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RALPH P. ROSNICK ET AL., APPELLANTS, V. EPHRAIM L. MARKS AND MARKS, CLARE, HOPKINS AND RAUTH, A PARTNERSHIP, APPELLEES.

357 N.W.2d 186

Filed October 26, 1984. No. 83-582.

1. **Words and Phrases.** "Injury" means an invasion of a legally protected interest of another. "Damage" means the harm, detriment, or loss sustained by reason of the injury.
2. **Limitations of Actions: Attorneys at Law.** A cause of action for malpractice accrues upon the violation of a legal right.
3. **Limitations of Actions: Constitutional Law.** The requirement of Neb. Const. art. I, § 13, that all courts be open and every person have a remedy by due process of law for any injury to his person, does not mean that reasonable limits may not be imposed upon the time within which one must seek redress in the courts.

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

Michael L. Lazer of Levy & Lazer, P.C., for appellants.

Joseph K. Meusey of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellees.

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

SHANAHAN, J.

Ralph P. Rosnick and Central States Tool and Die Works, Inc., sued Ephraim L. Marks and the law firm in which Marks is a partner. The action alleged malpractice of Marks and his firm during representation of Rosnick and Central States in a suit for breach of contract. The district court sustained a demurrer and dismissed the action on the ground that any cause of action for professional negligence was barred by Neb. Rev. Stat. § 25-222 (Reissue 1979). We affirm.

On May 8, 1978, Rosnick retained Marks and his law firm to file and prosecute an action against Carl W. Renstrom for damages on account of Renstrom's alleged breach of a contract with Rosnick and Central States. Suit was filed on May 9, 1978. (The plaintiffs are designated "Rosnick" for the purpose of this opinion.)

On September 19 Renstrom filed a motion that Rosnick make his petition more definite and certain. The district court sustained Renstrom's motion on October 25 and allowed Rosnick 2 weeks to amend his petition. Marks did not file an amended petition by November 8 and never filed such pleading in the suit against Renstrom.

Nothing transpired in the suit against Renstrom until Marks and his firm were permitted to withdraw as attorneys for Rosnick on July 3, 1980. That same day another attorney took over representation of Rosnick in the Renstrom litigation. On August 26 the district court dismissed the suit against Renstrom because Rosnick failed to comply with the court's order of October 25, 1978, which had necessitated an amended petition. The district court's dismissal of the Rosnick-Renstrom litigation was affirmed by this court on March 12, 1982. See *Rosnick v. Renstrom*, 210 Neb. 759, 316 N.W.2d 765 (1982).

On August 25, 1982, Rosnick filed the malpractice action against Marks and his firm and alleged that the attorneys were negligent in their failure to file an amended petition in response to the court's order of October 25, 1978. On June 16, 1983, the district court sustained a demurrer on the ground that any cause of action for professional negligence was barred by the statute of limitations found in § 25-222. Section 25-222, in pertinent part, provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . . .

In construing a statute this court must look to the statutory objective to be accomplished, the evil and mischief to be remedied, or purpose to be served, and then place on the statute

a reasonable or liberal construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose. Further, in determining the meaning of a statute, this court will, if possible, ascertain the legislative intent from the language of the act. *Mitchell v. County of Douglas*, 213 Neb. 355, 329 N.W.2d 112 (1983). As far as practicable, we must give effect to the language of a statute and reconcile different statutory provisions so that parts of a statute are consistent, harmonious, and sensible. *State v. Black*, 195 Neb. 366, 238 N.W.2d 231 (1976). Also, we must give effect, if possible, to the several parts of a statute to avoid rejection of a sentence, clause, or word as meaningless or superfluous. *Little Blue N.R.D. v. Lower Platte North N.R.D.*, 206 Neb. 535, 294 N.W.2d 598 (1980).

Statutes of limitations have an important role in disposition of claims between individuals, because such statutes promote and produce finality and thereby stability in human affairs. In this manner statutes of limitations stimulate activity and punish unreasonable delay in prosecuting claims. *Wood v. Carpenter*, 101 U.S. 135, 25 L. Ed. 807 (1879). In particular, § 25-222 insures that actions for professional negligence must be brought shortly after the alleged negligence occurs or is discovered, so that the professional can have a fair opportunity to defend against a claim for malpractice and not find defenses eroded or defeated by time. *Swassing v. Baum*, 195 Neb. 651, 240 N.W.2d 24 (1976).

We are somewhat puzzled that, in framing the issues by pleadings, apparently neither party believed it necessary to include the date when Rosnick knew that Marks and his firm had failed to comply with the order achieved through Renstrom's motion. Whether Rosnick actually knew about such failure before August 26, 1980 (dismissal of the contract action), is open to speculation from the pleadings. Proper pleading requires a petition to state in logical and legal form the facts which constitute the plaintiff's cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute. *Russell v. First York Sav. Co.*, *ante* p. 112, 352 N.W.2d 871 (1984).

If a petition alleges a cause of action ostensively barred by the

statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute. *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 343 N.W.2d 753 (1984). Rosnick's petition regarding Marks and his firm does not allege any circumstance preventing Rosnick's knowledge of his attorneys' professional negligence and his right to sue for malpractice. See § 25-222; cf. *Sacchi v. Blodig*, 215 Neb. 817, 341 N.W.2d 326 (1983) (claimant's legal disability under Neb. Rev. Stat. § 25-213 (Reissue 1979)); cf., also, *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962) (malpractice undiscovered and not discoverable with reasonable diligence).

Rosnick contends that the statute of limitations found in § 25-222 runs from the point at which actual damage results from malpractice, not from the act or omission of professional negligence. To support his contention Rosnick directs us to a line of cases typified by *Budd v. Nixen*, 6 Cal. 3d 195, 491 P.2d 433, 98 Cal. Rptr. 849 (1971), where the Supreme Court of California construed that state's Code of Civil Procedure applicable to a malpractice action against an attorney, namely, the provision requiring commencement of the action within 2 years "after the cause of action shall have accrued." In holding that actual loss or damage from malpractice must be sustained for accrual of a cause of action, the court stated in *Budd v. Nixen*:

> The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. [Citations omitted.] Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice. . . .
>
> The cause of action arises, however, before the client sustains all, or even the greater part, of the damages occasioned by his attorney's negligence. [Citations omitted.] Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue.

Id. at 200-01, 491 P.2d at 436, 98 Cal. Rptr. at 852.

We note that after *Budd v. Nixen, supra*, the California

Legislature amended the malpractice statute of limitations to provide that the time for commencement of the action "shall be tolled during the time that any of the following exist: (1) The plaintiff has not sustained actual injury." Cal. Civ. Proc. Code § 340.6 (West 1982).

In a manner similar to California, legislatures of other jurisdictions have incorporated a damage rule into malpractice statutes of limitation, for example, "[T]he cause of action shall not be deemed to accrue when the wrong is done or the technical breach of . . . duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment," Mo. Ann. Stat. § 516.100 (Vernon 1952); the statute of limitations does not begin to run where "damage [is not] readily apparent to the claimant at the time of its origin," N.C. Gen. Stat. § 1-15 (1983); and "the cause of action . . . shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury," Kan. Stat. Ann. § 60-513(b) (1983). One critical question raised by the damage rule is: What extent of damage triggers the statute of limitations?

The questions raised concerning § 25-222 can be stated: When did Rosnick's cause of action against his attorneys accrue? or, When could Rosnick have sued his attorneys for professional negligence?

> The traditional rule is that the statute begins to run as soon as the action accrues, and the cause is said to accrue when the aggrieved party has the right to institute and maintain a suit. In a contract action this means as soon as breach occurs, and in tort, as soon as the act or omission occurs.

Grand Island School Dist. #2 v. Celotex Corp., 203 Neb. 559, 562-63, 279 N.W.2d 603, 606 (1979). A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain suit, although the nature and extent of damages may not be known. See *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983) (malpractice of attorney).

Section 25-222 requires that the action for malpractice be commenced within 2 years "after the alleged act or omission" and contains a provision for deferred commencement "if the

cause of action is not discovered and could not be reasonably discovered within such two-year period." By using this language the Legislature envisioned situations involving a breach of duty as injury to the person entitled to the particular professional service. "[T]he term 'injury' has both a common and a legal meaning and . . . when used in construing a statute of limitations, the term 'injury' is to be given its legal meaning." *Dortch v. A. H. Robins Co., Inc.*, 59 Or. App. 310, ____, 650 P.2d 1046, 1051 (1982). The injury contemplated by § 25-222 is legal injury.

What, then, is contained in "injury"? As used in Restatement (Second) of Torts § 7 at 12 (1965): "The word 'injury' is used . . . to denote the invasion of any legally protected interest of another." Frequently, the words *injury* and *damage* are used interchangeably and synonymously, but there is a material difference between *injury* and *damage*. As expressed in *Carroll v. Township of Rye*, 13 N.D. 458, 466, 101 N.W. 894, 897 (1904): "There is a wide distinction between 'damage' and 'injury.' They bear the same relation to each other as cause and effect. An 'injury,' in its legal sense, is misconduct, and 'damage' is the legal term applied to the loss resulting from misconduct. [Citation omitted.]"

Injury is the wrongful act or omission which caused the loss. *Monsanto Co. v. Miller*, ____ Ind. App. ____, 455 N.E.2d 392 (1983).

> The terms "injury" and "damage" are not synonymous—in fact, they are, in law, materially different. . . .
>
> " 'The term "injury" is sometimes used in the sense of "damage," as including the harm or loss for which compensation is sought, and has been defined as damage resulting from an unlawful act; but in strict legal significance, there is, properly speaking, a material distinction between the two terms, in that injury means something done against the right of the party, producing damage, whereas damage is the harm, detriment, or loss sustained by reason of the injury.' "

Clark v. Cassetty, 71 N.M. 89, 92, 376 P.2d 37, 39 (1962) (citing and quoting from 1 C.J.S. *Actions* § 15 a. (1936)).

Damage means "[l]oss . . . caused by the negligence . . . of one person to another . . . . By damage we understand every loss or diminution of what is a man's own, occasioned by the fault of another. The harm, detriment, or loss sustained by reason of an injury." Black's Law Dictionary 351 (5th ed. 1979). Damages are simply a measure of injury. See, also, *Kozar v. Chesapeake and Ohio Railway Company*, 449 F.2d 1238 (6th Cir. 1971). "Damages" means compensation for a legal injury sustained. *Frankel v. United States*, 321 F. Supp. 1331 (E.D. Pa. 1970).

In conjunction with § 25-222 every professional has a duty to render services in a reasonable and prudent manner. A negligent breach of that professional duty invades a legal right of one entitled to receive negligence-free services. Thus, tortious invasion of another's legal right is the triggering device for the statute of limitations. This situation has been characterized as the occurrence rule, in contrast with the damage rule illustrated by *Budd v. Nixen*, 6 Cal. 3d 195, 491 P.2d 433, 98 Cal. Rptr. 849 (1971). Even those jurisdictions espousing the damage rule recognize that a statute of limitations can be triggered at some time before the full extent of damages is sustained. See *Jankowski v. Taylor, Bishop & Lee*, 246 Ga. 804, 273 S.E.2d 16 (1980); cf. *Budd v. Nixen, supra* at 201, 491 P.2d at 436, 98 Cal. Rptr. at 852: "Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue."

Legislatures have profound impact on statutes of limitations. The Legislature of Nebraska is no exception. In formulating the statute of limitations for actions based on professional negligence, Nebraska's Legislature has expressly stated that such actions "shall be commenced within two years next after the alleged act or omission." When it selected the language "act or omission" found in § 25-222, the Nebraska Legislature rejected actual damage as the index for inception of the time limit for a suit based on malpractice. Had the Nebraska Legislature desired actual damage to be an element of the statute of limitations under examination, and at the risk of emphasizing the obvious, the patently simple legislative course would have been insertion of such terminology into the statute, that is, malpractice actions "shall be commenced within two

years next after actual damage has been sustained by the claimant." However, this court cannot indulge in substitutional injection of "actual damage" into the malpractice statute of limitations, a phrase which would render "alleged act or omission" meaningless and repudiate the manifest legislative intent found in the unambiguous language of § 25-222. In utilizing the language found in § 25-222, the Nebraska Legislature has opted for the occurrence rule, tempered or ameliorated by a provision for discovery.

Permitting a client's lawsuit to be dismissed on account of an unexplained failure to comply with an order directing affirmative action in prosecution of litigation does indicate an improper degree of professional skill. In the case before us the alleged negligence occurred when Marks failed to amend Rosnick's petition in November 1978. By such omission there was dereliction of the duty to properly prosecute an action on behalf of a client. That breach of professional duty constituted injury to Rosnick and entitled him to prosecute a cause of action against Marks for damages, albeit an action at the point of such breach may have produced a recovery of nominal damages only.

Further, taking the pleaded facts in a light most favorable to Rosnick, failure to comply with the court's order in 1978 apparently remained unknown to Rosnick until July 3, 1980, when another attorney undertook representing Rosnick against Renstrom. On July 3, through his new counsel, Rosnick was charged with the knowledge that Marks had not complied with the 1978 order necessitating an amended petition. Moreover, when the court dismissed the suit against Renstrom on August 26, 1980, Rosnick was absolutely disqualified from pleading ignorance of Marks' failure to comply with the order regarding Rosnick's petition. Therefore, under the discovery provision and its 1-year limitation found in § 25-222, the statute of limitations began to run in 1980, at the earliest on July 3 and at the latest on August 26, when Rosnick was charged with knowledge or actually discovered that Marks and his firm had failed to dutifully prosecute the suit against Renstrom. When Rosnick filed the malpractice suit against Marks in 1982, the postdiscovery 1-year time limit had already expired.

The Legislature has made its choice between the occurrence rule and the damage rule. Under the circumstances we must honor that legislative selection and preference for one form of a statute of limitations over another. Consequently, we reaffirm the rule in Nebraska that a cause of action for malpractice accrues upon the violation of a legal right. See *Schwartz v. Heyden Newport Chem. Corp.*, 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963). The district court was correct in ruling that Rosnick's claim was barred by the statute of limitations prescribed in § 25-222.

Rosnick alleges the unconstitutionality of § 25-222 under the Nebraska Constitution, namely, violations of the "open court" provision of article I, § 13, and due process required by article I, § 3. Simply stated, Rosnick's contention is that any statute of limitations is unconstitutional.

The requirement of Neb. Const. art. I, § 13, that all courts be open and every person have a remedy by due process of law for any injury to his person, does not mean that reasonable limits may not be imposed upon the time within which one must seek redress in the courts. *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982).

Rosnick has failed to demonstrate any unfair prejudice or injustice resulting from the time limits found in § 25-222 and has, therefore, failed to provide any plausible challenge to the statute in question. Generally, a statute of limitations is a valid, acceptable legislative enactment. We are not inclined to adopt a rule that every statute of limitations in every case violates guarantees of due process under article I, § 3, and open access to the courts under article I, § 13, of the Nebraska Constitution.

The judgment of the lower court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CHARLES D. HAHN II, RESPONDENT.

356 N.W.2d 885

Filed October 26, 1984. No. 83-588.

1. **Disciplinary Proceedings.** A license to practice law is granted on the implied understanding that the party receiving it shall in all things demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts.
2. _____. The oath of an attorney requires that he observe established standards of professional ethics.
3. _____. The knowing and willful failure to make income tax reports as required by federal law is misconduct involving moral turpitude and a violation of the oath of an attorney and the canons of ethics.

Original action. Judgment of suspension.

Dennis G. Carlson, Counsel for Discipline, and Alison L. Larson, for relator.

Daniel E. Wherry of Johnston, Barber, Wherry & Knight, for respondent.

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

PER CURIAM.

This is an original disciplinary proceeding against the respondent, Charles D. Hahn II. The respondent was charged with violating his oath as an attorney and Canon I, DR 1-102(A)(1), (3), and (6), of the Code of Professional Responsibility in that he willfully and knowingly failed to file a federal income tax return in 1978, 1979, and 1980. The respondent's answer admitted the facts alleged in the formal charges but denied that his conduct as alleged in the charges constituted a violation of his oath or a violation of DR 1-102.

Following an evidentiary hearing, the referee found that the respondent had violated his oath as an attorney and DR 1-102 (A)(1), (3), and (6). The referee recommended that the respondent be disciplined by a public reprimand and probation for 18 months with a requirement that he perform 150 hours of pro bono legal services. After the report of the referee had been filed, we ordered that the matter be briefed and argued.

A license to practice law is granted on the implied understanding that the party receiving it shall in all things demean himself in a proper manner and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. *State ex rel. Nebraska State Bar Assn. v. Fitzgerald*, 165 Neb. 212, 85 N.W.2d 323 (1957); *State ex rel. NSBA v. Statmore, ante* p. 138, 352 N.W.2d 875 (1984). The oath of an attorney requires that he observe established standards of professional ethics.

DR 1-102(A)(1), (3), and (6) of the Code of Professional Responsibility provides as follows:

> DR 1-102 Misconduct.
>
> A. A lawyer shall not:
>
> 1. Violate a Disciplinary Rule.
>
> . . . .
>
> 3. Engage in illegal conduct involving moral turpitude.
>
> . . . .
>
> 6. Engage in any other conduct that adversely reflects on his fitness to practice law.

The record shows that the respondent was elected county attorney of Nemaha County in 1971 and held that office for 12 years. In 1978 the respondent received wages in the amount of $10,097.94 and partnership distributions of $37,548.70; in 1979, $12,172.50 in wages and $40,666.07 in partnership distributions; and in 1980 wages of $13,380 and partnership distributions of $45,724.61.

The record further shows that the respondent was charged in the U.S. District Court for the District of Nebraska with three separate counts of knowingly and willfully failing to timely file a federal income tax return in violation of I.R.C. § 7203 (1976). The respondent pleaded guilty to count III of that information; counts I and II were dismissed upon motion of the U.S. attorney. The respondent was fined $1,000 and costs and sentenced to 1 year's imprisonment, which sentence was suspended except for a period of 30 days of confinement to be served on 10 consecutive weekends. The respondent was also placed on probation, the terms of which included 150 hours of pro bono legal services.

In *State ex rel. Nebraska State Bar Assn. v. Fitzgerald, supra*, the respondent was suspended from the practice of law for 1 year for the failure to file federal income tax returns for 1947 to 1954, inclusive. We held that the knowing and willful failure to make income tax reports as required by federal law is misconduct involving moral turpitude and a violation of the oath of an attorney and the canons of ethics.

In *State ex rel. Nebraska State Bar Assn. v. Tibbels*, 167 Neb. 247, 92 N.W.2d 546 (1958), the respondent was suspended from the practice of law for 1 year for the failure to file federal income tax returns for 1952, 1953, and 1954. In the *Tibbels* case we reviewed our decision in the *Fitzgerald* case and again held that a knowing and willful failure to file income tax reports as required by the federal statutes is misconduct involving moral turpitude and a violation of the standards of ethics applicable to lawyers.

We believe that the *Fitzgerald* and *Tibbels* cases are controlling here and that the appropriate discipline to be imposed upon the respondent is suspension from the practice of law for 1 year.

It is the judgment of the court that the respondent be suspended from the practice of law for 1 year from November 15, 1984. The respondent may apply for reinstatement at the end of the period of suspension by making an affirmative showing that he has fully complied with the order of suspension and in the future will not engage in practices offensive to the legal profession.

JUDGMENT OF SUSPENSION.

GRANT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL E. McGUIRE, APPELLANT.

357 N.W.2d 192

Filed October 26, 1984.

Nos. 83-674, 83-675, 83-676, 83-677, 83-678.

1. **Search and Seizure: Probable Cause.** If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.
2. **Search and Seizure: Arrests: Probable Cause.** Where probable cause exists for the arrest of an accused in his motor vehicle upon a public highway and at that time probable cause for the search of his vehicle exists as well, a search of the vehicle a short time later at a different location while the vehicle is still in police custody is not unreasonable even though made without a warrant.
3. **Search and Seizure: Evidence.** Under the inevitable discovery exception to the exclusionary rule, illegally obtained evidence which would have been discovered in the course of a proper investigation is admissible.
4. **Indictments and Informations: Joinder.** Offenses of the same or similar character may be joined in one information and tried together.
5. **Joinder.** The question of the advisability of joint or separate trials is one directed to the sound discretion of the trial court.
6. **Sentences: Appeal and Error.** In the absence of an abuse of discretion by the trial court, a sentence imposed within statutory limits will not be disturbed on appeal.

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

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

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

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

BOSLAUGH, J.

The defendant, Michael E. McGuire, was charged in case No. 83-675 with robberies of Jerico's restaurant in Omaha, Nebraska, on or about October 16 and November 20, 1982, and use of a firearm in the commission of a felony on each occasion. In case No. 83-676 he was charged with first degree sexual assault and the robbery of the Spaghetti Works in Ralston, Nebraska, on or about November 13, 1982. Upon the motion of

the State these cases were consolidated for trial, and the jury returned verdicts of guilty on all counts.

The defendant pleaded guilty or nolo contendere to the remaining charges against him. Those included, in case No. 83-674, the robbery of Reuben's restaurant in Omaha, Nebraska, on or about November 27, 1982, and use of a firearm in the commission of a felony; in case No. 83-677, the robbery of the Cinema Center in Omaha, Nebraska, on or about September 24, 1982, and use of a firearm in the commission of a felony; and in case No. 83-678, the kidnaping of Clarence Landen III on or about February 16, 1983, and use of a firearm in the commission of a felony.

The defendant was adjudged guilty on all counts in all cases and sentenced to imprisonment for 61 to 170 years.

The defendant has appealed and has assigned as error the overruling of his motion to suppress the evidence taken from the automobile at the time of his arrest; the consolidation for trial of cases Nos. 83-675 and 83-676; and that the sentences imposed were excessive.

The first robbery of Jerico's restaurant occurred on October 16, 1982. The evidence is that the defendant entered the lounge at approximately 11 p.m. and sat at the bar. At about 12:30 a.m. the defendant pulled out an automatic pistol and, while holding the gun on a waitress, ordered the bartender to put the money in a paper sack. Before leaving, he forced the bartender and waitress into a walk-in cooler.

The robbery of the Spaghetti Works occurred on November 12, 1982. The evidence in that case is that the defendant entered the restaurant at about 10 p.m., sat at the bar, and had several conversations with the woman who was the assistant manager. At about 11:30 p.m., while approximately 12 persons including employees and customers were in the restaurant, the defendant pulled out an automatic handgun and committed the robbery. After he had collected the money he placed everyone except the assistant manager in the walk-in cooler and then sexually assaulted the assistant manager.

The second robbery of Jerico's restaurant occurred on November 20, 1982. The evidence is that when the defendant entered the bar at about 12:30 a.m., he was recognized by the

waitress who had been present during the first robbery. She attempted to leave, but the defendant pulled out a gun and forced her to stay. During this robbery, the defendant said something to the waitress about "dropping her drawers," but she was able to talk the defendant out of an assault.

The defendant was arrested in Burlingame, California, on March 2, 1983. The arresting officer had received information to be on the lookout for a gold Pontiac TransAm with Nebraska license plates, the rear plate in a holder with the word "Guam" inscribed on it. The bulletin further described a white male driver, armed and dangerous—possibly carrying a .45 automatic—and a white female passenger. At approximately 3:20 a.m., while making his rounds, the officer spotted the suspect vehicle parked in a convenience store parking lot near a phone booth in which both the defendant and his companion were standing.

The defendant was immediately handcuffed and placed in the back seat of an assisting officer's patrol car. The woman was not arrested; at the time, however, she was instructed not to move as she was being watched by a K-9 police dog. The arresting officer thereupon looked into the TransAm, where he saw, in plain view, a clear plastic baggie containing marijuana and a pipe. Conducting a search of the interior of the car, the officer found, among other things, a loaded .357 Magnum and a Walther .380 in the console between the seats. When he did not find the .45 automatic described in the bulletin, the officer took the keys from the ignition and opened the trunk. Finding luggage inside, the officer asked the defendant if he wanted it left in the trunk, where its safety was not guaranteed, or taken to the police station and inventoried. The defendant chose the latter. The inventory yielded a pair of black driving gloves, a nylon jacket, a plaid, long-sleeved shirt, and a gray tweed coat; all of which were admitted into evidence at trial and identified by some of the witnesses.

The defendant's first contention is that his motion to suppress should have been sustained because the search of the trunk of the automobile violated his fourth amendment rights.

In *United States v. Ross*, 456 U.S. 798, 825, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982), the Supreme Court held: "If probable

cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Ross* involved two separate searches of a car's trunk—one search made after the vehicle was stopped pursuant to an informant's tip, another made after the car had been taken to police headquarters. Permitting the heroin and cash found to be used against the defendant, the court reasoned that a lawful search extends to the entire area in which the sought-after object may be found and that it is not limited by the necessity for separate acts of entry to complete the search.

> When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.

456 U.S. at 821.

In this case the arresting officer was forewarned that the defendant might be armed with a .45 revolver. Since the description of the car and its occupants was on target and the search of the vehicle's interior yielded marijuana and two other guns, it was not unreasonable for the officer to search for the .45 in the trunk. The search was further justified by the fact that the defendant's female companion could have taken the alleged gun from the car later, as could have anyone.

In *Cady v. Dombrowski*, 413 U.S. 433, 448, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973), the Supreme Court said: "Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not 'unreasonable' within the meaning of the Fourth and Fourteenth Amendments." In *Cady* a Chicago police officer was arrested; the arresting officer, who was under the impression that Chicago police officers were required to carry their service revolvers at all times, conducted a warrantless search of the car to find the gun. See, also, *United States v. Nygard*, 324 F. Supp 863 (W.D. Mo. 1971), where police officers had teletype information that the defendant was "alleged to have pistol in possession and has

threatened to use same on father," *id.* at 865, and where at the time of defendant's arrest that gun was not on his person, officers had probable cause to search the car. It is well established that vehicles "may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts." *United States v. Ross, supra* at 806 n.8.

It has also been established that where probable cause exists for the arrest of an individual in a motor vehicle, and at that time probable cause also exists to search the vehicle, then a search of the vehicle made at the police station a short time later is not unreasonable even if made without a warrant. *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975) (citing *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970)). In *Franklin*, quoting *Chambers*, we said at 640, 234 N.W.2d at 616:

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. . . . The probable-cause factor still obtained at the station house and so did the mobility of the car . . . ."

Thus, having probable cause to search the car, including its trunk and contents, at the time of the arrest, that probable cause still existed after the car was moved to the safety afforded at the police station.

Defendant contends, however, that *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982), does not apply to the facts at bar. Rather, he argues that *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), limits the scope of the search to the passenger compartment of the car. In *Belton* the Court held that when a lawful custodial arrest has been made of the occupant of a vehicle, a search may be made of the passenger compartment. The defendant distinguishes *Ross* as entailing a search that resulted in an arrest, and states that "the unlocking of the trunk, observation of the suitcases and eventually taking them into custody was an unlawful search and seizure pursuant to *Belton*." Brief for

Appellant at 15.

Belton, however, was concerned with what constitutes "the area within the immediate control of the arrestee" when the arrestee is in a vehicle. 453 U.S. at 460. Where there is both probable cause for an arrest and probable cause to search, as in the case at bar, it would seem that the scope of the latter would be controlled by *Ross*.

Assuming, however, that there was no probable cause to search the trunk, the evidence obtained was still admissible. Under the inevitable discovery exception to the exclusionary rule, illegally obtained evidence can be admitted if it would have been discovered in the course of a proper investigation. *United States v. Glenn,* 577 F. Supp. 930 (W.D. Mo. 1984). In the case at bar the evidence objected to was first seen by the police when the luggage was opened in an inventory search. The U.S. Supreme Court has held that inventory searches are reasonable. *Illinois v. LaFayette,* 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983). Accord *State v. Hack and Callans,* 212 Neb. 406, 322 N.W.2d 806 (1982).

Finally, in light of the overwhelming evidence of guilt against this defendant and the number of positive identifications made, the admission into evidence of the articles of clothing objected to was not prejudicial.

Defendant's next assignment of error relates to the consolidation for trial of the Jerico's robberies and the Spaghetti Works robbery and assault. With respect to consolidation of cases for trial, Neb. Rev. Stat. § 29-2002 (Reissue 1979) provides in part:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> . . . .
>
> (3) The court may order two or more indictments, informations, or complaints, or any combination thereof, to be tried together if the offense, and the defendants, if

> there are more than one, could have been joined in a single indictment, information or complaint. The procedure shall be the same as if the prosecution were under such single indictment, information, or complaint.

If the offenses involved were of the same or similar character, they could be joined in one information and the trial court could order that they be tried together. *State v. Cole, ante* p. 1, 352 N.W.2d 154 (1984).

In all three robberies the same gun was described, a similar description of the man and some of the same articles of clothing—particularly black driving gloves—was made, and the same threats were said to have been used. Furthermore, in two of the robberies, references were made to calling a local disk jockey so that someone would know that persons were locked in a walk-in cooler.

Although not the "same," the offenses were similar in nature.

The defendant contends that he was prejudiced by the joinder because of the highly emotional character of the evidence as to the sexual assault during the Spaghetti Works robbery and the fact that such a charge did not exist in the Jerico's robberies. In *State v. Walker*, 200 Neb. 273, 263 N.W.2d 454 (1978), we found that the joinder was not prejudicial error where evidence relating to both offenses would have been admissible in a trial of either offense separately. In *Walker* the defendant was charged in an information with burglary with intent to commit rape and first degree sexual assault.

In the case at bar no sex-related offenses were charged in the Jerico's robberies. However, there was testimony that during the second Jerico's robbery, the defendant took a waitress aside, made advances toward her, and told her to "drop her drawers." Evidence of the completed crime in the Spaghetti Works case would have been admissible in the Jerico's cases to show method of operation and identity.

"The question of election between counts and the advisability of joint or separate trials is one directed to the sound discretion of the trial court . . . 'and unless some prejudice has resulted from the ruling of the court, it will not be

held that this discretion has been abused.' " *State v. Rodgers*, 186 Neb. 633, 635, 185 N.W.2d 448, 449 (1971) (quoting *Robinson v. State*, 107 Neb. 591, 186 N.W. 977 (1922)).

The defendant's final assignment of error is that the sentences imposed were excessive.

Within 6 months after arriving in Nebraska, the defendant committed a dozen felonies. The presentence report indicates that he is wanted in Arizona for parole violation (he has been convicted there on four counts of armed robbery); he is wanted in Kansas on charges including rape, sodomy, and kidnaping; and he is wanted in Colorado for questioning in connection with a missing person believed killed. It is apparent that the defendant is a violent and dangerous man and that a long period of incarceration is necessary for the protection of the public.

The defendant could have been sentenced to imprisonment for well over 400 years. In the absence of an abuse of discretion by the trial court, a sentence imposed within statutory limits will not be disturbed on appeal. *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982). The sentences which were imposed are well within statutory limits. A review of the record and the presentence report discloses that the trial court did not abuse its discretion in sentencing.

There being no error, the judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., concurs.

KRIVOSHA, C.J., concurring.

I concur in the results reached by the majority in this case. I write separately, however, because I believe that part of the rationale upon which the majority bases its decision is not correct. Specifically, I refer to that portion of the majority's opinion in which it states that "[e]vidence of the completed crime in the Spaghetti Works case would have been admissible in the Jerico's cases to show method of operation and identity." For reasons more particularly set out in my dissent in *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981), I do not believe that evidence of the sexual attack in the Spaghetti Works case could have been admissible to show either operation or identity in the

Jerico's robbery, and could only have been introduced by the State for the purpose of showing that McGuire acted in conformity with his character to commit a crime, contrary to the provisions of Neb. Rev. Stat. § 27-404(2) (Reissue 1979). I believe that we continue to improperly extend this rule to the point that we have virtually repealed the statute.

OCCIDENTAL SAVINGS AND LOAN ASSOCIATION, A CORPORATION, APPELLANT, V. BELL FEDERAL CREDIT UNION, A CORPORATION, APPELLEE.

357 N.W.2d 198

Filed October 26, 1984. No. 83-740.

1. **Declaratory Judgments: Appeal and Error.** This court treats the determination of factual issues in a declaratory judgment action, which would otherwise be an action at law and tried without a jury, in the same manner as any other action at law; accordingly, the findings of the trial court have the effect of a jury verdict and will not be set aside unless clearly wrong.
2. **Leases.** Any ambiguity in a lease will be construed against the party whose language was used.
3. _____. A sublessee can in no event have greater rights against the original lessor than were given by the original lessor to the original lessee.
4. **Contracts.** One who by contract imposes a duty upon himself must substantially comply with that undertaking.
5. **Leases: Contracts: Liability.** A sublessor who undertakes to grant renewal options he cannot deliver becomes, by reason of that breach of contract, liable in damages.

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

Robert M. Zuber of Zuber & Ginsburg, for appellant.

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

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

CAPORALE, J.

Occidental Savings and Loan Association, a corporation, plaintiff sublessee, appeals from the trial court's declaration that the sublessor and defendant-appellee, Bell Federal Credit Union, a corporation, incurred no liability by its inability to grant renewals to Occidental as provided in the sublease. We reverse and remand for further proceedings.

Bell, as lessee through its predecessor, and Masonic Templecraft of Omaha, as lessor, entered into a lease of a portion of a building on October 1, 1971, for the 10-year period beginning March 1, 1972, and ending February 28, 1982, with an option in Bell to renew the lease for two additional 5-year terms. This lease further provided that Templecraft's sale of the building would operate to cancel Bell's options to renew. On February 15, 1977, Occidental, as lessee, and Bell, as lessor, entered into an agreement entitled "LEASE," wherein Occidental subleased from Bell the premises Bell had leased from Templecraft. This Bell-Occidental agreement, or sublease, made no reference to the Templecraft-Bell lease. The original term of the Bell-Occidental sublease was from March 1, 1977, through February 28, 1982, with an option in Occidental to renew, without any limitation or condition, for two additional 5-year terms. In this sublease Bell represented, as discussed in more detail later, that it had obtained Templecraft's permission "to enter into this lease." On December 22, 1981, Occidental undertook to extend the sublease for the first of the two renewal periods. On January 7, 1982, Bell informed Occidental that Templecraft's sale of the building eliminated Occidental's renewal rights. On January 13, 1983, Occidental undertook to exercise the second renewal period.

The inability of Bell to grant the renewals requested by Occidental resulted in this declaratory judgment action by Occidental against Bell and others not involved in this appeal, wherein Occidental sought a declaration that the renewal

provisions of the Bell-Occidental sublease were binding upon Bell, and for monetary damages.

Following a bench trial, the district court specifically found that although the Bell-Occidental sublease made no reference to the underlying Templecraft-Bell lease, Occidental knew that it was in fact a sublessee and knew, or should have known, that sale of the building by Templecraft canceled the renewal options granted Bell by the underlying Templecraft-Bell lease. Accordingly, the district court dismissed Occidental's petition.

The two questions raised by Occidental's three assignments of error are (1) whether the evidence supports the district court's findings of fact and (2) whether the findings support the judgment.

We begin our analysis by setting forth the scope of our review. Although this suit is cast in the form of a declaratory judgment action, it is in point of fact a suit for breach of contract. Specifically, it is an action for damages occasioned by Bell's alleged breach of its sublease obligations to Occidental. That being so, it is an action at law. This court treats the determination of factual issues in a declaratory judgment action, which would otherwise be an action at law and tried without a jury, in the same manner as any other action at law; accordingly, the findings of the trial court have the effect of a jury verdict and will not be set aside unless clearly wrong. *Quinn v. Godfather's Investments*, 213 Neb. 665, 330 N.W.2d 921 (1983); *Roth v. School Dist. of Scottsbluff*, 213 Neb. 545, 330 N.W.2d 488 (1983).

The trial court's finding that Occidental knew it was a sublessee is clearly correct. It is established by Occidental's September 28, 1976, letter to Bell proposing to "sub-lease" from Bell and the testimony of Occidental's then president and then vice president that they knew at the relevant times that Bell was leasing the subject premises from Templecraft.

We find no evidence that Occidental actually knew of the cancellation provision of the underlying Templecraft-Bell lease. Neither does the evidence support the finding that Occidental should have known of that provision. The trial court's finding that Occidental knew or should have known of the cancellation provision is therefore clearly wrong.

Although Occidental's then president and vice president admitted that all questions asked by them were answered by Bell and that Bell provided all information sought by Occidental, they both testified they never saw the Templecraft-Bell lease. The substance of the testimony of Bell's representatives is only that the Templecraft-Bell lease was available to Occidental. The evidence further establishes that Bell did not wish Occidental to have any contact with Templecraft and therefore represented in the Bell-Occidental sublease that Bell had "obtained from Masonic Templecraft of Omaha, Nebraska, a Nebraska corporation, permission to enter into this lease agreement with the Lessee herein." It would certainly be reasonable for Occidental to read the foregoing language to mean that Templecraft consented to granting Occidental renewal options without any limitation or condition. Any argument that the representation meant only that Templecraft consented to the renewals under the same limitation and condition which Templecraft imposed on Bell would be answered by the rule that any ambiguity in a lease will be construed against the party whose language was used; in this case, Bell. *Sacher v. Taco Grande of Iowa, Inc.*, 210 Neb. 122, 313 N.W.2d 257 (1981).

Bell argues, however, that the rule is well established that a sublessee is bound by, and limited to, the rights of his sublessor. Therefore, it urges, Occidental could acquire no more from Bell than Bell acquired from Templecraft. In support of that argument, it cites *Century Paramount Hotel v. Rock Land Corp.*, 68 Misc. 2d 603, 327 N.Y.S.2d 695 (1971), *Minneapolis, St. Paul & Sault Ste. Marie R. Co. v. Duvall*, 67 N.W.2d 593 (N.D. 1954), *Merchants' State Bank v. Sawyer Farmers' Co-op. Asso.*, 47 N.D. 375, 182 N.W. 263 (1921), *Brock v. Desmond & Co., et al.*, 154 Ala. 634, 45 So. 665 (1908), *Cesar v. Virgin*, 207 Ala. 148, 92 So. 406 (1921), and *Handleman v. Pickerill*, 84 Cal. App. 214, 257 P. 890 (1927), which hold that a sublessee can in no event have greater rights against the original lessor than were given by the original lessor to the original lessee. Those cases are obviously inapposite, for in this case we are adjudicating Occidental's rights against Bell, the original lessee and present sublessor, not the rights of Occidental against the original lessor, Templecraft.

We recognize that *Gulden v. Newberry Wrecker Service*, 154 Ga. App. 130, 267 S.E.2d 763 (1980), *cert. denied* May 7, 1980, applying the rule previously announced by the Georgia Supreme Court in *Rosen v. Wolff*, 152 Ga. 578, 110 S.E. 877 (1922), holds that a sublessee is charged with notice by implication of every fact affecting the rights of his sublessor and discoverable by an examination of the sublessor's lease with the owner, and of every fact with which he, by reasonable diligence, ought to have become acquainted. As urged by Bell, *Gulden* does, in effect, hold that once one becomes aware of the fact he is a sublessee, he has the obligation to read his sublessor's lease with the original lessor and become aware of the limits of the sublessor's rights, and is bound thereby. We, however, reject that rule as unsound.

This case presents nothing more than a contract action in which Bell promised more than it could deliver and must now suffer the consequences. As we said in *University Products of Nebraska, Inc. v. Jensen*, 194 Neb. 700, 235 N.W.2d 229 (1975), if one by contract imposes a duty upon himself, he must substantially comply with that undertaking. In *University Products* we held that the bankruptcy of the seller's franchisor did not excuse the seller's unconditional promise to sell its photography business, notwithstanding the fact that its promise included the obligation to assign its franchise. In the context of this case the *University Products* rationale translates into the rule that a sublessor who undertakes to grant renewal options he cannot deliver becomes, by reason of that breach of contract, liable in damages. This is the rule applied in *Nybor Corp. v. Restaurants, Inc.*, 29 N.C. App. 642, 225 S.E.2d 609 (1976), which held that a sublessor which undertook to demise more land and for a longer term than under its own lease would be liable in damages to its sublessee. Bell undertook to grant renewals which it cannot deliver and must therefore respond in damages if any. Although the record includes evidence on that issue, this determination must be left to the district court.

In view of the foregoing analysis and determination, it is necessary that we reverse the judgment of the trial court and remand the cause for further proceedings to determine the amount of Occidental's damage.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JOHN R. HORN, APPELLANT.

357 N.W.2d 437

Filed October 26, 1984. No. 84-018.

1. **Arrests.** In determining the point at which an arrest has occurred, a court must look to the totality of the circumstances of a law enforcement officer's encounter with an individual and must view such circumstances objectively under a "reasonable person" standard.
2. **Search and Seizure.** The consent required to support a consensual search must be essentially free and unconstrained choice, and not the product of a will "overborne."
3. **Arrests: Warrants: Probable Cause.** A peace officer may arrest without a warrant, if the officer has reasonable cause to believe that the person to be arrested has committed a felony.

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

Dalke, Smith & Harris, for appellant.

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

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

SHANAHAN, J.

John R. Horn appeals his conviction in a jury trial for burglary. Horn assigns as error the overruling of his motions to suppress and subsequent admission of certain physical evidence and his oral statement to officers.

During the morning of August 26, 1983, Sheriff Ted Henderson and Deputy Daniel Cripe of the Gage County Sheriff's Department investigated an early morning burglary at the administration building of Southeast Community College. A 4- by 2½-foot dollar bill change machine had been removed from the lounge of the administration building through a broken window. Outside the broken window of the administration building, Deputy Cripe found some change, four tire tracks, some "plastic material with maroon paint on it"—apparently body putty from a vehicle—and bloodstained glass. Deputy Cripe also noticed three of the tire tracks were made by regular tires, while the fourth track was made by a

mud-grip tire.

Upon return to his office Sheriff Henderson received a telephone call from Supervisor Eldon Trauernicht of Southeast Community College regarding a possible burglary suspect. Trauernicht told the sheriff that John Horn, a former employee of the college, had earlier mentioned to several coemployees that there were large sums of money in the dollar bill change machine. Trauernicht also gave the sheriff directions to Horn's residence.

Sheriff Henderson and Deputy Cripe drove to Horn's residence, a trailer house. Neither of the uniformed officers had a warrant concerning Horn or the trailer house, and neither officer was acquainted with Horn. Each officer had his weapon "snapped" into his holster.

Arriving at Horn's home around 9:30 a.m., Henderson and Cripe saw a maroon automobile parked in the driveway for the trailer. Cripe noticed that one of the car's tires was a mud-grip. The officers observed blood in the parked car, the car's back window broken out, body putty missing from the car, and change in several places on the ground near the car.

While Sheriff Henderson watched the side door of the trailer, Deputy Cripe knocked on the front door. When Horn appeared in the trailer's doorway and displayed a bandaged hand and foot, Cripe asked whether they might talk. Horn answered "Yes," and, according to Cripe, walked out of his trailer house on his own accord. While walking to the patrol car, Cripe asked that Horn come to the sheriff's office and "speak with us voluntarily." Horn responded that he would. In the patrol car, Horn sat in the right rear seat, while the officers sat in front. Horn was at liberty to leave at any time. In the course of conversation, Cripe asked if Horn would consent to a search of his trailer house, but Horn replied he would "prefer not to." Sheriff Henderson proceeded to take a photograph of the trailer and automobile for use in obtaining a search warrant. At that point Horn told Cripe, "You might as well go ahead and search [the trailer house]." Sheriff Henderson radioed the Beatrice Police Department for a "consent to search" form. A Beatrice police officer arrived with a printed form having blanks to be filled in with information pertaining to a proposed

search. The form was completed by the officers and signed by Horn as follows:

PERMISSION FOR SEARCH

I, John R. Horn (Consenting Person), residing at 101 W Hoyt Beatrice (Address), do hereby voluntarily authorize Deputy Sheriff Daniel K Cripe (Rank/Name) of the Gage Co. Sheriff and any officer accompanying the said Daniel Cripe to search my residence, or other real estate, located at 101 W Hoyt Beatrice (Address) and/or my motor vehicle(s) (Namely) My Maroon 1972 (Color Year) Chevy (Make) Nova (Model) 2dr (Body Style) Bearing License In-transit (Number Year State) presently parked or located at 101 W Hoyt Beatrice (Address)

AND I FURTHER UNDERSTAND that I have a right to deny the officer(s) permission to search my property.

X /s/ John Horn
Signature of Consenting

WITNESSES:

/s/ Daniel K Cripe Signature Date 8-26-83, 1983 Time: 950am

/s/ Ted E. Henderson Signature

Before Horn signed the consent form, no officer had drawn his weapon, reached for handcuffs, or told Horn he was under arrest. Also, no officer promised anything in exchange for the consent form signed by Horn. Deputy Cripe testified that although Horn was not under arrest when the consent form was

signed, the deputy read Horn his "Miranda warnings" from a standard prepared form used by officers. Horn acknowledged that he understood each of the *Miranda* rights.

Equipped with the consent form signed by Horn, Sheriff Henderson and Deputy Cripe, after showing the consent form to Mrs. Horn at the front door of the trailer, entered the trailer and found the change machine in a bedroom. Horn had remained outside with an officer of the Beatrice Police Department. Deputy Cripe came out of the trailer, arrested and handcuffed Horn.

Upon arrival at the sheriff's office Horn was again advised of his *Miranda* rights. At approximately 10:50 a.m. Horn signed a form in which he acknowledged that he had been given his *Miranda* rights. At the sheriff's office Deputy Cripe obtained a statement "on tape" in which Horn related that he had stolen the change machine from the community college; had broken the window of his car to load the change machine; had cut his hand when he "punched" out the window during the break-in; and was further injured by the "dollar bill machine changer falling out the window on my foot."

Horn filed motions to suppress physical evidence obtained from his residence and his statement given to Deputy Cripe. Horn, 27 years old, testified at his suppression hearing. According to Horn, Sheriff Henderson and Deputy Cripe knocked on the front door of his trailer and "told me to come outside the trailer, that they wanted to ask me some questions." Horn then left his trailer without any exertion or further exhortation from the officers. Horn also testified there were no threats or promises made regarding the consent form he signed. Horn further acknowledged that he "freely and voluntarily" gave the signed "PERMISSION FOR SEARCH" form to the officers.

The district court overruled Horn's motions to suppress. As a result of a jury trial, Horn was convicted of burglary.

Horn contends that he was unlawfully arrested before the officers searched his residence. Further, Horn alleges error in overruling his motions to suppress physical evidence extracted from his home and his oral statement, the latter alleged to be an exploitation of an illegal arrest.

Horn contends that the officers made an illegal, warrantless arrest inside his trailer house, contrary to *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). In *Payton* the U.S. Supreme Court held that a warrantless arrest inside a suspect's home, absent exigent circumstances, violates the fourth amendment to the U.S. Constitution. Was Horn arrested before the officers searched his residence? Whether the prohibition of *Payton* applies depends upon when and where Horn's arrest took place.

"[I]t is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home." *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980).

In *State v. Longa*, 211 Neb. 356, 318 N.W.2d 733 (1982), we concluded that a person is "seized" and under arrest if, in view of all the circumstances surrounding the encounter with the officers, a reasonable person believes he is not free to leave.

United States v. Mendenhall, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), supplies criteria for determining whether a person is under arrest, namely:

> [A] person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." [Citation omitted.] As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.
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> . . . .
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> . . . [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. [Citations omitted.] In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Id. at 553-55.

> [W]hether an arrest has occurred depends upon an objective, not subjective, evaluation of what a person innocent of a crime would have thought of the situation, given all of the factors involved. When an arrest has occurred depends in each case upon an evaluation of all the surrounding circumstances. Primary among these is a determination of whether or not the defendant was free to choose between terminating or continuing the encounter with the law enforcement officers.

United States v. Johnson, supra at 755.

Thus, in determining the point at which an arrest has occurred, a court must look to the totality of the circumstances of a law enforcement officer's encounter with an individual and must view such circumstances objectively under a "reasonable person" standard and the pertinent factors illustrated in *United States v. Mendenhall, supra*. See, also, *People v. Pancoast*, 659 P.2d 1348 (Colo. 1982).

When officers encountered Horn at the trailer house's doorway, there was no official conduct invading or reaching inside Horn's home. The doorway contact with Horn consisted of identification and a request for further discussion. All testimony negatived any display of weapons, physical contact or "touching" by the officers, and any other official force to effect Horn's exit from the trailer house or produce his presence in the patrol car. Horn has never disputed his ability or liberty to discontinue contact with the officers, either within or without his home, before Deputy Cripe placed Horn under arrest upon discovery of the change machine. Further, nothing indicates

that exclusion of the officers from Horn's home was virtually impossible or impracticable, that is, no dilemmas of Horn. In Horn's doorway encounter with the officers, there was no derogation of the domiciliary dignity of Horn's home. Without some form of official conduct intruding into Horn's trailer house, there was no seizure or arrest of Horn within his home. The "archetype of the privacy protection secured by the Fourth Amendment" remained inviolate. See *Dorman v. United States*, 435 F.2d 385, 389 (D.C. Cir. 1970).

As expressed by the U.S. Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968): "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."

Viewing all the circumstances of Horn's initial contact with the officers, we cannot, and the trial court did not, conclude that a reasonable person would have believed that he was prevented from leaving the presence of the officers, that is, a reasonable person would not have believed he was "seized" or under arrest. " 'Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong.' " *State v. McCarthy, ante* p. 246, 249, 353 N.W.2d 14, 16 (1984). See, also, *State v. Hamilton*, 217 Neb. 734, 351 N.W.2d 63 (1984). Therefore, Horn's contention that he was illegally arrested before he signed the consent form is without merit.

Horn next contends that physical evidence seized from his home should have been suppressed because consent to the search was not voluntarily given. It is beyond dispute that the right to be free from unreasonable search and seizure, guaranteed by the fourth amendment to the U.S. Constitution and by article I, § 7, of the Nebraska Constitution, can be waived by the voluntary consent of the citizen. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). "The consent required to support a consensual search must be essentially free and unconstrained choice and not the product of a will 'overborne.' " *State v. Walmsley*, 216 Neb.

336, 340, 344 N.W.2d 450, 453 (1984). See, also, *Schneckloth v. Bustamonte, supra.* Whether consent to a search is voluntary must be determined from the totality of the circumstances. *State v. Garcia*, 216 Neb. 769, 345 N.W.2d 826 (1984).

After indicating to the officers that he did not want his home searched, Horn recanted and told the officers that they "might as well go ahead and search." The "PERMISSION FOR SEARCH" form signed by Horn contains an express provision that the signatory (Horn) could deny the officers permission to search the signatory's property. The record does not reflect any external coercion or official pressure brought to bear on Horn for his signature on the form. To the contrary, the record does show that no threats or promises were made in obtaining Horn's consent to the search. The evidence supports the trial court's finding that Horn voluntarily consented to the search of his home. Cf. *State v. McCarthy, supra.*

Finally, Horn contends that his statement given at the sheriff's office was an exploitation of an illegal arrest. Cf. *State v. George*, 210 Neb. 786, 317 N.W.2d 76 (1982) (defendant's statement in temporal proximity to illegal arrest is inadmissible). Finding the change machine inside Horn's trailer house pursuant to an authorized search and the other circumstances pointing to Horn's commission of the burglary were a permissible foundation for reasonable or probable cause to arrest Horn. A peace officer may arrest without a warrant if the officer has reasonable cause to believe that the person to be arrested has committed a felony. See, Neb. Rev. Stat. § 29-404.02 (Reissue 1979); *State v. Harrison, post* p. 532, 357 N.W.2d 201 (1984).

Therefore, Horn's arrest outside his trailer after discovery of the change machine was valid. Horn's argument that his statement to Deputy Cripe was an exploitation of an illegal arrest has no merit.

The questioned physical evidence obtained from Horn's home and statement given by Horn were admissible.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN R. HARRISON, APPELLANT.

357 N.W.2d 201

Filed October 26, 1984. No. 84-140.

1. **Constitutional Law: Arrests: Probable Cause.** Under the guarantees of both the U.S. Constitution and the Constitution of the State of Nebraska, one may not be arrested without probable cause.
2. **Arrests: Probable Cause.** Probable cause to arrest exists at the moment when the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed.
3. _____: _____. If the facts available to the officer at the time of the arrest would warrant a man of reasonable caution in the belief the action was appropriate, then probable cause exists.
4. **Criminal Law: Expert Witnesses: Evidence.** It is admissible and proper for a forensic serologist to testify that pubic hairs found on a victim are similar in character to the accused's standard pubic hairs, thereby showing that the accused cannot be excluded from the class of possible suspects. Such testimony has probative value and may be considered by the jury, although the weight to be given such testimony is for the jury to decide.

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

David L. Herzog, for appellant.

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

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

KRIVOSHA, C.J.

The appellant, John R. Harrison, was convicted, after trial to a jury, of first degree sexual assault in violation of Neb. Rev. Stat. § 28-319 (Reissue 1979). This is a Class II felony punishable by imprisonment of not less than 1 nor more than 50 years. Following his conviction, Harrison was sentenced to the Nebraska Penal and Correctional Complex for a term of not less than 7 nor more than 10 years. It is this conviction from which he now appeals, maintaining that the trial court erred in refusing to suppress testimony regarding a pretrial lineup identification of Harrison by the victim, due to the fact that

Harrison was illegally arrested without a warrant, and that the trial court erred in permitting the testimony of a forensic serologist concerning pubic hair found on the victim. Our review of the record discloses that the assignments of error are without merit and the conviction must be affirmed.

The evidence discloses that in the early afternoon of March 30, 1983, the victim, a 31-year-old female, went for a walk near Standing Bear Lake located at 144th and Fort Streets in Omaha, Nebraska. While nearing the completion of her walk, she was passed on the bicycle path by a male riding what she later described as a blue Kawasaki motorcycle. The rider stopped the motorcycle on the path of the victim and appeared to be fixing the vehicle as she passed him. He then came up from behind her, grabbed her, and held her face to face. The record then discloses a series of events which we need not detail, but which, if believed by the jury, clearly established that the victim was criminally assaulted in violation of § 28-319. While we need not detail the sordid events, we do point out that during the attack, the victim was afforded more than ample opportunity to see the attacker so that she could unquestionably identify the attacker upon seeing him again.

Following the assault, the victim returned to her car, drove to her apartment, and called her girl friend. Together, they proceeded to a local hospital, where the victim was examined for injuries sustained as a result of the attack. Specimens of her pubic hairs were also taken at the hospital. While still in the hospital, the victim, on two different occasions, gave a description of the attacker to two Omaha police officers. She also described the motorcycle as a blue Kawasaki.

Approximately 2 months after the assault, one of the investigating officers was patrolling in an unmarked police car near the area where the attack occurred. He noticed a man riding a blue motorcycle on the bicycle path and attempted to stop him. Unable to do so, the officer radioed to a second officer to assist him in pursuing the motorcycle. The second officer pursued the suspect until the suspect reached a dead end. At this point the officer identified himself as a police officer and ordered the suspect to stop in order to permit the officer to speak to him. The suspect jumped the curb with his motorcycle

and drove up an embankment 30 to 35 feet high.

A third officer was summoned and asked to stop the suspect. The third officer initiated a chase, with red lights, flashers, and siren on. With the officer in pursuit the suspect continued another 2 miles before abandoning the motorcycle and fleeing on foot. The motorcycle was impounded, and the police attempted to identify the owner. The police were able to determine that the last owner was James C. Harrison, appellant's brother, who resided at an address in Omaha. The victim identified the impounded motorcycle as resembling the one her assailant rode.

On May 26, 1983, 2 days after the motorcycle was impounded, the first two investigating officers went to the home of the registered owner. No one was at home when they first arrived, but the officers were informed by a young man who stopped by the house that James Harrison no longer owned the motorcycle because he had given it to the appellant. Two hours later, the officers returned to the house. They observed two young men working on a car in the driveway. One of the officers recognized John Harrison, one of the individuals, as the party involved in the motorcycle chase. The officers, without an arrest warrant, placed John Harrison under arrest.

Following the arrest, the victim was summoned to police headquarters to view a lineup containing Harrison. She positively identified Harrison as her assailant. Subsequently, a forensic serologist employed by the Nebraska State Patrol Criminalistics Laboratory examined pubic hairs of Harrison and compared them with the hair found on the victim which did not match her standard pubic hair. According to the serologist's testimony at trial, Harrison could not be excluded as a suspect, based upon similar characteristics of his standard pubic hair and the one found on the victim. The serologist did not attempt to testify that Harrison was the individual who committed the attack, but only that he could not be excluded from a group, based upon these similar characteristics.

Prior to trial, Harrison moved to suppress the pretrial identification as the fruit of an illegal arrest made without a warrant. The trial judge overruled the motion and found that

the police had probable cause to believe that a felony had been committed and that Harrison had committed the offense. The trial court further overruled Harrison's objection to the serologist's testimony.

With regard to Harrison's first assignment of error, that the pretrial lineup identification should have been suppressed because it was the fruit of an illegal arrest, we believe that the argument is not correct.

While it is true that under the guarantees of both the U.S. Constitution and the Constitution of the State of Nebraska, one may not be arrested without probable cause, see, *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), and *State v. Vicars*, 207 Neb. 325, 299 N.W.2d 421 (1980), it is likewise true that probable cause to arrest exists at the moment when the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed. See, *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949); *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925). In *State v. Hack and Callans*, 212 Neb. 406, 407-08, 322 N.W.2d 806, 808 (1982), this court said:

> Probable cause for an arrest exists if the officer has reasonable cause to believe that the person arrested has committed a felony. Probable cause does not require that the officer see the commission of a felony. " 'Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction,'. . . ." *State v. Brewer*, 190 Neb. 667, 674-75, 212 N.W.2d 90, 94 (1973).
>
> If the facts available to the officer at the time of the arrest would warrant a man of reasonable caution in the belief the action was appropriate, then probable cause exists.

