063.39 in 1979, and $420,247.12 in 1980. The total additional rent based upon the addendum was $29,741.71.

On November 6, 1981, Commonwealth filed this suit against Wilken, seeking the amounts due on the percentage rental requirement. By his answer Wilken claimed these defenses: (1) The addendum was void, pursuant to the statute of frauds, Neb. Rev. Stat. § 36-105 (Reissue 1978), since Commonwealth had not signed it; (2) The percentage rental requirement would, in effect, make Commonwealth a partner in Wilken's business and thereby violate the requirement that the license be held as Wilken's personal privilege under Nebraska statutes and the rules of the Commission; and (3) Commonwealth's laches barred its right to recovery, if any.

The findings of the court in a law action in which a jury is waived have the effect of a verdict of the jury

and will not be disturbed on appeal unless clearly wrong. *Stauffer v. Wilson*, 182 Neb. 129, 153 N.W.2d 454 (1967).

In order to recover on an action for a breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with the conditions precedent which activate the defendant's duty. See, *Pinkerton v. Leonhardt*, 184 Neb. 430, 168 N.W.2d 272 (1969); *Lange Bldg. & Farm Supply v. Open Circle "R"*, 216 Neb. 1, 342 N.W.2d 360 (1983).

The evidence clearly shows that Commonwealth proved the elements of its cause of action. The question then becomes whether Wilken established a defense.

The *first* defense asserted by Wilken is that the lease violates the statute of frauds, § 36-105:

> Every contract for the leasing for a longer period than one year, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and *signed by the party* by whom the lease or sale is to be made.

(Emphasis supplied.)

There is no question but that Wilken signed the addendum and that he knew it was a part of the original lease. Wilken's contention is that Commonwealth did not sign it as a party because only the typed name "THE COMMONWEALTH COMPANY" appeared following the language of the addendum.

> Affixing one's handwritten signature, however, is not the only method by which a paper writing may be considered as being signed within the meaning of the statute of frauds. As long ago as Lord Ellenborough's opinion in *Schneider and Another against Norris*, 2 M. & S. 286, 105 Eng. Rep. 388 (1814), it has been recognized that a printed name may constitute a sufficient signing under the statute of frauds, provided that it is recognized by the party sought to be charged.

Hansen v. Hill, 215 Neb. 573, 579, 340 N.W.2d 8, 12 (1983).

The uncontradicted testimony of Copple was that the typed name "THE COMMONWEALTH COMPANY" on the addendum was placed there by his secretary at his direction. There is no merit to this first defense.

Wilken's *second* defense is that the addendum violates Nebraska statutes and the rules of the Commission, particularly the following: "A license shall be *purely a personal privilege*, good for not to exceed one year after issuance unless sooner revoked as in this act provided, and *shall not constitute property* . . . ." (Emphasis supplied.) Neb. Rev. Stat. § 53-149 (Reissue 1978).

"Any license, covering premises *financed or operated on a percentage or share of the business basis, will be considered a partnership* between the parties involved insofar as the rights and duties of the licensee of record under his license are concerned." (Emphasis supplied.) Nebraska Liquor Control Commission Rule 20 (1975).

> No licensee or partner, principal, agent, or employee of any Bottle Club or Retail Liquor License shall permit any other person not licensed or included as a partner, principal, or stockholder of any Bottle Club or Retail Liquor License to participate in the sharing of profits or liabilities arising from any Bottle Club or Retail Liquor License. (Rule 20, 53-1,100).

Nebraska Liquor Control Commission Rule 14(E) (1979).

"Only the licensee may receive the proceeds resulting from the sale or dispensing of alcoholic liquors within the licensed premise except where otherwise provided for by the provisions of the Nebraska Liquor Control Act." Nebraska Liquor Control Commission Rule 16F (1978).

Wilken's theory is that such rental payments un-

lawfully create an interest in his liquor license in favor of Commonwealth.

The Commission has power to adopt rules and regulations, Neb. Rev. Stat. § 53-119 (Reissue 1978), and they have authority of law if enacted within the agency's authority. *Douglas County Welfare Administration v. Parks*, 204 Neb. 570, 284 N.W.2d 10 (1979). Deference is accorded to the agency's interpretation of those regulations unless plainly erroneous or inconsistent. *Columbus Community Hospital, Inc. v. Califano*, 614 F.2d 181 (8th Cir. 1980).

The affidavit of the Commission's executive director establishes that the Commission does not interpret its rules to prohibit a provision in a building lease whereby the lessor receives a percentage of the licensee's annual gross sales above a specified amount.

The addendum is a restatement of a similar provision (paragraph 6(b)) in the original lease, and it is referenced in paragraph 6(a)(v) as "[t]he additional rental set forth in subparagraph (b) of this paragraph 6 . . . ." Such an agreement is a common rental provision in commercial leases housing sales businesses.

The addendum was nothing more than an agreement to pay rent for the demised premises in addition to the agreed minimal annual rental of $11,835.72 payable monthly. Such additional rental liability, and its amount, was conditioned on the gross sales being more than $200,000 annually and the application of the agreed formula. Commonwealth had no other interest in the business being lawfully conducted by Wilken on the premises, except as lessor. It had no share, claim, interest, or responsibility in either the management, profits, losses, or distribution of sale proceeds, and there is no evidence that the addendum created a partnership between the parties. Receiving a share of profits as rent does not create a partnership. See

Garrett v. Republican Publishing Co., 61 Neb. 541, 85 N.W. 537 (1901). Wilken's second defense fails.

Wilken's *final* defense is that Commonwealth's laches should bar its recovery. The defense of laches is an equitable one, and its role in a suit upon the breach of a contract which is governed by a 5-year statute of limitations is of very limited scope. *Heese v. Wenke*, 161 Neb. 311, 73 N.W.2d 223 (1955). The common-law rule is that equitable defenses cannot be used to defeat an action at law based upon contract; however, we have not accepted that position, but, on the contrary, we have held that any defense, whether it be legal or equitable, may be set up in any case. *Kelly v. Kannarr*, 118 Neb. 472, 225 N.W. 230 (1929).

The defense of "[l]aches does not grow out of the mere passage of time. It is founded upon the inequity of enforcing a claim where there has been a change in the condition or relations of the property or parties." *Platte Valley Bank v. Lemke*, 141 Neb. 218, 225, 3 N.W.2d 396, 399 (1942). Wilken neither asserts nor proves that the 3- or 4-year delay by Commonwealth in demanding payment in any way prejudiced him. As such, the defense is unproved.

Wilken failed to present any credible evidence in support of his three defenses, and plaintiff was entitled to judgment as a matter of law. The judgment for defendant was clearly wrong, and it is set aside. The district court is directed to enter judgment for plaintiff in the sum of $29,741.71, plus interest and costs.

REVERSED AND REMANDED
WITH DIRECTIONS.

IN RE ESTATE OF THELMA SEVERNS, DECEASED. WILBUR F. ROGERS AND PRISCILLA ROGERS, APPELLANTS, V. SCOTTSBLUFF NATIONAL BANK AND TRUST COMPANY ET AL., PERSONAL REPRESENTATIVES, AND MELVIN ROGERS ET AL., APPELLEES.

352 N.W.2d 865

Filed July 6, 1984. No. 83-521.

1. **Decedents' Estates: Claims: Words and Phrases.** Claims, in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, demands, or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.
2. **Hearsay.** Under Neb. Rev. Stat. § 27-803(22) (Reissue 1979), hearsay testimony may be admissible under certain conditions, provided adequate notice is given.
3. _____. The question of "trustworthiness" under Neb. Rev. Stat. § 27-803(22) (Reissue 1979) does not involve whether the witness is "trustworthy," but, rather, involves whether the statement being reported by the witness is "trustworthy."
4. _____. While we have indicated that there is a distinction to be made between trustworthiness and credibility, we believe that the tests which we apply with regard to reviewing credibility must of necessity likewise apply with regard to trustworthiness.
5. **Property: Presumptions.** There is a presumption of ownership created by the fact that an individual has exclusive possession of personal property.
6. **Proof.** Generally, the burden of proof is ordinarily on the party who would suffer if no evidence at all were introduced.
7. **Evidence: Proof: Judgments.** If established facts give equal support to two inconsistent inferences, then the judgment must go against the party having the burden of proof.
8. **Evidence: Proof.** If the evidence upon a fact is evenly balanced or if it preponderates in favor of the other party, then the burden has not been met.

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

John K. Sorensen, for appellants.

Donn C. Raymond of Raymond, Olsen, Ediger & Ballew, P.C., for appellees Melvin Rogers et al.

No appearance for personal representatives.

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

KRIVOSHA, C.J.

The appellants, Wilbur F. Rogers and his wife, Priscilla Rogers (the Rogers), appeal from a judgment entered by the district court for Scotts Bluff County, Nebraska, which affirmed an earlier order entered by the county court for Scotts Bluff County, Nebraska, rejecting a certain "claim" filed by the Rogers against the estate of Wilbur Rogers' sister, Thelma Severns. We affirm.

On April 30, 1982, Thelma Severns died while domiciled in Gering, Scotts Bluff County, Nebraska. She left surviving four brothers, Melvin Rogers, Hubert Rogers, Merrell G. Rogers, and the appellant Wilbur F. Rogers. Her last will and testament was admitted to probate on June 3, 1982, and after providing for some specific bequests, directed that the residue of her estate be divided among her four surviving brothers. On August 9, 1982, Wilbur Rogers, together with his wife, Priscilla Rogers, filed a document entitled "STATEMENT OF CLAIM" in the Severns estate. The claim alleged that a certain grandfather's clock, shown as one of the assets of the estate of Thelma Severns, was in fact the personal property of the Rogers and should be ordered delivered back to them. The grandfather's clock was appraised at $3,750. The personal representatives objected to the allowance of the "claim," and the matter came before the county court for trial without a jury on February 18, 1983. Following a trial to the court, the court found that the grandfather's clock was owned by Thelma Severns at the time of her death and, therefore, disallowed the "claim." On appeal to the district court the judgment was affirmed, and it is now before us for further review.

While the document filed by the Rogers was entitled "STATEMENT OF CLAIM," we note in passing that such designation was not proper. Neb. Rev. Stat. § 30-2209(4) (Reissue 1979) of the Nebraska Probate Code defines a claim as follows:

> Claims, in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term *does not include* estate or inheritance taxes, demands *or disputes regarding title of a decedent* or protected person to specific assets alleged to be included in the estate.

(Emphasis supplied.) It is clear beyond question that the action here involved a dispute regarding title of property allegedly belonging to the decedent and included in her estate, and was not a claim. The county court, however, did have jurisdiction to determine whether the property properly belonged to the estate. See *In re Estate of Layton*, 207 Neb. 646, 300 N.W.2d 802 (1981). That is, the property was in the possession of the decedent at the time of her death and came into the possession of the personal representatives by reason of the decedent's death. Unlike the case of *Miller v. Janecek*, 210 Neb. 316, 314 N.W.2d 250 (1982), where the property was in the possession of another and the personal representative was attempting to establish title in the estate, where the property is already in the possession of the estate, the county court has jurisdiction to determine title. Neb. Rev. Stat. § 30-2405 (Reissue 1979). The misdesignation by the Rogers does not, however, affect the outcome of the case.

In support of their appeal Wilbur and Priscilla Rogers assign two errors. First, they maintain that the county court erred in allowing hearsay testi-

mony from two witnesses called by the estate. Second, they maintain that the county court erred in not finding that when the hearsay evidence is disregarded, as the Rogers maintain it should have been, the "claimants" made a prima facie case.

The two witnesses whose testimony is attacked are Betty Hullinger, a neighbor of the deceased, and Merrell G. Rogers, a brother of the deceased. All parties to this action concede that the statements in question were hearsay, but the objectors maintain that the statements were nevertheless admissible as an exception to the hearsay rule, particularly Neb. Rev. Stat. § 27-803(22) (Reissue 1979). Under § 27-803(22) hearsay testimony may be admissible under certain conditions, provided adequate notice is given. Section 27-803(22) provides in part:

> A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

We have previously held that this notice requirement is mandatory. See *State v. Leisy*, 207 Neb. 118, 295 N.W.2d 715 (1980). With regard to Betty Hullinger's testimony, all parties concede that this notice requirement was not met and, therefore, the trial court did err in admitting her statements. As we will point out hereafter, however, we do not believe that the court's error in that regard requires us to reverse the ultimate decision.

We then turn to the question of whether statements made by the decedent's brother Merrell Rogers were also inadmissible. With regard to the testimony of Merrell Rogers, there is no question that the notice requirement was met. The question which we must address is, assuming that proper notice was given with regard to the hearsay state-

ments made by Merrell Rogers, whether the testimony was admissible as an exception to the hearsay rule. Again, the parties all concede that there is no other exception to the hearsay rule which may be applicable except § 27-803(22). That section permits hearsay testimony under certain conditions, and provides in part as follows:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact, (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The particular testimony involved in this controversy concerned a conversation which allegedly took place between Merrell Rogers and his sister, the decedent, several years prior to her death, at which time she advised him that she had acquired the grandfather's clock in question by purchase from her brother Wilbur and his wife in 1962, that Wilbur and Priscilla had indicated a desire to repurchase the clock, but that Thelma was not interested. There is, of course, no question that the statement is hearsay, Neb. Rev. Stat. § 27-801(3) (Reissue 1979), and unless it is within one of the exceptions, in particular § 27-803(22), it was not admissible.

The Rogers specifically argue that Merrell Rogers' testimony does not fall within the exception because, on its face, it is not "trustworthy," as required by § 27-803(22). In support of that contention, they point out that if the "claim" is rejected and the property included in the estate, then Merrell Rogers will gain as an heir. The Rogers fail to recognize that, if the testimony of Merrell Rogers is rejected

and only the testimony of Wilbur Rogers is admitted, then it may be the Rogers who will gain. The argument that Wilbur Rogers' testimony is more trustworthy than Merrell Rogers' seems to fail to recognize that, at best, Wilbur Rogers' testimony may be totally self-serving and even less credible. The problem with the argument made by the Rogers is that it confuses the matter of "trustworthiness," as required in the exception to the hearsay rule, with the credibility or the weight to be given the evidence once admitted. The question of trustworthiness under § 27-803(22) does not involve whether Merrell Rogers' statement is "trustworthy," but, rather, it involves whether the decedent's statement, as reported by Merrell Rogers, is trustworthy. That is, "[t]he critical issue here is whether the circumstances surrounding the making of the hearsay statements by the decedent provided guarantees of trustworthiness comparable to the other specific exceptions . . . ." *State v. Beam*, 206 Neb. 248, 254, 292 N.W.2d 302, 305 (1980). The trustworthiness of the declarant should not be confused with the credibility of the witness testifying at trial, which is a question for the trier of fact. See, *Ineba Ranch v. Cockerill*, 201 Neb. 592, 271 N.W.2d 44 (1978); *Martinez v. Peterson*, 212 Neb. 168, 322 N.W.2d 386 (1982). Therefore, the fact that Merrell Rogers may be interested in the outcome of the case does not affect the issue of trustworthiness as contemplated by § 27-803(22).

Obviously, the instant fact situation presents an extremely difficult case. It is apparent that it is because of such difficult cases that this very exception to the hearsay rule was created. Here, the statement was made by one now deceased. Unless the testimony is admitted, then the statement is lost forever. When one views the circumstances under which the statement was supposedly made, if true, one concludes that if the witness is believed, the statement has trustworthiness. The statement as to ownership was made by the decedent at a time when

no issue as to title was in existence and decedent had no reason to create such testimony. If the trial court believed that the statement was in fact made by the decedent, an issue involving the credibility of Merrell Rogers, then it cannot be said as a matter of law that the statement itself, under the circumstances existing when made, did not have trustworthiness. Those issues are matters which the trial court, hearing the evidence and seeing the witnesses, must, in each instance, determine, just as the trial court must determine trustworthiness and credibility whenever the question of foundation is raised. While we have indicated that there is a distinction to be made between trustworthiness and credibility, we believe that the tests which we apply with regard to reviewing credibility must of necessity likewise apply with regard to trustworthiness. In *In Re Estate of Camin*, 212 Neb. 490, 506-07, 323 N.W.2d 827, 838 (1982), we said:

> Furthermore, with regard to the admission of the January 3, 1979, will, we note that " 'The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not be reviewed by an appellate court, unless it is clearly or plainly shown that the trial court abused its discretion.' " *Westover v. Kerr*, 168 Neb. 494, 498, 96 N.W.2d 421, 424 (1959).

We simply cannot say, as a matter of law, all things considered, that the trial court was clearly wrong in concluding that the hearsay testimony offered by Merrell Rogers regarding his sister's statements was not admissible as an exception to the hearsay rule. The trial court did not err in this regard.

We turn, then, to Wilbur and Priscilla Rogers' final claim, that the evidence was insufficient to support the court's decision. In this regard we might add that even disregarding the hearsay testimony of Merrell Rogers, the evidence was sufficient to support the conclusion of the trial court. The only testimony to support the claim that the clock belonged

to Wilbur and his wife was the self-serving statements offered by Wilbur Rogers and his wife. Opposing these statements are a number of uncontroverted facts. At the time of the decedent's death, the clock was in her possession, and had been so for nearly 28 years. There is a presumption of ownership created by the fact that an individual has exclusive possession of personal property. See, *Booknau v. Clark*, 58 Neb. 610, 79 N.W. 159 (1899); *Allied Inv. Co. v. Shaneyfelt*, 161 Neb. 840, 74 N.W.2d 723 (1956). Evidence must be offered to overcome the presumption.

Furthermore, even though Wilbur and Priscilla Rogers maintain that the property was theirs and it was of great value, they made no claim regarding the clock nor attempted in any manner to retrieve it when they were aware of their sister's grave illness and imminent death. And, following her death, a claim was made by another individual regarding certain property in the decedent's possession. Three of the brothers, including Wilbur, met with one of the personal representatives of the estate and agreed that the property did not belong to the decedent and should be returned to the individual making the claim. Yet, at no time during those discussions did the Rogers make any claim regarding the grandfather's clock. One is inclined to think that, if a meeting is taking place to sort out valuable property not belonging to the decedent, the grandfather's clock would have been discussed.

When one examines all of the admissible evidence, the most that can be said is that the evidence is evenly balanced between the parties. This is not sufficient to satisfy the burden of proof imposed upon Wilbur and Priscilla Rogers. The burden of proof in this case to establish lawful title to the clock was clearly upon the Rogers, who were seeking to take the property from the estate. Generally, the burden of proof is ordinarily on the party who would suffer if no evidence at all were introduced. *Bishop*

Buffets, Inc. v. Westroads, Inc., 202 Neb. 171, 274 N.W.2d 530 (1979). The burden of proof means the duty resting on one party to establish by a preponderance of the evidence an issue essential to recovery. *Davis v. Landis Outboard Motor Co.*, 179 Neb. 391, 138 N.W.2d 474 (1965). We have frequently held that if established facts give equal support to two inconsistent inferences, then the judgment must go against the party having the burden of proof. *Bernhardt v. Chicago, B. & Q. R. Co.*, 132 Neb. 346, 272 N.W. 209 (1937). We regularly instruct juries that if the evidence upon a fact is evenly balanced or if it preponderates in favor of the other party, then the burden has not been met. See NJI 2.12. Even disregarding the testimony of Merrell Rogers, we are unable to say that the evidence preponderates in favor of Wilbur and Priscilla Rogers. Being unable to do so, we must conclude, as the trial court obviously concluded, that the burden of proof had not been met by those seeking to establish title to the clock, and the judgment of the district court affirming the action of the trial court in declaring the clock to be a part of the decedent's estate must be affirmed.

AFFIRMED.

R.A.S., INC., A NEBRASKA CORPORATION, APPELLANT, V. MICHAEL M. CROWLEY AND JOYCE CROWLEY, APPELLEES.

351 N.W.2d 414

Filed July 6, 1984. No. 83-579.

1. **Contracts: Time.** When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement.
2. **Estoppel.** The essential elements of equitable estoppel are: As to party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than,

and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

3. **Summary Judgment.** In considering the evidence on a motion for summary judgment, both this court and the trial court must determine whether there is any genuine issue as to any material fact, the ultimate inferences to be drawn from those facts are clear, and whether the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Michael O. Johanns of Peterson, Bowman & Johanns, for appellant.

David A. Domina of Domina Law Firm, P.C., for appellees.

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

WHITE, J.

Appellant, R.A.S., Inc., a Nebraska corporation, appeals an order of the district court for Madison County, Nebraska, which sustained the motion for summary judgment of the appellees, Michael and Joyce Crowley, and dismissed the appellant's petition. We affirm.

The appellant's petition alleged that on May 1, 1973, a lease was entered into between Edmund H. Prenger and Mary E. Prenger, husband and wife, as lessors, and Prengers, Inc., a corporation owned by the Prengers, as lessee. The property leased was a business building and lots in Norfolk, Nebraska, which were used as a restaurant and lounge. The

term of the lease was for the period of 10 years, expiring May 1, 1983.

Subsequently, Prengers, Inc., assigned its lessee's interest to the appellant. Edmund and Mary Prenger consented to the assignment, which took place in November 1978.

On January 8, 1982, Edmund H. Prenger, surviving spouse, conveyed the real estate, including the landlord's interest in the lease, to appellees.

The lease contained the following paragraph which formed the basis of the appellant's action in the district court:

> At the expiration of this Second Supplemental Lease Extension Agreement on May 1, 1983, the second party shall have the privilege of an option for the further extension of this lease for an additional period of 10 years from and after May 1, 1983. Both parties agree that the rental terms and conditions for this lease shall be renegotiated as of May 1, 1983 for the 10 year term beginning on that date. The rental terms and conditions shall be negotiated upon a basis which is satisfactory and acceptable to both parties. Both parties agree to negotiate such terms consistant [sic] with conditions existing on May 1, 1983, to provide rental terms and conditions substantially the same as those now existing, with appropriate adjustments, however, satisfactory to both parties and covering the 10 year term beginning May 1, 1983.

In the petition appellant requested specific performance of the above-quoted option provision.

In their answer the Crowleys alleged that the option provisions "are not sufficient to create a contract between the parties thereto, and the alleged renewal option is therefore not binding upon the parties thereto or upon their successors in interest."

For its reply appellant essentially alleged that appellees were estopped from denying the validity of the option clause by reason of the following acts or

omissions to act of the Prengers and Crowleys:

(1) As part of the lease assignment, Prengers agreed to loan and did loan to appellant $25,000 for capital improvements to the leased premises.

(2) That the Prengers did not at any time during the lease period advise appellant that they considered the option void and unenforceable.

(3) That the Prengers intended that appellant rely on the conduct of the Prengers and that appellant did so rely and expended sums in excess of $100,000 for improvements and maintenance of the leased premises.

Essentially, the same allegations are directed against appellees Crowley, plus the additional allegation that Crowleys accepted the benefits of the lease (rent payments).

Appellees filed a motion for summary judgment pursuant to Neb. Rev. Stat. § 25-1330 (Reissue 1979), alleging that the pleadings, admissions, and affidavits offered in support of the motion show that there was no genuine issue of fact and that appellees were entitled to summary judgment.

The assignments of error are directed toward two areas:

(1) Was the court correct in its conclusion that the option provision consisted of a mere agreement to agree and was therefore void?

(2) Is there an issue of fact, respecting the conduct of the Prengers and Crowleys, sufficient, if believed, to give rise to an estoppel of Crowleys to assert the invalidity of the provision?

We will consider the assignments in order.

"A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 at 5 (1981).

Conspicuous by absence in the lease option is any agreement as to the rental price to be paid during the renewal period. The record shows the parties

were unable to agree on that amount. In *Alward v. United Mineral Products Co.*, 197 Neb. 658, 661, 250 N.W.2d 623, 625 (1977), this court observed:

> When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement. 17 C.J.S., Contracts, § 49, pp. 702, 703. There can, therefore, be no express contract between the parties here.

The law does not compel a duty to perform that which one has not contractually agreed to do, either expressly or impliedly. As no binding contract existed, nor is one alleged to be implied in law, we conclude the trial court was correct in declaring the option provision unenforceable.

For a discussion of the subject see Annot., Validity and Enforceability of Provision for Renewal of Lease at Rental to be Fixed by Subsequent Agreement of Parties, 58 A.L.R.3d 500 (1974).

We shall now consider the second assignment of error. This court in *Kirby v. Holland*, 210 Neb. 711, 718-19, 316 N.W.2d 746, 751 (1982), restated the essential elements of equitable estoppel, quoting from *Pester v. American Family Mut. Ins. Co.*, 186 Neb. 793, 186 N.W.2d 711 (1971):

> " 'The essential elements of equitable estoppel are: As to party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in

> good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.' "

In considering the evidence on a motion for summary judgment, both this court and the trial court must determine whether there is any genuine issue as to any material fact, the ultimate inferences to be drawn from those facts are clear, and whether the moving party is entitled to judgment as a matter of law. See *De Los Santos v. Great Western Sugar Co.*, *ante* p. 282, 348 N.W.2d at 842 (1984).

The following facts are not disputed. The option clause was well known to all parties to this action and their predecessors, each had equal knowledge of the provisions and an equal opportunity to determine the validity of the provision; the lease provision was arrived at between parties in pari materia—the Prengers and their wholly owned corporation—and with knowledge of its basic unenforceability; and neither appellees nor their grantors-assignors Prengers made any affirmative representation concerning the validity of the provision.

The appellant asserts, as the justification for the application of equitable estoppel, the payment of rent to the appellees and Prengers, the expenditure of funds for maintenance and improvement of the leased premises, and the repayment of a loan from Prengers secured at the time of the lease assignment, presumably also expended for leasehold improvement purposes. Although the appellant asserts that these activities were carried on in reliance on the option provision, it is not asserted, and it is not disputed in the record, that it did not do so on any representation as to the validity of the option. Obviously, at least as to (4) above, the appellant had equal means of obtaining knowledge as to the en-

forceability of the lease option, and, therefore, the doctrine of estoppel is not applicable.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY ULRICH, APPELLANT.

351 N.W.2d 417

Filed July 6, 1984. No. 83-598.

1. **Sentences: Appeal and Error.** It is settled law that the district court has the power to impose a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court to pronounce and where the accused himself has invoked appellate jurisdiction for the correction of error.
2. **Constitutional Law: Appeal and Error.** 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. Except in the most unusual of cases, if it has not been raised in the trial court, it will be considered to have been waived.

Appeal from the District Court for Cuming County: RICHARD P. GARDEN, Judge. Affirmed.

Kenneth P. Weiner of Wall, Wintroub & Weiner, and Seymour Katz, P.C., for appellant.

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

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

WHITE, J.

Appellant, Gary Ulrich, was charged in the county court for Cuming County with the offense of hunting with the aid of an artificial light attached to or used from a vehicle, Neb. Rev. Stat. § 37-501(2) (Reissue 1978), a Class III misdemeanor, and of operating a motor vehicle to avoid arrest, Neb. Rev. Stat. § 28-905(1) (Cum. Supp. 1982), a Class I misdemeanor. At arraignment in the county court appel-

lant pled guilty to count I, was assessed a fine of $250, and ordered to pay costs. Appellant pled not guilty to count II, and after trial he was found guilty and sentenced to a term of 15 days in the county jail and ordered to pay a fine of $250.

An appeal to the district court followed. Although not specifically found in the transcript or bill of exceptions, apparently the only issue raised was the sufficiency of the evidence to sustain the verdict. After review of the transcript and bill of exceptions, the district court affirmed the decision of the county court and again imposed the same fines and jail term as did the county court. In addition, the district court ordered the appellant not to drive a motor vehicle for any purpose for a period of 2 years. This appeal follows.

Appellant assigns as error: (1) The district court erred in increasing the valid sentence of the county court; and (2) The punishment for misdemeanor flight to avoid arrest, § 28-905(3) (mandatory suspension of motor vehicle operator's license for a period of 2 years), is greater than the penalty for felony flight and is therefore disproportionate and violative of the equal protection clause of the U.S. Constitution. We will discuss the assigned errors in order.

At the first hearing in the district court, the court affirmed the judgments and sentences of the county court. Shortly thereafter, its attention was called to the mandatory provision of § 28-905(3). The court thereupon vacated its order and imposed the additional penalty.

Appeals from the county courts in criminal matters are taken pursuant to Neb. Rev. Stat. § 29-613 (Reissue 1979), which provides as follows: "The district court shall hear and determine any cause brought by appeal from a county or municipal court upon the record, and may affirm, modify, or vacate the judgment, or may remand the case to the county or municipal court for a new trial."

Having properly vacated the prior erroneous judgment, the district court proceeded to redetermine the issues on appeal. The court affirmed the conviction and modified the erroneous sentence imposed by the county court which omitted the mandatory revocation of driver's license. The modification of the sentence was within the power of the district court pursuant to § 29-613.

In *State v. Shelby*, 194 Neb. 445, 447, 232 N.W.2d 23, 24 (1975), this court held as follows:

> It is settled law that the District Court has the power to impose a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court to pronounce and where the accused himself has invoked appellate jurisdiction for the correction of error.

A similar proposition in the context of this court's power on direct appeal was relied on in *State v. Gaston*, 191 Neb. 121, 214 N.W.2d 376 (1974), wherein the court went on to explain that the rule applied with equal force when the correction of error resulted in the imposition of a greater sentence. See, also, *People v Wilson*, 111 Mich. App. 770, 315 N.W.2d 423 (1981).

The first assignment is without merit.

As to the second assignment of error, as recently as *State v. Olson*, *ante* p. 130, 347 N.W.2d 862 (1984), and *State v. Smyth*, *ante* p. 153, 347 N.W.2d 859 (1984), we said that a prerequisite to the consideration of constitutionality of a statute on appeal is the raising of the issue in the trial court. As we said in *State v. Hert*, 192 Neb. 751, 752-53, 224 N.W.2d 188, 189-90 (1974):

> The issue of the constitutionality of a statute under which a defendant is prosecuted may be raised in a variety of ways, including demurrer, motion, and by plea of not guilty. 16 C.J.S., Constitutional Law, § 96, p. 343. However, we have long held that the issue must be specifically called to the trial court's attention in some way

> so that it has an opportunity to rule upon it and that we will not ordinarily consider for the first time in this court the constitutionality of the statute.

As the constitutionality of the statute was not raised in the instant case at the district court level, the issue will not be considered here.

No error appearing, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRANK A. SWENSON, APPELLANT.

352 N.W.2d 149

Filed July 6, 1984. No. 83-822.

1. **Entrapment.** Entrapment is governmental inducement of one to commit a crime not contemplated by the individual in order to prosecute that individual for commission of a criminal offense.
2. **Entrapment: Words and Phrases.** Regarding the defense of entrapment, Nebraska has adopted the "origin of intent" test to determine entrapment.
3. _____: _____. Under the "origin of intent" test, entrapment consists of two elements: (1) The government has induced the defendant to commit the offense charged; and (2) The defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity.
4. **Entrapment: Pleas.** Entrapment is an affirmative defense in a criminal proceeding. The defense of entrapment is raised by and contained in the defendant's plea of not guilty.
5. **Entrapment.** When a defendant raises the defense of entrapment, the court must determine whether the defendant has presented sufficient evidence to warrant submitting to the jury the issue of entrapment. Therefore, it is the initial duty of the court to determine as a matter of law whether there is sufficient evidence that the government has induced the defendant to commit a crime.
6. _____. In order to submit the defense of entrapment to the jury, a defendant's evidence of entrapment must be "more than a scintilla." To be more than a scintilla, evidence cannot be vague, conjectural, or the mere suspicion about the existence of a fact, but must be real and of such quality as to induce conviction.

7. _____. The lone fact that an undercover police officer, personally or through an informant, offers to purchase or obtain marijuana is not an inducement to commit a crime resulting in the availability of entrapment as a defense for the seller of the marijuana. Inquiry alone is not a lure into criminal activity and does not supply the degree of persuasion necessary for entrapment.
8. _____. In the absence of a governmental inducement to deliver a controlled substance, acts of the accused after delivery of the controlled substance are irrelevant.

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

Dennis R. Keefe, Lancaster County Public Defender, and Sean J. Brennan, for appellant.

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

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

SHANAHAN, J.

A Lancaster County jury found Frank A. Swenson guilty of knowingly delivering or dispensing a controlled substance, marijuana, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1982). The district court sentenced Swenson to 14 months' probation. Swenson appeals, and we affirm.

In the evening of February 16, 1982, a Lincoln undercover police officer and a female confidential informant drove to an arcade, Bogie's Game Room, to make a drug purchase from a specific supplier. The informant went inside the arcade, while the officer waited in the car. In the arcade the informant did not find the prospective supplier but did telephone that supplier. The informant returned to the officer's car and reported that the supplier "would be there within a few minutes, to wait."

While the officer and the informant were awaiting arrival of the supplier, Swenson approached the officer's car and asked whether the officer was "the party looking for a bag" of marijuana. When the officer answered affirmatively to Swenson's inquiry,

Swenson went toward the arcade and returned shortly thereafter with a bag of marijuana. The officer gave Swenson $40 in exchange for the marijuana. The officer then told Swenson that he was looking for at least a "quarter of a pound" of marijuana. Swenson again went to the arcade, returned to the officer's car, and said "nothing was available but maybe in a few days." The officer and the informant left Swenson. Sometime later, Swenson was arrested for the sale and delivery of marijuana to the officer.

Swenson testified he was on his way home from the arcade gameroom when he saw the informant sitting in the officer's car. Swenson further testified that he had known the informant for approximately 7 years. The informant waved, and Swenson went to the officer's car. After a short conversation with Swenson about her new hair style, the informant asked Swenson if he could obtain some marijuana for the officer. There was no additional conversation about marijuana involving Swenson. Swenson left the car and later returned with a bag of marijuana. In his testimony Swenson stated that if the informant had not beckoned, he would have gone home from the gameroom and would not have sold the marijuana to the officer.

The trial court refused Swenson's tendered instruction on entrapment. Such refused instruction is the subject of Swenson's first assignment of error.

Entrapment is governmental inducement of one to commit a crime not contemplated by the individual in order to prosecute that individual for commission of a criminal offense. See, *State v. Braun*, 31 N.C. App. 101, 228 S.E.2d 466 (1976); *Simmons v. State*, 8 Md. App. 355, 259 A.2d 814 (1969).

Entrapment occurs when the criminal intent or design originates with governmental officials who implant in the mind of an innocent person the disposition to commit a criminal offense and induce criminal conduct in order to prosecute the criminal of-

fense so induced. See, *Sorrells v. United States*, 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932); *State v. Hochman*, 2 Wis. 2d 410, 86 N.W.2d 446 (1957); *United States v. Wolffs*, 594 F.2d 77 (5th Cir. 1979).

However, entrapment is condemned on account of some misuse of power or impropriety by the state charged with protecting against, not promoting, criminal activity. By injecting a criminal intent where none existed in an individual, the state becomes an instigator of and an accomplice in the activity prohibited by the state's criminal code. In such cases the real culprit is the state rather than the individual accused of violating state law. Our jurisprudence denounces prosecution produced by governmental origination of the very activity to be prevented by law enforcement. As expressed by Justice Holmes in *Olmstead v. United States*, 277 U.S. 438, 470, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (dissenting): "[F]or my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."

After *Sorrells* the U.S. Supreme Court held in *Sherman v. United States*, 356 U.S. 369, 372, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958): "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." The test evolving from *Sorrells* and *Sherman* is the "origin of intent" test to determine entrapment. See, *Hawthorne v. State*, 43 Wis. 2d 82, 168 N.W.2d 85 (1969); *State v. Nelsen*, 89 S.D. 1, 228 N.W.2d 143 (1975). Nebraska has adopted the "origin of intent" test for entrapment. In *State v. Lampone*, 205 Neb. 325, 328, 287 N.W.2d 442, 444 (1980), we held: "Where a person has no previous intent or purpose to violate the law, but does so only because he is induced to commit the act by law enforcement officers or agents, he is entitled to the defense of entrapment." See, also, *State v. Smith*, 187 Neb. 511, 192 N.W.2d 158

(1971); *State v. Ransburg*, 181 Neb. 352, 148 N.W.2d 324 (1967).