Further, in determining what constitutes probable cause, we noted in *State v. Nowicki*, 209 Neb. 640, 645-46, 309 N.W.2d 89, 93 (1981):

> " '[T]he test of probable cause . . . is whether at the moment the facts and circumstances within their (the

> officers') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.' " In this regard, we have also held that probable cause is to be evaluated by the collective information of the police engaged in a common investigation.

That is to say, we have regularly held that the standard of probable cause is not to be viewed in a technical sense, but, rather, it takes form after analysis of the underlying circumstances of each particular case. See, *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); *Brinegar v. United States, supra; State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982); *State v. Dussault*, 193 Neb. 122, 225 N.W.2d 558 (1975); *State v. Atwater*, 193 Neb. 669, 228 N.W.2d 876 (1975).

Further, in view of the fact that the evidence establishes that the arrest occurred on the driveway and not within Harrison's home, no arrest warrant was required. See, *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *State v. Horn, ante* p. 524, 357 N.W.2d 437 (1984); *State v. Tipton,* 206 Neb. 731, 294 N.W.2d 869 (1980); *State v. Schlothauer,* 206 Neb. 670, 294 N.W.2d 382 (1980).

From the evidence in this case it appears clear that at the time that Harrison was arrested on the driveway of his home, the officers had probable cause for the arrest. One of the officers recognized Harrison as the individual who had, 2 days earlier, fled when the officers attempted to stop him and make an investigation. Additionally, the officers had reason to believe that the motorcycle in their possession belonged to Harrison and that Harrison resembled the attacker. This certainly was sufficient to establish probable cause. The arrest was lawful and valid, and so too was the testimony regarding the lineup.

That leaves us with Harrison's final assignment of error regarding the admissibility of the forensic serologist's testimony. Harrison's argument apparently is based upon some notion that because the witness did not positively identify Harrison, her testimony was therefore inadmissible. This may go to the weight of her testimony but not to the admissibility of the evidence. The admission of expert testimony is ordinarily

within the trial court's discretion, and its ruling will be upheld in the absence of a showing of an abuse of discretion. See *State v. Jones, supra.*

While we have not heretofore considered the admissibility of the testimony of an expert in the context of microscopic hair analysis, other jurisdictions have had occasion to do so and generally have upheld its admissibility. See, *People v Hayden*, 125 Mich. App. 650, 337 N.W.2d 258 (1983); *People v Allweiss*, 48 N.Y.2d 40, 396 N.E.2d 735, 421 N.Y.S.2d 341 (1979); *State v. Lerch*, 296 Or. 377, 677 P.2d 678 (1984); *State v. Williams*, 657 S.W.2d 405 (Tenn. 1983); *State v. Batten*, 17 Wash. App. 428, 563 P.2d 1287 (1977).

The fact that the testimony offered by the forensic serologist did not positively identify Harrison did not make the evidence inadmissible. It was not offered for the purpose of identifying Harrison, but only to show that he could not be excluded from the class of possible suspects. We are persuaded by the reasoning expressed by the Illinois Appellate Court in the case of *People v. Columbo,* 118 Ill. App. 3d 882, 962-63, 455 N.E.2d 733, 791 (1983), where the court noted:

> We do not find, however, that either the exclusionary character of hair comparisons or the lack of absolute scientific certainty renders [the expert's] testimony inadmissible. Instead, we adhere to the well-established rule that an expert's lack of absolute certainty goes to the weight of his testimony, not to the admissibility. [Citations omitted.] Moreover, we find that the determination that one [of the defendant's] hair standards was similar in color and characteristics to one found on [the victim's] T-shirt had probative value and, although not conclusive, was definitely proper to be considered by the jury and properly admitted by the trial court.

Likewise, in the case of *United States v. Hickey*, 596 F.2d 1082, 1089 (1st Cir. 1979), the U.S. Court of Appeals for the First Circuit observed:

> It was brought out by the witness that hair identifications, unlike fingerprint identifications, do not point to just one individual as the source. The jury was made well aware of the limitations of this evidence. On the other hand, the

> link between the sweater and mask and the robbery was strong, and the similarity of the hairs, while not affirmatively implicating Ferreira, "enhanced the probability of guilt" and was therefore probative.

While the evidence offered by the forensic serologist, standing alone, may have been insufficient to establish guilt, when considered in light of all the other evidence, including the victim's testimony, it did have probative value and could be considered by the jury for whatever benefit it may provide it. The weight to be given the testimony was for the jury to determine. In *United States v. Cyphers*, 553 F.2d 1064, 1072 (7th Cir. 1977), the U.S. Court of Appeals for the Seventh Circuit, in a similar case, stated:

> The weight to be assigned the opinion in view of the expert's admission that the hairs could also have come from persons other than the defendants was a matter for the jury to determine. Where a witness properly qualified as an expert bases his opinion on what he believes to be a reasonable scientific inference, his opinion should ordinarily be admitted subject to cross-examination concerning the propriety of the testing technique used and the validity of the conclusions drawn from his observations.

The situation presented to us here is not similar to that presented in the case of *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979), as urged by Harrison. In *Clearwater* the expert attempted to render opinions which were unsupported by the scientific facts available to him. That is not the case here. The expert in this case carefully pointed out that she could not positively identify Harrison as the attacker, but only that, because of the tests, he fell within the category of those persons having similar characteristics. We therefore hold that it is admissible and proper for a forensic serologist to testify that pubic hairs found on a victim are similar in character to the accused's standard pubic hairs, thereby showing that the accused cannot be excluded from the class of possible suspects. Such testimony has probative value and may be considered by the jury, although the weight to be given such testimony is for the jury to decide.

For these reasons, therefore, we believe that the trial court was correct in its rulings and that the conviction and sentence must in all respects be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN I. VERNON, APPELLANT.
356 N.W.2d 887

Filed October 26, 1984. No. 84-154.

1. **Jury Trials.** A demand is required to invoke the statutory right to a jury trial under Neb. Rev. Stat. § 24-536 (Reissue 1979).
2. _____. A defendant may orally request a jury trial while he is before the court or make a written request therefor.
3. **Jury Trials: Waiver.** A failure to file a timely request in accordance with the rules of the court constitutes a waiver of the statutory right to a jury trial.
4. **Blood, Breath, and Urine Tests: Trial.** Law enforcement agencies are not required to preserve breath samples in order to introduce breath analysis tests at trial.
5. **Sentences: Probation and Parole: Final Orders.** Probation is a sentence, and an order of probation is a final order from which an appeal may be taken.
6. **Sentences.** A sentence validly imposed takes effect from the time it is pronounced, and a subsequent, different sentence is a nullity.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Sentence vacated and cause remanded with directions.

Leroy P. Shuster, for appellant.

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

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

BOSLAUGH, J.

The defendant was charged in county court with driving while intoxicated. The county court held a group arraignment on September 21, 1982, at which the defendant and all others

present were advised, "If you wish a trial by jury, you must inform the Court of your request within 10 days from the date of entering your plea of not guilty."

When the defendant was called individually before the court, the following occurred:

> THE COURT: Were you present today when I recited your trial rights and your plea options?
>
> MR. VERNON: Yes, sir.
>
> THE COURT: Are you — Do you have any question with regard to your rights at the court proceedings?
>
> MR. VERNON: No.
>
> THE COURT: Do you wish to have an attorney represent you?
>
> MR. VERNON: I have got one but he's not here.
>
> THE COURT: Okay. Who is that?
>
> MR. VERNON: Howard Awk (phonetic).
>
> THE COURT: Okay. And has Mr. Awk explained to you how to proceed today?
>
> MR. VERNON: Yes, sir.
>
> THE COURT: What does he want you to do?
>
> MR. VERNON: Plead not guilty.
>
> THE COURT: All right. We'll record your plea of not guilty. I will remind you, Mr. Vernon, since you're not a member of the Bar you don't have — you don't have a copy of the rules of practice, as I've indicated in the rights you have 10 days from today to request a jury trial if that's what you want to do.
>
> MR. VERNON: Yes, sir.
>
> THE COURT: All right. I'll continue your bond in full force and effect pending trial. In the absence of a request for jury trial, I'm going to have the clerk set this trial date to a date certain. So when you take the order from the steno to the clerk's office, they will give you a trial time and Mr. Awk will be informed of that trial time at which time you must appear for trial.
>
> MR. VERNON: (Indiscernible.) sir.
>
> THE COURT: All right, sir, you're excused.

Between the arraignment on September 21, 1982, and trial, the defendant retained new counsel. On October 26, 1982, a

written request for a jury trial was filed, which was subsequently denied.

After a trial to the court the defendant was found guilty and sentenced to a term of probation. Approximately 40 days later, after the defendant had given notice of appeal, he was sentenced to jail for 7 days. Upon appeal to the district court that judgment was affirmed.

In this court the defendant contends that he was erroneously denied a jury trial; the result of a breath test should have been suppressed because he was not furnished with a breath sample for an independent test; and the resentencing was invalid.

In this case the defendant had only a statutory right to a jury trial, and a demand is required to invoke that right. See, Neb. Rev. Stat. § 24-536 (Reissue 1979); *State v. Mangelsen*, 207 Neb. 213, 297 N.W.2d 765 (1980). A defendant may orally request a jury trial while he is before the court or make a written request therefor. *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980). A failure to file a timely request in accordance with the rules of the court constitutes a waiver of the statutory right. *State v. Nielsen*, 199 Neb. 597, 260 N.W.2d 321 (1977).

The defendant contends the waiver in this case was invalid because it was made at a time when the defendant was not represented by counsel.

Although defendant's counsel was not present at the arraignment, the defendant elected to proceed in his absence and advised the court that counsel had instructed him to plead not guilty. The court specifically advised the defendant of the necessity for a demand for a jury trial within 10 days after arraignment, and stated that *in the absence of a request for jury trial*, the case was being set for trial on a date certain. This was binding upon both the defendant and his counsel, and the absence of a request within 10 days was effective as a waiver.

With respect to the defendant's contention that the State is obligated to preserve a breath sample so that an independent test can be made, the U.S. Supreme Court in a recent decision held that due process does not require the State to preserve such a sample. *California v. Trombetta,* 467 U.S. ____, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). In the *Trombetta* case the Court stated at 104 S. Ct. 2535: "We conclude, therefore, that the Due

Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce breath-analysis tests at trial." This assignment of error is without merit.

The attempt to resentence the defendant to jail after a sentence to probation had been imposed was void.

In *State v. Kinney*, 217 Neb. 701, 705-06, 350 N.W.2d 552, 555 (1984), a case involving a similar factual situation, we held the second sentence to be invalid, and said:

> 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).

The sentence imposed by the county court on April 25, 1983, is vacated and the cause remanded with directions to reinstate the sentence imposed on March 14, 1983.

SENTENCE VACATED AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JOHN PISKORSKI, APPELLANT.

357 N.W.2d 206

Filed October 26, 1984. No. 84-158.

1. **Indictments and Informations: Double Jeopardy.** An information must inform the accused with reasonable certainty of the charge against him that he may prepare his defense and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense.
2. **Indictments and Informations.** A complaint or information charging an offense in substantially the words of the statute is generally sufficient.
3. **Indictments and Informations: Constitutional Law.** An indictment or information meets all constitutional requirements (1) if it shows that the acts which defendant is charged with committing amounted to a crime which the court had power to punish and that it was committed within the territorial jurisdiction of the court, (2) if it informs the defendant of the nature of the charge against him, and (3) if it constitutes a record from which it can be determined whether a subsequent proceeding is barred by the former adjudication.
4. **Indictments and Informations: Double Jeopardy.** An indictment or information alone need not be full protection against double jeopardy, because a defendant may allege and prove facts outside the record in support of a plea of former adjudication.
5. **Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt.
6. **Directed Verdict.** It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.

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

James C. Cripe, for appellant.

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

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

KRIVOSHA, C.J.

The appellant, John Piskorski, was convicted by a jury of first degree sexual assault on a child under 16 years of age in

violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1979). This offense is a Class II felony, punishable by imprisonment for not less than 1 nor more than 50 years. The trial court sentenced Piskorski to serve an indeterminate term of not less than 2 nor more than 5 years' imprisonment and gave him credit for 128 days previously served in jail awaiting trial and sentence. Piskorski now appeals his conviction to this court, maintaining that the conviction must be set aside because (1) the information charging Piskorski with the crime was fatally defective, (2) the evidence was insufficient to establish a violation of the crime charged, and (3) he was deprived of a fair trial. We have reviewed the record and have concluded that the conviction and sentence should be affirmed.

Piskorski's first assignment of error is based upon his claim that the information was so vague and indefinite that he could not have known the specific nature of the charges against him and could not plead this conviction as a bar to any subsequent prosecution involving the same matter, thereby subjecting him to double jeopardy in violation of both the Constitution of the State of Nebraska and the Constitution of the United States. Specifically, Piskorski cites our decision in *Benedict v. State*, 166 Neb. 295, 297, 89 N.W.2d 82, 85 (1958), wherein we said: " 'An information must inform the accused with reasonable certainty of the charge against him that he may prepare his defense and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense. . . .' " Although we agree with that statement, we do not believe that the record in this case supports Piskorski's claim that he was not sufficiently informed of the charges or would not be able to plead the judgment in this case as a bar to a later prosecution for the same offense.

The complaint in the county court initially charged that Piskorski violated the laws of the State of Nebraska, in that

> [o]n or about December , 1982, at or near 7408 Gertrude, in Sarpy County, Nebraska, the said John Piskorski did then and there subject [name of victim] to sexual penetration and overcame such person by force, threat of force express or implied, coercion or deception, in violation of Section 28-319(1)(a), R.R.S. Nebraska.

(Class II Felony)

This complaint, in the language of the statute, advised Piskorski that during a specific period of time he subjected a named individual at a specific location to sexual penetration in violation of a specifically identified statute. Other than being able to specify the exact time and hour, we can conceive of no way in which the complaint could be more specific, other than to recite in detail all of the evidence. This, of course, the State is not required to do. We have frequently held that a complaint or information charging an offense in substantially the words of the statute is generally sufficient. See, *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982); *State v. Abraham*, 189 Neb. 728, 205 N.W.2d 342 (1973).

The rule first appears to have been announced by this court in *Cowan v. State*, 140 Neb. 837, 2 N.W.2d 111 (1942), when we specifically addressed the question of whether an information charging the crime in accordance with the language of the statute was sufficient to sustain a conviction. In holding that it was sufficient, we analyzed the history of criminal pleadings and stated:

> Constitutional provisions require that a defendant be convicted by due process of law, that he be charged in writing either by indictment or information, and that the accused shall have the right to demand the nature and cause of accusation and to have a copy thereof. This does not mean that detailed particulars of the crime must be stated in the information or indictment in the meticulous manner prescribed by the common law. The trend is in the direction of simplification of statement and the elimination of technical formalities. A proper administration of justice does not require our adherence to outmoded methods or the retention of legal fictions and absurdities. The legislature has the power to determine what constitutes a crime, and when it has performed this function it may likewise determine within constitutional limits what information must be included in the written charge to sufficiently advise the accused of the nature of the offense for which he must answer. Due process of law requires only that the accused be given sufficient notice of

> the nature of the charge against him in order that he may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense.

Id. at 839, 2 N.W.2d at 113.

We then went on in *Cowan* to set out the requirements for a sufficient information, saying:

> We have come to the conclusion that an indictment or information meets all constitutional requirements (1) if it shows that the acts which defendant is charged with committing amounted to a crime which the court had power to punish, and that it was committed within the territorial jurisdiction of the court, (2) if it informs the defendant of the nature of the charge against him, and (3) if it constitutes a record from which it can be determined whether a subsequent proceeding is barred by the former adjudication. And to the third requirement, it cannot be said that the indictment or information alone must be full protection against double jeopardy, for the reason that in many cases, such as where several acts constitute a single crime, the defendant is often required to allege facts outside the record to support his plea of former adjudication. If the information or indictment apprises the defendant with reasonable certainty of the accusation against him so that he may prepare his defense and plead the judgment as a bar to a subsequent prosecution for the same offense, it meets the fundamental purposes of an information or indictment, as well as constitutional requirements.

Id. at 840, 2 N.W.2d at 113. See, also, *State v. Adams*, 181 Neb. 75, 147 N.W.2d 144 (1966); *Sedlacek v. State*, 147 Neb. 834, 25 N.W.2d 533 (1946). Certainly, the initial complaint met all of the requirements of law as first announced in *Cowan*.

On the day after the initial complaint was filed, the State sought leave to file an amended complaint. This motion was unopposed by Piskorski, and the trial court granted the State leave to file the amended complaint. The principal difference between the two complaints was that in the amended complaint the name of the victim was deleted and the State alleged that the crime was committed by subjecting a person of *less* than 16

years of age to sexual penetration in violation of subsection (1)(c) of § 28-319 rather than (1)(a). In all other respects the two complaints were the same. Piskorski waived a preliminary hearing on the amended complaint and was bound over to the district court to stand trial. Again, we believe that the amended complaint, being in the language of the statute, was sufficient. Furthermore, as we recently observed in *State v. John*, 213 Neb. 76, 328 N.W.2d 181 (1982), where the defendant pleads to the general issue, defects that might otherwise have been excepted to by a motion to quash are taken to have been waived.

The State then filed an information in the district court for Sarpy County nearly identical to the amended complaint previously filed in the county court, except that the information alleged that the offense had occurred "[o]n or after December 11, 1982 and before December 25, 1982 . . . ."

On the day set for trial it was discovered that Piskorski had never been formally arraigned. He filed a motion to quash the information for the reason that the information was too vague and was, therefore, defective. The motion to quash was denied, Piskorski was arraigned and entered a plea of not guilty, and the trial commenced.

At the close of its case the State moved to amend the information to conform to the evidence. Over Piskorski's objection, the information was amended to allege that the assault occurred on or after *September 1, 1982,* and before *December 25, 1982*, and the name of the child was again inserted in the amended information. This amendment did not make any new or additional charges nor raise matters with which Piskorski was not previously aware. It simply attempted to cause the information to conform to the proof. No one could determine the date of the assault any closer than sometime between September 1, 1982, and December 25, 1982. The fact that the date upon which the crime is alleged to have been committed was expanded to conform to the proof is of no moment. It has long been the rule in this jurisdiction, as in others, that charging an individual with the commission of a crime anytime within the statute of limitations is sufficient. See, *Sledge v. State*, 142 Neb. 350, 6 N.W.2d 76 (1942); *Palin v. State*, 38 Neb. 862, 57 N.W. 743 (1894). Further, the reinsertion

of the child's name certainly was to Piskorski's benefit and would assist him in later being able to raise this judgment as a bar to any subsequent prosecution for the same offense. The trial court in the instant case simply exercised its discretion in permitting the information to be amended before the verdict to an extent that it neither charged a different offense nor prejudiced the substantial rights of Piskorski. See *State v. Gascoigen*, 191 Neb. 15, 213 N.W.2d 452 (1973).

Piskorski argues to us, however, that because the State introduced evidence of several occasions between September and December when Piskorski may have violated the statute in question, he has no way of knowing which specific act was involved in this conviction and which one is now barred. We do not believe that to be the case. As we have already indicated, one may go outside the information itself to determine what charge the conviction was based upon in order to raise it as a bar to a subsequent prosecution. See *Cowan v. State*, 140 Neb. 837, 2 N.W.2d 111 (1942). In *State v. Adams*, 181 Neb. 75, 79, 147 N.W.2d 144, 149 (1966), we said:

> An indictment or information alone need not be full protection against double jeopardy because a defendant may allege and prove facts outside the record in support of a plea of former adjudication. Cowan v. State, *supra*. The remedy of a bill of particulars is available to assist a defendant in preparing his defense and to protect him against a second prosecution for the same offense. Myers v. United States, 15 F.2d 977.

Other jurisdictions addressing this question have reached similar conclusions. See, *Hsu v. United States*, 392 A.2d 972 (D.C. App. 1978); *State v. Smith*, 102 Idaho 108, 626 P.2d 206 (1981); *Russell v. United States*, 369 U.S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962); *People v. King*, 41 Colo. App. 177, 581 P.2d 739 (1978); *State v. Roberts*, 101 Idaho 199, 610 P.2d 558 (1980).

The instructions to the jury in this case, in particular instruction No. 11, specifically advised the jury that it was only to consider testimony with regard to one specific event testified to by both the minor child and her mother. The court went on further in instruction No. 11 to tell the jury: "You are

specifically instructed not to consider the testimony of [the child] as to other sexual acts, for the reasons those alleged acts completely lack any corroboration and the defendant was never identified as the actor therein."

When one reviews the information, the instructions to the jury, and the record in this case, one can be left with no doubt that the act charged, and upon which Piskorski was convicted, was a specific act involving assault on the young child while the mother was present. The record makes it clear that only one such event occurred while the mother was present, although other violations, not charged in this information, may have occurred. Therefore, it would not be difficult to establish which act was involved that resulted in the conviction and is a bar to a subsequent prosecution for the same offense. The information satisfied all of the constitutional requirements, and the trial court was correct in refusing to sustain the motion to quash.

Piskorski's second argument is that the evidence was insufficient to establish the elements of the crime. The facts involving the incident are despicable, and we shall not cause further harm to the child by detailing them here. We must, however, recite a minimum number of facts to explain why the evidence was sufficient to sustain the conviction.

The evidence at trial, as testified to by the mother, established that Piskorski was babysitting while the mother was at work. When the mother returned from work that evening, she had several drinks with Piskorski, and they proceeded to engage in sexual intercourse on the living room floor. The child came downstairs from her bedroom during this act, and Piskorski suggested that she remain with them. The three then engaged in various sexual activities involving touching. The mother testified that while her daughter's clothes were off, the defendant touched the child between the legs with his hands, rubbed her between the legs, and then kissed her between the legs. Piskorski argues that the testimony establishing that he placed his head between the child's legs and kissed her did not prove the elements of the crime. With that argument we cannot agree.

Piskorski concedes that the instructions given by the court to the jury regarding the meaning of "sexual penetration," as

defined by Neb. Rev. Stat. § 28-318(5) (Reissue 1979), and the meaning of "cunnilingus" were correct. However, Piskorski argues in his brief that "[a]ssuming he put his head down between the victim's legs in an unspecified place and that he was kissing her in an unspecified place, he cannot be said to have performed cunnilingus on the victim." Brief for Appellant at 18.

Section 28-318(5) defines sexual penetration to include cunnilingus, an act which, as instructed to the jury, includes licking, kissing, sucking, or otherwise fondling the sex organ of the female with the mouth or tongue. By its very definition the act of kissing the sex organ of a female, which is the act of cunnilingus, constitutes sexual penetration within the meaning of § 28-319(1), even though there is not in fact intrusion into the body. In any event, the jury could reasonably reach the conclusion that the statute had been violated, based upon the testimony.

As we observed in *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981), one accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt. We further said in *State v. Buchanan, supra* at 29, 312 N.W.2d at 689:

> "It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty."

We believe that a complete examination of the evidence in this case could not support action by the trial court in directing a verdict of not guilty, but, rather, raised questions of fact which were for the jury to determine. Having made that determination, it is not for this court to reverse. See, *State v. Morosin*, 200 Neb. 62, 262 N.W.2d 194 (1978); *State v. Fallis*, 205 Neb. 465, 288 N.W.2d 281 (1980). Piskorski's contention that the trial court erred in not directing a verdict of not guilty must be overruled.

Piskorski's final claim is that he was denied a fair trial. His claim is based upon the assertion that the prosecutor was actively involved in coaching the victim on her testimony, in telling her what to say when she testified, and in compelling the mother to relate her "tasteless and baseless tale." This argument is simply without any basis. Because we have concluded that there was sufficient evidence to convict Piskorski, that the information was not defective, and that there was no fault in the testimony of the child, we are unable to, in any manner, ascertain how Piskorski was denied a fair trial. The testimony of the mother was tasteless due to acts of which Piskorski was a party. He is in no position to maintain that the mother's telling of the truth, tasteless as it was, denied him a fair trial. Persons who commit tasteless crimes will be subjected to hearing tasteless testimony in court. That does not constitute denial of a fair trial. Piskorski has simply failed to point out any facts which would support his third assignment of error, and it also must be overruled. For these reasons the conviction and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY B. SWILLIE, APPELLANT.
357 N.W.2d 212

Filed October 26, 1984. No. 84-233.

1. **Witnesses: Testimony: Rebuttal Evidence.** It is within the discretion of the trial court to allow testimony from a rebuttal witness who is in violation of a sequestration order. Such discretion is abused only where it is shown that the permitted testimony prejudiced the defendant's rights.
2. **Witnesses: Testimony.** Prejudice is established where the witness' testimony has changed or been influenced by what he heard from other witnesses. Such prejudice must clearly appear on the record.
3. **Criminal Law: Testimony: Rebuttal Evidence.** In a criminal prosecution any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony.

4. **Sentences.** In imposing a sentence a trial court should consider inter alia the defendant's age, mentality, education, experience, and social and cultural background, as well as his past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
5. _____. The seriousness of the offense is an important factor in the setting of a sentence.

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

Donald W. Kleine, for appellant.

Paul L. Douglas, Attorney General, and L. Jay Bartel, for appellee.

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

BOSLAUGH, J.

After trial to a jury the defendant, Timothy B. Swillie, was convicted of assault in the first degree and use of a firearm in the commission of a felony. He was sentenced to imprisonment for 4 to 8 years on count I, and to imprisonment for 2 years on count II, the sentences to run consecutively. He has appealed, and contends the trial court erred in permitting a rebuttal witness called by the State to testify over objection and that the sentences imposed were excessive.

The offense consisted of shooting Kim Morrow with a handgun while she was sitting in an automobile parked in front of Phil's Foodway in Omaha, Nebraska.

The record shows that the defendant and the victim had lived together, but had separated in October 1983. The defendant is the father of the victim's two children, sons 8 and 2 years of age.

On December 1, 1983, the victim had attended a wake with her sister Lauri. On the way home they stopped at the store. While the victim was in the store, the defendant drove up and parked behind Lauri's automobile so that she could not back out of the parking stall in front of the store.

After the victim had returned to the automobile, Lauri backed into the defendant's automobile in an effort to get the defendant to move his automobile. She described the impact as

only a "tap" or "bump." The defendant then pulled out a gun, and Lauri went into the shop to notify the security guard. The victim locked the doors on the automobile and rolled up the windows, and remained in the automobile with her children and a niece.

The defendant approached the automobile and attempted to talk with the victim, but she refused to talk with him. The defendant then fired three shots through the window, two of which struck the victim, causing severe injuries.

The defendant testified that he had not shot the victim but that the victim had shot at him and the gun had discharged several times while he was struggling with the victim. The physical facts, including the location of the broken glass from the automobile window, bullet holes inside the automobile, and the site of the entry wounds on the victim, all tended to disprove the defendant's version of the incident.

On rebuttal the State called the defendant's son, who was allowed to testify, despite an objection that the witness had been present in the courtroom while his mother had testified and despite the fact that the defendant's motion to sequester the witnesses had been sustained. The ruling on this objection is the defendant's principal assignment of error.

In overruling the objection the trial court stated: "He was here for a very brief time this morning. I—I know he left very early in the testimony. I'll overrule the objection."

The fact that a witness subject to a sequestration order was present in the courtroom briefly during the testimony of another witness does not in and of itself render his testimony inadmissible. *Clemmons v. Clemmons*, 1 Neb. (Unoff.) 880, 96 N.W. 404 (1901). It is within the discretion of the trial court to allow testimony from a rebuttal witness who is in violation of a sequestration order. *Fouse v. State*, 83 Neb. 258, 119 N.W. 478 (1909). Such discretion is abused only where it is shown that the permitted testimony prejudiced the defendant's rights. *Treppish v. State*, 126 Neb. 21, 252 N.W. 388 (1934); *Miller v. State*, 169 Neb. 737, 100 N.W.2d 876 (1960). Prejudice is established where the witness' testimony has changed or been influenced by what he heard from other witnesses. Such prejudice must clearly appear on the record. *State v. Keaton*, 61

N.C. App. 279, 300 S.E.2d 471 (1983). The appellant has failed to show that the witness' testimony changed as a result of his brief stay in the courtroom.

The defendant argues that he was prejudiced because the rebuttal witness was young and impressionable and was likely to align his testimony with that of his mother. The appellant cites *Roberts v. State*, 100 Neb. 199, 158 N.W. 930 (1916), for the proposition that relatives of a party to a suit are more susceptible to being influenced by their relative's testimony and therefore a greater reason for sequestering relatives exists. *Roberts* also points out that it is within the trial court's discretion whether to sequester any relative acting as a witness. It is for the trial court to determine the extent to which a sequestration order will be applied in a given case.

Here, the trial judge noted that the rebuttal witness had been present for only a short time during his mother's testimony. Other courts have allowed a witness subject to a sequestration order to testify if he has been in the courtroom for only a short time and has heard no substantial evidence. See, *State v. Edwards*, 257 La. 707, 243 So. 2d 806 (1971); *People v. Snell*, 74 Ill. App. 2d 12, 219 N.E.2d 554 (1966).

There was no showing in this case that the mother's testimony influenced the boy's testimony. On taking the stand the witness stated that he understood that he must tell the truth. On cross-examination he stated that no one had told him what to say.

The relationship which existed between the witness and victim did not in itself disqualify the witness' testimony; it was simply a factor to be considered by the jury in weighing the value of his testimony. See, *Shornick v. Shornick*, 25 Ariz. 563, 220 P. 397 (1923); 81 Am. Jur. 2d *Witnesses* §§ 69, 665 (1976). In this case the witness' presence in the courtroom in violation of the sequestration order went to the credibility rather than the admissibility of his testimony. *Wiseman v. State*, 168 Ga. App. 749, 310 S.E.2d 295 (1983); *Blanchard v. State*, 247 Ga. 415, 276 S.E.2d 593 (1981).

The appellant further argues that the rebuttal testimony should have been presented in the prosecution's case in chief because it only corroborated the other State's witnesses.

In *State v. Miller*, 213 Neb. 274, 278, 328 N.W.2d 769, 772 (1983), we said, " ' "In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony." ' " *Lipscomb v. State*, 162 Neb. 417, 76 N.W.2d 399 (1956); *Pribyl v. State*, 165 Neb. 691, 87 N.W.2d 201 (1957).

The rebuttal testimony was properly admitted because it disputed the defendant's contention that the victim had shot herself. Because it tended to dispute testimony offered on behalf of the defendant as to a material fact, it was properly offered in rebuttal.

In the present case the defendant was convicted of two Class III felonies, each of which carries a minimum sentence of 1 year's imprisonment and a maximum of 20 years' imprisonment and/or a $25,000 fine. Neb. Rev. Stat. § 28-105 (Reissue 1979). The defendant was sentenced to 4 to 8 years for the first degree assault (Neb. Rev. Stat. § 28-308(1) (Reissue 1979)) and 2 years for the use of a firearm in the commission of a felony. Neb. Rev. Stat. § 28-1205(3) (Reissue 1979) requires that a sentence for use of a firearm to commit a felony be served consecutively.

The defendant claims the sentences were excessive in light of the absence of any prior felony convictions and no history of violence to anyone other than the victim in this case.

In imposing a sentence a trial court should consider inter alia the defendant's age, mentality, education, experience, and social and cultural background, as well as *his past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. State v. Stranghoener*, 208 Neb. 598, 304 N.W.2d 679 (1981).

The seriousness of the offense is an important factor in the setting of a sentence. *State v. Sare*, 209 Neb. 91, 306 N.W.2d 164 (1981); *State v. Harpster*, 199 Neb. 234, 257 N.W.2d 702 (1977); *State v. Trout*, 199 Neb. 236, 257 N.W.2d 703 (1977).

At the sentencing hearing the trial court stated:

> I am convinced, Mr. Swillie, that, had the course of the wounds been just a little bit different, it's just a miracle

> that Kim Morrow wasn't slain by the bullets that entered her body. . . . Had she died, I think there was enough evidence there for first-degree murder or at least second-degree. Fortunately for you and for her, she survived somehow miraculously and is alive today.

The defendant is a violent person who had beaten and injured the victim before and had threatened to kill her. Under the circumstances the sentences imposed in this case were not excessive.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LEO G. KAISER, APPELLANT.
356 N.W.2d 890

Filed October 26, 1984. No. 84-320.

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 Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Anthony S. Troia of Troia Law Offices, P.C., for appellant.

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

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

WHITE, J.

The appellant, Leo G. Kaiser, was charged in the municipal court of Omaha, Douglas County, Nebraska, with fifth offense drunk driving. Kaiser pled guilty to the crime of operating a motor vehicle under the influence of intoxicating liquor. Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982). Before accepting

Kaiser's plea, the trial court advised him of the possible penalties for first, second, and third offense DWI, advised him of his constitutional rights per *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), and accepted the police reports of the offense to provide a factual basis for the plea.

During the enhancement hearing, the State offered evidence which proved that Kaiser had at least two prior DWI convictions in which he was represented by counsel or had voluntarily waived such a right. *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984); *State v. Tichota, ante* p. 444, 356 N.W.2d 85 (1984). Kaiser was then found guilty of fourth offense drunk driving and was sentenced to 90 days in the county jail, fined $500, and ordered never again to operate or drive a motor vehicle in the State of Nebraska for any purpose, thereby permanently revoking Kaiser's operator's license. Kaiser's conviction and sentence were affirmed by the district court.

On appeal to this court Kaiser's single assignment of error is that the trial court erred in imposing a sentence upon the defendant which amounts to cruel and unusual punishment within the ambit of the eighth and fourteenth amendments to the U.S. Constitution.

Whatever consideration Kaiser's position may merit, we need not decide the issue as it is not properly before us. This court has previously held that for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court and, if not so raised, will be considered to have been waived, except in the most unusual of cases. *State v. Hiross*, 211 Neb. 319, 318 N.W.2d 291 (1982); *State v. Smyth*, 217 Neb. 153, 347 N.W.2d 859 (1984); *State v. Olson*, 217 Neb. 130, 347 N.W.2d 862 (1984); *State v. Ledingham*, 217 Neb. 135, 347 N.W.2d 865 (1984); *State v. Mercer*, 217 Neb. 164, 347 N.W.2d 868 (1984).

Kaiser concedes that the constitutionality of the statute was not raised at trial court level. Rather, he argues:

> The fact that the issue of the unconstitutionality of the penalty Appellant received was raised on a de novo on the record appeal, and that the District Court had authority to receive new objections and defenses on a de novo on the

> record appeal, distinguishes the case at bar from State vs. Mercer, [*supra*], and related cases where the Court has held that for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court.

Brief for Appellant at 3-4.

The fallacy with this argument, however, is that appeals in criminal matters from the municipal court to the district court are not reviewed de novo upon the record; rather, they are reviewed "for error appearing on the record made in the county or municipal court." Neb. Rev. Stat. § 24-541.06(1) (Cum. Supp. 1982); *State v. Hatfield, ante* p. 470, 356 N.W.2d 872 (1984); *State v. Smith*, 199 Neb. 368, 259 N.W.2d 16 (1977). The district court in the instant case was functioning as an appellate court and not as a trial court; thus, it was restricted in its review to the record made in the lower court. *State v. Ledingham, supra; State v. Mercer, supra.*

Having waived the constitutional issue, there is no assignment of error properly before us. The judgment of the district court affirming the conviction and sentence of the municipal court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. DORIS FREY, APPELLEE.

357 N.W.2d 216

Filed October 26, 1984. No. 84-371.

1. **Constitutional Law: Statutes.** A statute may be constitutionally infirm by reason of being vague, or because it is overbroad.
2. _____: _____. A statute is vague if its prohibitions are not clearly defined.
3. _____: _____. A statute which is clear and precise, and therefore not vague, may nonetheless be overbroad in the sense that it prohibits the exercise of constitutionally protected conduct, such as the exercise of first amendment rights.
4. **Constitutional Law: Statutes: Appeal and Error.** In a facial challenge to the

overbreadth and vagueness of a law, that is, a claim that the law is invalid in toto and therefore incapable of any valid application, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge fails. The court then examines the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, upholds the challenge only if the enactment is impermissibly vague in all its applications.

5. **Statutes: Standing.** In order to have standing to challenge a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of the law as applied to the conduct of others.
6. **Constitutional Law: Criminal Law: Double Jeopardy.** Jeopardy does not attach to the sustainment of a criminal defendant's motion to quash an information.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Exception sustained, and cause remanded for further proceedings.

Michael G. Heavican, Lancaster County Attorney, and David W. Stempson, for appellant.

Jerry Soucie of Rehm & Bartling, for appellee.

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

CAPORALE, J.

Pursuant to leave, the State has appealed under the provisions of Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1984), taking exception to the sustainment by the district court of the motion of defendant, Doris Frey, to quash the information charging her with abusing an incompetent or disabled person, on the ground that Neb. Rev. Stat. § 28-708 (Cum. Supp. 1984) is unconstitutionally vague. We sustain the exception and remand the cause for further proceedings.

The State's operative information charges that on or about October 6, 1983, Frey, while in Lancaster County, Nebraska, committed manslaughter in violation of Neb. Rev. Stat. § 28-305(1) (Reissue 1979), in that she did

> unintentionally and without malice kill Eva Caves while the defendant, Doris Frey, was in the commission of an unlawful act, to-wit: while the defendant and Eva Caves were living together at the residence owned by Eva Caves

> at 5025 Martin Street, Lincoln, Lancaster County, Nebraska, the defendant did knowingly and intentionally cause or permit an incompetent person or a disabled person, Eva Caves, to be placed in a situation that endangered her life or health or cruelly confined said person or deprived said person of necessary food, or care.

The unlawful act complained of is found in the statute which the district court decided was unconstitutional. That statute, § 28-708, reads as follows:

> (1) A person commits abuse of an incompetent or disabled person if he or she knowingly, intentionally, or negligently causes or permits an incompetent person or a disabled person 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.
>
> (2) The statutory privilege between patient and physician and between husband and wife shall not be available for excluding or refusing testimony in any prosecution for a violation of this section.
>
> (3) Abuse of an incompetent or disabled person is a Class I misdemeanor if the offense is committed negligently.
>
> (4) Abuse of an incompetent or disabled person is a Class IV felony if the offense is committed knowingly and intentionally.

Our analysis must first speak to the State's contention that, given the posture of the record, Frey lacks standing to challenge the constitutionality of § 28-708.

A statute may be constitutionally infirm by reason of being vague, or because it is overbroad.

A statute is vague if its prohibitions are not clearly defined. The standards for evaluating vagueness were stated by the U.S. Supreme Court in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful

> and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

(Footnotes omitted.) For a recent application of the concept of vagueness by this court, see *State v. Hamilton*, 215 Neb. 694, 340 N.W.2d 397 (1983). We held therein that a statute attempting to prohibit the making of a threat to commit a crime "likely to" result in a variety of consequences to another was unconstitutional as vague because it left uncertain what constituted a threat.

Moreover, an enactment which is clear and precise, and therefore not vague, may nonetheless fail to pass constitutional muster by virtue of being overbroad in the sense that it prohibits the exercise of constitutionally protected conduct, such as the exercise of first amendment rights. *Zwickler v. Koota*, 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967); *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), *reh'g denied* 398 U.S. 914, 90 S. Ct. 1684, 26 L. Ed. 2d 80.

Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982), teaches that in a facial challenge to the overbreadth and vagueness of a law, that is, in this context, a claim that the law is invalid in toto and therefore incapable of any valid application, our first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. We are to then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, uphold the challenge only if the enactment is impermissibly vague in all its applications. In order to have standing to challenge a vague statute, one must not have engaged in conduct which is clearly

proscribed by the statute, and cannot complain of the vagueness of the law as applied to the conduct of others. We should therefore examine Frey's conduct before analyzing other hypothetical applications of the law. See, also, *United States v. Mazurie*, 419 U.S. 544, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975); *State v. Sprague*, 213 Neb. 581, 330 N.W.2d 739 (1983).

An examination of § 28-708 reveals that it implicates no constitutionally protected conduct. Therefore, any overbreadth challenge fails.

The difficulty with completing the second step in the constitutional analysis, determining whether § 28-708 is impermissibly vague, is that the record is devoid of any facts which would tell us whether Frey's conduct was clearly proscribed by the statute. Consequently, we are unable to determine whether Frey has standing to attack the constitutionality of § 28-708. We have held in several civil cases that absent facts in the record which establish standing, no standing exists. See, *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982); *West Fort Residents Assn. v. Housing Auth. of City of Omaha*, 205 Neb. 397, 288 N.W.2d 27 (1980); *Stahmer v. Marsh*, 202 Neb. 281, 275 N.W.2d 64 (1979). See, also, *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980).

We conclude, in accordance with *Hoffman Estates v. Flipside, Hoffman Estates, supra*, that on this record Frey lacks standing to challenge the constitutionality of § 28-708. That being the case, we do not reach the constitutional issues argued by Frey.

Frey not having been placed in jeopardy, see, *Tibbs v. Florida*, 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982), *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), *State v. Munn*, 212 Neb. 265, 322 N.W.2d 429 (1982), and *Skinner v. Jensen*, 178 Neb. 733, 135 N.W.2d 134 (1965), we remand, pursuant to the provisions of Neb. Rev. Stat. § 29-2316 (Reissue 1979), for further proceedings.

EXCEPTION SUSTAINED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

IN RE APPLICATION OF NORTHWESTERN BELL TELEPHONE COMPANY, OMAHA, NEBRASKA. NORTHWESTERN BELL TELEPHONE COMPANY, APPELLANT, V. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE.

357 N.W.2d 443

Filed November 2, 1984. No. 83-101.

1. **Public Service Commission: Appeal and Error.** It is not the function of the Supreme Court to second-guess the Public Service Commission or to make independent findings. Determinations by the Public Service Commission are a matter peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed by the Supreme Court in the absence of a showing that the action of the Public Service Commission was illegal, arbitrary, capricious, or unreasonable.
2. _____: _____. The striking of the balance between the competing interests of legitimate competition and the protection of the public interest are matters of legislative and administrative determination peculiarly resting in the judgment of the Public Service Commission. If there is evidence to sustain the findings of the Public Service Commission, the Supreme Court cannot substitute its judgment therefor.
3. _____: _____. It is only where the findings of the Public Service Commission are against all the evidence that the Supreme Court may hold the Public Service Commission's findings are arbitrary or capricious.
4. **Public Service Commission: Rates.** The ascertainment of a fair return in a given case is a matter incapable of exact mathematical determination and is one which must be, to some extent, left to the discretion of the Public Service Commission. At best, it is one of reasonable approximation given its basis in a proper consideration of all relevant facts.

Appeal from the Nebraska Public Service Commission. Affirmed in part, and in part reversed and remanded.

Melvin R. Quinlan and Richard L. Johnson, for appellant.

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

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

KRIVOSHA, C.J.

Northwestern Bell Telephone Company of Omaha, Nebraska (Northwestern Bell), appeals from an order entered by the Nebraska Public Service Commission which, after appropriate hearing, determined that Northwestern Bell is

entitled to a rate of return of 11 percent on its base rate. In order to produce such a rate of return, Northwestern Bell was authorized to increase its revenues in the amount of $8,032,684. Northwestern Bell, maintaining it was entitled to a higher rate of return, had sought an increase in the amount of $42,700,000. On appeal Northwestern Bell maintains that the Public Service Commission committed eight errors. The errors as listed by Northwestern Bell are the following:

1. The order of the commission requiring the continued capitalization of station connections is an attempt to exercise regulatory powers delegated exclusively to the Federal Communications Commission and is unconstitutional and contrary to federal law.

2. The commission has been arbitrary and capricious in applying its rule against the expensing of station connections.

3. The order of the commission disallowing Northwestern Bell's April and August 1982 wage increases in adjusting the test year was arbitrary and unreasonable and in violation of the commission's own rules.

4. The commission had no legal basis for arbitrarily limiting Northwestern Bell's license contract expenses for the test year to 1 percent of revenues.

5. The commission acted arbitrarily and unreasonably in finding that there was no cash working capital requirement for Northwestern Bell in this case.

6. The commission erred in failing to give Northwestern Bell credit for all of its 1981 federal income taxes by imputing to Northwestern Bell a theoretical interest deduction.

7. The commission erred in disallowing the amortization of one-tenth of the interest on short-term construction projects for the period of January 1, 1979, through April 30, 1980, and in removing from the rate base the unamortized portion of such interest.

8. The commission failed to grant Northwestern Bell a fair rate of return on its Nebraska intrastate investment.

In addressing each of these issues we must keep in mind that it is not the function of this court to second-guess the Public Service Commission or to make independent findings. Determinations by the Public Service Commission are a matter

peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed by this court in the absence of a showing that the action of the Public Service Commission was illegal, arbitrary, capricious, or unreasonable. The striking of the balance between the competing interests of legitimate competition and the protection of the public interest are matters of legislative and administrative determination peculiarly resting in the judgment of the Public Service Commission. If there is evidence to sustain the findings of the Public Service Commission, this court cannot substitute its judgment therefor. See, *In re Application of ATS Mobile Telephone*, 213 Neb. 403, 330 N.W.2d 123 (1983); *Robinson v. National Trailer Convoy, Inc.*, 188 Neb. 474, 197 N.W.2d 633 (1972). Whether we agree or disagree with the decision of the Public Service Commission is immaterial. It is not the province of this court to weigh or resolve conflicts in the evidence or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission, but will sustain the action of the commission if there is evidence in the record to support it. See *In re Application of Crusader Coach Lines*, 213 Neb. 53, 327 N.W.2d 98 (1982). See, also, *In re Application of Hunt Transportation*, 214 Neb. 236, 333 N.W.2d 883 (1983). With these principles in mind we turn to an examination of the assignments of error.

Errors Nos. 1 and 2—Station Connections.

With regard to the first two assignments of error involving the station connections, the Public Service Commission now concedes that federal law preempts this area, and, therefore, the commission may not deny to Northwestern Bell the right to expense the costs associated with installing station connections. The commission's order requiring Northwestern Bell to capitalize the cost of station connections is therefore in error and Northwestern Bell must be permitted to expense these costs. By reason of the concession of the commission, we need not further consider the first two assignments of error.

Error No. 3—Wage Increases and the Test Year.

We turn, then, to assignment No. 3. In an effort to determine what costs should be considered for the year in which the rate increase was sought, Northwestern Bell submitted the costs for

the year ending December 1981. This is what is known as the "test year." The purpose of a test year is to determine future performance. However, it is expected that certain changes will occur in the economy, and therefore, while using a test year to assess necessary rates for the future, it is an acceptable practice to make adjustments for the test year when those adjustments are known. In other words, to "update the test year" and to account for known expenses, known expenses occurring after the test year may be included in the formula. As a matter of fact, the Public Service Commission has a specific rule regarding this matter. Rule 24(1)(b), Rules of Comm. Proc., reads in part as follows:

> Adjustments will be made to test year data to reflect changes in costs occurring during the test year but not reflected in test year data, and known changes in costs occurring *subsequent* to the test year. All known decreases in costs, as well as increases will be included in the adjustments made.

(Emphasis supplied.) The evidence reflects that by the time the hearing was held in September of 1982, two wage increases were in fact being paid by Northwestern Bell, one having become effective in April of 1982 and the other in August of 1982. Nevertheless, the Public Service Commission refused to permit Northwestern Bell to adjust the test year to reflect these two increases. While the order entered by the commission on January 11, 1983, does not give any reason why the wage increases were disallowed, contrary to commission rule 24(1)(b), the commission now argues that such disallowance was reasonable because Northwestern Bell did not include in its adjustments to the test year all known adjustments, but only selected those which it desired. The difficulty with that argument is that the record does not reflect that there are any other significant adjustments which were not otherwise taken into account. To argue that known adjustments may not be made as otherwise required by rule because the evidence does not disclose that all adjustments were included is to beg the question. One must assume that, absent evidence presented either by Northwestern Bell or by staff appointed by the Public Service Commission to cross-examine, all of the significant,

known adjustments were taken into account. It is difficult to imagine how one proves the absence of a fact. Actually, the evidence appears to be to the contrary. The division staff manager-finance for Northwestern Bell testified that he made both favorable and unfavorable adjustments to the operating expenses, including one adjustment where he treated a rate increase which was in effect for only a 2-month period as if it had been in effect for 12 months. The Public Service Commission accepted this revenue adjustment but disallowed the wage adjustments.

The commission's staff had full opportunity to cross-examine Northwestern Bell's witness and could have easily determined what, if any, adjustments should have been included. Absent evidence to establish what those omissions were, it cannot be said that a known, significant adjustment such as a wage increase in effect at the time of the hearing should be disregarded, contrary to the commission's own rule. We must find that the commission's ruling disregarding the wage adjustments, contrary to the Public Service Commission's rule 24(1)(b), was arbitrary and capricious and that the wage increases should be included in Northwestern Bell's operating results.

Error No. 4—License Fees.

The next item involves the payments made by Northwestern Bell to its then parent corporation, AT&T. Many years ago, Northwestern Bell and AT&T entered into a license contract whereby AT&T granted to Northwestern Bell the right to use AT&T's patents, research and development, general business advice, and general financial advice. On October 1, 1974, it was determined that AT&T would accept as payment for license contract rights and services an amount equal to Northwestern Bell's share of total costs incurred by AT&T in furnishing these services to Northwestern Bell, not to exceed a maximum of 2½ percent of revenues, less uncollectibles. In 1981 Northwestern Bell paid AT&T as a license contract fee an amount somewhere between 2.3 and 2.4 percent of its revenues, less uncollectibles. The commission disallowed the payment and instead limited Northwestern Bell to a payment equal to 1 percent of revenues, less uncollectibles. According to the commission's order, "this

adjustment is appropriate because of the lack of probative evidence supporting the license contract payments, the concern evidenced by the operating companies about the level of expenditures, and their lack of control over such expenditures." In essence, what we are asked to determine is whether the commission's action in limiting the license fee actually paid by Northwestern Bell to an amount equal to 1 percent of revenues, less uncollectibles, can be supported by anything in the record or whether the commission's action in limiting payment to 1 percent is arbitrary or capricious.

If the commission had found that the record failed to support payment of 2.3 percent and therefore disallowed all payment, one might make some argument in support of the commission's actions. But where, as here, the commission disallows an actual payment of 2.3 percent because it contends the payment is arbitrary and then itself imposes a payment of 1 percent with no other evidence, we must conclude that the imposition of the 1 percent is likewise arbitrary or capricious and cannot be permitted. The question is not whether the action of the commission in allowing a payment of 1 percent may stand. That action clearly cannot be supported by anything in the record and must be considered arbitrary. Rather, the question is whether the record supports the payment of 2.3 percent plus, and therefore whether Northwestern Bell should be permitted to take credit for the payment actually paid. We believe the record does support such action.

The testimony, as presented at the hearing, established that AT&T provided Northwestern Bell with a host of services, the reasonable value of which was $52.4 million. The evidence further discloses that the amount actually paid by Northwestern Bell to AT&T was $5.9 million. The commission argues that the cost of certain services for which payment was made should more appropriately be shared by the stockholders and not borne exclusively by the ratepayers. While this may be true, in view of the fact that the undisputed evidence is that Northwestern Bell paid only about 10 percent of the cost of all the services received, and some, if not all, of the services were of benefit to Northwestern Bell ratepayers, absent evidence to the contrary, we cannot say that the payment by Northwestern Bell

was unreasonable and should have been disregarded by the commission. As noted by the U.S. Supreme Court in the case of *S. W. Tel. Co. v. Pub. Serv. Comm.*, 262 U.S. 276, 289, 43 S. Ct. 544, 67 L. Ed. 981 (1923):

> "The commission is not the financial manager of the corporation and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers."

Where, as here, there is no evidence to support the commission's finding other than a general feeling by the commission, we must hold that its disregard of the amount actually paid and a substitution therefor of 1 percent was arbitrary and capricious and cannot stand. Northwestern Bell should have been permitted to take full credit for the amount actually paid by it to AT&T under its license contract. See, also, *West Ohio Gas Co. v. Comm'n. (No. 1).*, 294 U.S. 63, 55 S. Ct. 316, 79 L. Ed. 761 (1935); *Northwestern Bell Telephone Co. v. Spillman*, 6 F.2d 663 (D. Neb. 1925).

The commission's assertion that Northwestern Bell may not, because of a lack of probative evidence, include in its rate base the payment actually made to AT&T fails to recognize what in fact is reflected by the record concerning benefits to ratepayers. The only probative evidence is that the amount was paid and that numerous services were obtained, many of which were clearly for the benefit of the ratepayers. That it was not reasonable, in whole or in part, is a conclusion reached by the staff but unsupported by any evidence elicited either on cross-examination or by direct evidence produced by the staff. We agree with the Supreme Judicial Court of Massachusetts, which said in *New England Telephone & Telegraph Co. v. Dept. of Public Utilities*, 371 Mass. 67, 80, 354 N.E.2d 860, 869 (1976), that "disallowance of payments in excess of 1% of the Company's gross revenue, based on criticism applicable only to an unspecified portion of the payments, is arbitrary and is unsupported by substantial evidence." We therefore must reverse that portion of the commission's order.

Errors Nos. 5, 6, and 7—Interest on Working Capital; 1981

Income Tax; and Interest on Construction Loans.

Northwestern Bell's next three assignments of error may be considered together. Northwestern Bell contends that the commission erred in refusing to permit it to include an item of interest on cash working capital requirements, in failing to give it credit for all of its 1981 federal income taxes by imputing to it a theoretical interest deduction, and by disallowing the amortization of one-tenth of the interest on short-term construction projects for the period of January 1, 1979, through April 30, 1980, and in removing from the rate base the unamortized portion of such interest.

While we might examine each of these three matters in the same great detail advanced by the parties, thereby unduly lengthening this opinion and probably providing more information than anyone other than the parties themselves can either digest or understand, the fact of the matter is that with regard to these three areas there was conflicting evidence offered by each side's experts. That is to say, with regard to these three matters, each side presented conflicting evidence and now argues that conclusions arrived at by the commission were erroneous because the contrary evidence should have been accepted. It is in this particular area where the Supreme Court, on review, is severely limited in what it may do.

As we noted in *Nebraska Railroads of Omaha v. Nebco, Inc.*, 194 Neb. 322, 330, 231 N.W.2d 505, 510 (1975):

> It is only where the findings of the Commission are against all the evidence that this court may hold the Commission's findings are arbitrary and [sic] capricious. The test, we believe, is best summarized in In re Lincoln Traction Co., 103 Neb. 229, 171 N.W. 192 (1919), wherein this court stated the rule to be: "This court upon appeal cannot disturb findings of the commission, unless it appears that some requirements of the law have been violated or disregarded, *or that the result reached cannot reasonably be derived from the facts proved.*" (Emphasis supplied.)

See, also, *In re Application of Best*, 209 Neb. 524, 308 N.W.2d 726 (1981).

While the arguments made by Northwestern Bell may be persuasive and, if adopted by the commission, supportable by

evidence in the record, we simply are not authorized by law to second-guess the commission. As we noted in *Robinson v. National Trailer Convoy, Inc.*, 188 Neb. 474, 478, 197 N.W.2d 633, 636 (1972): "Our function [the Supreme Court] in review is only to determine whether it [the commission's order] has a rational basis and is not arbitrary, capricious, or unreasonable." The mere fact that the evidence in this case is in conflict or that either position could be supported by the evidence does not permit us to reverse the action taken by the commission. We therefore find that with regard to assignments of error 5, 6, and 7, the order of the commission must stand.

Error No. 8—Rate of Return.

That brings us, then, to the last assignment of error. Northwestern Bell maintains that the commission erred in failing to grant it a fair rate of return on its Nebraska intrastate investment. Northwestern Bell had sought, by its application, a rate of return in the range of 13.2 to 13.8 percent. The commission, in its order, granted a rate of return in the amount of 11 percent.

As is so often the case in attempting to determine an appropriate rate of return, evidence presented by both sides varied widely.

The record reflects that both sides presented extensive evidence in this regard. Nevertheless, the rate determined by the commission was within the range of the evidence presented by the experts, though, admittedly, it was at the low end of the range. As we noted in *Omaha & C. B. Street R. Co. v. Nebraska State Railway Commission*, 103 Neb. 695, 697, 173 N.W. 690, 691 (1919), the commission, in determining a reasonable rate of return, has "a wide discretion." The ascertainment of a fair return in a given case is a matter incapable of exact mathematical determination and is one which must be, to some extent, left to the discretion of the commission. At best, it is one of reasonable approximation given its basis in a proper consideration of all relevant facts. See *Southern Bell Tel. & T. Co. v. Louisiana Pub. Serv. Com'n*, 239 La. 175, 118 So. 2d 372 (1960).

One may agree with Northwestern Bell's argument that the commission should not have refused to consider the high end of

a range because the company "has not exercised certain cost controls which other businesses and governmental bodies have had to observe." Still, one cannot find that the commission's action was arbitrary or capricious. While the commission's statement was perhaps gratuitous and unsupported by the facts, the issue to be determined by the commission was not whether Northwestern Bell had exercised cost controls similar to other businesses, but what the fair rate of return should be. This is not dissimilar to a situation where the trial court reaches the correct result for the wrong reason. In those cases we do not set aside the order, and we are unable to do so in this case. We are simply unable to say that the determination by the Public Service Commission with regard to the rate of return was arbitrary or capricious.

Having examined all of the matters presented to the court, the order of the commission is in part affirmed and in part reversed and remanded with instructions to enter an order in conformance with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

WHITE, J., participating on briefs.

WILLIAM F. BLACK, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, ET AL., APPELLEES.

358 N.W.2d 181

Filed November 2, 1984. No. 83-546.

1. **Administrative Law: Jurisdiction: Appeal Bonds.** When seeking to appeal an order of the director of the Department of Motor Vehicles, the appellant must execute and file the required bond within 20 days of the date of the final order complained of, and such filing is a jurisdictional requirement and condition precedent to the initiation of the appellate process.
2. **Appeal Bonds.** A defective or invalid bond may be amended if it has been filed and approved within the prescribed statutory time limits.

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

Kent E. Florom of Ruff & Florom, for appellant.

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

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

WHITE, J.

This is an appeal from an implied consent proceeding which resulted in the revocation of the appellant's driver's license for 1 year. A jurisdictional question is raised due to the appellant's alleged failure to file, within the statutory period, an appropriate bond for costs. The record reveals the following sequence of events.

On January 10, 1983, the appellant, William F. Black, was stopped by Trooper S. L. Mueller of the Nebraska State Patrol. Because the trooper suspected Black was driving while under the influence of alcohol, he requested that Black submit to a body fluid test pursuant to the implied consent law. Neb. Rev. Stat. § 39-669.08 (Cum. Supp. 1982). The appellant refused. As a result of this refusal, a hearing was held before the director of the Department of Motor Vehicles. On April 13, 1983, the department issued an order revoking the appellant's driver's license for a period of 1 year from the date of the order. A copy of this order was sent to the appellant by certified mail, return receipt requested. According to the appellant, upon his receipt of the order he initiated procedures for an appeal as set forth in Neb. Rev. Stat. § 60-420 (Reissue 1978). The appellant's attorney forwarded a check drawn on the trust account of the attorney's firm for $200, made payable to the director of the department. On April 27, 1983, the department notified the appellant's attorney that it was returning the check "as the Department [could not] accept a cash bond; [and that] a surety bond . . . must be filed within 20 days after the revocation date." The appellant received this letter on April 28, 1983, and executed a surety bond that same day. According to the appellant, the bond was immediately forwarded to the department.

On May 2, 1983, the appellant filed a petition with the

district court for Lincoln County, alleging reasons why the order of the department was in error. On May 4, 1983, the surety bond executed by the defendant was received by the department and approved by the Auditor of Public Accounts.

On May 11 the department filed a motion to dismiss Black's appeal because no proper surety bond had been filed within 20 days of the order of revocation entered April 13, 1983, and therefore the district court did not have subject matter jurisdiction.

On appeal to this court Black contends that the district court erred in calculating the 20-day period for the filing of an appropriate appeal bond, erred in failing to hold that the first check drawn on the attorney's trust account was of sufficient surety, and erred in failing to grant the appellant an extension of time to file an acceptable bond. We find the appellant's contentions to be without merit.

Section 60-420 provides in part:

> Any person who feels himself aggrieved because of any order of the director . . . may appeal therefrom to the district court . . . in manner following: The director shall reduce his ruling, order or decision to writing, file a copy of the same in his office, and shall furnish a copy thereof together with a statement of his reasons for his ruling to the applicant or licensee, as the case may be, upon request. The ruling, decision or order of the director in refusing to issue or reinstate such license or in suspending, canceling or revoking the same shall be as final and binding as the final order or judgment of a court of general jurisdiction. *The applicant*, licensee or appellant *shall within twenty days from the date of the final order complained of*, execute a *bond for costs* to the State of Nebraska in the sum of two hundred dollars *with sufficient surety to be approved by the Auditor of Public Accounts*. The bond shall be filed in the office of the director. . . . Applicant or licensee shall file his petition in such district court within thirty days from the date of filing of the director's final order in the matter, and he shall file such transcript before answer day which shall be the same as provided under the code of civil procedure in section 25-821.

(Emphasis supplied.)

The foregoing section, when read together with Neb. Rev. Stat. § 25-2221 (Reissue 1979), allowed the appellant 20 days from Wednesday, April 13, or until Tuesday, May 3, in which to file an appropriate bond. The appellant asserts that the first check, which was drawn on the attorney's trust account, should have been accepted by the department as being in compliance with § 60-420. The appellant contends that the check was of sufficient surety to be approved, and adds that by endorsing such a check the attorney places himself in the position of a surety for the payment of such a check.

The appellant, however, has apparently overlooked Neb. Rev. Stat. § 11-123 (Reissue 1983), which sets forth the type of surety necessary whenever a bond is required by law. As the check was not "executed or guaranteed solely by a corporation duly organized and existing under the laws of this state, or of any state of the United States," it was not of sufficient surety as defined by § 11-123.

The second bond executed by the appellant on April 28 was of sufficient surety. However, this bond was not received by the department until 21 days after the issuance of the department's order. It is the appellant's duty to see that the bond executed on April 28 was delivered to the proper official within the time provided by law. The appellant made no showing that the surety bond was delivered to the proper official within the time provided by law or that any delay in the receipt, performance, or recording of the bond was the fault of the department. See *Jacobitz v. Bussinger*, 179 Neb. 524, 138 N.W.2d 839 (1965).

This court has previously discussed the requirements for an appeal under § 60-420. See, e.g., *Lydick v. Johns*, 185 Neb. 717, 178 N.W.2d 581 (1970); *Buettner v. Sullivan*, 191 Neb. 592, 216 N.W.2d 872 (1974).

In *Lydick* we addressed an appeal in an implied consent proceeding involving a question of jurisdiction. We stated that the language of § 60-420 was clear, and held that "the filing of an approved bond is a jurisdictional requirement. Its filing is a condition precedent to the initiation of the appellate process." *Lydick, supra* at 719, 178 N.W.2d at 582.

Section 60-420 clearly states that a bond with sufficient

surety must be filed in the office of the director of the Department of Motor Vehicles within 20 days. In the instant case the bond was not filed with the director within 20 days as required. Therefore, we find that the district court properly dismissed the appellant's petition for lack of subject matter jurisdiction. The right of appeal in this case is clearly statutory, and the requirements of the statute are mandatory and must be met before the district court can acquire subject matter jurisdiction. *Lydick v. Johns, supra; Brown v. City of Omaha*, 179 Neb. 224, 137 N.W.2d 814 (1965).

Finally, the appellant contends that he should have been permitted an extension of time in which to file a bond with sufficient surety. "A bond which has been filed and approved within the time required by statute is subject to amendment if defective or invalid." *Reiber v. Harris*, 179 Neb. 582, 586, 139 N.W.2d 353, 355-56 (1966). The bond in this case, as previously stated, was not filed within the statutorily prescribed time limit, and therefore an amendment would have been inappropriate. *Reiber, supra.*

When a provision of a statute such as § 60-420 is plain and unambiguous on its face, this court must apply the provision as written. *State v. Havorka, ante* p. 367, 355 N.W.2d 343 (1984).

AFFIRMED.

FRANCIS SLUSARSKI ET AL., APPELLANTS, V. AMERICAN CONFINEMENT SYSTEMS, INC., ET AL., APPELLEES.

357 N.W.2d 450

Filed November 2, 1984. No. 83-624.

1. **Corporations.** A corporation is a legal entity complete and separate from its shareholders and officers.
2. _____. Generally, the shareholders of a corporation are not liable for its debts or other obligations.
3. _____. In equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where

necessary to prevent fraud or other injustice. Some of the factors which are relevant in determining to disregard the corporate entity are: (1) Grossly inadequate capitalization; (2) Insolvency of the debtor corporation at the time the debt is incurred; (3) Diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses; and (4) The fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity.

4. _____. Generally, equity will disregard the corporate entity only if it is used as a cloak to cover fraud or illegality or to work injustice, or if necessary to achieve equity.

5. **Prejudgment Interest.** 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.

Appeal from the District Court for Nuckolls County: ORVILLE L. COADY, Judge. Affirmed.

Raymond E. Baker and David A. Beck of Baker & Beck, P.C., for appellants.

John E. Sullivan and John J. Sullivan, for appellee Brockman.

Dean N. Hansen, for appellee Coxbill.

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

HASTINGS, J.

The plaintiffs brought this action against American Confinement Systems, Inc., a dissolved corporation, and the individual defendants as incorporators, stockholders, directors, or officers of that corporation, seeking damages for breach of contract. The plaintiffs' theory of liability against the individual defendants was that the court should disregard the corporate entity. The court entered judgment in the amount of $28,000 against the corporation and defendant Russell Dalrymple, but in favor of the other individual defendants. The court also refused to award prejudgment interest.

In their appeal the plaintiffs assign as error the failure of the district court to pierce the corporate veil as to the defendants Duane Coxbill and Howard Brockman and hold them liable to the plaintiffs, and the failure to award prejudgment interest.

The general rules which we must apply in determining the issue raised in the first assignment of error are found in *United States Nat. Bank of Omaha v. Rupe*, 207 Neb. 131, 135, 296 N.W.2d 474, 477 (1980):

> A corporation is a legal entity complete and separate from its shareholders and officers. . . . Generally, the shareholders of a corporation are not liable for its debts or other obligations. . . . In equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice. . . .
>
> Some of the factors which are relevant in determining to disregard the corporate entity are: (1) Grossly inadequate capitalization; (2) Insolvency of the debtor corporation at the time the debt is incurred; (3) Diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses; and (4) The fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity.

The plaintiffs are farmers, and in the spring of 1978 they became interested in acquiring a hog confinement system. An initial proposal was made to them in August of 1978 by P.C.P. Manufacturing, for whom Russell Dalrymple worked. It was shortly after that time that Dalrymple talked to the plaintiffs about going into business on his own to furnish confinement systems. On November 1, 1978, the plaintiffs did enter into a contract with American Confinement through Dalrymple for the purchase of a system, at a cost considerably less than that proposed by P.C.P.

From November 1978 through February 1979 the plaintiffs advanced $56,000 for construction of that unit. However, by mid-July, when work was stopped, the building was only one-fourth to one-half completed. The plaintiffs proceeded to finish the building themselves and paid off various mechanics' liens on the premises.

According to the testimony of defendant Coxbill, it was Dalrymple who initiated the various meetings during the late

summer of 1978 relative to the organizing of American Confinement. The two had met when Dalrymple attempted to sell him a P.C.P. system. His plan seemed to be that the money to run the business would come from customers who would sign up for purchases of the systems. Brockman and Dalrymple met under similar circumstances.

American Confinement Systems, Inc., was incorporated on September 1, 1978. The original single shareholder was Russell Dalrymple. In the latter part of September Brockman and Coxbill became directors and officers of the corporation. Brockman was elected vice president and purchased $1,800 worth of stock in cash. Prior to his election, he had also advanced $1,000 to Dalrymple as a personal loan to help get the company started. He was later repaid the loan with a check for $1,000 drawn by Dalrymple on the account of American Confinement. Coxbill was elected secretary, and he paid $1,200 for stock. Both of these men signed loan guaranties to further finance the corporation, and the two together actually paid in excess of $60,000 on those guaranties.

Francis Slusarski testified that his initial contacts with American Confinement were strictly with Dalrymple. Although inquiry was made as to the financial position of the corporation, the names of the other shareholders and directors were not revealed, and a check with the Better Business Bureau revealed no record of the company.

Although Slusarski did meet again with Dalrymple and Brockman sometime in October, there were only Dalrymple and Slusarski and his wife present when the November 1 contract was signed. Further conversations were had during the month of November, and a $16,000 downpayment was made at a meeting in which only Dalrymple and Slusarski and his wife participated.

In February of 1979 Dalrymple asked the plaintiffs for more money on the contract. On February 7 a check for $30,000 was delivered to Dalrymple. Although Coxbill was present at that meeting, the plaintiffs had no discussion with him. On that occasion a considerable amount of liquor, furnished by the plaintiffs, was consumed. Meetings between Dalrymple and the plaintiffs continued on a once or twice a week basis during the

early part of 1979. The last payment of $10,000 was requested by Dalrymple, and payment was made to him, on February 20, 1979.

Slusarski testified that it was not until December of 1978 or January of 1979 that he knew that Coxbill and Brockman were directors of American Confinement, but he never contacted them about any of his problems. There was no other testimony on behalf of the plaintiffs regarding any contacts with those two defendants.

Slusarski did testify that Dalrymple told him at one time that there were some wealthy men backing his company, that they were millionaires, but they were never identified. It was also Slusarski's testimony that he did not know whether Brockman or Coxbill knew anything about his problems in relation to the building contract.

The record leaves little doubt but that Dalrymple ran the corporation as if he were the sole owner. He was the one who generally signed the checks, and who borrowed and spent the money. He controlled the books of the corporation, and when any of the directors requested to see the books, he told them it was none of their business. He refused to account to the board of directors for the expense money that he paid to himself, and purchased an airplane for the company without board approval.

The plaintiffs argue that both Brockman and Coxbill knew that the corporation was grossly undercapitalized, knew that it was insolvent at the time of the contract with the plaintiffs, were aware of diversion of corporate funds by Dalrymple, and recognized that the corporation was a mere facade for Dalrymple's personal dealings, and, having that knowledge, failed to act to protect the plaintiffs and other customers, and therefore should be held personally liable.

However, reviewing the evidence de novo, as we must, we agree with the trial court that these defendants' apparent inaction in the face of this information nevertheless fell short of active participation in the fraud perpetrated by Dalrymple. The cases we have been cited to from this jurisdiction, as well as those from states other than Nebraska, all seem to involve one person, or a man and wife, who operated a corporation as an

alter ego. See, *United States Nat. Bank of Omaha v. Rupe*, 207 Neb. 131, 296 N.W.2d 474 (1980); *Nebraska Engineering Co. v. Gerstner*, 212 Neb. 440, 323 N.W.2d 84 (1982); *State ex rel. Sorensen v. Weston Bank*, 125 Neb. 612, 251 N.W. 164 (1933); *Gallagher v. Reconco Builders, Inc.*, 91 Ill. App. 3d 999, 415 N.E.2d 560 (1980); *Kilpatrick Bros., Inc. v. Poynter*, 205 Kan. 787, 473 P.2d 33 (1970); *Amoco Chemicals Corporation v. Bach*, 222 Kan. 589, 567 P.2d 1337 (1977).

Generally, equity will disregard the corporate entity only if it is used as a cloak to cover fraud or illegality or to work injustice, or if necessary to achieve equity. *Kilpatrick Bros., Inc. v. Poynter, supra.* Coxbill and Brockman were not active participants in the improper activities of Dalrymple.

Although Brockman felt as early as January or February of 1979 that Dalrymple was not doing a good job, he believed that to remove him from the corporation would have been the end for everyone involved. He got this impression after visiting with Robert McIllece, the president of the primary bank for the corporation. He had known and respected McIllece for a number of years, and it was McIllece's opinion that things could be worked out and American Confinement Systems could be a going company. This is the same bank in whose favor Brockman and Coxbill made good on their loan guaranties.

In addition, it was the testimony of attorney Eugene Foote II, who took over the corporation for a time as a quasi-trustee during the early months of 1979, that he operated for several months on the understanding that he had a viable corporation.

As previously stated, Brockman and Coxbill did not actively engage in fraudulent or illegal acts; and in light of the testimony by the banker and the attorney, they could hardly be said to have been guilty of negligence in their misappraisal of the situation. Considering also the knowledge the plaintiffs had of the unknown stability of the corporation and their failure to rely on the participation of either Coxbill or Brockman as members of the corporation, and the fact that Coxbill and Brockman not only fully paid for their stock but also answered dearly for their loan guaranties, we do not believe that equity requires a result different from that reached by the district court. As to the matter of liability of these two defendants, the

judgment is affirmed.

The second assignment of error relates to the matter of prejudgment interest. "Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed." *Land Paving Co. v. D. A. Constr. Co.*, 215 Neb. 406, 407, 338 N.W.2d 779, 780 (1983). Although the liability of the corporation and of Dalrymple was not seriously challenged, the fact that the plaintiffs' claim for damages was in excess of $43,000, whereas the court found from the evidence that it amounted to but $28,000, would seem to establish that there was in fact a reasonable controversy on that score.

The judgment of the district court is affirmed.

AFFIRMED.

RONALD E. CADDY, APPELLEE, V. DOROTHY J. CADDY, APPELLANT.

358 N.W.2d 184

Filed November 2, 1984. No. 83-659.

Courts: Judgments. In order to set aside a judgment after term on the ground of fraud practiced by the successful party, as provided for in Neb. Rev. Stat. § 25-2001 (Reissue 1979), the petitioning party must prove that due diligence was exercised by him or her at the former trial and that the failure to secure a just decision was not attributable to his or her fault or negligence.

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

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

Gene C. Foote II and Dale A. Norris of Whelan, Foote & Scherr, P.C., for appellee.

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

HASTINGS, J.

The respondent, Dorothy J. Caddy, has appealed from an order of the district court which denied and dismissed her

amended motion to vacate and modify a decree previously entered in a marriage dissolution proceeding. We review the case de novo on the record.

A decree dissolving the 30-year marriage of the parties was entered by the court on August 10, 1979. On March 21, 1983, the petitioner filed an application for modification of that decree. The respondent filed an amended motion to modify the decree. She asked that the court either vacate the decree and enter a "new decree" increasing the amount of the property award because of fraud practiced by the petitioner or, in the alternative, for an increase in alimony due to a change in circumstances. The court denied the relief requested by each party. The petitioner has not cross-appealed.

The basis for the requested vacation of the decree was that at the time of the dissolution proceedings petitioner submitted a false financial statement which left out certain items of property, a part of the marriage accumulation. Chief among these items was the value of petitioner's employee trust fund and pension annuity fund with K-N Energy, Inc. This was set forth in exhibit 2, an affidavit which provided in part as follows:

7/31/79	Employee Trust Fund	$10,325.59
7/31/79	Employee Pension Annuity Fund	
	Monthly Annuity	190.55
	Personal Contribution	2,647.69

(The above named employee would not have been eligible to receive the pension annuity fund as of 7/31/79, as he did not have 10 years vested service with the Company, but only would have been allowed to receive his own personal contributions).

There is no testimony in the record which further explains these figures. It is respondent's contention that as of the date of the decree, petitioner was entitled to both the sum of $10,325.59 and the $2,647.69. Therefore, she reasons, the petitioner omitted from his financial statement a total of almost $13,000 from the marital assets.

We do not interpret exhibit 2 in the same way. We are of the opinion that the $10,325.59 is an employer-contributed fund which includes the amount contributed by the employee, or, when added to the latter fund, provided for a monthly annuity

of $190.55. At least the figures are ambiguous, and in the absence of evidentiary explanation by the respondent, who must carry the burden of proof, the conclusion urged by her is pure speculation.

The amount of money in the trust and retirement funds was not readily available to the petitioner. He testified that the only way he could reach any of that money would be to quit his employment, to retire, to be fired, or to die. We do not believe that the omission of this information from the financial statement rose to the level of fraud.

In any event, the respondent had available to her the same avenues to discover the facts at the time of trial as she employed at this subsequent hearing. She appeared at the dissolution hearing without counsel. Both the trial judge and an associate of petitioner's trial counsel had urged respondent to obtain counsel. She declined to do so. The respondent testified that at the time of the dissolution hearing she was aware of the existence of the trust and pension fund or funds, as well as the other funds totaling $560.81, although she did not then know the exact amounts.

In order to set aside a judgment after term on the ground of fraud practiced by the successful party, as provided for in Neb. Rev. Stat. § 25-2001 (Reissue 1979), the petitioning party must prove that due diligence was exercised by him or her at the former trial and that the failure to secure a just decision was not attributable to his or her fault or negligence. *Grosse v. Grosse,* 166 Neb. 55, 87 N.W.2d 900 (1958); *Pinches v. Village of Dickens,* 131 Neb. 573, 268 N.W. 645 (1936).

The respondent chose to proceed without adequate representation and with at least a general knowledge of the underlying facts, and made no effort to bring before the court the correct information. The trial court was correct in denying the petition to vacate.

Furthermore, there was insufficient evidence of a change in circumstances to support a modification of the award of alimony.

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

AFFIRMED.

JUDY A. NEUJAHR, APPELLEE, V. DANNY L. NEUJAHR, APPELLANT.

357 N.W.2d 219

Filed November 2, 1984. No. 83-685.

Modification of Decree. Where modification of a dissolution decree is made during the 6-month period, Neb. Rev. Stat. § 42-372 (Reissue 1978), such modification can be made only upon good cause shown after notice to all interested parties and hearing.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Reversed and remanded with directions to dismiss.

Carole McMahon-Boies of Pepperl & Melcher, P.C., and Timothy J. Loudon, for appellant.

David L. Kimble of Souchek & Kimble, for appellee.

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

COLWELL, D.J., Retired.

Petitioner, Judy A. Neujahr, instituted contempt proceedings against respondent, Danny L. Neujahr, following the dissolution decree, claiming respondent withheld personal property assigned to her. No findings in contempt were entered. The trial court modified its original decree without either notice or hearing. Respondent appeals. We reverse and remand with directions to dismiss.

The dissolution decree of March 11, 1983, assigned the personal property between the parties; part was particularly described and part had these general descriptions: to respondent, "all tools, machinery and livestock equipment . . . personal effects . . . and miscellaneous items in his possession"; to petitioner, "all household goods except items specifically awarded the respondent . . . and her . . . personal effects . . . ." There was no appeal.

Disputes immediately arose between the parties concerning their separate claims to many items included in the above general descriptions.

On April 20, 1983, respondent filed a motion to cite

petitioner for contempt for withholding seven items. At a hearing on May 9, 1983, petitioner was ordered to deliver the items to respondent, which was done.

On May 5 and June 6, 1983, petitioner filed motions to cite respondent for contempt for withholding a total of 49 items that she claimed were included in the "household goods" assigned to her.

Petitioner's two motions came on for hearing on July 11, 1983. Both parties were present with counsel. The judge, without notice or hearing, forthwith announced these findings and orders that modified the dissolution decree:

> For the record, the Court finds without further evidence the following items are machinery or tools, and included as property awarded to the respondent under the decree of divorce: [here follows a description of 19 items]. Court further finds for the record that the following items are household goods within the intent of the decree and are awarded to the petitioner: [here follows a description of 33 items].
>
> . . . .
>
> . . . I am simply finding that within the intent and purpose of the decree, those items as I specifically found were either awarded to the petitioner or to the respondent, either as household goods, machinery, and/or tools.

Petitioner stated that she was satisfied, and she produced no evidence in support of her contempt motions. Respondent testified. The court reaffirmed its findings, with one exception, and ordered the parties to exchange and deliver the respective items on or before August 16, 1983.

On July 20, 1983, respondent filed a motion to reconsider the July 11 order, claiming abuse of discretion and using a contempt proceeding to modify the dissolution decree, and prayed the court to vacate the July 11 order and dismiss the contempt motions.

On August 10, 1983, respondent's motion to reconsider was overruled, and the court ordered the parties to deliver the items on or before August 16, 1983, under penalties of contempt.

Respondent assigns as error: (1) Modifying a dissolution decree in the course of a hearing on contempt citations; (2)

Modifying a dissolution decree absent a showing of good cause; and (3) Failure to accord respondent with due process in the form of notice.

In their dispute the parties made no formal application to the court for either interpretation of the decree, *Kasparek v. May*, 174 Neb. 732, 119 N.W.2d 512 (1963), or modification of the decree, Neb. Rev. Stat. § 42-372 (Reissue 1978). On the contrary, both parties employed coercive contempt procedures. Neb. Rev. Stat. § 25-2121 (Reissue 1979). " 'A civil contempt has for its purpose the preservation and enforcement of the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce private rights to which the court has found them to be entitled. . . .' " *Kasparek v. May, supra* at 736, 119 N.W.2d at 516.

> Section 42-372, R.S. Supp., 1972, permitting the trial court to modify its decree within 6 months, impliedly requires a showing of good cause. . . . As we said in Zachry v. Zachry (1970), 185 Neb. 336, 175 N.W.2d 616: "The control of a divorce decree during the 6-month period pending finality is within the sound judicial discretion of the trial court."

Miller v. Miller, 190 Neb. 816, 817, 212 N.W.2d 646, 647 (1973).

In *Howard v. Howard*, 207 Neb. 468, 299 N.W.2d 442 (1980), the trial court summarily vacated its dissolution decree without notice and entered a modified decree. In reversing we said:

> While the showing requiring modification might result in the same evidence being introduced as in the contempt hearing, the appellant will have notice at a subsequent hearing of the proposed modification and be prepared to introduce evidence. We do not hold that, after every vacation of a decree, a trial court must hold a further hearing to modify; simply that *one is required when a court, in effect, vacates a decree on its own motion without opportunity to produce evidence with respect to the terms of the proposed modification.*

(Emphasis supplied.) *Id.* at 471, 299 N.W.2d at 444.

"The trial court had no power to modify, during the course of contempt proceedings, the terms of its earlier support order."

Tuch v. Tuch, 210 Neb. 601, 603, 316 N.W.2d 304, 306 (1982). See, also, *Kaufmann v. Kaufmann*, 246 Ga. 266, 271 S.E.2d 175 (1980).

The court made a sincere effort to adjust the parties' claims that bordered on the vexatious; however, where modification of a dissolution decree is made during the 6-month period, § 42-372, such modification can be made only upon good cause shown, after notice to all interested parties and hearing. Absent notice and hearing, the July 11 order was void, and it is set aside. There being no evidence to support petitioner's contempt motions, the judgment of the district court is reversed with directions to dismiss the motions.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. RICHARD W. RAYES, APPELLANT.

357 N.W.2d 222

Filed November 2, 1984. No. 84-240.

1. **Constitutional Law: Witnesses.** The sixth amendment to the U.S. Constitution guarantees to a defendant compulsory process for obtaining witnesses in his favor. That clause is violated when a defendant is arbitrarily deprived of testimony that would have been relevant, material, and vital to the defense. The defendant must at least make some plausible showing of how the testimony of the absent witness would have been both material and favorable to the defense.
2. **Criminal Law: Evidence.** The prosecution may not deliberately withhold evidence which it knows or has reason to know will be beneficial to the defendant. This does not require the prosecution to disclose every fact which might conceivably benefit the defense.

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

Dennis R. Keefe, Lancaster County Public Defender, and Mariclare Thomas, for appellant.

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

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

PER CURIAM.

The defendant, an inmate at the Nebraska Penal and Correctional Complex, was convicted of the felony offense of carrying a deadly weapon concealed on or about his person. In his appeal he assigns as error the denial by the trial court of his right to call certain witnesses in his behalf, in contravention of his sixth and fourteenth amendment rights.

During the course of a strip search conducted preparatory to his being taken to court, he threw his shirt on a chair located in the corner of the room. The officer conducting the search heard an object hit the wall and saw it hit the floor. The object turned out to be a homemade knife with tape wrapped around it. The officer asked the defendant where the knife had come from, and the defendant replied that it must have come from the bottom of the chair. The knife was taken into custody, but the chair remained in use, and the defendant's clothing was returned to him.

The critical issue in this case was whether the knife was in fact concealed "on or about the person" of the defendant. This was established by circumstantial evidence only.

During the State's case in chief, a fingerprint specialist and an investigator with the State Patrol, in response to questions from both the State and the defense, stated that although the knife was examined for fingerprints, none were found. They also acknowledged that the State Patrol had experts who dealt with hair examinations, blood types, and tests for the presence of fibers or metal filings, but not one of these examinations was done.

As part of his defense, the defendant had subpoenaed two persons from the State Patrol criminal laboratory to testify. The State moved in limine to prohibit the witnesses from testifying as to what possible tests could have been run on the knife, as well as on the chair and defendant's clothing, on the ground that such evidence was not relevant. The motion was sustained.

The only showing in the nature of an offer of proof consisted of argument by trial counsel that there were certain tests which

could have been performed which might have included or excluded the defendant as having the weapon in his possession. Counsel was unable to state just what tests could have been performed or what the tests could demonstrate. It was defendant's position that he would want to ask the subpoenaed witnesses questions to make that determination.

The sixth amendment to the U.S. Constitution guarantees to a defendant "compulsory process for obtaining *witnesses in his favor.*" (Emphasis supplied.) That clause is violated when a defendant is arbitrarily deprived of testimony that would have been relevant, material, and vital to the defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). "He must at least make some plausible showing of how their [the absent witnesses'] testimony would have been both material and favorable to his defense." *Id.* at 867.

If we understand defendant's argument correctly, he contends that the proffered witnesses could have testified that the clothing contained or did not contain filings from the knife or that the knife revealed or did not reveal body secretions from the defendant. It would seem to us that all that could be deduced from that testimony would be that if tests had been run, they would either have shown that the defendant had the knife on his person or that *perhaps* he did not.

Furthermore, there is no requirement that we know of that the State, during its investigation, must "leave no stone unturned." The prosecution may not deliberately withhold evidence which it knows or has reason to know will be beneficial to the defendant. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). "If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice." *United States v. Agurs*, 427 U.S. 97, 109, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

The defendant here seems to be urging the adoption of the "conceivable benefit" test employed by the court of appeals and rejected by the Supreme Court in *Valenzuela-Bernal.*

> So it is with the "conceivable benefit" test. Given the vagaries of a typical jury trial, it would be a bold statement

> indeed to say that the testimony of any missing witness could not have "conceivably benefited" the defense. To us, the number of situations which will satisfy this test is limited only by the imaginations of judges or defense counsel.

Valenzuela-Bernal, supra at 866-67.

The testimony of the rejected witnesses, as far as we know, would have been both cumulative and lacking in relevancy. We believe the situation here is not so different from that existing in *State v. Vernon, ante* p. 539, 356 N.W.2d 887 (1984), in which we rejected defendant's claim that the State must preserve the defendant's breath sample taken in a suspected DWI case because a later test of the defendant's choosing might have revealed a lower blood alcohol level.

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

AFFIRMED.

STATE EX REL. HILT TRUCK LINE, INC., APPELLANT, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES FOR THE STATE OF NEBRASKA, APPELLEE.

357 N.W.2d 455

Filed November 2, 1984. No. 84-301.

1. **Courts: Appeal and Error.** Where the Supreme Court reverses and remands a cause to the district court for a special purpose, on remand the district court has no power or jurisdiction to do anything except to proceed in accordance with the mandate as interpreted in the light of the Supreme Court's opinion.
2. _____: _____. A trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. No judgment other than that directed or permitted by the Supreme Court's mandate may be rendered in the district court upon remand of a cause.

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

Michael O. Johanns of Peterson, Bowman & Johanns, for appellant.

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

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

SHANAHAN, J.

Hilt Truck Line, Inc., appeals the judgment of the district court for Lancaster County denying Hilt an attorney fee pursuant to Neb. Rev. Stat. § 25-2165 (Cum. Supp. 1984). We affirm.

Originally, in 1982, Hilt sought a writ of mandamus requiring that the director of the Department of Motor Vehicles of the State of Nebraska grant Hilt a proportional registration license. The district court denied the writ and dismissed Hilt's petition. Hilt appealed to this court and, in substance, assigned but one error, namely, the district court's denial of the writ of mandamus. Hilt requested that the judgment of the district court

> should be reversed and remanded with directions to the District Court of Lancaster County, Nebraska to issue a writ of mandamus directing the Director of the Department of Motor Vehicles for the State of Nebraska to accept the Relator's application for licensing, process the same, and issue licensing according to Nebraska law.

Brief for Appellant at 39-40. In *State ex rel. Hilt Truck Line v. Peterson*, 215 Neb. 81, 88, 337 N.W.2d 133, 137 (1983) (*Hilt I*), we held: "Hence, Hilt should be granted a writ of mandamus to compel the director to grant Hilt a proportional registration license. REVERSED AND REMANDED WITH DIRECTIONS." Hilt did not request any rehearing. By mandate of this court on August 26, 1983, costs of the appeal (*Hilt I*) were taxed to the director. (Costs thus taxed did not include an attorney fee.) The district court issued a peremptory writ of mandamus on September 22 in accordance with the mandate of this court.

On December 29 Hilt filed an application seeking damages, legal fees, and expenses alleged to have been the "proximate result of the actions of the Department of Motor Vehicles . . . ." The director filed a special appearance alleging lack of

jurisdiction of the district court regarding Hilt's application. The district court sustained the director's special appearance.

Hilt bases its claim for damages and attorney fee on § 25-2165 regarding a mandamus:

> If judgment be given for the plaintiff, he or she shall recover the damages which he or she shall have sustained, to be ascertained by the court or a jury, or by referees, in a civil action, and a peremptory mandamus shall also be granted to him or her without delay. In addition to damages the court may also award costs and reasonable attorney's fees. The costs and attorney's fees shall be paid by the governmental body represented by the public official or employee.

In *Hilt I*, Hilt never claimed or requested that the proceedings should be remanded to the district court for determination of any monetary amount, either damages or costs pertaining to proceedings before the trial court. Consequently, Hilt's appeal in this case is nothing more than an attempt to relitigate issues contained in the initial proceedings and appeal (*Hilt I*), including issues not assigned as errors for appellate review of the district court's action in denying the writ of mandamus. Consideration of a cause on appeal is limited to errors assigned and discussed. See Neb. Ct. R. 9D(1)d (rev. 1983). See, also, *McClellen v. Dobberstein*, 189 Neb. 669, 204 N.W.2d 559 (1973); *Lincoln Co. Sheriff's Emp. Assn. v. Co. of Lincoln*, 216 Neb. 274, 343 N.W.2d 735 (1984).

Where the Supreme Court reverses and remands a cause to the district court for a special purpose, on remand the district court has no power or jurisdiction to do anything except to proceed in accordance with the mandate as interpreted in the light of the Supreme Court's opinion. *Glenn v. Chambers*, 244 Iowa 750, 56 N.W.2d 892 (1953); *Kuhlmann v. Persinger*, 261 Iowa 461, 154 N.W.2d 860 (1967).

A trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. No judgment other than that directed or permitted by the Supreme Court's mandate may be rendered in the district court upon remand of a cause. See *Wendland v. Ridgefield Const. Services, Inc.*, 190 Conn. 791, 462 A.2d 1043 (1983).

The district court executed the judgment and mandate of the Supreme Court by issuing the writ of mandamus. Issuance of the writ was the specific and only direction from this court and, for that matter, was the only relief sought by Hilt in its first appeal (*Hilt I*). Damages and costs are matters outside the mandate of this court and are, therefore, beyond the jurisdiction of the district court upon remand. The district court was correct in sustaining the director's special appearance.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. DONALD E. RUZICKA, APPELLANT.

357 N.W.2d 457

Filed November 2, 1984. No. 84-325.

1. **Statutes.** One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.
2. **Statutes: Constitutional Law.** This court does not sit as a superlegislature to review the wisdom of legislative acts.
3. **Statutes: Constitutional Law: Public Purpose: Equal Protection.** All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature. If the classification of persons singled out by the legislation is reasonable and not arbitrary, and is based on substantial differences having a reasonable relation to the persons dealt with and the public purpose to be achieved, it meets the constitutional test of equal protection.
4. **Constitutional Law: Equal Protection.** Neb. Rev. Stat. § 28-802 (Reissue 1979) does not violate the constitutional guarantee of equal protection.
5. **Constitutional Law: Criminal Law.** The eighth amendment to the U.S. Constitution prohibits punishment which is grossly disproportionate to the severity of the crime.
6. _____: _____. Neb. Const. art. I, § 9, prohibiting "cruel and unusual" punishment, does not abridge the Legislature's power to select such punishment as it deems most effective in the suppression of crime, provided the punishment is not grossly disproportionate to the crime.
7. **Sentences: Appeal and Error.** A sentence will not be set aside if it is within the statutory limits, absent an abuse of discretion by the trial court.
8. **Trial: Evidence: Convictions.** The improper admission of cumulative evidence

constitutes nonreversible harmless error where there is other competent evidence sufficient to support the conviction.

9. **Trial: Evidence: Presumptions: Appeal and Error.** In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant. In such a case this court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.
10. **Verdicts: Appeal and Error.** A 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 is insufficient to support it.
11. **Preliminary Hearings: Proof.** The standard of proof at a preliminary hearing requires only that the evidence establish that a crime has been committed and that there is probable cause to believe that the accused committed it.

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

Patrick A. Brock of Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellant.

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

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

CAPORALE, J.

Defendant, Donald E. Ruzicka, appeals from his conviction, following a nonjury trial, of pandering, and from the sentence of 18 months' probation with confinement in the county jail for the first 60 days and final 30 days of the probationary period. He urges that the pandering statute is unconstitutional, that the trial court erred in admitting certain evidence, that the evidence is not sufficient to support his conviction, and that his plea in abatement should have been sustained. We find no error and affirm.

Neb. Rev. Stat. § 28-802 (Reissue 1979) provides that one commits pandering if, among other things, he agrees to receive money for procuring one to commit an act of prostitution. Neb. Rev. Stat. § 28-801(1) (Reissue 1979) provides in part: "Any person who performs, offers, or agrees to perform any act of sexual penetration, as defined in subdivision (5) of section 28-318, with any person not his spouse in exchange for money

or other thing of value commits prostitution." At the relevant time, sexual penetration was defined in Neb. Rev. Stat. § 28-318(5) (Reissue 1979), now § 28-318(6) (Cum. Supp. 1984), as

> sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen.

Ruzicka's first constitutional attack, that the act is impermissibly vague, may be disposed of quickly. We have said:

> A penal statute creating an offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. Any statute which forbids 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, violates the first essential of due process of law.

State v. Adkins, 196 Neb. 76, 80, 241 N.W.2d 655, 658 (1976).

However, it is well established that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974); *State v. Frey, ante* p. 558, 357 N.W.2d 216 (1984); *State v. Sprague,* 213 Neb. 581, 330 N.W.2d 739 (1983). As will be seen from the discussion which follows, there is no doubt that Ruzicka was engaging in conduct which § 28-802 clearly proscribes. The evidence establishes that Ruzicka agreed to receive money for procuring two women to commit acts of prostitution. Ruzicka thus cannot complain that the statute failed to provide him with notice that his acts were unlawful.

Ruzicka's second constitutional assault contends that § 28-802 violates the equal protection guarantees in that the penalties for pandering, a Class IV felony punishable by imprisonment for not more than 5 years or a fine of $10,000, or both such fine and imprisonment, Neb. Rev. Stat. § 28-105 (Reissue 1979), and for prostitution, a Class V misdemeanor

punishable by a maximum fine of $100, Neb. Rev. Stat. § 28-106 (Cum. Supp. 1984), are too disparate. Ruzicka reasons that one who engages in prostitution actually engages in a sex crime, yet is subject only to a maximum $100 fine, while one who merely facilitates the sex crime is subject to a substantially higher fine and possible imprisonment. Since, in Ruzicka's eyes, prostitution is morally more reprehensible than the act of pandering, the difference in penalties, he argues, denies equal protection rights.

A review of the legislative history demonstrates that the Legislature does not agree with Ruzicka's assessment of the relative vileness of the two crimes. That history reveals that in enacting § 28-802 the Legislature intended to curtail the business of prostitution and thereby reduce commercialized vice. Concern was also expressed during the floor debate about the well-being and safety of those who were under the control of panderers. The statute was specifically aimed at discouraging prostitution by punishing panderers, whom the Legislature considered to be a major source of the problem. Floor Debate, L.B. 38, Judiciary Committee, 85th Leg., 1st Sess. (Apr. 1, 5, 19, 1977).

It is clear that the more severe penalty for the crime of pandering is reasonably and rationally related to the legitimate governmental purposes of protecting the public and suppressing commercialized vice. This court does not sit as a superlegislature to review the wisdom of legislative acts. *Bridgeford v. U-Haul Co.*, 195 Neb. 308, 238 N.W.2d 443 (1976). Our statement in *State v. Haynes*, 192 Neb. 445, 448, 222 N.W.2d 358, 361 (1974), disposes of this second constitutional argument:

> It is well established that all reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature. If the classification of persons singled out by the legislation is reasonable and not arbitrary, and is based on substantial differences having a reasonable relation to the persons dealt with and the public purpose to be achieved, it meets the constitutional test of equal protection.

Section 28-802 does not violate the constitutional guarantee of equal protection.

In his third and final constitutional argument, Ruzicka contends that the penalty for pandering, authorized by § 28-802, is disproportionate to the severity of the crime and thereby amounts to cruel and unusual punishment, in violation of both the U.S. and state Constitutions. Again, Ruzicka relies on the disparity between the penalties for prostitution and for pandering.

The U.S. Supreme Court has explained in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), that the eighth amendment to the U.S. Constitution prohibits punishment which is grossly disproportionate to the severity of the crime. However,

> in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Id. at 175.

We find nothing in article I, § 9, of our Constitution which imposes greater limits upon our Legislature. Indeed, we have held that the language of article I, § 9, prohibiting "cruel and unusual" punishment does not abridge the Legislature's power to select such punishment as it deems most effective in the suppression of crime. *State v. Tucker*, 183 Neb. 577, 162 N.W.2d 774 (1968).

Ruzicka has failed to meet the heavy burden imposed by *Gregg v. Georgia*. As we have seen, the Legislature chose a penalty for the crime of pandering which is reasonably and rationally related to valid governmental goals. Although the Legislature has concluded that a defendant who is convicted of prostitution should be treated more leniently than a defendant convicted of pandering, it does not follow that the punishment for pandering is thereby rendered cruel and unusual.

For an example of a situation which meets the heavy burden

imposed by *Gregg v. Georgia,* see *Solem v. Helm,* 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), which held that a sentence of life imprisonment without the possibility of parole for uttering a $100 no-account check was grossly disproportionate to the crime committed, and thus cruel and unusual.

In essence, Ruzicka's argument is that his sentence is an excessive one. The sentence can hardly be characterized as harsh, and is well within the statutory limits set out in § 28-105. The applicable rule is that a sentence will not be set aside if it is within the statutory limits, absent an abuse of discretion by the trial court. *State v. Klappal, ante* p. 374, 355 N.W.2d 221 (1984). The record shows no abuse of discretion.

The facts were developed through a stipulated record consisting of certain police reports, to portions of which Ruzicka objected, and other documentary evidence. Ruzicka argues that the trial court erred in overruling his objections to certain statements made by two women who presented themselves to undercover investigators, as discussed later. His objections were grounded on the claims that the statements were hearsay and denied him his state and federal constitutional rights to confront the witnesses against him. He further objected on the ground that he had been unable to depose one of the women. We, however, need not address those claims, for, as will be seen from the discussion which follows, even if the statements made by the two women were improperly admitted, they were cumulative. There is sufficient evidence exclusive of those statements to sustain the conviction; if any error was made by admitting the statements, it was harmless error and not a ground for reversal. *State v. Smith, ante* p. 201, 352 N.W.2d 620 (1984); *State v. Smith*, 209 Neb. 505, 308 N.W.2d 820 (1981); *State v. Beam*, 206 Neb. 248, 292 N.W.2d 302 (1980); *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), *reh'g denied* 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241. Moreover, in a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant. In such a case this court will not overturn such a decision where there is sufficient material, competent, and

relevant evidence to sustain the judgment. *State v. Tomes, ante* p. 148, 352 N.W.2d 608 (1984).

This brings us to a review of the sufficiency of the evidence to support the conviction. The record, without reference to the statements of the two women, reveals the following.

On May 17, 1983, three men attending the annual fire school in Grand Island, Nebraska, were approached at the Ramada Inn by Ruzicka, who asked whether firemen would be able to pay $100 for a woman. Ruzicka advertised that he had plenty of girls in his "stable" who were clean, drug free, and herpes free. One of the men subsequently reported the incident to the Grand Island Police Department. The police enlisted the aid of the Nebraska State Patrol to investigate the matter.

On May 20, 1983, an investigator for the State Patrol, in an undercover capacity, met Ruzicka at a Grand Island bar. Upon inquiry, Ruzicka said that he had some girls for rent, two of whom were married and available for afternoon sessions, and another two of whom were single and available for evening sessions. During the course of the conversation, Ruzicka informed the investigator that he had only been in the business for 7 weeks and was attempting to recruit more women. However, he stated that the four women he had working for him were clean, "foxy" ladies. Ruzicka set a price range of from $70 to $150. He then gave the investigator his business card and information as to how he could be contacted.

On May 25, 1983, the investigator contacted Ruzicka on the telephone and recorded the conversation. Ruzicka stated that they could do business during the afternoon of May 26, 1983, at a Grand Island motel. He told the investigator that he could furnish two "foxy" ladies who would not give them anything to take home. Ruzicka stated that the price for a "straight lay," "half-and-half," or "blow job" was $50, but for $90 he could provide a more attractive lady.

On May 26, at a predetermined time, Ruzicka arrived at the motel rooms rented by the investigator for himself and for a second investigator. Ruzicka showed the investigators photographs of three women, one of whom he indicated was available for that afternoon. Ruzicka stated that Dee Dee was available for $90, which included anything except anal

intercourse and rough stuff. Ruzicka further stated that Ann, of whom he had no photograph, was also available for $70. After the investigators made their selections, Ruzicka consulted a book and called the two women on the telephone, telling them to go to the room of one of the investigators. He then told the investigators that he would call later to make arrangements to meet that evening, when payment would be made. Ruzicka then left the room.

About 10 minutes later Dee Dee and Ann arrived at the first investigator's room. One of the investigators and Ann then went to a separate room. The first investigator gave Dee Dee $90, and she began disrobing, following which she was arrested. Ann was given $70 and had completely disrobed before she was arrested. Ruzicka was arrested shortly thereafter.

It is well established in this jurisdiction that a 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 is insufficient to support it. *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983). See, also, *State v. Christiansen*, 217 Neb. 740, 351 N.W.2d 67 (1984). This is not such a case.

The foregoing record establishes beyond doubt that Ruzicka was engaged in the business of soliciting men to pay for the sexual services of women in his "stable." In the process of the undercover operation which ultimately led to his arrest, Ruzicka agreed to procure two women for the purpose of engaging in sexual activity with the investigators for a price. Ruzicka did in fact procure two women for the two investigators, and he arranged for payment after the acts were to have been completed. The women proceeded to assigned motel rooms, accepted money, and removed their clothing. Under these circumstances one would have to be more than ordinarily ignorant and naive to conclude that the two women were where they were at the behest of Ruzicka for any purpose other than to engage in prostitution as defined in §§ 28-801 and 28-318(5).

Ruzicka's argument that there is no evidence to show that he agreed to receive money is equally without merit. Direct evidence of an agreement to receive money was presented,

showing that Ruzicka told the investigators he would make arrangements to meet them later to secure payment for his services in procuring the two women. Although the fee set by Ruzicka was actually paid to the women, the evidence overwhelmingly indicates that Ruzicka expected to be paid for his efforts.

Finally, Ruzicka claims the trial court should have sustained his plea in abatement, which addressed two issues, the sufficiency of the evidence at the preliminary hearing and a claim that he was denied an opportunity to present evidence at the preliminary hearing.

The standard of proof at a preliminary hearing requires only that the evidence establish that a crime has been committed and that there is probable cause to believe that the accused committed it. *Kruger v. Brainard*, 183 Neb. 455, 161 N.W.2d 520 (1968). The evidence introduced at the preliminary hearing virtually duplicates the material evidence adduced at the trial in the district court. As we have seen, that evidence is sufficient to support the finding of guilt and therefore necessarily ample to justify binding Ruzicka over to the district court. *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983); *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975).

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. TERRY HAVLAT, APPELLEE.
357 N.W.2d 464

Filed November 2, 1984. No. 84-540.

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 the second appearance before me as a single judge

from the order of the district court for Seward County. The facts are recited at *State v. Havlat*, 217 Neb. 791, 351 N.W.2d 86 (1984), and will not be repeated here.

At issue here is whether Neb. Const. art. I, § 7, prohibits open field, warrantless searches and whether the fruits of such a search must be suppressed. The issue is one of first impression in this state. We have not yet considered, except obliquely, whether independent of the U.S. Constitution the exclusionary rule is rooted in our own Constitution.

Also at issue, though not argued, is whether the responsibility of a single judge of this court is to apply in cases of first impression his personal view of the desired rule, or to exercise an informed judgment as to the probable results if the entire court considered the issue.

The second approach seems to be the more sound and prudent. I am not convinced that a majority of this court would adopt an exclusionary rule based on the Nebraska Constitution relating to open field searches. Therefore, I conclude that the order of the district court suppressing the seized evidence must be reversed.

REVERSED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. WILLIAM R. THIERSTEIN, RESPONDENT.

357 N.W.2d 442

Filed November 1, 1984. No. 44119.

Original action. Judgment of disbarment.

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

PER CURIAM.

This matter came on for hearing on a showing filed by Dennis G. Carlson, Counsel for Discipline of the Nebraska State Bar Association, showing that although William R.

Thierstein had been indefinitely suspended from the practice of law in the State of Nebraska on January 19, 1982, he, nevertheless, continued to engage in the practice of law in the State of Nebraska. Following the filing of said showing, this court entered an order requiring respondent, William R. Thierstein, to show cause why he should not be barred from the practice of law. Thereafter, respondent did file a showing, and the matter was reviewed by a referee, who has now filed his report. The referee specifically finds that in fact respondent has engaged in the practice of law following his suspension, and the referee recommends to the court that the court enter an order of disbarment. No exceptions have been taken to the report of the referee by respondent, and Counsel for Discipline, pursuant to Rule 10(L) of the Disciplinary Rules of this court, has moved the court for a judgment on the pleadings.

In consideration of the report of the referee and the files and records in this case, the court finds that the motion of Counsel for Discipline should be sustained.

It is therefore ordered that the said William R. Thierstein be, and he hereby is, disbarred forthwith.

Dated this 1st day of November 1984.

JUDGMENT OF DISBARMENT.

SHARON KASPAR, APPELLANT, V. ALAN KASPAR, APPELLEE.

356 N.W.2d 892

Filed November 9, 1984. No. 83-031.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

David M. Geier of Bauer, Galter & Geier, for appellant.

No appearance for appellee.

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

PER CURIAM.

The instant appeal involves a domestic relations matter.

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

AFFIRMED.

GEORGE DARSAKLIS ET AL., APPELLANTS AND CROSS-APPELLEES, V. GEORGE SCHILDT ET AL., WILLIAM K. LAMBERT, INTERVENOR, APPELLEES AND CROSS-APPELLANTS.

358 N.W.2d 186

Filed November 9, 1984. No. 83-297.

1. **Contracts: Specific Performance: Statute of Frauds.** In order to satisfy the requirements of Neb. Rev. Stat. § 36-106 (Reissue 1978), the burden is upon the proponent to prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in performance are referable solely to the contract sought to be enforced, so that nonperformance by the other party would amount to a fraud upon him.
2. **Waters.** An irrigator has no right to discharge waste water across a neighbor's land unless he has an easement, either by agreement or prescription, to do so.
3. _____. Where all use was based upon the condition that the discharged waste water do no damage, such a limited agreement was no more than allowing a permissive use and was not an easement.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed in part, and in part reversed and remanded.

Steven C. Smith of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellants.

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

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

GRANT, J.

Plaintiffs-appellants, George Darsaklis and Angie Darsaklis, husband and wife (hereinafter Darsaklis), are the owners of the west half of Section 11, Township 20 North, Range 50 West, of the 6th P.M., Morrill County, Nebraska. Defendants George Schildt and Robert Schildt (hereinafter collectively Schildts) are son and father, and farm various lands as a partnership. During the crop year of 1982, Schildts leased the east half of the section described above and farmed that land as tenants. Intervenor, William K. Lambert (hereinafter Lambert), the successor in interest to Maude Lambert, was the owner of the east half of the section and leased that land to Schildts.

In the petition, Darsaklis sought an injunction enjoining Schildts from discharging waste irrigation water upon the Darsaklis land. In their answer Schildts admitted that waste irrigation water from their leased land flowed into a drain on the Darsaklis land, but denied that such water damaged Darsaklis; and further alleged that in 1969 William Glau (the predecessor in title to the Darsaklis land) and Maude Lambert (the predecessor in title to the Lambert land) entered into a partly oral and partly written agreement for the construction of a concrete and sod waterway across the Darsaklis land, that this agreement gave Maude Lambert the right to discharge waste irrigation water in a reasonable amount into this waterway, and that this right constituted a permanent easement. For further answer Schildts alleged that, in any event, for more than 10 years the owners and users of the Schildt-farmed land had discharged waste irrigation water "openly, notoriously, continuously, and adversely" across the Darsaklis land and therefore had a prescriptive right to do so. For reply to this answer Darsaklis admitted there was a conditional agreement between the previous owners of each party's land and that the users of the Lambert land were only allowed to discharge reasonable amounts of waste irrigation water onto the Darsaklis land. Lambert's petition in intervention adopted the same position as his tenants, the Schildts. In his cross-petition Lambert sought to quiet title to an easement over the Darsaklis land approximately 6 feet in width "for the purpose of

discharging a feasible amount of irrigation waste water," and to enjoin Darsaklis from interfering with the discharge of irrigation waste water over the Darsaklis land.

After trial the trial court dismissed the Darsaklis petition; denied Lambert's cross-petition insofar as it sought to quiet title in an easement over the Darsaklis land; and granted Lambert's cross-petition in the following respects:

> Intervenor and his sucessors in title shall have the right to discharge reasonable amounts of irrigation waste water through two existing culverts onto Plaintiffs' land . . . and Plaintiffs are enjoined from interfering with the discharge of those waters upon their land. Intervenor shall maintain the culverts, but shall have no responsibility for the maintenance of the drainways on the Plaintiffs' land. The amount of discharge of irrigation waste water which is reasonable is to be determined by the capacity of the concrete drains existing on Plaintiffs' land and the amount of irrigation waste water discharged from Intervenor's land in the exercise of good irrigation farming practices.

Darsaklis timely appealed and contends the trial court erred in (1) refusing to enjoin the Schildts and Lambert from discharging waste irrigation water onto the Darsaklis land; (2) determining there was still an agreement by the predecessor in title to Darsaklis, binding and enforceable against Darsaklis, allowing Schildts and Lambert to discharge reasonable amounts of irrigation waste water onto the Darsaklis land; (3) determining what was a reasonable amount of irrigation waste water, under the agreement and facts of the case; and (4) ruling that Darsaklis had notice of the terms of the agreement, whether actual or constructive, upon the purchase of the property.

On their cross-appeal Schildts and Lambert contend the court erred in not finding that Lambert had a prescriptive right to an easement. For the reasons set out below we determine that Lambert does not have an easement, and therefore we reverse in part and in part affirm.

This matter, being equitable in nature, is reviewed by this court de novo, subject to the rules that (1) where credible

evidence on material issues is in conflict, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another, and (2) where the trial court has viewed the premises, this court is required to consider any competent and relevant facts revealed by the view and any findings made by the court, provided that the record contains competent evidence to support the findings. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 560 (1983); *Mader v. Mettenbrink*, 159 Neb. 118, 65 N.W.2d 334 (1954). We note that the trial judge viewed the premises and that the record does not contain any findings which are specifically based on that view.

This action involves the drainage of irrigation waste water from the east half of Section 11, Township 20 North, Range 50 West, of the 6th P.M., Morrill County, Nebraska, onto land in the west half of that section. The east half is owned by Lambert, a California resident, and rented by the Schildts. The west half is owned and farmed by Darsaklis. This section drains naturally from east to west across the Darsaklis farm. The Northport Irrigation Canal, supplying water to the area's farmers for irrigation, runs along the east edge of the Lambert lands. Lambert's tenants use the water from the canal and run it through their fields under a gravity irrigation system, producing considerable waste water at the west end of the farm. It is this irrigation waste water, an unavoidable part of gravity irrigation, which is the subject of this dispute.

William Glau was the predecessor in title to Darsaklis. Glau owned the west half of Section 11 from 1954 until 1973. During this time, John Seng was Glau's tenant. Beginning in 1954, Glau and Seng complained to Maude Lambert's then tenant, Lloyd Nichols, who farmed the Lambert land from 1953 to 1963, about the waste irrigation water being run through the Glau place. Because of this problem, Glau and Maude Lambert both contributed money, first in 1965 and later in 1969, to attempt to correct the situation. In 1969 the two entered into a government cost-sharing program to line portions of two drains on the Glau land with concrete. These two drains diverted both waste water and storm water. Both drains run west from a field road dividing the Darsaklis and Lambert farms.

After the cement drains were installed the relationship between Seng (Glau's tenant) and George Karubas (Lambert's tenant after Nichols) improved. The water problem was so improved that Seng farmed rows running north and south across the north drain. In 1974 Glau sold his land to Darsaklis.

George Karubas farmed the Lambert lands from 1968 through 1981. While Karubas farmed the Lambert farm, he was responsive to, first, the concern of Seng and then to that of Darsaklis about waste water. Karubas varied the size of his irrigation tubes and rows, installed trash catchers, and regularly monitored the water to reduce his waste. Although Karubas attempted to control his irrigation waste water, Darsaklis still experienced some problems. Karubas always responded to the complaints of Seng and Darsaklis and took action to repair any damage or stop any damaging flow of water.

In 1982 Karubas gave up his lease, and Schildts leased the east half of the section from Lambert. Just prior to this, Darsaklis installed a center pivot irrigation system on the Darsaklis land, at a cost of $65,000. The pivot was installed to increase irrigable acres, increase the efficiency of the application, reduce or eliminate irrigation waste water, and reduce manhours. During the 1982 irrigation season, the irrigation waste water and silt from Schildts' farming operation bogged down and restricted the operation of the Darsaklis center pivot, eroded gullies, and created marshy conditions, which made general farming and harvesting difficult on the Darsaklis land.

In summary, this case is an attempt to enjoin Schildts and Lambert from discharging irrigation waste water over the Darsaklis land. Schildts and Lambert claim they have a right to do so under an oral agreement between Maude Lambert and Glau, the predecessor in title to Darsaklis. It is the Darsaklis claim that the alleged agreement violates the statute of frauds. The parties are in tacit understanding that Schildts and Lambert have no right to discharge waste water across the Darsaklis land unless they have an easement, either by agreement or prescription to do so—a soundly based understanding. See *Eunice Harrington Investments, Ltd. v. Wallace*, 207 Neb. 373, 299 N.W.2d 174 (1980).