Under the "origin of intent" test, entrapment consists of two elements: (1) The government has induced the defendant to commit the offense charged; and (2) The defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity. See, *United States v. Glassel*, 488 F.2d 143 (9th Cir. 1973); *United States v. Glaeser*, 550 F.2d 483 (9th Cir. 1977). In the "origin of intent" test the ultimate focus is on the defendant's predisposition to commit the crime for which the government prosecutes. See, *United States v. Principe*, 482 F.2d 60 (1st Cir. 1973); *United States v. Glaeser*, *supra*.

Entrapment is an affirmative defense in a criminal proceeding. See, *State v. Braun*, *supra*; *State v. Hsie*, 36 Ohio App. 2d 99, 303 N.E.2d 89 (1973); *People v McGee*, 49 N.Y.2d 48, 399 N.E.2d 1177, 424 N.Y.S.2d 157 (1979); cf. *State v. Ransburg*, *supra* (entrapment is "in the nature of an affirmative defense"). The defense of entrapment is raised by and contained in the defendant's plea of not guilty. See, *Sorrells v. United States*, *supra*; *State v. Hsie*, *supra*; *State v. Nelsen*, *supra*.

When a defendant raises the defense of entrapment, the court must determine whether the defendant has presented sufficient evidence to warrant submitting to the jury the issue of entrapment. See, *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982); *United States v. Wolffs*, *supra*. Therefore, it is the initial duty of the court to determine as a matter of law whether there is sufficient evidence that the government has induced the defendant to commit a crime. See, *Notaro v. United States*, 363 F.2d 169 (9th Cir. 1966); *Smith v. United States*, 390 F.2d 401 (9th Cir. 1968); *United States v. Glaeser*, *supra*; *United States v. Glassel*, *supra*. In order to submit the defense of entrapment to the jury, a defendant's

evidence of entrapment must be "more than a scintilla." See, *State v. Parks*, *supra*; *United States v. Wolffs*, 594 F.2d 77 (5th Cir. 1979). To be more than a scintilla, evidence cannot be vague, conjectural, or the mere suspicion about the existence of a fact, but must be real and of such quality as to induce conviction. See, *State v. Zamora*, 6 Wash. App. 130, 491 P.2d 1342 (1971); *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980); *P.L.R.B. v. Kaufmann Dept. Stores, Inc., Aplnt.*, 345 Pa. 398, 29 A.2d 90 (1942); *Wigginton's Adm'r v. Louisville Railway Co.*, 256 Ky. 287, 75 S.W.2d 1046 (1934).

The crucial question is, Did Swenson present sufficient evidence to require a jury to decide whether the undercover police officer induced the sale of marijuana?

The lone fact that an undercover police officer, personally or through an informant, offers to purchase or obtain marijuana is not an inducement to commit a crime resulting in the availability of entrapment as a defense for the seller of the marijuana. See, *Hawthorne v. State*, 43 Wis. 2d 82, 168 N.W.2d 85 (1969); *State v. Nelsen*, 89 S.D. 1, 228 N.W.2d 143 (1975); *People v Margaret Jones*, 48 Mich. App. 334, 210 N.W.2d 396 (1973). An undercover police officer's merely affording the defendant a favorable opportunity for commission of a crime already conceptualized in the accused is not entrapment. See, *State v. Lampone*, 205 Neb. 325, 287 N.W.2d 442 (1980); *State v. Nelsen*, *supra*; *State v. McGranahan*, 206 N.W.2d 88 (Iowa 1973); cf. *United States v. Glaeser*, *supra* (federal officers made initial contact; held, no entrapment).

Even accepting Swenson's version of the facts, the informant's inquiry about availability of marijuana was not a sufficient inducement to raise the defense of entrapment. Inquiry alone is not a lure into criminal activity and does not supply the degree of persuasion necessary for entrapment. The beckon to Swenson, accompanied by inquiry about marijuana,

did not constitute an inducement—an implantation of criminal intent in the mind of Swenson. Swenson's skeletal evidence of entrapment was no more than a scintilla of evidence. In the final analysis there was insufficient evidence presented indicating impermissible police persuasion to commit a crime. Additionally, the absence of persuasive efforts by the informant or officer and Swenson's immediate responsive production of marijuana without extensive persuasion demonstrated that Swenson was acting of his own voluntary predisposition to supply marijuana on request. The necessary conclusion is that the genesis of the criminal intent was in Swenson's mind, not in the mind of the officer. The trial court was correct in determining as a matter of law that the defense of entrapment could not be submitted to the jury.

In his second assignment of error Swenson contends he should have been allowed to testify about events occurring after the sale of marijuana. Swenson offered to prove that, after Swenson's sale of marijuana to the officer, the informant who had accompanied the officer on the night of the sale had sought to buy other controlled substances. Swenson refused such subsequent requests by the informant.

Rule 401 of the Nebraska Evidence Rules provides: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Rev. Stat. § 27-401 (Reissue 1979).

We have already concluded that entrapment is a defense, not an element of the crime charged. Bearing in mind that entrapment is a defense consisting of conjunctive elements—governmental inducement to commit a crime and a lack of criminal predisposition in the defendant—Swenson failed to present sufficient evidence of an inducement. The defense of entrapment suggested by Swenson was,

therefore, unavailable. In such posture without the defense of entrapment, the case against Swenson was complete and concluded with the occurrences on the night when Swenson sold marijuana to the officer. Consequently, absent the inducement required for entrapment, any postsale contacts between Swenson and the informant or officer were irrelevant in establishing commission of the crime charged, namely, that Swenson unlawfully and knowingly delivered marijuana to the officer on the night in question. The trial court was correct in refusing Swenson's offer of proof and any evidence of postsale contacts with Swenson under the circumstances.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

CAPORALE, J., participating on briefs.

WILLIAM NUSS ET AL., APPELLANTS, V. PATHFINDER IRRIGATION DISTRICT, APPELLEE.

351 N.W.2d 419

Filed July 6, 1984. No. 83-854.

1. **Attorney Fees.** In a proper case an award of attorney fees for services in this court may be made under Neb. Rev. Stat. § 25-2165 (Cum. Supp. 1982).
2. _____. The Nebraska Supreme Court is the proper forum for the allowance of attorney fees for services in that court.

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

John F. Wright of Wright, Simmons & Selzer, for appellants.

R. L. Gilbert, for appellee.

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

BOSLAUGH, J.

This was an action for a writ of mandamus to compel the defendant irrigation district to construct a bridge across an irrigation canal in Scotts Bluff County, Nebraska. The judgment of the district court granting a peremptory writ was affirmed in *Nuss v. Pathfinder Irr. Dist.*, 214 Neb. 888, 336 N.W.2d 584 (1983). The opinion was filed July 22, 1983. The mandate was issued August 15, 1983.

On September 13, 1983, the plaintiffs filed a motion in the district court requesting an award of reasonable fees for the services of their attorneys in this court. The trial court found that this court was the proper forum for the allowance of fees for services in this court, and overruled the motion. The plaintiffs have appealed.

Neb. Rev. Stat. § 25-2165 (Cum. Supp. 1982) provides that in addition to damages "the court may also award costs and reasonable attorney's fees." The plaintiffs requested and were allowed fees for the services of their attorneys in the district court. The plaintiffs conceded that they have made no request in this court for an allowance of fees by the court. Their theory is that the allowance for fees in this court should be made by the district court, and rely upon *In re Estate of Linch*, 139 Neb. 761, 298 N.W. 697 (1941).

The *Linch* case involved fees for services in preserving the assets of a trust estate. Unlike the case now under consideration, the fees in that case were to be paid from a fund recovered as a result of the litigation. In such a case the fees may be allowed by the court in which the litigation was commenced, after the litigation has been finally determined. See, *Blacker v. Kitchen Bros. Hotel Co.*, 133 Neb. 66, 273 N.W. 836 (1937); *Summerville v. North Platte Valley Weather Control Dist.*, 171 Neb. 695, 107 N.W.2d 425 (1961). The rule has no application in this case.

The defendant contends that no fees are allowable

under the statute for services in this court but that if fees are allowable, the request should be made in this court.

The defendant relies upon *Northcutt v. Missouri P. R. Co.*, 100 Neb. 1, 158 N.W. 388 (1916), in which it was held that fees could not be recovered in this court under Rev. Stat. § 6063 (1913). *Kaneft v. Mutual Benefit Health & Accident Association*, 102 Neb. 87, 166 N.W. 121 (1918), also cited by the defendant, held that fees could not be recovered in this court under Rev. Stat. § 3212 (1913). In 1919 this section (now Neb. Rev. Stat. § 44-359 (Reissue 1978)) was amended to allow attorney fees on appeal to be awarded by the appellate court. See *Dairyland Ins. Co. v. Kammerer*, 213 Neb. 108, 327 N.W.2d 618 (1982).

In *Pieper v. City of Scottsbluff*, 176 Neb. 561, 126 N.W.2d 865 (1964), we held that a condemnee was entitled to an allowance for the services of his attorneys in this court under Neb. Rev. Stat. § 76-720 (Cum. Supp. 1963), even though the statute referred only to appeals from an award of the appraisers.

In marriage dissolution cases in which an allowance for attorney fees is made for services in this court, it has been the uniform practice to make the allowance in this court.

Neb. Ct. R. 14B(1)d (Rev. 1983) provides that "[a]ttorney fees and other fees and costs as awarded by the court" shall be taxed in the Supreme Court and itemized on the mandate.

We conclude that this court is the proper forum for the allowance of fees for the services of attorneys in this court. The judgment of the district court is affirmed.

AFFIRMED.

MARY ANN STEINAUER, APPELLEE, V. SARPY COUNTY, A POLITICAL SUBDIVISION, APPELLANT.
ERNEST STEINAUER, APPELLEE, V. SARPY COUNTY, A POLITICAL SUBDIVISION, APPELLANT.

353 N.W.2d 715

Filed July 6, 1984. Nos. 83-871, 83-872.

1. **Motor Vehicles: Negligence: Rules of the Road.** A driver is guilty of negligence as a matter of law if he fails to see one who is favored over him under the rules of the road.
2. **Motor Vehicles: Highways: Right-of-Way: Rules of the Road.** The driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway.
3. **Negligence.** Generally, one is contributorily negligent if (1) he breaches the duty imposed upon him by the law to protect himself from injury; (2) his actions concur and cooperate with actionable negligence of the defendant; and (3) his actions contribute to the injuries as a proximate cause.
4. **Motor Vehicles: Highways: Rules of the Road.** A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner; and until he has such warning, notice, or knowledge, he may govern his acts in accordance with such assumption.
5. _____: _____: _____. While the driver on a favored highway must keep a proper lookout, the driver with the right-of-way may nevertheless assume, until he has knowledge to the contrary, that the other vehicles will respect his legal right-of-way.
6. **Damages: Appeal and Error.** There is no formula for computing damages in a personal injury case, and the final verdict is usually made up from a number of factors. As a general rule, the law gives the trier of fact the right to determine the amount of recovery in such cases, and if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed.
7. _____: _____. In awarding damages for physical discomfort and mental anguish, the fact finder must rely upon the totality of the circumstances surrounding the incident. The credibility of the evidence and the witnesses and the weight to be given all of these factors rests in the sound discretion of the fact finder.
8. **Negligence: Damages.** A person who suffers personal injury because of the negligence of another is entitled to recover for the reasonable value of medical care and expenses incurred for the treatment of the injuries incurred to the time of trial, as well as the cost of those reasonably certain to be incurred in the future.

9. **Damages: Proof.** The amount of future medical expenses need not be established with mathematical certainty.
10. _____: _____. Proof of an actual loss of earnings or wages is not essential to recovery for loss of earning capacity. Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry.
11. **Evidence.** The triers of fact are not to take into account the effects of future taxation when awarding a judgment in a personal injury case.

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

Thomas J. Walsh and Betty L. Egan of Walsh, Walentine, Miles, Fullenkamp & O'Toole, and Patrick Kelly, Sarpy County Attorney, for appellant.

Gordon R. Hauptman and Steven D. Wolf of Westergren, Hauptman & O'Brien, P.C., for appellees.

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

KRIVOSHA, C.J.

Both of the cases involved in this appeal arise out of an automobile-truck collision which occurred on April 16, 1982, at the intersection of 36th Street and Platteview Road in Sarpy County, Nebraska. The suit brought by the appellee Ernest Steinauer, who was the driver of the automobile involved in the accident, is for the damages directly suffered by Steinauer. The suit brought by his wife, Mary Ann Steinauer, is for loss of consortium. With regard to Mr. Steinauer's case, the appellant, Sarpy County, which was at the time of the accident the owner of the truck and the employer of the driver of the truck, has assigned two errors. It claims that the court erred in failing to find that Ernest Steinauer was contributorily negligent and that such contributory negligence was a proximate cause or a proximately contributing cause of the accident, and that the judgment entered on behalf of Steinauer was

clearly exorbitant and excessive. With regard to the suit brought by Mrs. Steinauer, Sarpy County does not contend that the award given to her for loss of consortium was excessive, but it maintains that due to Mr. Steinauer's alleged contributory negligence, she is not entitled to recover at all. Sarpy County concedes that if Mr. Steinauer was not guilty of contributory negligence, then the award to Mrs. Steinauer was appropriate and no error exists. Under our standard of review we believe that the trial court was correct in finding that Mr. Steinauer was not guilty of contributory negligence which was either the proximate cause or a proximately contributing cause of the accident, and we believe that the trial court did not err in the amount of its award. For these reasons the judgment of the trial court in both actions is affirmed.

The evidence discloses that on April 16, 1982, John Nielsen, a Sarpy County employee, was operating a 1976 Mack dump truck owned by the Sarpy County Highway Department. At the time of the collision the truck was loaded with rock and displaced a total weight of 55,900 pounds.

At the intersection of 36th Street and Platteview Road, Platteview is protected by a stop sign. Nielsen was traveling north on 36th Street, and Steinauer, driving a two-door Chevrolet, was traveling west on Platteview Road. The evidence discloses that as Nielsen approached Platteview Road, he stopped, at least momentarily, and, observing no traffic on Platteview Road, including Mr. Steinauer who was clearly there, pulled into the intersection. The left front of the Steinauer vehicle and the right front of the truck collided, causing the truck to turn over onto its side. The front end of the Chevrolet was severely damaged. The evidence indicated that the collision occurred just to the north of the center of Platteview Road. As a result of the accident, Steinauer suffered multiple injuries, including sev-

eral fractures and, most seriously, a closed head injury.

Emergency rescue squads were called to the scene of the accident, and Mr. Steinauer was transferred from the accident scene to St. Joseph Hospital by helicopter, where he was treated in the emergency room. He remained in St. Joseph Hospital and received emergency treatment until June 3, 1982, at which time he was transferred to Immanuel Medical Center for rehabilitation. Mr. Steinauer remained in a semicomatose state during all of the time that he was being treated at Immanuel Medical Center, and, therefore, on October 5, 1982, he was transferred to Methodist Midtown Hospital, where he remained until January 25, 1983, when he was transferred back to Immanuel Medical Center, where intensive efforts at rehabilitation were commenced. In late January 1983 Mr. Steinauer made a sudden and drastic improvement in his awareness and function. He was no longer in a semicomatose condition, and it was for this reason he was transferred back to Immanuel Medical Center.

Despite Mr. Steinauer's continued improvement, most of his bodily functions have been severely impaired, resulting in total and permanent disability. Mr. Steinauer does not have the ability to control his swallowing reflexes, which has led to complications, and further has resulted in a requirement that he be continually fed through a tube inserted into an opening in his abdominal cavity which leads directly to his stomach. He also cannot control his speaking function and can only talk in gutteral sounds. He has very limited use of his right arm and hand and left hand, and can only perform very elementary and perfunctory hygiene tasks, such as shaving and brushing his teeth. Because of his limited ability to move, he has suffered continual problems associated with skin diseases and lung accumulations. He has

no control over his bowel or bladder and must be fitted with an external catheter.

On May 25, 1982, Mr. Steinauer filed a tort claim with Sarpy County. When the county had made no disposition of the claim within 6 months after its filing, Steinauer, as he was authorized by law, withdrew the claim by giving the county written notice and filed an action in the district court for Sarpy County, Nebraska. Sarpy County filed an amended answer in which it generally denied the allegations of the amended petition filed by Steinauer, and specifically alleged, by way of answer, that the injuries resulting from the accident were caused by the negligence and contributory negligence of Steinauer, which negligence was more than slight and sufficient to bar his recovery. Specifically, Sarpy County alleged that Steinauer was negligent in failing to stop his vehicle within the area comprising his range of vision; by traveling at a rate of speed that was imprudent under the then and there existing conditions; by failing to keep a proper lookout; by failing to keep his automobile under reasonable and proper control; and in failing to yield the right-of-way to the defendant's truck. Trial was had to the court without a jury, as is required in tort claim actions, see Neb. Rev. Stat. § 23-2406 (Reissue 1983), and on November 1, 1983, the trial court filed a memorandum opinion finding generally for the plaintiff and against Sarpy County. Specifically, the trial court, in its memorandum, found that

> the defendant had failed to prove by a preponderance of the evidence that the plaintiff was negligent in any of the particulars claimed against him by the defendant in paragraph three of its amended answer.
>
> The Court further finds that if there was any negligence on the part of the plaintiff, that it was not the proximate cause or a proximately contributing cause of the accident.

The trial court then set out the various factors which

should be considered in making an award in a case of this type, and without specifically allocating any amount to any factor, it awarded Mr. Steinauer $3.9 million in damages. In Mrs. Steinauer's case the trial court awarded her $275,000 in damages.

Before turning to the two assignments of error claimed by Sarpy County, we review the rules with regard to actions brought pursuant to the Political Subdivisions Tort Claims Act, so that we may properly consider this case pursuant to those rules. To begin with, the findings of the trial court are not to be disturbed on appeal unless clearly wrong. *Hume v. Otoe County*, 212 Neb. 616, 324 N.W.2d 810 (1982); *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 345 N.W.2d 12 (1984). Moreover, when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in its favor, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. See, *Brahatcek v. Millard School District*, 202 Neb. 86, 273 N.W.2d 680 (1979); *Lindgren v. City of Gering*, 206 Neb. 360, 292 N.W.2d 921 (1980). And, finally, this court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor, and, therefore, this court will give great weight to the trial court's judgment regarding credibility. See, *Paasch v. Brown*, 199 Neb. 683, 260 N.W.2d 612 (1977); *Ineba Ranch v. Cockerill*, 201 Neb. 592, 271 N.W.2d 44 (1978). With these rules in mind, then, we turn first to Sarpy County's contention that the trial court erred in not finding Mr. Steinauer guilty of contributory negligence *as a matter of law.*

Sarpy County does not dispute that its driver was negligent, nor, in light of the evidence, could it make such a claim. The truckdriver testified that he did not see the automobile until just prior to the impact, though the evidence would indicate that he should have been able to see Steinauer. This court has fre-

quently held that a driver is guilty of negligence as a matter of law if he fails to see one who is favored over him under the rules of the road. See *Bonnes v. Olson*, 197 Neb. 309, 248 N.W.2d 756 (1976). This holding is consistent with the rule that one is legally obligated to keep a proper lookout and that failure to look at a time when looking would have been effective is negligence as a matter of law. See, *Buresh v. George*, 149 Neb. 340, 31 N.W.2d 106 (1948); *Zeiger v. Farmers Co-op Assn.*, 212 Neb. 933, 327 N.W.2d 43 (1982). Futhermore, we have previously and frequently held that the driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway, and, after having stopped, such driver shall yield the right-of-way to any vehicle which is approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves his vehicle into or across such intersection. See *Hartman v. Brady*, 201 Neb. 558, 270 N.W.2d 909 (1978).

The question, then, is whether Mr. Steinauer, in failing to recognize that Nielsen would not honor the right-of-way and would not stop, was contributorily negligent. Generally, one is contributorily negligent if (1) he breaches the duty imposed upon him by the law to protect himself from injury; (2) his actions concur and cooperate with actionable negligence of the defendant; and (3) his actions contribute to the injuries as a proximate cause. See, *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984); *Mundy v. Davis*, 154 Neb. 423, 48 N.W.2d 394 (1951). In attempting to determine whether Mr. Steinauer was contributorily negligent in light of the elements comprising contributory negligence, we must also keep in mind that a traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner; and

until he has such warning, notice, or knowledge, he may govern his acts in accordance with such assumption. See, *Nichols v. McArdle*, 170 Neb. 382, 102 N.W.2d 848 (1960); *Steinberg v. Pape*, 181 Neb. 806, 150 N.W.2d 912 (1967). Therefore, while the driver on a favored highway must keep a proper lookout, the driver with the right-of-way may nevertheless assume, until he has knowledge to the contrary, that the other vehicles will respect his legal right-of-way. In view of the fact that this case was tried to the court without a jury, the judgment of the trial court can only be wrong if Mr. Steinauer was contributorily negligent as a matter of law. Even if the evidence were sufficient to create a question of fact, it was properly considered by the trial court. It appears to us, therefore, that the real issue in this case concerning the alleged contributory negligence on the part of Mr. Steinauer is whether the trial court was clearly wrong in apparently concluding that Mr. Steinauer was not placed on notice, or with the exercise of reasonable care should have been placed on notice, at a time and place when he might have taken some action to avert the accident. We believe that the evidence in this case supports the trial court's conclusion, and it therefore cannot, as a matter of law, be said to be in error.

As we have noted already, the accident occurred at the intersection of 36th Street and Platteview Road, just slightly north of the center of Platteview Road. Because Mr. Steinauer was not able to communicate and because the driver of the truck testified that he never saw Mr. Steinauer's automobile until just prior to the impact, the only eyewitness testimony regarding this matter was that of a witness, Mrs. Luttman, who was in a vehicle immediately behind the truck. She testified that the truck came to a momentary stop, with the front end of the truck *ahead* of the stop sign. As the truck started to move forward again, she observed the Steinauer vehicle traveling between 45 and 50 m.p.h.

At trial she testified that approximately 3 seconds elapsed between the time the truck started forward and the impact occurred. She had earlier testified in a deposition that the interval was between 5 and 10 seconds. However, she testified at trial that she had returned to the scene of the accident and more accurately measured the time and the distance, and she believed that she had been in error in her earlier testimony and that she was correct with regard to the 3-second interval. Her testimony formed part of the basis for the testimony of plaintiffs' reconstruction expert, Richard Large. As part of his investigation, he went out to the scene with Mrs. Luttman. At the scene Large took several measurements. These measurements indicate that the distance from the stop sign on 36th Street to the point of impact on Platteview Road is 50 feet. The distance from the south edge of Platteview Road to the point of impact is 13½ feet. Relying upon the eyewitness' testimony that the driver stopped the truck in front of the stop sign, Large assumed that the truck stopped 40 feet from the point of impact. Based upon this assumption, he testified that the 40-foot mark is 26½ feet from the edge of the road. Between the edge of the road and the point of impact, there is a distance of 13½ feet. Using certain acceleration tests, he estimated that it would take 3¼ seconds for the truck to reach the edge of the road from its stopped position 40 feet from the point of impact. It would then take the truck three-fourths of a second to travel from the edge of the road to the point of impact. Additionally, assuming a car speed of 50 m.p.h., the Steinauer vehicle would be 293 feet from the impact when the truck started out from the 4-second mark. Therefore, when the automobile was 100 feet from the point of impact, the truck still would not have reached the traveled portion of the highway and the impact would not occur for another 1.3 seconds. Additionally, Large testified concerning the braking distances possible for

Steinauer's vehicle. He testified that at 45 m.p.h. the vehicle would require 104 feet to stop on dry pavement. However, the patrolman investigating the accident testified that the pavement on the day of the accident was wet, and, therefore, Large concluded that the stopping distance on wet pavement was 135 feet. These distances exclude reaction time. He further testified that the minimum reaction time in a simple situation is three-fourths of a second. While Sarpy County's expert maintained that the truck was 50 feet away when it started its movement, rather than 40 feet away, there was no substantial dispute between the experts as to the times involved. Even assuming 50 feet as a starting point, the Steinauer vehicle, traveling at 50 m.p.h., would be 110 feet from the point of impact when the truck reached the edge of the road. While Sarpy County's expert testified that, in his opinion, Steinauer had time to turn north onto 36th Street in order to avoid the collision, the trial court chose to disbelieve this testimony, and we cannot say, as a matter of law, that it was wrong.

The trial court, as finder of fact, could find that Steinauer had every reason to believe that the driver of the truck could see him, because the intersection was virtually unobstructed. It also could find that Steinauer had the right to believe that the driver would yield to his right-of-way and would not move his vehicle across the road in front of him, even though it may have been slowly inching forward in front of the stop sign. The evidence as presented by the eyewitness, and as used by the plaintiffs' expert, was sufficient to permit a finder of fact to conclude that Mr. Steinauer could not reasonably anticipate that the truck was going to move in front of him until it was too late for him to stop within the distance available. Unless it can be said as a matter of law that Steinauer should in some manner have anticipated the truckdriver's negligence and, therefore, proceeded to take some precautionary move, it

is difficult to see how he can be said to have been contributorily negligent as a matter of law. Certainly, we are not prepared to say that the driver of a motor vehicle must slow down at every intersection in anticipation that the driver of the vehicle on the nonfavored street is about to commit a negligent act. We believe that the evidence was sufficient to permit the trial court to find that Steinauer was not guilty of contributory negligence as alleged by Sarpy County.

Having thus disposed of the issue of contributory negligence, we need not give any further consideration to the suit brought by Mrs. Steinauer. Sarpy County acknowledges that the award to her was not excessive, and, absent contributory negligence on the part of Mr. Steinauer, the judgment awarded to Mrs. Steinauer must be affirmed.

We then turn to the final issue before us, whether the award to Mr. Steinauer was excessive and, therefore, improper. While Sarpy County breaks the award down into various amounts and then argues that certain of the breakdowns are excessive, the trial court's award consisted of no such divisions. The award simply recognized the various factors which should be considered, all of which appear appropriate, and then awarded a total amount of $3.9 million. There is no breakdown given by the court as to how the damages were assessed; and while we know what factors the court considered in arriving at the damages, we do not know the exact amount assessed for any particular item making up the total. When Sarpy County, therefore, argues that any single item was excessive, it is engaging in pure speculation.

In *Schaefer v. McCreary*, 216 Neb. 739, 742, 345 N.W.2d 821, 824 (1984), we said:

> 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.

Nevertheless, we shall examine the claims made by Sarpy County, although, as we have already noted, we are unable to find in the record evidence that the trial court did anything which could be claimed as error. Sarpy County argues that the appropriate amount of special damages, absent pain and suffering, incurred by Mr. Steinauer as a result of its driver's negligence should not exceed $1.3 million. In arriving at this figure it excludes any sum for loss of earning capacity. Were we to accept Sarpy County's figures, we would then be required to say that a judgment for pain and suffering in this case in the amount of $2.6 million would be so excessive as to require this court to set it aside. We do not believe that there is any legal basis for us to do so. As we have already noted, we have many times held that there is no mathematical formula for translating pain and suffering into terms of dollars and cents. See *Zawada v. Anderson*, 181 Neb. 467, 149 N.W.2d 329 (1967). In awarding damages for physical discomfort and mental anguish, the fact finder must rely upon the totality of the circumstances surrounding the incident. The credibility of the evidence and the witnesses and the weight to be given all of these factors rest in the sound discretion of the fact finder. See *Bishop v. Bockoven, Inc.*, 199 Neb. 613, 260 N.W.2d 488 (1977). To be sure, at some point the verdict may shock the conscience and, therefore, obviously be excessive, but the record in this case does not produce that result. The evidence discloses that we have a 54-year-old man with a normal life expectancy of 20.47 years, absent his injury, and perhaps now an expectancy only of 10 to 15 years by reason of his injury. What is the value of those lost years directly attributable to the negligence of the county's driver? Moreover, the evi-

dence discloses that while Mr. Steinauer was unconscious when he reached the hospital, he did show some reflexive reaction to pain. He began to evidence some signs of improvement in about May or June of 1982, and he experienced reflexive reaction to pain. At times Mr. Steinauer has been agitated and has attempted to remove medical devices attached to his body. The evidence discloses that before the accident Mr. Steinauer was a hard-working man who wanted his children to obtain a college education. His wife could recall only taking two vacations during all the years of their marriage. He enjoyed fishing, hunting, and football. One of his daughters had recently given birth to his first grandchild, with whom Mr. Steinauer enjoyed playing before the accident. After the accident he was unable to play with his granddaughter. He may never taste food again, and he must be subjected to the indignity of being fed through a tube inserted into his stomach. He will be confined to a bed or wheelchair for the rest of his life, and he will never be able to walk, work, or care for himself again. Although he has learned to shave himself and brush his teeth, there is testimony that he has reached the maximum of improvement. He must rely on an external catheter to care for his basic bladder functions and the wearing of a diaper because of his inability to control his bowels. Therefore, even if Sarpy County's figures concerning everything but pain and suffering are adopted, to conclude that the judgment would be excessive is something which this court may not do.

However, an examination of the record discloses that there is at least a bona fide dispute regarding the specials which Sarpy County seeks to reduce, and which, if rejected, would have justified the trial court in awarding an amount greater than that suggested by Sarpy County. As we have already indicated, we have no way of knowing how the trial court arrived at its total verdict. To therefore attempt to sort out the figures requires us to engage

in gross speculation. Nevertheless, accepting the task, as urged by Sarpy County, discloses that the judgment of the trial court must be affirmed.

Sarpy County's first complaint is with regard to future medical expenses. This general complaint can be divided into two categories. One, Sarpy County contends that the verdict is excessive because improper figures were used for inflating and discounting the amount of future medical expenses. Second, Sarpy County argues that the items included in the figure for future medical expenses are based upon improper assumptions. There is no question that Mr. Steinauer is entitled to recover for future medical expenses. It is a fundamental principle of the law of damages that a person who suffers personal injury because of the negligence of another is entitled to recover for the reasonable value of medical care and expenses incurred for the treatment of the injuries incurred to the time of trial, as well as the cost of those reasonably certain to be incurred in the future. See *Stanek v. Swierczek*, 209 Neb. 357, 307 N.W.2d 807 (1981). Additionally, the amount of future medical expenses need not be established with mathematical certainty. In *Schaeffer v. McCreary*, 216 Neb. 739, 743, 345 N.W.2d 821, 824 (1984), we said:

> 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.

Relying upon our decision in *Colvin v. Powell & Co., Inc.*, 163 Neb. 112, 77 N.W.2d 900 (1956), Sarpy County argues that there was a duty on Mr. Steinauer's part to mitigate the cost of medical ex-

penses, both with regard to those incurred to the date of trial and those in the future. While we have previously held that a claimant in a personal injury accident may be required to mitigate the *effects* of his injury by seeking medical care and, if he fails to do so, complications arising because of his failure to seek care may not be compensated, see *Hurlbut v. Landgren*, 200 Neb. 413, 264 N.W.2d 174 (1978), we have never held that an individual must mitigate his *expenses* incurred for medical care by seeking less expensive care than is reasonable under the circumstances. In the instant case there is absolutely no evidence that Steinauer failed to do what the physicians required in order to lessen the effects of his injury. Once it is determined that all of the care was necessary and the costs incurred were reasonable, Mr. Steinauer owed no further duty or obligation to Sarpy County to mitigate the costs of such care by forgoing some of the care because Sarpy County thinks that it was not necessary.

Sarpy County argues that the amount of future medical expenses, the exact amount of which we have no way of determining, is too high. The county bases its claim upon testimony offered by its expert that the amount given by plaintiffs' expert was excessive, because if the money in that fund were put in government investments at the current interest rates, the interest would be sufficient to cover Mr. Steinauer's medical expenses. Furthermore, Sarpy County argues that in the first few years the amount of the fund would exceed the medical expenses and that, therefore, if these additional funds were invested it could eventually be used to pay the medical expenses not covered by the interest on the government investments. While there may be some basis for this argument, which a jury could believe, it appears from the record that there is simply a conflict in the evidence between the experts. Sarpy County argued that the rate of interest would exceed the cost of medical care. Plaintiffs' expert, Dr. Raw-

leigh Ralls, disagreed with that analysis, maintaining that based upon past history, the increase of medical care was greater than the increase in interest rates. Dr. Ralls determined that based upon historical factors during the last 15-year period, medical costs had increased at 3 percent more than interest rates. He used this fact to arrive at the amount of money necessary to provide for future medical expenses. Dr. Ralls also testified that the fund necessary for future medical expenses must be $2.4 million, while the county's expert maintains that a fund of $932,945 would be sufficient. This was a matter for the trier of fact to determine, and where, as here, there appears to be no abuse of discretion, but, rather, a choice of whom to believe, we cannot say that the trial court's determination was error.

A second factor which causes these figures to be so grossly disparate is based upon a conflict in the evidence as to the type of care to be given to Mr. Steinauer. Sarpy County argues that the level of care presently being given Mr. Steinauer will not be necessary in the future. Mr. Steinauer's evidence was to the contrary. This was another matter for the trial court to resolve.

There was likewise a conflict in the evidence as to Mr. Steinauer's life expectancy. There was, however, sufficient evidence to support a life expectancy from as little as 5 years to as much as 15 years, and, again, we do not know what amount of the total verdict the trial court attributed to this aspect.

Sarpy County also complained about the source of nursing care. Plaintiffs' economic expert based the cost of future nursing care on the use of a professional agency providing nursing care. Sarpy County argues that it should not be required to pay for such a service, which includes markup, but, rather, that Mr. Steinauer should be required to go into the market and hire his own nurse and nurse's aide in order to save Sarpy County money. There is no evidence, however, to indicate what that difference

would be, nor is there any evidence to indicate how Mr. Steinauer would be assured of constant care in the event that one of the nurses or nurse's aides hired wanted the day off or wanted to go on vacation or when one of the regular nurses became ill. The evidence was that a service would be responsible for all of these contingencies.

Sarpy County's final complaint regarding future health care concerns the projected cost of nursing care. Sarpy County contends the court ignored the fact that future estimates show problems in health and nursing care which would cause a decrease in the rise of such costs. This, again, is simply a conflict in the evidence and depends upon which expert the court believed.

The second area which Sarpy County argues was improperly awarded is with regard to future earnings. As we have continually pointed out, there is no way of knowing whether the court allowed any amount for future earnings. Nevertheless, we examine the argument as made by Sarpy County. There is no conflict regarding Mr. Steinauer's past wages. Plaintiffs' expert determined that if Mr. Steinauer retired at the age of 65, his future earnings had a value of $187,618.17. Sarpy County argues that the manner in which plaintiffs' expert arrived at this amount was incorrect. The expert took a historical approach to wages. He looked at the local wages and found their increase and then looked at the long-term government interest rate during the same period to determine a discount rate. He then applied the increase and the discount rate to arrive at the number given. Sarpy County argues that plaintiffs' expert should not have used a historical interest rate but, rather, should have used present interest rates for the purpose of discounting. Also, Sarpy County contends that this projection by plaintiffs' expert ignores the current condition in Mr. Steinauer's profession of bricklaying. And, finally,

Sarpy County argues that we should consider the effects of taxation on future earnings.