An easement, under Nebraska law, is an interest in real estate which permits the use of another's land for a specified purpose. *Voltmer Family Farms v. Board of Equal.*, 216 Neb. 396, 343 N.W.2d 755 (1984). It is such an interest in land that is subject to the requirements of the statute of frauds.

Nebraska's statutes concerning conveyances and contracts relating to real property are set forth in Neb. Rev. Stat. §§ 36-103 to 36-107 (Reissue 1978). In general, these statutes provide that no interest in land may be created or granted unless, as set out in § 36-103, "by operation of law, or by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same." The only exception to this general rule is that set out in § 36-106, which states: "Nothing contained in sections 36-101 to 36-106 shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance."

In this case the parties agree that an easement, or an agreement for an easement, was never signed. The defense presented by Schildts and Lambert requires the establishment and proof of an oral contract declared void by the statute of frauds. § 36-103. Such an oral contract is unenforceable unless the evidence is sufficient to satisfy the requirements of § 36-106.

As stated in *Anderson v. Anderson*, 150 Neb. 879, 891-92, 36 N.W.2d 287, 293 (1949):

> In order to satisfy the requirements of this section [§ 36-106] the burden was upon plaintiffs to prove an oral contract the terms of which were clear, satisfactory, and unequivocal, and also part performance, and that the acts done in performance were referable solely to the contract sought to be enforced . . . so that nonperformance by the other party would amount to a fraud upon him.

See, also, *Yates v. Grosh*, 213 Neb. 164, 328 N.W.2d 200 (1982).

In the instant case there is no real disagreement that there was partial performance by the Lambert interests in advancing money to help defray the cost of building the two culverts. The evidence shows that the federal government paid the bulk of the cost but that Maude Lambert did contribute some $600 in 1969.

There is no evidence, however, to tie this performance to any particular agreement. In order to satisfy the requirements of an exception to the hearsay rule, and establish an oral easement in real estate, a second prong of the test must be met—the terms of the oral contract must be "clear, satisfactory, and unequivocal." See, *Anderson v. Anderson, supra; Yates v. Grosh, supra.*

Both the Schildts and Lambert contend there was a partly written, partly oral agreement in 1969 between William Glau and Maude Lambert. Maude Lambert's decisions in any discussions or agreements with Glau were those made by her agents, the employees of the farm management company managing the Lambert farm in 1969. In that year Robert Buecker was the local manager representing Maude Lambert, as he had been since 1960 and continued to be until 1972. Buecker testified in the case as to conversations with Glau concerning waste water. Buecker testified, from memory refreshed by his letters written to Maude Lambert in May of 1966, that in the fall of 1965 Glau complained to Buecker about waste waters and Buecker cooperated in correcting the problem. Buecker wrote:

> Last fall Bill Glau approached me about sharing in the cost to correct this situation before the 1966 irrigation starts. The deal is: either go along with him or he can force us to keep our irrigation water from going through his land, and this would be a difficult job. While in Omaha last fall, this matter was taken up with you and you thought we just as well share the cost and keep good relationship with Mr. Glau. The job is completed and your share of the total cost was $250.

In September of 1969 Buecker signed a "Pooling Agreement" as agent for Maude Lambert. Glau also signed the agreement. The pooling agreement stated only that a "Channel & Gulley" and "Sod Waterway" were to be constructed on the Glau land and that "Costs will be shared 50 - 50 between owners." Later, on January 29, 1970, Buecker wrote a letter to Lambert indicating that the government had paid $2,332 and that the Lambert estate's share was $588.04, and stating:

> Since this is completed now, Mr. Glau will give us an easement . . . . According to the State Law, he could keep

> this from letting our water go through his farm except for rain water and melting snow . . . . But irrigation waste water must be controlled by the people that are using it; an easement hasn't been drawn up to date, but we plan to go to an Attorney's Office to have this taken care of . . . .

When asked if he had any idea whether Glau ever gave an easement, Buecker testified: "Gave us one? No." Such testimony indicates disagreement on an easement, not agreement.

Albion Visser succeeded Buecker as farm manager in 1971. Visser testified that he did not talk to Glau about waste water problems. In August of 1972 Visser wrote to Lambert, concerning the easement, as follows:

> EASEMENT. Last spring I contacted Mr. Bill Glaugh [sic] about an easement for the water to go through his place. Mr. Glaugh [sic] did not give me an easement because it should have been done in 1969 and he was very reluctant about giving me one at that time. As you have noticed on your visit everyone more or less respects each others [sic] property and rights so I would not recommend any easement at this time in writing. I feel that it is necessary to have good common sense and respect of other people's property rather than an easement.

It is clear that the oral easement relied upon by Schildts and Lambert had to arise from an oral agreement between Buecker, acting for Maude Lambert, and Glau in 1969. The only other direct testimony as to this agreement comes from William Glau. Glau testified that he contributed to the cost of the cement culvert because, "Well, we had to do something to try to — to leave those people off the hook, and when we put it in — get this down straight — we agreed to take a reasonable amount of water, but not enough to do any damage."

In later testimony Glau testified:

> Well, the situation is this. Now you run me right up in a corner here on this deal that far back and them documents, and what we were doing at that time was just trying to keep peace between, live and let live with them farmers up there, and the idea was this. We just put that in there to take a reasonable amount of water, but not

enough to do any damage.

Later, Glau testified:

> And at different times of the year you could take more water, but the simple reason was — don't get away from this — we put it in there as a live-and-let-live proposition, a reasonable amount of water, but not enough to do any damage.

It is clear, then, that the only agreement shown in the evidence in this case is an agreement by Glau to try to get along with his neighbors, to "live-and-let-live," and "to take a reasonable amount of water, *but not enough to do any damage*." (Emphasis supplied.) When an agreement is so limited as by the words "but not enough to do any damage," the agreement is conditional and not unequivocal as required by *Anderson v. Anderson*, 150 Neb. 879, 36 N.W.2d 287 (1949), and *Yates v. Grosh*, 213 Neb. 164, 328 N.W.2d 200 (1982). Such a limited permissive use is a far different thing from George Schildt's view of the situation as expressed to George Darsaklis: "Well, according to the law, I can spill the water on you and nobody can stop me."

The limited or conditional nature of the arrangement is clear throughout all the evidence. In 1965 Maude Lambert paid $250 for some temporary work in order to "go along with him or he can force us to keep our irrigation water . . . ." In 1969, the year in which the purported oral easement was granted, Maude Lambert's agent testified unequivocally that Glau did not give them an easement but that they would try to get one. In 1972 a new agent wrote William Lambert "that it is necessary to have good common sense and respect of other people's property rather than an easement." Throughout the years up to 1982 when George Karubas farmed the Lambert land, Karubas made constant changes in his farming operation at the complaint of Glau about waste irrigation water. Karubas changed the size of his irrigation tubes, the width of his rows, installed trench cleaners, acquired new ditching equipment, and "kept up a pretty good vigil of watching and pulling ditches to make sure the water did not run all over, roughshod, all over the place into the irrigation ditches."

There is no testimony in this record as to any unequivocal

easement granted by William Glau. There is no testimony as to the duration of any easement nor as to the maintenance of the waterways involved. The most that Glau did was to act in a neighborly fashion and accept limited quantities of water upon the repeated condition "that it do no damage." Such a limited agreement is no more than allowing a permissive use. Glau always maintained the position that he was being neighborly and that no one was using the Glau land as a matter of right. No one ever asserted a right against Glau.

The facts are comparable to those stated in *Bone v. James*, 82 Neb. 442, 445, 118 N.W. 83, 85 (1908), where we said:

> It is quite apparent from the whole testimony that the use of this road or way was commenced and continued by Meredith under license or permission from the plaintiff, and that no claim of right was ever asserted until made by the defendant a short time prior to commencement of this action.

Here, the only claim of right is that expressed by Lambert to his agent in 1981, and never expressed to Glau, and by George Schildt in 1982. Schildts and Lambert have failed to prove any oral easement.

The foregoing discussion also disposes of Lambert's cross-appeal seeking a prescriptive easement. *Gerberding v. Schnakenberg*, 216 Neb. 200, 204, 343 N.W.2d 62, 65 (1984), states: "The general rule is that if a use begins as a permissive one, it retains that character until notice that the use is claimed as a matter of right is communicated to the owner of the servient estate."

In view of this disposition of the case, the remainder of the Darsaklis assignments of error need not be discussed.

For all the foregoing reasons the trial court's dismissal of the Darsaklis petition is reversed, and the trial court is directed to grant the injunction prayed for by Darsaklis. The trial court's dismissal of Lambert's cross-petition seeking to quiet title in an easement over the Darsaklis land is affirmed, and the granting of an easement to Lambert is reversed.

AFFIRMED IN PART, AND IN PART
REVERSED AND REMANDED.

KEITH J. MOORE, APPELLEE, V. HARRY "PETE" PETERSON, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLANT.

358 N.W.2d 193

Filed November 9, 1984. No. 83-395.

1. **Affidavits: Oaths and Affirmations.** The oath to an affidavit is not required to be administered with any particular ceremony, but the affiant must perform some corporal act whereby he consciously takes upon himself the obligation of an oath.
2. _____: _____. When attention of the person making an affidavit is called to the fact that it must be sworn to and, in recognition of this, he is asked to do some corporal act and he does it, the instrument constitutes a statement under oath, irrespective of other formalities.
3. _____: _____. The act of signing an affidavit before an officer authorized to administer oaths may be a sufficient corporal act to satisfy the requirement of execution under oath.
4. **Statutes: Legislature: Intent.** A legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
5. **Statutes: Drunk Driving: Blood, Breath, and Urine Tests: Implied Consent Law.** Where the arrest and refusal took place prior to the effective date of the amendment to the implied consent law, the rights of the parties are fixed by the statute as it existed prior to the amendment.

Appeal from the District Court for Colfax County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions.

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

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

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

BOSLAUGH, J.

The director of the Department of Motor Vehicles appeals from the judgment of the district court reversing the order of the director revoking the operator's license and operating privileges of the plaintiff, Keith J. Moore, for 6 months from August 30, 1982, for refusal to submit to a test of body fluids pursuant to Neb. Rev. Stat. § 39-669.08 (Reissue 1978) of Nebraska's implied consent law.

Neb. Rev. Stat. § 39-669.15 (Reissue 1978) requires the arresting officer to make a "sworn report" to the director concerning the arrest and refusal of the arrested person to submit to the required test. The plaintiff alleged and the district court found that the report of the arresting officer had not been sworn to as required by the statute.

The record shows that the arresting officer appeared before the city clerk-treasurer of Schuyler, Nebraska, a notary public, on July 2, 1982, and stated: "This is an implied consent form for Keith Moore, I need you to notarize this." He then signed the report in her presence. She then filled in the blanks of the jurat, or certificate, printed on the form and affixed her signature and seal to the certificate. The plaintiff contends that this was insufficient to constitute the report a "sworn report" because there was no overt act by the arresting officer showing an intention to take an oath or affirmation.

In *State v. Howard*, 184 Neb. 274, 167 N.W.2d 80 (1969), an affidavit used to obtain a search warrant was held valid where the affidavit had been signed before the county judge but no oath had been administered and the judge had not asked the affiant, "Do you swear to this?"

The form in this case contained the following language: "The undersigned officer being first duly sworn on oath states . . . ." The jurat read: "Subscribed and sworn to before me . . . ." The affidavit and jurat in the *Howard* case contained similar language.

We held that the oath to an affidavit is not required to be administered with any particular ceremony, but the affiant must perform some corporal act whereby he consciously takes upon himself the obligation of an oath. *State v. Howard, supra.* In this case, as in the *Howard* case, the signature of the officer was a corporal act which, under the circumstances, was sufficient to meet the requirement of execution under oath. See, also, *Blackburn v. Motor Vehicles Division, Dept. of Transp.*, 33 Or. App. 397, 576 P.2d 1267 (1978); *McLeod v. Motor Vehicles*, 16 Wash. App. 400, 556 P.2d 563 (1976); *Schoultz v. Dep't Motor Vehicles*, 89 Wash. 2d 664, 574 P.2d 1167 (1978).

The judgment of the district court was erroneous and must be reversed.

There is another matter which we believe requires mention.

The arrest and refusal in this case was made on July 2, 1982, prior to the effective date of the 1982 amendment to Neb. Rev. Stat. § 39-669.16 (Reissue 1978). Consequently, the statute as it existed prior to the amendment is applicable, and the proper term of revocation is 6 months, even though the hearing before the director took place on August 26, 1982, after the effective date of the amendment.

The Legislature, in 1982 Neb. Laws, L.B. 568, which amended § 39-669.16, also amended Neb. Rev. Stat. § 39-669.34 (Reissue 1978) by deleting a reference to § 39-669.16 in subsection (1). The effect of the amendment was to eliminate the eligibility of a person whose permit to operate a motor vehicle was revoked under § 39-669.16 to operate a motor vehicle under an employment driving permit.

Since the arrest and refusal all took place before the effective date of L.B. 568, the statute as it existed prior to the amendment governs the rights of the plaintiff as to eligibility for an employment driving permit. A legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. *Wheelock & Manning OO Ranches, Inc. v. Heath*, 201 Neb. 835, 272 N.W.2d 768 (1978). The department's refusal to entertain the plaintiff's application for an employment driving permit on the ground that L.B. 568 had eliminated his eligibility for a permit was erroneous.

The judgment of the district court is reversed and the cause remanded with directions to reinstate the order of the director revoking the plaintiff's operator's license and operating privileges for a period of 6 months.

REVERSED AND REMANDED WITH DIRECTIONS.

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

358 N.W.2d 195

Filed November 9, 1984. No. 83-537.

Post Conviction. Under the Nebraska Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979), an evidentiary hearing is required upon an appropriate motion containing a factual allegation which, if proved, constitutes a violation or infringement of a constitutional right. However, a court may properly deny an evidentiary hearing upon a determination after an examination of the files and records of the case that the petitioner is entitled to no relief.

Appeal from the District Court for Lancaster County: PAUL D. EMPSON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

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.

SHANAHAN, J.

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). This is Williams' second motion for post conviction relief. A jury found Williams guilty of the first degree murders of Catherine M. Brooks and Patricia A. McGarry, and one count of first degree sexual assault. Williams was sentenced to death for each of the murders and to an indeterminate sentence for the sexual assault. See *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). For the jury trial and direct appeal, as well as when Williams' first motion for post conviction relief was filed, the Lancaster County public defender's office represented Williams. After the hearing on Williams' first motion, present counsel was appointed. See *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984).

In the second motion for post conviction relief, Williams alleges a violation of his sixth amendment right guaranteed

under the U.S. Constitution, namely, a denial of effective assistance of counsel. Williams contends such constitutional question could not have been raised in his first post conviction proceedings because he was still being represented by the public defender's office, the very attorneys whose assistance Williams now assails.

As alleged in the second motion for post conviction relief, the ineffective assistance of Williams' counsel falls into two categories. First, Williams asserts that his counsel did not adequately investigate, prepare, and perform regarding the jury trial. Second, Williams claims that a conflict of interest in the public defender's office denied effective assistance of counsel. Williams' motion contains the following:

> Defendant was further denied effective assistance of counsel, in violation of the Sixth Amendment to the Constution [sic] of the United States, as a result of his trial attorneys having a conflict of interest at the time they represented defendant herein, which conflict was as follows:
>
> (a) Defendant, prior to his arrest in the above matter, was the Respondent in a divorce action in the District Court of Lancaster County, Nebraska, in which Merrilee Williams was the Petitioner;
>
> (b) That Merrilee Williams was represented in said divorce action by one Paul Conley, who was at that time also a member of the same office as defendant's trial counsel, that office being the Lancaster County Public Defender's Office;
>
> (c) That defendant, approximately two days before the crimes alleged herein, telephoned Mr. Conley, and inquired regarding the status of the divorce proceeding, at which time defendant was informed that the divorce proceeding was completed, and defendant was divorced;
>
> (d) That defendant was thereafter arrested for abducting Merrilee Williams, and after posting bond, became a suspect in the killings of Patricia McGarry and Catherine Brooks which occurred two days later;
>
> (e) That defendant's trial attorneys discovered that Merrilee Williams was a critical witness for the defense in

> their presentation of an insanity defense for defendant, due to her knowledge of defendant's mental state at the time of the crimes alleged;
>
> (f) Notwithstanding the fact that trial counsel was aware that Merrilee Williams' attorney was a member of the same office as defendant's attorneys, they undertook representation of defendant with the knowledge that their interests in locating and procuring the testimony of Merrilee Williams was [sic] in conflict with those of Ms. Williams, who left the State of Nebraska during the pendency of defendant's case herein;
>
> (g) That as a result of the above-stated conflict of interest, defendant was unable to present evidence at trial which was critical to his defense;
>
> (h) That defendant expressed concern to his trial counsel regarding this conflict of interest, but trial counsel obtained no waiver of said conflict from defendant, nor did they alert the trial court to this problem.

After examining the records and files, the trial court, without an evidentiary hearing, denied Williams' second motion. Williams contends he is entitled to an evidentiary hearing on his motion for post conviction relief.

> In a proceeding under the Post Conviction Act the applicant is required to allege facts which, if proved, constitute a violation or infringement of constitutional rights and the pleading of mere conclusions of fact or of law are [sic] not sufficient to require the court to grant an evidentiary hearing.

State v. Turner, 194 Neb. 252, 257, 231 N.W.2d 345, 349 (1975). See, also, *State v. Robinson*, 215 Neb. 449, 339 N.W.2d 76 (1983).

We have consistently stated that "[a] court may properly deny an evidentiary hearing upon a motion to vacate a conviction filed under § 29-3001 upon a determination after an examination of the files and records of the case that the petitioner is entitled to no relief." *State v. Meredith*, 212 Neb. 109, 109-10, 321 N.W.2d 456, 457 (1982). See, also, *State v. Miles*, 202 Neb. 126, 274 N.W.2d 153 (1979); *State v. Fincher*, 189 Neb. 746, 204 N.W.2d 927 (1973).

> Once a motion for post conviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of the filing of the prior motion. [Citations omitted.]

State v. Ohler, 215 Neb. 401, 405, 338 N.W.2d 776, 778-79 (1983).

Concerning Williams' first motion for post conviction relief, we specifically held:

> 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. [Citation omitted.] Based on the record before us, we are satisfied that Williams had effective assistance of counsel in every proceeding against or involving him.

State v. Williams, 217 Neb. 539, 550, 352 N.W.2d 538, 544 (1984). Clearly, in disposing of Williams' first motion we have already dealt with the contention that counsel did not adequately prepare, investigate, and perform during Williams' jury trial. Denial of an evidentiary hearing on Williams' claim that his counsel did not properly prepare for or conduct the jury trial does not constitute error under the circumstances.

The gist of the remainder of Williams' motion is that his defense of insanity was undermined as the result of a conflict of interest—his counsel's apparently preferential protection of Merrilee Williams by nondisclosure of her whereabouts, to the prejudice of Williams' defense against the criminal charges.

> A conflict of interest places a defense attorney in a situation inherently conducive to divided loyalties. . . . The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another . . . where a lawyer's representation of one client is rendered less effective by reason of his representation of another client.

State v. Turner, ante p. 125, 131, 354 N.W.2d 617, 621-22 (1984).

During the jury trial, two psychiatrists testified on behalf of Williams. In our opinion rendered in Williams' direct appeal, *State v. Williams*, 205 Neb. 56, 63, 287 N.W.2d 18, 23 (1979), we referred to the expert testimony of the psychiatrists:

> Two psychiatrists for the defense testified that at the time of the crimes the defendant suffered from a paranoid state beyond that of a personality disorder. One testified that the defendant's perception of reality and his judgment were seriously impaired, but the doctor could not say the defendant did not know that what he was doing was wrong. The other doctor testified that the defendant's thinking process was distorted and that he would know his actions were wrong only if he took time to think.

As an inference in the second motion, Merrilee, although not an expert, could have testified that Williams was insane when the crimes charged were committed. See *State v. Myers*, 205 Neb. 867, 869, 290 N.W.2d 660, 661 (1980) ("a nonexpert with an intimate personal acquaintance may be allowed to testify as to the sanity or insanity of a defendant"). Merrilee's missing testimony is characterized as "critical" to Williams' defense of insanity, that is, the turning point in psychiatric opinions about Williams' inability to distinguish between right and wrong. Consequently, according to Williams' allegations, Merrilee's testimony about insanity would have provided a basis for psychiatric opinions more consistent with Williams' defense of insanity rather than the inconclusive opinions actually expressed by the psychiatrists testifying at trial.

As a result of Williams' second motion, there are several questions raised regarding a possible conflict of interest on the part of defense counsel. Therefore, there should have been an evidentiary hearing as an opportunity for Williams to establish his allegation that a conflict of interest denied effective assistance of counsel. See §§ 29-3001 et seq. Refusal to grant an evidentiary hearing on the question of whether there was a conflict of interest regarding Williams' counsel was prejudicial error by the district court and requires reversal of the lower court's judgment.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HASTINGS, J., not participating.

KRIVOSHA, C.J., dissenting.

I find that I must respectfully dissent from the majority in this case, in that I do not believe that the allegations contained in Williams' second motion for post conviction relief are sufficient to require the trial court to grant him an evidentiary hearing.

Part of the difficulty we encounter here may be as a result of our earlier decision in *State v. Myers*, 205 Neb. 867, 290 N.W.2d 660 (1980). In *Myers* I wrote separately because I did not then, nor do I now, believe that a nonexpert can testify as to whether one is insane as that term is used under our criminal law. To suggest that a nonexpert may testify as to whether an individual, at the time of the commission of a crime, had the ability to distinguish between right and wrong and knew the nature and quality of his or her act, as required under the rule in this jurisdiction, is to permit a nonexpert to testify about a matter on which the nonexpert could not possibly have an opinion. See *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 275 N.W.2d 77 (1979).

Beyond that, however, I do not believe that the allegations contained in the motion filed by Williams are sufficient to raise a factual dispute sufficient to entitle Williams to an evidentiary hearing. As the majority notes, a court may properly deny an evidentiary hearing upon a determination after an examination of the files and records of the case that the petitioner is entitled to no relief. Further, as the majority notes, the pleading of mere conclusions of fact or of law is not sufficient to require the court to grant an evidentiary hearing. See, *State v. Turner*, 194 Neb. 252, 231 N.W.2d 345 (1975); *State v. Robinson*, 215 Neb. 449, 339 N.W.2d 76 (1983).

Recently, in *State v. Rayes, ante* p. 588, 357 N.W.2d 222 (1984), we held that the defendant must at least make some plausible showing of how the testimony of the absent witness would have been both material and favorable to the defense before the defendant is entitled to relief. And earlier, in *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980), we held that

Holtan's conclusory claim that he did not receive effective assistance of counsel because counsel did not subpoena witnesses from the State of Washington was without merit. In doing so, we said at 321, 287 N.W.2d at 676:

> The record, however, fails to disclose what, if anything, the witnesses would have testified to had they been called. What they might have testified to at best was the defendant's hope and wish. In the absence of evidence to disclose what the witnesses would have testified to, we are unable to establish any prejudice and therefore unable to establish any error.

In the instant case the motion filed by Williams makes no allegations of fact entitling Williams to any evidentiary hearing or further relief. The allegations are simply that as a result of his trial attorneys' having a conflict of interest, they failed to call Williams' former wife, Merrilee Williams. The allegations, however, contain no matters of fact and are wholly conclusory in nature. Specifically, the allegations read: "That defendant's trial attorneys discovered that Merrilee Williams was a critical witness for the defense in their presentation of an insanity defense for defendant, due to her knowledge of defendant's mental state at the time of the crimes alleged." The allegations of paragraph 6(e) of Williams' motion contain no allegations of fact requiring the holding of an evidentiary hearing. At a minimum, Williams was required to allege what it is that Merrilee Williams would have testified about had she been called. To suggest that she was a critical witness due to her knowledge of his mental state, without alleging whether she would have testified and of what that testimony would have consisted, is insufficient in my view to entitle Williams to an evidentiary hearing.

While it may be true, as suggested by the majority opinion, that Merrilee Williams "could have" testified that Williams was insane, the problem is that the motion contains no such allegation. For all we can tell from the allegations, Merrilee Williams may testify that Williams was sane. We need not hold a hearing to receive that evidence. That is why a party seeking relief under the Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979), must allege "facts" and not

mere conclusions to entitle him to an evidentiary hearing. I would have affirmed the action of the trial court in denying to Williams an evidentiary hearing.

BOSLAUGH, J., dissenting.

I join in that part of the dissent of the Chief Justice which relates to the insufficiency of the allegations in the motion.

GERALD R. CHRISTENSEN, APPELLANT, V. RICHARD A. ARANT ET AL., APPELLEES.

358 N.W.2d 200

Filed November 9, 1984. No. 83-590.

1. **Contracts: Homesteads.** A contract to convey the homestead of a married person is absolutely void and unenforceable unless validly executed and acknowledged by both husband and wife.
2. **Acknowledgments.** An acknowledgment is the act by which a party who has executed an instrument of conveyance as grantor goes before a competent officer or court and declares or acknowledges the same to be his genuine and voluntary act and deed.
3. **Homesteads.** An interest in the homestead simply will not pass nor be created unless the documents for that purpose are signed and acknowledged by both husband and wife.

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

Eric W. Kruger of Bradford & Coenen, for appellant.

Robert G. Decker, for appellees.

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

PER CURIAM.

The defendants, Richard A. Arant and Eunice Arant, husband and wife, own a residence property located at 5016 Nicholas Street in Omaha, Nebraska. On January 7, 1983, the plaintiff, Gerald R. Christensen, made a written offer on a printed uniform purchase agreement form to purchase the

property from the defendants for $50,000 "net" to the sellers. This offer was submitted to the defendants by their agent, David Osborne, and accepted by them on January 10, 1983. The defendants signed the written acceptance form printed on the document. Sometime later, the agent, who was a notary public, signed the certificate form of acknowledgment printed on the document and affixed his seal.

The contract called for closing and delivery of possession on February 1, 1983. The defendant sellers notified Osborne on February 8, 1983, that they did not intend to perform the contract and discharged him as their agent. The plaintiff commenced this action for specific performance on February 16, 1983. On March 7, 1983, the defendants entered into a contract with a different purchaser for a sale of the property for $64,000.

The trial court found generally for the plaintiff and ordered specific performance. The defendants then filed a motion for new trial, which was sustained by the trial court. The plaintiff has appealed from the order granting a new trial.

This is a proceeding in equity, and the review in this court is de novo on the record. Although the parties have submitted the matter as if the question were whether the order granting a new trial was erroneous, the issue is whether the plaintiff was entitled to specific performance. If the trial court believed the judgment was erroneous, the judgment should have been vacated and a new judgment entered refusing specific performance. There was no basis for granting a new trial.

The principal issue involves the acknowledgment of the contract and whether the contract is unenforceable because of irregularity in the acknowledgment of the contract.

The defendants alleged, and the uncontradicted evidence shows, that the subject property was the homestead of the defendants.

Neb. Rev. Stat. § 40-104 (Reissue 1978) provides in relevant part: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife . . . ."

With respect to execution of the contract, the record shows

that the defendants' agent, Osborne, visited the defendants at their home on January 10, 1983, to submit the offer from the plaintiff. The defendants and Osborne discussed the sale around the dining room table for approximately 25 minutes. Mrs. Arant then went into a bedroom across a hallway and approximately 4 to 7 feet from the dining room to nurse a baby. She testified that the bedroom door was closed, but it is unclear as to whether she was able to continue in conversation with her husband and Osborne. Mr. Arant signed the contract in front of Osborne and then took the contract into the bedroom for Mrs. Arant to sign. She then signed the contract, fully intending to convey the property. Sometime later, Osborne completed the acknowledgment form printed on the contract and affixed his seal. The record shows that Osborne had previously represented the sellers in real estate transactions, and at least Mr. Arant was aware that Osborne was a notary public.

It is well established that "a contract to convey the homestead of a married person is absolutely void and unenforceable unless validly executed and acknowledged by both husband and wife." *Trowbridge v. Bisson*, 153 Neb. 389, 390-91, 44 N.W.2d 810, 812 (1950); *O'Neill Production Credit Assn. v. Mitchell*, 209 Neb. 206, 307 N.W.2d 115 (1981). In *Trowbridge* an acknowledgment was defined by the court as " '[t]he act by which a party who has executed an instrument of conveyance as grantor goes before a competent officer or court, and declares or acknowledges the same as his genuine and voluntary act and deed.' " (Citations omitted.) 153 Neb. at 391, 44 N.W.2d at 812. The general rule was then stated that

> if the party executing such an instrument knows that he is before an officer having authority to take acknowledgments, understands that such officer is present for the purpose of taking his acknowledgment, intends to then do whatever is necessary to make the instrument effective, and the acknowledging officer's official certificate is attached thereto, then such acknowledgment, in the absence of fraud, will be conclusive in favor of those who in good faith rely upon it. Council Bluffs Savings Bank v. Smith, 59 Neb. 90, 80 N.W. 270, 80 Am. S.R. 669; Fisher v. Standard

Investment Co., 145 Neb. 80, 15 N.W.2d 355.

153 Neb. at 391, 44 N.W.2d at 812. However, the court continued that

> where the grantor has never appeared before the officer for the purpose of acknowledging the instrument as aforesaid, and it was never in fact acknowledged, a certificate of acknowledgment is not conclusive of the facts recited therein, and evidence showing its invalidity for such reason is admissible even against a bona fide holder.

Id.

In *O'Neill Production Credit Assn., supra*, only the husband appeared before the notary. The wife's signature was not affixed to the document at the time the notary certified that all parties concerned had appeared before him; the wife, however, testified that she had voluntarily and freely signed the document. In holding the mortgage void as to the homestead interest, we said:

> It has long been the law of this state that where the statutory requirements of signature and acknowledgment by both husband and wife to encumbrance of a homestead are wanting, they cannot be supplied by estoppel. *Davis v. Thomas*, 66 Neb. 26, 92 N.W. 187 (1902); *Betts v. Sims*, 25 Neb. 166, 41 N.W 117 (1888). See, also, *McIntosh v. Borchers*, 196 Neb. 109, 241 N.W.2d 534 (1976), *appeal after remand*, 201 Neb. 35, 266 N.W.2d 200 (1978). We see no reason to depart from that rule. *An interest in the homestead simply will not pass nor be created unless the documents for that purpose are signed and acknowledged by both husband and wife.*

(Emphasis supplied.) 209 Neb. at 211, 307 N.W.2d at 119.

The record in this case shows clearly that Mrs. Arant did not sign the contract before the notary public, Osborne, who completed the certificate of acknowledgment. Thus, the contract was void under § 40-104 and the plaintiff could not obtain specific performance.

It is unnecessary to consider the other assignments of error.

The order granting a new trial is reversed and the cause remanded with directions to enter a judgment dismissing the

petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

BOSLAUGH, J., dissenting.

It seems to me that the decision in this case is a triumph of form over substance.

A defective acknowledgment may be cured by a reacknowledgment. See, 1 C.J.S. *Acknowledgments* § 115 (1936); 1 Am. Jur. 2d *Acknowledgments* § 110 (1962).

The testimony of the defendants, under oath in open court, established that the execution of the contract was their voluntary act and deed and that they intended it to be effective as a conveyance of their property. They admitted that they were not under duress or the influence of drugs or alcohol.

Their testimony was a reacknowledgment of the contract and cured any prior error or irregularity in the acknowledgment of the contract.

CHARLES D. GLEASON, APPELLANT AND CROSS-APPELLEE, V. BETTY L. GLEASON, APPELLEE AND CROSS-APPELLANT.

357 N.W.2d 465

Filed November 9, 1984. No. 83-654.

Alimony. The condition of a spouse's business is not the sole factor in determining proper alimony. Rather, the earning capacity of a spouse operating a business is an element which is to be considered in determining alimony.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed in part, and in part reversed and remanded with directions.

Frank E. Piccolo of Murphy, Pederson & Piccolo, for appellant.

George E. Clough of Clough Law Office, for appellee.

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

PER CURIAM.

Charles D. Gleason (Charles) appeals the judgment of the district court for Lincoln County, namely, alimony claimed to be excessive. Betty L. Gleason (Betty) cross-appeals, claiming that the periodic payments ordered by the district court are not alimony and are exempt from modification. In addition to alimony, the district court ordered Charles to pay certain debts of the parties and to pay child support monthly in the amount of $300 for the teenage daughter of the parties, but on appeal the parties do not contest the debts to be paid by Charles or the child support. We reverse the judgment of the district court concerning alimony.

Charles and Betty were married in December 1953. Charles is 49 years of age, Betty is 47, and both are in good health. Since 1967, Betty has been self-employed as a licensed, practicing beautician and owner of "Betty's Hi-Way Beauty Salon." Charles is an executive whose primary duties consist of management and operation of three corporations, Gleason Truck Sales & Service, Inc.; Big Diesel Warehouse, Inc.; and Gleason Enterprises, Inc. The bulk of the marital estate is comprised of the Gleasons' interest in the three corporations. Charles owns 75 percent of the stock of the corporations, while Betty owns 25 percent. The primary purpose of having three corporations is limitation of potential liability. Gleason Enterprises, Inc., owns the real estate on which the other two corporations operate. Each corporation is operated as a separate entity and files a small business corporation income tax return. Gains or losses from the various small business corporations are reflected on the individual income tax returns of the shareholders.

Recently, revenues of the three corporations have fallen off dramatically. Corporate tax returns for the past 3 years show a combined overall profit of $1,950 in 1980 and $7,560 in 1981, and a net loss of $40,085 in 1982, the year in which the dissolution action was filed.

Net profits of the corporations were distributed to the shareholders. Charles' income is derived from the three corporations, which pay Charles an annual combined salary of $1,300. Living expenses of the family were paid from a "901

account," which enabled Charles and Betty to withdraw money from the corporations as advances against dividends. In 1982, the only year for which complete records are available, approximately $27,000 was withdrawn in this manner.

Although Betty is and has been self-employed as a beautician, there is no information in the record about Betty's income as a beautician. At times Betty has employed as many as four beauticians in her salon.

By the decree, Betty received the beauty shop, valued at $34,000, and the shop contents. Also, Betty received the family home and approximately 14 acres, free and clear, valued at $109,000 and located near North Platte. By the decree of dissolution, Charles is required to satisfy the real estate mortgage on the family home, in the amount of $8,895.37, with monthly installments of $221.42. Betty's monthly utilities for the family home are expected to be $280. Monthly maintenance or repair of the residence is anticipated at $100. As a result of the property division, Charles received total control over the corporations and all corporate assets. Except for a debt of $530 pertaining to the beauty salon, the decree charged Charles with payment of all debts of the parties. Such debts are $278,000.

The decree of dissolution also provided:

> [Betty] should have and recover from [Charles] as alimony, the sum of $96,800.00 at the rate of $800.00 per month for a period of 121 months, commencing forthwith and hereafter due and payable by [Charles] to [Betty] through the Clerk of the District Court of Lincoln County, Nebraska, on the 24th day of each month for a total of 121 months.

Charles claims the amount of alimony is excessive. In her cross-appeal Betty contends that the periodic payments ordered were an adjustment of property, not alimony, and should be exempt from modification or termination.

In appeals concerning dissolution of marriage, the Supreme Court is required to try the case de novo on the record and reach independent conclusions on the issues presented by the appeal without reference to the conclusions or judgment of the district court. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Campbell v. Campbell*, 202 Neb. 575, 276 N.W.2d 220 (1979).

Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982) provides:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Reasonable security for payment may be required by the court. Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown, but when alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony. Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient.
>
> While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

The determination of what will constitute proper alimony has been established by a long line of Nebraska cases. In *Magruder v. Magruder*, 190 Neb. 573, 576-77, 209 N.W.2d 585, 587 (1973), we held:

> In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criteria under the statute as well as under the former decisions of this court is one of reasonableness. . . .

> [Citations omitted.] The determination of whether it is reasonable to award alimony and if so how much takes into consideration all the circumstances of the parties, as well as the duration of the marriage and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children of the parties in the supported party's custody.

Tax returns of the Gleason corporations for the fiscal year ending January 31, 1982, indicate a net loss of $40,085. Of that loss, $17,021 is directly attributable to the depreciation of assets owned by the corporations. The removal of this noncash loss figure from the overall loss shown by the corporations reveals that the corporations nevertheless suffered a $23,064 loss for 1982. Although approximately $27,000 has been withdrawn from the corporations as advances against dividends and used by the parties to meet household or living expenses, neither party treats such advances as income. Little is offered to the court beyond corporate tax returns in clarifying any profit or loss from any Gleason corporation.

Determining what is reasonable alimony under given circumstances is never an easy task. The standard of reasonableness by its very nature defies clear and specific quantification inasmuch as the determination of reasonableness is directly tied to the virtually unique circumstances of each case. In *Altschuler v. Coburn*, 38 Neb. 881, 890, 57 N.W. 836, 838 (1894), we noted that an attempt to give a specific meaning to the word *reasonable* is " 'trying to count what is not number, and measure what is not space.' " There is no mathematical formula by which an award of alimony can be precisely determined. The amount of appropriate alimony is determined by the facts of each case, and the court will consider all pertinent facts in reaching an award that is just and equitable. *Cole v. Cole*, 208 Neb. 562, 304 N.W.2d 398 (1981).

Charles claims the alimony is excessive because the alimony annually exceeds his income. In *Jenks v. Jenks*, 200 Neb. 298, 263 N.W.2d 469 (1978), we recognized that the earning capacity of *both parties* in a dissolution of marriage is a proper inquiry and consideration by the court. Alimony in excess of one's

earning capacity is an abuse of discretion. The relevant inquiry becomes whether such an award is present here.

We are confronted with a situation where Charles, in effect, has been awarded patently unprofitable businesses. While the condition of a business is an important consideration in determining the propriety of alimony to be paid, the condition of a spouse's business is not the sole factor in determining proper alimony. Rather, the earning capacity of a spouse operating a business is an element which is to be considered in determining alimony. *Kosnopfl v. Kosnopfl*, 206 Neb. 524, 293 N.W.2d 854 (1980); § 42-365. The actual earning capacity or ability of a spouse to engage in gainful employment is frequently more important than the profitability of a spouse's business in resolving the question of alimony. Here, it is undisputed that Charles has acquired a degree of expertise in his present occupation. It is reasonable, therefore, that Charles would have an earning capacity or ability to earn a wage quite apart from his actually or personally managing the corporations involved in the dissolution proceedings. However, in the interests of equity, we must also take into consideration that Betty is a licensed beautician, in good health, and has been awarded her salon. Consequently, we are constrained to take into account Betty's earning capacity in the same manner as was done regarding Charles' earning capacity, notwithstanding a complete absence of information regarding Betty's income from her beauty salon. Further, the record discloses that Betty's beautician business does not interfere with rearing the Gleasons' teenage daughter.

We are of the opinion that, taking into consideration that Betty received the house free and clear and her needs in maintaining the house, $800 per month as alimony is clearly in excess of what is a reasonable amount under the circumstances, especially in view of the earning capacity of each party. We believe that alimony in the amount of $400 per month would be reasonable under the circumstances. For this reason we modify the alimony to be paid by Charles to Betty so that Charles is required to pay alimony in the sum of $400 per month, provided such alimony shall terminate on the death of either party or on Betty's remarriage.

We cannot accept Betty's contention that the property division ordered by the court is unfair and inadequate. If we accept the values assigned by the parties to the respective assets they received, Betty received $143,000 and Charles received $447,000, offset by debts of $278,000 which he is required to assume under the decree. Therefore, the net value of Charles' assets is $169,000. There was evidence presented by an appraiser who established the value of the real estate owned by Gleason Enterprises, Inc., at $322,000, which is $72,000 in excess of the $250,000 value asserted by Charles. Adjusting values in the light of the appraiser's testimony, the net value of the assets received by Charles is $241,000. Under this formulation it is apparent that Charles receives approximately 63 percent of the marital property, while Betty receives 37 percent. These figures are within the guidelines approved in *Martin v. Martin*, 215 Neb. 508, 339 N.W.2d 754 (1983), where we held that, generally, in proceedings for the dissolution of a marriage, awards of property to a spouse from the marital estate vary from one-third to one-half of the value of the property involved, depending on the facts and circumstances of the particular case.

Further, we cannot accept Betty's claim that the periodic payments ordered by the district court and designated as "alimony" were in fact a property adjustment for distribution of marital property. We believe that the amount to be paid by Charles was correctly designated as "alimony," a means to provide continued maintenance or support for Betty, especially since Betty has apparently had little, if any, income from her beauty salon, as reflected by the record before us. We believe that if the trial court had intended the periodic payments as part of a property adjustment and distribution, the district court would have expressed itself accordingly and not employed the term "alimony" in reference to the periodic payments. Betty's attempts to characterize the payments as a property division or adjustment of property interests are without sound basis and are not supported by the record. Because we have directed that Charles pay alimony, and, further, because we have held that the division of property ordered by the district court is proper, Betty's contention and characterization of the periodic

payments are without merit.

Consequently, as previously indicated in this opinion, we modify the district court's order regarding alimony to be paid by Charles, namely, Charles shall pay Betty alimony in the amount of $400 per month, provided such alimony shall terminate on the death of either party or on Betty's remarriage. In all other respects the district court's judgment is affirmed. We remand this matter to the district court for modification of the judgment regarding alimony consistent with this opinion.

This court awards to Betty's attorney the sum of $750 as an attorney fee for services regarding the appeal.

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

CAPORALE, J., dissenting.

I dissent. The record as presented to us demonstrates not only that the alimony awarded by the district court to Mrs. Gleason is excessive but that there is no basis for awarding any alimony to her.

The record is silent on the question of Mrs. Gleason's earnings. *Essex v. Essex*, 195 Neb. 385, 238 N.W.2d 235 (1976), states that support is one of the primary reasons for awarding alimony and holds that it is not error to deny alimony in the absence of a showing of need. How can Mrs. Gleason's need for alimony be determined in the absence of proof of that fact? Did Mrs. Gleason deliberately not prove her earnings because she would thereby establish a lack of need?

Whatever the reasons for the state of the record and whatever the answers to the foregoing questions, we cannot "review de novo on the record" what the record does not contain.

Moreover, how on earth can Mrs. Gleason be entitled to an attorney fee in this court for losing half of the alimony she had before she was brought here?

I would affirm in part and in part reverse with the direction that the judgment with respect to alimony be vacated and no alimony be awarded.

KRIVOSHA, C.J., joins in this dissent.

IN RE APPLICATION OF JAMES M. McCARTY.
JAMES M. McCARTY, APPELLANT, V. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE.
IN RE COMPLAINT OF BEE LINE MOTOR FREIGHT, INC. AND BROWN TRANSFER CO.
BEE LINE MOTOR FREIGHT, INC., AND BROWN TRANSFER CO., APPELLEES, V. KRUSE TRANSPORTATION CO., INC., APPELLANT, CANNING TRUCK SERVICE ET AL., INTERVENORS-APPELLEES.

358 N.W.2d 203

Filed November 9, 1984. No. 83-833.

1. **Public Service Commission: Appeal and Error.** It is not the province of this court to weigh or resolve conflicts in the evidence or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it.
2. _____: _____. This court upon appeal cannot disturb findings of the Nebraska Public Service Commission unless it appears that some requirements of the law have been violated or disregarded or that the result reached cannot reasonably be derived from the facts proved.
3. _____: _____. On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.

Appeal from the Nebraska Public Service Commission. Affirmed.

Michael J. Ogborn of Nelson & Harding, for appellants.

Marshall D. Becker, for appellees Bee Line Motor Freight and Brown Transfer Co., and for intervenors-appellees.

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

KRIVOSHA, C.J.

This is an appeal from orders entered by the Nebraska Public Service Commission (Commission) in two cases which were consolidated for hearing before the Commission and which are consolidated for disposition before this court. The first case involves an application by James M. McCarty, filed pursuant to the provisions of Neb. Rev. Stat. § 75-311 (Reissue 1981),

seeking approval to transfer stock in Kruse Transportation Co., Inc. (Kruse), from the present owner, Carl Cooper, to McCarty. The second action involves a complaint filed by Bee Line Motor Freight, Inc. (Bee Line), and Brown Transfer Co. (Brown) against Kruse, alleging that the authority held by Kruse was dormant and therefore should not be transferred absent a showing that the transfer is or will be required by the present and future public convenience and necessity, as required by Neb. Rev. Stat. § 75-318 (Reissue 1981). Canning Truck Service, Lyon Transfer Company, and M & S Transfer were granted leave to intervene and join with Bee Line and Brown in their complaint. Following a public hearing, the Commission denied the application filed by McCarty. McCarty has appealed to this court, maintaining that the Commission erred in numerous ways. We need, however, only determine the issue regarding dormancy, for if we find that the action of the Commission in finding the Kruse authority dormant is supported by the evidence, we are required by law to affirm the action of the Commission. Our review of the record convinces us that there is sufficient evidence to support the order entered by the Commission on the dormancy issue, and, accordingly, we affirm.

Each side vigorously argues that the other has the burden of proof in this case. The issue is somewhat blurred because we have two different types of action consolidated for trial. We may, however, dispose of this issue by simply noting that regardless of who may have the burden of proof in each particular case, the evidence upon which the Commission relied was produced prior to Commission action. Therefore, the question of who should have produced the evidence or who had the burden of proof need not be considered.

The evidence discloses that McCarty produced three witnesses in support of his application for authority to purchase the stock. The witnesses were Paul Schmalenbach, Donald O. Hall, and the appellant James M. McCarty. Both Hall's prepared statement, introduced in evidence, and his oral testimony given at the hearing established that his involvement with the Kruse operation began on or about August 1, 1982, when McCarty took over the Kruse operation without

authority from the Commission. Except for an unsupported conclusion contained in Hall's prepared statement, to the effect that he was familiar with the Kruse operation prior to August 1, 1982, and knew it held itself out to the shipping public as a motor common carrier, Hall's testimony provided no evidence upon which the Commission was required to find that the Kruse certificate was active prior to the time that McCarty took over the Kruse operation. Likewise, McCarty's prepared statement contained no evidence which required the Commission to find that the Kruse certificate was active prior to August of 1982. Consequently, only the testimony of Paul Schmalenbach remained to be considered. Schmalenbach's prepared statement recited the fact that prior to August 1, 1982, he "managed" Kruse for the owner, Carl Cooper, and did everything expected of a "general manager." While his prepared statement indicated that he was the *general manager* of Kruse, Schmalenbach's oral testimony contradicted that fact. Schmalenbach testified at the hearing that he did not manage Kruse, but was merely an "agent" for Kruse. Schmalenbach did not even know what authority Kruse held. In response to a question on cross-examination, he testified: "A I don't know what their authority read. Q How did you know when you were given a load whether or not Kruse Transportation actually had that authority or not? A Well, I'm just an agent. I'm not the manager. I did what the manager says." The record further reflects that Kruse had no manager at any time in Omaha and that Schmalenbach, as "agent," was the only person stationed in Omaha who was connected with Kruse.

While Schmalenbach attempted to establish that Kruse had transported barrels intrastate from time to time prior to August 1982, the evidence was so vague and unsupported by any other corroborative evidence that the Commission apparently chose to disregard it, as it was entitled to do.

McCarty argues that there was ample evidence to support a finding that Kruse was not dormant prior to his purchase. The record would seem to dispute this contention. As an example, on cross-examination McCarty was asked about freight bills brought to the hearing but which were never offered in evidence.

Q Now, your counsel was kind enough to bring along a numer [sic] of freight bills, some of which covered Exhibit Number 5, and I have looked through those with your able assistance. Would I be correct in making the statement that of the freight bills that you brought with you, except for some shipments that date back to 1976, you have no actual freight bills showing transportation by Kruse during the years 1977, 1978, 1979, 1980, 1981, or the first part of 1982?

A Well, there should be records here for 1974 and '75 and '76 and 1977 and 1978. And Mr. Cooper assured me that there was other records to cover the years of 1979 and 1980 and 1981, and since Mr. Cooper had left Chillicothe, Missouri down to Tulsa, I have had a very difficult time to get Mr. Cooper to cooperate with me to furnish me the rest of the papers and everything.

Q Yes, I understand that and I read your statement. I just wanted to make it clear on the record that the records you brought with you, which may have been all you're able to find, we have no freight bills showing actual transportation intrastate commerce for those periods that I need.

A I have not seen the records for 1980.

Q Now you do have, and your counsel made reference to, annual report that was filed by Kruse for 1980 and for the year 1981. Do you recall that?

A Yes.

Q But, as far as any underlying documents are concerned, you have not brought with you nor have you ever seen any freight bills covering that transportation.

A No, I have not seen no freight bills.

The reference to Cooper in McCarty's testimony pertained to the former owner of Kruse, Carl Cooper, who, according to the statement submitted by McCarty, was a certified public accountant, formerly of Chillicothe, Missouri, who had been transferred to Tulsa, Oklahoma. The record failed to disclose any evidence of anyone, other than Schmalenbach as agent, operating an intrastate transportation operation on behalf of Kruse in the State of Nebraska at any time before McCarty sought to purchase the stock.

sought to purchase the stock.

Furthermore, witnesses for the various complainants appeared and testified that they were actively engaged in intrastate transportation in the State of Nebraska, were mindful of their competition, and were not aware of any movement by Kruse prior to the time that McCarty sought to acquire the stock.

The only other evidence offered with regard to the movement of intrastate loads was a document produced by McCarty which showed shipments beginning on July 18 and continuing through December 22, 1982. No explanation is given as to why there is suddenly movement by Kruse beginning July 18, 1982, though there was no movement prior to that date, or how such shipments suddenly came into existence when Kruse had no personnel other than Schmalenbach as agent before McCarty purchased the stock. One may surmise that the Commission concluded that the shipments originating on and after July 18, 1982, were the result of efforts by McCarty. Because the shipments were carried without prior Commission approval, they could not be considered in determining whether the certificate of authority had become dormant prior to the transfer of the stock. *Jeffries-Eaves, Inc. v. Gettel, Inc.*, 173 Neb. 337, 113 N.W.2d 476 (1962).

The most that can be said about the evidence produced is that there was a conflict in the evidence, some of which was created by McCarty's own witnesses. The Commission obviously chose to believe the complainants rather than the applicant. We are without authority to order otherwise. In *In re Application of ATS Mobile Telephone*, 213 Neb. 403, 413, 330 N.W.2d 123, 129 (1983), we said:

> " 'Whether we agree or disagree with the decision of the commission, however, is immaterial. It is not the province of this court to weigh or resolve conflicts in the evidence, or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it. . . .' " [Citation omitted.]

Further, in *Nebraska Railroads of Omaha v. Nebco, Inc.*, 194 Neb. 322, 330, 231 N.W.2d 505, 510 (1975), we said:

> As bearing upon the question of when the findings of the Commission may be held to be "arbitrary and [sic] capricious," it was held in Robinson v. National Trailer Convoy, Inc., 188 Neb. 474, 197 N.W.2d 633 (1972), that if there is evidence to sustain the findings of the Commission, this court may not intervene. It is only where the findings of the Commission are against all the evidence that this court may hold the Commission's findings are arbitrary and [sic] capricious. The test, we believe, is best summarized in In re Lincoln Traction Co., 103 Neb. 229, 171 N.W. 192 (1919), wherein this court stated the rule to be: "This court upon appeal cannot disturb findings of the commission, unless it appears that some requirements of the law have been violated or disregarded, or that the result reached cannot reasonably be derived from the facts proved."

(Emphasis omitted.) See, also, *In re Application of Northwestern Bell Tel. Co., ante* p. 563, 357 N.W.2d 443 (1984); *In re Application of Crusader Coach Lines*, 213 Neb. 53, 327 N.W.2d 98 (1982).

When all of the evidence is considered, including the testimony by complainants that they were not aware of Kruse's operations prior to August of 1982, one cannot say that the action of the Commission finding the Kruse authority dormant was arbitrary. McCarty argues that the testimony of the competitors that they were not aware of Kruse's presence does not establish dormancy. However, we have previously held to the contrary. Recognizing that it is extremely difficult to prove the absence of a fact, we said in the case of *Ace Gas, Inc. v. Peake, Inc.*, 184 Neb. 448, 453, 168 N.W.2d 373, 376 (1969): "The evidence of the protestants was that they had not experienced any competition from Wroughton prior to the operations referred to. They believed Wroughton's authority, to the extent that it authorized transportation of bulk commodities and commodities requiring special equipment, was dormant."

We cannot say, as a matter of law, that the Commission was arbitrary in considering the statements of the complainants, together with all of the other evidence before it. Further, we

cannot say, as a matter of law, that the evidence would not support a finding by the Commission that the certificate of authority was dormant. Being unable to find that the action of the Commission was arbitrary or capricious, we cannot say that its finding was in error.

> The rule is well established that on an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the Commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.

In re Application of Hunt Transportation, 214 Neb. 236, 240, 333 N.W.2d 883, 885 (1983).

Having concluded, therefore, that the Commission did not act arbitrarily in determining that the certificate previously held by Kruse had become dormant prior to the time that McCarty sought to acquire the stock, it was incumbent upon McCarty to show to the Commission that the transfer "is or will be required by the present and future public convenience and necessity." See § 75-318. On this issue the record is abundantly clear that no such showing was made.

No one introduced evidence as to what authority was held by Kruse, let alone how it would be needed in the future. As we observed parenthetically in *Neb. Public Service Commission v. Grand Island Mov. & Stor. Co., Inc.*, 203 Neb. 356, 366, 278 N.W.2d 762, 769 (1979):

> Statements of counsel are not evidence. Statements of Commission members are not evidence. Matters of fact known to Commission members are not evidence and are not bases for findings of fact. If matters in the records of the Commission are to be considered by this court on review, they must be included in whatever part of the record, either the bill of exceptions or the transcript, is appropriate under the proper rules.

The record is totally devoid of any evidence that the current needs of the public are not being met or that either present or future public convenience and necessity require the transfer of this dormant certificate. In this regard McCarty failed to meet

his burden. For these reasons we believe that the action of the Public Service Commission was not arbitrary or capricious and must be affirmed.

AFFIRMED.

FRANCES E. RALEY, APPELLEE, V. MILTON C. RALEY, APPELLANT.
357 N.W.2d 470

Filed November 9, 1984. No. 83-923.

1. **Alimony: Pensions.** It is proper to consider retirement benefits in determining whether alimony should be awarded.
2. _____: _____. In determining the amount of alimony to be awarded, a retirement benefit earned prior to the marriage may be considered.
3. **Alimony: Property Division.** The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined.
4. **Alimony.** The ultimate test in determining alimony is one of reasonableness.
5. _____. In awarding alimony the total obligation imposed upon the party and that party's ability to make the payments required must be considered in determining whether the award made was erroneous.

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

James P. Miller, for appellant.

James Michael Edgar, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding for the dissolution of a marriage. The trial court dissolved the marriage; divided the marital property; awarded custody of the minor children of the parties to the petitioner, Frances E. Raley; and awarded child support, alimony for 121 months, and attorney fees to the petitioner.

The trial court further awarded the petitioner an additional $200 per month as one-half of the amount the respondent

would receive as a retirement benefit if he were to retire from the U.S. Postal Service as of the date of the decree, the payments to commence upon the retirement of the respondent from the Postal Service.

The respondent, Milton C. Raley, has appealed and has assigned as error the award of alimony, the consideration by the trial court of the respondent's military pension, and the award to the petitioner of a portion of the respondent's postal pension.

The parties were married on March 23, 1968. They have two children; Christie, age 16, and Tammy, age 14.

The petitioner, age 46, sustained a back injury while she was employed in a sheet metal factory prior to the marriage. As a result of this injury, she had a laminectomy at the level of the fifth lumbar vertebra. During the course of the marriage, she worked in a bakery for approximately 8 years. She finally left that job because of back pain from her earlier injury. She testified that she is now unable to sit or stand for extended periods of time and that she suffers from bronchial asthma. The petitioner's only other employment skill results from secretarial training she received in high school. After the filing of the petition for divorce, the petitioner applied for ADC benefits, which she now receives.

Prior to the marriage, the respondent retired from the military service and began receiving a military pension, which now is $500 a month. The respondent is currently employed as a printer by the Postal Service, with a gross salary of $23,653 per year, although he testified that he only "clears" about $1,000 per month. The respondent is entitled to receive retirement benefits from the Postal Service which would amount to a monthly annuity of $400 if he retired at the time of trial.

The respondent contends that his military pension, which was earned prior to marriage, should not be considered for alimony or property division purposes.

In a number of cases we have held that it is proper to consider retirement benefits in determining whether alimony should be awarded. See, *Taylor v. Taylor*, 217 Neb. 409, 348 N.W.2d 887 (1984); *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981); *Pyke v. Pyke*, 212 Neb. 114, 321 N.W.2d 906 (1982).

In *In re Marriage of Bedwell*, 626 S.W.2d 455 (Mo. App.

1981), the appellant argued that it was unfair to consider his military pension in gauging his ability to pay alimony because all but 16 months of the service for which the pension was paid had been prior to the marriage. In holding that it was correct to consider the pension, the court said at 456:

> This court perceives no reason why the amount of a military pension should be deducted from the total income of Homer and maintenance awarded based on the reduced total. To do so would ignore the facts. The court was correct in including the amount of the military pension in determining Homer's income and his ability to pay maintenance.

The fact that the respondent acquired the right to a military pension prior to his marriage to the petitioner was not a bar to its consideration by the trial court in determining the issue of alimony.

The respondent further contends that the award to the petitioner of 50 percent of the postal retirement benefits was patently unfair. He argues that the trial court assumed and speculated that a pension fund was available from facts not in evidence. A review of the record, however, demonstrates that postal retirement benefits, although perhaps not vested, did exist. Neb. Rev. Stat. § 42-366(8) (Cum. Supp. 1982) includes pension plans as property which shall be included as part of the marital estate.

The evidence upon which the value of the postal retirement benefit was determined does not appear in the record. At the conclusion of the trial, the trial court directed the parties to "Get me the figures on the pension fund."

The decree, dated November 17, 1983, awarded the petitioner one-half of the amount the respondent would receive if he retired on that date, the exact amount to be determined later. An order dated December 1, 1983, fixed the amount at $200 per month. The order recited that the finding was based upon "Exhibit A," an exhibit attached to the order and made a part thereof by reference. Exhibit A, however, does not appear in the record.

It is the responsibility of the appellant to see that the record filed in this court is complete insofar as all matters to be

reviewed by this court are concerned. In the present state of the record we presume that the evidence before the trial court at the time the order of December 1, 1983, was made, supported the finding made on that date.

As to the contention that the award of alimony was excessive, on many occasions we have held:

> The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined. They are to be determined by the facts in each case and the courts will consider all pertinent facts in reaching an award that is just and equitable.

Grady v. Grady, 204 Neb. 595, 597, 284 N.W.2d 402, 403-04 (1979).

The ultimate test is one of reasonableness. "The total obligation imposed upon the party and that party's ability to make the payments required must be considered in determining whether the award made was erroneous." *Shald v. Shald*, 216 Neb. 897, 905, 346 N.W.2d 406, 411 (1984).

The respondent is now obligated to payments of $800 per month ($400 for child support and $400 for alimony). At a minimum his monthly income is $1,000 from his employment and $500 from his military pension.

As we view the record, the award of alimony was not excessive. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CARY L. HOXWORTH, APPELLANT.

358 N.W.2d 208

Filed November 9, 1984. No. 84-071.

1. **Search Warrants: Affidavits.** Affidavits for search warrants must be tested in a commonsense, realistic fashion. Where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the court

should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner.

2. **Search Warrants: Probable Cause.** In determining whether to issue a search warrant, the task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
3. **Rules of Evidence: Expert Witnesses.** Under the provisions of Neb. Rev. Stat. § 27-702 (Reissue 1979), it is no longer necessary to have formal training in order to be considered as an expert witness; actual practical experience in the field can also qualify one as an expert in that field.
4. **Identification Procedures: Proof.** Although identification of the accused is an essential element in establishment of guilt beyond a reasonable doubt, such identification can be inferred from all the facts and circumstances that are in evidence.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed.

Michael J. Javoronok of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellant.

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

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

HASTINGS, J.

Following a trial in which a jury was waived, the defendant was convicted of the misdemeanor offenses of possession of marijuana weighing more than 1 ounce but less than 1 pound and possession of drug paraphernalia. He has appealed to this court, alleging as error that (1) the trial court failed to suppress evidence seized pursuant to a July 23, 1983, search warrant; (2) the trial court convicted the defendant without competent evidence identifying the substance possessed as marijuana; and (3) the trial court convicted the defendant without an in-court identification of the defendant. We affirm.

On July 18, 1983, Roger D. Sterkel, the sheriff of Morrill County, obtained a search warrant to search the premises of Erman Overshiner. His affidavit in support of the issuance of that warrant alleged that he had been informed by a reliable

informant that Overshiner was dealing in drugs and that the informant had seen certain items of contraband in specific locations within Overshiner's trailer house. The sheriff executed that search warrant on the date that it was issued and found precisely the items listed in the affidavit and in the place described therein.

On July 23 the sheriff obtained a warrant to search the premises belonging to the defendant. This warrant was also supported by the sheriff's affidavit in which he stated that he had been informed by an informant who "is reliable and has developed other cases where valid searches and arrests were made," that the defendant was in possession of drugs, that he was selling them, and that on that particular day the informant had seen marijuana and paraphernalia in the basement and other places in the defendant's residence. That warrant was executed by the sheriff on the date issued, and the items listed in the affidavit and warrant were found in the locations specifically designated.

The sheriff also testified that he had known the informant for about 15 years, that he believed the informant knew what marijuana looked like, and that the informant was familiar with drugs and marijuana.

It is true that the sheriff's affidavit contained an inaccurate statement that the informant was reliable and had developed "other cases." The evidence disclosed that the sheriff had had experience with this informant on only one other occasion, the Overshiner case, but his information had proved to be accurate. However, one former case is sufficient to support a conclusion of accuracy. Therefore, if "cases" is stricken from the affidavit, leaving only one prior case, the affidavit is left with sufficient content to establish probable cause. *State v. Sims*, 216 Neb. 569, 344 N.W.2d 645 (1984). As stated in *State v. Arnold*, 214 Neb. 769, 773, 336 N.W.2d 97, 99 (1983):

> Affidavits for search warrants must be tested in a commonsense, realistic fashion. Where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the court should not invalidate the warrant by interpreting

> the affidavit in a hypertechnical rather than a commonsense manner.

The record reflects that the "two-prong" test concerning the informant's reliability and basis of knowledge was met by the affidavit and warrant issued thereon in this case. *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969).

Compliance with the less burdensome requirements of *Illinois v. Gates,* 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), is even more apparent.

> *Gates* holds that the elements under the two-pronged test concerning the informant's veracity, reliability, and basis of knowledge should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is probable cause to believe that contraband or evidence is located in a particular place. The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. Arnold, supra at 774, 336 N.W.2d at 100. Defendant's first assignment of error is without merit.

Defendant's second assignment of error relates to the testimony of the sheriff identifying the seized material as marijuana. Because the witness stated he did not consider himself an expert, defendant argues that he should not have been permitted to testify as an expert under the provisions of Neb. Rev. Stat. § 27-702 (Reissue 1979).

It is true the sheriff testified that he had no experience in botany and that he knew very little about the tests which scientific experts used to determine whether a substance was marijuana. However, the record does disclose that the sheriff had 9 years' experience in law enforcement, and he testified that after having worked with marijuana over that period of time, "you know what it looks like and what the seeds look like." He

said that he had attended approximately 50 hours of state-sponsored drug seminars to educate himself about their characteristics, and this training included a recognition of the various properties of marijuana, such as odor, texture, and appearance. He also has conducted seminars for various civic groups and schools about the use and appearance of drugs, five or six times a year during the last 9 years.

Section 27-702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, *a witness qualified as an expert by knowledge, skill, experience, training*, or education, may testify thereto in the form of an opinion or otherwise.

(Emphasis supplied.)

It is quite apparent that under the provisions of § 27-702 it is no longer necessary to have formal training in order to be considered an expert; actual practical experience in the field can also qualify one as an expert in that field. *State v. Loveless*, 209 Neb. 583, 308 N.W.2d 842 (1981); *State v. Briner*, 198 Neb. 766, 255 N.W.2d 422 (1977).

In addition, a field test was performed on the substance with a "narc kit," which proved to be positive for marijuana. This test was certainly corroborative of the sheriff's testimony.

The testimony of the sheriff was properly admitted and did furnish sufficient competent evidence of the identity of the marijuana.

The defendant complains that he was not specifically identified from the witness stand during the trial. This is true. However, although identification of the accused is an essential element in establishment of guilt beyond a reasonable doubt, such identification can be inferred from all the facts and circumstances that are in evidence. *State v. Kaba*, 217 Neb. 81, 349 N.W.2d 627 (1984). As in *Kaba*, the defendant's identity was not at issue and he was present at trial. "THE COURT: State v Cary Hoxworth, are you present? MR. HOXWORTH: Yes, Sir." Additionally, the bill of exceptions is replete with references by the witnesses to the defendant Hoxworth. As stated in *Kaba, supra* at 88, 349 N.W.2d at 632: "It is inconceivable that [the witness] would sit silently by, knowing

the wrong man had been brought to trial. [His] silence is eloquent and sufficient to support a finding of identity in this case."

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

AFFIRMED.

MELVIN E. SMITH, APPELLANT AND CROSS-APPELLEE, V. FREMONT CONTRACT CARRIERS, INC., ET AL., APPELLEES AND CROSS-APPELLANTS.

358 N.W.2d 211

Filed November 9, 1984. No. 84-145.

1. **Workmen's Compensation: Jurisdiction.** The Workmen's Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
2. **Workmen's Compensation: Judgments.** A decree or award in a workmen's compensation case is final unless the petitioner seeking to reopen the case can bring the case within the terms of any statute to that effect.
3. **Workmen's Compensation: Courts: Judgments.** In civil cases a court of general jurisdiction has inherent power to vacate or modify its own judgment during the term at which it was rendered. However, this is a rule of the common law and does not apply to statutory tribunals such as the Workmen's Compensation Court.
4. **Workmen's Compensation: Statutes: Attorney Fees.** An amendment to a workmen's compensation statute which provides for the payment of attorney fees relates to the remedy and affects procedure only, and does not interfere with substantive rights. Therefore, such fees as are provided may be taxed as an item of costs in entering judgment on a claim that arose before the amendatory act was passed.
5. **Workmen's Compensation: Attorney Fees.** In a workmen's compensation case an employee may not withhold evidence of medical expense at the first hearing, inadvertent though it might be, and then claim on rehearing that an attorney fee should be awarded because the award was increased.
6. **Workmen's Compensation.** In cases involving disability arising from a stroke, the employee has the burden of establishing by a preponderance of the evidence that exertion in his employment, in reasonable probability, contributed in some material and substantial degree to cause the injury. The presence of a preexisting disease or condition would enhance the degree of proof required to establish that an injury arose out of and in the course of employment.

7. _____. 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.
8. **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. The facts are not reweighed on appeal.

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

William G. Line of Kerrigan, Line & Martin, for appellant.

Walter E. Zink II of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

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

HASTINGS, J.

The plaintiff employee has appealed from an award of the Nebraska Workmen's Compensation Court which denied him benefits for waiting time, attorney fees, and interest. The defendant employer and its insurer, Great West Casualty Company, have cross-appealed from the award generally, claiming that the injury which plaintiff suffered was not compensable.

On January 11, 1983, the plaintiff was a 54-year-old man employed by the defendant Fremont Contract Carriers, Inc., driving a tractor-trailer rig. While driving on an interstate highway in Indiana, his trailer brakes locked, the rig went off the road, he applied the tractor brakes, and they locked. He then lost control of the unit; it moved across the median, over a large sign, past the southbound lanes, and came to rest in a ditch. A short time after the accident, the plaintiff noticed that he could not put change back in his pocket, he had difficulty putting money in the coffee machine, he could not hold a cup of coffee, and he had a "lost" feeling. His condition remained about the same for the next couple of days. By Saturday, after the plaintiff had returned home, he was taken to the hospital in Fremont, and then to Methodist Hospital in Omaha the same evening. During his stay in the hospital, he was diagnosed as

having suffered a cerebrovascular accident and was subjected to surgery to clean out his right carotid artery, which was causing paralysis and weakness of his left arm and hand.

After the defendants had refused to pay any compensation benefits, plaintiff filed a petition in the Workmen's Compensation Court. Following a hearing before Judge Vrana, an award was entered in favor of the plaintiff for benefits for disability and medical expenses. A rehearing before a three-judge panel was held at the request of the plaintiff because certain items of medical expense, by inadvertence, were not offered in evidence by the plaintiff at the first hearing. An award on rehearing was entered on January 24, 1984, which in effect affirmed the original award, plus adding the items of expense originally omitted.

The plaintiff then filed a motion to amend the award to provide for penalty payments, attorney fees, and interest under the provisions of Neb. Rev. Stat. § 48-125 (Supp. 1983), which had been authorized by 1983 Neb. Laws, L.B. 18. The compensation court denied the request on three grounds: (1) L.B. 18, under which the plaintiff claimed these benefits, was not effective until August 26, 1983, after the accident, and those provisions were substantive in nature and therefore not applicable to this situation; (2) The plaintiff was not entitled to these benefits because a reasonable controversy existed; and (3) The court had no jurisdiction to entertain such a motion because, after rehearing, the compensation court may modify its award only for the purpose of correcting any ambiguity or clerical error as provided for in Neb. Rev. Stat. § 48-180 (Reissue 1978).

We agree with the compensation court as to its last contention. The Workmen's Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. 81 Am. Jur. 2d *Workmen's Compensation* § 80 (1976). A decree or award in a compensation case is final unless the petitioner seeking to reopen the case can bring the case within the terms of any statute to that effect.

We previously have referred to § 48-180, which provides for the modification of awards because of ambiguity or clerical

error. Neb. Rev. Stat. § 48-141 (Reissue 1978) permits the modification of an award under certain circumstances, not applicable here, because of the increase or decrease of disability.

In Nebraska, in civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment during the term at which it was rendered. *Barney v. Platte Valley Public Power and Irrigation District*, 147 Neb. 375, 23 N.W.2d 335 (1946). This is a rule of the common law. *Schubach v. Hammer*, 117 Kan. 615, 232 P. 1041 (1925); 49 C.J.S. *Judgments* § 229 (1947). That rule does not apply to statutory tribunals such as the compensation court.

However, this does not end our inquiry. If the failure to award the benefits complained of by the plaintiff was either the breach of a mandatory duty or an abuse of discretion on the part of the compensation court, we must grant relief.

Under the provisions of § 48-125 existing at the date of this injury, there seems to be little doubt under our prior holdings but that the plaintiff was not entitled to either statutory penalties or attorney fees because of a sustainable finding of the existence of a reasonable controversy. *Savage v. Hensel Phelps Constr. Co.*, 208 Neb. 676, 305 N.W.2d 375 (1981). To the same effect, that section did not authorize the award of an attorney fee when the employee was the appellant. *Akins v. Happy Hour, Inc., supp. op.* 209 Neb. 748, 311 N.W.2d 518 (1981).

However, at the time of the rehearing, October 13, 1983, L.B. 18 was in effect. The question then becomes, Was this a substantive or procedural change so as to make the critical effective date the day of the accident or the day of the hearing?

We previously have decided this issue. *Western Newspaper Union v. Dee*, 108 Neb. 303, 187 N.W. 919 (1922), involved a situation where the employee was injured March 12, 1918. At that time, the predecessor of § 48-125, Rev. Stat. § 3666 (1913), provided only that compensation under the provisions of that "article shall be payable periodically in accordance with the methods of payment of the wages of the employe at the time of his injury or death." That law was amended by 1917 Neb. Laws, ch. 85, § 9½, p. 208, to provide for the 50-per centum penalty for all delinquent payments. It was not until a further amendment, 1919 Neb. Laws, ch. 91, § 4, p. 234, that § 3666

was to provide for the allowance of a reasonable attorney fee whenever the employer neglects to pay compensation for 30 days after the injury.

In *Western Newspaper Union, supra*, the trial court allowed an attorney fee. On appeal that award was upheld in the following language at 307, 187 N.W. at 921: "Though this provision was inserted by amendment after defendant was injured, the attorney's fee relates to the remedy and may be taxed as an item of costs in entering judgment on a claim that arose before the amendatory act was passed."

The authority of *Western Newspaper Union* was followed in *Solomon v. A. W. Farney, Inc.*, 136 Neb. 338, 286 N.W. 254 (1939), which held that a similar amendment affected procedure only and did not interfere with substantive rights. It cited with approval at 348, 286 N.W. at 260, the following syllabus point from *Western Newspaper Union*: " 'In a proceeding under the workmen's compensation act the allowance of a reasonable attorney's fee in the district court affects the remedy only and may be taxed as an item of costs, though the injury for which compensation is allowed occurred before the legislature authorized such a fee.' "

The final question in this regard is whether the rule of reasonable controversy, expressed in *Savage, supra*, is applicable to the expanded § 48-125.

L.B. 18, Eighty-eighth Session of the Nebraska Legislature, effective as of August 26, 1983, effected the following changes in the compensation provisions of § 48-125:

1. Added the bracketed language:

> Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the court [in all cases when the employee receives an award.]

2. Changed the following language (new language in brackets, deleted language emphasized):

> *In the event* [If] the employer files an application for a rehearing before the compensation court *en banc* from an award of a judge of the compensation court and fails to

obtain any reduction in the amount of such award, the compensation court *sitting en banc may* [shall] allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court.

3. Added the following language:

If the employee files an application for a rehearing before the compensation court from an order of a judge of the compensation court denying an award and obtains an award or if the employee files an application for a rehearing before the compensation court from an award of a judge of the compensation court where the amount of compensation due is disputed and obtains an increase in the amount of such award, the compensation court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing . . . .

(2) When an attorney's fee is allowed pursuant to this section, there shall further be assessed against the employer an amount of interest on the final award obtained . . . .

Plaintiff's argument seems to be that because of the addition of the language "in all cases when the employee receives an award," the reasonable controversy limitation does not apply. We do not agree. That language simply declares the obvious, i.e., no penalty certainly will be imposed if an award is not received. The reasonable controversy rule is still viable.

Finally, we would point out that the employee is not entitled to an attorney fee on rehearing under the new statutory provisions in any event. The section of L.B. 18 which allows for an attorney fee when the employee files the application for rehearing is pertinent only on rehearing "from an award of a judge of the compensation court where the amount of compensation due is disputed and [the employee] obtains an increase in the amount of such award." The amount of the medical expense to which the employee was entitled was not disputed. The employee simply neglected to present evidence of the amount of his claim. An employee may not withhold

evidence of medical expense at the first hearing, inadvertent though it might be, and then claim on rehearing that an attorney fee should be awarded because the award was increased.

The defendants' cross-appeal alleges that the compensation court erred in its finding of the requisite causal connection between the truck accident and the employee's subsequent stroke. The defendants argue that the plaintiff failed to demonstrate that his employment stress (1) contributed in some material and substantial degree to cause the stroke and (2) was greater than the stress of nonemployment life.

Brokaw v. Robinson, 183 Neb. 760, 764, 164 N.W.2d 461, 464-65 (1969), properly states an employee's burden of proof in stroke cases:

> [T]he plaintiff now has the burden of establishng [sic] by a preponderance of the evidence that exertion in his employment, in reasonable probability, contributed in some material and substantial degree to cause the injury. Obviously, the presence of a preexisting disease or condition would enhance the degree of proof required to establish that an injury arose out of and in the course of employment.

Accord *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 272 N.W.2d 372 (1978). This court has further stated:

> "The exertion 'greater than nonemployment life' test has been applied by this court *only* in cases involving heart attacks allegedly caused by the activities or stress of employment. *Chrisman v. Greyhound Bus Lines, Inc., supra; Sellens v. Allen Products Co., Inc., supra; Hyatt v. Kay Windsor, Inc.*, 198 Neb. 580, 254 N.W.2d 92 (1977); *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 272 N.W.2d 372 (1978); *Beck v. State*, 184 Neb. 477, 168 N.W.2d 532 (1969); *Brokaw v. Robinson*, 183 Neb. 760, 164 N.W.2d 461 (1969).
>
> "The rationale for the rule is discussed at some length in *Sellens, supra* at 509-11. Where a person suffers from a preexisting condition which he claims is aggravated by his employment, he has an increased burden of proving

> causation. The exertion 'greater than nonemployment life' test is simply an application of the increased burden of proof required in preexisting condition cases to the unique problems of proving causation of a myocardial infarction. We find no reason to extend the rule to other cases where the proof of causation is not usually as complex." (Emphasis supplied.)

Sandel v. Packaging Co. of America, 211 Neb. 149, 154-55, 317 N.W.2d 910, 914 (1982), quoting *Engel v. Nebraska Methodist Hospital*, 209 Neb. 878, 312 N.W.2d 281 (1981). That rationale is logically applicable to stroke cases.

The facts indicate that the plaintiff employee suffered from "a severe right internal carotid arteriostenosis and moderate left internal arteriostenosis." It was the opinion of the neurosurgeon that the plaintiff's stroke was related to his preexisting condition. "He undoubtedly had a lack of blood supply to the right side of the brain related to his severe stenosis of the right internal carotid artery." It is this artery that was operated on and cleaned out.

Two doctors were presented with a hypothetical question involving the plaintiff's factual circumstances:

> Q. Okay. Doctor, I'm going to give you a hypothetical question here from — assuming Mr. Smith was driving a truck on the interstate highway in January of 1983, that there was a brake failure on the truck, the brakes locked and that his truck went across the median taking out a sign, out of control, wound up in a barrow pit. Mr. Smith reporting that he was shaken up in the accident. That at the time he was going across the interstate he felt a terrific pain in his chest, like he felt the sign was coming through at him; that he was bounced around in the cab; and that at 5 o'clock — this incident occurring about 10 or 11 o'clock in the morning; and that at 5 o'clock the same day he was observed to have slurred speech, incoherent speech, kept repeating himself, his color was pale, he could not walk straight or — walk straight, in attempting to drink a cup of coffee, when he would keep reaching for his coffee cup, he would miss it by as much as 3 or 4 inches at a time. He was smoking a cigarette, let the cigarette burn clear down to

> his finger and couldn't find the ashtray; and he had not been drinking or under the influence of alcohol. Would you feel on the basis of those facts that the accident in the morning was a triggering effect that started the cardiac vascular accident? . . .

Dr. Jack Lewis, board qualified in internal medicine, responded:

> A. I think that because of the time factor involved and the natural history of a stroke occurring, that a precipitating event such as you described would have to be a cause and effect incident because of the hypertension. This would have certainly raised the blood pressure on an instant [sic] like you've talked about, and a big rise in his blood pressure would have certainly precipitated a hypertensive crisis and/or a stroke which occurred; and since this happened only hours afterward, I would feel from a medical standpoint there was a definite relationship.

Posed with a substantially similar question, with emphasis on the fact that the truck accident was precipitated by the mechanical failure of the brakes rather than any physical condition of the employee himself, Dr. Leslie Hellbusch, a neurosurgeon, replied: "A. Well, if that's true, then I think it would be more likely that the accident precipitated the stroke."

The relevant inquiry is whether the testimony is sufficient to establish, within reasonable probability, that the accident contributed in a material and substantial degree to the disability. The defendants argue that "expert medical testimony couched as 'more likely' is insufficient as a matter of law to support an award." Brief for Appellees at 17.

However, the case cited for this proposition does not so hold. *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981), involved an employee who suffered a back injury. Two out of three doctors testified they could not causally connect the previous work accident to the current injury. One doctor was asked whether the injury took place at the time of the accident or during the subsequent bed rest. He responded that it was "more likely" that the injury occurred when the plaintiff was lifting rather than while in bed. This court refused

to find a causal connection, stating at 113-14, 313 N.W.2d at 251: "A workmen's compensation award cannot be based upon possibility or speculation. If an inference favorable to the claimant can only be reached upon the basis of possibility or speculation, he cannot recover. . . . An award cannot be based upon conflicting inferences of equal degrees of probability."

The instant case does not involve conflicting inferences. Under the controlling circumstances, both doctors concluded there was a relationship between the accident and the stroke. The issue is not whether the plaintiff would have suffered a stroke regardless of the incident, but whether the incident substantially contributed to the stroke. See, e.g., *Benson v. Barnes & Barnes Trucking*, 217 Neb. 865, 872, 354 N.W.2d 127, 132 (1984): "[W]e 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."

Dr. Lewis testified that the main causes of a stroke are arteriosclerosis and hypertension. It is undisputed that the plaintiff suffered from the former. However, it is also not subject to dispute that an accident of the kind suffered by Mr. Smith would cause a sharp rise in blood pressure or hypertension. The facts disclose that within a few hours after the accident Mr. Smith was undergoing significant problems with his motor coordination and his mental abilities. Those problems have continued from that time.

This court has stated innumerable times 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.

Person v. Red Lion Inn, 217 Neb. 745, 746, 350 N.W.2d 570, 571 (1984).

Expert testimony indicated that the accident caused "a big rise in [plaintiff's] blood pressure [which] would have certainly precipitated a hypertensive crisis and/or a stroke which

occurred . . . ." This evidence would appear to satisfy the requirement of a substantial and material cause, and the record therefore supports the compensation court's finding.

The second argument advanced by the defendants is that there is an inadequate showing of greater employment stress. As noted earlier, this is an element of the greater burden in stroke cases to establish a causal connection between the employment and the disability. One inquiry may be whether this applies to disabilities arising from an employment accident, as opposed to the mere fact of employment.

Mann v. City of Omaha, 211 Neb. 583, 319 N.W.2d 454 (1982), cited by the defendants, involved a police officer who suffered a heart attack. He alleged that the day-to-day stress of police work, not any individual incident, caused his disability. Similarly, in *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 272 N.W.2d 372 (1978), the plaintiff employee claimed that the stress of bartending caused his heart problems. In both instances the court evaluated the proof as to whether the stress of employment was greater than that of nonemployment life.

In the instant case plaintiff points to one individual incident which inarguably caused a high level of stress. Defendants' point appears to be that this was not established by expert testimony. Both doctors stated that such an accident would lead to a high level of stress. Neither compared the level of stress to nonemployment life, but it is clear that this employment-related accident caused a substantial increase in blood pressure. It seems to be not only a reasonable but an inescapable inference that this was greater stress than nonemployment life. As such, the award on rehearing is sustainable on the evidence contained in the bill of exceptions.

The judgment of the compensation court is affirmed.

AFFIRMED.

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

I concur in the result reached by the majority in this case. I believe, however, that our earlier decisions which prompt us to find that the amendments contained in 1983 Neb. Laws, L.B. 18, are procedural and not substantive were wrong when they

were decided and have not improved in any manner with the passage of time. I would have affirmed on the basis that the amendments to Neb. Rev. Stat. § 48-125 (Supp. 1983), having been adopted after the cause of action herein arose, had no application to the instant case, just as the Workmen's Compensation Court found.

As noted by the majority opinion, our decision in *Western Newspaper Union v. Dee*, 108 Neb. 303, 187 N.W. 919 (1922), did indeed determine that an amendment to the Nebraska workmen's compensation law, enacted after the injury and providing for the payment of attorney fees, applied to cases arising before the act was amended. A reading, however, of the *Western Newspaper Union* case and the cases which preceded it, and upon which it relied, makes interesting reading and causes one to question the correctness of the decision. *Western Newspaper Union* relied, as its authority, on the cases of *Reed v. American Bonding Co.*, 102 Neb. 113, 166 N.W. 196 (1918), and *Johnson v. St. Paul Fire & Marine Ins. Co.*, 104 Neb. 831, 178 N.W. 926 (1920), neither of which had anything to do with workmen's compensation. Rather, both cases dealt with the relationship between a contract of insurance and a general statute which provided that if one sued upon a policy of insurance and recovered, one was entitled to additionally recover an attorney fee. In upholding the right of the plaintiff to recover an attorney fee, this court in *Reed* said at 116, 166 N.W. at 197: "The reasons advanced for this contention on the part of the defendant, and the manner in which they are presented in this brief, might well cause us to hesitate if the question was an open one." That is to say, even in 1918, we had some question as to whether the granting of a fee not previously allowed was merely procedural or was, in fact, substantive in nature and therefore had no retroactive application. In opting for the procedural view the court relied upon two earlier decisions, *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co., modified* 98 Neb. 863, 155 N.W. 235 (1915), and *Ward v. Bankers Life Co.*, 99 Neb. 812, 157 N.W. 1017 (1916). Neither of these cases, however, offers any support for the position taken.

In *Nye-Schneider-Fowler Co., supra*, we did indeed permit

the payment of the fee. In doing so, however, we had some difficulty, saying at 867, 155 N.W. at 236-37:

> If the question that we are considering was now presented for the first time, we would hesitate to say that this statute does not create and add to the contract a legal liability which would not exist under the contract prior to the enactment of this statute. The fact that the attorney's fee is to be taxed as costs in the case is not of itself decisive of the question. It was uniformly held under the act of 1873 that attorney's fees provided for by that act were not a part of the judgment proper, but were to be taxed as costs in the case, and yet, after the repeal of that act, attorney's fees were not allowed in actions upon contracts entered into while the act was in force. The fact that the allowance of attorney's fees and taxing them as costs in the case depended upon there being an express provision in the contract for such allowance would not change the nature of the allowance, and if they were properly considered as costs in the case, and ought to be regarded as a part of the remedy and not as adding any legal liability, the reasoning would apparently be the same, whether or not the contract provided for such costs. If the new statute adds an additional burden to the contracting parties that without the statute would not exist, it has generally been considered that such statute could not be applied to a contract entered into before its enactment.

The court concluded, however, that by reason of an earlier decision of this court in *Security Co. v. Eyer*, 36 Neb. 507, 54 N.W. 838 (1893), attorney fees in states where they are allowed by the court to the successful party are in the nature of costs and are taxed and treated as such. Therefore, the allowance of such fees, the court concluded, was procedural and not substantive. Unfortunately, both the authority for that position and the rationale of the case leave much to be desired. Moreover, this court in the *Nye-Schneider-Fowler Co.* case, while recognizing that earlier decisions of the court held to the contrary, resolved that conflict by simply saying at 868, 155 N.W. at 237:

> If these decisions are inconsistent with *White v. Rourke*, 11 Neb. 519, and *Bond v. Dolby*, 17 Neb. 491, and other

> cases following them, we do not feel at liberty to disregard the *later* cases, and must therefore hold that attorney's fees under this statute, as being a part of the costs of the litigation, relate to the remedy, and that it was the intention of the legislature that this statute providing for attorney's fees in such cases should apply, in all actions upon such contracts, whether the contract was made before or after the enactment of the statute.

(Emphasis supplied.) In effect, then, we now rely upon the *earlier* cases which earlier relied upon the *later* cases.

In both *White v. Rourke*, 11 Neb. 519, 9 N.W. 689 (1881), and *Bond v. Dolby*, 17 Neb. 491, 23 N.W. 351 (1885), statutes were enacted which authorized the payment of fees. After the causes of action arose, the statutes were repealed. In permitting the payment of the fees, this court in both *White* and *Bond* held that it was the law that applied at the time the contract was *enacted*, and not the law as it existed when the cause of action arose, which controls. The rule announced in *Western Newspaper Union v. Dee*, 108 Neb. 303, 187 N.W. 919 (1922), reaffirmed in *Solomon v. A. W. Farney, Inc.*, 136 Neb. 338, 286 N.W. 254 (1939), and once again reaffirmed in this case, is based upon nothing more than an unsupported statement to the effect that "it's always been that way," even if it has not.

The difficulty we have in declaring the amendments to § 48-125 as being procedural rather than substantive should be obvious. It is generally considered in the law that a substantive right is one which creates a right or remedy that did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. See, 40 Words and Phrases *Substantive* (perm. ed. 1964 & Supp. 1984); Black's Law Dictionary (5th ed. 1979). A procedural right, on the other hand, is considered to simply be the method by which an already *existing* right is exercised. In view of the fact that neither the attorney fees nor the penalties were available to the employee prior to the enactment of L.B. 18, it is difficult to see how they could be procedural and not substantive. It is for that reason that I would have agreed with the decision of the Workmen's Compensation Court that the act, being substantive in nature, had no application to an accident which occurred

prior to the enactment of the law.

WHITE, J., concurring in part, and in part dissenting.

I agree with the majority opinion. I write only to address the limited issue as to whether, under Neb. Rev. Stat. § 48-125 (Supp. 1983), the appellant is not entitled to an attorney fee in this court for services rendered in opposition to the cross-appeal.

The language of the statute applicable here is as follows:

> If the employer files an application for a rehearing before the compensation court from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court shall allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing, and the Supreme Court shall in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court.

Prior to 1975 Neb. Laws, L.B. 187, the review by this court in Workmen's Compensation Court cases was de novo upon the record, with this court coming to an independent conclusion. Thus, regardless of which party appealed, the effect was that the issue of whether the employee had sustained his burden was before us.

We now review only for errors assigned. In this case the appellant employee did not seek to increase the award. His assigned errors related to other matters. It was the employer and its insurer, by cross-appeal, who raised the issue of the propriety of the award. The employer and its insurer did not prevail. The statutory precondition having been satisfied, I would award the appellant's (employee's) attorney $750 in this court for services in resisting the cross-appeal.

SHANAHAN, J., joins in this concurrence and dissent.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM SKOLNIK, DOING BUSINESS AS MUSE THEATRE, APPELLANT.

358 N.W.2d 497

Filed November 9, 1984. No. 84-150.

1. **Constitutional Law: Appeal and Error.** The constitutionality of a statute is not before this court where the court order issued pursuant to the statute was never served upon the defendant.
2. **Constitutional Law: Search and Seizure.** Seizure of theater owner's films without a warrant is not justified under the fourth amendment to the U.S. Constitution or article I, § 7, of the Nebraska Constitution in the absence of probable cause and exigent circumstances or some other recognized exception.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Conviction and sentence vacated. Reversed and remanded for a new trial.

James E. Schaefer, for appellant.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, and Gary P. Bucchino, Omaha City Prosecutor, for appellee.

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

GRANT, J.

The defendant, William Skolnik, was convicted on two counts of distribution of obscene material in violation of Neb. Rev. Stat. § 28-813 (Reissue 1979). On May 5, 1983, an Omaha Municipal Court judge placed him on probation for 1 year and ordered him to pay a fine of $500 in the event he violated his probation. The district court for Douglas County affirmed the conviction and sentence. Defendant appeals to this court, assigning as error the overruling of defendant's motion to suppress, as evidence, the films allegedly constituting the obscene material in question, the overruling of defendant's motion to dismiss, and the sentencing of defendant to probation. We reverse on the ground that defendant's motion to suppress should have been granted because the seizure of the films used to convict the defendant was a violation of defendant's constitutional rights. This disposition of the case makes it inappropriate to discuss the remaining assigned errors.

On March 3, 1983, Omaha police officer Joseph Nepodal

entered the Muse Theatre and watched a double feature, "Young and Innocent" and "The Erotic Adventures of Lolita." The officer then compiled an "Affidavit of States [sic] Witness," setting forth his synopsis of the movies. On the basis of this affidavit an Omaha municipal judge issued an order pursuant to Neb. Rev. Stat. § 28-828 (Reissue 1979) requiring the defendant to deliver to the State of Nebraska one copy of each of the movie films. Section 28-828 provides:

> In any proceeding, civil or criminal under sections 28-807 to 28-829, the party charged with possession of any obscene material shall be required, upon application by petitioner and order of the court, to provide one copy of such material to petitioner to be used in the preparation and trial of such proceedings. Failure to comply with this section shall be punishable as contempt of court.

On the next day, March 4, Officer Nepodal and two other officers entered the defendant's theater at 11:35 a.m., 35 minutes after it opened. They had the court order issued pursuant to § 28-828 and an arrest warrant for the defendant. Defendant was not at the theater, and the officers, on hearing this, told the ticket seller and projectionist they were police officers and were at the theater to take the films. The officers did, in fact, seize both films. Defendant Skolnik, to whom the court order was directed, was not present at the theater at any time the officers were at the theater on March 4. Defendant was not arrested at the theater, nor was the court order ever served on him. The officers did not have a search warrant.

The issue of constitutionality of § 28-828 is not before us, because, while the court order issued pursuant to that statute may comply with the statute, the methods pursued by the police officers did not comply with the statute, in that the court order was never served on defendant and the films were never delivered to the officers by defendant. The films were nevertheless seized by the officers. It is clear that the officers did not comply with the terms of § 28-828, because the facts are undisputed that defendant Skolnik, "the party charged with possession of . . . [the] obscene material," was never personally asked or required to deliver a copy of the films in question to the State of Nebraska. The statute in question, § 28-828, never

came into play, therefore, and we can consider that statute no further.

For a seizure to be valid it must be made pursuant to a validly authorized search warrant, or in response to sufficient exigent circumstances or other recognized exceptions. The seizure of the two films in this case violated the defendant's rights under article I, § 7, of the Nebraska Constitution and under the fourth amendment to the U.S. Constitution. The police officers had no search warrant, and there were no exigent circumstances or other recognized exceptions which justified this seizure. We set out in *State v. Rice*, 188 Neb. 728, 741, 199 N.W.2d 480, 488 (1972), *cert. denied* 430 U.S. 947, 97 S. Ct. 1584, 51 L. Ed. 2d 795 (1977): "Search pursuant to warrant is to be much preferred to search without warrant, and a warrant should be applied for absent the exceptions applicable to exigent circumstances and other recognized exceptions."

The State does not contend that the police officers had a valid search warrant. Admittedly, they did not. The State does, however, argue that all of the necessary requirements of the fourth amendment to the U.S. Constitution and of article I, § 7, of the Nebraska Constitution for a valid seizure were complied with in the process of obtaining the § 28-828 order.

Article I, § 7, of the Nebraska Constitution provides, as does the fourth amendment to the U.S. Constitution, as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

Nothing in the order issued pursuant to § 28-828 described a place to be searched or authorized a thing to be seized. The judge signed an order requiring the defendant to provide a copy of the material described. An order requiring a defendant to provide something, under threat of contempt of court, is not constitutionally equivalent to a warrant allowing the State to search a place and seize a thing.

In oral argument the State implied that the circumstances surrounding this seizure made it an exception to the search

warrant requirement. Although it need not be discussed in detail herein, the area of the law dealing with seizure of films and books is complicated, because the constitutional protections of the first and fourth amendments to the U.S. Constitution intertwine, as do §§ 5 and 7, article I, of the Nebraska Constitution. The constitutional protection against unreasonable searches and seizures is intensified by our jealous protection of free speech, freedom of expression, and our protection of a free press. This is a case which falls within this intensified protection, because it concerns a film that was seized and because seizing that film prevented its showing.

If the film were a bomb or an illegal drug, the obviousness of its illegality might allow its seizure on sight without a warrant, but because the "illegality" of a film is not so obvious, and because seizure prevents expression, both the U.S. Constitution and the Nebraska Constitution demand greater protection both for the issuing of warrants and seizure without a warrant when films are the subject.

In *Roaden v. Kentucky*, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973), a sheriff went to a drive-in theater, concluded the film shown was obscene, arrested the manager, and seized the film incident to arrest. The Supreme Court stated at 504-05:

> Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is "unreasonable" in the light of the values of freedom of expression. . . .

> Moreover, ordinary human experience should teach that the seizure of a movie film from a commercial theater with regularly scheduled performances, where a film is being played and replayed to paid audiences, presents a very different situation from that in which contraband is changing hands or where a robbery or assault is being perpetrated. In the latter settings, the probable cause for an arrest might justify the seizure of weapons, or other evidence or instruments of crime, without a warrant.

While Officer Nepodal did approach a neutral magistrate, he, like the sheriff in *Roaden*, did not have a search warrant, did not seize the films based on a procedure " ' "designed to focus searchingly on the question of obscenity," ' " *id.* at 503, and, unlike the sheriff in *Roaden*, Officer Nepodal did not seize these films incident to a lawful arrest. Since the U.S. Supreme Court found the "exigent circumstances" in *Roaden* insufficient, it is clear that the alleged "exigent circumstances" in this case fall far short of what is necessary to permit a seizure of films without a warrant.

Any other "exception" to the warrant requirement must be viewed with the distinction between search and seizure in mind. This court has specifically separated these two concepts. We said in *State v. Searles*, 214 Neb. 849, 853, 336 N.W.2d 571, 575 (1983), "Such activity [a seizure] does not constitute a search," and in *State v. Edwards*, 197 Neb. 354, 357, 248 N.W.2d 775, 777 (1977), " 'The search was private, and the ensuing warrantless seizure was made upon probable cause under exigent circumstances. Neither the search nor the seizure violated appellant's Fourth Amendment rights.' "

We are here concerned with an illegal seizure, not an illegal search; and while inevitable discovery, no privacy interest, and such claims may get an officer into the theater and past a claim of illegal search, the *seizure* of the object cannot be done without probable cause. A gun or a body may present probable cause on sight, but films do not, because that determination must be made by a neutral magistrate making an inquiry designed to focus searchingly on the issue of obscenity. See *Marcus v. Search Warrant*, 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (1961).

The seizure of the films violated the defendant's constitutional rights, and the admission of the seized films in evidence requires reversal of the defendant's conviction. Defendant's motion to suppress should have been granted.

CONVICTION AND SENTENCE VACATED.

REVERSED AND REMANDED FOR A NEW TRIAL.

SHANAHAN, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. JAMES L. GILLETTE, APPELLANT.

357 N.W.2d 472

Filed November 9, 1984. No. 84-322.

1. **Sentences.** After conviction a trial judge has broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct. In gaining this information the trial court may consider reports of probation officers, police reports, affidavits, and other information, including his own observations of the defendant.
2. _____. The latitude allowed a judge at a sentencing hearing to determine the nature and length of punishment, other than in recidivist cases, is almost without limitation as long as it is relevant to the issue.
3. **Sentences: Appeal and Error.** The rule is firmly established in this state that in the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
4. _____: _____. It is the rule in this jurisdiction that an order or sentence of the trial court denying probation will not be overruled on appeal unless there has been an abuse of discretion.
5. **Sentences.** That part of Neb. Rev. Stat. § 29-2260(2) (Cum. Supp. 1984) providing that the court "may withhold sentence of imprisonment" is a guideline for the court and is not mandatory.

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

Daniel E. Wherry of Johnston, Barber, Wherry & Knight, for appellant.

Richard T. Smith, Gage County Attorney, for appellee.

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

COLWELL, D.J., Retired.

Defendant, James L. Gillette, was convicted on his guilty plea that on June 4, 1982, he caused to be made false statements or false bank entries in the books of First Security Bank and Trust, Beatrice, Nebraska (Security Bank). Neb. Rev. Stat. § 8-175 (Reissue 1983). The penalty for this Class III felony is 1 to 20 years' imprisonment, or $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1979).

Defendant appeals his sentence of 16 months to 2 years, claiming these errors: (1) The trial court abused its discretion by considering irrelevant and unsubstantiated facts contained in the presentence report, including the Federal Bureau of Investigation reports; (2) The sentence is excessive and constitutes cruel and unjust punishment; and (3) The trial judge erred in not disqualifying himself because of an appearance of bias and because he was indirectly interested.

Defendant, a college graduate, age 40, is married to Nancy Copple; they are the parents of two minor children. At the time of the offense, defendant was president of Security Bank, which he acquired in 1980 along with First Security Savings Company, Beatrice, Nebraska (Security Savings), from Nancy's grandfather, S. E. Copple.

Prior to the guilty plea, defendant, his wife Nancy, and the Gage County attorney signed a written plea agreement providing (1) no further criminal charges would be filed against either defendant or Nancy Gillette as regarding Security Bank and Security Savings, and (2) defendant and Nancy would cooperate with the county attorney and federal authorities and "[i]n any criminal investigations concerning conduct of public officials or others in regards to the above-named institutions and Commonwealth Savings Company of Lincoln, Nebraska."

The thrust of defendant's first error assignment is that the presentence report contained information concerning other unproven state and federal bank violations that in some way involved defendant and that they should not be considered by

the sentencing judge.

> The presentence investigation and report shall include, when available, an analysis of the circumstances attending the commission of the crime, the offender's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation and personal habits, and any other matters that the probation officer deems relevant or the court directs to be included.

Neb. Rev. Stat. § 29-2261(3) (Cum. Supp. 1984).

> It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the sourse [sic] and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and *previous conduct*. In gaining this information, the trial court may consider reports of probation officers, police reports, affidavits, and other information including his own observations of the defendant. A presentence investigation has nothing to do with the issue of guilt. . . . *The latitude allowed a sentencing judge at a presentence hearing to determine the nature and length of punishment, other than in recidivist cases, is almost without limitation as long as it is relevant to the issue.*

(Emphasis supplied). *State v. Rose*, 183 Neb. 809, 811, 164 N.W.2d 646, 648-49 (1969); *State v. Harrington*, 202 Neb. 356, 275 N.W.2d 294 (1979).

In *Harrington*, a forgery case, it was held relevant for the court to consider " 'that you engaged in a deliberate and premeditated course of conduct over a period of 42 days which involved 5 separate incidents of embezzlement; while you're not charged with embezzlement, I think I'm entitled to consider that and have to consider that. . . .' " *Id.* at 358, 275 N.W.2d at 296.

The presentence report, prepared by a state probation officer, consisted of (1) general background information; (2)

two lengthy statements given by defendant to Richard T. Smith, Gage County attorney, relating to a wide range of banking law violations, both state and federal; (3) a copy of an FBI investigative report dated June 16, 1983, concerning federal bank violations involving the Security Bank and other institutions; and (4) more than 50 personal, good character letters from defendant's friends and acquaintances. The full report was examined and studied by defendant's counsel and the sentencing judge. Defendant added to the report by furnishing documents showing that his residence in Tucson, Arizona, was in foreclosure and that his business assets had little value.

This colloquy occurred at the beginning of the sentencing hearing:

> THE COURT: The presentence investigation report proper deals with the matters in Gage County. The FBI reports in particular and some of the matters in the statements to Mr. Smith deal with matters involving other jurisdictions and possible charges against other people. Those the Court has excluded from its consideration and limits itself to those matters dealing with the Gage County institutions. . . .
>
> MR. WHERRY: I realize that, and I appreciate that, your Honor, and with regard to and specifically on that, with regard to some of those matters that relate to the Beatrice situation that are included in the FBI report, I think it's fair to say that Mr. Gillette does not totally agree with all the conclusions that were reached by the FBI with regard to some of the other transactions.

Later, counsel made reference to defendant's faith and reliance on S. E. Copple and other Copple family members with whom "in-house" unsecured bank loans were made and that these were a part of his "sloppy" banking practices. Defendant's only statement to the court was, "I'm sorry."

Counsel's concluding statement was prefaced: "In summary, all we can say is that we know the Court has tried its best to separate the Beatrice problem from all the other matters of Commonwealth . . . ."

The record clearly shows that the judge limited his

consideration of the report to relevant information; there was no abuse of discretion.

Next, defendant contends his sentence is excessive, claiming probation should have been granted, since he met the statutory grounds to be accorded weight in favor of withholding sentence, Neb. Rev. Stat. § 29-2260(3) (Cum. Supp. 1984), particularly, (1) the crime neither caused nor threatened serious harm; (2) the offender has no prior criminal history and has led a law-abiding life prior to the crime charged; (3) the crime was the result of circumstances unlikely to recur; (4) defendant is unlikely to commit another crime; (5) defendant would respond to probation; and (6) imprisonment would cause excessive hardship on his family.

The judge addressed all of these claims of defendant, and then concluded:

> Of course, the sad fact is that in all of these situations, when a man falls as Mr. Gillette has fallen here, his family are the innocent victims of his acts, and unfortunately there's not a great deal that this Court can do about it. There are a number of things Mr. Gillette's attorney has suggested that would be a basis for this Court granting probation. And in other circumstances, that might be a viable alternative. Certainly the Court has studied it carefully here. But there is riding above all these other things that are in a sense in Mr. Gillette's favor, the facts that he knowingly engaged in a prolonged pattern of false and fraudulent transactions, and the worst part of it all is that in doing that, he treated these financial institutions as if they were his own private operations . . . . I certainly will take into account these matters in the imposition of sentence . . . .

Probation was then denied and sentence imposed.

> The rule is firmly established in this state that in the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. . . . It is also the rule in this jurisdiction that an order or sentence of the trial court denying probation will not be overturned on appeal unless there has been an abuse of discretion.

State v. Bridgmon, 196 Neb 714, 717-18, 246 N.W.2d 57, 59 (1976).

That part of § 29-2260(2) providing that the court "may withhold sentence of imprisonment" is a guideline for the court and is not mandatory. See *State v. Hunt*, 214 Neb. 214, 333 N.W.2d 405 (1983).

The record supports the court's finding that to withhold a sentence of imprisonment would depreciate the seriousness of the offense. § 29-2260(2)(c). There was no abuse of discretion. The sentence imposed was not excessive, it being within the statutory limits.

Finally, defendant claims error of prejudice and bias on the part of the judge because the judge's brother and sister-in-law were unpaid depositors in the insolvent Commonwealth Savings Company, Lincoln, Nebraska, which company was founded and owned by S. E. Copple, Nancy Gillette's grandfather. Neb. Rev. Stat. § 24-315 (Reissue 1979) provides:

> A judge or justice is disqualified from acting as such in the county, district or Supreme Court, except by mutual consent of the parties, in any case wherein he or she is a party or interested, or where he or she is related to either party by consanguinity or affinity within the fourth degree . . . .

The word "interested" in that statute has long been interpreted as one of a pecuniary nature. See *Uerling v. State*, 125 Neb. 374, 250 N.W. 243 (1933). See, also, 46 Am. Jur. 2d *Judges* § 99 (1969).

"A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality." *Arnholt v. Arnholt*, 129 Mich. App. 810, 817, 343 N.W.2d 214, 218 (1983). See, also, *State v. Smith*, 77 Neb. 824, 110 N.W. 557 (1906); 46 Am. Jur. 2d, *supra*, § 220.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES H. FISCHER, APPELLANT.

357 N.W.2d 477

Filed November 9, 1984. No. 84-369.

Pleas. Before accepting a guilty plea, a judge should sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Remanded with directions.

Arthur C. Toogood of Toogood and McGath, for appellant.

Paul L. Douglas, Attorney General, and Dale A. Comer, for appellee.

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

PER CURIAM.

Defendant was charged with first degree sexual assault in Adams County District Court. Defendant entered a plea of not guilty, and the public defender was appointed to defend him. Defendant's motion to suppress statements he gave to police was overruled. Subsequently, defendant changed his not guilty plea to guilty and, after a determination that he was not a mentally disordered sex offender, was sentenced to 15 to 25 years in the Nebraska Penal and Correctional Complex.

The facts are not in dispute. Defendant, age 26, seized the victim, one of his former junior high school teachers, in her garage. Defendant was wearing a gorilla mask, which he later removed. He dragged the victim into the house, tried to tie her up, had an unsuccessful attempt to rape her, and later succeeded. After about an hour and a half, the victim was allowed to go to the bathroom. She succeeded in jumping out the bathroom window, seriously injuring her right arm and hand in the process. Defendant has no prior felony record—only a series of misdemeanors and traffic infractions.

Defendant presents two assignments of error: (1) The trial court abused its discretion in not placing defendant on probation; and (2) The sentence is excessive. While the

assignments of error are without merit, we note plain error on another issue and remand the case.

In reviewing the record we find that at no time during the hearing during which defendant changed his plea did the trial court inform the defendant as to the penalty the crime carried. In *State v. Turner*, 186 Neb. 424, 425-26, 183 N.W.2d 763, 765 (1971), we stated: "Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea."

Here, a close reading of the bill of exceptions shows that the trial court had no dialogue with defendant informing defendant of the statutory penalty of 1 to 50 years' imprisonment.

In *State v. Curnyn*, 202 Neb. 135, 274 N.W.2d 157 (1979), the record did not establish conclusively that the defendant had been advised of the possible penalties when he entered his guilty plea. There, as here, there was some evidence implying that the defendant was aware of the consequences of his plea. We remanded the *Curnyn* case with specific directions to the sentencing court. We generally follow the *Curnyn* case in this case.

We therefore remand this case to the sentencing court. In such court, defendant is granted the right to apply to that court for leave to withdraw his plea of guilty. Should defendant fail to exercise that right to seek withdrawal of his plea within 10 days of the issuance of the mandate in this case, then the sentence heretofore entered by the sentencing court shall stand.

If the defendant elects to withdraw his plea, the trial court shall hold an evidentiary hearing to determine whether the defendant was, in fact, aware of the possible penalties for the offense in question at the time he entered his plea. If the court finds that defendant was not aware of the penal consequences of the plea, the judgment of conviction shall be deemed vacated and he shall be permitted to plead again. If the court determines that defendant was aware of the penalties and consequences of the plea, the judgment and sentence shall stand.

Defendant asserts that he should not have been denied probation. While the trial judge did not specifically comment

on Neb. Rev. Stat. § 29-2260(2) (Cum. Supp. 1984), the record indicates that he determined that withholding sentence in favor of probation in this case would serve to "depreciate the seriousness of the offender's crime or promote disrespect for law." The denial of probation was proper.

Likewise, defendant's contention that the sentence of 15 to 25 years was excessive is without merit. The statutory penalty for the crime is 1 to 50 years. Neb. Rev. Stat. § 28-105 (Reissue 1979). The victim here was a former teacher of the defendant, a motivating factor in the assault. She was held for over an hour and a half and was seriously injured. Under the circumstances the sentence was not excessive.

REMANDED WITH DIRECTIONS.

RONALD E. SORENSEN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEE, V. FRANCIS PETERSON, DOING BUSINESS AS PANHANDLE DRILLING, APPELLANT.

358 N.W.2d 742

Filed November 30, 1984. No. 83-612.

1. **Contempt.** A contempt sanction which aims to compel future obedience to the court's orders and decrees is conditioned upon the contemner's continued noncompliance and is coercive in nature.
2. _____. A punitive contempt sanction is absolute and not subject to mitigation if the contemner alters his future conduct toward the court.
3. _____. A coercive contempt sanction is not final and therefore not appealable; it is subject to collateral attack by habeas corpus.
4. _____. A punitive contempt sanction takes on the aspects of a final order or an order affecting a substantial right issued in a special proceeding and is appealable.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Appeal dismissed.

David E. Veath of Fisher & Veath, for appellant.

Pamela A. Mattson, for appellee.

BOSLAUGH, WHITE, and GRANT, JJ., and MCCOWN, J., Retired, and COLWELL, D.J., Retired.

WHITE, J.

Francis Peterson appeals the finding of the district court for Sheridan County that he was in contempt of the order of that court dated June 7, 1983, commanding him to appear before the Nebraska Department of Labor to testify and produce certain records. Upon its finding, the court sentenced Peterson to 6 months in jail or until he purged himself of the contempt by producing the records. For reasons discussed below we dismiss the appeal.

The Commissioner of Labor, pursuant to Neb. Rev. Stat. § 48-613 (Reissue 1978), issued a subpoena directed to the appellant commanding him to appear in the Sheridan County Courthouse on May 11, 1983, to testify and produce certain employment records from 1980, 1981, and 1982. Peterson did appear but did not produce the records. Thereafter, the commissioner made an application for an order of the district court pursuant to Neb. Rev. Stat. § 48-614 (Reissue 1978) to command Peterson to appear before the Department of Labor to testify and produce the records. The court so ordered on June 7, 1983. Peterson appeared at the designated time but again did not produce the records. A motion for citation of contempt was served on Peterson, and a hearing thereon was held on August 9, 1983. Evidence was adduced, and the court thereafter found Peterson in contempt of court and ordered him committed to jail for a period of 6 months or until such time as he complied with the order of the court.

In *In re Contempt of Liles*, 216 Neb. 531, 534, 344 N.W.2d 626, 628-29 (1984), we said:

> The first question which then presents itself is whether the district court's order of December 14, 1983, is appealable. It is not. We have addressed various aspects of the contempt powers of courts and the methods of review in a number of cases. . . . Although the language in these cases may not always be as clear as we might wish, in *McFarland v. State, supra*, we distinguished between contempt sanctions which are coercive in nature and those which are punitive in nature; that is to say, between those

> which aim to compel future obedience to the court's orders and decrees and are therefore coercive, and those which punish past disrespectful or contumacious conduct and vindicate the court's authority. In the coercive sanction, the type involved here, the contemner holds the keys to his jail cell, in that the sentence is conditioned upon his continued noncompliance. The punitive sanction is much like the sentence in a criminal case, in that it is absolute and not subject to mitigation if the contemner alters his future conduct toward the court, and takes on the aspects of a final order or of an order affecting a substantial right issued in a special proceeding, both of which are reviewable on appeal. . . . The coercive sanction, on the other hand, is always subject to modification by the contemner's conduct; that sanction is not final in any sense. Therefore, punitive sanctions are reviewable by appeal; whereas coercive sanctions can only be attacked collaterally by habeas corpus.

See, also, *Rol v. Rol, ante* p. 305, 353 N.W.2d 19 (1984).

APPEAL DISMISSED.

STATE NATIONAL BANK AND TRUST COMPANY, WAYNE, NEBRASKA, TRUSTEE, APPELLEE, V. EUGENE JACOBSEN, A SINGLE PERSON, APPELLANT.

358 N.W.2d 743

Filed November 30, 1984. No. 83-780.

1. **Adverse Possession.** The burden is on one who claims title by adverse possession to prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the statutory period, namely, 10 years.
2. _____. Where one by mistake as to the true boundary line enters upon and takes possession of land of another, claiming it as his own to a definite and certain boundary, by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession.
3. _____. Payment of taxes is a circumstance which may be considered with all

other circumstances in determining the question of adverse possession.

Appeal from the District Court for Cedar County: FRANCIS J. KNEIFL, Judge. Reversed and remanded with directions.

Ronald J. Albin, for appellant.

Kenneth M. Olds of Olds, Swarts and Ensz, for appellee.

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

SHANAHAN, J.

Eugene Jacobsen, defendant and cross-petitioner, appeals the decision of the district court for Cedar County, namely, judgment quieting title in State National Bank and Trust Company (State National). We reverse and remand with directions.

Originally, an east-west, section line road separated the south half of Section 28 from the north half of Section 33, adjacent tracts. Gradually, the section line road arched southward with further encroachment on Section 33. The tract in dispute, containing 2.3 acres, was formed as a result of the road's bow and the east-west line between Sections 28 and 33. A three-strand barbed wire fence ran along the north side of the road. When and by whom the fence was installed are undisclosed.

As described, the bowed road and barbed wire fence existed when Floyd and Jessie Root acquired the north half of Section 33 in 1947.

In 1949 Eugene Jacobsen was residing with his parents, Axel and Helga Jacobsen, when Axel purchased the south half of Section 28. Sometime between 1949 and 1958, Axel and Eugene temporarily removed the barbed wire fence to install a culvert north of the road but replaced the fence at its previous location after installing the culvert. Referring to the tract in dispute, Floyd Root testified that Axel Jacobsen "made it part of his pasture," "pastured" the 2.3 acres, and "treated it like his own."