The first claim is merely another verse of the same song: a conflict in the evidence between two experts, neither being more right than the other. The second claim, concerning the expert's failure to take into account the nature of Mr. Steinauer's profession, while interesting, ignores how loss of future earnings are to be computed. It is not just the actual wages in the future for which compensation is awarded, but it is, as well, the loss of earning capacity or the ability to earn. In *Washington v. American Community Stores Corp.*, 196 Neb. 624, 629, 244 N.W.2d 286, 289 (1976), this court stated:

> Proof of an actual loss of earnings or wages is not essential to recovery for loss of earning capacity. [Citations omitted.] Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry.

The trier of fact could presume that if Mr. Steinauer were not able to continue working in the trade in which he was then engaged, everything else being equal, he could have, nevertheless, continued his ability to earn at some trade to age 65.

And, finally, with respect to the effect of taxation on an award in a case of this nature, we have already decided that the triers of fact are not to take into account the effects of future taxation when awarding damages in a personal injury case. See *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983).

Sarpy County also challenges the alleged one-time costs incurred, arguing that the amount of one-time costs should not exceed $117,667.50, while Mr. Steinauer's testimony established the amount to be $179,056.79. Once again, we are confronted with the difficult problem of determining which of the two figures the court in fact accepted in making its

award to Mr. Steinauer. Because there was no specific breakdown, to now determine what amount was awarded for such item would be mere speculation. We cannot simply reduce the total amount because of a conflict in the evidence when we do not know what figure the trial court used.

Whether we view the award in its entirety and accept Sarpy County's figures or we accept all of Mr. Steinauer's figures as produced by his experts, or we conclude that the trial court arrived at some middle ground, we are unable to say that the award is unsupported by the evidence or that it is so grossly excessive as to obviously be a product of passion and prejudice requiring a reversal. The amount of the award is large, but the nature of the injuries is equally large. Being unable to say as a matter of law that the award constituted an abuse of discretion and was, as a matter of law, excessive, we are required to affirm the judgment of the trial court. The judgment and order of the trial court are therefore in all respects affirmed.

AFFIRMED.

VINCE KIRBY, APPELLEE, V. DANIEL J. LISKA, APPELLANT.

351 N.W.2d 421

Filed July 6, 1984. No. 83-892.

1. **Attorney Fees.** A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
2. _____. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

Appeal from the District Court for Knox County: MARK J. FUHRMAN, Judge. Remittitur awarded, and cause remanded with directions.

Kenneth M. Olds of Olds, Swarts and Ensz, for appellant.

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

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

PER CURIAM.

This is an action to recover attorney fees. The plaintiff, Vince Kirby, was employed by the defendant, Daniel J. Liska, to represent him in a suit brought by his brothers to set aside a deed from his parents to 726 acres of land. The deed had been executed by the grantors while they were under conservatorship and patients in a rest home.

In the first trial the plaintiff relied on theories of an express contract and quantum meruit. Upon appeal we held that the record would not support the award of $65,340 on either theory and remanded the cause for further proceedings. *Kirby v. Liska*, 214 Neb. 356, 334 N.W.2d 179 (1984).

At the second trial the evidence from the first trial was received and both parties introduced additional evidence.

Kirby produced a timesheet put together in 1983 for the purpose of this litigation. It stated that he had spent 126 hours performing various activities related to the quiet title action. The timesheet attributed time spent to conferences, review of depositions, writing letters, research, filing pleadings, and other assorted tasks.

Kirby testified that when he undertook the representation, there was a motion for summary judgment pending. It was his opinion that "a hearing on the Motion for Summary Judgment would have been fatal to Danny's [Liska's] interest." Kirby testified that he was successful in getting the matter continued through the ruse of scheduling conflicts for about a year from the date the motion was filed. Kirby also testified that he convinced the attorney representing Liska's brothers that that attorney had

a conflict of interest and should withdraw from the case. Kirby testified that these two actions paved the way for the settlement.

The trial court found that the plaintiff should recover $22,500 for his services. The defendant has again appealed. The issue is whether the record will support the judgment.

The evidence shows that Kirby performed little of what is usually understood to be legal services. The case was at issue when he entered his appearance. The case was never tried, but a judgment quieting title in the defendant was entered as a result of a settlement agreement dated May 8, 1977. The record shows that the settlement was due in a large part to the attitude and efforts of the mother of the parties.

In our judgment a fee of $22,500 is clearly excessive under the facts of this case. Most of the tasks performed by Kirby required little, if any, specialized legal skill. The case involved no novel or difficult legal questions. Those which did require legal skill, for example, the filing of pleadings, were relatively uncomplicated matters. Kirby's contention that his actions which contributed to the settlement and warrant a fee of $22,500 cannot be countenanced. The actions taken by Kirby required but little legal skill, and some bordered on the unethical.

The evidence shows that a reasonable fee would be between $25 and $75 per hour for the time devoted to the case. We conclude that the record will not support an award of attorney fees in excess of $6,500, and a remittitur in that amount is awarded.

The cause is remanded and the plaintiff shall have 10 days after the filing of the mandate of this court in the trial court in which to file his consent to and acceptance of the remittitur. The judgment shall draw interest from the date the remittitur is accepted.

In the event the plaintiff fails to accept the remittitur, the judgment shall be vacated and the defendant granted a new trial.

All costs are taxed to the plaintiff.

REMITTITUR AWARDED, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, v. JON R. ERICKSON, APPELLANT.

351 N.W.2d 423

Filed July 6, 1984. No. 84-142.

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

Thomas M. Kenney, Douglas County Public Defender, and Victor Gutman, for appellant.

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

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

PER CURIAM.

Following a trial by jury, the defendant was found guilty of burglary, a Class III felony, and was sentenced to a term of imprisonment of 5 to 7 years. He has appealed to this court, assigning as the sole error the alleged excessiveness of his sentence when compared to those of his two codefendants.

The evidence clearly supports the verdict of guilty. As nearly as we can determine from the record, the degree of culpability of the three participants in this offense is equal. The codefendants surrendered to arrest without resistance. The defendant broke away from a civilian volunteer who tried to hold him, and made necessary the forcible restraint by a law enforcement officer.

The codefendants entered pleas of guilty; the defendant protested his innocence at all times. The prior criminal records of all three individuals are quite extensive, are nearly equal, and would support

sentences at least up to that imposed on the defendant.

The codefendants were each sentenced to terms of imprisonment of from 1 to 3 years. Defendant insists that under all the circumstances he should have received a sentence of no greater severity.

The defendant overlooks the fact that both codefendants entered pleas of guilty and fully admitted their involvement in the crime.

> It is proper for the court to grant charge and sentence concessions to defendants who plead guilty when the interest of the public in the effective administration of criminal justice would be served. A.B.A. Standards Relating to Pleas of Guilty, § 1.8, p. 8 (App. Dr., 1968).

State v. Black Bear, 187 Neb. 670, 673-74, 193 N.W.2d 563, 565-66 (1972).

Nevertheless, from our review of the record, we believe that the imparity of sentences in this case amounts to an abuse of discretion on the part of the trial court. The sentence of the district court is modified to one of imprisonment of not less than 3 nor more than 5 years.

AFFIRMED AS MODIFIED.

AIRPORT INN, INC., APPELLANT AND CROSS-APPELLEE, V. NEBRASKA EQUAL OPPORTUNITY COMMISSION, APPELLEE, AND MICHAEL SUMP, APPELLEE AND CROSS-APPELLANT.

353 N.W.2d 727

Filed July 13, 1984. No. 83-303.

1. **Equal Opportunity Commission: Appeal and Error.** On appeal of review by the district court of an order of the Nebraska Equal Opportunity Commission, this court will not disturb the district court's findings of fact if they are supported by substantial evidence. The court will, however, reach independent conclusions with respect to questions of law.

2. **Fair Employment Practice Act: Discrimination: Proof.** An individual case of discrimination based on the disparate treatment theory will usually be divided into three phases. First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry the burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.
3. **Fair Employment Practice Act: Damages.** Backpay awards under the Nebraska Fair Employment Practice Act must be reduced by earnings or amounts earnable with reasonable diligence by the person or persons discriminated against.
4. _____: _____. Once an unlawfully discharged employee produces evidence in support of his claim for backpay, contending that he was unable to find comparable work, the employer has the burden of showing that the discharged employee did not exercise reasonable diligence in mitigating his damages.
5. **Claims: Prejudgment Interest.** Prejudgment interest may be recovered on claims that are liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.
6. _____: _____. Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed.
7. **Fair Employment Practice Act: Prejudgment Interest: Damages.** Prejudgment interest is not generally allowed on backpay awards under the Nebraska Fair Employment Practice Act.
8. **Fair Employment Practice Act: Attorney Fees.** In any action or proceeding under the Nebraska Fair Employment Practice Act, the district court, in its discretion, may allow the prevailing party a reasonable attorney fee.
9. _____: _____. Unless there are special circumstances a prevailing plaintiff, under the Nebraska Fair Employment Practice Act, should be awarded a reasonable attorney fee for all stages of the proceedings.
10. **Fair Employment Practice Act: Damages.** Unemployment compensation benefits should be deducted from a backpay award under the Nebraska Fair Employment Practice Act.

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

Thomas C. Lansworth of Bauer, Galter & Geier, for appellant.

W. Michael Morrow of Hecht, Sweet, Alesio & Morrow, P.C., for appellee Sump.

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

PER CURIAM.

This is an appeal from an order of the district court for Lancaster County, which affirmed the decision of the Nebraska Equal Opportunity Commission (Commission) that appellant, Airport Inn, Inc., discriminated against the appellee Michael Sump because of his sex, in violation of the Nebraska Fair Employment Practice Act (NFEPA), Neb. Rev. Stat. §§ 48-1101 to 48-1125 (Reissue 1978). We affirm.

Section 48-1104 provides: "It shall be an unlawful employment practice for an employer: (1) . . . to discharge any individual . . . because of such individual's . . . sex . . . ."

Airport Inn's four assignments of error relate to the proposition that the district court's order was not supported by a preponderance of the evidence and/or was contrary to law. The appellee cross-appeals concerning the issues of the award of back-pay, attorney fees, and prejudgment interest.

Our scope of review is limited, inquiring only as to whether or not there is substantial evidence to support the district court's order. We do, however, make our own determination with respect to questions of law. *Ranger Division v. Bayne*, 214 Neb. 251, 333 N.W.2d 891 (1983); *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, *ante* p. 289, 348 N.W.2d 846 (1984).

The evidence most favorable to the appellee's position indicates that Airport Inn is a motel located in Lancaster County, Nebraska. A restaurant and a bar/lounge are located within the motel. Sump was

hired as a bartender by Airport Inn on October 23, 1976. His beginning wage was $2.75 per hour, and on December 1, 1976, he was given a raise to $3 per hour. Sump was also entitled to receive one free meal for each shift that he worked, the retail value of which was $3. Although we deal with the issue later in the opinion, Sump also contends he earned $50 per week in tips. During the period from January 26, 1977, to and including February 11, 1977, Sump worked 95.5 hours and received 12 free meals. Sump's employment at Airport Inn was terminated on February 14, 1977. Within 2 days after Sump's discharge, Airport Inn hired a female bartender to replace him.

On February 28, 1977, Sump filed a complaint with the Commission, contending that he was fired illegally by Airport Inn because Airport Inn was implementing a policy decision to have all female personnel working in the bar/lounge. Airport Inn asserted that Sump was terminated because he was an unsatisfactory employee.

After conciliation efforts failed a hearing was had before a hearing examiner appointed by the Commission. The hearing was concluded on September 13, 1978. After an unexplained and inexcusable delay of nearly 40 months, the hearing examiner filed his findings of fact, conclusions of law, and recommended an order which contained the following findings: (1) That a policy concerning an all-female bar staff did exist; (2) That such policy discriminated against Sump; (3) That Sump was terminated by Airport Inn without an adequate showing of a legitimate business necessity; (4) That the adoption of the policy concerning an all-female bar staff was the predominate reason for Sump's termination; and (5) That Sump was succeeded in his employment by a female. With respect to damages the hearing examiner found: (1) Sump was terminated in February 1977, and he did not obtain equal, alternative employment for a period of 230 days; (2)

While employed at Airport Inn, Sump's average rate of pay per day was $35.37, which resulted in total gross lost wages of $8,135.10; (3) Sump's total interim earnings, including unemployment compensation of $1,080, were $1,952.69; and (4) Sump's net loss was $6,182.41. The hearing examiner made no award of attorney fees, and he did not award Sump any prejudgment interest on the net loss. On March 5, 1982, the Commission entered its final order, in which it adopted in toto the hearing examiner's recommendations.

The district court, on appeal, held that "[t]he only portion of the [Commission's] order which the court finds not to be supported by a preponderance of the evidence is that which pertains to the computation of damages, based upon tips purportedly received by the claimant." The court went on to reduce Sump's backpay award to $4,695, to affirm the Commission's final order in all other respects, to award no prejudgment interest, and to require that each party pay its own costs and attorney fees.

Because the NFEPA is patterned from that part of the Civil Rights Act of 1964 contained in 42 U.S.C. §§ 2000e et seq. (1976), it is appropriate to look to federal court decisions construing similar and parent federal legislation. See, *Richards v. Omaha Public Schools*, 194 Neb. 463, 232 N.W.2d 29 (1975); *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, *ante* p. 289, 348 N.W.2d 846 (1984).

We begin our analysis by finding that the appellee did indeed establish, under the theory of disparate treatment, a prima facie case of sex discrimination. The appellee demonstrated, without rebuttal from Airport Inn: (1) That he was a male employee hired as a bartender by Airport Inn; (2) That he was discharged from that position; and (3) That shortly after his discharge, Airport Inn hired a female bartender to replace him. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

Once Sump established his prima facie case, Airport Inn had the burden to rebut the resulting inference of discriminatory intent, because, in light of the prima facie case, a trier of fact presumes that the employer's acts, "if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978). Airport Inn articulated the following reasons for Sump's discharge: (1) Unsatisfactory personal appearance and hygiene. This included improper dress, uncombed hair, a habit of chewing ice cubes and then throwing the ice back into the ice bin, and the use of a bar towel for a personal table napkin and then using the same towel to clean the bar area. (2) Failure to follow company rules and policy. This included eating meals at the bar instead of in the designated employee eating area, drinking in the bar when he was not "clocked out," refusing to wear a uniform, "not marketing drinks," not keeping the bar area neat and clean, and having bad customer relations.

Airport Inn set forth nondiscriminatory explanations "legally sufficient to justify a judgment for the [employer]"; therefore, it then became incumbent upon Sump "to demonstrate that the proffered reason[s] [were] not the true reason[s] for the employment decision." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255-56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). Sump "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation[s] [are] unworthy of credence." *Id.* at 256. Sump carried his burden of proof under either standard.

On February 22, 1977, Denise McConnell, Sump's immediate supervisor, gave Sump a letter of recommendation which stated: "To whom it may concern: Myke Sump was a [sic] honest, dependable,

sober bartender. His termanation [sic] was caused by a policy decision, uniforms were purchased for an all female bar." /s/ "Denise McConnell Bar Manager 2/22/77." McConnell's explanation for the letter was that Sump told her what to put in the letter and that she complied. Sump agreed that he had asked McConnell for the recommendation, but he denied that he had told her the contents. Even if Sump directed the contents of the letter, McConnell testified she was not coerced in any way to write the recommendation.

Roy Gentry, the general manager of Airport Inn at the time of Sump's discharge, also provided Sump with a letter of recommendation. The letter stated that Sump "was a dependable, honest and courteous person." Gentry also told Sump that Sump had been fired because of a policy change and an effort to "upgrade the bar." Gentry denied that there was a policy to hire an all-female bar staff.

Sump called three witnesses who were employees at Airport Inn when he was terminated. Each of the three witnesses testified that McConnell told them that Sump was terminated by Airport Inn because Gentry wanted an all-female bar staff. The witnesses also testified that Sump's appearance was good. Two of the witnesses testified that Sump was a good bartender; the third witness was not asked. It was undisputed that there was no dress code in effect for the bar staff while Sump was employed, save for the fact that he was not to wear blue jeans, a rule which Sump obeyed.

Sump testified that he was never told what to wear; he was never criticized about his appearance; he was never told where to eat; and he never told McConnell that he would not wear a uniform. (In fact, Sump testified that he did wear a uniform at two previous places of employment.) He testified that there were other bartenders who ate at the same place that he ate; McConnell would often compliment his work; and he was reprimanded only once

when he forgot to clock out before having a drink at the bar. Sump further denied chewing ice and throwing it back into the ice bin and using a bar towel as a personal napkin. Concerning the reason for discharge, Sump testified that both McConnell and Gentry expressed no dissatisfaction with his work and that McConnell told him that the letter of recommendation expressed why he was fired.

Resolution of these conflicting claims depended largely upon the credibility of witnesses. Not surprisingly, both the Commission and the district court, on appeal, chose to believe Sump's version. We find that not only is the appellee's position supported by substantial evidence but that the evidence is overwhelming.

Airport Inn further contends that Sump's award must be reduced because Sump did not use reasonable diligence in mitigating his damages. Backpay awards under the NFEPA must be reduced by "earnings or amounts earnable with reasonable diligence by the person or persons discriminated against . . . ." § 48-1119(3). Unquestionably, wrongfully discharged employees have an obligation to use reasonable efforts to mitigate their damages. The only issue is whether the district court's finding that Sump exercised reasonable diligence is supported by substantial evidence.

"A claimant is required to make only reasonable exertions to mitigate damages, and is not held to the highest standards of diligence. It does not compel him to be successful in mitigation. It requires only an honest, good faith effort." *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 938 (10th Cir. 1979). Once an unlawfully discharged employee produces evidence in support of his claim for backpay, contending that he was unable to find comparable work, the employer has the burden of showing that the discharged employee did not exercise reasonable diligence in mitigating his damages. *Di Salvo v. Chamber of Commerce, etc.*, 568 F.2d 593

(8th Cir. 1978); *Edwards v. School Bd. of City of Norton, Va.*, 658 F.2d 951 (4th Cir. 1981).

The record reveals that Sump made in excess of 25 contacts with prospective employers after his termination by Airport Inn and before finding comparable employment. The first contact was made immediately on the day that he was notified of his discharge. Sump registered with the Nebraska Job Service and also took the Nebraska Merit System employment examination. He worked part time on two jobs prior to obtaining equal, alternative employment on October 1, 1977. Airport Inn's assertion that Sump turned down a job offer is not supported by the record. With respect to the testimony by the appellant's expert witness that, in his opinion, Sump did not extend a reasonable effort to find another job, we need only state that his standard need not be the legal standard. We further note that triers of fact are not required to take the opinions of experts as binding on them. *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983); *Novotny v. Electric Hose & Rubber Co.*, 214 Neb. 216, 333 N.W.2d 406 (1983). The district court's finding that Sump exercised reasonable diligence to mitigate his damages is supported by substantial evidence.

We now turn to the appellee's cross-appeal. The first issue is the district court's reduction of Sump's backpay award. Sump contends that the district court erred in reducing his backpay award by the amount of tips Sump allegedly would have earned had he not been unlawfully discharged. Sump contends that it was inconsistent for the district court to exclude the tips which he purportedly would have earned at Airport Inn from the backpay award, but to include, as interim earnings, the tips that he received while employed at the Zoo Bar. Sump concedes that he did not report any of the tips received on his state or federal income tax returns. The only evidence concerning the amount of tips allegedly made at Airport Inn is Sump's own self-serving

statement. With respect to the inclusion of the tips earned at the Zoo Bar as interim earnings, but the exclusion of the tips allegedly made at the Airport Inn in Sump's backpay award, we note that the former testimony is a statement against interest, while the latter is not. The substantial evidence standard of review is indeed a double-edged sword.

Sump next contends that the district court erred in failing to award him prejudgment interest on the backpay award granted by the Commission. Although there are federal cases which hold both ways, see, *Taylor v. Philips Industries, Inc.*, 593 F.2d 783 (7th Cir. 1979) (prejudgment interest denied), and *Washington v. Kroger Co.*, 671 F.2d 1072 (8th Cir. 1982) (prejudgment interest awarded), the law in Nebraska is well settled that

> prejudgment interest may be recovered on claims that are liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. . . . Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed.

Classen v. Becton, Dickinson & Co., 214 Neb. 543, 545, 334 N.W.2d 644, 645 (1983).

An award of backpay, as the instant case aptly reveals, is not subject to exact computation. Many variables need be considered before the amount of the award, if any, is set. The district court did not err in denying Sump prejudgment interest.

Sump's final contention deals with an award of attorney fees to a prevailing plaintiff under the NFEPA. Sump contends that the district court abused its discretion in failing to award him attorney fees for prosecuting his case against Airport Inn. We agree.

Section 48-1120(6) states that "[i]n any action or

proceeding under sections 48-1101 to 48-1125, wherein an appeal is lodged in the district court, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs."

Section 48-1120(7) provides that even if no judicial review is sought, the enforcement of the Commission's order must be initiated through the district court. Consequently, the district court may, in its discretion, award the prevailing party attorney fees even if no judicial appeal is sought.

In construing 42 U.S.C. §§ 1988 and 2000e-5(k) (1976), the federal law after which the Nebraska provision is modeled, the U.S. Supreme Court held in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63, 100 S. Ct. 2024, 64 L. Ed. 2d 723 (1980), that "a prevailing plaintiff 'ordinarily is to be awarded attorney's fees in all but special circumstances.' " See, also, *Hameed v. Intern. Ass'n of Bridge, etc.*, 637 F.2d 506 (8th Cir. 1980); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Farmer v. Richman Gordman Stores, Inc.*, 203 Neb. 222, 278 N.W.2d 332 (1979); *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, *ante* p. 289, 348 N.W.2d 846 (1984).

The Court in *New York Gaslight Club, Inc. v. Carey*, *supra*, went on to hold that a prevailing plaintiff should be awarded reasonable attorney fees in all stages of the proceedings, including those undertaken in the various state administrative agencies such as the Commission. Under the NFEPA, Sump was required to begin his proceedings against Airport Inn through the Commission. The initial hearing was Sump's sole opportunity to build a record on which to base his claim. The use of competent counsel at this hearing is nearly indispensable. Sump was successful in his action before the Commission, and it was an abuse of discretion for the district court not to award attorney fees.

As to the proceeding in district court, Airport Inn asserts that it was "successful in that appeal" be-

cause that court reduced the Commission's award of backpay. Although we are cognizant of the fact that success can sometimes be measured in small ways, one must query as to the burden of this appeal. The appellee is hereby awarded $2,000 in attorney fees for the prosecution of his claim against Airport Inn.

Although not initially addressed by the parties in this case, this court asked the parties, upon reargument, to address the question that if employment discrimination is found, whether or not, under the NFEPA, unemployment compensation benefits should be deducted from the discriminatee's backpay award. Both the Commission and the district court deducted $1,080 that Sump received as interim unemployment compensation benefits from Sump's backpay award.

We have not passed on this question, but because the backpay provisions of the NFEPA are modeled after parent federal legislation, we look to several of the federal jurisdictions which have examined the issue. The split of authority in this area is conspicuously noticeable.

The third, fourth, ninth, and eleventh federal circuit courts recently have adopted the rule that unemployment compensation benefits should not be deducted from a discriminatee's backpay award. See, *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77 (3d Cir. 1983); *E. E. O. C. v. Ford Motor Co.*, 645 F.2d 183 (4th Cir. 1981), *rev'd on other grounds* 458 U.S. 219, 102 S. Ct. 3057, 73 L. Ed. 2d 721 (1982), *adhered to the original position on remand* 688 F.2d 951 (4th Cir. 1982); *Kauffman v. Sidereal Corp.*, 695 F.2d 343 (9th Cir. 1982); *Brown v. A.J. Gerrard Mfg. Co.*, 715 F.2d 1549 (11th Cir. 1983).

In other federal and state jurisdictions unemployment compensation benefits are automatically deducted from the backpay award, or the deduction is discretionary. See, *Merriweather v. Hercules, Inc.*, 631 F.2d 1161 (5th Cir. 1980); *Equal Emp. Op. Com'n v. Enterprise Ass'n Steamfitters*, 542 F.2d 579 (2d

Cir. 1976), *cert. denied* 430 U.S. 911, 97 S. Ct. 1186, 51 L. Ed. 2d 588 (1977); *Satty v. Nashville Gas Company*, 522 F.2d 850 (6th Cir. 1975) (without discussion), *aff'd in part, vacated in part on other grounds* 434 U.S. 136, 98 S. Ct. 347, 54 L. Ed. 2d 356 (1977); *Bowe v. Colgate-Palmolive Company*, 416 F.2d 711 (7th Cir. 1969); *Meyers v. I.T.T. Diversified Credit Corp.*, 527 F. Supp. 1064 (E.D. Mo. 1981); *Foods, Inc. v. Iowa Civil Rights Commission*, 318 N.W.2d 162 (Iowa 1982).

We are persuaded by the rationale in the decisions which hold that unemployment compensation benefits are to be deducted from a discriminatee's backpay award. The purpose of a backpay award is to place the discriminatee in the position he or she would have been in but for the discriminatory practice of the employer. Since unemployment compensation is funded by employer contributions, including Airport Inn, the benefits are not collateral. We conclude that the district court was correct in deducting the $1,080 Sump received in interim unemployment compensation benefits from his backpay award.

AFFIRMED AS MODIFIED.

WHITE, J., concurring in part, and in part dissenting.

I concur with the majority's result in this case, with the exception of that part of the opinion which holds that interim unemployment compensation benefits are to be deducted from a discriminatee's backpay award. The majority correctly notes that there is a conflict of authority as to whether an award of backpay should be reduced by unemployment compensation benefits received by the discriminatee. Unlike the majority, however, I am persuaded by the rationale in the recent decisions which hold that unemployment benefits are not to be deducted from a discriminatee's backpay award. The design and purpose of the Nebraska Fair Employment Practice Act is to eliminate discrimina-

tory employment practices, not to foster them. I would therefore hold that it was error, as a matter of law, to deduct the $1,080 Sump received in interim unemployment compensation benefits from his backpay award.

SHANAHAN and GRANT, JJ., join in this concurrence and dissent.

RONALD R. BENSON, APPELLANT, V. BARNES & BARNES TRUCKING, DEFENDANT AND THIRD-PARTY PLAINTIFF, NEBRASKA SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLEES.

354 N.W.2d 127

Filed July 13, 1984. No. 83-400.

1. **Workmen's Compensation.** Where an injury arising out of and in the course of employment combines with a preexisting condition to produce disability, though absent the preexisting condition no disability would have resulted, recovery can be had by the employee.
2. **Workmen's Compensation: Second Injury Fund.** The burden of proof necessary to establish apportionment under Neb. Rev. Stat. § 48-128 (Reissue 1978), the Second Injury Fund statute, is upon the employer who seeks the benefits of that statute.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Larry R. Taylor of Taylor, Fabian, Thielen & Thielen, for appellant.

William J. Dunn and Larry E. Welch of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee Barnes & Barnes Trucking.

Paul L. Douglas, Attorney General, and Martel J. Bundy, for appellee Second Injury Fund.

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

KRIVOSHA, C.J.

The appellant, Ronald R. Benson, an employee of

the appellee Barnes & Barnes Trucking (employer), appeals from an order entered by a three-judge panel of the Nebraska Workmen's Compensation Court which, on rehearing, reversed an earlier award entered by a single judge of the Nebraska Workmen's Compensation Court. Employer had impleaded the Nebraska Second Injury Fund, which likewise was found by the three-judge panel not to be liable to the employee. For reasons more particularly set out hereinafter, we believe that the order of the three-judge panel must be in part affirmed and in part reversed.

The transcript discloses that on June 8, 1982, Benson filed a petition in the Nebraska Workmen's Compensation Court, alleging that on July 25, 1980, while in the employment of Barnes & Barnes Trucking, he sustained an injury in an accident arising out of and in the course of his employment. Specifically, Benson alleged that while he was unloading 100-pound bags of potatoes from a truck, he stumbled over a pallet and fell backwards with a bag of potatoes. The employer filed an answer admitting that Benson was one of its employees on July 25, 1980, and that, based upon the representations made by Benson, the employer has paid to employee temporary total disability benefits for 83 weeks at the rate of $180 per week for the period October 3, 1980, through May 6, 1982, for a total of $14,940; and, further, that it has paid permanent partial disability benefits for 5 weeks at the rate of $4.63 per week, for a total of $23.15, that "it continues to pay permanent partial disability at said rate," and that it has paid medical expenses on behalf of the employee in the amount of $18,555.09. The employer denied each and every other allegation of the petition, and alleged that any disability which Benson had at the time of the filing of the answer was the result of a deteriorating condition preexisting the alleged accident. By way of further answer the employer alleged that if indeed the employee was entitled to any further compensation

or medical expense, such claim was a claim against the Second Injury Fund. The Second Injury Fund also filed an answer generally denying all of the allegations of the employee's petition and praying that the employee be placed on strict proof.

The single-judge compensation court found that the employee had established by sufficient proof that he was totally disabled and therefore entitled to an award. In its order the court divided the responsibility for compensation between the employer and the Second Injury Fund, 15 percent and 85 percent, respectively. It was from this order that the Second Injury Fund appealed; the employer elected not to appeal. On rehearing, the three-judge panel dismissed Benson's petition because it found that he had failed to prove by expert medical testimony, with sufficient certainty, that the present disability was caused by the accident which allegedly occurred on July 25, 1980. Apparently, the three-judge panel placed both the burden of proving that an accident or injury, arising out of and in the course of the employee's employment, had occurred and the burden of proving the liability of the Second Injury Fund, as though they were interrelated, upon the employee. We believe that, in so doing, the three-judge panel committed error. It appears to us that there are really two separate issues involved in this case. The first issue, raised by the employee, involves the question of whether the employee's current condition is as a result of an accident which occurred on July 25, 1980, and which accident arose out of and in the course of employee's employment. The second issue is whether the Second Injury Fund is liable for some part of the injury and resulting disability. These issues are separate and distinct and should be so viewed.

We turn, then, to what we perceive to be the first issue: Did Benson, on July 25, 1980, suffer a personal injury caused by an accident arising out of and in the course of his employment for which he is

entitled to compensation pursuant to the Nebraska workmen's compensation law? To answer this question it is necessary that we review the facts. The record discloses that prior to Benson's employment by Barnes & Barnes, Benson was employed by Missouri River Industries, Inc. On January 31, 1977, while its employee, he slipped and fell on the ice and a 2,400-pound cart of meat, which he was pulling, ran over him. As a result of the accident, he injured his back. In July of 1977 Benson underwent back surgery performed by Dr. William Smith, an orthopedic surgeon. The surgery consisted of a laminectomy on the left side at the L4-5 space. Following the surgery, the plaintiff returned to work with instructions to lift no more than 20 pounds. On February 26, 1978, Benson again slipped on a piece of cardboard and fell. In March of 1978 Dr. Smith again performed a laminectomy at the L4-5 space, this time on the right side. Following these two incidents, in September of 1978, Benson entered into a lump sum settlement with his then employer, based upon a finding that Benson had sustained a 37.5 percent disability to the body as a whole. Although he continued to experience some back pain, Benson worked at a series of truck driving jobs, none of which involved lifting.

Then, on July 25, 1980, while in the employ of Barnes & Barnes Trucking, Benson tripped on a pallet while unloading a truck and fell with a 100-pound sack of potatoes. Two days after the incident, Benson was treated by Dr. Smith in the emergency room at Methodist Hospital in Omaha, Nebraska, and was again seen and treated by Dr. Smith in August and September of 1980. Benson continued to work; however, the work Benson did was with the assistance of his wife, who also was a truckdriver. On October 3, 1980, the record reflects that Benson simply collapsed when his "legs gave out," and he fell to the floor. There was no new incident which precipitated that fall as reflected by the

record. Following this October incident, Dr. Smith once again performed a laminectomy on the L4-5 space, again on the left side, during which he removed degenerated disk material. Everyone agrees that Benson has not worked again since October 3, 1980.

While home recovering, Benson suffered two further accidents. In December 1980 he fell down a flight of stairs in his home. As a result of this accident, Benson was once more hospitalized, in February of 1981, and in July of 1981 was again operated on by Dr. Smith, at which time Dr. Smith performed a fusion to eliminate motion at L4-5 and L5-S1. Then, in October of 1981, Benson again fell down a flight of stairs in his home, and in March of 1982 a double laminectomy was performed at the L4-5 and L5-S1 spaces on the right side. Benson contended that these subsequent falls were caused by reason of his inability to walk properly and that his inability to walk properly related back to the injury which occurred on July 25, 1980, and the subsequent surgery which was necessitated by that accident.

While we recognize that in reviewing the judgment of the compensation court after rehearing, we must keep in mind that its findings have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong, *Taylor v. Benton*, 205 Neb. 203, 286 N.W.2d 755 (1980), we are also aware of the fact that if the judgment and order of the court is not supported by the evidence, we are required to reverse it. Neb. Rev. Stat. § 48-185 (Reissue 1978). We believe such to be the case here with regard to the question of whether Benson suffered an accident arising out of and in the course of his employment for which he is entitled to compensation. The burden of proving that he suffered an accident arising out of and in the course of his employment, entitling him to compensation, is unquestionably on the employee. In *Novotny v. Electric Hose & Rubber Co.*, 214 Neb. 216, 219, 333 N.W.2d 406, 409 (1983), we said:

> Under the Nebraska Workmen's Compensation Act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected and unforeseen injury was in fact caused by the employment. There is no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment.

See, also, *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 272 N.W.2d 372 (1978); *Randall v. Safeway Stores*, 215 Neb. 877, 341 N.W.2d 345 (1983). And we acknowledge that where there is knowledge of a preexisting condition, the claimant carries a greater burden of proof. In *Engel v. Nebraska Methodist Hospital*, 209 Neb. 878, 881, 312 N.W.2d 281, 284 (1981), we said: "The employee must prove the injury was not the result of the normal progression of his preexisting condition which would have been sustained even in the absence of the accident." We went on to say at 883, 312 N.W.2d at 285: "The question simply is whether the plaintiff suffered an injury arising out of and in the course of his employment which aggravated the preexisting condition and resulted in the disability."

In light of these rules it appears to us that Benson has sustained his burden. No one, including Benson's employer, seriously disputes that he suffered an accident on July 25, 1980, when he tripped over a pallet and fell with a 100-pound bag of potatoes. Moreover, no one disputes that Benson is currently totally disabled. It appears to us that it is by reason of the employer having injected the Second Injury Fund into the case that confusion as to the employee's burden has occurred. The employer argues that the medical testimony produced by Benson was insufficient to establish causation. We do not read the record that way.

On direct examination Dr. Smith, by deposition, was asked whether he had an opinion as to the cause of Benson's disability. He said that he did, and

when asked to give his opinion, testified as follows: "The disability that he has now is from the multiple surgeries that he's had and the disc herniations, and the rating that I would tie him to now is a culmination of all of these things, the recurrent injuries that he had and the subsequent surgeries." The record makes clear that the injury sustained in the July 1980 accident required surgery in October 1980. Dr. Smith candidly admitted that there was no way he could specifically separate one from the other, because the current condition was "kind of a cumulating effect." The three-judge panel concluded that Dr. Smith's testimony was speculative in nature and was insufficient to establish causation. We do not believe that to be the case.