In view of the fence-road condition and sometime before 1964, Floyd Root had a dispute with Axel Jacobsen regarding

the tract formed by the bow in the road and told Axel he wished "he [Axel] would move his fence back and get off" the tract in question. Axel "never set [the fence] back" but continued to use the disputed tract as pasture for Jacobsen livestock.

On account of Axel Jacobsen's death in 1964, title to the land in Section 28 devolved upon Helga Jacobsen and was subsequently acquired by Eugene Jacobsen in 1974 through a deed from the executor of Helga's estate. On July 26, 1975, Roots conveyed their land in Section 33 to State National as trustee.

In 1971 Roots had leased their land in Section 33 to Marvin Jensen for a share of the crop produced on the land south of the road. Jensen testified that from 1971 to 1978 Eugene Jacobsen's cattle grazed on the grass north of the fence and road. In fact, since 1949, the disputed tract has served as a pasture for Jacobsen cattle, either Axel's or Eugene's. In 1977 Eugene Jacobsen cultivated the 2.3 acres. However, because the ground was too wet due to drainage, Jacobsen could not grow crops on the tract in dispute.

Another fence dispute arose in 1978 when Floyd Root directed Jensen to move the fence from the road to a site near the east-west line between Sections 28 and 33.

State National filed suit to quiet title in 1982. Eugene Jacobsen filed a cross-petition claiming title by adverse possession. At trial State National showed it had paid taxes on the entire tract encompassing the 2.3 acres since acquisition of the real estate from Roots in 1975. Jacobsen also showed he had paid taxes on the 2.3 acres after the renewed dispute or incident in 1978.

In its judgment entered in favor of State National, the district court recited: "We hold for the Plaintiff and find that the Plaintiff and its immediate grantors and predecessors in title have and have had continuous possession of the said real estate under continuity of title for 10 years last past or since July 26, 1975." The district court then quieted title to the 2.3 acres in State National.

Adverse possession actions are equitable in nature; therefore, we review the record de novo and reach an independent conclusion without reference to the findings of the

trial court. *Hardt v. Eskam, ante* p. 81, 352 N.W.2d 583 (1984); *Wiedeman v. James E. Simon Co., Inc.*, 209 Neb. 189, 307 N.W.2d 105 (1981). "The burden is on one who claims title by adverse possession to prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the statutory period, namely, 10 years." *Hardt v. Eskam, supra* at 82, 352 N.W.2d at 585.

When Roots acquired their tract in 1947 and Axel Jacobsen purchased his real estate in Section 28 in 1949, the fence restricted access from the road and Root land to the tract in dispute. Jacobsens used the 2.3 acres as a pasture in their farming operations until 1977. Thus, for nearly 30 years all but the Jacobsens were excluded from the 2.3 acres. Before Eugene Jacobsen's abortive cultivation of the disputed tract, the character of the 2.3 acres was definitely pasture. Pasturing cattle on the disputed tract supplied the possession necessary to sustain Jacobsen's claim of adverse possession. See *Wiedeman v. James E. Simon Co., Inc., supra* (sufficiency of possession depends on the character and reasonable use of adversely claimed land). The incident involving Axel Jacobsen and Floyd Root circa 1964, namely, Axel's refusal to remove the fence as requested by Root, was Axel's emphatic assertion of ownership to the 2.3 acres. Further, as we held in *Hendrickson v. Glaser*, 204 Neb. 492, 494-95, 283 N.W.2d 41, 43 (1979):

> Where one by mistake as to the true boundary line enters upon and takes possession of land of another, claiming it as his own to a definite and certain boundary, by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession.

See, also, *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957). The preponderance of the evidence demonstrates that Eugene Jacobsen has satisfied each element required for acquisition of title by adverse possession. After one has acquired title by adverse possession, the adverse possessor has an indefeasible title which can only be divested by his conveyance of the land to another or by a subsequent disseisin for the statutory limitation period. *Hendrickson v. Glaser,*

supra.

State National points to its payment of taxes in support of its claim to the 2.3-acre tract. Payment of taxes is a circumstance which may be considered with all other circumstances in determining the question of adverse possession. *Ziemba v. Zeller*, 165 Neb. 419, 86 N.W.2d 190 (1957). However, in the case before us, payment of taxes as a factor is greatly outweighed by the other attendant circumstances. In the final analysis, State National lacked Roots to support its claim to the tract in dispute.

Upon the record presented to this court, we find that the judgment of the district court quieting title in State National is incorrect and must be reversed. We find that Eugene Jacobsen by adverse possession has acquired title to the tract in dispute. Therefore, the judgment of the district court is reversed and this matter is remanded to the district court, which shall, consistent with this opinion, enter judgment in favor of Eugene Jacobsen on his cross-petition regarding his title by adverse possession.

REVERSED AND REMANDED WITH DIRECTIONS.

DEBRA ANN GINSBERG, APPELLEE, V. AMES AVENUE BINGO, APPELLANT.

358 N.W.2d 221

Filed November 30, 1984. No. 83-791.

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

Larry R. Taylor of Taylor, Fabian, Thielen & Thielen, for appellant.

Barbara C. Lohr Van Sant of Nelson, Morrow, Waldron & Kivett, for appellee.

KRIVOSHA, C.J., HASTINGS, SHANAHAN, and GRANT, JJ., and MCCOWN, J., Retired.

PER CURIAM.

This court has considered the complete record in this case. The evidence supports the judgment of the district court.

AFFIRMED.

THE STROMSBURG BANK, STROMSBURG, NEBRASKA, A CORPORATION, APPELLEE, V. ROY NUTTELMAN ET AL., APPELLANTS, DENNIS NUTTELMAN ET AL., APPELLEES.

358 N.W.2d 746

Filed November 30, 1984. No. 83-908.

1. **Records: Evidence.** A bill of exceptions is the only vehicle for bringing evidence to this court.
2. **Summary Judgment: Records: Presumptions: Appeal and Error.** Where a summary judgment has been entered, the absence of a bill of exceptions results in the presumptions that the evidence sustains the trial court's finding that there was no genuine issue as to any material fact and that the case was correctly decided.
3. **Summary Judgment: Records: Appeal and Error.** In the absence of a bill of exceptions, the only issue which will be considered on appeal of a summary judgment is the sufficiency of the pleadings to support the judgment.
4. **Summary Judgment.** Summary judgment is an extreme remedy which may properly be granted only 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 judgment as a matter of law.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed.

Roy Nuttelman and Cecilia Nuttelman, pro se.

James E. Papik of Mills Law Offices, for appellee Stromsburg Bank.

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

CAPORALE, J.

Plaintiff-appellee, The Stromsburg Bank, brought an action against the defendants-appellants, Roy Nuttelman and his wife,

Cecilia Nuttelman, and others having an interest in certain real estate, seeking to set aside its conveyance by the Nuttelmans and a subsequent mortgage thereof on the ground that the transactions were fraudulent as to the bank. Following the entry of a summary judgment in the bank's favor, the Nuttelmans filed a notice of appeal to this court. We affirm.

The judgment recites that evidence was adduced at the hearing had on the bank's motion for summary judgment. Based upon that evidence, the trial court specifically found that no genuine issues of material fact existed and that the bank was entitled to judgment as a matter of law. It accordingly found, ordered, adjudged, and decreed that the conveyance and mortgage in question were each fraudulent as to the bank, and each of them was set aside as null and void. The trial court then declared the real estate subject to execution for the satisfaction of a judgment previously obtained by the bank against Roy Nuttelman in another case.

No bill of exceptions containing the proceedings had on the bank's motion for summary judgment has been filed. The absence of a bill of exceptions, it being the only vehicle for bringing evidence to this court, results in the presumptions that the evidence sustains the trial court's finding that there was no genuine issue as to any material fact and that the case was correctly decided. *Scarpello v. Continental Assur. Co.*, 187 Neb. 395, 191 N.W.2d 444 (1971). The only issue which will be considered on appeal of a summary judgment in the absence of a bill of exceptions is the sufficiency of the pleadings to support the judgment. *Scarpello, supra.* See, also, *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983).

The bank's petition alleges facts which, if true, would make the conveyance and mortgage fraudulent as to the bank and render each of them null and void as to the bank. Consequently, the presumptions which operate as aforesaid support the summary judgment, notwithstanding the fact that such a judgment is an extreme remedy which may properly be granted only 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 judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1979); *Straub v. American*

Bowling Congress, ante p. 241, 353 N.W.2d 11 (1984); *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983).

AFFIRMED.

MERLE R. McCLEMENS II, APPELLEE, V. UNITED PARCEL SERVICE, INC., APPELLEE, RONALD E. SORENSEN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLANT.

358 N.W.2d 748

Filed November 30, 1984. No. 84-081.

1. **Employment Security Law: Appeal and Error.** This court's scope of review in unemployment compensation cases is de novo on the record; it becomes this court's duty to retry the issues of fact involved in the findings complained of and reach independent conclusions with respect thereto.
2. **Employment Security Law: Words and Phrases.** The phrase "to leave work voluntarily" means to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment.
3. **Employment Security Law: Good Cause.** It cannot be said that leaving employment is without good cause if the reason for leaving, although it may appear voluntary, has some justifiably reasonable connection with or relation to the conditions of employment.
4. **Employment Security Law.** The rule of construction that the Employment Security Law is to be liberally construed in order that its beneficent purposes may be accomplished applies to the interpretation of the law but not to consideration of the evidence offered in support of a claim under the law.
5. **Employment Security Law: Proof: Good Cause.** In voluntary termination cases the burden of proof is on the employee to prove that the leaving was for good cause.
6. **Appeal and Error.** On appeal a party may not complain of evidence to which he did not object at trial.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded with directions.

Pamela A. Mattson, for appellant.

Carla J. Alexander of Downing & Alexander, for appellee McClemens.

BOSLAUGH, WHITE, and CAPORALE, JJ., and RIST, D.J., and COLWELL, D.J., Retired.

CAPORALE, J.

Merle R. McClemens II filed for unemployment compensation benefits under the Nebraska Employment Security Law. Both the claims deputy and the Nebraska Appeal Tribunal determined that McClemens voluntarily left his employment with United Parcel Service, Inc., without good cause, and disqualified McClemens from receiving benefits for a period of 8 weeks. Upon McClemens' appeal the district court determined that he left his employment for good cause and reversed the decision of the appeal tribunal. On appeal to this court by the Commissioner of Labor, we reverse the judgment of the district court and remand the cause for reinstatement of the decision of the appeal tribunal.

The scope of review in this court is de novo on the record from the district court. It becomes our duty to retry the issues of fact involved in the findings complained of and reach independent conclusions with respect thereto. *Taylor v. Collateral Control Corp., ante* p. 432, 355 N.W.2d 788 (1984).

Neb. Rev. Stat. § 48-628 (Cum. Supp. 1982) provides in part:

> An individual shall be disqualified for benefits:
>
> (a) For the week in which he or she has left work voluntarily without good cause, if so found by the Commissioner of Labor, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner according to the circumstances in each case.

The phrase "to leave work voluntarily" has been defined as meaning " 'to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment.' " *Nuss v. Sorensen, post* p. 703, 706, 358 N.W.2d 752, 753 (1984); *Gastineau v. Tomahawk Oil Co., Limited,* 211 Neb. 537, 319 N.W.2d 107 (1982); *Powers v. Chizek,* 204 Neb. 759, 285 N.W.2d 501 (1979).

We have said, however, that leaving employment may not be

said to be without good cause if the reason for leaving, although it may appear voluntary, has some justifiably reasonable connection with or relation to the conditions of employment. *Heimsoth v. Kellwood Co.*, 211 Neb. 167, 318 N.W.2d 1 (1982); *Glionna v. Chizek*, 204 Neb. 37, 281 N.W.2d 220 (1979).

The rule of construction that the Employment Security Law is to be liberally construed in order that its beneficent purposes may be accomplished applies to the interpretation of the law but not to consideration of the evidence offered in support of a claim under the law. *Hunter v. Miller*, 148 Neb. 402, 27 N.W.2d 638 (1947). In voluntary termination cases the burden of proof is on the employee to prove that the leaving was for good cause. *Taylor v. Collateral Control Corp., supra.*

With the foregoing principles in mind, we find the following relevant facts.

McClemens, then a Gibbon, Nebraska, resident, was employed as a delivery driver for United Parcel at Kearney, Nebraska. He last worked on August 9, 1982, when he went on a 1-week vacation in Minnesota. While vacationing, he suffered a puncture knife wound of his left knee, for which he underwent surgery at the Rochester, Minnesota, Mayo Clinic on August 12, 1982. United Parcel then placed McClemens on disability status beginning at the conclusion of his vacation time.

McClemens returned to his Nebraska home, and after becoming unhappy with the progress of his knee, again went to the Mayo Clinic. On January 6, 1983, after conversing with his Mayo Clinic physician, as the result of which McClemens understood he would not be able to return to his old job, McClemens notified United Parcel that he would not be able to return to work as a delivery driver. The record contains no description of McClemens' employment duties. McClemens did not inquire whether United Parcel had some other type of work he could do, thinking instead it was United Parcel's option to offer something else if it wished. No other work was offered by United Parcel.

Between the date of the injury in August and January 6, 1983, McClemens sold his house in Gibbon and moved with his family to Minnesota.

After receiving a letter dated February 9, 1983, from the business office of the Mayo Clinic, reading, "The patient's attending surgeon stated that the patient had made maximum improvement and he would estimate the patient should be able to return to work by February 1, 1983," United Parcel paid McClemens disability benefits through February 1, 1983.

On July 29, 1983, the Mayo Clinic physician attending McClemens wrote McClemens' attorney, saying, among other things:

> We followed Mr. McClemens along as I saw him on several occasions. We saw him last on January 6, 1983. At that time he still complained of stiffness and discomfort on flexion-extension activities. His patellofemoral pain is aggravated by bending and squatting. On examination, he had mild crepitus. There were no retropatellar signs or pain on patellar pressure. There was no swelling. He had a full range of motion and good stability.
>
> We advised him to continue with conservative treatment for his patellofemoral chondromalacia. At that time he was considering changing jobs because this was too stressful for him, causing him too much patellofemoral irritation. We did advised [sic] him to gradually increase his activities as tolerated and continue with his strengthening program.
>
> We recently heard from Mr. McClemens that he was unable to regain enough function to return to his previous level of activity and return to his previous job without causing too much distress. I did advise him to seek other types of work that wound [sic] not distress his knee if he could not handle his present job.
>
> If a new job is required, it is best if he can avoid standing for prolonged periods and excessive walking. He should also avoid squatting and stairs.

We first address McClemens' argument that the letter from the business office of the Mayo Clinic is not competent evidence because, although it was signed by someone, it was not signed by McClemens' physician, and further because it only estimates when McClemens might be able to return to work. McClemens' concern with the admissibility of that document comes too late,

for no objection to its receipt into evidence was made before the appeal tribunal. It has long been, and continues to be, the rule that on appeal a party may not complain of evidence to which he did not object at trial. *State v. Harper*, 215 Neb. 686, 340 N.W.2d 391 (1983); *Lindgren v. City of Gering*, 206 Neb. 360, 292 N.W.2d 921 (1980); *Catron v. Shepherd*, 8 Neb. 308, 1 N.W. 204 (1879). At this point and in the state of the record, the only question is the weight to be given to the letter.

If we were to construe the ambiguous phrase in the February 9 letter, "should be able" to return to work, to mean "will be able" to return to work, the evidence would be overwhelmingly against McClemens. On the other hand, if, because of its ambiguity, we were to ignore the February 9 letter and rely solely on the physician's letter of July 29, the evidence would nonetheless fall far short of sustaining McClemens' claim that he left his employment for sound medical reasons and thus for good cause. That letter is also ambiguous, in that it states: "*[I]f* he [McClemens] could not handle his present job," and "*If* a new job is required." (Emphasis supplied.) It contains no expression that McClemens' medical condition required different employment nor any expression that he could not perform his work. While McClemens complained on January 6, 1983, of stiffness and discomfort on moving his knee, particularly on bending or squatting, he was found to have had a full range of motion and good stability. Although movement of the knee produced a mild crackling sound, he demonstrated no swelling and neither complained of pain nor demonstrated any objective signs of injury to the back of the kneecap. In short, there was little, if any, objective medical evidence to support his complaints.

Consequently, no matter how the February 9 letter is viewed, the record is devoid of any competent medical evidence which supports a finding of an inability on McClemens' part to perform his work. What is clear, as observed in *Nuss v. Sorensen, post* p. 703, 358 N.W.2d 752 (1984), is that United Parcel did nothing to force McClemens' move to Minnesota.

Under these circumstances McClemens' personal belief that he had to leave his work and move to Minnesota cannot be said

to have been with good cause.

REVERSED AND REMANDED WITH DIRECTIONS.

FARM BUREAU LIFE INSURANCE COMPANY, A CORPORATION, APPELLANT, V. ALVIN J. LUEBBE, PERSONAL REPRESENTATIVE OF THE ESTATE OF WANDA L. LUEBBE, DECEASED, APPELLEE.

358 N.W.2d 754

Filed November 30, 1984. No. 84-093.

1. **Directed Verdict.** In considering a motion for a directed verdict or a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.
2. **Verdicts.** In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it.
3. **Insurance: Fraud: Pleadings.** In order to defeat coverage on the basis of fraud, an insurer must plead and prove, among other things, that a misrepresentation of fact or opinion was made knowingly with intent to deceive, that the insurer relied and acted upon such statement, and that the insurer was deceived to its injury.
4. **Insurance: Statutes.** The provisions of Neb. Rev. Stat. § 44-710.14 (Reissue 1978), applying to sickness and accident insurance, are to be read in pari materia with the provisions of Neb. Rev. Stat. § 44-358 (Reissue 1978), applying to all insurance policies.
5. **Insurance: Fraud.** The nature of a false statement in an insurance application may be such that the trier of fact may infer from the mere making of the statement that it was made knowingly with the intent to deceive.
6. **Constitutional Law: Statutes.** The party attacking a statutory classification must carry the burden of showing that the classification does not rest on any reasonable basis.
7. _____: _____. When no fundamental rights or suspect classification is affected, the equal protection clause of the fourteenth amendment to the U.S. Constitution requires only that the state law be shown to bear some rational relationship to legitimate state purposes.
8. _____: _____. A statute may discriminate in favor of a certain class if the discrimination is founded upon a reasonable distinction, or difference in state policy, or if any state of facts can reasonably be conceived which would sustain the classification.

9. _____: _____. Neb. Rev. Stat. § 44-359 (Reissue 1978) violates neither the equal protection clause of the fourteenth amendment to the U.S. Constitution nor the special law clause of article III, § 18, of the Nebraska Constitution, and is constitutional.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

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

Con M. Keating of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellee.

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

CAPORALE, J.

Plaintiff-appellant, Farm Bureau Life Insurance Company, a corporation, petitioned for a declaration that a policy of life insurance it had issued provides no coverage for the air crash death of the named insured, Duane A. Luebbe. Alvin J. Luebbe, the defendant-appellee and personal representative of the named beneficiary, the insured's wife, Wanda L. Luebbe, who died as a result of the same crash, counterclaimed, seeking payment of the policy proceeds and an attorney fee. Trial was had to a jury, which returned a verdict in favor of the personal representative both on Farm Bureau's petition and on the personal representative's counterclaim. A judgment was entered in accordance with the verdict. In this appeal Farm Bureau assigns three errors to the trial court in (1) failing to sustain Farm Bureau's motion for a directed verdict made at the close of all the evidence and in failing to sustain its motion for judgment notwithstanding the verdict, (2) instructing the jury that Farm Bureau had the burden of proving the insured's intent to deceive, and (3) awarding the personal representative an attorney fee under an unconstitutional statute. We find each assignment to be without merit and affirm.

Farm Bureau, through its agent, John Clabaugh, first sold a $500,000 30-year decreasing term life insurance policy to Duane A. Luebbe, hereinafter called Luebbe, in the fall of 1979. Because Luebbe had previously flown 45 hours as a student

pilot and because his father ran an aerial spraying business, this policy did not cover his death if it were to result from the crash of an airplane on which he was a member of the crew in any capacity.

In the fall of 1981 Clabaugh contacted Luebbe, suggesting that the 1979 policy be changed to an annual renewable term policy. It was decided at this time that an effort be made to have the aviation exclusion removed. Luebbe first filled out a regular policy application on October 13, 1981. Later, on October 22, 1981, he signed an aviation supplement at the request of Farm Bureau's home office. After reviewing both of these application documents, Farm Bureau issued the annual renewable term policy in the amount of $500,000, insuring Luebbe without an aviation exclusion and naming his wife as the beneficiary. This 1981 policy is the policy in question. Both Mr. and Mrs. Luebbe were killed on September 26, 1982, when the plane Luebbe was piloting crashed.

As part of its investigation following the crash, Farm Bureau discovered that Luebbe's logbook indicated he had taken an approximately 48-minute plane ride on September 21, 1981, less than a month before he answered negatively to the following question upon applying for the 1981 policy: "Has any person proposed for coverage: . . . Made any aerial flights in the past two years or contemplate such flights, other than as a civilian passenger?"

Further investigation revealed that the September 21 flight had taken place with one Louis Nigro, a flight instructor who actually made the entry in Luebbe's logbook indicating the flight had taken place. The printed remarks in the logbook read: "Instructor should enter in this column the nature of each maneuver in which instruction is given, and the time spent thereon, and shall attest each such entry with his initials, pilot certificate number, and pertinent rating." There follows in that column, in Nigro's writing: "Basics, C & D turns, LD. L. Nigro 507665532 CFI." Nigro testified that he did not remember the flight with Luebbe and was only reciting what the logbook indicated. When questioned by Farm Bureau's counsel if Luebbe was the one "accomplishing the climbing and descending turns, and the landing," Nigro replied: "It could be

that he was and it could be that I was assisting him or I was demonstrating them to him." Nigro further testified that the "flight instructor is always the pilot in command," and a person is "not considered a student pilot until they pass a medical" examination under the FAA rules.

There was also evidence of Luebbe's reputation for truthfulness and further evidence that he only became reinterested in flying after a convention in Las Vegas, Nevada, in December 1981 when he and a couple of friends flew over Death Valley in a plane one friend rented and piloted. Evidence was adduced from Luebbe's brother and father that after 1976 Luebbe expressed no desire to fly. It seems that Luebbe lost interest in flying as a pilot when, in 1976, he had difficulty landing safely in a direct crosswind. However, the Death Valley experience reawakened his desire to fly. This testimony corresponds with Luebbe's logbook, which indicates that on December 17, 1981, he began making numerous flights, culminating in the receipt of a pilot's license in February 1982.

Farm Bureau's contention is that Luebbe made a material misrepresentation of fact when he stated in the 1981 insurance application that he had made no aerial flights in the past 2 years nor contemplated such flights, other than as a civilian passenger.

The rules of law applicable to Farm Bureau's first assignment of error are that on a motion for a directed verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom. *AgriStor Credit Corp. v. Radtke, ante* p. 386, 356 N.W.2d 856 (1984); *Flakus v. Schug,* 213 Neb. 491, 329 N.W.2d 859 (1983). The same rules apply when the trial judge considers a motion for judgment *non obstante veredicto*. *Middleton v. Nichols*, 178 Neb. 282, 132 N.W.2d 882 (1965).

Correspondingly, in determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of

any inferences reasonably deducible from it. *Pioneer Enterprises v. Edens*, 216 Neb. 672, 345 N.W.2d 16 (1984); *Havelock Bank of Lincoln v. Bargen*, 212 Neb. 70, 321 N.W.2d 432 (1982). A jury's verdict will not be disturbed unless it is clearly wrong. *Kresha v. Kresha*, 216 Neb. 377, 344 N.W.2d 906 (1984); *Ellis v. Far-Mar-Co*, 215 Neb. 736, 340 N.W.2d 423 (1983).

There is evidence from which the jury need not but could reasonably deduce that during his flight with Nigro less than a month before the application, Luebbe was nothing other than a civilian passenger. Nigro's testimony was it "could be" that Luebbe had flown the plane himself once it was in the air, or it "could be" that Nigro had. The logbook entry itself does not recite who piloted the plane, only that instruction was given. This equivocal evidence, combined with the other evidence concerning Luebbe's rekindled interest in aviation only after he applied for the policy in question, is such as to allow the jury to properly find that Luebbe truthfully stated he had made no aerial flights other than as a civilian passenger in the 2 years prior to signing the relevant application documents. The foregoing evidence, notwithstanding the logbook entry, is also such that the jury need not but could reasonably deduce that Luebbe contemplated no such flights as of the date of the application.

Although other finders of fact might reasonably conclude otherwise, the jury could, under one view of the evidence, properly find that Luebbe made no misrepresentation. Its finding was therefore not clearly wrong, and the trial court was correct in overruling Farm Bureau's motion for a directed verdict as well as its motion for judgment notwithstanding the verdict.

The next assignment of error complains that the trial court's instructions to the jury improperly imposed upon Farm Bureau the burden of proving that any misrepresentation made by Luebbe was made with the intent to deceive the insurer. The position of Farm Bureau is that only when an insured has made a misrepresentation as to a matter of opinion, as distinguished from a matter of fact, is intent required. We have, unquestionably, held that where a matter of opinion is involved,

coverage is defeated only when an intent to deceive was present. *Muhlbach v. Illinois Bankers Life Ass'n*, 108 Neb. 146, 187 N.W. 787 (1922). That is not to say, however, that when a misrepresentation of fact is involved, an intent to deceive is not required in order to defeat coverage.

Indeed, the recent case of *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982), clearly establishes that our case law does not support Farm Bureau's contention. Therein, the insured made a misrepresentation of fact in an application for sickness and accident insurance by denying the existence of a material and significant past medical history. We affirmed the dismissal of the insured's claim following a bench trial. In doing so, we held, as required by *Zimmerman v. Continental Cas. Co.*, 181 Neb. 654, 150 N.W.2d 268 (1967), that the provisions of Neb. Rev. Stat. § 44-710.14 (Reissue 1978), applying only to sickness and accident insurance, were to be read in pari materia with the provisions of Neb. Rev. Stat. § 44-358 (Reissue 1978), applying to all insurance policies. Section 44-710.14 provides that a misrepresentation which materially affects either acceptance of the risk or the hazard assumed by the insurer defeats coverage. Section 44-358 provides that a misrepresentation which exists at the time of, and contributes to, the loss and which deceives the insurer to its injury defeats coverage. We then held that in order to defeat coverage on the basis of fraud, the insurer "must plead and prove, among other things, that the misrepresentations were made knowingly with intent to deceive, that the insurer relied and acted upon such statements, and that the insurer was deceived to its injury." 212 Neb. at 905, 327 N.W.2d at 609-10. Accord, *Mutual Benefit Life Ins. Co. v. Chisholm*, 213 Neb. 301, 329 N.W.2d 103 (1983). To be sure, the nature of a false statement may be such that the trier of fact may infer from the mere making of the statement that it was made knowingly with the intent to deceive. *White v. Medico Life Ins. Co., supra.*

The trial court correctly instructed the jury; accordingly, Farm Bureau's second assignment of error fails.

This leaves the third, and final, assignment of error, which argues that Neb. Rev. Stat. § 44-359 (Reissue 1978), allowing the award of an attorney fee to a successful claimant against his

insurer but not to a successful insurer against its insured, denies insurers equal protection of the law and is therefore unconstitutional.

Section 44-359 provides:

> In all cases where the beneficiary, or other person entitled thereto, brings an action upon any type of insurance policy except workmen's compensation insurance, or upon any certificate issued by a fraternal beneficiary association, against any company, person or association doing business in this state, the court, upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings; *Provided*, that if the plaintiff shall fail to obtain judgment for more than may have been offered by such company, person or association in accordance with section 25-901, then the plaintiff shall not recover the attorney's fee provided by this section.

In determining the constitutionality of this statute, we must bear in mind several rules. To begin with, the party attacking a statutory classification must carry the burden of showing that the classification does not rest on any reasonable basis. *State v. Davison*, 213 Neb. 173, 328 N.W.2d 206 (1982). When no fundamental rights or suspect classification is affected, as is the case here, the "Equal Protection Clause of the Fourteenth Amendment requires only that the state law be shown to bear some rational relationship to legitimate state purposes." *Parker v. Roth*, 202 Neb. 850, 861, 278 N.W.2d 106, 113 (1979), *cert. denied* 444 U.S. 920, 100 S. Ct. 240, 62 L. Ed. 2d 177, *reh'g denied* 444 U.S. 1104, 100 S. Ct. 1072, 62 L. Ed. 2d 790 (1980); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973).

Further, *State v. Sprague*, 213 Neb. 581, 330 N.W.2d 739 (1983), states that a statute may discriminate in favor of a certain class if the discrimination is founded upon a reasonable distinction, or difference in state policy, or if any state of facts

can reasonably be conceived which would sustain the classification.

Farm Bureau attacks § 44-359 as containing the following unconstitutional classifications:

(1) The allowance of a fee on an action upon any type of insurance policy except workmen's compensation or a certificate issued by a fraternal beneficiary association.

(2) The lack of a provision which would allow an attorney fee in favor of the insurer in the event of its success in bringing the action or in defending the action brought against it.

(3) The arbitrary subjection of insurance companies to a liability for an attorney fee when other defendants in other classes of *contract* cases are not subject to such burden.

(4) The arbitrary subjection of insurance companies to a liability for an attorney fee when other defendants in othed [sic] classes of cases are not subject to such burden.

Brief for Appellant at 25.

After examining numerous cases dealing with the constitutionality of attorney fee statutes in the context of insurance claims, many of which are collected at Annot., 73 A.L.R.3d 515 (1976), we conclude that none of these classifications are so arbitrary as to violate either the equal protection clause of the fourteenth amendment to the U.S. Constitution or the special law clause of article III, § 18, of the Nebraska Constitution.

As far back as 1900, in *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N.W. 313 (1900), this court upheld the constitutionality of the attorney fee statute then in force. That statute provided for the recovery of an attorney fee from an insurer when the insured prevailed on a property damage claim, and was upheld on the theory that property insurers "have been long accustomed to vexatiously and oppressively resisting payment of claims arising under their policies." *Id.* at 124, 82 N.W. at 315.

This same statute was upheld by the U.S. Supreme Court 3

years later in *Farmers' &c. Ins. Co. v. Dobney*, 189 U.S. 301, 23 S. Ct. 565, 47 L. Ed. 821 (1903). The insurer in *Dobney* contended that equal protection was violated because insurers were liable for attorney fees when other defendants were not; because if the insurer was successful, no attorney fee would be given; and because the statute only applied to property insurers. These arguments are noticeably similar to the ones now made by Farm Bureau. The U.S. Supreme Court rejected each of these arguments, holding that "contracts of insurance from their very nature are susceptible of classification, not only apart from other contracts, but from each other . . . ." *Id.* at 305.

In 1934 the U.S. Supreme Court dealt with the attorney fee issue in the context of a life insurance policy in *Life & Casualty Co. v. McCray*, 291 U.S. 566, 54 S. Ct. 482, 78 L. Ed. 987 (1934). The statute upheld in *McCray* is similar to the current Nebraska statute in that an attorney fee is automatically awarded even if the insurer resisted payment in good faith and upon reasonable grounds. The Court found this to be of no consequence, since "[o]ne who refuses to pay when the law requires that he shall, acts at his peril, in the sense that he must be held to the acceptance of any lawful consequences attached to the refusal. It is no answer in such circumstances that he has acted in good faith." *Id.* at 574. The U.S. Supreme Court also held there was no unconstitutional classification, since diverse social needs made it proper to only charge insurers with their successful opponents' attorney fees. These social needs cited by the Court are just as persuasive now as they were then.

> Dependents left without a breadwinner will be exposed to sore distress if life insurance payments are extracted slowly and painfully, after costly contests in the courts. Health and accident insurance will often be the sources from which the sick and the disabled are to meet their weekly bills. Fire insurance moneys, if withheld, may leave the business man or the householder without an office or a home. Classification prompted by these needs is not tyrannical or arbitrary.

Id. at 569-70.

Cases from other jurisdictions, such as *Brandywine Shoppe, Inc. v. State Farm Fire & Cas. Co.*, 307 A.2d 806 (Del. Super.

Ct. 1973), and *Feller v. Equitable Life Assur. Soc.*, 57 So. 2d 581 (Fla. 1952), in upholding their attorney fee statutes against equal protection attacks, found it persuasive that the field of insurance has traditionally been subject to state regulation.

> The business of insurance is affected with a public interest as much as any other business conducted in the United States. Such business is subject to reasonable regulation in the public interest. It is an undue hardship upon beneficiaries of policies to be compelled to reduce the amount of their insurance by paying attorney's fees when suits are necessary in order to collect that to which they are entitled.

57 So. 2d at 586.

Contrary to the contention of Farm Bureau, the reasoning of the above cases is still valid; § 44-359 continues to bear a rational relationship to a legitimate state interest.

The personal representative of the estate of Wanda L. Luebbe, deceased, is awarded the sum of $1,500 for the services of his attorney in this court.

AFFIRMED.

JANINE A. NUSS, APPELLEE, V. RONALD E. SORENSEN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLANT, DONNA BRITTENHAM ET AL., APPELLEES.

358 N.W.2d 752

Filed November 30, 1984. No. 84-164.

1. **Employment Security Law: Words and Phrases.** Under the Nebraska Employment Security Law, the phrase "to leave work voluntarily" means to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment.
2. **Employment Security Law.** As a general rule, an employee who leaves employment for the sole purpose of obtaining a better job has left work voluntarily within the meaning of the Nebraska Employment Security Law.

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

Paul D. Kratz, for appellant.

Robert G. Hays, for appellee Nuss.

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

HASTINGS, J.

This is an appeal by the Commissioner of Labor from an order of the district court for Lancaster County which reversed a ruling of the Nebraska Appeal Tribunal. The tribunal had found that claimant-appellee, Janine A. Nuss, had voluntarily left her employment without good cause, thus disqualifying her from 9 weeks of unemployment compensation.

The facts, as stipulated by the parties, are as follows: The claimant was employed as a housekeeper at the Sharon Motel until October 17, 1982. At that time Nuss *voluntarily* left this position in order to accept a permanent, higher-paying job with the Brunswick Corporation. Nuss worked for Brunswick for 5 weeks and then was laid off through no fault of her own, as the corporation reduced its work force.

The question presented is whether Neb. Rev. Stat. § 48-628(a) (Cum. Supp. 1982) requires that a person who voluntarily leaves one job in order to accept another is disqualified from receiving benefits for having left without good cause. The statute provides: "An individual shall be disqualified for benefits: (a) For the week in which he or she has left work voluntarily without good cause, if so found by the Commissioner of Labor, and for not less than seven weeks nor more than ten weeks which immediately follow such week . . . ."

In reaching its decision for the claimant, the district court relied on the following language from our opinion in *Gilbert v. Hanlon*, 214 Neb. 676, 680, 335 N.W.2d 548, 551 (1983):

> We believe that a more appropriate reading of both the language of § 48-628 and the intent and purpose of the Nebraska Employment Security Law (Neb. Rev. Stat.

> §§ 48-601 to 48-669) is to interpret § 48-628(a) such that one is disqualified for benefits if, by leaving work voluntarily without good cause, one thereby makes himself or herself "unemployed."

However, in view of the differing factual situation presented in *Gilbert*, such reliance was not warranted.

Gilbert concerned an employee who held both full-time and part-time positions concurrently. The individual quit her part-time position and was laid off from her full-time job. In affirming the district court's ruling that the employee was not disqualified from receiving benefits attributable to her full-time position, we stated:

> While the language of § 48-628 appears clear on its face, when applied to the factual situation in this case the conflict becomes readily apparent. Section 48-628 apparently contemplates that an employee will have only one job at any one time, because it does not provide for what is to happen in the event of multiple jobs. Section 48-628 does not say that one is disqualified if he or she leaves "some of his or her work" or if he or she leaves "part of his or her work," or anything of that import. The commissioner advises us in his brief that it is his position that § 48-628(a) must be interpreted to apply to claimants who voluntarily leave *any* job, as the statute makes no distinction between quitting part-time and full-time employment. We believe that such an interpretation would be wholly inappropriate.

Id. at 679-80, 335 N.W.2d at 551.

The appellee's argument in the instant case, that she did not make herself "unemployed" by leaving her job at the motel, overlooks the limited context of our ruling in *Gilbert*. The specific situation we addressed was *concurrent* employment and the effect of a voluntary ending of a part-time employment on unemployment benefits arising from full-time employment. We noted the incongruous result that

> one who had worked for years at a full-time job and then took a part-time job selling on Thursday evenings, and who thereafter voluntarily quit the part-time employment in order to devote even more time to his or her full-time

> employment, might lose all the benefits of the Nebraska Employment Security Law by reason of having taken this temporary part-time job.

Id. at 682-83, 335 N.W.2d at 552. The situation involving Nuss presents no such hardship, but rather concerns a common occurrence wherein an employee quits a full-time job through no fault of the employer.

We have said that " 'to leave work voluntarily,' as that term is used in the Nebraska Employment Security Law, means to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment." *Powers v. Chizek*, 204 Neb. 759, 764, 285 N.W.2d 501, 504 (1979). The stipulated facts are clear that the appellee left her job for the sole reason that she had found a more lucrative position. Her employer did nothing to force this move, thus making Nuss' actions completely voluntary. "It is obvious that the Employment Security Law does not purport to grant benefits to employees who leave their work purely voluntarily." *Glionna v. Chizek*, 204 Neb. 37, 40, 281 N.W.2d 220, 223 (1979).

The judgment of the district court is reversed, and the cause is remanded with directions to reinstate the order of the Nebraska Appeal Tribunal.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., dissenting.

As recently as *Gilbert v. Hanlon*, 214 Neb. 676, 680, 335 N.W.2d 548, 551 (1983), this court said:

> We believe that a more appropriate reading of both the language of § 48-628 and the intent and purpose of the Nebraska Employment Security Law (Neb. Rev. Stat. §§ 48-601 to 48-699) is to interpret § 48-628(a) such that one is disqualified for benefits if, by leaving work voluntarily without good cause, one thereby makes himself or herself "unemployed."

Janine A. Nuss, by leaving the employ of the Sharon Motel and accepting higher paid employment, did not render herself unemployed. Therefore, she was eligible for unemployment benefits. I would have so held.

SHANAHAN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. GARY KEITHLEY, APPELLANT.

358 N.W.2d 761

Filed November 30, 1984. No. 84-368.

1. **Criminal Law: Trial: Attorney and Client.** A defendant will not be allowed to disrupt the orderly procedure of the trial court by discharging his counsel on the eve of trial and demanding that all proceedings be stayed while he attempts to find other counsel.
2. **Sexual Assault: Corroboration.** Corroboration of the principal act constituting the offense is not required.
3. **Criminal Law: Evidence: Prior Acts.** Whether evidence of previous conduct is not relevant because of remoteness or lack of similarity is a matter within the discretion of the trial court.
4. _____: _____: _____. Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused.
5. **Sexual Assault: Evidence: Prior Acts.** Evidence of previous similar conduct has independent relevancy in prosecutions for sexual offenses.

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

Dana M. London, for appellant.

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

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

BOSLAUGH, J.

The defendant, Gary Keithley, was convicted of first degree sexual assault and sentenced to imprisonment for 15 to 25 years. He has appealed and contends that it was error for the trial court to require him to elect between a jury trial and a bench trial when he was without the assistance of his own counsel, to admit evidence of a previous incest offense, that there was not sufficient evidence of corroboration, and that the sentence was excessive.

The record shows that the defendant was present with counsel at a hearing on motions 6 days before his scheduled trial. At that time the court was made aware that the defendant was considering waiving his right to a jury trial and retaining

other private counsel. The trial court told the defendant that there would be no continuance granted, and if he desired to waive his right to a jury trial, it was necessary for him to do so at that time. After a private discussion with counsel the defendant chose to waive a jury. The court then fully apprised the defendant of his rights and accepted the defendant's waiver as given freely and voluntarily.

Although the trial court permitted the first counsel to withdraw, he was ordered to be present at the trial to assist any other counsel the defendant might obtain. The defendant was allowed to consult with that counsel before making his election as to a bench trial, and we find that he was not denied any substantial right by this procedure. A defendant will not be allowed to disrupt the orderly procedure of the trial court by discharging his counsel on the eve of trial and demanding that all proceedings be stayed while he attempts to find other counsel.

At the trial the defendant's 15-year-old daughter testified that on September 20, 1983, the defendant forced her to perform oral sex with him in the living room of their home as a form of punishment. She further testified that such incidents had occurred 20 to 30 times over the course of the summer.

Over objection the victim's sister was allowed to testify concerning sexual encounters with the defendant which led to his conviction in 1980 for incest. This daughter testified that when she was about 13 years old the defendant began to approach her almost weekly to engage in oral sex. She further testified that this activity led to sexual intercourse within 6 to 8 months and that when she was 17 she filed charges against her father.

The testimony of the victim was corroborated by the officer who received her complaint. Furthermore, the defendant admitted being with the prosecutrix at the same time and place that the assault occurred. In *State v. Watkins*, 207 Neb. 859, 864, 301 N.W.2d 338, 341-42 (1981), this court said, "It is clear from the record that the defendant in this case had both the opportunity and inclination to commit the offense; and we have held that such opportunity and inclination on the part of the defendant may be considered in determining whether there has

been sufficient corroboration."

This evidence was sufficient corroboration of the victim's testimony. Corroboration of the principal act constituting the offense is not required. *State v. Davis*, 214 Neb. 474, 334 N.W.2d 450 (1983).

The defendant contends that the evidence concerning the 1980 incest case was inadmissible because it was remote, lacking in sufficient similarity, and unnecessary. The defendant relies on Neb. Rev. Stat. § 27-404(2) (Reissue 1979), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The defendant argues that the practical effect of admitting testimony regarding his prior offense was to establish that he acted in conformity therewith in the case at bar.

In *State v. Ellis*, 208 Neb. 379, 392-93, 303 N.W.2d 741, 750 (1981), in discussing the discretion exercised by the trial court in admitting such evidence, we said:

> "The extent to which the discretion of the trial court will be allowed to be exercised in this regard has not been fixed by any decision of this court. Probably it cannot be but depends upon the facts in each case. . . . In State v. Siddoway, 61 Utah 189, 211 P. 968, it was held: 'No exact limitation of time can be fixed as to when another offense tending to prove the intent of the act charged is remote. The decision of that question must depend upon the circumstances of the particular case, and whether evidence is too remote or not is a question whose decision is largely in the sound discretion of the trial court.' [Citations omitted.] The doctrine generally accepted is that remoteness in point of time may weaken the evidential value of the evidence but does not justify its exclusion. [Citations omitted.]
>
> "*Likewise it is a matter left to the discretion of the trial court as to whether the prior offenses are sufficiently similar to the one charged in the case on trial so that*

> *evidence thereof has probative value.*" *Sall v. State*, 157 Neb. 688, 697-98, 61 N.W.2d 256, 262 (1953). (Emphasis supplied.)

In *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981), the defendant was charged with first degree sexual assault on his 11-year-old son. The victim's 8-year-old brother was allowed to testify that the defendant had engaged in the same conduct with him on at least one occasion. This court found that the evidence of sexual assault with the younger brother was part of a continuing pattern of conduct by the defendant toward his sons and was admissible, since it tended to establish motive, intent, preparation, plan, and knowledge. The court stated:

> Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused. The balancing of the need for other-crimes evidence against the possible prejudice to the defendant is within the appropriate discretion of the trial court. *State v. Williams, supra.*
>
> This court has also held that evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes. See, *State v. Williams, supra; State v. Nielsen*, 203 Neb. 847, 280 N.W.2d 904 (1979). In the present case the evidence of sexual conduct with the younger son was, in effect, part of a continuous pattern of conduct by the defendant toward both of his sons and tended to establish motive, opportunity, intent, preparation, plan, and knowledge.

207 Neb. at 748-49, 301 N.W.2d at 99. The court concluded the issue by quoting authorities which recognize the independent relevancy of other similar conduct in sexual crimes.

In *State v. Plymate*, 216 Neb. 722, 345 N.W.2d 327 (1984), the principal assignment of error concerned the trial court's admission into evidence of testimony that the defendant made admissions to a newspaper reporter concerning commission of 300 or more sexual assaults. Concerning the admissibility of such evidence, the court began: " ' "[I]t is a matter left to the discretion of the trial court as to whether the prior offenses are sufficiently similar to the one charged in the case on trial so that the evidence thereof has probative value." ' " *Id.* at 725, 345 N.W.2d at 329. The court began its discussion by acknowledging the independent relevancy of other sexual conduct, and then proceeded to more specifically delineate its holding, saying that the defendant had carried out a detailed scheme to commit a crime, which made evidence of the scheme admissible to show plan and intent.

In *State v. Evans*, 212 Neb. 476, 323 N.W.2d 106 (1982), the defendant was charged with attempted first degree sexual assault of his 14-year-old daughter. The sister of the prosecutrix was allowed to testify that the defendant had made initial sexual advances toward her when she was 10 years old and had engaged in sexual intercourse with her by the time she was 12 years old. It was further revealed in cross-examination that the defendant had been charged and tried on a previous occasion concerning a similar allegation. This court noted that intent was an essential element of the crime charged and held that evidence of the defendant's prior sexual relationships with the prosecutrix and her sister was properly admitted.

In *State v. Baker, ante* p. 207, 352 N.W.2d 894 (1984), the defendant was convicted of attempted first degree sexual assault and false imprisonment in the first degree. The victim had accepted a ride to school from the defendant, who said he was called "Stud." The defendant asked the victim to have sexual relations, and when she refused, the defendant drove to a park, where he attempted to force the victim to engage in fellatio. During the course of the trial, the court received the testimony of three minor girls that the defendant had previously attempted to pick up girls of similar age and appearance, that he had driven the same car in approximately the same area each time, and that he had used the same name.

Holding that the evidence was "clearly admissible to establish preparation, plan, and identity as well as motive and intent," this court quoted from previous cases in which it was determined:

> " '[S]exual crimes have consistently been classified as those in which evidence of other similar sexual conduct has been recognized as having independent relevancy, and courts generally hold that evidence of other sex offenses by the defendant may be admissible, whether the other offense involves the complaining witness or third parties.' "

Id. at 212, 352 N.W.2d at 897.

In this case the testimony of the sister of the victim concerning the 1980 incest was admissible as tending to prove intent, motive, plan, and method of operation.

In regard to the defendant's claim that the sentence was excessive, first degree sexual assault on a child is a Class II felony carrying a penalty of 1 to 50 years' imprisonment. At the time of his conviction defendant was on parole for the 1980 incest conviction. Psychiatric tests showed nothing to suggest that his prior incarceration or professional attempts at family intervention and counseling had been of any benefit. Under the circumstances his sentence to imprisonment for 15 to 25 years was not an abuse of discretion.

The judgment of the district court is affirmed.

AFFIRMED.

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

While I do not agree with the majority's reliance on all of the cases cited for their conclusion, I do believe that the results reached by the court in this case are correct and that evidence of Keithley's previous conviction for incest with his older daughter was admissible. For that reason I concur only in the result reached by the majority in this case.

STATE OF NEBRASKA, APPELLEE, V. ISAIAH JERRY JONES, APPELLANT.

358 N.W.2d 765

Filed November 30, 1984. No. 84-377.

1. **Sentences: Death Penalty.** Where a sentence of life imprisonment and a sentence of death are imposed at the same time by the same court, the life sentence is to be served until the death sentence is carried out.
2. **Sentences.** A court may impose a lesser sentence when an erroneous sentence has been vacated.

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

James J. Frost of North, Black & Kubichek, for appellant.

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

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

CAPORALE, J.

Defendant, Isaiah Jerry Jones, was tried previously and convicted of one count of murder in the second degree and one count of murder in the first degree. He was thereafter, at one proceeding, sentenced first to life imprisonment on the second degree conviction and then to death on the first degree conviction. Nothing was said as to whether any sentence was to be served concurrently with or consecutively to the other. On direct appeal this court affirmed both convictions and the life sentence imposed on the second degree conviction, but vacated the death sentence imposed on the first degree conviction and remanded the cause for resentencing on that conviction. Jones was subsequently sentenced to life imprisonment on the first degree conviction, said sentence to run consecutively to the life sentence previously imposed on the second degree conviction. He now appeals from that new sentence, arguing that requiring him to serve the first degree life sentence consecutively to the previously imposed second degree life sentence somehow increases the length of the previously imposed sentence, thereby impermissibly subjecting him to double jeopardy. The claim

being without merit, we affirm.

The circumstances under which Jones snuffed out the lives of Ann L. Speese and her 12-year-old daughter, Tina, are set forth in *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982), wherein consideration by the trial court of certain immunized testimony by Jones in an unrelated case required that we remand for resentencing on the first degree murder conviction for the slaying of Tina.

Jones first postulates that where two sentences are imposed in the same court at the same time for two offenses, each sentence runs concurrently with the other if the trial judge does not specify otherwise. He next observes that he was originally sentenced in the same court at the same time on each of the second and first degree murder convictions. He then concludes that the original second degree life sentence was to be served concurrently with the vacated concurrent first degree death sentence. From that conclusion he contends that changing the prior concurrent second degree life sentence to a consecutive one by substituting a consecutive life sentence for the vacated concurrent death sentence is a modification upward; that as he had begun to serve the valid second degree life sentence, that sentence could not be later increased; and that, in any event, a court may not add punishment to a valid, unchallenged sentence to offset a criminal defendant's successful challenge to an invalid sentence on a separate conviction.

We reach none of Jones' various contentions, for his postulate, even if correct, has no application to the situation presented. The hypothesis rests on language contained in *Culpen v. Hann*, 158 Neb. 390, 63 N.W.2d 157 (1954), and *Luke v. State*, 123 Neb. 101, 242 N.W. 265 (1932), which states that where two sentences are imposed in the same court at the same time for two offenses, the sentences will run concurrently if the trial judge does not otherwise order. It must be noted first of all that the statements are dicta because neither of those cases involved concurrent sentences. *Culpen* presented two consecutive 3-year sentences which the defendant unsuccessfully challenged on the basis they were to be treated as concurrent, notwithstanding the trial judge's pronouncement to the contrary. *Luke* involved a 30-day jail sentence combined

with a $50 fine and a consecutive sentence of 1 to 3 years' imprisonment. Moreover, the dicta upon which Jones relies do not say that in the absence of a consecutiveness direction, each sentence runs concurrently with the other, only that the sentences will run concurrently. There is some authority for stating the general rule to be that in the absence of a consecutiveness specification, it is the second sentence which runs concurrently with the first, not that each sentence runs concurrently with the other. 21 Am. Jur. 2d *Criminal Law* § 552 (1981). The *Culpen* and *Luke* language is as consistent with that latter interpretation of the doctrine as it is with the interpretation given the doctrine by Jones. If it is only the second sentence which runs concurrently with the first, then Jones' entire argument fails, for it was the vacated death sentence which was imposed second and that death sentence was the only sentence for which the subsequent consecutive life sentence was substituted.

However, we need not resolve in this case which of the foregoing two interpretations is the Nebraska rule, for there is a dispositive distinction between the situation presented in this case and those in which some variation of the concursion in the absence of a consecutiveness direction doctrine may apply. The word "concurrent" means operating simultaneously. Webster's Third New International Dictionary, Unabridged 472 (1968). Concurrent sentences operate simultaneously; that is to say, they run together during the periods they overlap. *State v. Martinez*, 99 N.M. 248, 656 P.2d 911 (1982); *In re Roberts*, 40 Cal. 2d 745, 255 P.2d 782 (1953). One may, while alive, simultaneously serve time to be applied to two sentences. He may not, however, be at the same time alive and dead, as the definition of one condition excludes the other. Consequently, any rule that in the absence of a consecutiveness direction two sentences pronounced at the same time by the same court are to be served concurrently can have no application when death has been imposed as one of the sentences. In such an instance, a life sentence, or so much thereof as may be, is served until the death sentence is carried out. See, *Elledge v. Graham*, 432 So. 2d 35 (Fla. 1983), *cert. denied* 464 U.S. 986, 104 S. Ct. 436, 78 L. Ed. 2d 368, and *Whitney v. State*, 132 So. 2d 599 (Fla. 1961),

holding that an offender has no legal right to serve a life sentence before a death sentence can be carried out. To require a sentencing judge to announce that a sentence of death is to be served consecutively to a sentence of life imprisonment would be to require a judge to state the obvious. This we refuse to do. The fact that, as Jones points out, the sentencing panel in *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977), chose, perhaps out of an overabundance of caution, to pronounce that a sentence for an indefinite term of years was to be served consecutively to a sentence of death in no way affects the foregoing analysis.

As we have seen, the simultaneous sentence cases cited by Jones which do not deal with a death sentence are not relevant to the inquiry at hand. The death sentence case on which Jones places heavy reliance, *United States v. Frady*, 607 F.2d 383 (D.C. Cir. 1979), was, in our view, decided incorrectly. Therein, Frady was originally sentenced at the same time and in the same court to death on a first degree murder conviction and to imprisonment for a period of from 5 to 15 years on a robbery conviction. On appeal it was determined that the death sentence was erroneous, and the trial court was directed to resentence Frady to life imprisonment on the murder conviction. When the trial court did so, it altered the prison sentence imposed on the robbery conviction to make it run consecutively to the life sentence imposed on the murder conviction. The two-judge majority of the three-judge panel concluded that the original prison sentence on the robbery conviction, consecutiveness not having been specified, was concurrent with the death sentence in the murder conviction. Thus, it reasoned, changing the robbery sentence subjected Frady to double jeopardy by extending the time he would be imprisoned on the robbery conviction. Firstly, as noted earlier, we conclude that the *Frady* majority was simply wrong in applying the concurrent in the absence of a consecutiveness direction doctrine when death was one of the sentences originally imposed. There is no logic in that position. Secondly, there is a factual distinction between *Frady* and the instant case. In *Frady* the trial court modified an original sentence which had not been vacated by the appellate court. That is not what happened here. Here, the trial court

substituted a lesser sentence, consecutive life, for the vacated death sentence. Imposing a lesser sentence when an erroneous sentence has been vacated is entirely permissible. *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969); *State v. Lopez*, 217 Neb. 719, 350 N.W.2d 563 (1984); *State v. Gaston*, 193 Neb. 259, 226 N.W.2d 355 (1975).

Having elected to take the lives of two human beings, it is entirely appropriate that Jones be required to spend two lifetimes in prison, or so much thereof as the Board of Pardons of this state and the ordinances of nature shall allow.

AFFIRMED.

EARL RAYMOND WISEMAN ET AL., PLAINTIFFS, V. ROBERT KELLER, STATE PROBATION ADMINISTRATOR FOR THE STATE OF NEBRASKA, ET AL., DEFENDANTS.

358 N.W.2d 768

Filed November 30, 1984. No. 84-408.

Constitutional Law: Actions: Statutes. Neb. Rev. Stat. § 20-148 (Reissue 1977) does not waive the sovereign immunity of the State of Nebraska as to actions brought in federal court under 42 U.S.C. § 1983 (1982) to protect rights under the contract clause (article I, § 10, of the U.S. Constitution) and property interests protected under the fourteenth amendment to the U.S. Constitution.

Certified Question from the U.S. District Court for the District of Nebraska. Judgment entered.

Beverly Evans Grenier and Steven D. Burns of Steven D. Burns, P.C., for plaintiffs.

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

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

BOSLAUGH, J.

The U.S. District Court for the District of Nebraska has certified the following question of law to this court: Does Neb.

Rev. Stat. § 20-148 (Reissue 1977) constitute a waiver of sovereign immunity by the State of Nebraska for actions brought in federal court under 42 U.S.C. § 1983 (1982) to protect rights under the contract clause (article I, § 10, of the U.S. Constitution) and property interests protected under the fourteenth amendment to the U.S. Constitution?

The question arises in an action brought in the federal court pursuant to § 1983 by Earl Raymond Wiseman, Robert V. Yanders, and Eleanor L. Yanders against the administrators of the Nebraska Office of Probation Administration, members of the state judiciary, and the State of Nebraska for violation of their due process rights under the fourteenth amendment to the U.S. Constitution and for violation of the contract clause found in article I, § 10, of the U.S. Constitution.

The plaintiffs were employees of the probation office in Columbus, Nebraska. On April 13, 1983, each was called to a meeting before five members of the state judiciary and asked to resign. Each did so under protest. The plaintiffs were not given notice of the purpose of the meeting, nor were they given any opportunity to hear or answer any charges made against them.

The plaintiffs sought a declaration of their rights under their contract for employment, reinstatement, backpay, and damages. They sought special damages for aggravation of preexisting heart conditions in plaintiffs Robert Yanders and Wiseman. They sought general damages to compensate them for damage to their reputations occasioned by the publicity surrounding their dismissals.

The federal court found that the plaintiffs had been deprived of a property right in their employment without due process and were entitled to a termination hearing. The injunctive relief requested was granted pending such a hearing. The state officials were held not liable for damages because they had acted in good faith as they understood the terms of the contract.

On March 29, 1984, the federal court dismissed the plaintiffs' claims for monetary damages. However, at the request of the plaintiffs, the order of March 29, 1984, was stayed pending certification of the question of state law to this court.

The issue with respect to the claim against the State of

Nebraska is whether the bar against a suit on such a claim provided by the eleventh amendment to the U.S. Constitution has been waived. In the order of March 29, 1984, the federal court found that the eleventh amendment barred such a suit under the doctrine of sovereign immunity and that § 20-148 did not "explicitly and unequivocally" act as a waiver of state immunity.

The general rules governing statutory construction and interpretation provide that, absent any indication to the contrary, words in a statute are to be given their ordinary meaning. *Kellogg Company v. Herrington*, 216 Neb. 138, 343 N.W.2d 326 (1984). If any ambiguities exist in the wording, the court will look to the legislative history to determine the lawmakers' intent. *Ebert v. Black*, 216 Neb. 814, 346 N.W.2d 254 (1984). The court will, however, avoid constructions which would lead to absurd, unjust, or unconscionable results. *Ebert, supra; Worley v. City of Omaha*, 217 Neb. 77, 348 N.W.2d 123 (1984). It will, instead, place a sensible construction upon a statute to effectuate the object of the legislative intent rather than a literal meaning which would defeat such intent. *State v. Coffman,* 213 Neb. 560, 330 N.W.2d 727 (1983).

There are, in addition, special rules which govern statutes in derogation of state sovereignty. Statutes which waive a state's sovereign immunity should be strictly construed in favor of the state. *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979); *Gentry v. State*, 174 Neb. 515, 118 N.W.2d 643 (1962). The court will resolve an evenly balanced uncertainty of meaning in favor of sovereignty. R. Dickerson, The Interpretation and Application of Statutes 206 (1975). This is so that " 'sovereignty may be upheld and not narrowed or destroyed, and [no law should] be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, unless the intention of the legislature to effect this object is clearly expressed.' " *Catania* at 313, 282 N.W. 2d at 32.

Article V, § 22, of the Constitution of Nebraska provides: "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." This provision is not self-executing; legislation is necessary to make it available. *Gentry, supra; Catania, supra;*

State v. Mortensen, 69 Neb. 376, 95 N.W. 831 (1903).

The eleventh amendment to the U.S. Constitution prohibits suits against a state in federal court without its consent, even by its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1889). Waiver will only be found "where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Edelman v. Jordon*, 415 U.S. 651, 673, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 29 S. Ct. 458, 53 L. Ed. 742 (1909); *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984).

Section 20-148 provides as follows:

> (1) Any person or company, as defined in section 49-801, except any political subdivision, who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the United States Constitution or the Constitution and laws of the State of Nebraska, shall be liable to such injured person in a civil action or other proper proceeding for redress brought by such injured person.
>
> (2) The remedies provided by this section shall be in addition to any other remedy provided by Chapter 20, article 1, and shall not be interpreted as denying any person the right of seeking other proper remedies provided thereunder.

Neb. Rev. Stat. § 49-801(16) (Reissue 1978) provides that "[p]erson includes bodies politic and corporate, societies, communities, the public generally, individuals, partnerships, joint stock companies and associations."

The question, then, is whether the state is a person within the meaning of § 49-801(16) subjecting itself to suit under § 20-148. The answer depends upon the meaning ascribed to the term "bodies politic and corporate." The term must be read conjunctively, *Lindburg v. Bennett*, 117 Neb. 66, 219 N.W. 851 (1928), and any entity must fulfill both aspects to fall within its meaning. The term "body politic" refers to an association of individuals, a social compact by which the whole group

covenants with each other that all shall be governed by laws for the common good. It usually applies to the state or other public associations. *Lindburg, supra; Utah State Bldg. Comm. v. Great Amer. Indem. Co. et al.*, 105 Utah 11, 140 P.2d 763 (1943). The term "body corporate" is defined as a corporation, public or private. *Utah State Bldg. Comm., supra*; Black's Law Dictionary 159 (5th ed. 1979). It thus appears the state is a body politic but not corporate.

Recent case law supports this analysis. In *State ex rel. Dept. of Pub. Instruction v. ILHR*, 68 Wis. 2d 677, 229 N.W.2d 591 (1975), the Wisconsin Supreme Court held the state was not included in the statutory definition of "person" with respect to liability under that state's Fair Employment Act inasmuch as the state is a body politic but neither the state nor its agencies are corporate. The decision conforms to the common dictionary meaning which notes the phrase "body politic and corporate" is particularly appropriate to a public corporation with powers and duties of government, i.e., a municipal corporation. Black's Law Dictionary 159 (5th ed. 1979); Ballentine's Law Dictionary 144 (3d ed. 1969); *Student Bar Association v. Byrd*, 293 N.C. 594, 239 S.E.2d 415 (1977); *McGuire v. Bd. of Regents of N. Ill. Univ.*, 71 Ill. App. 3d 998, 390 N.E.2d 632 (1979).

The legislative history of § 20-148 indicates that the major focus of the statute was to wipe out *private* acts of discrimination by *private* employers, thus excluding the state. Judiciary Committee Hearing, L.B. 66, 85th Leg., 1st Sess. (Jan. 18, 1977).

Further support for this conclusion is found in other statutes passed by the Nebraska Legislature which specifically provide the state is subject to suit only under certain circumstances. See, e.g., Neb. Rev. Stat. §§ 24-319 (Reissue 1979), 25-1012.01 (Cum. Supp. 1984), 81-8,209 (Reissue 1981), 48-1126 (Supp. 1983), and 48-1227.01 (Supp. 1983).

There is a further reason why a suit for damages against the state may not be maintained in federal court. "A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." (Emphasis in original.) *Pennhurst State School & Hosp. v. Halderman*, 465

U.S. 89, 104 S. Ct. 900, 907, 79 L. Ed. 2d 67 (1984). In the present case, even if the state had waived its sovereign immunity, that immunity would have been waived only with respect to state courts. Here, the legislative history indicates the remedy afforded by this statute is a state remedy only. The legislators purposely eliminated excess wording covered by federal enactment § 1983. "And the words stricken will be 'under color of any state or local law, statute, ordinance, resolution, regulation, custom or usage of this state.' That need not be in the provision because this is establishing a *state* remedy and not a federal remedy." (Emphasis supplied.) Judiciary Committee Hearing, *supra* at 1.

A state's waiver of sovereign immunity in its own courts is not a waiver of the eleventh amendment immunity in the federal courts. *Pennhurst, supra; O'Connor v. Slaker*, 22 F.2d 147 (8th Cir. 1927). Therefore, since the statute is silent as to allowing suit in federal court and the legislative history indicates it was intended as a state remedy, we conclude that even if the statute permitted suit against the state, that suit could only be brought in state court.

We conclude that the question must be answered in the negative. Section 20-148 did not waive the sovereign immunity of the State of Nebraska as to actions brought in federal court under § 1983 to protect rights under the contract clause (article I, § 10, of the U.S. Constitution) and property interests protected under the fourteenth amendment to the U.S. Constitution.

JUDGMENT ENTERED.

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

The majority opinion correctly holds that there is insufficient evidence to establish that the State of Nebraska has unequivocally waived its sovereign immunity, and therefore it must be held that such sovereign immunity has not been waived. Having therefore determined that there has been no waiver, I do not believe it appropriate to conclude further that, even if immunity had been waived, which we say has not occurred, it was only waived in regard to state court actions and not in regard to federal court actions. In my view, the State of Nebraska has not waived its immunity either in state court or in

federal court, and therefore we should answer the question posed to us by the U.S. District Court for the District of Nebraska solely on the basis that sovereign immunity has not been waived by the State of Nebraska, without making any distinction between state court actions and federal court actions.

IN RE ESTATE OF THERESA P. CORRIGAN, DECEASED. CLARA ZABOROWSKI ET AL., APPELLANTS, V. CHARIS M. FLEMING, PERSONAL REPRESENTATIVE OF THE ESTATE OF THERESA P. CORRIGAN, DECEASED, APPELLEE.

358 N.W.2d 501

Filed November 30, 1984. No. 84-560.

1. **Wills.** A patent ambiguity in a will is one appearing on the face of the instrument as a result of the language contained therein.
2. _____. A patent ambiguity in a will must be resolved without resort to extrinsic evidence.
3. **Appeal and Error.** This court is obliged to reach its own independent conclusions on questions of law.
4. **Wills.** The cardinal rule in construing a joint and mutual will is to ascertain and effectuate the intention of the testators if that intention is not contrary to law.
5. _____. In searching for the intention of the testators of a joint and mutual will, we must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge in the presumption that the testators understood the meaning of the words used.
6. _____. The presumption that a testator intends to dispose of his entire estate and not to die intestate as to either a part or the whole of his estate cannot supplant the actual intent of the testator as derived from the language of the will.
7. _____. It is not the province of the courts by construction to supply omissions or to write residuary clauses for testators who neglect to do so.
8. _____. The presumption that one making a will intended to fully dispose of his or her estate by that document does not overcome the rule requiring an express provision or necessary implication to disinherit one's heirs.

Appeal from the District Court for Holt County: EDWARD E. HANNON, Judge. Reversed and remanded with directions.

William W. Griffin, for appellants.

Boyd W. Strope, for appellee.

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

CAPORALE, J.

Theresa P. Corrigan and her husband, Patrick J. Corrigan, executed a joint and mutual last will and testament on December 22, 1970. Patrick Corrigan died in 1972. Upon Theresa Corrigan's death on January 6, 1984, the county court interpreted the will in favor of the beneficiaries named therein. Theresa Corrigan's heirs at law, her brothers, sisters, and children of her deceased brothers and sisters, appealed that determination to the district court, which affirmed the county court. The heirs now seek this review, claiming the lower courts erred in their respective interpretations. We agree with that claim and accordingly reverse the judgment and remand to the district court, directing it to remand to the county court with the direction that the county court cause distribution of the estate to Theresa Corrigan's heirs.

The legal thorns growing on the grave of Theresa Corrigan germinated in the following four paragraphs of the joint and mutual will:

> FIRST.
>
> We and each of us do hereby give, devise and bequeath all of our property, of whatsoever nature, whether real or personal property, and wherever situate to the survivor of us, to have and to hold absolutely and forever.
>
> SECOND.
>
> In the event that we are killed as the result of a common disaster, or in the event that neither of us shall survive the other for a period of thirty calendar days, it is hereby determined that Patrick J. Corrigan shall have died first, and all of said property shall then pass to his widow, Theresa P. Corrigan. In the event that neither of us shall survive the other for the period last above stated, then and in that event, we jointly and mutually give, devise and bequeath all of our property as hereinafter set forth:
>
> We Give and bequeath to St. Joseph's Catholic Church of Atkinson, Nebraska the sum of Ten Thousand

($100,00.00) [sic] dollars to have and to hold absolutely and forever.

THIRD.

All of the rest and residue of our property, after the payment of the bequest to St. Joseph's Church, we jointly and mutually give, devise and bequeath in equal shares to Catherine Bonnie Whalen, now residing in Oakland California and Charis Fleming, of Ardmore, South Dakota, to have and to hold, absolutely and forerver [sic].

Lastly, we make constitute and appoint the survivor of us to be Executor or Executrix of this our mutual Last Will and Testament. In the event we are however killed in a common disaster or do not survive each other for thirty calendar days then we make constitute and appoint Charis Fleming of Ardmore South Dakota, who actually resides in Nebraska, the Executor of this our Last Will and Testament.

The threshold question is whether paragraph THIRD is a separate residuary clause operating free of any conditions on all property not otherwise disposed of, or whether the dispositions made therein are subject to the conditions imposed by paragraph SECOND. It cannot, therefore, be said the will is without ambiguity. The ambiguity being a patent one, that is, one appearing on the face of the instrument as a result of the language contained therein, we must resolve it without resort to extrinsic evidence. *In re Estate of Florey*, 212 Neb. 665, 325 N.W.2d 643 (1982). The question being one of law, we are obliged to reach independent conclusions with respect thereto. *Ranger Division v. Bayne*, 214 Neb. 251, 333 N.W.2d 891 (1983).

In reaching those conclusions we are bound by a number of rules of construction. The cardinal rule in construing a joint and mutual will is to ascertain and effectuate the intention of the testators if that intention is not contrary to law. *Sheldon v. Watkins*, 188 Neb. 599, 198 N.W.2d 455 (1972). In searching for the intention of the testators, we must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge in the presumption that the testators understood the meaning of the

words used. *In re Estate of Schmitz*, 214 Neb. 28, 332 N.W.2d 666 (1983). Further, " ' "[t]he intention of the testator is to be ascertained from a liberal interpretation and comprehensive view of all of the provisions of the will." ' " *In re Estate of Florey, supra at* 673, 325 N.W.2d at 647, quoting *Gretchen Swanson Family Foundation, Inc. v. Johnson,* 193 Neb. 641, 228 N.W.2d 608 (1975).

Paragraph FIRST unconditionally gives the surviving Corrigan all of the other's estate "to have and to hold absolutely and forever."

Paragraph SECOND then specifies the conditions under which the inheriting Corrigan may be divested of that estate and which must first exist before the bequests which follow are to be made. Paragraph SECOND states in part: "In the event that neither of us shall survive the other for the period last above stated, then and in that event, we jointly and mutually give, devise and bequeath *all* of our property as *hereinafter set forth*." (Emphasis supplied.) What then follows in paragraph SECOND is a description of the property to be given ($10,000) and the identity of the recipient, St. Joseph's Catholic Church of Atkinson. Standing alone, paragraph SECOND disposes of less than all of the Corrigans' estate in the event its operation divests the inheritance bestowed on one of them by paragraph FIRST.

While paragraph THIRD is separately numbered and is written as a separate paragraph, it directs that the remaining property, "after the payment of the bequest to St. Joseph's Church," be given to Catherine Whalen and Charis Fleming. In other words, it is only by reading paragraphs SECOND and THIRD together that the will disposes of *all* the estate in the event that neither Corrigan outlives the other by at least 30 days.

The unnumbered fourth paragraph further supports this conclusion. It provides that if both Corrigans die within a 30-day period, Charis Fleming is to be appointed the executor of the estate. This evidences the Corrigans' intent that Fleming should have some control over the administration of the estate *only if* he should inherit a large portion of it. This condition corresponds with the provisions in paragraphs SECOND and

THIRD, illustrating a continuity of purpose and an intent to harmonize all the provisions in the will.

We conclude that the Corrigans intended the bequests to the church and other named beneficiaries to be conditional upon the death of both of them within 30 days of each other. The Corrigans were in effect saying: "If neither of us lives past the 30-day period after the other dies, *then* the property will be distributed as set forth." Only by reading the will in that fashion can we give effect to the entire will and honor all of the Corrigans' intentions as expressed in the will.

This result is not unique. In *McLaughlin v. Heath*, 164 Neb. 511, 82 N.W.2d 533 (1957), and in *Sheldon v. Watkins, supra*, we held that under joint wills the surviving spouse in each case took the entire estate provided for in the wills, thus rendering the wills inapplicable to the other beneficiaries named in the wills and thereby creating the possibility that those estates would pass intestate if the surviving spouses failed to execute other wills.

It is urged, on behalf of the beneficiaries, that we apply the presumption that a testator intends to dispose of his entire estate and not to die intestate as to either a part or the whole thereof. *Dunlap v. Lynn*, 166 Neb. 342, 89 N.W.2d 58 (1958). We have also indicated, however, that the presumption cannot supplant the actual intent of the testator as derived from the language of the will. *Allemand v. Weaver*, 208 Neb. 618, 305 N.W.2d 7 (1981); *Katt v. Claussen*, 174 Neb. 603, 118 N.W.2d 1002 (1963).

" 'It is not the province of the courts by construction to supply omissions or to write residuary clauses for testators who neglect to do so.' " *Allemand v. Weaver, supra* at 621, 305 N.W.2d at 9.

We have also said:

> Where there is a doubt as to the distribution of property under a will, the heirs at law will be favored, and, so far as consistent with the terms of the will, or the reasonable inferences to be drawn therefrom, the law of descent will be followed as presumptively in accord with the intention of the testator.

Hunter v. Miller, 109 Neb. 219, 222-23, 190 N.W. 583, 585

(1922).

The presumption that one making a will intended to fully dispose of his or her estate by that document does not overcome the rule requiring an express provision or necessary implication to disinherit one's heirs. *Lowry v. Murren*, 195 Neb. 42, 236 N.W.2d 627 (1975).

There is nothing in the will which indicates an intent by Theresa Corrigan to disinherit her heirs.

Since Theresa Corrigan survived her husband for more than 30 days, she became, under paragraph FIRST of the will, the owner of all of the Corrigans' estate "to have and to hold absolutely and forever." The conditions set forth in the remainder of the will for divesting her of that estate never came into play. Having made no other will, she died intestate, and the distribution of her estate is to be made in accordance with the law concerning such cases.

REVERSED AND REMANDED WITH DIRECTIONS.

CONRAD W. SMITH ET AL., APPELLEES, V. CENTRAL INVESTMENT CO., LTD., A NEBRASKA LIMITED PARTNERSHIP, ET AL., APPELLANTS.

358 N.W.2d 772

Filed December 7, 1984. No. 83-412.

1. **Contracts.** It is well recognized that, as a general rule, every contract for work or services includes an implied duty to perform the work or services skillfully, carefully, diligently, and in a workmanlike manner.
2. **Mechanics' Liens: Foreclosure: Appeal and Error.** An action to foreclose a mechanic's lien is equitable in nature, and we review it de novo.
3. **Prejudgment Interest.** It is the rule in this jurisdiction that prejudgment interest is allowable only where the amount of the claim is liquidated; conversely, where reasonable controversy exists as to the plaintiffs' right to recover or as to the amount of such recovery, the claim is considered to be unliquidated and prejudgment interest is not allowed.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed as modified, and cause remanded with directions.

Dixon G. Adams, for appellants.

Dennis J. Mullin of Breeling, Welling, Place & Steier, for appellees.

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

COLWELL, D.J., Retired.

Plaintiffs brought suit to foreclose a mechanic's lien for "extra" carpentry done on a residence in Bellevue, Nebraska, owned by C. Clifton Nelsen and Dianne E. Nelsen. On April 7, 1983, plaintiffs recovered judgment against defendants for the full amount of their claim, $7,710.75 plus prejudgment interest from September 30, 1981. Defendants appeal, claiming the judgment is excessive and the allowance of prejudgment interest is contrary to law.

Plaintiffs were acting as a joint venture of C. W. Smith Construction, a partnership of Conrad W. Smith and Rollin Alley, and Steve Rewolinski, doing business as Rewolinski Construction. In June 1981 they agreed in writing with Nelsen to frame a new residence for $14,179.66; this contract was fully performed about September 15, 1981, and plaintiffs were paid in full.

The parties orally agreed that any extra work done by plaintiffs would be paid at the rate of $15 per hour plus 15 percent profit, or $17.25 per hour. This suit involves 447 hours of extra work that plaintiffs claim was performed as agreed between June 22 and September 25, 1981, either at Nelsen's request or with his knowledge. Nelsen refused to pay the $7,710.75 claim on the basis of overcharged hours, a mechanic's lien was filed, and this suit followed.

" 'It is well recognized that, as a general rule, every contract for work or services includes an implied duty to perform the work or services skillfully, carefully, *diligently*, and in a workmanlike manner.' " (Emphasis supplied.) *Smith v. Erftmier*, 210 Neb. 486, 490-91, 315 N.W.2d 445, 449 (1982).

The trial court entered judgment on the theories of

quasi-contract and unjust enrichment. Plaintiffs on appeal claim that recovery was in quantum meruit, which theory is not supported in the record. "[A] party cannot recover upon a quantum meruit where he pleads and relies during the trial solely upon an expressed contract." *Reeves v. Watkins*, 208 Neb. 804, 809, 305 N.W.2d 815, 819 (1981). The petition states a cause of action for an oral contract to perform services at an agreed price of $17.25 per hour. There is no issue either that some work was performed or of its workmanlike quality. This reduced the main issue and plaintiffs' burden to prove the extra work hours that were necessary and diligently performed. As we discuss later, plaintiffs did not maintain regular and complete time records for all extra work claimed; they did offer corroborating evidence. Both parties offered evidence as to the reasonableness of the disputed hours.

An action to foreclose a mechanic's lien is equitable in nature, and we review it de novo. *O'Keefe Elevator v. Second Ave. Properties*, 216 Neb. 170, 343 N.W.2d 54 (1984).

The extra work is listed in the recorded lien as 41 items with assigned dollar charges; at trial these charges were translated into hours by using the base hourly wage. Alley kept the daily time records for plaintiffs, but not always on a daily basis. At the beginning he noted extra worktime in these records, and Nelsen approved them by initials. The last approved extra work was August 24. Alley could not explain the discontinuance of that procedure. For convenience we have assembled and consider the items in four categories.

First, there are 20 items approved by Nelsen, totaling 57 hours after deducting 4 hours for error in overbilling.

Second, there are six items for door siding, kitchen soffit, skylight, deck post, front entry, and moving a wall, totaling 48 hours that are supported in the evidence as proven time charges.

Third, and the main area of disagreement, is the claim for 190 extra hours to apply lap siding or 1- by 8-inch board siding as a substitute for the plywood siding provided for in the contract. All parties and witnesses agree that board siding requires more time and skill than plywood. There is a wide range of testimony concerning this item. Plaintiffs testified that in their original contract they allotted 220 hours to apply the

plywood and that their claim of 190 added hours is fair and reasonable, although it is not supported by any specific time records. Their time record book bears the notation "Siding" in the margin for the weeks beginning August 17, 24, and 31; however, there is no approval by Nelsen, although during the week of August 24, he did approve other extra work items. Plaintiffs could not explain the lack of any supporting record for the 190 hours. Their expert witnesses estimated board siding required twice as much time as plywood.

Defendants' experts were Francis Biskup, registered architect and member of the firm of Boyer, Biskup & Associates, Omaha, Nebraska, which prepared the house plans, and Robert Engel, registered architect employed by the Boyer firm. Biskup testified that board siding required about one-third more time to apply than plywood. Engel, who visited the site, was of the opinion that it would take 154 hours to apply plywood and one-third more time to apply board siding. Dwayne Holsteen, a contractor with 22 years of house building experience, testified for defendants; he had examined the site. It was his opinion that it would take 49 extra hours to apply board siding and that 136½ hours was a reasonable estimate to perform all of the extras.

Fourth are 14 items, included as a group, totaling 135 hours. The record is not clear as to the times of performance and the amount of time expended on several items. Alley and Rewolinski say that they were all performed after the original contract was finished and during the last week; this is disputed by Nelsen, who observed some of the work being done previously. No records were kept as to the time spent on any item. The time records show that there were only 124 hours of work performed in the last week after they claimed the original contract was finished on September 15. Rewolinski testified that he and Alley got together about 4 days after the work was finished and "sort of wrote them down on a little scratch pad. . . . [W]e just didn't bother to itemize each one exact for hours, but we . . . knew that we spent a certain amount of time on each one." Alley testified that they "lumped them together" and estimated the time they worked on them, dependent upon the type of work involved. Included was an item of 18 hours to

help other trades or contractors, which does not find support in the evidence.

Nelsen acted as his own contractor in constructing the house. He had built about 30 other homes in the Omaha vicinity. After discussing all of the 41 items, it was his opinion that 172 hours would be reasonable for all of the extra hours.

From the record and the evidence, we conclude that, pursuant to the oral contract, plaintiffs performed 298 hours of extra work on the house, for which $5,140.50 is owing from defendants to plaintiffs.

Lastly, we agree with defendants that the allowance of prejudgment interest was contrary to law, and error. There is no evidence that plaintiffs' claim was liquidated.

> It is the rule in this jurisdiction that prejudgment interest is allowable only where the amount of the claim is liquidated; conversely, where reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such a recovery, the claim is considered to be unliquidated and prejudgment interest is not allowed.

Langel Chevrolet-Cadillac v. Midwest Bridge, 213 Neb. 283, 289, 329 N.W.2d 97, 101 (1983).

Plaintiffs shall have judgment against defendants for $5,140.50.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTIONS.

BETTY K. REUTER, APPELLANT, V. RONALD L. REUTER, APPELLEE.

359 N.W.2d 78

Filed December 7, 1984. No. 83-549.

1. **Alimony: Property Division: Appeal and Error.** The division of property and the awarding of alimony in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; however, where the evidence is in conflict, this court will give weight to the fact that the trial judge observed and heard the witnesses

and accepted one version of the facts rather than another.

2. **Property Division.** There is no mathematical formula for dividing property when a marriage is dissolved; such awards are to be determined by the facts in each case, the ultimate test being one of reasonableness.

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

Terrance A. Poppe of Hecht, Sweet, Alesio & Morrow, P.C., for appellant.

Hal W. Bauer of Bauer, Galter & Geier, for appellee.

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

COLWELL, D.J., Retired.

This is an appeal from a dissolution of marriage decree filed June 27, 1983, dividing personal property between the parties and making these awards to petitioner: (1) Custody of two minor adopted children; (2) Child support of $100 per month per child; (3) $200 a month alimony for 60 consecutive months; and (4) An equitable interest in a rural residence acreage subject to $50,750 in improvement debts. Petitioner appeals, claiming two errors: (1) That she should not be required to pay all of the joint debts; and (2) That the alimony award was inadequate in view of her ordered debt liability.

Betty K. Reuter, petitioner, and Ronald L. Reuter, respondent, 30 and 35 years of age respectively, were married December 31, 1971. On November 5, 1982, they adopted two minor boys, Scott A. Reuter, born December 26, 1972, and Todd M. Reuter, born April 23, 1974, who had been living with them for 4 years. The boys reside with Betty, who receives $209 a month care and support subsidy for each child from the Lancaster County Welfare Department. Betty is a schoolteacher by education and has taught for 7 years. She last earned $1,289 per month; however, her contract expiring September 1, 1983, was not renewed because of budget cutbacks. At trial she had no other employment. Ronald is a machinist, earning $1,550 per month from Garner Industries, Lincoln, Nebraska; he farms part-time on his parents' farm, using their machinery. In the last 2 years he averaged $5,000

annual farm income. He pays a token rental by paying the real estate taxes and keeping the machinery in repair.

We have held that the division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; however, where the evidence is in conflict, this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another. *Guggenmos v. Guggenmos, post* p. 746, 359 N.W.2d 87 (1984). We now hold that the same standard of review applies in the awarding of alimony.

Most of the evidence relates to the division of personal property which was generally divided, without objection, between the parties as they suggested and requested, with these approximate values: $12,750 to Betty and $13,800 to Ronald.

The main issue concerns $50,750 in marital debts, which Betty was ordered to pay, that were incurred by the Reuters' improving an old farmhouse 5 miles south of Elmwood, Nebraska, owned by Betty's parents, Mr. and Mrs. Howard Crandell. The Reuters paid no rent. Both parties claimed an equitable interest in the house (later discussed), which Betty petitioned to be assigned to her—Ronald did not object—and the court awarded it to Betty subject to "Petitioner should . . . pay the notes and indebtedness to American Exchange Bank in Elmwood, Nebraska and to Vern Jansky and Howard Crandell."

There is no mathematical formula for dividing property when a marriage is dissolved; such awards are to be determined by the facts in each case, the *ultimate test being one of reasonableness. Guggenmos v. Guggenmos, supra.*

After moving to the farmhouse in 1974, the Reuters improved the house located on a 1.28-acre surveyed tract, with the consent and approbation of the owners. Ronald contributed $1,500 from his insurance, Howard Crandell advanced $5,000 for material, and $11,200 was borrowed from the Elmwood bank, with a $138.86 monthly payment note signed by the Reuters and the Crandells, who also gave some

form of security; this note balance is $3,800. Most of the work was done by Ronald, with some assistance from Mr. Crandell.

In 1982 there was a major house improvement financed by advancements made by the Elmwood bank as needed, represented by a $41,200 note given to the bank by the Reuters in January 1983, requiring $600 monthly payments; there was also an unpaid $1,750 account of Vern Jansky, contractor, for work last performed in August 1982. At the time the $41,200 note was executed, the parties were separated and Ronald did not live in the home.

Betty valued the house at $60,000 to $70,000; Ronald's opinion was $80,000. There was no independent appraisal.

The evidence of the debts is clear; however, the evidence concerning the validity of their claimed equitable interest in the house is confused, sketchy, and speculative. The parties do not agree on the details of an agreement with the Crandells to convey the property to them. Betty's only testimony was that the Crandells orally agreed to convey the property to her when all of the debts were paid. Ronald testified that the agreement was that the Crandells would convey the property to Betty and him when the $11,200 bank loan and Crandell's $5,000 advancement were paid; further, that when the 1982 major improvements were made, the Crandells agreed to convey the property to the Reuters so that they could give the bank a note and mortgage for their bank debts but that when the Reuters separated, the Crandells would not convey the property and the Reuters gave the bank the $41,200 note without any security.

Betty now argues that their claimed equitable interest in the house has no value, since in its present posture some judicial title determination is required, that she cannot pay the monthly payments to the bank, and that Ronald should be required to pay one-half of the debts imposed upon her. As an alternative, she suggested that the equitable interest in the house be assigned to both parties in equal shares subject to the debts, which we reject as unreasonable under this record.

When Betty commenced this action, which included a request for the assignment of the equitable interest to her, all of the controverted facts and circumstances were known to her. The validity and the resource value of the equitable claim that

she now questions were a part of her burden of proof; further, litigants have a responsibility to fully and fairly present to trial courts all material evidence for an intelligible presentation of all issues. Here, the parties were the only witnesses, and the evidence is inconclusive on the equitable interest issue as a marital asset, leaving to speculation the position and claims of the Crandells as titleholders concerning the Reuters' claims. The claims of the bank were also material. The appellant urges this court to bring order out of chaos, even though our review is limited to the record she presents. Under this record the assignment to Betty of the equitable interest in the house and 1.28-acre tract subject to the debts as ordered by the court was reasonable, and it was not an abuse of discretion. However, since the joint liability of both Betty and Ronald for those debts was either fixed or admitted by them, the decree should be modified to provide that Betty shall hold Ronald harmless from liability on the debts owed to the bank on the two notes and on the accounts of Vern Jansky and Howard Crandell.

As to the second claimed error, it was considered with the division of property. At trial Betty requested an alimony award of $12,000, payable $100 per month for 10 years. The court approved that award, payable $200 a month for 60 consecutive months; it meets the test of reasonableness, *Slama v. Slama*, 203 Neb. 644, 280 N.W.2d 633 (1979), and no good cause is shown to disturb the award, *Cumming v. Cumming*, 193 Neb. 601, 228 N.W.2d 296 (1975).

AFFIRMED AS MODIFIED.

RAY P. STEINFELDT ET AL., APPELLANTS, V. WILLIAM F. KLUSMIRE ET AL., APPELLEES.

359 N.W.2d 81

Filed December 7, 1984. No. 83-593.

1. **Equity: Appeal and Error.** In an equitable action it is the duty of this court to try the issues of fact de novo on the record and to reach an independent conclusion without reference to the findings of the district court.

2. **Adverse Possession.** The burden is on one who claims title by adverse possession to prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the statutory period, namely, 10 years.
3. _____. The claimant of title by adverse possession must show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description.
4. **Equity: Evidence: Appeal and Error.** In an equity action, when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed.

Ernest H. Addison and James P. Miller, for appellants.

John B. Ashford of Dowd, Fahey & Ashford, and James L. Quinlan of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, for appellees.

KRIVOSHA, C.J., WHITE, and SHANAHAN, JJ., and MCCOWN, J., Retired, and BUCKLEY, D.J.

MCCOWN, J., Retired.

Plaintiffs, Ray and Jeanne Steinfeldt, commenced this action to quiet title to a strip of land along the boundary between plaintiffs' residence and the residence of defendants, William and Luana Klusmire, and for damages for trespass. Plaintiffs claim title by adverse possession. The district court found for the defendants, quieted and confirmed title in them, and dismissed plaintiffs' action. The location of a boundary line fence is the essential issue on appeal.

In 1927 the father of defendant William Klusmire purchased Lots 7, 8, 9, 10, 11, and 12 in Hoctor Terrace Addition, Sarpy County, Nebraska. In 1937 he sold Lot 11 to Philip and Matilda Kruml. He had Lot 11 surveyed at the time of the sale and built a hog wire fence on Lot 10 on the boundary line between Lots 10 and 11, as determined by the survey. Defendant's father also planted several pine trees on a line just inside the boundary line on Lot 10.

The Krumls built their home on Lot 11 in 1937 and sold Lot 11 to the plaintiffs in 1953.

The defendants acquired Lots 9 and 10 from defendant's father, Frank Klusmire, in 1947. Their home was built on Lot 9.

The lots involved here front on Bellevue Boulevard, which runs in a northwest-southeast direction in that area. The lots are 100 feet wide and 200 feet deep. The front of the lot is to the south, and the back of the lot is to the north and adjoins a park. Plaintiffs' property is east of defendants', and the house faces southwest. An open porch is on the west end of plaintiffs' stone house. On the front of the porch a decorative stone facing extends 3 feet to the west of the porch itself. Concrete steps lead down to the backyard on the north side of the porch, and there are fairly narrow wooden steps on the west side of the porch behind and north of the stone facing wall.

The west end of the decorative facing wall in the front is approximately 1 1/2 feet from the survey boundary line, and the northwest corner of the porch is approximately 4 1/2 feet from the line.

Plaintiff Ray Steinfeldt testified that when he bought the house in 1953, there was a gate between the front corner of the porch and the fence, and there was a distance of 4 or 5 feet between the corner of the porch and the fence. He also testified that his predecessor in title told him he had put in the fence and planted the pine trees, which plaintiff testified were then on plaintiffs' side of the fence. He testified that the fence was at the same location until the defendants installed a chain link fence on the survey boundary line in 1982. After the new fence was installed the gate would not close. The plaintiff also testified that when the defendants erected the 1982 fence, they removed a trellis, tossed it over on his lot, and destroyed bulbs and plants in the west portion of some of plaintiffs' flowerbeds, which he testified caused damages of approximately $23,000.

The defendants' evidence was that the fence was originally built on the survey line and remained in that location until sometime in 1979 or 1980. On two occasions they gave plaintiff permission to take down the fence, drive his tractor onto Lot 10, and remove fallen timber. In 1981 defendants noticed that the fence had been moved to the west a short distance,

commencing a short distance in front of plaintiffs' house and continuing to some distance to the rear of the house. This bulge is the disputed property in this case.

In the summer of 1982 defendants had the boundary line surveyed. The survey confirmed the original survey, and the surveyor observed the bulge in the existing fence. Defendants ordered a chain link fence erected on the boundary line, and the fence builder also observed the bulge in the old fence line. The evidence is undisputed that the front post of the original fence was mounted in concrete and the new chain link fencepost was mounted in the same spot.

Plaintiffs commenced this action in August 1982. The case was tried in April 1983, and the district court found for the defendants and entered judgment accordingly. We affirm.

In an equitable action it is the duty of this court to try the issues of fact de novo on the record and to reach an independent conclusion without reference to the findings of the district court. *Pettis v. Lozier*, 217 Neb. 191, 349 N.W.2d 372 (1984). "The burden is on one who claims title by adverse possession to prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the statutory period, namely, 10 years." *Hardt v. Eskam, ante* p. 81, 82, 352 N.W.2d 583, 585 (1984).

The claimant of title by adverse possession must show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description. *Layher v. Dove*, 207 Neb. 736, 301 N.W.2d 90 (1981).

Plaintiffs' evidence failed to establish any specific boundaries of the area or areas claimed to have been occupied and used. Any attempt to describe the area claimed in terms of metes and bounds would rest on speculation and conjecture.

In an equity action, when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of

testifying, and must have accepted one version of the facts rather than the opposite. *Baker v. Buglewicz*, 205 Neb. 656, 289 N.W.2d 519 (1980).

The plaintiffs failed to meet their burden of proof, and the judgment of the district court is affirmed.

AFFIRMED.

ROGER S. EMERY ET AL., APPELLEES, V. GARY MANGIAMELI ET AL., APPELLANTS.

359 N.W.2d 83

Filed December 7, 1984. No. 83-623.

1. **Appeal and Error.** Error without prejudice is not a ground for reversal.
2. **Judgments: Appeal and Error.** The party appealing from the judgment has the burden to show prejudicial error.
3. _____: _____. A judgment will not be reversed by reason of any error or defect in the proceedings which does not affect the substantial rights of the adverse party.

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

Dale D. Kuhlmann and Lloyd E. Atchley, for appellants.

Richard T. Kizer and Jeanne A. Weaver of Hotz, Kizer & Jahn, P.C., for appellees.

BOSLAUGH, WHITE, and GRANT, JJ., and MCCOWN, J., Retired, and COLWELL, D.J., Retired.

BOSLAUGH, J.

This case arises out of a dispute concerning a contract for the sale of real estate. The trial court ordered specific performance and found that the plaintiffs should recover damages in the amount of $4,397.42 from the defendants. The defendants have appealed.

The record shows that the parties entered into a contract for the sale of a property known as 5106 Hamilton Street in Omaha, Nebraska, on September 22, 1982. The contract,

which was prepared on a uniform purchase agreement form, provided that the plaintiffs would purchase the property from the defendants for $50,000, of which $27,000 had been paid. The plaintiffs were to assume an existing mortgage in the amount of approximately $17,000, with the balance to be paid in cash.

The contract further provided:

> Garages to be structurally aligned upon foundation, new roofing boards, doors aligned & new roofing shingles; either all the aforementioned work satisfactorly [sic] completed or an equivalent cash amount in lieu of the materials and work (labor) to be completed - to be agreed upon before closing date.* Garage & basement windows panes to be repaired. All owners contents to removed [sic] from premises before closing.

The contract also provided: "Seller agrees to maintain, until delivery of possession, the heating, air conditioning, water heater, sewer, plumbing and electrical systems and any built-in appliances in working condition."

A controversy developed over the performance of the maintenance and repair work to be done by the defendants. On November 18, 1982, the plaintiffs commenced this action for specific performance. The petition prayed for damages in the alternative and requested an "injunction" requiring the defendants to pay into court the $27,000 paid by the plaintiffs to the defendants. The defendants did not comply with an ex parte "temporary restraining order" which directed payment of the $27,000 into court.

On January 4, 1983, the matter came on to be heard upon the plaintiffs' motion for a temporary injunction. At this hearing both parties introduced evidence concerning the contract and the dispute that had arisen.

At this hearing the trial court inquired as to whether the defendants wanted to complete the contract, with a determination of damages to be made later, or whether the defendants could refund the $27,000 paid by the plaintiffs. Although the defendants' answers were not entirely clear, it was apparent that the defendants were unable to refund the $27,000 and were willing to complete the contract if a satisfactory

determination of damages could be made. The hearing resulted in an order which stated: "Specific performance of the plaintiff's [sic] contract appears to be only equitable relief possible. So ordered and closing to take place within a reasonable time."

On January 18, 1983, the defendants filed an answer and counterclaim. The answer alleged that the plaintiffs were not entitled to specific performance and claimed the $27,000 paid by the plaintiffs as liquidated damages. The counterclaim alleged that the defendants had sustained damages in excess of the $27,000 paid by the plaintiffs and prayed for rescission of the contract. On February 2, 1983, the plaintiffs filed a reply and an answer to the counterclaim.

On January 25, 1983, the plaintiffs had filed an application for an order requiring the defendants to show cause why they should not be held in contempt for failure to comply with the order of January 4, 1983. An order to show cause was issued, and, after several continuances, the order came on for hearing on February 8, 1983. Meanwhile, a hearing on a permanent injunction was set for February 11, 1983.

At the hearing on February 11, 1983, all of the evidence received at the January 4, 1983, hearing was reoffered and received in evidence without objection. The plaintiff Roger Emery testified that he was ready to close. An employee of Pioneer Title and Abstract Company testified that the company had issued a commitment for title insurance on the property to the defendants and was willing to act as escrow agent in closing the sale.

At this hearing the trial court again inquired as to whether the defendants would be able to return the $27,000 which the plaintiffs had paid. Defendants' counsel made no direct reply as to whether the defendants could repay the $27,000 and took the position that under the contract the defendants were entitled to retain the money as liquidated damages.

This hearing resulted in an order directing in detail how the contract should be performed and appointing Pioneer Title as agent for the parties to close the sale. A hearing on the claims for damages was continued to March 8, 1983.

The hearing on the claims for damages was held on March 8,

1983, and resulted in the award of $4,397.42 to the plaintiffs. The defendants' counterclaim was dismissed.

The defendants' assignments of error all relate to their contention that they were denied due process of law, in that the trial court ordered specific performance at the hearing upon the motion for a temporary injunction before the case was at issue and without giving the defendants an adequate opportunity to present their evidence. Since this is a matter in equity, it is reviewed de novo on the record in this court.

Although no answer had been filed at the time of the January 4, 1983, hearing, it is clear from the record that the defendants continued to participate in that hearing without objection after the trial court announced "We're hearing the merits right now." When no answer has been filed in the lower court, but it appears that the cause was tried by both parties, without objection, as though an answer had been filed, this court will treat the case in the same manner. *Schuster v. Carson*, 28 Neb. 612, 44 N.W. 734 (1890).

The hearing on February 11, 1983, was held after the issues had been made up. The evidence presented at the hearing on January 4, 1983, was reoffered and received in evidence without objection. At the oral argument in this court, in response to questions from the bench, defendants' counsel was unable to suggest any additional evidence which would be offered by the defendants in the event a further hearing were to be ordered in this case.

Although the procedure which was followed in the trial court in this case was highly irregular, we are unable to discover any prejudice to the defendants. Error without prejudice is not a ground for reversal. *Regier v. Nebraska P.P. Dist.*, 189 Neb. 56, 199 N.W.2d 742 (1972). The party appealing from the judgment has the burden to show prejudicial error. *Insurance Co. of North America v. Hawkins*, 197 Neb. 126, 246 N.W.2d 878 (1976). A judgment will not be reversed by reason of any error or defect in the proceedings which does not affect the substantial rights of the adverse party. *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

In *Atlantic Richfield Co. v. F.T.C.*, 546 F.2d 646 (5th Cir. 1977), the court entered final judgment after a hearing on an

application for a preliminary injunction. The appellant argued that because the court had not ordered or given notice of a consolidation of the preliminary injunction with a hearing on the merits, it was precluded from adequately developing and presenting its case for final adjudication. The court held:

> [W]e need not find error in the district court's entry of final judgment unless [the appellant] Atlantic shows prejudice from the lack of notice. In *Eli Lilly and Company v. Generix Drug Sales, Inc.*, 460 F.2d 1096 (5 Cir. 1972), we explained: "[S]urprise alone is not a sufficient basis for appellate reversal; appellant must also show that the procedures followed resulted in prejudice, i.e., that the lack of notice caused the complaining party to withhold certain proof which would show his entitlement to relief on the merits."

Id. at 651. See, also, *Holly Sugar v. Goshen County Co-op. Beet Growers*, 725 F.2d 564 (10th Cir. 1984), where the court found that a consolidation was not prejudicial when the appellant admitted at oral argument that it would not have significantly changed the presentation of its evidence even if it had received more timely notice.

In *State v. Holdrege State Bank*, 110 Neb. 814, 195 N.W. 120 (1923), the parties appeared at a hearing to set aside an order. At that time there was some doubt in the minds of the counsel as to whether the orders in question had been vacated and whether the hearing was upon the merits of the claim. The trial court stated, "This proceeding will go into the merits of the proposition . . ." and the parties proceeded in that fashion. At the close of the hearing a decision was rendered. Notwithstanding that the order in question had not been vacated, but only treated by the trial court and the respective parties as if it had, it was held, "Under these circumstances, this court will disregard any technical question as to procedure and treat the matter as did the trial court and determine it upon its merits." *Id.* at 816, 195 N.W. at 120-21.

In *Insurance Co. of North America v. Hawkins, supra*, the defendants contended on appeal that they had been deprived of due process of law when the lower court entered a partial summary judgment on the issue of liability. Specifically, they

contended that the lower court had previously overruled a motion for summary judgment and that the partial summary judgment order was made without a further hearing. In light of this claim that due process was denied the defendants because of this procedural and technical error on the part of the lower court, this court reviewed the record to determine if any prejudice to the defendants appeared:

> The record, however, clearly reflects that a trial was scheduled and held. Evidence was adduced by stipulation or waiver, exhibits were introduced, arguments made by counsel and briefs submitted.
>
> While it was technically inaccurate to designate the order as a partial summary judgment on the issue of liability, the error, if any, was technical and procedural. The defendants had their full day in court on the issue of liability, had the opportunity to introduce all the evidence they wished to submit, and made all appropriate objections to plaintiff's evidence. The defendants fail to assert or prove any prejudice or injury caused by the procedural inadvertence, and the record wholly fails to sustain any contention of violation of due process.

197 Neb. at 129-30, 246 N.W.2d at 881.

While the proceedings below were irregular, the defendants were not deprived of due process. Upon a consideration of the entire record, and the response of defendants' counsel at argument, we conclude that the defendants received an adequate hearing on the merits of the case at the hearings on January 4, February 11, and March 8, 1983.

The judgment of the district court is affirmed.

AFFIRMED.

ALICE CONSTANCE GUGGENMOS, APPELLEE, V. DONALD LEE GUGGENMOS, APPELLANT.

359 N.W.2d 87

Filed December 7, 1984. No. 83-713.

1. **Property Division: Attorney Fees: Appeal and Error.** The division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; however, where the evidence is in conflict, this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
2. **Trial: Appeal and Error.** An abuse of discretion exists where the reasons or rulings of the trial judge are clearly untenable and deprive a party of a substantial right such as to amount to a denial of justice; it does not imply an improper motive, willful purpose, or intentional wrong.
3. **Marriage: Equity.** An action to annul a marriage is equitable in nature.
4. **Marriage: Appeal and Error.** It is the duty of this court, on appeal of an action to annul a marriage, to retry the issue or issues of fact complained of de novo on the record and reach independent conclusions without reference to the conclusions reached by the trial judge, giving weight, where the evidence is in conflict, to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
5. **Marriage.** An annulment will be granted only in the presence of one or more of the grounds enumerated in Neb. Rev. Stat. § 42-374 (Reissue 1978).
6. **Marriage: Proof.** A marriage is presumed valid, and the burden of proving otherwise is upon the party seeking the annulment.
7. **Property Division.** There is no mathematical formula for dividing property when a marriage is dissolved; such awards are to be determined by the facts in each case, the ultimate test being one of reasonableness.
8. **Attorney Fees.** The award of an attorney fee involves a consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, the customary charges of the bar for similar services, the earning capacity of the parties, and the general equities of the case.

Appeal from the District Court for Keith County: JOHN P. MURPHY, Judge. Affirmed.

McQuillan & Spady, P.C., for appellant.

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

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

PER CURIAM.

This case began with the filing of a petition by Alice Constance Guggenmos, appellee, for dissolution of her marriage to appellant, Donald Lee Guggenmos, who cross-petitioned for an annulment. For ease in reading we shall hereafter refer to the parties by their respective forenames. The district court dismissed Donald's cross-petition, dissolved the marriage, awarded each party the property in her or his possession, and awarded Alice an attorney fee of $1,000. This appeal from those determinations presents three issues: (1) Whether Alice perpetrated a fraud sufficient to justify an annulment rather than a dissolution of the marriage; (2) Whether the trial court erred in its division of property; and (3) Whether the trial court erred in awarding Alice an attorney fee. We answer each question negatively and, accordingly, affirm.

We begin by examining the rules of law which apply to the various scopes of review involved in this case. In our most recent marriage dissolution case dealing with the standard of review in the division of property, *Gleason v. Gleason, ante* p. 629, 357 N.W.2d 465 (1984), we said we are required to try the case de novo on the record and reach independent conclusions on the issues without reference to the conclusions or judgment of the district court. However, in cases as recent as *Haase v. Haase*, 210 Neb. 371, 314 N.W.2d 270 (1982), and *Liss v. Liss*, 206 Neb. 587, 294 N.W.2d 341 (1980), we said that the distribution of property rests in the sound discretion of the trial court and would not be disturbed on appeal absent an abuse of discretion. See, also, *Dobesh v. Dobesh*, 216 Neb. 196, 342 N.W.2d 669 (1984), stating that in considering whether a property settlement agreement is unconscionable, the review is de novo but weight is given to the fact that the trial court observed the witnesses. In *Steele v. Steele*, 201 Neb. 549, 270 N.W.2d 903 (1978), also dealing with the division of property, we observed that where the evidence is in conflict, we give weight to the fact that the trial court had the opportunity to observe and hear the witnesses.

We have also made similar statements with respect to

reviewing the award of attorney fees. For example, in *Pittman v. Pittman*, 216 Neb. 746, 345 N.W.2d 332 (1984), and *Pfeiffer v. Pfeiffer*, 203 Neb. 137, 277 N.W.2d 575 (1979), we indicated the matter was within the sound discretion of the trial judge, and his award would not be disturbed on appeal in the absence of an abuse of that discretion. Yet, in *Buker v. Buker*, 205 Neb. 571, 288 N.W.2d 732 (1980), we said the determination of attorney fees was to be reviewed de novo on the record.

A review de novo on the record is different than a review to determine whether an abuse of discretion has taken place. See *Puetz v. Puetz*, 211 Neb. 674, 319 N.W.2d 761 (1982). In a review de novo on the record, we reappraise the evidence as presented by the record and reach our own independent conclusions with respect to the matters at issue. A review to determine whether an abuse of discretion has taken place is much narrower. Although an abuse of discretion does not imply an improper motive, willful purpose, or intentional wrong, it does require the reasons or rulings of the trial judge to be clearly untenable and to deprive a party of a substantial right such as to amount to a denial of justice. *Pettegrew v. Pettegrew*, 128 Neb. 783, 260 N.W. 287 (1935).

Such confusion as may exist as to the appropriate standards of review arises not from the fact that the various statements we have made are inconsistent as might first appear, for they are not, but, rather, from the fact that we have apparently not stated the rule completely in any one case. There is no inconsistency in saying a matter is initially entrusted to the sound discretion of the trial judge and that on appeal we review the record de novo to determine whether that discretion has been abused. That is to say, we do not defer to the findings of the trial judge in determining whether there has been an abuse of discretion, but, rather, make our own appraisal of the record to determine whether the results obtained are untenable such as to have denied justice.

To remove any doubt as to the proper standard of review, we now state that the division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and

affirmed in the absence of an abuse of the trial judge's discretion. In our de novo review, where the evidence is in conflict, we will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.

An action to annul a marriage is equitable in nature. As such, it is our duty on appeal to retry the issue or issues of fact complained of de novo on the record and reach independent conclusions without reference to the conclusions reached by the trial judge, giving weight, where the evidence is in conflict, to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Edmunds v. Edwards*, 205 Neb. 255, 287 N.W.2d 420 (1980).

An annulment will be granted only in the presence of one or more of the grounds enumerated in Neb. Rev. Stat. § 42-374 (Reissue 1978), which include fraud. A marriage is presumed valid, and the burden of proving otherwise is upon the party seeking the annulment. *Edmunds v. Edwards, supra.*

Zutavern v. Zutavern, 155 Neb. 395, 52 N.W.2d 254 (1952), instructs us as to the type of fraud required to vitiate a marriage:

> The fraud that vitiates a marriage contract does not lend itself to definitive statement automatically resolving every case. It is not every kind and degree of fraud that affords cause for setting aside the contract. The law differentiates between fraud in the essentials of the marriage relation and deceptive arts to which some persons resort with a view to an advantageous marriage by placing their accomplishments, character, and circumstances in a too optimistic view. While these constitute a species of fraud, they do not afford a basis for destruction of the marriage. However, if there is a deception as to some fact whose existence or non-existence may affect in some certain way the very essence of the marriage relation, resulting in a lawful marriage which practically operates as a fraud upon the deceived spouse, and the existence or non-existence of the fact thus concealed or misrepresented must operate as between the parties to the marriage to prevent some essential purpose thereof and result in a

> practical destruction of that relation, there exists such fraud as the law contemplates and such as renders the marriage contract subject to annulment.

Id. at 398-99, 52 N.W.2d at 257-58.

With the foregoing rules in mind we determine the following to be the facts.

Although living in different Nebraska towns, Donald and Alice first met in 1976, when each had another spouse. Notwithstanding their respective marriages, they entered into a sexual relationship with each other beginning sometime in 1978 or 1979. This relationship began to wane when Alice was divorced from her prior husband in the spring of 1979, and came to an end about the time Donald received a divorce from his prior wife in June of 1980.

Before this first breakup, Donald provided Alice with various sums of money and items of personalty which he characterized both as loans and gifts. Although he made demand for repayment of the money in November 1980 and had his attorney send a letter to Alice suggesting that the parties work something out, Donald testified that he had given the money and personalty to Alice at her specific request; that he had never discussed repayment or return of the personalty with her; that there were no arrangements for repayment; and that Alice had never offered to repay any sums to him. Nonetheless, Alice did eventually return an automobile to Donald after their 1980 separation. No other transfers of personalty were made following this first breakup, and Donald made no further demand for payment.

In April 1981 Alice apologized to Donald for her prior behavior, agreed to marry him, and the parties resumed their sexual relationship. Donald testified he made clear to Alice that he desired a long-term marriage. The record does not tell us, however, what Alice's response, if any, may have been.

At the time Donald and Alice were making their plans to be married, Donald knew that Alice was living with a Larry Pierce. In April and again in May, Donald and Alice discussed when Pierce would be moving out of Alice's house. Pierce finally moved out in August 1981, approximately a week before the marriage ceremony between Donald and Alice, which took

place August 21, 1981. There is nothing in the record to indicate that Donald made further inquiries about Pierce prior to the marriage, and, in fact, Donald testified that he knew, or surmised, that Pierce had not moved out of Alice's house as quickly as Alice had promised.

Prior to the marriage, Donald and Alice agreed that Alice would live in Ogallala, where she had been living for some time, while Donald would live at his ranch near Dunning, approximately 150 miles from Ogallala. It was decided that Donald would visit Alice on Wednesdays and Alice would spend weekends with Donald on his ranch. Alice did in fact make such visits, although not as frequently as Donald had wished. On these visits she frequently brought members of her family with her. Later, in November 1981, Donald purchased a house in Ogallala in which Alice, but not Donald, lived.

Although Donald complained that on only one occasion did Alice use Guggenmos as her surname, the record establishes that Donald and Alice had agreed before the marriage that she would continue to use Norris as her surname.

Donald and Alice's rather unorthodox state of semiunited bliss encountered difficulties when Donald visited Alice at Christmas in 1981 and overheard a telephone conversation between her and Pierce, in which she and Pierce professed their love for one another. When Donald confronted Alice about the conversation, she made light of it, explaining that Pierce was "just drunk." Donald had been aware of several other phone calls between Alice and Pierce and had observed Pierce near Alice's residence in Ogallala on two prior occasions.

The day after Christmas Donald returned to his ranch but continued to visit Alice in Ogallala. During these visits, Alice was "cold" and "wouldn't hardly speak." Their sexual encounters ended in January 1982. Alice visited Donald one more time, in February 1982, and these proceedings were commenced the following April.

Donald contends the foregoing evidence establishes that Alice made several material misrepresentations which duped and induced him into marrying her. Essentially, he complains that Alice did not intend to live with him, did not visit him at his ranch as often as had been agreed, brought other members of

her family with her when she did visit, did not use the Guggenmos surname, and did not terminate her relationship with Pierce. The difficulty with those complaints, from Donald's point of view, is that he knew prior to entering into the marriage that Alice was not going to be living with him on a day-to-day basis; there were no promises that she would not bring others with her when she visited him; he knew well before the marriage that Alice had not ended her relationship with Pierce as promptly as Donald had contemplated; and they had agreed she would not use the Guggenmos surname. Under the circumstances it cannot be said that any of the things about which Donald complains goes to the "essence" of the marriage relationship.

Donald has failed to sustain his burden of proving fraud such as to warrant the granting of an annulment.

The assignment of error with respect to the division of property relates to the failure of the trial court to return to Donald the money he paid and personalty he transferred to Alice prior to the marriage. He argues that had the court granted an annulment as it should have done, then the money and personalty would have been returned to him, as the court would have restored the parties to the position in which they were prior to the marriage. As we have seen, the premise that an annulment should have been granted is wrong; it is therefore unnecessary to discuss what the property and monetary consequences would have been in such an instance.

There is no mathematical formula for dividing property when a marriage is dissolved. Such awards are to be determined by the facts in each case. *Gleason v. Gleason, ante* p. 629, 357 N.W.2d 465 (1984); *Whitney v. Whitney,* 214 Neb. 565, 334 N.W.2d 799 (1983); *Lord v. Lord*, 213 Neb. 557, 330 N.W.2d 492 (1983). The ultimate test is one of reasonableness. *Burger v. Burger*, 215 Neb. 699, 340 N.W.2d 400 (1983).

This is not a case such as presented in *Andersen v. Andersen*, 204 Neb. 796, 285 N.W.2d 692 (1979), wherein we held that gifts of jewelry given during the course of a long marriage were to be treated as part of the marital estate. Money spent or gifts made in anticipation of marriage ordinarily will not be reimbursed when dissolution is granted and will not be considered in

dividing the marital property. *Ritter v. Ritter*, 205 Neb. 668, 289 N.W.2d 526 (1980).

Under the circumstances we conclude on our de novo review of the record that the trial court did not abuse its discretion in decreeing that each party be awarded the property in her and his respective possession at the time of the dissolution.

This, then, brings us to the matter of the attorney fee. We have held that in an action for dissolution of marriage, the award of an attorney fee involves a consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, the customary charges of the bar for similar services, the earning capacity of the parties, and the general equities of the case. *Pittman v. Pittman,* 216 Neb. 746, 345 N.W.2d 332 (1984); *Pfeiffer v. Pfeiffer,* 203 Neb. 137, 277 N.W.2d 575 (1979).

The trial judge concluded that due to the novel nature of the legal questions presented, the length of the trial, 1 day, and the pretrial preparation required, Alice was entitled to an attorney fee as aforesaid. Although we conclude that Alice's request for the award of an attorney fee in this court is to be denied, we cannot conclude upon a de novo review of the record that the trial judge abused his discretion in awarding her one for the services of her attorney in the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD C. REYNOLDS, ALSO KNOWN AS JACK REYNOLDS, APPELLANT.

359 N.W.2d 93

Filed December 7, 1984. No. 83-808.