Unlike *Taylor v. Benton*, *supra*, where there was evidence from which the three-judge panel could believe that even absent an alleged accident which arose out of and in the course of Taylor's employment, she nevertheless would have sustained the difficulty she in fact encountered and would have required the surgery which was performed, the evidence in this case is otherwise. Dr. Smith was not vague about the cause of Benson's total disability. He was quite specific. He said that it was the accumulation of the various injuries. That is to say, that by reason of a preexisting condition aggravated by a subsequent injury, requiring several operations, Benson was now totally disabled. There is nothing vague or indefinite about this testimony, nor is the testimony insufficient to entitle the employee to recover. For reasons known only to the employer, no expert evidence was tendered by the employer to contradict anything said by Dr. Smith. No effort was made to show that notwithstanding the second injury, Benson would have suffered whatever difficulty he ultimately suffered, and even absent the second injury, would have required the subsequent surgery and would have ultimately been totally disabled. We have never held that an injury

made worse by reason of a preexisting condition prevents an employee from receiving compensation. Quite to the contrary, we have consistently held that where an injury arising out of and in the course of employment combines with a preexisting condition to produce disability, though absent the preexisting condition no disability would have resulted, recovery can be had by the employee. See, *Chatt v. Massman Construction Co.*, 138 Neb. 288, 293 N.W. 105 (1940); *Maul v. Iowa-Nebraska Light & Power Co.*, 137 Neb. 128, 288 N.W. 532 (1939); *Dymak v. Haskins Bros. & Co.*, 132 Neb. 308, 271 N.W. 860 (1937). Once Benson established that he suffered an injury arising out of and in the course of his employment, which, together with a preexisting condition, caused his permanent and total disability, he satisfied his burden of proof. If the employer wished to show that this condition would have prevailed, notwithstanding the intervening accident, the burden was upon the employer to do so.

Recently, in the case of *White v. Western Commodities, Inc.*, 207 Neb. 75, 295 N.W.2d 704 (1980), we were confronted with a somewhat similar situation. There, the compensation court *allowed* recovery, notwithstanding the fact that the physician was unable to separate the extent of disability between an earlier service-connected disability and an employment accident. When specifically asked to separate the two, the doctor testified, "I can't separate the two." *Id.* at 84, 295 N.W.2d at 710. And, in affirming the compensation court, we noted at 86, 295 N.W.2d at 711:

> "The primary purpose of the workmen's compensation act is to insure an employee against accidental injury arising out of and in the course of his employment. To accomplish this purpose the act should be liberally construed, not to find that liability exists without the required quantum of proof, but to include within the protection of the act by liberal interpretation all injuries

> arising out of and in the course of the employment which the act does not clearly exclude. A strict interpretation should not be resorted to in order to accomplish such exclusion."

By dismissing the plaintiff's petition in its entirety, the three-judge panel found, in effect, that Benson had failed to prove that he was entitled to *any* compensation for medical expenses, including the substantial sum which the employer had already paid to him. While the payment by the employer does not, in and of itself, constitute an admission, nevertheless, it is difficult to perceive how the three-judge panel could find that Benson had not suffered any compensable injury or be entitled to any medical expense by reason of his fall on July 25, 1980. The evidence clearly established that this fall was compensable in some degree and, when combined with his preexisting condition, necessitated the subsequent surgery and caused the ultimate disability.

One may argue that the subsequent falls down the stairs, resulting in further disability and expense, should not be treated as a part of the accident which occurred on July 25, 1980. The record is clear, however, and the employer sought to introduce no evidence to contradict the record to this effect, that as of October 1980, Benson was already totally and permanently disabled and that his inability to properly maneuver in 1980 and 1981 was the cause of his falling down the stairs. If such was not the case, then the employer had some burden to introduce contrary evidence. The compensation court, therefore, erred in not finding that Benson had met his burden of proof and that he was entitled, at that point, to be compensated.

The second issue which must then be considered is the liability of the Second Injury Fund, if any, and, specifically, the question of who has the burden of proof with regard to this issue. While it appears that we have never before had an occasion to pass upon this question, it further appears clear to us that

a reading of the statute imposes the burden upon the employer for whose benefit the Second Injury Fund was principally created. Neb. Rev. Stat. § 48-128 (Reissue 1978) provides in part:

> If an employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, which is or is likely to be a hindrance or obstacle to his obtaining employment or obtaining reemployment if the employee should become unemployed and which was known to the employer prior to the occurrence of a subsequent compensable injury, receives a subsequent compensable injury resulting in additional permanent partial or in permanent total disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself; and if the employee is entitled to receive compensation on the basis of the combined disabilities, the *employer* at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability, and for the additional disability the employee shall be compensated out of a special trust fund created for that purpose, which sum so set aside shall be known as the Second Injury Fund.

(Emphasis supplied.) The purpose of the statute is clear. If an employer, knowing that an employee has a preexisting condition, agrees nevertheless to employ the individual and the employee subsequently suffers a second injury which, but for the preexisting condition, would have produced a lesser degree of injury and disability and, therefore, a smaller payment by the employer, then the employer is only required to pay for that portion of the total injury which would have occurred without the preexisting condition. The balance is to be paid out

of the Second Injury Fund. It is, therefore, in the interests of the employer to establish that the extent of disability now experienced by the employee was increased by the preexisting condition and, therefore, the employer should only be required to pay for a proportion of the disability.

As we have already noted, an employee is entitled to full compensation, notwithstanding the fact that his present disability is the result of an aggravated preexisting condition. Absent the provisions of § 48-128, an employer would be liable for all of the injury. Therefore, the general rules with regard to burden of proof seem to demand that the burden of proving apportionment between the portion of the injury for which the employer is liable and the portion for which the Second Injury Fund is liable must be on the employer. The employee is not interested in who pays him the money, so long as he receives it. And he is entitled to receive compensation notwithstanding the existence of a preexisting condition. To therefore impose upon the employee the burden of proving both that he suffered an accident arising out of and in the course of his employment and also what proportion should be paid by the employer and what portion by the Second Injury Fund is to impose upon the employee a burden which should not be placed on him.

Just noting how the Second Injury Fund is made a party to this case should make it clear as to where the burden lies. It was not Benson who made the Second Injury Fund a party to this action but, rather, the employer who did so, saying, in effect, that if there is liability on the employer, then a portion of it should be paid by the Second Injury Fund. And, in fact, when the single-judge court entered an award assessing liability to the employer in the amount of 15 percent and liability to the Second Injury Fund in the amount of 85 percent, the employer chose not to appeal. The employer's joining of the Second Injury Fund is in every respect akin to mak-

ing the Second Injury Fund a third-party defendant, and the rules with regard to third-party practice should apply here as everywhere else. See *Mobil Oil Corp. v. Grantham*, 200 Neb. 782, 265 N.W.2d 669 (1978), in which this court held that a defendant who cross-claims has the burden of proving the facts necessary to recover on its cross-claim. The burden of proof is generally upon the party who, absent meeting his burden, is not entitled to relief. *Empire State Building Co. v. Bryde*, 211 Neb. 184, 318 N.W.2d 65 (1982). In the instant case it is the employer who will suffer if evidence of apportionment is not introduced, and, therefore, it is the employer who should assume the burden of proving such facts. We therefore hold that the burden of proof necessary to establish apportionment under § 48-128, the Second Injury Fund statute, is upon the employer who seeks the benefits of that statute. See, *Masotto v. Atlantic & Pac. Tea Co.*, 70 A.D.2d 714, 416 N.Y.S.2d 433 (1979); *Texas Employers' Ins. Ass'n v. Haunschild*, 527 S.W.2d 270 (Tex. Civ. App. 1975); *Scott v. Day and Zimmerman, Inc.*, 215 Kan. 782, 529 P.2d 679 (1974). The three-judge panel was correct in determining that the employer had failed to prove apportionment and, therefore, should have dismissed the petition against the Second Injury Fund. It committed error, however, in not entering an award for Benson based upon the evidence. The judgment of the three-judge panel of the compensation court is therefore affirmed insofar as it found the Nebraska Second Injury Fund not liable in this case and is reversed and remanded with directions to enter an award on behalf of Benson consistent with this opinion.

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

DAVID S. BLANCHARD, APPELLANT, V. CONSTANCE B. WHITE, PERSONAL REPRESENTATIVE OF THE ESTATE OF MILDRED G. BLANCHARD, DECEASED, APPELLEE.

351 N.W.2d 707

Filed July 13, 1984. No. 83-805.

1. **Contracts: Property: Consideration: Trusts.** Generally, an agreement to devise and bequeath property is, where supported by consideration, valid and enforceable. In such a case equity will impress a trust upon the property, which trust will follow it into the hands of the personal representative of the promisor or into the hands of a grantee who has not given consideration for the conveyance.
2. **Demurrer: Pleadings.** A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
3. _____: _____. If a petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action.
4. **Contracts: Consideration.** There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee.
5. **Contracts: Consideration: Pleadings.** In an action on a contract the absence of consideration is an affirmative defense to be set out in the answer.
6. **Pleadings.** Matter is irrelevant in a pleading which has no bearing upon the subject matter of the controversy, and which cannot affect the decision of the court.

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

Michael R. Snyder of Tvrdik, Brandt & Snyder, and Stephen G. Lowe of McMullen and Lowe, for appellant.

C. Russell Mattson of Mattson, Ricketts, Davies, Stewart, Calkins & Duxbury, for appellee.

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

HASTINGS, J.

This was an action brought by David S. Blanchard,

as a third-party beneficiary, seeking an injunction, a constructive trust, and specific performance for breach of a written contract to make a will. The action, filed against the personal representative of the estate of the plaintiff's stepmother, sought to enforce a memorandum executed by the plaintiff's father, Charles A. Blanchard, and his stepmother, Mildred G. Blanchard, in which Mildred agreed to make a codicil to her will leaving to the plaintiff the residue remaining at her death of property devised to her by Charles, her husband, under a will executed the same day, February 25, 1972.

After the trial court sustained a motion to strike portions of the plaintiff's petition, an amended petition was filed, to which the defendant demurred. The district court sustained the defendant's demurrer and found the memorandum identified in the pleadings to be a void postnuptial contract due to noncompliance with the acknowledgment provision of Neb. Rev. Stat. § 30-106 (Cum. Supp. 1969), rather than a contract to make a will.

The district court further found that the petition did not allege that mutual or reciprocal wills existed and that since Charles A. Blanchard's will gave to Mildred what would have been hers legally upon his death, there was no consideration for Mildred's promise to make a codicil. Upon the plaintiff's refusal to plead further, plaintiff's amended petition was dismissed and this appeal followed.

In his appeal to this court the plaintiff assigns as error: (1) The sustaining of the motion to strike the allegations of the petition relating to joint tenancy property received by defendant's decedent; and (2) The sustaining of the defendant's demurrer to the amended petition, because the court erred in finding § 30-106, the postnuptial statute, to be applicable and that the contract to make a will was not supported by consideration.

Charles A. Blanchard executed his will on February 25, 1972, giving one-fourth of his entire estate to

his wife, Mildred G. Blanchard. On the same day his will was executed, Charles and Mildred executed the memorandum agreement which provided in part:

> Whereas, Charles A. Blanchard has on this day made a last will and testament in which he gives to Mildred Blanchard one-fourth of his estate; and,
>
> Whereas, Mildred Blanchard desires that she retain the use of said one-fourth of the estate of Charles Blanchard only during the remainder of her natural life and that any residue thereof remaining shall go to David Blanchard, a son of Charles A. Blanchard, or his heirs, upon the death of Mildred Blanchard:
>
> Now, therefore, it is stipulated that in the event of the death of Charles A. Blanchard, Mildred Blanchard will make a codicil to her last will and testament providing that upon her death any residue remaining of the property willed to her by Charles A. Blanchard shall go to David Blanchard, his son, or to the heirs of David Blanchard.

The memorandum agreement was signed by Charles and Mildred Blanchard and one witness. Charles died June 29, 1972, and his will was admitted to probate. Mildred received $7,500 in cash and 11,250.0225 shares of Affiliated Fund Investment Trust. On March 18, 1980, Mildred died testate, leaving a will with two codicils, but no provision was made for the plaintiff.

It is the rule of law that an agreement to devise and bequeath property is, where supported by consideration, valid and enforceable. In such a case equity will impress a trust upon the property, which trust will follow it into the hands of the personal representative of the promisor or into the hands of a grantee who has not given consideration for the conveyance. *Allen v. Mayo*, 203 Neb. 602, 279 N.W.2d 617 (1979).

A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. On reviewing the sustaining of a demurrer, this court must treat as undisputed the facts as alleged in the petition. *Philp v. First Nat. Bank & Trust Co.*, 212 Neb. 791, 326 N.W.2d 48 (1982).

In the present case the trial court concluded that if the memorandum agreement was a postnuptial agreement, it was void because not acknowledged as required by § 30-106. That section provides in part:

> A man or woman may also bar his or her right to inherit *part or all of the lands* of his or her husband or wife by a contract . . . [which] shall be in writing signed by both of the parties to such marriage and acknowledged in the manner required by law for the conveyance of real estate . . . .

(Emphasis supplied.)

This statute, which was repealed in 1974, refers to lands. The property here in dispute is all personal property. Therefore, although we do not believe that it was a postnuptial agreement, we are convinced that the postnuptial statute does not in any event apply in this instance.

It was the finding of the trial court that the memorandum failed as a contract to make a will because of an absence of consideration. On review of the pleadings the amended petition alleged the execution of the last will and testament by Charles A. Blanchard was consideration for the execution of the contract by Mildred G. Blanchard. It is the rule that contracts for testamentary or similar disposition of property must, like other contracts, be supported by a sufficient valid consideration. *Allen v. Mayo, supra*; *In re Estate of Nelson*, 127 Neb. 563, 256 N.W. 27 (1934).

Also, if a petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not

demurrable upon the ground that it does not state facts sufficient to constitute a cause of action. *Philp v. First Nat. Bank & Trust Co.*, *supra*.

In the present case the trial court was correct to note that this was not a situation where mutual wills existed with mutual promises by the husband and wife, amounting to sufficient consideration. But, just because the wills were not mutual and did not contain mutual promises, that does not eliminate the possibility that consideration may have been present to support a valid contract.

There is a sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. A benefit need not necessarily accrue to the promisor if a detriment to the promisee is present, and there is a consideration if the promisee does anything legal which he is not bound to do or refrains from doing anything which he has a right to do, whether or not there is any actual loss or detriment to him or actual benefit to the promisor. *Omaha Nat. Bank v. Goddard Realty, Inc.*, 210 Neb. 604, 316 N.W.2d 306 (1982); *Phelps v. Blome*, 150 Neb. 547, 35 N.W.2d 93 (1948).

The amended petition simply alleged the execution of the last will and testament by Charles A. Blanchard was consideration for the execution of the contract. The defendant insists that her decedent got nothing more from the estate than she would have been entitled to had she renounced the will and elected to take her statutory share. The fact remains, however, that she did not choose to do so.

As the plaintiff argues in his brief, his father executed the will in favor of Mildred, appointing her as executrix, for which services she was entitled to and did receive a fee, and that the father preserved his estate intact and left his will unchanged and unrevoked until his death, even though he was not legally bound to do so. The general demurrer admits all facts and reasonable inferences to be drawn from facts properly pleaded.

Also, in an action on contract, the absence of consideration is an affirmative defense to be set out in the answer, see *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982), and the issue of consideration should not be the subject of a demurrer.

In reviewing the motion to strike certain language within the initial petition, Neb. Rev. Stat. § 25-833 (Reissue 1979) provides in part: "If redundant, scandalous or irrelevant matter be inserted in any pleading, it may be stricken out on motion of the party prejudiced thereby . . . ."

In *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 696, 77 N.W.2d 215, 224 (1956), this court stated: " 'Matter is irrelevant in a pleading which has no bearing upon the subject matter of the controversy, and cannot affect the decision of the court. . . .' "

The stricken allegations of the plaintiff's petition relate to two joint tenancy accounts owned by Charles and Mildred Blanchard. We believe the trial court was correct to sustain the motion to strike, because the joint accounts are separate from the probate property received by Mildred, and separate from the property referred to in the memorandum which the plaintiff seeks to enforce. Also, the joint accounts are not referred to as consideration in the pleadings, although the plaintiff now contends the accounts might be considered sufficient consideration.

The action of the district court in sustaining the general demurrer of the defendant and dismissing the plaintiff's amended petition was erroneous. The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GRANT, J., disqualified.

IN RE INTEREST OF D.R. AND S.B., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. D.R. ET AL., APPELLANTS.

351 N.W.2d 424

Filed July 13, 1984. No. 83-811.

1. **Parental Rights: Appeal and Error.** An appeal from an order terminating parental rights is reviewed de novo upon the record in this court.
2. **Parental Rights.** An order terminating parental rights must be supported by clear and convincing evidence.
3. _____. Where there are reasonable grounds to believe that the conditions giving rise to the parents' inability to care for their children will continue for a prolonged and indefinite period, the parental rights may be terminated when such action is in the best interests of the children.

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

Donald W. Walters, for appellants.

Gary L. Schacht, Chief Deputy Hall County Attorney, for appellee.

James D. Livingston, guardian ad litem.

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

WHITE, J.

This is an appeal from the district court for Hall County, Nebraska, affirming the order of the county court which terminated the parental rights of J.B. to S.B. The order also terminated the parental rights of J.B. to D.R. Additionally, the parental rights of the natural father, D.R., to D.R. were terminated. J.B. and D.R. appeal. We affirm, keeping in mind that we review the matter de novo upon the record and that an order terminating parental rights must be supported by clear and convincing evidence. *In re Interest of Hill*, 207 Neb. 233, 298 N.W.2d 143 (1980); *In re Interest of J. and R.*, 216 Neb. 183, 342 N.W.2d 660 (1984).

The evidence discloses that J.B. is the mother of four children, the oldest of whom is not now subject to the juvenile statutes. Legal custody of the second oldest child is in the Hall County Division of Public Welfare and physical custody is in a foster home because the child ran away from home after an incident in which she was the subject of a sexual assault by a brother of the appellant D.R. The brother was convicted and sentenced to a term in the Nebraska Penal and Correctional Complex. Therefore, these two children are not involved in this matter; rather, this action concerns the extended saga of the two younger children, S.B., who was born on February 23, 1972, and D.R., who was born on January 19, 1982.

Appellants, D.R. and J.B., are not married, and D.R. is the natural father of D.R. The whereabouts of the natural father of S.B., to whom J.B. was also not married, are unknown. The older two children were born in wedlock, and J.B. remains legally married to their father. Although the petition which is the subject of this appeal was filed on February 23, 1983, and the order terminating parental rights was entered on April 20, 1983, one or more of J.B.'s children have been the subject of juvenile court action since 1970. The juvenile petition alleges that S.B. and D.R. are minor children who are neglected and lack proper care, and are in a situation injurious to their health, morals, or well-being. Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982).

Shortly after S.B.'s birth, she was admitted to Lutheran Memorial Hospital in Grand Island, Nebraska, under the diagnosis of failure to thrive. In other words, the child was malnourished, had gained inadequate weight, and was in a life-threatening situation. The child gained weight, and was released on April 17, 1972. Shortly thereafter, S.B. was again admitted to Lutheran Memorial Hospital suffering from the same condition, which, according to the physician's reports, was attributable to a failure to receive adequate nourishment. S.B. was

not returned to her mother's custody until August 1973. The evidence indicates that during this period of time, the services of the Hall County Division of Public Welfare, the department of health, the public health nurses, and the county extension service were utilized in various attempts to train J.B. and, by that time, D.R., who had moved in with J.B., in basic housekeeping skills, cleanliness, diet preparation, personal hygiene, and child care. In June 1974 the appellants moved to North Platte, Nebraska, and the supervision of the case was transferred to the Lincoln County Division of Public Welfare. The situation with respect to the older children's nonattendance at school and the disordered and filthy housekeeping practices continued. Subsequently, in 1978, the parties returned to Hall County, where extended social service activities, including ADC payments and various other state and federal welfare programs, continued. It was during this time that the juvenile activities of the older two children were principally involved.

In February 1983 the petition to secure temporary custody of S.B. and D.R. was filed. The evidence discloses that the rental property occupied by the family was literally filled with garbage, there was clothing 2 to 3 feet deep on the floor of the bathroom, and there was opened and spoiled food throughout the house. The house was heated by electric heaters because the gas had been shut off. Previously, J.B. had been advised by the welfare departments to apply for certain additional welfare aid. She refused to do so. At this time S.B. and D.R. were taken into physical custody. S.B. was small for her age and underweight, but in generally acceptable health. D.R., who was approximately 1 year old, was in good physical health, bearing no signs of abuse. The home was determined to be a fire hazard and showed evidence of a recent fire caused by the trash surrounding the space heaters. The meals were prepared in an electric frying pan and, although

there was refrigeration, the refrigerator was unclean and contained a large amount of spoiled foods and liquids.

Essentially, appellants do not contest that the physical condition of the home, at the time the children were taken from them, was dangerous to the health and well-being of S.B. and D.R., nor do they deny that substantially the same conditions persisted for a period of over 10 years, from the time of the first welfare contacts in 1970. Rather, they point out that the children showed no evidence of physical abuse and that the children were not in bad health when they were taken from them in February 1983.

At the time of the hearing on April 4, 1983, appellants were living in a less expensive rental property, and they introduced photographs showing the condition of the home. The photographs indicate a well-kept home, with good housekeeping standards evident. Both at the time of the hearing and for some time prior thereto, J.B. and D.R. were unemployed. Their sole source of income was ADC and various other welfare benefits, food stamps, etc. While the evidence indicates that D.R. had made extended efforts to obtain work, J.B. had not sought employment because she wished to remain home with her youngest child, D.R. In spite of this the evidence indicates that D.R. did all of the cooking for the family.

The appellee points out, and the evidence supports its contention, that the now clean and neat household of appellants is one of numerous repetitive acts of improvement and then a subsequent decline in household standards until the home becomes unfit and dangerous for adults, much less minor children, to reside in. A caseworker testified that, in spite of their protestations, the only time the appellants would attempt to comply with even the most basic of housekeeping standards, so as not to endanger the health or safety of their children, was after threats of removal were made; then those standards would

be maintained for only a short period of time. This cycle is now into its 13th year.

During the educational and training process of various agencies, the appellants appeared interested, and listened. However, based on psychological studies, there was apparently no interest or incentive to apply those standards on a day-to-day, regular basis. It was the opinion of the caseworker, based on her experience, that if the children, S.B. and D.R., were not removed from the home, supervision must continue on a frequent, regular basis until the children reached maturity. Furthermore, the caseworker testified that the best efforts of the welfare department to train or motivate J.B. and D.R. have been a total and absolute failure.

The county court for Hall County in 1972 terminated the parental rights of J.B. to S.B. On appeal the district court for Hall County reversed. While we recognize that custody of minor children is a fundamental right and that it should not be lightly disturbed, we have also held where there are reasonable grounds to believe that the conditions giving rise to a parent's inability to care for children will continue for a prolonged and indefinite period, the parental rights may be terminated when the action is in the best interests of the minor children. *In re Interest of M.*, 215 Neb. 383, 338 N.W.2d 764 (1983).

D.R. is now slightly over 2 years old. To suggest that the preservation of the parental rights of appellants requires that the welfare department actively supervise and closely watch, and, if necessary, threaten and cajole, in order to ensure that the appellants will provide adequate care so as not to endanger the life or health of their children borders on the preposterous. Appellants have indicated, through the 13-year history of their relationship with the department of public welfare and the juvenile court, that they are either unwilling or unable to, on a sustained basis, provide proper parental care for the minor children. The record discloses that this is

the fourth time that physical custody of S.B. has been removed from J.B. Four times is enough. To further subject D.R., a child of tender years, to such an environment cannot be said to be in the best interests of the child.

Appellants' contention that the county and district courts' orders relied on a statutory provision other than that alleged in the petition is not supported by the record and is therefore without merit.

We find by clear and convincing evidence that the best interests of the minor children, S.B. and D.R., require that the parental rights of J.B. and D.R. be terminated.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. While I concede that the parents in this case are not likely to be designated "parents of the year," I likewise believe that the evidence does not disclose either physical abuse or conditions eminently harmful to the children, thereby compelling state intervention. I continue to be convinced that "best interests of the children" means within the context of their natural family home and does not imply that children should be removed from their parents if, by doing so, they may move up in life. I would have concluded that the record was insufficient to establish by clear and convincing evidence that the best interests of the minor children require that the parents' parental rights be terminated, and I would have reversed.

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State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622
2. An administrative agency is limited in its rule-making authority to powers granted to the agency by the statutes which it is to administer.
State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622
3. Departmental or administrative decisions contrary to law or based on a mistaken view of the law are not within the exercise of discretion lying outside the remedy of mandamus. By mandamus a court can correct such mistake of law and compel the proper application of law, thereby converting an otherwise discretionary act into a purely ministerial duty.
State ex rel. Creighton Univ. v. Smith 682

Administrative Orders

In a proceeding in the district court to review an order of the Department of Motor Vehicles under the Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. §§60-501 et seq. (Reissue 1978 and Cum. Supp. 1982), the burden is upon the plaintiff to show that the order of the department was invalid.
Way v. Department of Motor Vehicles 641

Adoption

1. Abandonment for purposes of permitting substitute consent pursuant to Neb. Rev. Stat. §§43-104 and 43-105 (Reissue 1978) must be established by clear and convincing evidence.
In re Guardianship of Sain 96
2. The question of abandonment is largely one of intent to be determined in each case from all the facts and circumstances.
In re Guardianship of Sain 96
3. To prove abandonment in adoption proceedings, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of parental obligations and to forego parental rights, together with a repudiation of parenthood and an abandonment of parental rights and responsibilities.
In re Guardianship of Sain 96

Adverse Possession

1. One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, open, continuous, exclusive, notorious, and adverse possession under a claim of ownership for a full period of 10 years.
Pettis v. Lozier 191
Paasch v. Brown 761
2. When a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is in danger and that unless he takes

proper action within 10 years to protect himself, he may lose his title to the claimant. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession.
Pettis v. Lozier 191

Affidavits

1. To be effective evidence opposing rendition of a summary judgment, an affidavit must be made on personal knowledge and show affirmatively that affiant is competent to testify to the matters stated therein.
Cillessen Constr. v. Scotts Bluff Co. Hous. Auth. 39
2. 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. 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.
State v. LeBron 452

Alienation of Affections

A cause of action for alienation of affections still exists in the State of Nebraska.
Creason v. Myers 551

Alimony

While alimony and distribution of property rights have different purposes in marriage dissolution proceedings, in a proper case they may be considered together in reaching an award that is just and equitable.
Taylor v. Taylor 409

Appeal and Error

1. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
State v. Schaeffer 4
State v. Kaba 81
State v. West 389
2. While matters in equity are reviewed de novo on appeal, this court must, where the credibility of the evidence is in conflict, give weight to the fact that the trial court saw and observed the witnesses while testifying.
Kluck v. Mentzer 8
Paasch v. Brown 761
3. In a review de novo, this court will also give weight to an inspection of the premises by the trial court, where such inspec-

tion was given consideration by the trial court in its decision and judgment.
Kluck v. Mentzer 8
4. On appeal of domestic relations cases we review the record de novo in making our independent findings of fact, without reference to the conclusion reached by the trial court.
Nielsen v. Nielsen 34
5. A petition in error is designed to review the decision of the inferior tribunal to determine that it is in accordance with law and is supported by sufficient competent evidence. The reviewing court is not to act as a super administrative agency and come to an independent conclusion.
Cox v. County of Sarpy 52
6. In determining the sufficiency of evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.
State v. Green 70
State v. Ledingham 135
State v. Christiansen 740
7. In a case tried to the court without a jury, there is a presumption that the court considers only such evidence as is competent and relevant, and a reviewing court will not reverse such a case because evidence was erroneously admitted, where there is other material, competent, and relevant evidence sufficient to sustain the judgment.
State v. Green 70
8. A judgment denying probation and imposing a sentence which is within statutory limits will not be modified absent an abuse of discretion by the sentencing judge.
State v. Cooley 90
State v. Teater 723
9. This court will not for the first time on appeal consider a question not presented to or passed upon by the trial court, though in limited cases we will correct plain error in furtherance of the interest of substantial justice.
In re Estate of Glaser 104
10. The denial of a motion for summary judgment is not a final order and therefore is not appealable.
Schmuecker Bros. Implement v. Sobotka 114
11. For a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. Except in the most unusual of cases, if it has not been raised in the trial court, it will be considered to have been waived.
State v. Olson 130

State v. Ledingham 135
State v. Smyth 153
State v. Mercer 164
In re Estate of Snyder 356
State v. Ulrich 817

12. The standard of review in criminal cases on appeal to the district court from the county court is limited to an examination of the record presented for error or abuse of discretion.
State v. Olson 130

13. Findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict and will not be set aside unless clearly wrong.
Gregg v. Challburg 143
Doggett v. Brunswick Corp. 166
Doty v. Aetna Life & Casualty 428
Powell v. W. G. Pauley Lumber Co. 707
Nussbaum v. Wright 712
Person v. Red Lion Inn 745

14. On appeal of the trial court's determinations as to whether such a change in circumstances has occurred which justifies the modification of a prior child custody order in a dissolution of marriage case, this court must review the determinations de novo and make independent conclusions of fact without reference to the conclusion reached by the trial court, recognizing, however, that this court will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite.
Dennis v. Smith 147
Krohn v. Krohn 158
Robertson v. Robertson 786

15. An action to quiet title is an equitable action, and it is the duty of this court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the district court.
Pettis v. Lozier 191

16. Upon appeal to the district court from an order of the Nebraska Equal Opportunity Commission, the review is by trial de novo upon the record.
Zalkins Peerless Co. v. Nebraska Equal Opp. Comm. 289

17. On appeal of review by the district court of an order of the Nebraska Equal Opportunity Commission, this court will not disturb the district court's findings if they are supported by substantial evidence.
Zalkins Peerless Co. v. Nebraska Equal Opp. Comm. 289

18. In an appeal of a juvenile case, including termination of parental rights, we review the record de novo, and regarding disputed facts make our own findings independent of any conclusion reached by the trial court. If evidence is in conflict or dis-

pute, we do consider and give great weight to the fact that the trial court has observed the parties and witnesses and has judged their credibility.
In re Interest of W. 325
In re Interest of D.R. and S.B. 883
19. The standard of review in both the district court and this court in cases arising from Neb. Rev. Stat. § 30-2482 (Cum. Supp. 1982) is for error appearing on the record.
In re Estate of Snyder 356
20. On appellate review of an order of the State Board of Education, this court may not reach an independent conclusion as to factual issues, but may determine only whether the findings of the board are supported by substantial evidence or are arbitrary or capricious.
Richardson v. School Dist. No. 100 359
21. On an appeal the appellant has the burden of establishing that there was error in the proceeding from which the appeal is taken.
Richardson v. School Dist. No. 100 359
22. The appropriate standard of review for an assignment of error directed at the exclusion of evidence is one of abuse of discretion.
State Bank v. Scoular-Bishop Grain Co. 379
23. A motion for a new trial upon the ground of jury misconduct is addressed to the sound discretion of the trial court, and a ruling made thereon will not be disturbed in the absence of an abuse of discretion.
State v. West 389
24. Since there is no statutory provision for an appeal from a judgment of contempt, any such review of that judgment must be conducted in the Supreme Court on error in the same manner as a criminal case.
In re Contempt of Liles 414
25. In an error proceeding the review is solely on the record, and the judgment of the lower court or tribunal will be affirmed, absent errors of law, if the findings are supported by the evidence.
In re Contempt of Liles 414
26. Findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In such a circumstance it is not within our province to resolve conflicts in or to weigh the evidence; if there is a conflict in the evidence, this court will review the judgment rendered and will presume that controverted facts were decided in favor of the successful party.
Wheeler Constr. v. Town & Country Realty 424
27. In testing the sufficiency of evidence to support findings of the

compensation court after rehearing, the evidence must be considered in the light most favorable to the successful party.
Doty v. Aetna Life & Casualty 428
28. A conviction will not be set aside unless the defendant meets his burden of showing that the error claimed created actual prejudice rather than merely the possibility of prejudice.
State v. LeBron 452
29. A judgment will not be reversed for error in the exclusion of evidence if there was no prejudice to a substantial right of the accused and the record as a whole shows the error was harmless beyond a reasonable doubt.
State v. LeBron 452
30. A proper objection to the receipt of evidence is required to preserve for review any error in the overruling of a motion in limine.
State v. LeBron 452
31. A defendant may not predicate error on the admission of evidence to which a timely objection was not made.
State v. Laymon 464
32. An action for specific performance is an equitable matter triable de novo on appeal to the Supreme Court.
III Lounge, Inc. v. Gaines 466
33. The Nebraska Supreme Court's review in matters of judicial discipline is de novo; when no new evidence is received, our review is de novo on the record.
In re Complaint Against Kneifl 472
34. This court must determine upon its own independent inquiry whether the evidence clearly and convincingly proves the alleged misconduct.
In re Complaint Against Kneifl 472
35. Although the recommendations of the Commission on Judicial Qualifications are entitled to be given weight, this court has the obligation to make its own determination of what discipline is appropriate.
In re Complaint Against Kneifl 472
36. An action in equity is reviewed de novo without reference to the findings of fact made by the trial court, but where the testimony or evidence is in irreconcilable conflict, we take into consideration that the trial court observed the witnesses.
Hiegel Farms Corp. v. Casselman 506
37. In a de novo review the Supreme Court will also give weight to the fact that an inspection of the premises was made by the trial court, where such inspection was given consideration by the court in its decision and judgment.
Hiegel Farms Corp. v. Casselman 506
38. Grandparents of a child as to whom parental rights have been terminated do not have standing, as grandparents, to appeal

from juvenile court orders for placement and custody of the child with appropriate entities for adoption.
In re Interest of S.R. 528
39. The right to appeal from orders of a county court sitting as a juvenile court, insofar as that right is vested in the child's custodian, is vested only in individuals or entities having legal custody of such a child, and not in those persons having only possession of the child.
In re Interest of S.R. 528
40. A defendant's verdict cures error, if any, in a court's failure to dismiss a pleaded action vulnerable to a demurrer.
Creason v. Myers 551
41. This court has treated the determination of factual issues in a declaratory judgment action which would otherwise be an action at law in the same manner as if a jury had been waived. The findings of the trial court therefore have the effect of the verdict of a jury and will not be set aside unless clearly wrong.
Havelock Bank v. Western Surety Co. 560
42. An action for an accounting between partners is grounded in equity; as such, the scope of our review is de novo on the record.
Langness v. "O" Street Carpet Shop 569
43. The bill of exceptions is the only vehicle for bringing evidence to this court.
Langness v. "O" Street Carpet Shop 569
44. The filing of an improperly prepared bill of exceptions may result in a case being treated as if no bill had been filed.
Langness v. "O" Street Carpet Shop 569
45. 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.
McGinn v. City of Omaha 579
46. Counsel does not have the license to quarrel with a trial judge's evidentiary ruling; if the ruling is prejudicially erroneous, and is properly preserved and presented to this court, an appropriate correction will be made on appeal.
Pitt v. Checker Cab Co. 600
47. A claim of improper conduct on the part of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection.
Pitt v. Checker Cab Co. 600
48. A verdict may be set aside as excessive when, and not unless, it is so exorbitant as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.
Pitt v. Checker Cab Co. 600
49. A defendant seeking post conviction relief has the burden of establishing a basis for such relief, and the findings of the dis-

trict court in denying relief will not be disturbed on appeal unless they are clearly erroneous.
State v. Moore 609
50. It is the general rule that where the parties have given consent or acquiescence to private interviews with the children and the court conducts an in camera hearing, such consent waives any objections which might be raised on appeal.
Marez v. Marez 615
51. Error may be waived at both the trial and appellate levels, and constitutional rights may likewise be waived.
Marez v. Marez 615
52. In a proceeding in the district court to review an order of the Department of Motor Vehicles under the Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. §§ 60-501 et seq. (Reissue 1978 and Cum. Supp. 1982), the burden is upon the plaintiff to show that the order of the department was invalid.
Way v. Department of Motor Vehicles 641
53. The granting or denying of a motion to compel a physical or mental examination of a party is grounded in the sound discretion of the trial court; absent an abuse of that discretion, the trial court's ruling must stand.
Thynne v. City of Omaha 654
54. On review we must treat a plaintiff's motion for a directed verdict as an admission of the truth of all competent evidence submitted on behalf of the defendant. The defendant is entitled 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.
Five Points Bank v. Scoular-Bishop Grain Co. 677
55. When a court overrules a motion in limine, it is incumbent upon the movant to make an objection to the particular evidence sought to be adduced or offered by the State. A defendant cannot predicate error on the admission of evidence to which no objection was made at the time the evidence was adduced.
State v. Sailors 693
56. Probation is a sentence, and an order of probation is a final order from which an appeal may be taken.
State v. Kinney 701
57. The determination of the finder of fact on the issue of competency will not be disturbed unless there is insufficient evidence to support the findings.
State v. Teater 723
58. Consideration of assignments of error is limited to those discussed in the brief.
State v. Teater 723
59. The findings of fact by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong.
State v. Hamilton 734

60. A defendant may not predicate error on an instruction that is more favorable to him than is required by law.
State v. Hamilton 734
61. In determining on appeal the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury.
State v. Meis 770
62. A jury verdict in a criminal case will not be overturned on appeal for lack of evidence unless it is so lacking in probative force that it can be said as a matter of law that the evidence was insufficient to support it.
State v. Meis 770
63. On an appeal to the Supreme Court, it is the responsibility of the party appealing or urging error to have included within the bill of exceptions all matters from the record which it believes material to issues to be presented for review.
State v. Meis 770
64. As a general rule, the trial court is vested with broad discretion in considering discovery requests of defense counsel, and error can be predicated only upon an abuse of such discretion.
State v. Meis 770
65. It is settled law that the district court has the power to impose a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court to pronounce and where the accused himself has invoked appellate jurisdiction for the correction of error.
State v. Ulrich 817
66. There is no formula for computing damages in a personal injury case, and the final verdict is usually made up from a number of factors. As a general rule, the law gives the trier of fact the right to determine the amount of recovery in such cases, and if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed.
Steinauer v. Sarpy County 830
67. In awarding damages for physical discomfort and mental anguish, the fact finder must rely upon the totality of the circumstances surrounding the incident. The credibility of the evidence and the witnesses and the weight to be given all of these factors rests in the sound discretion of the fact finder.
Steinauer v. Sarpy County 830
68. On appeal of review by the district court of an order of the Nebraska Equal Opportunity Commission, this court will not disturb the district court's findings of fact if they are supported by substantial evidence. The court will, however, reach independent conclusions with respect to questions of law.
Airport Inn v. Nebraska Equal Opp. Comm. 852

Arson

Although Neb. Rev. Stat. § 44-501 (Reissue 1978) precludes evidence of the actual value of the insured premises for the purpose of voiding a fire insurance policy on the basis it was procured fraudulently or for the purpose of showing that a proof of loss statement was executed with fraudulent intent, evidence of actual value may nonetheless be admitted as bearing on the insured's motive to commit arson.
Heady v. Farmers Mut. Ins. Co. 172

Assault

An unintentional stabbing is not the use of "deadly force" as defined in Neb. Rev. Stat. § 28-1406(3) (Reissue 1979).
State v. Canby 461

Attorney and Client

Ordinarily, the power of the attorney to act for his client in an action is to be considered valid and sufficient until disproved, not void or insufficient until proved.
III Lounge, Inc. v. Gaines 466

Attorney Fees

1. Attorney fees may be recovered only in such cases as are provided by statute, or where the uniform course of procedure has been to allow such recovery.
Quinn v. Godfather's Investments 441
Havelock Bank v. Western Surety Co. 560
2. An allowance for attorney fees as costs is erroneous unless it is permitted by statute or uniform practice.
Quinn v. Godfather's Investments 441
3. A provision in a contract that in the event of any dispute or litigation involving the contract, the prevailing party shall be entitled to recover all costs of suit, including reasonable attorney fees, is contrary to public policy and void.
Quinn v. Godfather's Investments 441
4. Attorney fees can be allowed upon recovery on a statutory motor vehicle dealer's bond.
Havelock Bank v. Western Surety Co. 560
5. In a proper case an award of attorney fees for services in this court may be made under Neb. Rev. Stat. § 25-2165 (Cum. Supp. 1982).
Nuss v. Pathfinder Irr. Dist. 827
6. The Nebraska Supreme Court is the proper forum for the allowance of attorney fees for services in that court.
Nuss v. Pathfinder Irr. Dist. 827
7. A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
Kirby v. Liska 848

8. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.
Kirby v. Liska 848
9. In any action or proceeding under the Nebraska Fair Employment Practice Act, the district court, in its discretion, may allow the prevailing party a reasonable attorney fee.
Airport Inn v. Nebraska Equal Opp. Comm. 852
10. Unless there are special circumstances a prevailing plaintiff, under the Nebraska Fair Employment Practice Act, should be awarded a reasonable attorney fee for all stages of the proceedings.
Airport Inn v. Nebraska Equal Opp. Comm. 852

Attorneys At Law

1. A violation of the Code of Professional Responsibility which is applicable to members of the bar is not, as such, an impeachable offense.
State v. Douglas 199
2. Counsel owe to the judge, because of the position he occupies, the utmost deference and respect, and the judge owes to counsel an equal obligation of courtesy, patience, and consideration.
Pitt v. Checker Cab Co. 600
3. It is the duty of the judge, as well as the attorneys, to endeavor to surround the trial with an atmosphere of fairness, undisturbed by prejudice, passion, or ill will.
Pitt v. Checker Cab Co. 600
4. Generally, counsel for the parties should be relied on to manage and bring out their own cases.
Pitt v. Checker Cab Co. 600
5. Counsel does not have the license to quarrel with a trial judge's evidentiary ruling; if the ruling is prejudicially erroneous, and is properly preserved and presented to this court, an appropriate correction will be made on appeal.
Pitt v. Checker Cab Co. 600

Banks and Banking

1. The language of Neb. U.C.C. § 3-419(3) (Reissue 1980), "a representative, including a depositary or collecting bank," does include depositary and collecting banks when engaged in the normal business of paying or collecting ordinary checks.
Hydroflo Corp. v. First Nat. Bank 20
2. In an action brought under Neb. U.C.C. § 3-419 (Reissue 1980) by a payee to recover in conversion for payment on a forged endorsement, it is incumbent on a depositary bank seeking immunity under subsection (3) to plead and prove as affirma-

tive defenses that it acted in good faith and in accordance with reasonable commercial standards.
Hydroflo Corp. v. First Nat. Bank 20
3. Whether a bank has acted in a commercially reasonable manner is a question of fact.
Hydroflo Corp. v. First Nat. Bank 20
4. A claim for money had and received has not been eliminated by the Uniform Commercial Code. However, it is subject to the defenses of "good faith" and "reasonable commercial standards" as provided for by Neb. U.C.C. § 3-419(3) (Reissue 1980).
Hydroflo Corp. v. First Nat. Bank 20
5. Because Neb. Rev. Stat. § 8-103 (Reissue 1977) of the Banking Act requires the director of the Department of Banking and Finance to "constructively aid banks in maintaining proper banking standards and efficiency," a bank is exempt from suit under the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1978), by reason of its failure to follow customary and standard banking practices.
Hydroflo Corp. v. First Nat. Bank 20
6. A bank, if it can prove a loss occasioned by a statutory motor vehicle dealer's breach of one of the conditions outlined in Neb. Rev. Stat. § 60-1419 (Reissue 1978), is entitled to recover on the dealer's statutory bond.
Havelock Bank v. Western Surety Co. 560

Blood, Breath, and Urine Tests

1. The regulations promulgated by the Nebraska Department of Health recognize that the holder of a Class B permit may test not only for alcohol content in breath but in blood and urine as well, and the tester to do so may use an Intoximeter Mark IV.
State v. West 389
2. Whether a law enforcement officer refused a request for a second test is a foundational requirement for the admission of evidence as to results of a breath test.
State v. Hamilton 734
3. The jury may not consider the question of an alleged refusal once the trial court has determined that all foundational requirements for admission of the results of the breath test have been met.
State v. Hamilton 734
4. In a criminal case the proper method to challenge the admissibility of evidence as to the results of a chemical test for intoxication is to file a motion to suppress.
State v. Hamilton 734

Bonds

1. A grain dealer's bond is an official bond, sometimes called a

statutory bond, creating a new obligation; the liability of both principal and surety is original and primary.
Stock v. Meissner 56
2. A bank, if it can prove a loss occasioned by a statutory motor vehicle dealer's breach of one of the conditions outlined in Neb. Rev. Stat. §60-1419 (Reissue 1978), is entitled to recover on the dealer's statutory bond.
Havelock Bank v. Western Surety Co. 560
3. A bond required by statute will be construed in light of the purpose for which it is required as expressed in the statute.
Way v. Department of Motor Vehicles 641
4. The security deposit required by statute to insure that any judgment against the uninsured motorist will be paid must be in an amount adequate for that purpose.
Way v. Department of Motor Vehicles 641

Breach of Contract

1. In order to prove a breach of a service contract, the plaintiff must show that the defendant failed to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities.
Doupnik v. Usher Pest Control Co. 1
2. As a general rule, a condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition. That person must put forth a good faith effort to obtain the condition.
Bellevue College v. Greater Omaha Realty Co. 183
3. If a promisor prevents or hinders the occurrence of a condition precedent, the condition is excused.
Bellevue College v. Greater Omaha Realty Co. 183

Brokers' Licenses

For the purpose of Neb. Rev. Stat. § 81-885.24(28) (Reissue 1981), regarding revocation or suspension of a real estate broker's license, *incompetence* means failure to meet requirements for a minimal level of acceptable conduct.
Weiner v. State ex rel. Real Estate Comm. 372

Causes of Action

1. Under the code system of pleading it is not necessary to state a cause of action or a defense in any particular form. It is only necessary to plead the facts, not the theory of recovery.
Waite v. Samson Dev. Co. 403
2. The prayer of a petition is not a part of the allegations of fact constituting the cause of action, and where the facts state a cause of action and are supported by the evidence, the court will

grant proper relief, though it may not conform to the relief prayed for.
Waite v. Samson Dev. Co. 403
3. The essential character of a cause of action or the remedy or relief it seeks, as shown by the allegations of the complaint, determine whether a particular action is one at law or in equity, unaffected by conclusions of the pleader or the prayer for relief.
Waite v. Samson Dev. Co. 403
4. A cause of action for alienation of affections still exists in the State of Nebraska.
Creason v. Myers 551
5. A party who voluntarily agrees by stipulation to consolidate several causes of action cannot later be heard to complain of the ramifications of such an agreement.
Havelock Bank v. Western Surety Co. 560

Child Custody

1. On appeal of the trial court's determinations as to whether such a change in circumstances has occurred which justifies the modification of a prior child custody order in a dissolution of marriage case, this court must review the determinations de novo and make independent conclusions of fact without reference to the conclusion reached by the trial court, recognizing, however, that this court will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite.
Dennis v. Smith 147
Krohn v. Krohn 158
Robertson v. Robertson 786
2. Orders fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person who has custody is unfit for that purpose or that the best interests of the child require such action.
Dennis v. Smith 147
3. The provisions of Neb. Rev. Stat. § 42-364(1)(b) (Cum. Supp. 1982) do not empower this nor any other court to abdicate its responsibility to decide custody on the basis of what it deems to be in a child's best interests based on the totality of the circumstances.
Dennis v. Smith 147
Krohn v. Krohn 158
4. One who seeks modification of a prior custody determination has the burden of showing that there has been a change of circumstances such as to show that the person who has custody is unfit for that purpose or that the best interests of the child require such action.
Krohn v. Krohn 158

5. Sexual conduct is a factor which may be considered, among others, in deciding the issue of custody, and may support a finding of a change of circumstances sufficient to conclude that the one who had custody is no longer fit for that purpose or that the best interests of the child require such change.
Krohn v. Krohn 158
6. Custody and visitation of minor children shall be determined on the basis of their best interests.
Marez v. Marez 615
Robertson v. Robertson 786
7. In determining with which of the parents the children, or any of them, shall remain, the court shall consider the best interests of the children, which shall include, but not be limited to, the desires and wishes of the children if of an age of comprehension regardless of their chronological age, when such desires and wishes are based on sound reasoning.
Marez v. Marez 615
8. The phrase "change of circumstances" should not be mechanically construed. The children's happiness, their psychological adjustment, their own wishes, are as much entitled to consideration as changes in material environment.
Marez v. Marez 615
9. It is the general rule that where the parties have given consent or acquiescence to private interviews with the children and the court conducts an in camera hearing, such consent waives any objections which might be raised on appeal.
Marez v. Marez 615

Claims

1. A claim for money had and received has not been eliminated by the Uniform Commercial Code. However, it is subject to the defenses of "good faith" and "reasonable commercial standards" as provided for by Neb. U.C.C. § 3-419(3) (Reissue 1980).
Hydroflo Corp. v. First Nat. Bank 20
2. Prejudgment interest is allowable where the amount of the claim is liquidated. A claim is liquidated where no reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery. If either of the requirements of the rule is not met, the claim is unliquidated and prejudgment interest is not allowed.
Aetna Cas. & Surety Co. v. Nielsen 297
Airport Inn v. Nebraska Equal Opp. Comm. 852
3. Claims, in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include es-

tate or inheritance taxes, demands, or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.
In re Estate of Severns 803
4. Prejudgment interest may be recovered on claims that are liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.
Airport Inn v. Nebraska Equal Opp. Comm. 852

Collateral Attack

When a district court has acquired jurisdiction, it has the right to decide every question which arises in the case, and its judgment, even if erroneous, cannot be collaterally assailed.
State ex rel. Ritthaler v. Knox 766

Collateral Estoppel

It is now generally held that collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action.
Stock v. Meissner 56

Confessions

A statement made by a defendant, although inadmissible during the State's case in chief due to a failure to comply with *Miranda,* may be admissible for impeachment purposes.
State v. Meis 770

Consideration

1. Generally, an agreement to devise and bequeath property is, where supported by consideration, valid and enforceable. In such a case equity will impress a trust upon the property, which trust will follow it into the hands of the personal representative of the promisor or into the hands of a grantee who has not given consideration for the conveyance.
Blanchard v. White 877
2. There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee.
Blanchard v. White 877
3. In an action on a contract the absence of consideration is an affirmative defense to be set out in the answer.
Blanchard v. White 877

Constitutional Law

1. For a question of constitutionality to be considered on appeal, it

must have been properly raised in the trial court. Except in the most unusual of cases, if it has not been raised in the trial court, it will be considered to have been waived.
State v. Olson 130
State v. Ledingham 135
State v. Smyth 153
State v. Mercer 164
In re Estate of Snyder 356
State v. Ulrich 817
2. A warrantless search of a third party's home by police officers for a person named in an arrest warrant, absent consent or exigent circumstances, violates the fourth amendment rights of the third party.
State v. Roepka 139
3. The concurrence of five or more judges is required to convict in an impeachment proceeding.
State v. Douglas 199
4. A distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act.
State v. Jackson 332
5. Multiple punishments can be imposed for the same act without violating the double jeopardy guarantee of the fifth amendment to the U.S. Constitution, where it is specifically authorized by state statute.
State v. Jackson 332
6. Retroactive application of a new rule of law is appropriate when it is aimed at enhancing the accuracy of criminal trials, when there has not been justifiable reliance on a prior rule of law, and when retroactive application will not have a disruptive effect on the administration of justice.
State v. Clark 417
7. The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare.
Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm. 487
8. Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. Generally speaking, any valid or constitutional exercise of the police power must reasonably embody one of the purposes mentioned. There must

be some clear and real connection between the assumed purpose of the law and its actual provisions.
Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm. 487
9. The constitutional guarantees of our Bill of Rights contemplate that every person legally possesses the right of acquiring the absolute and unqualified title to every species of property recognized by law, with all rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases and to sell it at such price as he can obtain in fair barter.
Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm. 487
10. If it becomes apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. The Legislature, under the guise of regulation, may not indulge in arbitrary price-fixing or the destruction of lawful competition.
Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm. 487
11. Error may be waived at both the trial and appellate levels, and constitutional rights may likewise be waived.
Marez v. Marez 615
12. Generally, a measure seeking an advisory vote of the electorate or a nonbinding expression of public opinion on a question is not a proper subject for the initiative.
State ex rel. Brant v. Beermann 632
13. A state legislature may generally pass any act, because legislative capacity not constitutionally inhibited or prohibited is retained in the people and exercised in the legislature by representatives of the people.
State ex rel. Creighton Univ. v. Smith 682
14. Neb. Const. art. VII, § 11, does not prohibit the state from doing business or contracting with private institutions in fulfilling a governmental duty and furthering a public purpose.
State ex rel. Creighton Univ. v. Smith 682
15. Neb. Rev. Stat. § 28-512(1) (Reissue 1979) affords due process and is constitutional.
State v. Sailors 693
16. Neither double jeopardy nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction or resentencing. A trial judge is not constitutionally precluded from imposing a new sentence, even though greater than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities, which information may have come to the judge's attention from evidence adduced at the second trial itself, from a new

presentence investigation, from the defendant's recent prison record, or possibly from other sources.
State v. Lopez 719
17. Under the provisions of Neb. Const. art. VIII, § 1, the taxation of personal property must be uniform not only as to the rate of taxation but as to the valuation of the property as well.
Xerox Corp. v. Karnes 728
18. Neb. Rev. Stat. § 77-1301 (Reissue 1981), which provides for valuation of real and personal property for tax purposes only in odd-numbered years, held unconstitutional.
Xerox Corp. v. Karnes 728
19. Generally, there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.
State v. Meis 770

Constitutional Rights

A defendant is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial 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. Clark 417

Constructive Knowledge

Constructive knowledge is that knowledge which one would possess if through the exercise of reasonable care he would have known such facts.
McGinn v. City of Omaha 579

Consumer Protection Act

Because Neb. Rev. Stat. § 8-103 (Reissue 1977) of the Banking Act requires the director of the Department of Banking and Finance to "constructively aid banks in maintaining proper banking standards and efficiency," a bank is exempt from suit under the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1978), by reason of its failure to follow customary and standard banking practices.
Hydroflo Corp. v. First Nat. Bank 20

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 414

2. Guilt in a contempt action must be found beyond a reasonable doubt.
In re Contempt of Liles 414
3. Since there is no statutory provision for an appeal from a judgment of contempt, any such review of that judgment must be conducted in the Supreme Court on error in the same manner as a criminal case.
In re Contempt of Liles 414
4. In an error proceeding the review is solely on the record, and the judgment of the lower court or tribunal will be affirmed, absent errors of law, if the findings are supported by the evidence.
In re Contempt of Liles 414

Contracts

1. Where contract language is plain and unambiguous, the court will not read an ambiguity into the language of a contract in order to construe it against the one who prepared the contract.
Cillessen Constr. v. Scotts Bluff Co. Hous. Auth. 39
2. As a general rule, a condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition. That person must put forth a good faith effort to obtain the condition.
Bellevue College v. Greater Omaha Realty Co. 183
3. If a promisor prevents or hinders the occurrence of a condition precedent, the condition is excused.
Bellevue College v. Greater Omaha Realty Co. 183
4. It is a general rule that the description of land in a memorandum of a contract for the sale thereof must be sufficiently definite to identify the land by its own terms or by reference to external standards in existence at the time of the making of the contract, and capable of being determined beyond dispute.
Bellevue College v. Greater Omaha Realty Co. 183
5. An agreement which depends upon the wish, will, or pleasure of one of the parties is unenforceable.
De Los Santos v. Great Western Sugar Co. 282
6. Speaking generally, mutuality of obligation is an essential element of every enforceable agreement; mutuality of contract consists in the obligation on each party to do, or to permit something to be done, in consideration of the act or promise of the other; mutuality is absent when one only of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only.
De Los Santos v. Great Western Sugar Co. 282
7. When the provisions of a contract, together with the facts and circumstances that aid in ascertaining the intent of the parties thereto, are not in dispute, the proper construction of such con-

tract is a question of law and determinable upon a motion for summary judgment.
De Los Santos v. Great Western Sugar Co. 282
8. A guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance.
Chiles, Heider & Co. v. Pawnee Meadows 315
9. The law does not require a useless formality. A formal tender is not necessary where a party has shown by act or word that it would not be accepted if made.
Chiles, Heider & Co. v. Pawnee Meadows 315
10. A person with whom or in whose name a contract is made for the benefit of another may bring an action without joining with him the person for whose benefit it is prosecuted.
Chiles, Heider & Co. v. Pawnee Meadows 315
11. Every contract for the sale of any lands shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the sale is to be made.
Wheeler Constr. v. Town & Country Realty 424
12. A provision in a contract that in the event of any dispute or litigation involving the contract, the prevailing party shall be entitled to recover all costs of suit, including reasonable attorney fees, is contrary to public policy and void.
Quinn v. Godfather's Investments 441
13. As a general rule, where a valid, binding contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance as a matter of course or right where the remedy at law is inadequate and specific performance will not be inequitable or unjust.
III Lounge, Inc. v. Gaines 466
14. A party who seeks specific performance must show not only that he has a valid, legally enforceable contract but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the other party.
III Lounge, Inc. v. Gaines 466
15. In the absence of words of express limitation, when a lease confers on the lessee an option to purchase the property at any time during the term of the lease, and the lease is thereafter extended upon the same terms and conditions, the option to purchase is also extended for the period of the extended term.
III Lounge, Inc. v. Gaines 466
16. A written contract that is clear and unambiguous is not subject to interpretation or construction by this court.
Havelock Bank v. Western Surety Co. 560
17. The general rule is that all payments made under a contract are

presumed to be voluntary, and the party seeking to recover payment has the burden to prove that it was involuntary.
Chalupa v. Hartford Fire Ins. Co. 662
18. An insurer who has made a payment under a mistake of fact that the terms of an insurance contract require such payment is entitled to restitution, at least where the payee has not so changed his position that it would be inequitable to require him to make full payment.
Chalupa v. Hartford Fire Ins. Co. 662
19. A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used.
Moreland v. Transit Auth. of Omaha 775
20. In order to recover on an action for a breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with the conditions precedent which activate the defendant's duty.
Department of Banking, Receiver v. Wilken 796
21. To satisfy the statute of frauds the contract itself must be in writing or, in the event the contract is oral, there must be a written memorandum of the contract, signed or authenticated by the party against whom it is to be enforced.
Department of Banking, Receiver v. Wilken 796
22. When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement.
R.A.S., Inc. v. Crowley 811
23. Generally, an agreement to devise and bequeath property is, where supported by consideration, valid and enforceable. In such a case equity will impress a trust upon the property, which trust will follow it into the hands of the personal representative of the promisor or into the hands of a grantee who has not given consideration for the conveyance.
Blanchard v. White 877
24. There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee.
Blanchard v. White 877
25. In an action on a contract the absence of consideration is an affirmative defense to be set out in the answer.
Blanchard v. White 877

Conversion

In an action brought under Neb. U.C.C. §3-419 (Reissue 1980) by a payee to recover in conversion for payment on a forged endorsement, it is incumbent on a depositary bank seeking immunity under subsection (3) to plead and prove as affirmative defenses

that it acted in good faith and in accordance with reasonable commercial standards.
Hydroflo Corp. v. First Nat. Bank 20

Convictions

1. In determining the sufficiency of evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.
State v. Green 70
2. A conviction will not be set aside unless the defendant meets his burden of showing that the error claimed created actual prejudice rather than merely the possibility of prejudice.
State v. LeBron 452

Costs

A provision in a contract that in the event of any dispute or litigation involving the contract, the prevailing party shall be entitled to recover all costs of suit, including reasonable attorney fees, is contrary to public policy and void.
Quinn v. Godfather's Investments 441

Court Rules

This court will judicially notice trial court rules filed with the clerk of this court.
Aetna Cas. & Surety Co. v. Nielsen 297

Courts

1. Courts will take appropriate action to prevent unnecessary delays and dilatory proceedings, and such action may involve a refusal to permit amendment of pleadings where request therefor is both untimely and violates a prior order limiting such pleading by virtue of a failure to answer requests for admissions.
Aetna Cas. & Surety Co. v. Nielsen 297
2. As a general rule, it is the province of the trial court in a jury case to determine the admissibility of the evidence offered by the parties at trial.
State v. West 389
3. Preliminary questions concerning the admissibility of evidence shall be determined by the judge. The court, and not the jury, is the arbitrator as to the admissibility of the evidence.
State v. West 389

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. Schaeffer 4
2. In determining the sufficiency of evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.
   State v. Green 70
   State v. Ledingham 135
   State v. Christiansen 740
   State v. Meis 770
3. The standard of review in criminal cases on appeal to the district court from the county court is limited to an examination of the record presented for error or abuse of discretion.
   State v. Olson 130
4. When the State introduces statements of a defendant, the State is not bound by exculpatory statements contained therein, but such statements are to be considered by the finder of fact in the light of the surrounding facts and circumstances.
   State v. Douglas 199
5. Where one is charged with the commission of a crime which may be committed in a number of ways, a general verdict finding the defendant guilty of the crime charged is sufficient and is not ambiguous.
   State v. West 389
6. Retroactive application of a new rule of law is appropriate when it is aimed at enhancing the accuracy of criminal trials, when there has not been justifiable reliance on a prior rule of law, and when retroactive application will not have a disruptive effect on the administration of justice.
   State v. Clark 417
7. When an improper communication with a juror or jurors is shown to have taken place in a criminal case, a rebuttable presumption of prejudice arises and the burden is on the State to prove that the communication was not prejudicial.
   State v. LeBron 452
8. In cases where the contact with the witnesses is minimal or where the testimony of the witness involves only formal or uncontroverted issues, the presumption of prejudice is overcome.
   State v. LeBron 452
9. A prosecution for disturbing the peace under a city ordinance for which there is a possibility of incarceration is a criminal

offense, and, as such, the prosecutor has the burden of proving all elements of the charge beyond a reasonable doubt.
State v. Schachter 536
10. When, in a criminal prosecution, all elements of the offense are not proven beyond a reasonable doubt, the defendant is entitled to a dismissal of the charge.
State v. Schachter 536
11. Opinion testimony is sufficient to support a finding of guilt in a criminal case, if the opinion is based on facts enabling the witness to express a reasonably accurate opinion.
State v. Kinney 701
12. Neither double jeopardy nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction or resentencing. A trial judge is not constitutionally precluded from imposing a new sentence, even though greater than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities, which information may have come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's recent prison record, or possibly from other sources.
State v. Lopez 719
13. In a criminal case the proper method to challenge the admissibility of evidence as to the results of a chemical test for intoxication is to file a motion to suppress.
State v. Hamilton 734
14. A jury verdict in a criminal case will not be overturned on appeal for lack of evidence unless it is so lacking in probative force that it can be said as a matter of law that the evidence was insufficient to support it.
State v. Meis 770
15. Due process of law is violated where the prosecution suppresses evidence after a request by the defense and the evidence is shown to be favorable in character for the defense and is material.
State v. Meis 770
16. Generally, there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.
State v. Meis 770
17. As a general rule, the trial court is vested with broad discretion in considering discovery requests of defense counsel, and error can be predicated only upon an abuse of such discretion.
State v. Meis 770
18. It is a general rule in a homicide case that a defendant may show the dangerous and turbulent character of the victim only

after laying a foundation by evidence tending to show self-defense.
State v. Meis 770
19. A statement made by a defendant, although inadmissible during the State's case in chief due to a failure to comply with *Miranda,* may be admissible for impeachment purposes.
State v. Meis 770
20. Because the crime of child abuse requires that the victim be a child, and third degree assault mandates that the offense must be done "intentionally, knowingly, or recklessly," neither of which element is necessary to establish the crime of manslaughter, such offenses are not lesser-included offenses of manslaughter.
State v. White 783

Damages

1. Irrigation districts organized under the laws of the State of Nebraska are liable for seepage damage under Neb. Const. art. I, § 21, without regard to negligence, even though legal title to the project is vested in someone other than the irrigation district, if the irrigation district is responsible for its operation and maintenance.
Wood v. Farwell Irr. Dist. 511
2. The mere fact that property abutting a district is damaged does not entitle the property owner to recover for such damages, absent proof that the damages realized by the owner were proximately caused by the seepage from the irrigation district.
Wood v. Farwell Irr. Dist. 511
3. An owner of property allegedly damaged by seepage may, among other available rights, file a direct suit for damages against an irrigation district responsible for such alleged damages.
Wood v. Farwell Irr. Dist. 511
4. There is no formula for computing damages in a personal injury case, and the final verdict is usually made up from a number of factors. As a general rule, the law gives the trier of fact the right to determine the amount of recovery in such cases, and if the verdict is not so disproportionate to the injury as to disclose prejudice and passion, it will not be disturbed.
Steinauer v. Sarpy County 830
5. In awarding damages for physical discomfort and mental anguish, the fact finder must rely upon the totality of the circumstances surrounding the incident. The credibility of the evidence and the witnesses and the weight to be given all of these factors rests in the sound discretion of the fact finder.
Steinauer v. Sarpy County 830
6. A person who suffers personal injury because of the negligence of another is entitled to recover for the reasonable value of

medical care and expenses incurred for the treatment of the injuries incurred to the time of trial, as well as the cost of those reasonably certain to be incurred in the future.
Steinauer v. Sarpy County 830
7. The amount of future medical expenses need not be established with mathematical certainty.
Steinauer v. Sarpy County 830
8. Proof of an actual loss of earnings or wages is not essential to recovery for loss of earning capacity. Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry.
Steinauer v. Sarpy County 830
9. Backpay awards under the Nebraska Fair Employment Practice Act must be reduced by earnings or amounts earnable with reasonable diligence by the person or persons discriminated against.
Airport Inn v. Nebraska Equal Opp. Comm. 852
10. Once an unlawfully discharged employee produces evidence in support of his claim for backpay, contending that he was unable to find comparable work, the employer has the burden of showing that the discharged employee did not exercise reasonable diligence in mitigating his damages.
Airport Inn v. Nebraska Equal Opp. Comm. 852
11. Prejudgment interest is not generally allowed on backpay awards under the Nebraska Fair Employment Practice Act.
Airport Inn v. Nebraska Equal Opp. Comm. 852
12. Unemployment compensation benefits should be deducted from a backpay award under the Nebraska Fair Employment Practice Act.
Airport Inn v. Nebraska Equal Opp. Comm. 852

Decedents' Estates

1. Where one holds a life estate for the duration of his own life, such estate is terminated by his death, and, while it may be a property right when held by the life tenant, it does not pass on account of anyone's death, including the life tenant's.
In re Estate of Glaser 104
2. Under the provisions of the Nebraska Probate Code, if one of the parties to a decree of dissolution dies during the 6-month period, the decree is effectively made nonoperative and the other party is the surviving spouse within the meaning of the Nebraska Probate Code.
In re Estate of Watson 305
3. The standard of review in both the district court and this court in cases arising from Neb. Rev. Stat. § 30-2482 (Cum. Supp. 1982) is for error appearing on the record.
In re Estate of Snyder 356

4. Claims, in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, demands, or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.
In re Estate of Severns 803

Declaratory Judgments

1. This court has treated the determination of factual issues in a declaratory judgment action which would otherwise be an action at law in the same manner as if a jury had been waived. The findings of the trial court therefore have the effect of the verdict of a jury and will not be set aside unless clearly wrong.
Havelock Bank v. Western Surety Co. 560
2. An action for a declaratory judgment is an appropriate remedy to determine the validity, construction, or interpretation of a statute.
Xerox Corp. v. Karnes 728

Demurrer

1. While leave to amend should ordinarily be granted when a demurrer has been sustained, such is not necessary if there is no reasonable possibility that the plaintiff can state a cause of action.
Schmuecker Bros. Implement v. Sobotka 114
2. A demurrer admits all well-pleaded facts.
MacMillen v. A. H. Robins Co. 338
3. A petition is sufficient [as against a general demurrer] if from the statement of facts set forth therein the law entitles the plaintiff to recover.
Waite v. Samson Dev. Co. 403
4. Pleadings are to be liberally construed, and if with such construction a petition states a cause of action against a defendant and in favor of the plaintiff, a demurrer thereto should be overruled.
Waite v. Samson Dev. Co. 403
5. A defendant's verdict cures error, if any, in a court's failure to dismiss a pleaded action vulnerable to a demurrer.
Creason v. Myers 551
6. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
Blanchard v. White 877

7. If a petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action.
Blanchard v. White 877

Directed Verdict

1. In examining the propriety of an order sustaining a motion for a directed verdict, all controverted facts and all inferences arising from the evidence shall be construed most strictly against the moving party and in favor of the party against whom the motion for directed verdict was granted.
Otto v. Hongsermeier Farms 45
2. Upon a motion for directed verdict or for judgment notwithstanding the verdict, the party against whom a verdict is directed is entitled to have all controverted facts resolved in his favor and to have the benefit of every reasonable inference deducible from the evidence.
Heady v. Farmers Mut. Ins. Co. 172
3. On review we must treat a plaintiff's motion for a directed verdict as an admission of the truth of all competent evidence submitted on behalf of the defendant. The defendant is entitled 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.
Five Points Bank v. Scoular-Bishop Grain Co. 677

Disciplinary Proceedings

1. Conduct which falls short of reaffirming one's fitness for the high responsibilities of judicial office constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute.
In re Complaint Against Kneifl 472
2. Conduct prejudicial to the administration of justice that brings the judicial office into disrepute is less grave than willful misconduct in office.
In re Complaint Against Kneifl 472
3. The Nebraska Supreme Court's review in matters of judicial discipline is de novo; when no new evidence is received, our review is de novo on the record.
In re Complaint Against Kneifl 472
4. This court must determine upon its own independent inquiry whether the evidence clearly and convincingly proves the alleged misconduct.
In re Complaint Against Kneifl 472
5. Although the recommendations of the Commission on Judicial Qualifications are entitled to be given weight, this court has the

obligation to make its own determination of what discipline is appropriate.
In re Complaint Against Kneifl 472
6. A judge's general performance as a jurist may be a relevant factor to consider in determining the appropriate discipline.
In re Complaint Against Kneifl 472
7. A judge may be disciplined for misconduct arising outside the performance of his judicial duties.
In re Complaint Against Kneifl 472
8. The purpose of sanctions in cases of judicial discipline is to preserve the integrity and independence of the judiciary and to restore and reaffirm public confidence in the administration of justice.
In re Complaint Against Kneifl 472
9. The discipline imposed must be designed to announce publicly this court's recognition that there has been misconduct; it must be sufficient to deter respondent from again engaging in such conduct; and it must discourage others from engaging in similar conduct in the future.
In re Complaint Against Kneifl 472
10. A judge is disciplined not for purposes of vengeance or retribution, but to instruct the public and all judges of the importance of the function performed by judges in a free society, to reassure the public that judicial misconduct is neither permitted nor condoned, and to reassure the citizens of Nebraska that the judiciary of their state is dedicated to the principle that ours is a government of laws and not of men.
In re Complaint Against Kneifl 472

Discrimination

1. An individual case of discrimination based on the disparate treatment theory will usually be divided into three phases. First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry the burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.
Zalkins Peerless Co. v. Nebraska Equal Opp. Comm. 289
Airport Inn v. Nebraska Equal Opp. Comm. 852
2. Employment decisions based on subjective standards carry little weight in rebutting charges of discrimination.
Zalkins Peerless Co. v. Nebraska Equal Opp. Comm. 289

Divorce

1. On appeal of domestic relations cases we review the record de novo in making our independent findings of fact, without reference to the conclusion reached by the trial court.
   Nielsen v. Nielsen 34
2. Under the provisions of the Nebraska Probate Code, if one of the parties to a decree of dissolution dies during the 6-month period, the decree is effectively made nonoperative and the other party is the surviving spouse within the meaning of the Nebraska Probate Code.
   In re Estate of Watson 305
3. The effect of the Uniformed Services Former Spouses Protection Act, 10 U.S.C. §§ 1401 et seq. (1982), is that nondisability military pensions need no longer be treated differently than nonmilitary pensions.
   Taylor v. Taylor 409
4. The method of considering a husband's pension fund by awarding the wife a specified amount of alimony for her lifetime falls within the approved methods for dealing with pension funds.
   Taylor v. Taylor 409

Double Jeopardy

1. A distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act.
   State v. Jackson 332
2. Multiple punishments can be imposed for the same act without violating the double jeopardy guarantee of the fifth amendment to the U.S. Constitution, where it is specifically authorized by state statute.
   State v. Jackson 332

Drunk Driving

1. Testimony by a witness as to acts done and words spoken by defendant as the basis for an opinion that defendant was intoxicated is direct evidence which, if believed by the trier of fact, is sufficient to support a conviction for driving while under the influence of intoxicating liquor.
   State v. Green 70
2. The fact that the driver of a motor vehicle has .10 percent of alcohol in his body fluids does not, of itself, establish as a mat-

ter of law that the driver is under the influence of intoxicating liquor.
Cathcart v. Blacketer 755
3. The operator of a motor vehicle is under the influence of intoxicating liquor if he has, due to the consumption of intoxicating liquor, so lost the control of his body or his mental faculties as to impair to any appreciable degree his ability to operate his motor vehicle in the manner that an ordinarily prudent and cautious man in the full possession of his faculties would operate it.
Cathcart v. Blacketer 755

Due Process

1. Whether an identification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it.
State v. Christianson 445
2. Any employee who has obtained a property interest in his employment is entitled to both notice in accordance with employment rules as well as notice which affords him constitutional due process.
Hill v. Gerber 670
3. 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.
Hill v. Gerber 670
4. Neb. Rev. Stat. § 28-512(1) (Reissue 1979) affords due process and is constitutional.
State v. Sailors 693
5. Due process of law is violated where the prosecution suppresses evidence after a request by the defense and the evidence is shown to be favorable in character for the defense and is material.
State v. Meis 770

Employer and Employee

1. There is no single test by which determination of whether a workman is an employee, as distinguished from an independent contractor, may be made. The determination must be made by consideration of all the facts in the case. The burden is on the plaintiff to prove that he was an employee at the time of the accident.
Gregg v. Challburg 143
2. Any employee who has obtained a property interest in his employment is entitled to both notice in accordance with employ-

ment rules as well as notice which affords him constitutional due process.
Hill v. Gerber 670
3. Before an employer to whom the injured employee is loaned can be found liable for injuries to the loaned employee, the employee must show that he has made a contract of hire, express or implied, with the special employer, that the work being done is essentially that of the special employer, and that the special employer has the right to control the details of the work.
Nussbaum v. Wright 712

Entrapment

1. Entrapment is governmental inducement of one to commit a crime not contemplated by the individual in order to prosecute that individual for commission of a criminal offense.
State v. Swenson 820
2. Regarding the defense of entrapment, Nebraska has adopted the "origin of intent" test to determine entrapment.
State v. Swenson 820
3. Under the "origin of intent" test, entrapment consists of two elements: (1) The government has induced the defendant to commit the offense charged, and (2) The defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity.
State v. Swenson 820
4. Entrapment is an affirmative defense in a criminal proceeding. The defense of entrapment is raised by and contained in the defendant's plea of not guilty.
State v. Swenson 820
5. When a defendant raises the defense of entrapment, the court must determine whether the defendant has presented sufficient evidence to warrant submitting to the jury the issue of entrapment. Therefore, it is the initial duty of the court to determine as a matter of law whether there is sufficient evidence that the government has induced the defendant to commit a crime.
State v. Swenson 820
6. In order to submit the defense of entrapment to the jury, a defendant's evidence of entrapment must be "more than a scintilla." To be more than a scintilla, evidence cannot be vague, conjectural, or the mere suspicion about the existence of a fact, but must be real and of such quality as to induce conviction.
State v. Swenson 820
7. The lone fact that an undercover police officer, personally or through an informant, offers to purchase or obtain marijuana is not an inducement to commit a crime resulting in the availability of entrapment as a defense for the seller of the marijuana. Inquiry alone is not a lure into criminal activity and

does not supply the degree of persuasion necessary for entrapment.
State v. Swenson 820
8. In the absence of a governmental inducement to deliver a controlled substance, acts of the accused after delivery of the controlled substance are irrelevant.
State v. Swenson 820

Equal Opportunity Commission
1. Upon appeal to the district court from an order of the Nebraska Equal Opportunity Commission, the review is by trial de novo upon the record.
Zalkins Peerless Co. v. Nebraska Equal Opp. Comm. 289
2. On appeal of review by the district court of an order of the Nebraska Equal Opportunity Commission, this court will not disturb the district court's findings if they are supported by substantial evidence.
Zalkins Peerless Co. v. Nebraska Equal Opp. Comm. 289
3. On appeal of review by the district court of an order of the Nebraska Equal Opportunity Commission, this court will not disturb the district court's findings of fact if they are supported by substantial evidence. The court will, however, reach independent conclusions with respect to questions of law.
Airport Inn v. Nebraska Equal Opp. Comm. 852

Equity
1. While matters in equity are reviewed de novo on appeal, this court must, where the credibility of the evidence is in conflict, give weight to the fact that the trial court saw and observed the witnesses while testifying.
Kluck v. Mentzer 8
Hiegel Farms Corp. v. Casselman 506
Paasch v. Brown 761
2. In a review de novo, this court will also give weight to an inspection of the premises by the trial court, where such inspection was given consideration by the trial court in its decision and judgment.
Kluck v. Mentzer 8
Hiegel Farms Corp. v. Casselman 506
3. Generally, in order to be entitled to the equitable remedy of accounting, it is necessary to show a fiduciary or a trust relationship between the parties, or a complicated series of accounts, making the remedy at law inadequate.
Wheeler Constr. v. Town & Country Realty 424
4. An action for an accounting between partners is grounded in equity; as such, the scope of our review is de novo on the record.
Langness v. "O" Street Carpet Shop 569

Escheat

Under the Uniform Disposition of Unclaimed Property Act, Neb. Rev. Stat. §§ 69-1301 et seq. (Reissue 1981), the rights of the state are strictly derivative.
State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622

Estoppel

1. 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 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.
   Cillessen Constr. v. Scotts Bluff Co. Hous. Auth. 39
   R.A.S., Inc. v. Crowley 811
2. Estoppel may be applied to prevent a fraudulent or inequitable resort to a statute of limitations.
   MacMillen v. A. H. Robins Co. 338
3. Ordinarily, to establish waiver of a legal right there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his part.
   Five Points Bank v. Scoular-Bishop Grain Co. 677

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. Schaeffer 4
2. Where reasonable minds may differ as to the conclusions or inferences to be drawn from the evidence, such issues must be submitted to the jury or the trier of facts.
   Hydroflo Corp. v. First Nat. Bank 20
3. The failure to abide by custom or ordinary practice is competent evidence of negligence.
   Hydroflo Corp. v. First Nat. Bank 20
4. Where evidence is conflicting on the question of proximate cause, the question is ordinarily one for the trier of facts.
   Hydroflo Corp. v. First Nat. Bank 20

5. Testimony by a witness as to acts done and words spoken by a defendant as the basis for an opinion that defendant was intoxicated is direct evidence which, if believed by the trier of fact, is sufficient to support a conviction for driving while under the influence of intoxicating liquor.
State v. Green 70
6. In a case tried to the court without a jury, there is a presumption that the court considers only such evidence as is competent and relevant, and a reviewing court will not reverse such a case because evidence was erroneously admitted, where there is other material, competent, and relevant evidence sufficient to sustain the judgment.
State v. Green 70
7. Clear and convincing evidence means evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
In re Guardianship of Sain 96
8. Ordinarily, unless the substance of the evidence is apparent, an offer of proof is required to predicate error for the exclusion of evidence.
Krohn v. Krohn 158
9. Questions of causation in workmen's compensation cases are for the fact finder.
Doggett v. Brunswick Corp. 166
10. A judgment will be reversed for the reception of irrelevant evidence where it is probable such evidence influenced the jury.
Heady v. Farmers Mut. Ins. Co. 172
11. Although Neb. Rev. Stat. § 44-501 (Reissue 1978) precludes evidence of the actual value of the insured premises for the purpose of voiding a fire insurance policy on the basis it was procured fraudulently or for the purpose of showing that a proof of loss statement was executed with fraudulent intent, evidence of actual value may nonetheless be admitted as bearing on the insured's motive to commit arson.
Heady v. Farmers Mut. Ins. Co. 172
12. When the State introduces statements of a defendant, the State is not bound by exculpatory statements contained therein, but such statements are to be considered by the finder of fact in the light of the surrounding facts and circumstances.
State v. Douglas 199
13. A failure to appropriately respond to properly served requests for admissions within the time prescribed constitutes an admission of the facts sought to be elicited.
Aetna Cas. & Surety Co. v. Nielsen 297
14. In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a

fundamental failure preventing a fair trial in the adversarial process.
State v. Archbold 345
15. A litigant may not speculate about the answer to a question and then, after answer has been given, for the first time lodge his objection. Failure to make a timely objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony.
State v. Archbold 345
16. In order to be timely an objection must ordinarily be made at the earliest opportunity after the ground for the objection becomes apparent. A motion to strike is not timely where testimony has been adduced without objection and the grounds for the motion to strike should have been apparent before the motion to strike is made.
State v. Archbold 345
17. A motion to strike evidence to which there should have been an objection when offered is merely another term for an objection and is governed by the rules as to the time of an objection.
State v. Archbold 345
18. When there occurs in the course of a trial a highly prejudicial event which is likely to materially affect the outcome of the trial, the party aggrieved must raise his objection then and move for mistrial. His failure to do so when he reasonably should have known of the prejudicial occurrence constitutes a waiver of the objection.
State v. Archbold 345
19. Problematical prejudice is no justification for delay in making a required, proper objection to questioning and testimony believed to be improper.
State v. Archbold 345
20. The appropriate standard of review for an assignment of error directed at the exclusion of evidence is one of abuse of discretion.
State Bank v. Scoular-Bishop Grain Co. 379
21. As a general rule, it is the province of the trial court in a jury case to determine the admissibility of the evidence offered by the parties at trial.
State v. West 389
22. Preliminary questions concerning the admissibility of evidence shall be determined by the judge. The court, and not the jury, is the arbitrator as to the admissibility of the evidence.
State v. West 389
23. Absent a showing of pretext or bad faith on the part of the police or the prosecution, invalidity of part of a search warrant does not require the suppression of all the evidence seized pursuant to the valid portions of the warrant.
State v. LeBron 452

24. A judgment will not be reversed for error in the exclusion of evidence if there was no prejudice to a substantial right of the accused and the record as a whole shows the error was harmless beyond a reasonable doubt.
State v. LeBron 452
25. After trial and conviction in the district court, any error in the ruling of the district court 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. LeBron 452
26. A proper objection to the receipt of evidence is required to preserve for review any error in the overruling of a motion in limine.
State v. LeBron 452
27. A defendant may not predicate error on the admission of evidence to which a timely objection was not made.
State v. Laymon 464
28. The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery.
Moudry v. Parkos 521
29. Evidence from which a conclusion can be arrived at only by guess or conjecture does not sustain one's burden of proof.
Moudry v. Parkos 521
30. Violation of an ordinance may be evidence of negligence.
McGinn v. City of Omaha 579
31. Whether one failed to look or looked and failed to see a vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching vehicle was within the limit of danger that reasonable minds could not differ thereon.
Jershin v. Becker 645
32. Before a verdict can be properly directed in a case where one failed to look or looked and failed to see a vehicle when it was within the limit of danger, the position of the oncoming vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger; otherwise, the question becomes one for the jury.
Jershin v. Becker 645
33. In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury.
Jershin v. Becker 645

34. When a court overrules a motion in limine, it is incumbent upon the movant to make an objection to the particular evidence sought to be adduced or offered by the State. A defendant cannot predicate error on the admission of evidence to which no objection was made at the time the evidence was adduced.
State v. Sailors 693
35. The plaintiff must establish by a preponderance of the evidence that his injury arose out of and in the course of his employment and is the proximate cause of the disability for which benefits are sought.
Powell v. W. G. Pauley Lumber Co. 707
36. Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony.
Powell v. W. G. Pauley Lumber Co. 707
37. For medical testimony to be the basis for an award, it must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between the accident and the disability.
Powell v. W. G. Pauley Lumber Co. 707
38. Whether a law enforcement officer refused a request for a second test is a foundational requirement for the admission of evidence as to results of a breath test.
State v. Hamilton 734
39. The jury may not consider the question of an alleged refusal once the trial court has determined that all foundational requirements for admission of the results of the breath test have been met.
State v. Hamilton 734
40. Where counsel for a party specifically states in the trial court that he has no objection to the introduction of certain documents, he cannot on appeal urge that they were improperly certified or authenticated and, for that reason, not admissible.
State v. Tonge 747
41. A judicial record of this state, or of any other federal court of the United States, may be proved by the producing of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one.
State v. Tonge 747
42. In determining on appeal the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury.
State v. Meis 770
43. It is a general rule in a homicide case that a defendant may show the dangerous and turbulent character of the victim only

after laying a foundation by evidence tending to show self-defense.
State v. Meis 770
44. If established facts give equal support to two inconsistent inferences, then the judgment must go against the party having the burden of proof.
In re Estate of Severns 803
45. If the evidence upon a fact is evenly balanced or if it preponderates in favor of the other party, then the burden has not been met.
In re Estate of Severns 803
46. The triers of fact are not to take into account the effects of future taxation when awarding a judgment in a personal injury case.
Steinauer v. Sarpy County 830

Expert Witnesses

1. Where the testimony of the same expert witness given at different times is conflicting, for other than bad faith motives, it rests with the trier of fact to resolve the conflict.
Doggett v. Brunswick Corp. 166
2. Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony.
Powell v. W. G. Pauley Lumber Co. 707
3. For medical testimony to be the basis for an award, it must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between the accident and the disability.
Powell v. W. G. Pauley Lumber Co. 707
4. The value of an opinion of an expert is no stronger than the facts upon which it is based.
Powell v. W. G. Pauley Lumber Co. 707
5. The opinions of expert witnesses are not binding on the finder of fact.
Cathcart v. Blacketer 755

Fair Employment Practice Act

1. An individual case of discrimination based on the disparate treatment theory will usually be divided into three phases. First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry the burden, the plaintiff must then have an opportunity to prove by a preponderance of the evi-

dence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.
Zalkins Peerless Co. v. Nebraska Equal Opp. Comm. 289
Airport Inn v. Nebraska Equal Opp. Comm. 852
2. Employment decisions based on subjective standards carry little weight in rebutting charges of discrimination.
Zalkins Peerless Co. v. Nebraska Equal Opp. Comm. 289
3. Backpay awards under the Nebraska Fair Employment Practice Act must be reduced by earnings or amounts earnable with reasonable diligence by the person or persons discriminated against.
Airport Inn v. Nebraska Equal Opp. Comm. 852
4. Once an unlawfully discharged employee produces evidence in support of his claim for backpay, contending that he was unable to find comparable work, the employer has the burden of showing that the discharged employee did not exercise reasonable diligence in mitigating his damages.
Airport Inn v. Nebraska Equal Opp. Comm. 852
5. Prejudgment interest is not generally allowed on backpay awards under the Nebraska Fair Employment Practice Act.
Airport Inn v. Nebraska Equal Opp. Comm. 852
6. In any action or proceeding under the Nebraska Fair Employment Practice Act, the district court, in its discretion, may allow the prevailing party a reasonable attorney fee.
Airport Inn v. Nebraska Equal Opp. Comm. 852
7. Unless there are special circumstances a prevailing plaintiff, under the Nebraska Fair Employment Practice Act, should be awarded a reasonable attorney fee for all stages of the proceedings.
Airport Inn v. Nebraska Equal Opp. Comm. 852
8. Unemployment compensation benefits should be deducted from a backpay award under the Nebraska Fair Employment Practice Act.
Airport Inn v. Nebraska Equal Opp. Comm. 852

Final Orders

The denial of a motion for summary judgment is not a final order and therefore is not appealable.
Schmuecker Bros. Implement v. Sobotka 114

Forcible Entry and Detainer

A forcible entry and detainer action is a civil action subject to the normal rules of a civil proceeding, including the power of the court to sustain a motion for a directed verdict in favor of either party at the close of all the evidence.
Otto v. Hongsermeier Farms 45

Fraud

Although Neb. Rev. Stat. § 44-501 (Reissue 1978) precludes evidence of the actual value of the insured premises for the purpose of voiding a fire insurance policy on the basis it was procured fraudulently or for the purpose of showing that a proof of loss statement was executed with fraudulent intent, evidence of actual value may nonetheless be admitted as bearing on the insured's motive to commit arson.
Heady v. Farmers Mut. Ins. Co. 172

Gaming

1. Neb. Rev. Stat. § 2-1208 (Reissue 1983), which prohibits the imposition of any license tax, permit tax, occupation tax, or excise tax, or racing fee upon a licensee of the State Racing Commission, except as provided in the statutes, does not exempt a purchaser of an admission ticket from the state sales tax, and the licensee is required to collect the sales tax from the purchaser and remit the tax collected to the state.
Governors of Ak-Sar-Ben v. Department of Rev. 518
2. Under the parimutuel system of wagering, the licensee authorized to accept such bets is in possession of the sum of money wagered as a custodian, depositary, or administrative agent, out of which it is obligated to pay unknown bettors the amount of their winnings.
State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622
3. The Nebraska State Board of Agriculture, while operating parimutuel betting, is a "business association," as contemplated by the Uniform Disposition of Unclaimed Property Act, Neb. Rev. Stat. §§ 69-1301 et seq. (Reissue 1981).
State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622
4. A parimutuel wagering ticket is an instrument payable on demand.
State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622

Garnishment

Neb. Rev. Stat. § 25-1056 (Cum. Supp. 1982) allows garnishment in aid of execution when the garnishee is indebted to the judgment debtor.
Schmuecker Bros. Implement v. Sobotka 114

Guaranty

1. There is no presumption as to the genuineness of signatures upon a guaranty of a contract or promissory note. The presumption of genuineness of a signature under Neb. U.C.C. § 3-307 (Reissue 1980) has application only to negotiable instruments, and a guaranty is not such an instrument.
Aetna Cas. & Surety Co. v. Nielsen 297
2. A guaranty is a collateral undertaking by one person to answer

for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance.
Chiles, Heider & Co. v. Pawnee Meadows 315

Hearsay

1. The foundational requirements for the admission of evidence under the business records exception to the hearsay rule are threefold. First, the activity recorded must be a type which regularly occurs in the course of the business' day-to-day activity. Second, the record must have been made as a part of a regular business practice at or near the time of the event recorded. Third, the record must be authenticated by a custodian or other qualified witness.
Chalupa v. Hartford Fire Ins. Co. 662
2. Under Neb. Rev. Stat. § 27-803(22) (Reissue 1979), hearsay testimony may be admissible under certain conditions, provided adequate notice is given.
In re Estate of Severns 803
3. The question of "trustworthiness" under Neb. Rev. Stat. § 27-803(22) (Reissue 1979) does not involve whether the witness is "trustworthy," but, rather, involves whether the statement being reported by the witness is "trustworthy."
In re Estate of Severns 803
4. While we have indicated that there is a distinction to be made between trustworthiness and credibility, we believe that the tests which we apply with regard to reviewing credibility must of necessity likewise apply with regard to trustworthiness.
In re Estate of Severns 803

Highways

1. A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection.
Jershin v. Becker 645
2. A motorist is not only obligated to look for approaching vehicles but also must see any vehicle within the radius which denotes the limit of danger.
Jershin v. Becker 645
3. The right of a motorist on a favored street to assume that a vehicle on a nonfavored street will be brought to a stop before it enters the intersection and will not proceed until the motorist has passed neither permits the motorist on the favored street to claim the right-of-way when he is too distant from the intersec-

tion to be entitled to it nor relieves him of the duty of exercising due care to avoid an accident.
Jershin v. Becker 645
4. The driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway.
Steinauer v. Sarpy County 830
5. A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner; and until he has such warning, notice, or knowledge, he may govern his acts in accordance with such assumption.
Steinauer v. Sarpy County 830
6. While the driver on a favored highway must keep a proper lookout, the driver with the right-of-way may nevertheless assume, until he has knowledge to the contrary, that the other vehicles will respect his legal right-of-way.
Steinauer v. Sarpy County 830

Homicide

1. As required by Neb. Rev. Stat. § 29-2027 (Reissue 1979), and when there is a proper, factual basis, a court is required to instruct on the degrees of criminal homicide even in the absence of a requested instruction regarding the lesser degrees of criminal homicide.
State v. Archbold 345
2. No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not merely simultaneously with the act which caused the death.
State v. Jones 435
3. In a homicide case in particular, photographs of the victim are admissible, even if gruesome, if proper foundation is laid and they are received for purposes of identification, to show the condition of the body, the nature and extent of the wounds, and to establish malice or intent.
State v. Jones 435
4. It is a general rule in a homicide case that a defendant may show the dangerous and turbulent character of the victim only after laying a foundation by evidence tending to show self-defense.
State v. Meis 770

Identification Procedures

1. Identification of the accused is an essential element in establishment of guilt beyond a reasonable doubt; however, identifi-

cation can be inferred from all facts and circumstances that are in evidence.
State v. Kaba 81
2. While specific in-court identification is the preferred method of discharging the State's burden of proving the identity of an accused as the perpetrator of the crime charged, absent such identification, where no witness during trial noted that the defendant was not the same individual charged with the crime, both the prosecution and defense counsel referred to the defendant as the individual involved in the crime, and at no time did defense counsel object to the prosecution's references to the defendant, there is sufficient evidence to establish the defendant's identity in connection with the crime for which he stood accused.
State v. Kaba 81
3. Whether an identification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it.
State v. Christianson 445

Impeachment
1. The concurrence of five or more judges is required to convict in an impeachment proceeding.
State v. Douglas 199
2. An impeachment proceeding is a judicial proceeding in the nature of a criminal proceeding in which the rules of evidence apply.
State v. Douglas 199
3. An omission for which an officer may be impeached and removed from office must relate to the duties of the office.
State v. Douglas 199
4. A misdemeanor in office may consist of a violation of some provision in the Constitution or a statute, willful neglect of duty done with a corrupt intention, or negligence so gross and disregard of duty so flagrant as to warrant an inference that it was willful and corrupt.
State v. Douglas 199
5. A violation of the Code of Professional Responsibility which is applicable to members of the bar is not, as such, an impeachable offense.
State v. Douglas 199
6. A witness may be impeached by showing prior contrary statements as to a matter relative to the issue.
State v. Jackson 363
7. The State may not use a prior inconsistent statement of a witness under the guise of impeachment for the primary purpose of

placing before the jury substantive evidence which is not otherwise admissible.
State v. Jackson 363
8. If a witness, not a party, admits making earlier statements contradictory of his testimony given at trial, then the earlier statements are not admissible for purpose of impeachment.
State v. Jackson 363
9. A statement made by a defendant, although inadmissible during the State's case in chief due to a failure to comply with *Miranda,* may be admissible for impeachment purposes.
State v. Meis 770

Implied Consent Law

The regulations promulgated by the Nebraska Department of Health recognize that the holder of a Class B permit may test not only for alcohol content in breath but in blood and urine as well, and the tester to do so may use an Intoximeter Mark IV.
State v. West 389

Independent Contractor

There is no single test by which determination of whether a workman is an employee, as distinguished from an independent contractor, may be made. The determination must be made by consideration of all the facts in the case. The burden is on the plaintiff to prove that he was an employee at the time of the accident.
Gregg v. Challburg 143

Initiative and Referendum

Generally, a measure seeking an advisory vote of the electorate or a nonbinding expression of public opinion on a question is not a proper subject for the initiative.
State ex rel. Brant v. Beermann 632

Insurance

1. No right of subrogation can arise in favor of an insurer against its own insured, since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty.
Reeder v. Reeder 120
2. Absent an express agreement to the contrary between a host and a guest, the host's fire insurance carrier does not have a right of subrogation against the guest for the negligent destruction of the property which the carrier insured and for which the host paid a premium.
Reeder v. Reeder 120

3. Neb. Rev. Stat. §44-501 (Reissue 1978) applies to policies of fire insurance.
Heady v. Farmers Mut. Ins. Co. 172
4. Although Neb. Rev. Stat. § 44-501 (Reissue 1978) precludes evidence of the actual value of the insured premises for the purpose of voiding a fire insurance policy on the basis it was procured fraudulently or for the purpose of showing that a proof of loss statement was executed with fraudulent intent, evidence of actual value may nonetheless be admitted as bearing on the insured's motive to commit arson.
Heady v. Farmers Mut. Ins. Co. 172
5. An insurer who has made a payment under a mistake of fact that the terms of an insurance contract require such payment is entitled to restitution, at least where the payee has not so changed his position that it would be inequitable to require him to make full payment.
Chalupa v. Hartford Fire Ins. Co. 662

Intent

1. The question of abandonment is largely one of intent to be determined in each case from all the facts and circumstances.
In re Guardianship of Sain 96
2. No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not merely simultaneously with the act which caused the death.
State v. Jones 435

Irrigation Districts

1. Irrigation districts organized under the laws of the State of Nebraska are liable for seepage damage under Neb. Const. art. I, § 21, without regard to negligence, even though legal title to the project is vested in someone other than the irrigation district, if the irrigation district is responsible for its operation and maintenance.
Wood v. Farwell Irr. Dist. 511
2. The mere fact that property abutting a district is damaged does not entitle the property owner to recover for such damages, absent proof that the damages realized by the owner were proximately caused by the seepage from the irrigation district.
Wood v. Farwell Irr. Dist. 511
3. An owner of property allegedly damaged by seepage may, among other available rights, file a direct suit for damages against an irrigation district responsible for such alleged damages.
Wood v. Farwell Irr. Dist. 511

Joinder

A person with whom or in whose name a contract is made for the benefit of another may bring an action without joining with him the person for whose benefit it is prosecuted.
Chiles, Heider & Co. v. Pawnee Meadows 315

Judges

1. Conduct which falls short of reaffirming one's fitness for the high responsibilities of judicial office constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute.
In re Complaint Against Kneifl 472
2. Conduct prejudicial to the administration of justice that brings the judicial office into disrepute is less grave than willful misconduct in office.
In re Complaint Against Kneifl 472
3. The Nebraska Supreme Court's review in matters of judicial discipline is de novo; when no new evidence is received, our review is de novo on the record.
In re Complaint Against Kneifl 472
4. This court must determine upon its own independent inquiry whether the evidence clearly and convincingly proves the alleged misconduct.
In re Complaint Against Kneifl 472
5. Although the recommendations of the Commission on Judicial Qualifications are entitled to be given weight, this court has the obligation to make its own determination of what discipline is appropriate.
In re Complaint Against Kneifl 472
6. A judge's general performance as a jurist may be a relevant factor to consider in determining the appropriate discipline.
In re Complaint Against Kneifl 472
7. A judge may be disciplined for misconduct arising outside the performance of his judicial duties.
In re Complaint Against Kneifl 472
8. The purpose of sanctions in cases of judicial discipline is to preserve the integrity and independence of the judiciary and to restore and reaffirm public confidence in the administration of justice.
In re Complaint Against Kneifl 472
9. The discipline imposed must be designed to announce publicly this court's recognition that there has been misconduct; it must be sufficient to deter respondent from again engaging in such conduct; and it must discourage others from engaging in similar conduct in the future.
In re Complaint Against Kneifl 472
10. A judge is disciplined not for purposes of vengeance or retribu-

tion, but to instruct the public and all judges of the importance of the function performed by judges in a free society, to reassure the public that judicial misconduct is neither permitted nor condoned, and to reassure the citizens of Nebraska that the judiciary of their state is dedicated to the principle that ours is a government of laws and not of men.
In re Complaint Against Kneifl 472

11. A fair trial requires at a minimum an impartial judge, an impartial jury, and an atmosphere of judicial calm.
Pitt v. Checker Cab Co. 600

12. Counsel owe to the judge, because of the position he occupies, the utmost deference and respect, and the judge owes to the counsel an equal obligation of courtesy, patience, and consideration.
Pitt v. Checker Cab Co. 600

13. It is the duty of the judge, as well as the attorneys, to endeavor to surround the trial with an atmosphere of fairness, undisturbed by prejudice, passion, or ill will.
Pitt v. Checker Cab Co. 600

14. During the course of a trial, the judge should refrain from making remarks which may have a tendency to influence the jury.
Pitt v. Checker Cab Co. 600

15. While there is no impropriety in a trial judge's interrogating a witness when the tendency is only to develop the truth and is not calculated to influence the jury, save as the testimony will assist it to arrive at a correct conclusion on the question at issue, the practice is one which should be very sparingly employed.
Pitt v. Checker Cab Co. 600

16. The actions of the trial judge should never be such as to warrant any assertion that he assisted one or the other party.
Pitt v. Checker Cab Co. 600

17. Counsel does not have the license to quarrel with a trial judge's evidentiary ruling; if the ruling is prejudicially erroneous, and is properly preserved and presented to this court, an appropriate correction will be made on appeal.
Pitt v. Checker Cab Co. 600

18. A claim of improper conduct on the part of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection.
Pitt v. Checker Cab Co. 600

19. It is prejudicially erroneous for a judge to comment in such a manner as to discredit a witness.
Pitt v. Checker Cab Co. 600

Judgments

1. A judgment denying probation and imposing a sentence which

is within statutory limits will not be modified absent an abuse of discretion by the sentencing judge.
State v. Cooley 90
2. Failing a notation on the trial docket, a judgment is rendered when some written notation of it is made and filed in the records of the court.
Schmuecker Bros. Implement v. Sobotka 114
3. An irregularity in a judgment which has no prejudicial effect is to be ignored.
Schmuecker Bros. Implement v. Sobotka 114
4. While Neb. Rev. Stat. § 25-852 (Reissue 1979) allows pleadings to be amended after judgment in furtherance of justice, such may not be allowed when the amendment changes the issues or expands the relief the original judgment affords by the addition of another judgment debtor.
Schmuecker Bros. Implement v. Sobotka 114
5. A judgment will be reversed for the reception of irrelevant evidence where it is probable such evidence influenced the jury.
Heady v. Farmers Mut. Ins. Co. 172
6. Findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In such a circumstance it is not within our province to resolve conflicts in or to weigh the evidence; if there is a conflict in the evidence, this court will review the judgment rendered and will presume that controverted facts were decided in favor of the successful party.
Wheeler Constr. v. Town & Country Realty 424
7. A judgment will not be reversed for error in the exclusion of evidence if there was no prejudice to a substantial right of the accused and the record as a whole shows the error was harmless beyond a reasonable doubt.
State v. LeBron 452
8. A judgment denying probation and imposing a sentence which is within statutory limits will not be modified absent an abuse of discretion by the sentencing judge.
State v. Teater 723
9. If established facts give equal support to two inconsistent inferences, then the judgment must go against the party having the burden of proof.
In re Estate of Severns 803

Judicial Notice

This court will judicially notice trial court rules filed with the clerk of this court.
Aetna Cas. & Surety Co. v. Nielsen 297

Juries

The jury may not consider the question of an alleged refusal once

the trial court has determined that all foundational requirements for admission of the results of the breath test have been met.
State v. Hamilton 734

Jurisdiction

When a district court has acquired jurisdiction, it has the right to decide every question which arises in the case, and its judgment, even if erroneous, cannot be collaterally assailed.
State ex rel. Ritthaler v. Knox 766

Juror Misconduct

1. In order for a verdict to be set aside because of the prejudicial effect of newspaper accounts on jurors, there must be evidence presented that the jurors read newspaper accounts and that the accounts were unfair or prejudicial to the defendant.
State v. West 389
2. The determination as to whether misconduct was prejudicial is to be resolved by the trial court on the basis of an independent evaluation of all the circumstances in the case.
State v. West 389
3. A motion for a new trial upon the ground of jury misconduct is addressed to the sound discretion of the trial court, and a ruling made thereon will not be disturbed in the absence of an abuse of discretion.
State v. West 389

Jurors

1. When an improper communication with a juror or jurors is shown to have taken place in a criminal case, a rebuttable presumption of prejudice arises and the burden is on the State to prove that the communication was not prejudicial.
State v. LeBron 452
2. In cases where the contact with the witnesses is minimal or where the testimony of the witness involves only formal or uncontroverted issues, the presumption of prejudice is overcome.
State v. LeBron 452
3. The retention or rejection of a juror is a matter of discretion for the trial court.
State v. LeBron 452

Jury Instructions

1. As required by Neb. Rev. Stat. § 29-2027 (Reissue 1979), and when there is a proper, factual basis, a court is required to instruct on the degrees of criminal homicide even in the absence of a requested instruction regarding the lesser degrees of criminal homicide.
State v. Archbold 345

2. A trial court is not required to give a cautionary instruction in the absence of a request.
State v. Jackson 363
3. It is the duty of the trial court upon request of the accused to instruct the jury upon the accused's theory of the case if there is sufficient evidence to support it.
State v. Canby 461
4. A defendant may not predicate error on an instruction that is more favorable to him than is required by law.
State v. Hamilton 734

Jury Trials

1. The right of trial by jury having been voluntarily waived by the accused, he thereafter has no right or power at his mere will to withdraw or revoke his waiver and demand a jury trial.
State v. Kaba 81
2. Whether one accused of a crime who has voluntarily waived a jury trial will be permitted to withdraw the waiver and have his case tried before a jury is ordinarily within the discretion of the trial court.
State v. Kaba 81

Juvenile Courts

The right to appeal from orders of a county court sitting as a juvenile court, insofar as that right is vested in the child's custodian, is vested only in individuals or entities having legal custody of such a child, and not in those persons having only possession of the child.
In re Interest of S.R. 528

Laches

1. The defense of laches is not a favored one, and it will be sustained only if the litigant has been guilty of inexcusable neglect in enforcing a right to the prejudice of his adversary.
State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622
2. Laches does not grow out of the mere passage of time; it is founded upon the inequity of enforcing a claim where there has been a change in the condition or relations of the property or parties.
Department of Banking, Receiver v. Wilken 796

Landlord and Tenant

1. If a tenant, without consent of the landlord, holds over after the term of the lease has expired, there is no presumption that the parties had agreed that the same relation of landlord and tenant should continue for another term.
Otto v. Hongsermeier Farms 45
2. Where lands are leased to a tenant for 1 year for a stipulated

rent reserved, and after the expiration of the lease the tenant, without further contract, remains in possession and is recognized as a tenant by the landlord in the receipt of rent for another year, this will create a tenancy from year to year; and, in such case, the tenancy can only be terminated by an agreement of the parties, express or implied, or by notice given, 6 calendar months ending with the period of the year at which the tenancy commenced.
Moudry v. Parkos 521

3. Generally, in this state, in the absence of any different agreement, a yearly lease of farm lands begins on March 1 and ends on February 28 of the succeeding year, and the rental becomes due at the expiration of the term.
Moudry v. Parkos 521

Leases

1. If a tenant, without consent of the landlord, holds over after the term of the lease has expired, there is no presumption that the parties had agreed that the same relation of landlord and tenant should continue for another term.
Otto v. Hongsermeier Farms 45

2. In the absence of words of express limitation, when a lease confers on the lessee an option to purchase the property at any time during the term of the lease, and the lease is thereafter extended upon the same terms and conditions, the option to purchase is also extended for the period of the extended term.
III Lounge, Inc. v. Gaines 466

3. Where lands are leased to a tenant for 1 year for a stipulated rent reserved, and after the expiration of the lease the tenant, without further contract, remains in possession and is recognized as a tenant by the landlord in the receipt of rent for another year, this will create a tenancy from year to year; and, in such case, the tenancy can only be terminated by an agreement of the parties, express or implied, or by notice given, 6 calendar months ending with the period of the year at which the tenancy commenced.
Moudry v. Parkos 521

4. Generally, in this state, in the absence of any different agreement, a yearly lease of farm lands begins on March 1 and ends on February 28 of the succeeding year, and the rental becomes due at the expiration of the term.
Moudry v. Parkos 521

5. As a matter of law, one takes property subject to the rights of persons in possession.
Moudry v. Parkos 521

6. The payment of rent based on a percentage of sales does not create a partnership between the lessor and lessee.
Department of Banking, Receiver v. Wilken 796

Legislative Intent

1. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately.
   In re Boundaries of McCook P.P. Dist. 11
2. When a statute is ambiguous and must be construed, recourse may be had to the legislative history for the purpose of discovering the intent of lawmakers. This court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results.
   Worley v. City of Omaha 77
3. A sensible construction will be placed upon a statute to effectuate the object of legislation, rather than a literal meaning that would have the effect of defeating the legislative intent.
   Worley v. City of Omaha 77

Legislature

A state legislature may generally pass any act, because legislative capacity not constitutionally inhibited or prohibited is retained in the people and exercised in the legislature by representatives of the people.
State ex rel. Creighton Univ. v. Smith 682

Lesser-Included Offenses

1. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
   State v. Jackson 332
2. Use of a firearm or other deadly weapon in the commission of a felony is not a lesser-included offense of assault in the second degree.
   State v. Jackson 332
3. The test for determining whether a lesser-included offense exists in this jurisdiction is that a lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
   State v. White 783
4. The determination of whether an offense is a lesser-included offense is controlled by the elements of the crimes as set forth in

the statutes and not by the facts presented in the particular case at issue.
State v. White 783
5. The fact that the elements of the lesser-included offense may be present in a case of the greater offense is not sufficient to invoke the lesser-included offense instruction if it is *possible* to commit the greater offense without at the same time committing the lesser offense.
State v. White 783
6. Because the crime of child abuse requires that the victim be a child, and third degree assault mandates that the offense must be done "intentionally, knowingly, or recklessly," neither of which element is necessary to establish the crime of manslaughter, such offenses are not lesser-included offenses of manslaughter.
State v. White 783

Liability
1. Irrigation districts organized under the laws of the State of Nebraska are liable for seepage damage under Neb. Const. art. I, § 21, without regard to negligence, even though legal title to the project is vested in someone other than the irrigation district, if the irrigation district is responsible for its operation and maintenance.
Wood v. Farwell Irr. Dist. 511
2. A municipal corporation is ordinarily liable for injuries to travelers resulting from the fall of a tree growing on or overhanging the street or way, provided it had actual or constructive notice of its dangerous condition.
McGinn v. City of Omaha 579

Licensee
Neb. Rev. Stat. § 2-1208 (Reissue 1983), which prohibits the imposition of any license tax, permit tax, occupation tax, or excise tax, or racing fee upon a licensee of the State Racing Commission, except as provided in the statutes, does not exempt a purchaser of an admission ticket from the state sales tax, and the licensee is required to collect the sales tax from the purchaser and remit the tax collected to the state.
Governors of Ak-Sar-Ben v. Department of Rev. 518

Limitations of Actions
1. Statutes of limitation are statutes of repose, and generally they do not impair existing substantive rights, but merely affect the procedure by which such rights may be enforced.
Stock v. Meissner 56
2. The 4-year statute of limitations set forth in Neb. Rev. Stat. § 25-224(1) (Cum. Supp. 1982) begins to run on the date on

which the party holding the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of the injury or damage.
Condon v. A. H. Robins Co. 60
3. One who wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit, cannot avail himself of the statute of limitations as a defense.
MacMillen v. A. H. Robins Co. 338
4. The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived, and will be unless pleaded.
State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622

Mandamus

Departmental or administrative decisions contrary to law or based on a mistaken view of the law are not within the exercise of discretion lying outside the remedy of mandamus. By mandamus a court can correct such mistake of law and compel the proper application of law, thereby converting an otherwise discretionary act into a purely ministerial duty.
State ex rel. Creighton Univ. v. Smith 682

Master and Servant

1. The general test in determining whether an employee is a servant of his original master, or of the party to whom he has been furnished, is whether in the particular service which he is engaged to perform he continues to be liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired.
Nussbaum v. Wright 712
2. It is quite generally agreed that in order to transfer liability from the general employer to the one to whom the employee is loaned, there must be some consensual relationship between the loaned employee and the employer whose service he enters, sufficient to create a new employer-employee relationship. Where an employee enters the service of another at the command and pursuant to the direction of the master, no new relationship is created. While the employee may be subject to the direction of the temporary master, he is there in obedience to the command of his employer; and in doing what the new master directs him to do, he is performing his duty to the employer who gave the order. Consent cannot be inferred merely from the fact that the employee obeyed the commands of his master in entering the services of another.
Nussbaum v. Wright 712
3. Before the new master and servant relationship can be made

effective, the servant must understand that he is submitting himself to the control of the new master.
Nussbaum v. Wright 712

Mental Competency

1. The test of mental competency to stand trial is whether the defendant has the present capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.
State v. Teater 723
2. The determination of the finder of fact on the issue of competency will not be disturbed unless there is insufficient evidence to support the findings.
State v. Teater 723
3. The test of mental capacity to plead or stand trial is the same.
State v. Teater 723

Misdemeanors

A misdemeanor in office may consist of a violation of some provision in the Constitution or a statute, willful neglect of duty done with a corrupt intention, or negligence so gross and disregard of duty so flagrant as to warrant an inference that it was willful and corrupt.
State v. Douglas 199

Modification of Decree

On appeal of the trial court's determination as to whether such a change in circumstances has occurred which justifies a modification of its prior custody order, this court must review the record de novo and make independent conclusions of fact without reference to the conclusion reached by the trial court. Where evidence is in conflict, however, this court will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite.
Robertson v. Robertson 786

Motions for Mistrial

1. In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process.
State v. Archbold 345
2. When there occurs in the course of a trial a highly prejudicial event which is likely to materially affect the outcome of the trial, the party aggrieved must raise his objection then and move for mistrial. His failure to do so when he reasonably

should have known of the prejudicial occurrence constitutes a waiver of the objection.
State v. Archbold 345

Motions for New Trial

A motion for a new trial upon the ground of jury misconduct is addressed to the sound discretion of the trial court, and a ruling made thereon will not be disturbed in the absence of an abuse of discretion.
State v. West 389

Motions to Strike

1. A litigant may not speculate about the answer to a question and then, after answer has been given, for the first time lodge his objection. Failure to make a timely objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony.
State v. Archbold 345
2. In order to be timely an objection must ordinarily be made at the earliest opportunity after the ground for the objection becomes apparent. A motion to strike is not timely where testimony has been adduced without objection and the grounds for the motion to strike should have been apparent before the motion to strike is made.
State v. Archbold 345
3. A motion to strike evidence to which there should have been an objection when offered is merely another term for an objection and is governed by the rules as to the time of an objection.
State v. Archbold 345

Motions to Suppress

1. In a criminal case the proper method to challenge the admissibility of evidence as to the results of a chemical test for intoxication is to file a motion to suppress.
State v. Hamilton 734
2. The findings of fact by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong.
State v. Hamilton 734

Motor Vehicles

1. Two vehicles approach an intersection at approximately the same time whenever they are in such relative positions that it would appear to one of ordinary prudence approaching from the left that there is danger of collision if he fails to yield.
Kendall v. Hongsermeier 109
2. The failure to look at a time when looking would have been

effective was negligence as a matter of law, and the court was in error in not so holding and instructing the jury.
Circo v. Transit Auth. of City of Omaha 497
3. Although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nevertheless keep a proper lookout and watch where he is driving.
Circo v. Transit Auth. of City of Omaha 497
4. Users of the highway are required to exercise reasonable care. What is reasonable care must, in each case, be determined by its own peculiar facts and circumstances.
Circo v. Transit Auth. of City of Omaha 497
5. The security deposit required by statute to insure that any judgment against the uninsured motorist will be paid must be in an amount adequate for that purpose.
Way v. Department of Motor Vehicles 641
6. A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection.
Jershin v. Becker 645
7. A motorist is not only obligated to look for approaching vehicles but also must see any vehicle within the radius which denotes the limit of danger.
Jershin v. Becker 645
8. Whether one failed to look or looked and failed to see a vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching vehicle was within the limit of danger that reasonable minds could not differ thereon.
Jershin v. Becker 645
9. Before a verdict can be properly directed in a case where one failed to look or looked and failed to see a vehicle when it was within the limit of danger, the position of the oncoming vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger; otherwise, the question becomes one for the jury.
Jershin v. Becker 645
10. The right of a motorist on a favored street to assume that a vehicle on a nonfavored street will be brought to a stop before it enters the intersection and will not proceed until the motorist has passed neither permits the motorist on the favored street to claim the right-of-way when he is too distant from the intersection to be entitled to it nor relieves him of the duty of exercising due care to avoid an accident.
Jershin v. Becker 645

11. To recover as a guest from a host driver in an accident occurring before August 30, 1981, the guest must prove either (1) that the host driver was intoxicated and was also guilty of some ordinary negligence proximately causing or contributing to cause the accident; or (2) that the host driver was guilty of gross negligence proximately causing or contributing to cause the accident.
Cathcart v. Blacketer 755
12. A driver is guilty of negligence as a matter of law if he fails to see one who is favored over him under the rules of the road.
Steinauer v. Sarpy County 830
13. The driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway.
Steinauer v. Sarpy County 830
14. A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner; and until he has such warning, notice, or knowledge, he may govern his acts in accordance with such assumption.
Steinauer v. Sarpy County 830
15. While the driver on a favored highway must keep a proper lookout, the driver with the right-of-way may nevertheless assume, until he has knowledge to the contrary, that the other vehicles will respect his legal right-of-way.
Steinauer v. Sarpy County 830

Municipal Corporations

A municipal corporation is ordinarily liable for injuries to travelers resulting from the fall of a tree growing on or overhanging the street or way, provided it had actual or constructive notice of its dangerous condition.
McGinn v. City of Omaha 579

Names

1. The rule of idem sonans is applicable to both civil and criminal proceedings.
State v. Laymon 464
2. Under the doctrine of idem sonans a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance.
State v. Laymon 464

Negligence

1. Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a trade is required to exercise the skill and knowledge normally

possessed by members of that trade in good standing in similar communities.
Doupnik v. Usher Pest Control Co. 1
2. The failure to abide by custom or ordinary practice is competent evidence of negligence.
Hydroflo Corp. v. First Nat. Bank 20
3. Generally, the question of whether there has been an intervening cause eliminating negligence of a defendant as a proximate cause is for the trier of facts.
Hydroflo Corp. v. First Nat. Bank 20
4. The failure to look at a time when looking would have been effective was negligence as a matter of law, and the court was in error in not so holding and instructing the jury.
Circo v. Transit Auth. of City of Omaha 497
5. Although one in a favored position may assume, until he has warning, notice, or knowledge to the contrary, that others will use a highway lawfully, he must nevertheless keep a proper lookout and watch where he is driving.
Circo v. Transit Auth. of City of Omaha 497
6. Users of the highway are required to exercise reasonable care. What is reasonable care must, in each case, be determined by its own peculiar facts and circumstances.
Circo v. Transit Auth. of City of Omaha 497
7. A municipal corporation is ordinarily liable for injuries to travelers resulting from the fall of a tree growing on or overhanging the street or way, provided it had actual or constructive notice of its dangerous condition.
McGinn v. City of Omaha 579
8. Violation of an ordinance may be evidence of negligence.
McGinn v. City of Omaha 579
9. Negligence must be measured against the particular set of facts and circumstances present in each case.
McGinn v. City of Omaha 579
10. In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury.
Jershin v. Becker 645
11. To recover as a guest from a host driver in an accident occurring before August 30, 1981, the guest must prove either (1) that the host driver was intoxicated and was also guilty of some ordinary negligence proximately causing or contributing to cause the accident; or (2) that the host driver was guilty of gross

negligence proximately causing or contributing to cause the accident.
Cathcart v. Blacketer 755
12. A driver is guilty of negligence as a matter of law if he fails to see one who is favored over him under the rules of the road.
Steinauer v. Sarpy County 830
13. Generally, one is contributorily negligent if (1) he breaches the duty imposed upon him by the law to protect himself from injury; (2) his actions concur and cooperate with actionable negligence of the defendant; and (3) his actions contribute to the injuries as a proximate cause.
Steinauer v. Sarpy County 830
14. A person who suffers personal injury because of the negligence of another is entitled to recover for the reasonable value of medical care and expenses incurred for the treatment of the injuries incurred to the time of trial, as well as the cost of those reasonably certain to be incurred in the future.
Steinauer v. Sarpy County 830

Negotiable Instruments

In an action brought under Neb. U.C.C. § 3-419 (Reissue 1980) by a payee to recover in conversion for payment on a forged endorsement, it is incumbent on a depositary bank seeking immunity under subsection (3) to plead and prove as affirmative defenses that it acted in good faith and in accordance with reasonable commercial standards.
Hydroflo Corp. v. First Nat. Bank 20

Notice

1. Any employee who has obtained a property interest in his employment is entitled to both notice in accordance with employment rules as well as notice which affords him constitutional due process.
Hill v. Gerber 670
2. 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.
Hill v. Gerber 670

Option to Purchase

In the absence of words of express limitation, when a lease confers on the lessee an option to purchase the property at any time during the term of the lease, and the lease is thereafter extended upon the same terms and conditions, the option to purchase is also extended for the period of the extended term.
III Lounge, Inc. v. Gaines 466

Ordinances

1. A prosecution for disturbing the peace under a city ordinance for which there is a possibility of incarceration is a criminal offense, and, as such, the prosecutor has the burden of proving all elements of the charge beyond a reasonable doubt.
   State v. Schachter 536
2. When, in a criminal prosecution, all elements of the offense are not proven beyond a reasonable doubt, the defendant is entitled to a dismissal of the charge.
   State v. Schachter 536
3. Violation of an ordinance may be evidence of negligence.
   McGinn v. City of Omaha 579

Parental Rights

1. The natural rights of a parent to the custody of a child cannot be terminated absent clear and convincing evidence.
   In re Interest of B.F.R. 94
   In re Interest of S. 369
   In re Interest of D.R. and S.B. 883
2. In an appeal of a juvenile case, including termination of parental rights, we review the record de novo, and regarding disputed facts make our own findings independent of any conclusion reached by the trial court. If evidence is in conflict or dispute, we do consider and give great weight to the fact that the trial court has observed the parties and witnesses and has judged their credibility.
   In re Interest of W. 325
   In re Interest of D.R. and S.B. 883
3. Public policy requires the severing of all family ties, including those of grandparents, with respect to a child whose parents have had their parental rights terminated.
   In re Interest of S.R. 528
4. Grandparents of a child as to whom parental rights have been terminated do not have standing, as grandparents, to appeal from juvenile court orders for placement and custody of the child with appropriate entities for adoption.
   In re Interest of S.R. 528
5. Where there are reasonable grounds to believe that the conditions giving rise to the parents' inability to care for their children will continue for a prolonged and indefinite period, the parental rights may be terminated when such action is in the best interests of the children.
   In re Interest of D.R. and S.B. 883

Parimutuel Tickets

1. Under the parimutuel system of wagering, the licensee authorized to accept such bets is in possession of the sum of money wagered as a custodian, depositary, or administrative agent,

out of which it is obligated to pay unknown bettors the amount of their winnings.
State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622
2. A parimutuel wagering ticket is an instrument payable on demand.
State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622

Parties

1. Neb. Rev. Stat. § 43-1210 (Cum. Supp. 1982) does not provide a basis for complaint to one not prejudiced by the failure to implead others as parties.
Dennis v. Smith 147
2. A party who voluntarily agrees by stipulation to consolidate several causes of action cannot later be heard to complain of the ramifications of such an agreement.
Havelock Bank v. Western Surety Co. 560
3. A party to a case who has been served with a copy of the notice of appeal and who is not an appellant is an appellee in this court.
Langness v. "O" Street Carpet Shop 569

Partnerships

1. A partner who contributes only services to the partnership is not deemed to have made a capital contribution to the partnership such as to require capital repayment upon dissolution unless the parties have agreed to the contrary.
Langness v. "O" Street Carpet Shop 569
2. Amounts owing to partners to reimburse them for capital contributions are liabilities of the partnership and take priority over amounts owing to partners in respect to profits.
Langness v. "O" Street Carpet Shop 569
3. Upon dissolution each partner impliedly consents that his copartners receive their appropriate shares of the partnership assets; anything one partner receives over his appropriate share is deemed to have been obtained without the consent of the other partners.
Langness v. "O" Street Carpet Shop 569
4. The payment of rent based on a percentage of sales does not create a partnership between the lessor and lessee.
Department of Banking, Receiver v. Wilken 796

Pensions

1. The effect of the Uniformed Services Former Spouses Protection Act, 10 U.S.C. §§ 1401 et seq. (1982), is that nondisability military pensions need no longer be treated differently than nonmilitary pensions.
Taylor v. Taylor 409
2. The method of considering a husband's pension fund by award-

ing the wife a specified amount of alimony for her lifetime falls within the approved methods for dealing with pension funds.
Taylor v. Taylor 409

Photographs

In a homicide case in particular, photographs of the victim are admissible, even if gruesome, if proper foundation is laid and they are received for purposes of identification, to show the condition of the body, the nature and extent of the wounds, and to establish malice or intent.
State v. Jones 435

Plea in Abatement

After trial and conviction in the district court, any error in the ruling of the district court 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. LeBron 452

Pleadings

1. While Neb. Rev. Stat. § 25-852 (Reissue 1979) allows pleadings to be amended after judgment in furtherance of justice, such may not be allowed when the amendment changes the issues or expands the relief the original judgment affords by the addition of another judgment debtor.
Schmuecker Bros. Implement v. Sobotka 114
2. While leave to amend should ordinarily be granted when a demurrer has been sustained, such is not necessary if there is no reasonable possibility that the plaintiff can state a cause of action.
Schmuecker Bros. Implement v. Sobotka 114
3. Neb. Rev. Stat. § 43-1210 (Cum. Supp. 1982) does not provide a basis for complaint to one not prejudiced by the failure to implead others as parties.
Dennis v. Smith 147
4. Courts will take appropriate action to prevent unnecessary delays and dilatory proceedings, and such action may involve a refusal to permit amendment of pleadings where request therefor is both untimely and violates a prior order limiting such pleading by virtue of a failure to answer requests for admissions.
Aetna Cas. & Surety Co. v. Nielsen 297
5. Formal judicial admissions which waive any evidence by the adverse party on the admitted matter are conclusive on the pleader.
Aetna Cas. & Surety Co. v. Nielsen 297
6. Under the code system of pleading it is not necessary to state a

cause of action or a defense in any particular form. It is only necessary to plead the facts, not the theory of recovery.
Waite v. Samson Dev. Co. 403
7. A petition is sufficient [as against a general demurrer] if from the statement of facts set forth therein the law entitles the plaintiff to recover.
Waite v. Samson Dev. Co. 403
8. Pleadings are to be liberally construed, and if with such construction a petition states a cause of action against a defendant and in favor of the plaintiff, a demurrer thereto should be overruled.
Waite v. Samson Dev. Co. 403
9. The prayer of a petition is not a part of the allegations of fact constituting the cause of action, and where the facts state a cause of action and are supported by the evidence, the court will grant proper relief, though it may not conform to the relief prayed for.
Waite v. Samson Dev. Co. 403
10. A general denial to a claim is insufficient to raise a specific affirmative defense contained within a statute.
State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622
11. When a court overrules a motion in limine, it is incumbent upon the movant to make an objection to the particular evidence sought to be adduced or offered by the State. A defendant cannot predicate error on the admission of evidence to which no objection was made at the time the evidence was adduced.
State v. Sailors 693
12. A party will not be permitted to plead one cause of action and, upon trial, rely upon proof establishing another. In order that a recovery may be had in an action, the pleadings and the proof must agree.
Barker v. Wrehe 793
13. In order to recover on an action for a breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with the conditions precedent which activate the defendant's duty.
Department of Banking, Receiver v. Wilken 796
14. A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
Blanchard v. White 877
15. If a petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action.
Blanchard v. White 877

16. In an action on a contract the absence of consideration is an affirmative defense to be set out in the answer.
Blanchard v. White 877
17. Matter is irrelevant in a pleading which has no bearing upon the subject matter of the controversy, and which cannot affect the decision of the court.
Blanchard v. White 877

Pleas

1. A defendant is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial 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. Clark 417
2. The rule announced in *State v. Tweedy,* 209 Neb. 649, 309 N.W.2d 94 (1981), is not to be applied retroactively to guilty pleas accepted by any of the courts of this state before the date upon which the *Tweedy* mandate was issued, August 31, 1981.
State v. Clark 417
3. Misinforming a defendant of the possible penalty a conviction entails, coupled with a defendant's actual lack of knowledge of the actual penalty, vitiates an otherwise valid guilty plea.
State v. Clark 417
4. There is no requirement that the judge who accepts a guilty plea also sentence the defendant.
State v. Clark 417
5. The test of mental capacity to plead or stand trial is the same.
State v. Teater 723
6. Entrapment is an affirmative defense in a criminal proceeding. The defense of entrapment is raised by and contained in the defendant's plea of not guilty.
State v. Swenson 820

Political Subdivisions Tort Claims Act

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.
McGinn v. City of Omaha 579

Post Conviction

A defendant seeking post conviction relief has the burden of establishing a basis for such relief, and the findings of the district court in denying relief will not be disturbed on appeal unless they are clearly erroneous.
State v. Moore 609

Prejudgment Interest

1. Prejudgment interest is allowable where the amount of the claim is liquidated. A claim is liquidated where no reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery. If either of the requirements of the rule is not met, the claim is unliquidated and prejudgment interest is not allowed.
   Aetna Cas. & Surety Co. v. Nielsen 297
2. Prejudgment interest may be recovered on claims that are liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.
   Airport Inn v. Nebraska Equal Opp. Comm. 852
3. Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed.
   Airport Inn v. Nebraska Equal Opp. Comm. 852
4. Prejudgment interest is not generally allowed on backpay awards under the Nebraska Fair Employment Practice Act.
   Airport Inn v. Nebraska Equal Opp. Comm. 852

Presumptions

1. If a tenant, without consent of the landlord, holds over after the term of the lease has expired, there is no presumption that the parties had agreed that the same relation of landlord and tenant should continue for another term.
   Otto v. Hongsermeier Farms 45
2. There is no presumption as to the genuineness of signatures upon a guaranty of a contract or promissory note. The presumption of genuineness of a signature under Neb. U.C.C. § 3-307 (Reissue 1980) has application only to negotiable instruments, and a guaranty is not such an instrument.
   Aetna Cas. & Surety Co. v. Nielsen 297
3. There is a presumption of ownership created by the fact that an individual has exclusive possession of personal property.
   In re Estate of Severns 803

Pretrial Motions

1. A failure to appropriately respond to properly served requests for admissions within the time prescribed constitutes an admission of the facts sought to be elicited.
   Aetna Cas. & Surety Co. v. Nielsen 297
2. The granting or denying of a motion to compel a physical or mental examination of a party is grounded in the sound discretion of the trial court; absent an abuse of that discretion, the trial court's ruling must stand.
   Thynne v. City of Omaha 654

3. Clinical psychologists are physicians within rule 35 of the Nebraska Discovery Rules.
Thynne v. City of Omaha 654
4. Due process of law is violated where the prosecution suppresses evidence after a request by the defense and the evidence is shown to be favorable in character for the defense and is material.
State v. Meis 770
5. Generally, there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.
State v. Meis 770
6. As a general rule, the trial court is vested with broad discretion in considering discovery requests of defense counsel, and error can be predicated only upon an abuse of such discretion.
State v. Meis 770

Principal and Surety

A grain dealer's bond is an official bond, sometimes called a statutory bond, creating a new obligation; the liability of both principal and surety is original and primary.
Stock v. Meissner 56

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.
State v. Smyth 153

Prior Inconsistent Statements

1. A witness may be impeached by showing prior contrary statements as to a matter relative to the issue.
State v. Jackson 363
2. The State may not use a prior inconsistent statement of a witness under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible.
State v. Jackson 363
3. If a witness, not a party, admits making earlier statements contradictory of his testimony given at trial, then the earlier statements are not admissible for purpose of impeachment.
State v. Jackson 363

Probation and Parole

Probation is a sentence, and an order of probation is a final order from which an appeal may be taken.
State v. Kinney 701

Products Liability

The 4-year statute of limitations set forth in Neb. Rev. Stat. § 25-224(1) (Cum. Supp. 1982) begins to run on the date on which the party holding the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of the injury or damage.
Condon v. A. H. Robins Co. 60

Proof

1. In order to prove a breach of a service contract, the plaintiff must show that the defendant failed to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities.
Doupnik v. Usher Pest Control Co. 1
2. Testimony by a witness as to acts done and words spoken by a defendant as the basis for an opinion that defendant was intoxicated is direct evidence which, if believed by the trier of fact, is sufficient to support a conviction for driving while under the influence of intoxicating liquor.
State v. Green 70
3. Identification of the accused is an essential element in establishment of guilt beyond a reasonable doubt; however, identification can be inferred from all facts and circumstances that are in evidence.
State v. Kaba 81
4. While specific in-court identification is the preferred method of discharging the State's burden of proving the identity of an accused as the perpetrator of the crime charged, absent such identification, where no witness during trial noted that the defendant was not the same individual charged with the crime, both the prosecution and defense counsel referred to the defendant as the individual involved in the crime, and at no time did defense counsel object to the prosecution's references to the defendant, there is sufficient evidence to establish the defendant's identity in connection with the crime for which he stood accused.
State v. Kaba 81
5. Abandonment for purposes of permitting substitute consent pursuant to Neb. Rev. Stat. §§ 43-104 and 43-105 (Reissue 1978) must be established by clear and convincing evidence.
In re Guardianship of Sain 96
6. The question of abandonment is largely one of intent to be

determined in each case from all the facts and circumstances.
In re Guardianship of Sain 96
7. 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.
State v. Smyth 153
8. Ordinarily, unless the substance of the evidence is apparent, an offer of proof is required to predicate error for the exclusion of evidence.
Krohn v. Krohn 158
9. An individual case of discrimination based on the disparate treatment theory will usually be divided into three phases. First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry the burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.
Zalkins Peerless Co. v. Nebraska Equal Opp. Comm. 289
Airport Inn v. Nebraska Equal Opp. Comm. 852
10. We hold that in cases involving a question of a waiver of a security interest, the standard of proof is by clear and convincing evidence, being 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.
State Bank v. Scoular-Bishop Grain Co. 379
11. Guilt in a contempt action must be found beyond a reasonable doubt.
In re Contempt of Liles 414
12. When an improper communication with a juror or jurors is shown to have taken place in a criminal case, a rebuttable presumption of prejudice arises and the burden is on the State to prove that the communication was not prejudicial.
State v. LeBron 452
13. In cases where the contact with the witnesses is minimal or where the testimony of the witness involves only formal or uncontroverted issues, the presumption of prejudice is overcome.
State v. LeBron 452
14. The mere fact that property abutting a district is damaged does not entitle the property owner to recover for such damages, absent proof that the damages realized by the owner were prox-

imately caused by the seepage from the irrigation district.
Wood v. Farwell Irr. Dist. 511
15. The burden of proof means the duty resting on one party or the other to establish by a preponderance of the evidence an issue essential to recovery.
Moudry v. Parkos 521
16. Evidence from which a conclusion can be arrived at only by guess or conjecture does not sustain one's burden of proof.
Moudry v. Parkos 521
17. A prosecution for disturbing the peace under a city ordinance for which there is a possibility of incarceration is a criminal offense, and, as such, the prosecutor has the burden of proving all elements of the charge beyond a reasonable doubt.
State v. Schachter 536
18. When, in a criminal prosecution, all elements of the offense are not proven beyond a reasonable doubt, the defendant is entitled to a dismissal of the charge.
State v. Schachter 536
19. In a proceeding in the district court to review an order of the Department of Motor Vehicles under the Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. §§ 60-501 et seq. (Reissue 1978 and Cum. Supp. 1982), the burden is upon the plaintiff to show that the order of the department was invalid.
Way v. Department of Motor Vehicles 641
20. The general rule is that all payments made under a contract are presumed to be voluntary, and the party seeking to recover payment has the burden to prove that it was involuntary.
Chalupa v. Hartford Fire Ins. Co. 662
21. The plaintiff must establish by a preponderance of the evidence that his injury arose out of and in the course of his employment and is the proximate cause of the disability for which benefits are sought.
Powell v. W. G. Pauley Lumber Co. 707
22. The fact that the driver of a motor vehicle has .10 percent of alcohol in his body fluids does not, of itself, establish as a matter of law that the driver is under the influence of intoxicating liquor.
Cathcart v. Blacketer 755
23. The operator of a motor vehicle is under the influence of intoxicating liquor if he has, due to the consumption of intoxicating liquor, so lost the control of his body or his mental faculties as to impair to any appreciable degree his ability to operate his motor vehicle in the manner that an ordinarily prudent and cautious man in the full possession of his faculties would operate it.
Cathcart v. Blacketer 755
24. A party will not be permitted to plead one cause of action and, upon trial, rely upon proof establishing another. In order that a

recovery may be had in an action, the pleadings and the proof must agree.
Barker v. Wrehe 793
25. Generally, the burden of proof is ordinarily on the party who would suffer if no evidence at all were introduced.
In re Estate of Severns 803
26. If established facts give equal support to two inconsistent inferences, then the judgment must go against the party having the burden of proof.
In re Estate of Severns 803
27. If the evidence upon a fact is evenly balanced or if it preponderates in favor of the other party, then the burden has not been met.
In re Estate of Severns 803
28. The amount of future medical expenses need not be established with mathematical certainty.
Steinauer v. Sarpy County 830
29. Proof of an actual loss of earnings or wages is not essential to recovery for loss of earning capacity. Recovery for loss or diminution of the power to earn in the future is based upon such factors as the plaintiff's age, life expectancy, health, habits, occupation, talents, skill, experience, training, and industry.
Steinauer v. Sarpy County 830

Property

1. It is a general rule that the description of land in a memorandum of a contract for the sale thereof must be sufficiently definite to identify the land by its own terms or by reference to external standards in existence at the time of the making of the contract, and capable of being determined beyond dispute.
Bellevue College v. Greater Omaha Realty Co. 183
2. The mere fact that property abutting a district is damaged does not entitle the property owner to recover for such damages, absent proof that the damages realized by the owner were proximately caused by the seepage from the irrigation district.
Wood v. Farwell Irr. Dist. 511
3. An owner of property allegedly damaged by seepage may, among other available rights, file a direct suit for damages against an irrigation district responsible for such alleged damages.
Wood v. Farwell Irr. Dist. 511
4. As a matter of law, one takes property subject to the rights of persons in possession.
Moudry v. Parkos 521
5. There is a presumption of ownership created by the fact that an individual has exclusive possession of personal property.
In re Estate of Severns 803
6. Generally, an agreement to devise and bequeath property is,

where supported by consideration, valid and enforceable. In such a case equity will impress a trust upon the property, which trust will follow it into the hands of the personal representative of the promisor or into the hands of a grantee who has not given consideration for the conveyance.
Blanchard v. White 877

Property Division

While alimony and distribution of property rights have different purposes in marriage dissolution proceedings, in a proper case they may be considered together in reaching an award that is just and equitable.
Taylor v. Taylor 409

Prosecuting Attorneys

The remarks of a prosecutor in his closing argument which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct.
State v. LeBron 452

Proximate Cause

1. Where evidence is conflicting on the question of proximate cause, the question is ordinarily one for the trier of facts.
Hydroflo Corp. v. First Nat. Bank 20
2. Generally, the question of whether there has been an intervening cause eliminating negligence of a defendant as a proximate cause is for the trier of facts.
Hydroflo Corp. v. First Nat. Bank 20

Public Meetings

A county agricultural society is a public body subject to the provisions of the public meetings law.
Nixon v. Madison Co. Ag. Soc'y 37

Public Purpose

Neb. Const. art. VII, § 11, does not prohibit the state from doing business or contracting with private institutions in fulfilling a governmental duty and furthering a public purpose.
State ex rel. Creighton Univ. v. Smith 682

Public Utilities

1. The right to vote in an election of successors to the board of directors of a public power district is purely statutory.
In re Boundaries of McCook P.P. Dist. 11
2. A public power district which does not provide at least 50 percent of the retail or wholesale power requirements of a municipality cannot include that municipality within its charter area.
In re Boundaries of McCook P.P. Dist. 11

Quiet Title

An action to quiet title is an equitable action, and it is the duty of this court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the district court.
Pettis v. Lozier 191

Real Estate

Every contract for the sale of any lands shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the sale is to be made.
Wheeler Constr. v. Town & Country Realty 424

Records

1. Once filed with the clerk of the district court, the bill of exceptions as prepared by the reporter becomes the official bill of exceptions in the case and shall not be altered or marked in any fashion by any person.
Langness v. "O" Street Carpet Shop 569
2. The bill of exceptions is the only vehicle for bringing evidence to this court.
Langness v. "O" Street Carpet Shop 569
3. A document entitled "Bill of Exceptions," but which is not prepared in accordance with this court's rules, is not such a bill.
Langness v. "O" Street Carpet Shop 569
4. The filing of an improperly prepared bill of exceptions may result in a case being treated as if no bill had been filed.
Langness v. "O" Street Carpet Shop 569
5. Where counsel for a party specifically states in the trial court that he has no objection to the introduction of certain documents, he cannot on appeal urge that they were improperly certified or authenticated and, for that reason, not admissible.
State v. Tonge 747
6. A judicial record of this state, or of any other federal court of the United States, may be proved by the producing of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one.
State v. Tonge 747
7. On an appeal to the Supreme Court, it is the responsibility of the party appealing or urging error to have included within the bill of exceptions all matters from the record which it believes material to issues to be presented for review.
State v. Meis 770

Restitution

1. The general rule is that all payments made under a contract are

presumed to be voluntary, and the party seeking to recover payment has the burden to prove that it was involuntary.
Chalupa v. Hartford Fire Ins. Co. 662
2. An insurer who has made a payment under a mistake of fact that the terms of an insurance contract require such payment is entitled to restitution, at least where the payee has not so changed his position that it would be inequitable to require him to make full payment.
Chalupa v. Hartford Fire Ins. Co. 662

Revocation

Under Neb. U.C.C. § 2-608 (Reissue 1980), a buyer may revoke acceptance of a lot or commercial goods only if there is some defect or nonconformity in the article that substantially impairs its value.
Havelock Bank v. Western Surety Co. 560

Right-of-Way

1. Two vehicles approach an intersection at approximately the same time whenever they are in such relative positions that it would appear to one of ordinary prudence approaching from the left that there is danger of collision if he fails to yield.
Kendall v. Hongsermeier 109
2. The driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway.
Steinauer v. Sarpy County 830

Rules of Evidence

1. An impeachment proceeding is a judicial proceeding in the nature of a criminal proceeding in which the rules of evidence apply.
State v. Douglas 199
2. Under the provisions of Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1979), testimony contrary to the testimony of a witness during the course of a trial, which contrary testimony was given under oath subject to the penalty of perjury at a former trial, hearing, or other proceeding, is not hearsay and is therefore admissible as substantive evidence of the truth of the fact alleged.
State v. Jackson 363
3. The foundational requirements for the admission of evidence under the business records exception to the hearsay rule are threefold. First, the activity recorded must be a type which regularly occurs in the course of the business' day-to-day activity. Second, the record must have been made as a part of a regular business practice at or near the time of the event re-

corded. Third, the record must be authenticated by a custodian or other qualified witness.
Chalupa v. Hartford Fire Ins. Co. 662

Rules of the Road

1. Two vehicles approach an intersection at approximately the same time whenever they are in such relative positions that it would appear to one of ordinary prudence approaching from the left that there is danger of collision if he fails to yield.
Kendall v. Hongsermeier 109
2. A motorist approaching a highway protected by stop signs must stop before going upon the highway, must look to his left and to his right, and must permit a motor vehicle which is proceeding along the highway protected by stop signs to pass if it is at a distance and is traveling at a speed making it imprudent for the motorist to proceed into the intersection.
Jershin v. Becker 645
3. A motorist is not only obligated to look for approaching vehicles but also must see any vehicle within the radius which denotes the limit of danger.
Jershin v. Becker 645
4. The right of a motorist on a favored street to assume that a vehicle on a nonfavored street will be brought to a stop before it enters the intersection and will not proceed until the motorist has passed neither permits the motorist on the favored street to claim the right-of-way when he is too distant from the intersection to be entitled to it nor relieves him of the duty of exercising due care to avoid an accident.
Jershin v. Becker 645
5. A driver is guilty of negligence as a matter of law if he fails to see one who is favored over him under the rules of the road.
Steinauer v. Sarpy County 830
6. The driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway.
Steinauer v. Sarpy County 830
7. A traveler on highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that any other user of the highways will use them in a lawful manner; and until he has such warning, notice, or knowledge, he may govern his acts in accordance with such assumption.
Steinauer v. Sarpy County 830
8. While the driver on a favored highway must keep a proper lookout, the driver with the right-of-way may nevertheless assume, until he has knowledge to the contrary, that the other vehicles will respect his legal right-of-way.
Steinauer v. Sarpy County 830

Rules of the Supreme Court

1. A party to a case who has been served with a copy of the notice of appeal and who is not an appellant is an appellee in this court.
   Langness v. "O" Street Carpet Shop 569
2. Once filed with the clerk of the district court, the bill of exceptions as prepared by the reporter becomes the official bill of exceptions in the case and shall not be altered or marked in any fashion by any person.
   Langness v. "O" Street Carpet Shop 569
3. A document entitled "Bill of Exceptions," but which is not prepared in accordance with this court's rules, is not such a bill.
   Langness v. "O" Street Carpet Shop 569

Sales

It is a general rule that the description of land in a memorandum of a contract for the sale thereof must be sufficiently definite to identify the land by its own terms or by reference to external standards in existence at the time of the making of the contract, and capable of being determined beyond dispute.
Bellevue College v. Greater Omaha Realty Co. 183

Schools and School Districts

The contention that a person is not bound by the educational laws of this state because of his sincerely held religious beliefs is controlled by the 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.
State ex rel. Douglas v. Calvary Academy 450

Search and Seizure

1. The warrantless search of a third party's home by police officers for a person named in an arrest warrant, absent consent or exigent circumstances, violates the fourth amendment rights of the third party.
   State v. Roepka 139
2. The determination of whether a consent to search is voluntarily given is a question of fact. The voluntariness of the consent to search should be determined from the totality of the circumstances surrounding it.
   State v. Christianson 445
3. The mere fact that the individual is in police custody, standing alone, does not invalidate the consent to search if, in fact, it was voluntarily given.
   State v. Christianson 445

Search Warrants

1. Absent a showing of pretext or bad faith on the part of the police

or the prosecution, invalidity of part of a search warrant does not require the suppression of all the evidence seized pursuant to the valid portions of the warrant.
State v. LeBron 452
2. 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. 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.
State v. LeBron 452
3. A search warrant may be issued for a location where it is probable that the property described would be found.
State v. LeBron 452

Second Injury Fund

The burden of proof necessary to establish apportionment under Neb. Rev. Stat. § 48-128 (Reissue 1978), the Second Injury Fund statute, is upon the employer who seeks the benefits of that statute.
Benson v. Barnes & Barnes Trucking 865

Security Interests

1. A security interest continues in collateral notwithstanding sale, exchange, or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds, including collections received by the debtor.
State Bank v. Scoular-Bishop Grain Co. 379
2. Where a buyer of farm products subject to a recorded security interest requiring "written consent" relies on the "or otherwise" provision, Neb. U.C.C. § 9-306(2) (Reissue 1980), and implied consent, waiver, or ratification by course of dealing, Neb. U.C.C. § 1-205 (Reissue 1980), the buyer must prove that the course of dealing was reasonably consistent with the express provisions in the security agreement, § 1-205(4), and that the course of dealing was a voluntary and intentional relinquishment by the secured party of a known and existing right amounting to waiver, consent, or ratification.
State Bank v. Scoular-Bishop Grain Co. 379
3. We hold that in cases involving a question of a waiver of a security interest, the standard of proof is by clear and convincing evidence, being 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.
State Bank v. Scoular-Bishop Grain Co. 379
4. Normally, a factual question is presented as to whether a

bank's prior course of dealing with the debtor created an implied agreement amounting to a waiver of the security interest under the "or otherwise" provision of Neb. U.C.C. § 9-306(2) (Reissue 1980).
Five Points Bank v. Scoular-Bishop Grain Co. 677

Self-Defense

It is a general rule in a homicide case that a defendant may show the dangerous and turbulent character of the victim only after laying a foundation by evidence tending to show self-defense.
State v. Meis 770

Sentences

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. Schaeffer 4
2. In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
State v. Schaeffer 4
State v. Kaba 81
State v. Olson 130
State v. West 389
State v. Clark 417
3. A judgment denying probation and imposing a sentence which is within statutory limits will not be modified absent an abuse of discretion by the sentencing judge.
State v. Cooley 90
State v. Teater 723
4. A sentence validly imposed takes effect from the time it is pronounced, and a subsequent, different sentence is a nullity.
State v. Kinney 701
State v. Christiansen 740
5. Probation is a sentence, and an order of probation is a final order from which an appeal may be taken.
State v. Kinney 701
6. Neither double jeopardy nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction or resentencing. A trial judge is not constitutionally precluded from imposing a new sentence, even though greater than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities, which information may have come to the judge's attention from evidence adduced at the second trial itself, from a new

presentence investigation, from the defendant's recent prison record, or possibly from other sources.
State v. Lopez 719
7. Whenever a judge imposes a more severe sentence upon a defendant after a new trial or upon resentencing, the reasons for doing so must affirmatively appear from the record and be based upon objective information occurring after the time of the original sentencing.
State v. Lopez 719
8. It is settled law that the district court has the power to impose a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court to pronounce and where the accused himself has invoked appellate jurisdiction for the correction of error.
State v. Ulrich 817

Specific Performance

1. An action for specific performance is an equitable matter triable de novo on appeal to the Supreme Court.
III Lounge, Inc. v. Gaines 466
2. As a general rule, where a valid, binding contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance as a matter of course or right where the remedy at law is inadequate and specific performance will not be inequitable or unjust.
III Lounge, Inc. v. Gaines 466
3. A party who seeks specific performance must show not only that he has a valid, legally enforceable contract but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the other party.
III Lounge, Inc. v. Gaines 466

Statute of Frauds

1. It is a general rule that the description of land in a memorandum of a contract for the sale thereof must be sufficiently definite to identify the land by its own terms or by reference to external standards in existence at the time of the making of the contract, and capable of being determined beyond dispute.
Bellevue College v. Greater Omaha Realty Co. 183
2. To satisfy the statute of frauds the contract itself must be in writing or, in the event the contract is oral, there must be a written memorandum of the contract, signed or authenticated by the party against whom it is to be enforced.
Department of Banking, Receiver v. Wilken 796
3. A typed or printed name is a signing sufficient to satisfy the

statute of frauds, provided the name is recognized as his signature by the party sought to be charged.
Department of Banking, Receiver v. Wilken 796

Statutes

1. Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately.
In re Boundaries of McCook P.P. Dist. 11
2. It is a fundamental rule of statutory construction that, if possible, a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results. A statute should be construed in the context of the mischief sought to be remedied and the purpose to be served.
In re Boundaries of McCook P.P. Dist. 11
3. When a statute is ambiguous and must be construed, recourse may be had to the legislative history for the purpose of discovering the intent of lawmakers. This court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results.
Worley v. City of Omaha 77
4. A sensible construction will be placed upon a statute to effectuate the object of legislation, rather than a literal meaning that would have the effect of defeating the legislative intent.
Worley v. City of Omaha 77
5. Neb. Rev. Stat. § 44-501 (Reissue 1978) applies to policies of fire insurance.
Heady v. Farmers Mut. Ins. Co. 172
6. For the purpose of Neb. Rev. Stat. § 81-885.24(28) (Reissue 1981), regarding revocation or suspension of a real estate broker's license, *incompetence* means failure to meet requirements for a minimal level of acceptable conduct.
Weiner v. State ex rel. Real Estate Comm. 372
7. The police power is an attribute of state sovereignty, and, within the limitations of state and federal Constitutions, the state may, in its exercise, enact laws for the promotion of public safety, health, morals, and generally for the public welfare.
Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm. 487
8. Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. Generally speaking, any valid or constitutional exercise of the police power must reasonably embody one of the purposes mentioned. There must

be some clear and real connection between the assumed purpose of the law and its actual provisions.
Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm. 487
9. If it becomes apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety, or welfare, but tends more to stifle legitimate business by creating a monopoly or trade barrier, it is unconstitutional as an invasion of the property rights of the individual. The Legislature, under the guise of regulation, may not indulge in arbitrary price-fixing or the destruction of lawful competition.
Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm. 487
10. Where the language of a statute is plain, direct, and unambiguous, no interpretation is needed to ascertain its meaning and no resort to rules of construction and interpretation is required.
Governors of Ak-Sar-Ben v. Department of Rev. 518
11. Generally, a measure seeking an advisory vote of the electorate or a nonbinding expression of public opinion on a question is not a proper subject for the initiative.
State ex rel. Brant v. Beermann 632
12. A law is a rule of conduct prescribed by the lawmaking power of a sovereign.
State ex rel. Brant v. Beermann 632
13. A bond required by statute will be construed in light of the purpose for which it is required as expressed in the statute.
Way v. Department of Motor Vehicles 641
14. The security deposit required by statute to insure that any judgment against the uninsured motorist will be paid must be in an amount adequate for that purpose.
Way v. Department of Motor Vehicles 641
15. Neb. Rev. Stat. § 28-512(1) (Reissue 1979) affords due process and is constitutional.
State v. Sailors 693
16. The "statutory employer" provisions of Neb. Rev. Stat. § 48-116 (Reissue 1978) do not supersede the exemption provisions of Neb. Rev. Stat. § 48-106(2) (Reissue 1978).
Nussbaum v. Wright 712
17. An action for a declaratory judgment is an appropriate remedy to determine the validity, construction, or interpretation of a statute.
Xerox Corp. v. Karnes 728

Stipulations

A party who voluntarily agrees by stipulation to consolidate several causes of action cannot later be heard to complain of the ramifications of such an agreement.
Havelock Bank v. Western Surety Co. 560

Subrogation

1. No right of subrogation can arise in favor of an insurer against its own insured, since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty.
   Reeder v. Reeder 120
2. Absent an express agreement to the contrary between a host and a guest, the host's fire insurance carrier does not have a right of subrogation against the guest for the negligent destruction of the property which the carrier insured and for which the host paid a premium.
   Reeder v. Reeder 120

Summary Judgment

1. Summary judgment may be properly granted where there exists no genuine issue as to any material fact in the case, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law.
   Cillessen Constr. v. Scotts Bluff Co. Hous. Auth. 39
   De Los Santos v. Great Western Sugar Co. 282
   Signor v. National Transp., Inc. 667
2. To be effective evidence opposing rendition of a summary judgment, an affidavit must be made on personal knowledge and show affirmatively that affiant is competent to testify to the matters stated therein.
   Cillessen Constr. v. Scotts Bluff Co. Hous. Auth. 39
3. The denial of a motion for summary judgment is not a final order and therefore is not appealable.
   Schmuecker Bros. Implement v. Sobotka 114
4. For summary judgment purposes the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party against whom it is directed, and any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party.
   De Los Santos v. Great Western Sugar Co. 282
5. When the allegations of the pleadings have been pierced by a movant for summary judgment and resistance to the motion fails to show that a genuine issue of fact exists, summary judgment should be granted.
   De Los Santos v. Great Western Sugar Co. 282
6. When the provisions of a contract, together with the facts and circumstances that aid in ascertaining the intent of the parties thereto, are not in dispute, the proper construction of such contract is a question of law and determinable upon a motion for summary judgment.
   De Los Santos v. Great Western Sugar Co. 282
7. In considering the evidence on a motion for summary judgment, both this court and the trial court must determine whether

there is any genuine issue as to any material fact, the ultimate inferences to be drawn from those facts are clear, and whether the moving party is entitled to judgment as a matter of law.
R.A.S., Inc. v. Crowley 811

Taxation

1. Neb. Rev. Stat. § 2-1208 (Reissue 1983), which prohibits the imposition of any license tax, permit tax, occupation tax, or excise tax, or racing fee upon a licensee of the State Racing Commission, except as provided in the statutes, does not exempt a purchaser of an admission ticket from the state sales tax, and the licensee is required to collect the sales tax from the purchaser and remit the tax collected to the state.
Governors of Ak-Sar-Ben v. Department of Rev. 518
2. Under the provisions of Neb. Const. art. VIII, § 1, the taxation of personal property must be uniform not only as to the rate of taxation but as to the valuation of the property as well.
Xerox Corp. v. Karnes 728
3. The uniform method for valuing property for tax purposes which the Legislature has provided is to tax property at its "actual value."
Xerox Corp. v. Karnes 728
4. For purposes of taxation the terms actual value, market value, and fair market value mean exactly the same thing.
Xerox Corp. v. Karnes 728
5. Neb. Rev. Stat. § 77-1301 (Reissue 1981), which provides for valuation of real and personal property for tax purposes only in odd-numbered years, held unconstitutional.
Xerox Corp. v. Karnes 728

Tender

The law does not require a useless formality. A formal tender is not necessary where a party has shown by act or word that it would not be accepted if made.
Chiles, Heider & Co. v. Pawnee Meadows 315

Termination of Employment

1. Generally, discharge of an employee protected by civil service or classified service may only occur for reasons stated in the enabling legislation or agreement.
Cox v. County of Sarpy 52
2. Any employee who has obtained a property interest in his employment is entitled to both notice in accordance with employment rules as well as notice which affords him constitutional due process.
Hill v. Gerber 670

Testimony

Opinion testimony is sufficient to support a finding of guilt in a criminal case, if the opinion is based on facts enabling the witness to express a reasonably accurate opinion.
State v. Kinney 701

Time

When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement.
R.A.S., Inc. v. Crowley 811

Trial

1. In a case tried to the court without a jury, there is a presumption that the court considers only such evidence as is competent and relevant, and a reviewing court will not reverse such a case because evidence was erroneously admitted, where there is other material, competent, and relevant evidence sufficient to sustain the judgment.
State v. Green 70
2. Courts will take appropriate action to prevent unnecessary delays and dilatory proceedings, and such action may involve a refusal to permit amendment of pleadings where request therefor is both untimely and violates a prior order limiting such pleading by virtue of a failure to answer requests for admissions.
Aetna Cas. & Surety Co. v. Nielsen 297
3. In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process.
State v. Archbold 345
4. A litigant may not speculate about the answer to a question and then, after answer has been given, for the first time lodge his objection. Failure to make a timely objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony.
State v. Archbold 345
5. In order to be timely an objection must ordinarily be made at the earliest opportunity after the ground for the objection becomes apparent. A motion to strike is not timely where testimony has been adduced without objection and the grounds for the motion to strike should have been apparent before the motion to strike is made.
State v. Archbold 345
6. A motion to strike evidence to which there should have been an objection when offered is merely another term for an objection

and is governed by the rules as to the time of an objection.
State v. Archbold 345
7. When there occurs in the course of a trial a highly prejudicial event which is likely to materially affect the outcome of the trial, the party aggrieved must raise his objection then and move for mistrial. His failure to do so when he reasonably should have known of the prejudicial occurrence constitutes a waiver of the objection.
State v. Archbold 345
8. Problematical prejudice is no justification for delay in making a required, proper objection to questioning and testimony believed to be improper.
State v. Archbold 345
9. Under the provisions of Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1979), testimony contrary to the testimony of a witness during the course of a trial, which contrary testimony was given under oath subject to the penalty of perjury at a former trial, hearing, or other proceeding, is not hearsay and is therefore admissible as substantive evidence of the truth of the fact alleged.
State v. Jackson 363
10. The appropriate standard of review for an assignment of error directed at the exclusion of evidence is one of abuse of discretion.
State Bank v. Scoular-Bishop Grain Co. 379
11. As a general rule, it is the province of the trial court in a jury case to determine the admissibility of the evidence offered by the parties at trial.
State v. West 389
12. Preliminary questions concerning the admissibility of evidence shall be determined by the judge. The court, and not the jury, is the arbitrator as to the admissibility of the evidence.
State v. West 389
13. The retention or rejection of a juror is a matter of discretion for the trial court.
State v. LeBron 452
14. After trial and conviction in the district court, any error in the ruling of the district court 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. LeBron 452
15. A proper objection to the receipt of evidence is required to preserve for review any error in the overruling of a motion in limine.
State v. LeBron 452
16. A fair trial requires at a minimum an impartial judge, an impartial jury, and an atmosphere of judicial calm.
Pitt v. Checker Cab Co. 600

17. Counsel owe to the judge, because of the position he occupies, the utmost deference and respect, and the judge owes to counsel an equal obligation of courtesy, patience, and consideration.
Pitt v. Checker Cab Co. 600
18. It is the duty of the judge, as well as the attorneys, to endeavor to surround the trial with an atmosphere of fairness, undisturbed by prejudice, passion, or ill will.
Pitt v. Checker Cab Co. 600
19. During the course of a trial, the judge should refrain from making remarks which may have a tendency to influence the jury.
Pitt v. Checker Cab Co. 600
20. While there is no impropriety in a trial judge's interrogating a witness when the tendency is only to develop the truth and is not calculated to influence the jury, save as the testimony will assist it to arrive at a correct conclusion on the question at issue, the practice is one which should be very sparingly employed.
Pitt v. Checker Cab Co. 600
21. Generally, counsel for the parties should be relied on to manage and bring out their own cases.
Pitt v. Checker Cab Co. 600
22. The actions of the trial judge should never be such as to warrant any assertion that he assisted one or the other party.
Pitt v. Checker Cab Co. 600
23. Counsel does not have the license to quarrel with a trial judge's evidentiary ruling; if the ruling is prejudicially erroneous, and is properly preserved and presented to this court, an appropriate correction will be made on appeal.
Pitt v. Checker Cab Co. 600
24. A claim of improper conduct on the part of the trial judge in the presence of the jury will not be reviewed on appeal in the absence of a timely objection.
Pitt v. Checker Cab Co. 600
25. It is prejudicially erroneous for a judge to comment in such a manner as to discredit a witness.
Pitt v. Checker Cab Co. 600
26. It is the general rule that where the parties have given consent or acquiescence to private interviews with the children and the court conducts an in camera hearing, such consent waives any objections which might be raised on appeal.
Marez v. Marez 615
27. Whether one failed to look or looked and failed to see a vehicle when it was within the limit of danger is a question for the jury, except in those cases where the evidence is so conclusive that the approaching vehicle was within the limit of danger that reasonable minds could not differ thereon.
Jershin v. Becker 645
28. Before a verdict can be properly directed in a case where one

failed to look or looked and failed to see a vehicle when it was within the limit of danger, the position of the oncoming vehicle must be definitely located in a favored position, that is, that it was within that radius which denotes the limit of danger; otherwise, the question becomes one for the jury.
Jershin v. Becker 645

29. In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury.
Jershin v. Becker 645

30. The foundational requirements for the admission of evidence under the business records exception to the hearsay rule are threefold. First, the activity recorded must be a type which regularly occurs in the course of the business' day-to-day activity. Second, the record must have been made as a part of a regular business practice at or near the time of the event recorded. Third, the record must be authenticated by a custodian or other qualified witness.
Chalupa v. Hartford Fire Ins. Co. 662

31. The test of mental competency to stand trial is whether the defendant has the present capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.
State v. Teater 723

32. Where counsel for a party specifically states in the trial court that he has no objection to the introduction of certain documents, he cannot on appeal urge that they were improperly certified or authenticated and, for that reason, not admissible.
State v. Tonge 747

33. A judicial record of this state, or of any other federal court of the United States, may be proved by the producing of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one.
State v. Tonge 747

Trusts

Generally, an agreement to devise and bequeath property is, where supported by consideration, valid and enforceable. In such a case equity will impress a trust upon the property, which trust will follow it into the hands of the personal representative of

the promisor or into the hands of a grantee who has not given consideration for the conveyance.
Blanchard v. White 877

Unclaimed Property Act

1. Under the parimutuel system of wagering, the licensee authorized to accept such bets is in possession of the sum of money wagered as a custodian, depositary, or administrative agent, out of which it is obligated to pay unknown bettors the amount of their winnings.
State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622
2. The Nebraska State Board of Agriculture, while operating parimutuel betting, is a "business association," as contemplated by the Uniform Disposition of Unclaimed Property Act, Neb. Rev. Stat. §§ 69-1301 et seq. (Reissue 1981).
State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622
3. Under the Uniform Disposition of Unclaimed Property Act, Neb. Rev. Stat. §§ 69-1301 et seq. (Reissue 1981), the rights of the state are strictly derivative.
State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622

Uniform Commercial Code

1. The language of Neb. U.C.C. § 3-419(3) (Reissue 1980), "a representative, including a depositary or collecting bank," does include depositary and collecting banks when engaged in the normal business of paying or collecting ordinary checks.
Hydroflo Corp. v. First Nat. Bank 20
2. In an action brought under Neb. U.C.C. § 3-419 (Reissue 1980) by a payee to recover in conversion for payment on a forged endorsement, it is incumbent on a depositary bank seeking immunity under subsection (3) to plead and prove as affirmative defenses that it acted in good faith and in accordance with reasonable commercial standards.
Hydroflo Corp. v. First Nat. Bank 20
3. Whether a bank has acted in a commercially reasonable manner is a question of fact.
Hydroflo Corp. v. First Nat. Bank 20
4. A claim for money had and received has not been eliminated by the Uniform Commercial Code. However, it is subject to the defenses of "good faith" and "reasonable commercial standards" as provided for by Neb. U.C.C. § 3-419(3) (Reissue 1980).
Hydroflo Corp. v. First Nat. Bank 20
5. Where a buyer of farm products subject to a recorded security interest requiring "written consent" relies on the "or otherwise" provision, Neb. U.C.C. § 9-306(2) (Reissue 1980), and implied consent, waiver, or ratification by course of dealing, Neb. U.C.C. § 1-205 (Reissue 1980), the buyer must prove that the course of dealing was reasonably consistent with the express

provisions in the security agreement, § 1-205(4), and that the course of dealing was a voluntary and intentional relinquishment by the secured party of a known and existing right amounting to waiver, consent, or ratification.
State Bank v. Scoular-Bishop Grain Co. 379
6. Under Neb. U.C.C. § 2-608 (Reissue 1980), a buyer may revoke acceptance of a lot or commercial goods only if there is some defect or nonconformity in the article that substantially impairs its value.
Havelock Bank v. Western Surety Co. 560
7. Normally, a factual question is presented as to whether a bank's prior course of dealing with the debtor created an implied agreement amounting to a waiver of the security interest under the "or otherwise" provision of Neb. U.C.C. § 9-306(2) (Reissue 1980).
Five Points Bank v. Scoular-Bishop Grain Co. 677

Valuation

1. Under the provisions of Neb. Const. art. VIII, § 1, the taxation of personal property must be uniform not only as to the rate of taxation but as to the valuation of the property as well.
Xerox Corp. v. Karnes 728
2. The uniform method for valuing property for tax purposes which the Legislature has provided is to tax property at its "actual value."
Xerox Corp. v. Karnes 728
3. For purposes of taxation the terms actual value, market value, and fair market value mean exactly the same thing.
Xerox Corp. v. Karnes 728
4. Neb. Rev. Stat. § 77-1301 (Reissue 1981), which provides for valuation of real and personal property for tax purposes only in odd-numbered years, held unconstitutional.
Xerox Corp. v. Karnes 728

Verdicts

1. Where one is charged with the commission of a crime which may be committed in a number of ways, a general verdict finding the defendant guilty of the crime charged is sufficient and is not ambiguous.
State v. West 389
2. In order for a verdict to be set aside because of the prejudicial effect of newspaper accounts on jurors, there must be evidence presented that the jurors read newspaper accounts and that the accounts were unfair or prejudicial to the defendant.
State v. West 389
3. A defendant's verdict cures error, if any, in a court's failure to dismiss a pleaded action vulnerable to a demurrer.
Creason v. Myers 551

4. A verdict may be set aside as excessive when, and not unless, it is so exorbitant as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.
Pitt v. Checker Cab Co. 600
5. A jury verdict in a criminal case will not be overturned on appeal for lack of evidence unless it is so lacking in probative force that it can be said as a matter of law that the evidence was insufficient to support it.
State v. Meis 770

Visitation

Custody and visitation of minor children shall be determined on the basis of their best interests.
Marez v. Marez 615

Waiver

1. The right of trial by jury having been voluntarily waived by the accused, he thereafter has no right or power at his mere will to withdraw or revoke his waiver and demand a jury trial.
State v. Kaba 81
2. Whether one accused of a crime who has voluntarily waived a jury trial will be permitted to withdraw the waiver and have his case tried before a jury is ordinarily within the discretion of the trial court.
State v. Kaba 81
3. 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.
State v. Smyth 153
4. Waiver has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits; or such conduct as warrants an inference of the relinquishment of such right; or the intentional doing of an act inconsistent with claiming it.
State Bank v. Scoular-Bishop Grain Co. 379
Five Points Bank v. Scoular-Bishop Grain Co. 677
5. A defendant is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial 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. Clark 417
6. It is the general rule that where the parties have given consent or acquiescence to private interviews with the children and the court conducts an in camera hearing, such consent waives any objections which might be raised on appeal.
Marez v. Marez 615
7. Error may be waived at both the trial and appellate levels, and constitutional rights may likewise be waived.
Marez v. Marez 615
8. The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived, and will be unless pleaded.
State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622
9. Normally, a factual question is presented as to whether a bank's prior course of dealing with the debtor created an implied agreement amounting to a waiver of the security interest under the "or otherwise" provision of Neb. U.C.C. § 9-306(2) (Reissue 1980).
Five Points Bank v. Scoular-Bishop Grain Co. 677
10. Ordinarily, to establish waiver of a legal right there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his part.
Five Points Bank v. Scoular-Bishop Grain Co. 677

Waters

1. It is the general rule that where surface waters concentrate and gather in volume, so as to lose their character as diffused surface waters and flow into a natural depression, draw, swale, or other natural drainageway, the flow may not be arrested or interfered with to the injury of neighboring proprietors.
Hiegel Farms Corp. v. Casselman 506
2. As a general rule, a lower landowner who builds a structure across a natural drainageway must provide for the natural passage through such obstruction of all the water which reasonably may be anticipated to drain therein.
Hiegel Farms Corp. v. Casselman 506

Witnesses

1. A witness may be impeached by showing prior contrary statements as to a matter relative to the issue.
State v. Jackson 363
2. The State may not use a prior inconsistent statement of a witness under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible.
State v. Jackson 363

3. If a witness, not a party, admits making earlier statements contradictory of his testimony given at trial, then the earlier statements are not admissible for purpose of impeachment.
State v. Jackson 363
4. Under the provisions of Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1979), testimony contrary to the testimony of a witness during the course of a trial, which contrary testimony was given under oath subject to the penalty of perjury at a former trial, hearing, or other proceeding, is not hearsay and is therefore admissible as substantive evidence of the truth of the fact alleged.
State v. Jackson 363

Words and Phrases

1. The language of Neb. U.C.C. § 3-419(3) (Reissue 1980), "a representative, including a depositary or collecting bank," does include depositary and collecting banks when engaged in the normal business of paying or collecting ordinary checks.
Hydroflo Corp. v. First Nat. Bank 20
2. Because Neb. Rev. Stat. § 8-103 (Reissue 1977) of the Banking Act requires the director of the Department of Banking and Finance to "constructively aid banks in maintaining proper banking standards and efficiency," a bank is exempt from suit under the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1978), by reason of its failure to follow customary and standard banking practices.
Hydroflo Corp. v. First Nat. Bank 20
3. Clear and convincing evidence means evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
In re Guardianship of Sain 96
4. For the purpose of Neb. Rev. Stat. § 81-885.24(28) (Reissue 1981), regarding revocation or suspension of a real estate broker's license, *incompetence* means failure to meet requirements for a minimal level of acceptable conduct.
Weiner v. State ex rel. Real Estate Comm. 372
5. Waiver has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits; or such conduct as warrants an inference of the relinquishment of such right; or the intentional doing of an act inconsistent with claiming it.
State Bank v. Scoular-Bishop Grain Co. 379
Five Points Bank v. Scoular-Bishop Grain Co. 677
6. We hold that in cases involving a question of a waiver of a security interest, the standard of proof is by clear and convinc-

ing evidence, being 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.
State Bank v. Scoular-Bishop Grain Co. 379
7. An unintentional stabbing is not the use of "deadly force" as defined in Neb. Rev. Stat. § 28-1406(3) (Reissue 1979).
State v. Canby 461
8. The right to appeal from orders of a county court sitting as a juvenile court, insofar as that right is vested in the child's custodian, is vested only in individuals or entities having legal custody of such a child, and not in those persons having only possession of the child.
In re Interest of S.R. 528
9. Constructive knowledge is that knowledge which one would possess if through the exercise of reasonable care he would have known such facts.
McGinn v. City of Omaha 579
10. The phrase "change of circumstances" should not be mechanically construed. The children's happiness, their psychological adjustment, their own wishes, are as much entitled to consideration as changes in material environment.
Marez v. Marez 615
11. The Nebraska State Board of Agriculture, while operating parimutuel betting, is a "business association," as contemplated by the Uniform Disposition of Unclaimed Property Act, Neb. Rev. Stat. §§ 69-1301 et seq. (Reissue 1981).
State ex rel. Marsh v. Nebraska St. Bd. of Agr. 622
12. A law is a rule of conduct prescribed by the lawmaking power of a sovereign.
State ex rel. Brant v. Beermann 632
13. Clinical psychologists are physicians within rule 35 of the Nebraska Discovery Rules.
Thynne v. City of Omaha 654
14. To appropriate means to set apart, or assign to a particular person or use in exclusion of others, to use or employ for a particular purpose, or in a particular case.
State ex rel. Creighton Univ. v. Smith 682
15. Claims, in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, demands, or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.
In re Estate of Severns 803

16. Regarding the defense of entrapment, Nebraska has adopted the "origin of intent" test to determine entrapment.
State v. Swenson 820
17. Under the "origin of intent" test, entrapment consists of two elements: (1) The government has induced the defendant to commit the offense charged, and (2) The defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense on any propitious opportunity.
State v. Swenson 820

Workmen's Compensation

1. There is no single test by which determination of whether a workman is an employee, as distinguished from an independent contractor, may be made. The determination must be made by consideration of all the facts in the case. The burden is on the plaintiff to prove that he was an employee at the time of the accident.
Gregg v. Challburg 143
2. Findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict and will not be set aside unless clearly wrong.
Gregg v. Challburg 143
Doggett v. Brunswick Corp. 166
Doty v. Aetna Life & Casualty 428
Powell v. W. G. Pauley Lumber Co. 707
Nussbaum v. Wright 712
Person v. Red Lion Inn 745
3. Questions of causation in workmen's compensation cases are for the fact finder.
Doggett v. Brunswick Corp. 166
4. The scheduled allowance for the loss of an eye is exclusive, and includes all consequences which naturally follow from the loss of an eye or its loss of use, total or partial.
Doggett v. Brunswick Corp. 166
5. There is no disability to an eye in the absence of a loss or diminution of vision.
Doggett v. Brunswick Corp. 166
6. There can be no disability benefits payable in the absence of disability being suffered.
Doggett v. Brunswick Corp. 166
7. In testing the sufficiency of evidence to support findings of the compensation court after rehearing, the evidence must be considered in the light most favorable to the successful party.
Doty v. Aetna Life & Casualty 428
8. Where an employee has sustained an injury compensable under the Workmen's Compensation Act, and suffers a later injury off the jobsite, his workmen's compensation benefits depend on

whether his disability after the second accident was caused by the original injury or by an independent intervening cause.
Doty v. Aetna Life & Casualty 428
9. The plaintiff must establish by a preponderance of the evidence that his injury arose out of and in the course of his employment and is the proximate cause of the disability for which benefits are sought.
Powell v. W. G. Pauley Lumber Co. 707
10. Where the injury is not of an objective nature, a causal connection between the accident and the disability must be established by expert medical testimony.
Powell v. W. G. Pauley Lumber Co. 707
11. For medical testimony to be the basis for an award, it must be sufficiently definite and certain that a conclusion can be drawn that there was a causal connection between the accident and the disability.
Powell v. W. G. Pauley Lumber Co. 707
12. The general test in determining whether an employee is a servant of his original master, or of the party to whom he has been furnished, is whether in the particular service which he is engaged to perform he continues to be liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired.
Nussbaum v. Wright 712
13. It is quite generally agreed that in order to transfer liability from the general employer to the one to whom the employee is loaned, there must be some consensual relationship between the loaned employee and the employer whose service he enters, sufficient to create a new employer-employee relationship. Where an employee enters the service of another at the command and pursuant to the direction of the master, no new relationship is created. While the employeee may be subject to the direction of the temporary master, he is there in obedience to the command of his employer; and in doing what the new master directs him to do, he is performing his duty to the employer who gave the order. Consent cannot be inferred merely from the fact that the employee obeyed the commands of his master in entering the services of another.
Nussbaum v. Wright 712
14. Before the new master and servant relationship can be made effective, the servant must understand that he is submitting himself to the control of the new master.
Nussbaum v. Wright 712
15. Before an employer to whom the injured employee is loaned can be found liable for injuries to the loaned employee, the employee must show that he has made a contract of hire, express or implied, with the special employer, that the work being done

is essentially that of the special employer, and that the special employer has the right to control the details of the work.
Nussbaum v. Wright 712
16. The "statutory employer" provisions of Neb. Rev. Stat. § 48-116 (Reissue 1978) do not supersede the exemption provisions of Neb. Rev. Stat. § 48-106(2) (Reissue 1978).
Nussbaum v. Wright 712
17. Employment which is both casual and which is not in the usual course of the trade, business, profession, or occupation of the employer is exempt from coverage under the Nebraska Workmen's Compensation Act.
Nussbaum v. Wright 712
18. Where an injury arising out of and in the course of employment combines with a preexisting condition to produce disability, though absent the preexisting condition no disability would have resulted, recovery can be had by the employee.
Benson v. Barnes & Barnes Trucking 865
19. The burden of proof necessary to establish apportionment under Neb. Rev. Stat. § 48-128 (Reissue 1978), the Second Injury Fund statute, is upon the employer who seeks the benefits of that statute.
Benson v. Barnes & Barnes Trucking 865