1. **Extradition and Detainers.** The Agreement on Detainers was designed to promote the expeditious and orderly disposition of outstanding charges against a prisoner and to determine the proper status of any and all detainers based on untried indictments, informations, or complaints.

2. **Extradition and Detainers: Words and Phrases.** Under the Agreement on Detainers, Neb. Rev. Stat. §§ 29-759 et seq. (Reissue 1979), a "detainer" is a notification filed with the institution in which an individual is serving a sentence, advising the prisoner that he is wanted to face criminal charges pending in another jurisdiction.
3. **Extradition and Detainers.** The provisions of the Agreement on Detainers apply only when a detainer has been lodged against a prisoner who has entered a term of imprisonment in a party state.
4. _____. Article III of the Agreement on Detainers prescribes the procedure by which a prisoner against whom a detainer has been lodged may demand a speedy disposition of outstanding charges.
5. _____. Upon receipt of a proper request for disposition under Article III of the Agreement on Detainers, the receiving state must bring the prisoner to trial within 180 days.
6. _____. Article IV of the Agreement on Detainers sets forth the procedures by which the authorities where the charges are pending may initiate the process whereby a prisoner is returned to the state for trial.
7. _____. In respect of any proceedings made possible under Article IV of the Agreement on Detainers, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state.
8. _____. Article V(c) of the Agreement on Detainers provides for dismissal of a pending complaint on which a detainer is based if the appropriate authority shall refuse or fail to accept custody of the prisoner against whom the charges are pending or fail to bring that prisoner to trial within the period provided in Article III or Article IV.
9. _____. Under Article III of the Agreement on Detainers, for a prisoner's demand for disposition of the charges to trigger the 180-day period, it must be made in the manner required by Article III.
10. _____. The Agreement on Detainers provides the remedy of dismissal of charges with prejudice in those specific cases not including possible errors made by another party's prison officials.

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

Dennis R. Keefe, Lancaster County Public Defender, and Sean J. Brennan, 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.

The single issue presented in this case is whether the

Agreement on Detainers (hereinafter Agreement), Neb. Rev. Stat. §§ 29-759 et seq. (Reissue 1979), imposes upon the state seeking custody of a prisoner a duty to proceed to obtain custody of that prisoner without unreasonable delay once that state has lodged a detainer against the prisoner and requested his custody. A brief recitation of the pertinent facts and pretrial proceedings is necessary.

On September 25, 1980, the appellant was involved in an incident in which a Lincoln, Nebraska, police officer was disarmed and held prisoner. A complaint was filed on September 26, 1980, charging appellant, Donald C. Reynolds, also known as Jack Reynolds, with the crime of kidnaping. An arrest warrant was issued on that date. Subsequently, on June 18, 1982, after Reynolds had been apprehended and incarcerated in another jurisdiction, the chief deputy county attorney of Lancaster County, Nebraska, filed a request for temporary custody of Reynolds with the warden of the federal correctional institution at Lompoc, California.

On June 28, 1982, the defendant, Reynolds, completed an "Inmate Request to Staff Member" form requesting that the warden of the federal correctional institution at Lompoc "not honor the request for [his] custody to the state of Nebraska." Reynolds received a response from prison officials on July 1, 1982, informing him that it was possible for an authority to place a detainer upon him and that he could request a disposition of the pending charges. The Lancaster County attorney's office, however, heard no response from the federal authorities at Lompoc until March 21, 1983, when the county attorney's office received a letter indicating that the appellant would soon be available for custody. Soon thereafter, the defendant was released to Nebraska authorities and arrived in the state on May 6, 1983. That same day the defendant appeared in county court, where he was informed of the charges against him, the possible penalties, and his constitutional rights, and requested that a public defender be appointed to represent him. On June 1 the defendant waived his right to a preliminary hearing and was bound over to the district court. On June 24 and July 21, 1983, Reynolds filed motions to dismiss on the grounds that the Agreement had been violated,

as were his rights to a speedy trial under the U.S. and Nebraska Constitutions. On August 24, 1983, these motions were overruled. Trial to the court on stipulated facts was held on August 31, 1983. Reynolds was subsequently found guilty as charged and sentenced to a term of not less than 7 nor more than 9 years' imprisonment.

It is essentially the argument of the appellant that the trial court erred in overruling his motion to dismiss the charge against him because the State of Nebraska failed, after filing a request for temporary custody, to proceed to obtain custody of him within a reasonable time and without unreasonable delay.

The Agreement, adopted by the State of Nebraska in 1963 and to which the United States is a party, see Interstate Agreement on Detainers Act, 18 U.S.C. app. §§ 1 and 2 (1982), was designed " 'to encourage the expeditious and orderly disposition of . . . charges [outstanding against a prisoner] and determination of the proper status of any and all detainers based on untried indictments, informations or complaints.' " Art. I of the Agreement. Although the Agreement itself does not define "detainer," it is generally recognized that a detainer is a notification filed with the institution in which an individual is serving a sentence, advising the prisoner that he is wanted to face criminal charges pending in another jurisdiction. *People v Bentley*, 121 Mich. App. 36, 328 N.W.2d 389 (1982). "The provisions of the Agreement apply only when a detainer has been lodged against a prisoner who has entered a term of imprisonment in a party State." *People v. Daily*, 46 Ill. App. 3d 195, 200, 360 N.E.2d 1131, 1136 (1977); *United States v. Mauro*, 436 U.S. 340, 98 S. Ct. 1834, 56 L. Ed. 2d 329 (1978). Since "a detainer remains lodged against a prisoner without any action being taken on it," *People v McLemore*, 411 Mich. 691, 692 n.2, 311 N.W.2d 720, 721 n.2 (1981), the Agreement sets forth two procedures designed to effectuate its purpose. The machinery of the Agreement may be activated by either the prisoner or the receiving state. *People v. Daily, supra.*

Article III of the Agreement prescribes the procedure by which a prisoner against whom a detainer has been lodged may demand a speedy disposition of outstanding charges. *Johnson v. Cuyler*, 535 F. Supp. 466 (E.D. Pa. 1982).

Article III(a) of the Agreement provides in part:

> "[W]henever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint . . . . The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner."

Article III(c) of the Agreement requires the warden or official having custody of the prisoner to promptly inform the prisoner of the source and contents of any untried complaint and of his right to request its final disposition. Upon receipt of a proper request for disposition under Article III, the receiving state must bring the prisoner to trial within 180 days.

Article IV of the Agreement sets forth the procedures by which the authorities in the state where the charges are pending, the receiving state, may initiate the process whereby a prisoner is returned to the state for trial. Under Article IV(a) the proper state official must present a written request for temporary custody to the appropriate authorities of the custodial or sending state.

Article IV(c) of the Agreement provides in part: " 'In respect of any proceeding made possible by this article, trial shall be commenced within one hundred twenty days of the *arrival* of the prisoner in the receiving state . . . .' " (Emphasis supplied.) See *People v Cook*, 95 Mich. App. 645, 291 N.W.2d 152 (1980).

Article V(c) of the Agreement provides:

> "If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect."

Appellant concedes that the trial deadlines of the Agreement apply to only two situations, i.e., the prisoner's written demand for disposition or the prisoner's arrival in the receiving state.

It is apparent from the record that the time limitation contained in Article III was never properly triggered and that the state complied with the time limitations imposed under Article IV.

Under Article III of the Agreement, for a prisoner's demand for disposition of charges to trigger the 180-day period, it must be made in the manner therein required. See *State v. Soloway*, 603 S.W.2d 688 (Mo. App. 1980). Article III(a) establishes the two requirements which must be met before the 180-day limit can be invoked: (1) written notice of the requested disposition and (2) the requisite certificate of the officials of the incarcerating state. *State v. Bass*, 320 N.W.2d 824 (Iowa 1982). There is no evidence, nor does Reynolds contend, that he complied with Article III by giving or sending written notice and request for final disposition of the Nebraska charge to the warden of the federal correctional institution at Lompoc. The appellant did testify that while he was a prisoner in Illinois in the Du Page County jail prior to his transfer to California, he wrote a letter demanding speedy disposition of the Nebraska charges. Reynolds contends the letter was addressed to the prosecuting attorney's office in Lincoln, Nebraska. Two unnamed inmates were alleged to be witnesses. No other evidence exists that a demand for speedy disposition was made, and, as a factual matter, appellant was represented by counsel at the time of the alleged request. The record is silent as to the receipt of the alleged request. Whether Reynolds' demand for a speedy trial

was sent or received is irrelevant, since there is no contention or proof that a detainer was filed with the correctional officials in Illinois at the time of Reynolds' alleged request.

As previously stated, the speedy trial provisions of the Agreement are triggered *only* when a detainer is filed with the state where an individual is a prisoner by the state which has untried charges pending against the individual. The Agreement does not provide relief for those accused of crime in another jurisdiction and incarcerated in a party state when no detainer has been lodged. *People v. Daily*, 46 Ill. App. 3d 195, 360 N.E.2d 1131 (1977); *United States v. Mauro*, 436 U.S. 340, 98 S. Ct. 1834, 56 L. Ed. 2d 329 (1978); *People v Paulis*, 115 Mich. App. 183, 320 N.W.2d 337 (1982). Furthermore, Reynolds was repeatedly asked at trial if he had "made any other requests or demands for a quick and speedy trial regarding the charges pending against you in the state of Nebraska," to which he responded, "No."

Regarding Article IV of the Agreement, it is undisputed that the state fully complied with the literal provisions of that article. On March 21, 1983, Nebraska authorities first received notice from federal officials that Reynolds would be available to be taken into custody on or after April 20, 1983. Reynolds arrived in Nebraska on May 6, 1983, and trial was held on August 30, 1983, 116 days after his arrival pursuant to the request for temporary custody.

Appellant nevertheless urges that grounds for dismissal may exist under the Agreement, even though the time limitations of Articles III and IV have been met. The appellant urges that the Agreement should be read to impose an additional burden on the receiving state to justify any delay, such as the 11 months in this case, which elapsed between the request for custody and Reynolds' arrival in Nebraska. As authority for this proposition, the appellant cites *State v. Chirra*, 79 N.J. Super. 270, 191 A.2d 308 (1963). In that case the court dismissed charges pursuant to a detainer for a refusal on the part of the receiving state to accept custody with all reasonable diligence and dispatch, even though the state stood ready to bring the defendants to trial within 120 days of their arrival in the state. In *Chirra*, however, it appears that the prisoners in question

were readily available for a period of 27 months and that the prosecutor declined to take custody of the defendants because of a heavy court docket. In *Chirra, supra* at 278, 191 A.2d at 312, the court said:

> [W]hen the prosecuting officials of a party state request temporary custody of a prisoner in another party state for trial, they must continue their effort to obtain delivery of the prisoner from the other state with all reasonable diligence and dispatch. *If the prisoner is available for transfer, his custody must be accepted by such prosecuting officials.*

(Emphasis supplied.)

In the instant case, unlike *Chirra*, the Lancaster County authorities took custody of Reynolds as soon as practicable upon learning of his availability.

The appellant also directs us to the case of *People v Bentley*, 121 Mich. App. 36, 328 N.W.2d 389 (1982), wherein the Michigan Court of Appeals dismissed charges pending against a prisoner in the receiving state for the sending state's noncompliance with Article III(c), the duty to inform the prisoner of the source and contents of any detainer lodged against him. In *Bentley*, in the context of the Interstate Agreement on Detainers, the court discussed on which party the burden should fall of showing the sending state's compliance with the terms of the agreement. The court stated at 43, 328 N.W.2d at 392:

> Nothing in the IAD supports the invocation of a presumption of official compliance with the dictates of the agreement. We are persuaded by the reasoning of the Colorado appellate court which rejected the claim that a prisoner bears the burden of proving that he was not advised of a detainer lodged against him or of his right to request final disposition of the pending charges.

Quoting *People v. Lincoln*, 42 Colo. App. 512, 601 P.2d 641 (1979), *Bentley* adopted the following language: " 'We hold that the presumption that public officials perform the duties imposed on them by law in a valid and regular manner does not apply to officials of a sending state under the Agreement on Detainers.' " *Bentley* at 43, 328 N.W.2d at 392.

In determining the appropriate sanction to be imposed when officials of a sending state fail, as they did in the instant case, to promptly comply with the provisions of the Interstate Agreement on Detainers, the *Bentley* court further cited with approval the following language from *People v. Lincoln, supra*:

> "The receiving state, having set the provisions of the Agreement in motion, must bear the burden of assuring that its provisions are enforced in the sending state. If the serious consequence of dismissal results automatically from the failure of the correctional officials in the imprisoning state to comply, 'pressure [will] soon be brought to bear on the negligent officials from their administrative superiors as a result of protest from the other state.' . . ."

Bentley at 45, 328 N.W.2d at 393.

Appellant urges us to adopt similar language and place the burden on the receiving state to show that the sending state properly complied with Article III(c) of the Agreement and that in the absence of such a showing the charges must be dismissed.

We note, however, the court in *Bentley* emphasized that

> we do not intend by this opinion to set forth a rule of general applicability. We do not hold that the prosecutor of the receiving state must always bear the burden of the custodial state's noncompliance with Article III(c). Nor do we hold that dismissal is always the proper remedy for IAD violations. Our holding is limited to the particular facts of this case.

Id. at 46, 328 N.W.2d at 394.

The Agreement does not require that the additional burden of proving that the sending state promptly complied with its provisions be placed on the receiving state, nor shall we. Under the particular facts of this case the request for temporary custody was in proper form and timely. No explanation appears in the record for the federal authorities' delay in responding to the Nebraska prosecutor's "request for custody." The prosecutors in this case are blameless and helpless, in view of the seeming disregard of the law by federal authorities.

The Agreement provides for the remedy of dismissal of

charges with prejudice only in three specific cases, not including possible errors made by another party's prison officials. See *Com. v. Gonce,* 320 Pa. Super. 19, 466 A.2d 1039 (1983). Because the Legislature chose to mention specific situations when dismissal of charges is appropriate, we will not extend such relief for a custodial state's failure to promptly deliver a prisoner to the receiving state pursuant to a proper request for custody.

AFFIRMED.

MARIE J. SIMPSON, APPELLANT, V. WILLIAM S. SIMPSON, APPELLEE.

359 N.W.2d 349

Filed December 7, 1984. No. 83-812.

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

Carolyn A. Rothery of Byrne, Rothery, Borchers & Lewis, P.C., for appellant.

Michael L. Getty, for appellee.

KRIVOSHA, C.J., HASTINGS, SHANAHAN, and GRANT, JJ., and MCCOWN, J., Retired.

PER CURIAM.

This court has considered the complete record in this case. We conclude, on our de novo review of the record, that the trial court did not abuse its discretion in entering its order and judgment herein. See *Guggenmos v. Guggenmos, ante* p. 746, 359 N.W.2d 87 (1984).

AFFIRMED.

IN RE COVAULT FREEHOLDER PETITION.
HAROLD GOTTULA, APPELLANT, V. RODNEY D. COVAULT ET AL., APPELLEES.
IN RE GLATHAR FREEHOLDER PETITION.
HAROLD GOTTULA, APPELLANT, V. JOHN J. GLATHAR ET AL., APPELLEES.
IN RE DOBROVOLNY FREEHOLDER PETITION.
HAROLD GOTTULA, APPELLANT, V. RICHARD DOBROVOLNY ET AL., APPELLEES.

359 N.W.2d 349

Filed December 7, 1984. Nos. 83-819, 83-820, 83-821.

1. **Schools and School Districts: Appeal and Error: Statutes: Time.** The manner of taking appeals from actions of the State Board of Education, pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), must be in the same manner in which appeals from any action of the State Board of Education are taken to the district court. However, because the language of a specific statute takes precedence over the language of a general statute, the time in which the appeal is to be taken must be within 20 days as provided in § 79-403(1), rather than 30 days as provided in Neb. Rev. Stat. § 84-917 (Reissue 1981).
2. **Schools and School Districts: Appeal and Error: Jurisdiction.** Pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), appeals are filed in the district court where the land is located rather than where the action is taken by the State Board of Education.
3. **Schools and School Districts: Appeal and Error: Time.** The time for taking an appeal from the action of the State Board of Education, pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), begins to run when the board, at a duly convened meeting at which minutes are required to be taken, votes to transfer the land, and not when it approves a formal memorandum.
4. **Schools and School Districts: Appeal and Error.** The action of the statutory board created under Neb. Rev. Stat. § 79-403(2) (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and on appeal therefrom to the district court the cause is triable de novo as though it had originally been instituted in such court.
5. **Trial: Words and Phrases: Appeal and Error.** When an appeal is conducted as a "trial de novo," as opposed to a "trial de novo on the record," it means literally a new hearing and not merely new findings of fact based upon a previous record.
6. **Trial: Evidence: Appeal and Error.** A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.
7. **Schools and School Districts: Accreditation: Appeal and Error.** Where all of the acts necessary to effect accreditation of a school district have been met prior to the statutory board's ordering the transfer, and, in fact, formal accreditation is granted prior to the time the children begin school and prior to the time the

district court acts on the appeal, the issue of accreditation must be considered to have become moot.

Appeal from the District Court for Pawnee County: ROBERT T. FINN, Judge. Judgments in Nos. 83-820 and 83-821 affirmed. Cause in No. 83-819 reversed and remanded with directions.

Richard L. Halbert, for appellant.

James B. Gessford of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellees Glathar and Dobrovolny.

Kelley Baker of Nelson & Harding, for appellees Covault et al.

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

KRIVOSHA, C.J.

The three cases consolidated for purposes of this appeal involve freeholders petitions seeking the transfer of land from one school district to another. In the Glathar case (No. 83-820) and the Dobrovolny case (No. 83-821), the landowners filed freeholders petitions with the State Board of Education, seeking to transfer land out of the Table Rock school district and into the Humboldt school district, pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984). In the Covault case (No. 83-819), the landowners filed a freeholder petition with the Pawnee County freeholder board, seeking to transfer land out of the Table Rock school district and into the Pawnee City school district, pursuant to § 79-403(2). Both the State Board of Education, in the Glathar and Dobrovolny cases, and the Pawnee County freeholder board, in the Covault case, granted the relief sought and transferred the land.

The decisions of both the State Board of Education and the Pawnee County freeholder board were appealed to the district court for Pawnee County, Nebraska. After hearing, the district court concluded that the actions of both the State Board of Education and the Pawnee County freeholder board were correct and affirmed the transfers. It is from that decision by the district court for Pawnee County that these appeals are now brought to this court. The appellant in all three cases is Harold

Gottula, who apparently is the president of the Table Rock School Board. Gottula maintains that the district court erred in affirming the transfers in each of the three cases and that its action should be reversed. For reasons more particularly set out hereinafter, we believe the decisions in Glathar and Dobrovolny must be affirmed, while the decision in Covault must be reversed.

We turn first to the Glathar and Dobrovolny cases. Under the provisions of § 79-403(1) any freeholder may file a petition with the State Board of Education, asking to have any tract of land described therein set off from a Class I, II, III, or VI district in which it is situated and attached to some other district in the petitioner's county of residence or a county adjoining thereto, for the purpose of providing a better education for children of school age residing on the land to be transferred. In order for the petitioner to prove that the petition is in the best educational interests of such children, the petitioner must show a difference in the state accreditation of the schools involved. Subsection (1) of § 79-403 then provides that "[a]ppeals may be taken from the action of the State Board of Education to the district court of the county in which the real estate is located within twenty days after entry of such action on the records of the board." This is somewhat different than the law as it existed before the statute was amended.

Prior to July 17, 1982, § 79-403(1) (Reissue 1981) provided that such petitions were filed with a board consisting of the county superintendent, county clerk, and county treasurer, rather than with the State Board of Education. The previous act also provided that appeals were to be taken from the action of the board in the same manner as appeals are "now taken from the action of the county board in the allowance or disallowance of claims against the county." In amending the act and transferring authority to the State Board of Education, the language describing the manner in which the appeal should be taken was deleted and no new appeal procedure was specifically provided. One must conclude, therefore, that the manner of taking appeals from actions of the State Board of Education pursuant to § 79-403(1) must be in the same manner in which appeals from any action of the State Board of Education are

taken to the district court. See *Bd. of Ed. of Keya Paha County v. State Board of Education*, 212 Neb. 448, 323 N.W.2d 89 (1982). Furthermore, because there is a procedure for taking an appeal from the action of the State Board of Education, the provisions of Neb. Rev. Stat. § 25-1937 (Reissue 1979), which provide how appeals are to be taken when no other procedure is provided, have no application. See Neb. Rev. Stat. § 84-917 (Reissue 1981). However, because the language of a specific statute takes precedence over the language of a general statute, the time in which the appeal is to be taken must be within 20 days, as provided in § 79-403(1), rather than 30 days as provided in § 84-917. *State v. Havorka, ante* p. 367, 355 N.W.2d 343 (1984); *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982). See, also, *Duffy v. Physicians Mut. Ins. Co.*, 191 Neb. 233, 214 N.W.2d 471 (1974). There is one further difference which is not material to our decision, and that is that, pursuant to subsection (1) of § 79-403, the appeals in these cases are filed in the district court where the land is located rather than where the action by the State Board of Education was taken.

The record discloses that in Glathar and Dobrovolny the notice of appeal was filed on April 1, 1983. The record further discloses that the meeting at which the State Board of Education approved the transfers was held on March 11, 1983. The time, therefore, between the meeting at which the action was taken and the date on which the appeals were filed was more than 20 days. Appellant argues that the appeals were filed within 20 days because, while the board voted to transfer the land on March 11, 1983, it also voted at that time to hold an emergency telephone conference in order to approve memorandum opinions regarding the decisions made on March 11, 1983. The question that we must therefore decide is whether the actions from which these appeals are taken occurred on March 11 when the board voted to approve the transfer or on March 15 when the memorandum decisions were approved. We believe § 79-403(1) requires that the appropriate date must be March 11, 1983. It was on that date that the board, at a duly convened meeting at which minutes were required by statute to be taken, voted to authorize the transfers. Neb. Rev. Stat.

§ 79-327(2) (Reissue 1981). It is the "action" of approving the transfer which is now being appealed. While it is true that the State Board of Education is required, under the provisions of Neb. Rev. Stat. § 84-915 (Reissue 1981), to prepare findings of fact and conclusions of law, it is also true that the language of § 79-403(1) pertaining to the time for taking appeal is significantly different from the language of § 84-917. As we have noted, § 79-403(1) provides that the time for taking an appeal begins to run "after entry of such action on the records of the board." On the other hand, the time for appeal under § 84-917 begins to run "after the service of the final decision by the agency." To suggest that the language of § 79-403(1) is the same as § 84-917 is to ignore the plain meaning of the words. When the board met on March 11, 1983, it took "action" and recorded it "on the records of the board." That it may also be required to prepare a "final decision" cannot alter that fact. Nor can the fact that the time for giving notice of appeal begins to run when the vote is taken and before the final decision is drafted alter the language of § 79-403(1).

Absent some violation of due process, the Legislature may prescribe the time in which an appeal must be taken, even if the procedure, on careful reflection, is foolish or contrary to other procedures provided. The preparation of a formal document required by § 84-917 does not extend the time for appeal under § 79-403(1) any more than a delay in preparing the minutes of the meeting of March 11, 1983, could delay the time for taking the appeal.

When the board formally met and voted, it entered "such action on the records of the board" and started the clock running. See § 79-327(2). See, also, *Marcotte v. City of Omaha,* 196 Neb. 217, 241 N.W.2d 838 (1976); *Brown v. City of Omaha,* 179 Neb. 224, 137 N.W.2d 814 (1965). The appeals in the Glathar and Dobrovolny cases were, therefore, filed 21 days after the action was taken and beyond the time provided for by statute. Good judgment might suggest that § 79-403(1) should track the Administrative Procedures Act in all respects. That, however, is for the Legislature to decide and not for this court.

While this may seem to be highly technical, nevertheless the

matter of acquiring jurisdiction by an appellate court is indeed a technical matter and one over which courts have no discretion. As we observed in *Brown v. City of Omaha, supra* at 226, 137 N.W.2d at 816:

> We have no power to extend the period of review for 1 or 2 days any more than we could extend it 6 months, and it is fundamental that the right to review by error proceedings or to appeal is statutory and the requirements of the statute must be met before the district court or this court acquires jurisdiction of the subject matter of the action.

The record simply and absolutely discloses that Gottula did not file his appeal in time and that the district court did not acquire jurisdiction. The action of the State Board of Education, therefore, became final, and neither the district court nor this court can review such action.

The situation in the Covault case (No. 83-819), however, is entirely different. The record makes clear that the appeal was taken within 20 days from the date upon which the freeholder board acted, and in accordance with the provisions of § 79-403(2), which provides that appeals under subsection (2) shall be taken in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county. We, therefore, must turn to the merits of the appeal in Covault.

Section 79-403(2) provides that any freeholder may file a petition with a board consisting of the county superintendent, county clerk, and county treasurer, asking to have any tract of land set off from a *nonaccredited* Class I, II, III, or VI district in which it is situated and attached to an *accredited* district in the county of the residence of the petitioner or an adjoining county. A freeholder may not seek to have land transferred from one accredited school district to another accredited school district under § 79-403(2).

The evidence in the Covault case discloses that the hearing on the petition was held on December 15, 1982, and that, while the Table Rock school district had not yet been formally accredited, it had been advised on December 2, 1982, that it had met all of the requirements for accreditation and would be accredited by

the State Accreditation Committee at its meeting in May and by the State Board of Education at its meeting in June. The letter of December 2 further advised the Table Rock school district that the accreditation classification would become official after the action of the State Board of Education in June for the school year starting July 1, 1983, through June 30, 1984, the period of time involved in this action.

Nevertheless, the freeholder board granted the request to transfer, and the district court, on appeal, held that it could not consider the fact that Table Rock had been advised of its accreditation and would be accredited before the new school year began, but must instead consider the status of the district as it existed on the date on which the freeholder board met. The district court also held that it could not consider evidence as to the status of Table Rock on the date of the trial, but was only to determine whether Table Rock was accredited on the date the freeholder board met. This would appear to be directly in conflict with our recent decision in *Miller v. School Dist. No. 69*, 208 Neb. 290, 303 N.W.2d 483 (1981). We believe this to be true notwithstanding the fact that Neb. Rev. Stat. § 79-1108 (Reissue 1976) has been amended.

In the first place, we said in *Miller* that the action of the statutory board under § 79-403 (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and on appeal therefrom to the district court the cause is triable de novo as though it had originally been instituted in such court. See, also, *Klecan v. Schmal*, 196 Neb. 100, 241 N.W.2d 529 (1976); *Friesen v. Clark*, 192 Neb. 227, 220 N.W.2d 12 (1974). When an appeal is conducted as a "trial de novo," as opposed to a "trial de novo on the record," it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal. See, generally, 25A C.J.S. *De novo* at 483 (1966); Black's Law Dictionary 1349 (5th ed. 1979); *Box Butte County v. Noleman*, 54 Neb. 239, 74 N.W. 582 (1898); *Miller v. School Dist. No. 69, supra.*

Therefore, when the trial court considered this matter on

August 8, 1983, it should have taken into account the fact that the district was now accredited and that the Covaults did not meet the necessary requirements of § 79-403(2).

Furthermore, in *Miller* we held that where all of the acts necessary to effect accreditation of a school district have been met prior to the statutory board's ordering the transfer, and in fact formal accreditation is granted prior to the time the children begin school and prior to the time the district court acts on the appeal, the issue of accreditation must be considered to have become moot. It appears to us that this rule must cut both ways. If it is the law, as we believe it to be, that the board must consider whether the district to which the land is being transferred is accredited under the conditions set out in *Miller*, it would likewise seem to follow that both the freeholder board in the first instance and the district court on appeal must consider whether the district from which the land is being transferred is accredited under the conditions in this case.

Argument is made that by amending § 79-1108 (Reissue 1981), the Legislature has caused our decision in *Miller* to no longer have application. See § 79-1108 (Cum. Supp. 1984). We do not agree. It would make little sense to say that the district court, on appeal, must consider the fact that the school district in question has become accredited, because the trial is de novo, but that the freeholder board must disregard that all steps have been taken for accreditation except for the formal vote of the State Board of Education. This would simply require the taking of an appeal in order to obtain a guaranteed favorable result, and cannot be the law. We believe that our holding in *Miller* remains the law notwithstanding the amendment to § 79-1108.

In the instant case all of the requirements necessary to effect accreditation of the Table Rock school district had been met prior to the time that the statutory board ordered the transfer, and in fact the formal certification was granted prior to the time the children began school and prior to the time the district court acted on the appeal. It was therefore error for the district court not to consider those facts. If the district court had considered those facts, as we believe it should have, it would have been required to find that the Covaults were not seeking to transfer land from a nonaccredited district to an accredited district but,

rather, were seeking to transfer land from an accredited district to an accredited district, and therefore did not meet the requirements of § 79-403(2). The freeholder board did not have jurisdiction in this matter. The decision of the trial court in Covault must be reversed and the matter remanded with directions to set aside the transfer.

JUDGMENTS IN NOS. 83-820 AND 83-821 AFFIRMED.
CAUSE IN NO. 83-819 REVERSED AND REMANDED WITH DIRECTIONS.

IN RE PELAN FREEHOLDER PETITION.
ROBERT H. CLAUSEN, APPELLANT, V. LYNN PELAN ET AL., APPELLEES.
IN RE ZYBACH FREEHOLDER PETITION.
ROBERT H. CLAUSEN, APPELLANT, V. DAVID ZYBACH ET AL., APPELLEES.
359 N.W.2d 355

Filed December 7, 1984. Nos. 83-824, 83-826.

Schools and School Districts. Where a freeholder seeks to transfer land located in an unaccredited Class I district to an accredited Class II, III, IV, or V district and the Class I district is a part of an accredited Class VI district, the transfer must be effected pursuant to Neb. Rev. Stat. § 79-403(2) (Cum. Supp. 1984) and the land is transferred out of both the Class I district and the Class VI district.

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

Barlow, Johnson, DeMars & Flodman, for appellant.

Leininger, Grant, Rogers & Maul, for appellees.

KRIVOSHA, C.J., HASTINGS, SHANAHAN, and GRANT, JJ., and MCCOWN, J., Retired.

KRIVOSHA, C.J.

This appeal is another in a series of cases arising by reason of landowners seeking to transfer land from one school district to

another pursuant to the provisions of Neb. Rev. Stat. § 79-403(1) and (2) (Cum. Supp. 1984). More specifically, the question presented to us by this combined appeal is whether a freeholder seeking to transfer land located in an unaccredited Class I district which is a part of an accredited Class VI district to an accredited Class III district must do so under the provisions of subsection (1) or subsection (2) of § 79-403. In both the Pelan case (No. 83-824) and the Zybach case (No. 83-826), the freeholders filed their petitions with a board consisting of the county superintendent, county clerk, and county treasurer pursuant to the provisions of § 79-403(2). The requests to transfer were granted, and appeals were taken by Robert H. Clausen to the district court. The district court affirmed the actions of the freeholder board, and Clausen appealed to this court.

While a number of assignments of error are raised, appellant essentially argues that § 79-403 must be read in such a manner that if an unaccredited Class I district is also located in an accredited Class VI district, then only the State Board of Education has jurisdiction to authorize a transfer pursuant to § 79-403(1). We believe, however, that a simple reading of the statute leads to a contrary conclusion and supports the actions of both the freeholder board and the district court.

It appears to us that there is no ambiguity insofar as this issue is concerned and that, in fact, the Legislature clearly contemplated the situation presented to us by this case. Section 79-403(2) provides in pertinent part as follows:

> Any freeholder . . . may file a petition with a board consisting of the county superintendent, county clerk, and county treasurer, asking to have any tract or tracts of land described therein set off from a nonaccredited Class I, II, III, or VI district in which it is situated and attached to an accredited district in the county of the residence of the petitioner or an adjoining county thereto . . . .

The record in these cases, as stipulated to by the parties, establishes that the land sought to be transferred is presently located in an unaccredited Class I school district attended by the children living on the land. The facts as alleged would appear to be exactly as described in § 79-403(2), and we are simply unable

to see how any other conclusion can be reached.

Appellant argues that although the school district attended by the children living on the land sought to be transferred is an unaccredited Class I, the unaccredited Class I is a part of an accredited Class VI and the transfers must, therefore, be considered to be between accredited school districts pursuant to § 79-403(1). Again, we believe the Legislature contemplated this situation and reached a contrary conclusion. Section 79-403(2) further provides in part that "when such petition is for transfer of land from a Class I district which is part of a Class VI district, the petitioner shall be allowed to have such land attached to an adjoining accredited Class II, III, IV, or V district." The Class II, Class III, Class IV, and Class V school districts are all districts having both elementary and high school grades, but having varying populations. See Neb. Rev. Stat. § 79-102 (Reissue 1981). There appears to us to be no reasonable way in which to read the clear language of § 79-403(2) other than to conclude that where the Class I district is unaccredited and a part of a Class VI district which is accredited, the land is transferred from both the Class I district and the Class VI district to a Class II, III, IV, or V district pursuant to § 79-403(2). To hold otherwise would require us to interpret that which is unambiguous and which requires no interpretation, an act which we are not permitted to do. See, *Kellogg Company v. Herrington*, 216 Neb. 138, 343 N.W.2d 326 (1984); *Ragland v. Norris P. P. Dist.*, 208 Neb. 492, 304 N.W.2d 55 (1981). The freeholder board had jurisdiction to hear these matters and to transfer the land as it did. The action of the district court, therefore, was correct and must be affirmed.

AFFIRMED.

IN RE RESNER FREEHOLDER PETITION.
ROBERT H. CLAUSEN, APPELLANT, V. DARRELL RESNER ET AL., APPELLEES.
359 N.W.2d 359

Filed December 7, 1984. No. 84-716.

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

Barlow, Johnson, DeMars & Flodman, for appellant.

Leininger, Grant, Rogers & Maul, for appellees.

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

PER CURIAM.

This appeal is another in a series of appeals involving the transfer of school land from one district to another pursuant to the provisions of Neb. Rev. Stat. § 79-403(2) (Cum. Supp. 1984). Specifically, this case involves the transfer of land from an unaccredited Class I district located within an accredited Class VI district to an accredited Class III district. The parties have waived oral argument and have stipulated that because the land in this case is located within the same school district as the land involved in No. 83-824, *In re Pelan Freeholder Petition*, and No. 83-826, *In re Zybach Freeholder Petition*, the decision in those cases will be dispositive of this case. Having now decided *Pelan* and *Zybach, ante* p. 771, 359 N.W.2d 355 (1984), the judgment of the trial court in this case is affirmed on the basis of our holding in *Pelan* and *Zybach*.

AFFIRMED.

IN RE HOTOVY FREEHOLDER PETITION.
WILLIAM GREGURAS, APPELLANT, V. RAPHAEL HOTOVY ET AL., APPELLEES.

359 N.W.2d 357

Filed December 7, 1984. No. 84-524.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

Larry L. Brauer of Allan, Brauer & Mullally, for appellant.

Ivan A. Blevens of Blevens, Blevens & Jacobs, for appellees.

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

KRIVOSHA, C.J.

This case is one more in a series of cases involving the transfer of land from one school district to another pursuant to the provisions of Neb. Rev. Stat. § 79-403 (Cum. Supp. 1984). In the instant case the landowners sought to have property allegedly located in an unaccredited Class I district transferred to an accredited Class III district. A petition was filed before the State Board of Education pursuant to the provisions of § 79-403(1). The State Board of Education approved the transfer, and the appellant, William Greguras, appealed the decision to the district court for Seward County, Nebraska. The landowners, whose property had been transferred, filed a motion to dismiss the appeal for lack of jurisdiction. That motion was sustained by the district court. Greguras has now appealed to this court. A number of issues are raised by Greguras, some of which we have already decided. See, *In re Covault Freeholder Petition, ante* p. 763, 359 N.W.2d 349 (1984); *In re Pelan Freeholder Petition, ante* p. 771, 359 N.W.2d 355 (1984). There is, however, one issue which is dispositive of the entire appeal and to which we now direct our attention.

It is undisputed that the State Board of Education voted to transfer the land at a meeting held on March 8, 1984, although the final memorandum prepared by the staff for the State Board of Education was not approved by the board until March

9, 1984. It is further undisputed that the appeal was not filed in the district court until March 29, 1984. If the time for taking the appeal commenced to run on March 8, 1984, when the vote was taken and recorded, rather than on March 9, 1984, when the formal order was approved, then more than 20 days expired between the "entry of such action on the records of the board" and the time the appeal was filed, contrary to § 79-403(2).

We have this day in *In re Covault Freeholder Petition, supra*, held that the time for appeal begins to run when the board votes to transfer the land, and not when the formal decision is approved. In light of this holding, it is clear that the time for appeal expired before the notice of appeal was filed, and the district court failed to acquire jurisdiction. The action of the district court in sustaining the motion to dismiss was correct.

Normally, such a finding by this court would end the matter before us. However, we note that the petition to transfer was filed with the State Board of Education pursuant to § 79-403(1). The petition alleges that the landowners seek to transfer land from an unaccredited Class I district to an accredited Class III district. It would appear that this transfer is of a type which must be filed under the provisions of § 79-403(2) with a freeholder board consisting of the county treasurer, the county clerk, and the county superintendent of schools, and not with the State Board of Education. The State Board of Education had no jurisdiction to transfer the land. See, *In re Covault Freeholder Petition, supra; In re Pelan Freeholder Petition, supra.*

Unfortunately, however, because the appeal in the instant case was not timely, the district court in the first instance and this court on further appeal may not consider this issue at this time. That issue will have to be decided in an appropriate case brought for that purpose.

The decision of the district court is affirmed.

AFFIRMED.

SHANAHAN, J., concurs in the result.

CHIMNEY ROCK IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLEE AND CROSS-APPELLANT, V. FAWCUS SPRINGS IRRIGATION DISTRICT, A PUBLIC CORPORATION, APPELLANT AND CROSS-APPELLEE.

359 N.W.2d 100

Filed December 7, 1984. No. 83-832.

1. **Eminent Domain.** The power of eminent domain is to be exercised only where the taking is for a public use, just compensation is paid, and due process of law has been observed.
2. _____. Whether the use for which property is taken is public or private in nature is a judicial question and not a legislative one.
3. _____. In determining whether a taking by eminent domain is for a public or private use, the concern is with the use for which the property is taken, not the agency or instrumentality through which the taking is accomplished.
4. **Quo Warranto.** Quo warranto is the exclusive means of challenging the legal existence of a public entity.
5. _____. Generally, quo warranto will not lie to challenge an improper exercise of a conferred power, although such irregularity may be sufficient, when tested by other means, to void the act done.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed.

Steven C. Smith of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant.

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

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

CAPORALE, J.

Defendant-appellant, Fawcus Springs Irrigation District, instituted a proceeding in the county court to condemn certain land owned by plaintiff-appellee, Chimney Rock Irrigation District. On appeal by Chimney Rock the district court dismissed the proceeding. Fawcus Springs appeals that judgment of dismissal to this court, assigning as error the district court's finding that the taking was for a private rather than a public use, and further claiming that, in any event, the district court lacked jurisdiction to adjudicate the matter. Chimney Rock cross-appeals with respect to certain of the

district court's other specific findings of fact. We affirm.

This case was spawned by our holding in *Schmidt v. Chimney Rock Irrigation Dist.*, 209 Neb. 1, 305 N.W.2d 888 (1981), that Robert L. Schmidt had no right to flow water "under or over or across" land owned by Chimney Rock in fee simple and on which Chimney Rock maintains an irrigation canal. Following that decision, Schmidt conveyed, without consideration, approximately 15 acres each of land owned by him to his sister, father, and son. Schmidt retained the remainder of his land. Schmidt's grantees then duly formed Fawcus Springs Irrigation District under the provisions of Neb. Rev. Stat. §§ 46-101 through 46-128 (Reissue 1978), which district also encompasses the land retained by Schmidt. Thereafter, Schmidt's father, as one of the directors of Fawcus Springs, appeared before Chimney Rock seeking a right-of-way across a strip of land containing Chimney Rock's irrigation canal, which canal separates the land in Fawcus Springs from its water supply.

After Chimney Rock refused to deal with Fawcus Springs, Fawcus Springs exercised its power of eminent domain to acquire Chimney Rock's land in order to build its right-of-way. After an award of damages to Chimney Rock by the condemnation appraisers, Chimney Rock appealed to the district court, claiming, among other things, that the taking was not for a public use but, rather, for the private benefit of Schmidt.

Constitutional limitations permit the power of eminent domain to be exercised only where the taking is for a public use, just compensation is paid, and due process of law has been observed. *Father Flanagan's Boys' Home v. Millard School Dist.*, 196 Neb. 299, 242 N.W.2d 637 (1976).

The core of Fawcus Springs' argument that the taking was for a public use is that § 46-128 declares it to have been such and that this court has recognized that fact in *Vetter v. Broadhurst*, 100 Neb. 356, 160 N.W. 109 (1916). Section 46-128 provides:

> The use of all water required for the irrigation of lands of any district formed under the provisions of sections 46-101 to 46-128, together with canals and ditches already constructed, the rights-of-way for canals and ditches, sites

> for reservoirs and pumping plants, and all other property required in fully carrying out the provisions of sections 46-101 to 46-1,111, is hereby declared to be a public use, subject to the regulation and control of the state in the manner prescribed by law.

In *Vetter* this court refused to permit a landowner to condemn his neighbor's land in order that the condemnor might store water from a creek to irrigate his own ground. The court held that the condemnation statutes concerning impounding water could not, "with due regard to the right of private property, be applied to circumstances in which a merely private interest is subserved." *Id.* at 363, 160 N.W. at 112. In so holding, however, the court observed:

> It may be thought to be rather an artificial distinction to say that an irrigation district, or a canal company created to furnish water to landowners for agricultural purposes for compensation, may exercise the right of eminent domain, but that a private owner of a single tract of land may not have such a privilege. But this difficulty rests on the nature of the matter. Such agencies are in a sense common carriers of water, and the right of control and of regulation of rates exists in the public, so that all courts would agree that such agencies are formed for a public purpose. If a carrier of goods only carries one package of goods, but offers to carry for all, the public is interested, but if he carries for himself alone the public has no concern with his business.

Id.

Fawcus Springs takes a great deal more comfort from § 46-128 and the above-quoted obiter dictum of *Vetter* than is warranted by the facts of this case. Section 46-128 does no more than provide that land necessarily taken to benefit an irrigation district is taken for a public use. The statute does not undertake to adjudicate under what circumstances land has been taken to benefit an irrigation district and under what circumstances land has been taken to benefit a private interest. Indeed, this court has previously held that whether the use for which property is taken is public or private in nature is a judicial question and not a legislative one. *Burger v. City of Beatrice*, 181 Neb. 213, 147

N.W.2d 784 (1967). In making that determination "the facts of the particular case must be subjected to close examination." *Id.* at 222, 147 N.W.2d at 790. Although the *Vetter* dictum does imply that an irrigation district might, under some circumstances, do what an individual would not be able to do, the court was not adjudicating, as it must in this case, whether an irrigation district had improperly exercised its power of eminent domain.

It is clear from the evidence, and was conceded by Fawcus Springs in oral argument, that the sole purpose of forming Fawcus Springs was to obtain and exercise the power of eminent domain for Schmidt's own benefit. One of Schmidt's neighbors testified Schmidt told him that he (Schmidt) would have no problem getting water over or under Chimney Rock's canal, since he was going to "form a ditch company and condemn a right-of-way through there . . . ." The neighbor also testified that at meetings of the county commissioners and before the Board of Educational Lands and Funds, Schmidt was either the primary spokesman for Fawcus Springs or was the person with whom Fawcus Springs' attorney consulted. Also, when Schmidt's father no longer wanted to be on the Fawcus Springs board, he conveyed, without consideration, the tract of land previously given to him by Schmidt to Schmidt's sister's father-in-law. Schmidt's father did not list the land with a realtor "because nobody would want 15 acres by itself." The reason given by Schmidt's father for not giving the land back to Schmidt was that Schmidt "couldn't be on the ditch board and we had to have three people on the ditch board."

This jurisdiction has long been committed to the principle that a private use is not converted into a public one merely because a number of individuals band together to do what a single individual could not do. *Jenal v. Green Island Draining Co.*, 12 Neb. 163, 10 N.W. 547 (1881), struck down a statute allowing three or more individuals to form a corporation which would have the power to construct structures across lands owned by others for the purpose of reclaiming wet or overflowed lands without reference to whether the public welfare, as contrasted with the private benefit of the organizers of the corporation, would be served. The *Jenal* court stressed

that

> [t]he legislature possesses no authority, however, to take the property of one citizen and transfer it to another, even where full compensation is made. . . . The statute in question authorizes the entry upon lands and construction of drains, whenever the private interest of the corporation requires it, and without reference to the public welfare. . . . Three individuals, by forming a corporation, may locate and open a drain across the property of others without their consent, and compel them to bear the burden of constructing the same. This is an infringement of the right of private property, and is unauthorized and void.

Id. at 166-67, 10 N.W. at 548.

The real issue in this case, therefore, is whether form is to triumph over substance. That substance is the controlling consideration is established by *Burger v. City of Beatrice, supra*, wherein we quoted from *State ex rel. Dominick v. Superior Court*, 52 Wash. 196, 100 P. 317 (1909): " 'Courts look to the substance rather than the form, to the end rather than to the means. If in the end the property is devoted to a public use, the mere agency or instrumentality through which that result is accomplished is a matter of no concern.' " *Burger v. City of Beatrice*, 181 Neb. 213, 223, 147 N.W.2d 784, 791 (1967). Conversely, if in the end the property taken is devoted to a private use, the same rationale applies, as shown in *Burger*. In refusing to allow the city of Beatrice to take easements over privately owned land in order to install wells and withdraw water so as to benefit private businesses located outside the city limits, the *Burger* court stated that a broad definition of public use would not be adopted "in condemnations for drainage ditches, irrigation works, reservoirs, dams, and the like." *Id.* at 221, 147 N.W.2d at 790. That court also observed:

> The improper exercise of the power of eminent domain is an infringement upon a citizen's constitutional right to own and possess property. It is essential therefore that the exercise of the power of eminent domain be in strict accordance with its essential elements in order to protect the constitutional right of the citizen to own and possess property against an unlawful perversion of such right. The

> authorities are in agreement that a taking of property under the power of eminent domain must be for a public purpose and that it may not be taken for a private one.

Id. at 220, 147 N.W.2d at 789-90.

The *Burger* court then concluded:

> [T]he attempt of Beatrice to take the easements on plaintiffs' lands by eminent domain, insofar as the use by Phillips and Cominco [the two businesses outside the city limits] is concerned, is an attempt to obtain private property against the will of the owners for a private purpose, even though for compensation, under the guise of an exercise of its power of eminent domain. This it cannot do.

Id. at 224, 147 N.W.2d at 792.

We recognize that a factual distinction exists between *Burger* and the instant case, in that in *Burger* the city sought to condemn private land outside its borders to benefit private businesses also located outside its borders, whereas in this case Fawcus Springs seeks to condemn land outside its borders to benefit one with an interest in land within its borders. Nonetheless, the *Burger* rationale is apposite. The city of Beatrice was, as is Fawcus Springs, a lawful entity possessing the power of eminent domain. The fact which defeated the city of Beatrice is the fact which defeats Fawcus Springs; the taking in both cases was to benefit private rather than public interests.

Fawcus Springs' first assignment of error is without merit.

As to the second, or jurisdictional, issue, Fawcus Springs relies on the ruling in *Osborn v. Village of Oakland*, 49 Neb. 340, 68 N.W. 506 (1896), that quo warranto is the exclusive means of challenging the legal existence of a public entity. That ruling, however, has no application to this case. The question presented is not whether Fawcus Springs is in legal existence, but whether it validly exercised its power of eminent domain. In *State ex rel. Tomek v. Colfax County Reorganization Committee*, 190 Neb. 447, 209 N.W.2d 188 (1973), we held that, generally, quo warranto will not lie to challenge an improper exercise of a conferred power, although such irregularity may be sufficient, when tested by other means, to void the act done. Chimney Rock chose a proper means of challenging Fawcus

Springs' exercise of its power of eminent domain.

The record failing to sustain either of Fawcus Springs' assignments of error, we affirm. Such disposition makes unnecessary any consideration of the issues presented by Chimney Rock's cross-appeal.

AFFIRMED.

WHITE, J., not participating.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority opinion in this case. Although the majority opinion acknowledges that the Fawcus Springs Irrigation District was duly formed under the provisions of Neb. Rev. Stat. §§ 46-101 through 46-128 (Reissue 1978), it nevertheless holds that in an appeal from a condemnation action the court may look behind the establishment of the district. While the district, on its face, appears to have been validly created, the majority holds that, in fact, it may not possess the powers granted to such duly created districts because a single individual benefits from the district's exercise of its lawfully given power.

The evidence is undisputed that the Fawcus Springs Irrigation District was lawfully created and, as such, has been given authority to condemn private property for public use after complying with the requirements of law. Those who objected to the creation of the Fawcus Springs Irrigation District, including Chimney Rock Irrigation District, had an opportunity to appeal from the order creating the district at the time of its formation. Having elected not to do so, it should not now, in a proceeding involving the district's exercise of eminent domain, be permitted to contest the validity of the district. It has long been the law in this jurisdiction that the judgment of a county board establishing an irrigation district cannot be collaterally attacked as to those matters by statute committed to the consideration, investigation, and determination of the board. See *State v. Several Parcels of Land*, 80 Neb. 424, 114 N.W. 283 (1907). The majority is simply in error when it suggests that the real issue in this case "is whether form is to triumph over substance." The real issue in this case is whether an irrigation district, lawfully created and empowered by the Legislature to exercise the right of eminent domain, can have

that authority stripped from it by collateral attack when the district seeks to exercise the authority granted to it by the Legislature.

No one contends that the statutes creating irrigation districts are in any manner invalid and that, once created, the district cannot exercise the right of eminent domain, nor does anyone contend that the Fawcus Springs Irrigation District is not a valid, lawful, public corporation, having the power of eminent domain. Yet the district is denied the right to exercise the power of eminent domain in order to obtain water for the district because the majority says the taking is not for a public purpose.

Section 46-128 specifically provides that the use of all water required for the irrigation of lands of any district formed under this act is declared to be a public use, subject to the regulation and control of the state in the manner prescribed by law. While we recognize that the mere fact that the Legislature declares something to be a public purpose does not, in and of itself, foreclose any further examination, we believe that such declaration should not be lightly set aside, absent some violation of constitutional law.

Apparently, the basis for concluding that the action of this district must be set aside is because a single individual owning the majority of the land within this 270-acre district is the only individual benefiting from the water, and therefore the right of eminent domain cannot exist. No authority, however, is cited in support of that position, and, in fact, the number of individuals who may benefit from a particular public project is in no manner controlling. As noted by the U.S. Supreme Court in the case of *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707, 43 S. Ct. 689, 67 L. Ed. 1186 (1923), "It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use." And the Supreme Court of South Carolina, in *Young v. Wiggins*, 240 S.C. 426, 434, 126 S.E.2d 360, 364 (1962), noted:

> It is of no legal significance that the organized district involves some twenty landowners. The constitutional prohibition applies to the same extent as though there were only three owners, of whom two favored the lake and

one opposed it. The character of the use, whether by individuals or by members of the public, rather than the numbers of users, is controlling.

Further, in *State v. Buck*, 94 N.J. Super. 84, 88-89, 226 A.2d 840, 842 (1967), the New Jersey court said:

> A use is not denominated public or private by simply relying upon the number of persons it serves. . . . It has been stated that a use does not "fail to be public upon the ground that the immediate enjoyment of it is limited to a small group or even to a single person." *United States v. Boyle*, 52 *F. Supp.* 906, 908 (*N.D. Ohio* 1943), affirmed *sub nom. City of Cleveland v. United States*, 323 *U.S.* 329, 65 *S. Ct.* 280, 89 *L. Ed.* 274 (1945). Accord, *Fallbrook Irrigation District v. Bradley*, 164 *U.S.* 112, 161-162, 17 *S. Ct.* 56, 41 *L. Ed.* 369, 389-390 (1896).

The fact that in the instant case the irrigation district benefits only one person does not change the fact that the use of water for irrigation purposes in Nebraska by an irrigation district is a public use and that a duly created irrigation district has the lawful authority to condemn land in order to obtain water, even though only a single individual is benefited. That is the very holding in *Vetter v. Broadhurst*, 100 Neb. 356, 363, 160 N.W. 109, 112 (1916), wherein we said:

> It may be thought to be rather an artificial distinction to say that an irrigation district, or a canal company created to furnish water to landowners for agricultural purposes for compensation, may exercise the right of eminent domain, but that a private owner of a single tract of land may not have such a privilege. But this difficulty rests on the nature of the matter. Such agencies are in a sense common carriers of water, and the right of control and of regulation of rates exists in the public, so that all courts would agree that such agencies are formed for a public purpose.

As noted in 26 Am. Jur. 2d *Eminent Domain* § 31 at 679 (1966):

> It is a generally recognized principle that the public nature of a project, as warranting the exercise of eminent domain, cannot be made to depend on a numerical count

> of those to be served or the smallness or largeness of the community to be benefited. Therefore it is settled that a use may be public even though it will be enjoyed by a comparatively small number of people.

So adamantly do we, as a state, feel about the matter of water and its use, we have devoted four sections of our Constitution to the matter of water and the people's right to divert it and use it. Article XV, § 4, of the Constitution of the State of Nebraska acknowledges that water for irrigation purposes is a natural want. And § 5 of article XV of the Constitution of the State of Nebraska declares that the water of every natural stream is dedicated to the people of the state for beneficial purposes.

What we are in effect saying by the majority opinion herein is that the right of this irrigation district to exercise its duly granted power of eminent domain must be denied because the driving force behind the creation of the district was too clever and followed the law to the letter. If the Legislature wishes to prohibit such an occurrence from arising in the future, it may make whatever constitutional, reasonable restrictions it wishes on the formation of a district. But the Legislature's having described how that district should be created and, once created, what powers it should have, it should not be for this court to look behind those provisions and determine that the district is not entitled to the rights granted to it.

In my view, the decision of the district court was in error and should have been reversed.

BOSLAUGH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. BERNARD R. SCHAEFFER, APPELLANT.

359 N.W.2d 106

Filed December 7, 1984. No. 83-868.

1. **Post Conviction.** Under Neb. Rev. Stat. § 29-3001 (Reissue 1979), a court may properly deny an evidentiary hearing on a motion to vacate a conviction upon a

determination after an examination of the files and records of the case that petitioner is entitled to no relief.

2. **Pleas.** The test for the voluntariness of a plea of guilty is determined by the law in effect at the time of the plea.

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

Thomas A. Wagoner, for appellant.

Bernard R. Schaeffer, pro se.

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

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

GRANT, J.

In this post conviction proceeding, defendant, Bernard R. Schaeffer, appeals from the trial court's denial of his pro se "Motion to Withdraw Guilty Plea" and the denial of a "Motion to Vacate Conviction and Sentence" filed by defendant's appointed counsel. For the reasons hereinafter set out we affirm.

The record shows that on May 22, 1977, a complaint was filed in Hall County, Nebraska, against defendant, charging that on May 18, 1977, defendant, while in the perpetration of a robbery, did feloniously kill Donald N. Berry, Jr. On May 22, 1977, defendant appeared with his own private counsel for a bond hearing. Bond was denied. On May 25, 1977, the court permitted defendant's counsel to withdraw as private attorney of record and appointed the same attorney to represent defendant.

Counsel vigorously represented defendant throughout the proceedings. Motions for a change of venue and for a continuance were filed and denied after hearing. A motion to transfer the case to juvenile court was filed on the grounds that defendant was 16 years old. Another hearing was held and the motion to transfer was denied. A motion to suppress all oral or written statements was filed and, after hearing, denied.

On June 27, 1977, defendant was arraigned on an

information filed on June 21, 1977. His counsel was present. The information charging him with felony murder was read in full to defendant. Defendant was interrogated by the trial court judge and specifically stated that he understood the nature of the proceedings; that he understood he could plead guilty or not guilty; that he knew he was entitled to a jury trial and knew that he had the right to cross-examine witnesses against him; and that he knew he had a presumption of innocence in his favor and knew that the State had the burden to prove him guilty. He was then asked how he pled. His attorney intervened and requested that defendant be permitted to stand mute. The court allowed this procedure and entered a plea of not guilty on defendant's behalf. The case was set for trial to begin on August 1, 1977. After this arraignment, motions almost identical to those described above were again filed. Additional hearings were held. All these motions were again overruled.

On August 1, 1977, defendant appeared for trial with his attorney. Jury selection started on August 1 and continued on August 2, up to 2:40 p.m. At that time defendant's counsel informed the court that "we would like to withdraw our plea of standing mute and, with the Court's consent, enter a plea of no contest to the information." The court specifically asked defendant if the defendant had consulted with his attorney and with defendant's parents about changing his plea. The defendant answered that he had consulted with both his parents and his attorney. Defendant also answered that no one had made any promises or threats to him in exchange for the plea and that he understood the penalty, in that if he pled nolo contendere to the charge, he knew the court "could put me to death, or life in prison."

The trial court then told defendant that he could not accept the nolo contendere plea without a basis for accepting it and asked defendant to tell him what happened. Defendant then, in open court and in the presence of his counsel, described the homicide in great detail, including the events that led up to the robbery which culminated in the murder, and the events after the murder, including the splitup of the money stolen and the manner of disposing of the murder weapon. Defendant told how he obtained a nine-shot Ruger automatic pistol and how he

and another had transported the victim to a local sandpit in Hall County where, defendant stated, he shot the victim. Defendant stated, "I emptied the clip and went back to the car and got another clip and emptied it."

The court then asked for the appointment of a three-judge sentencing panel to determine if defendant should be sentenced to life in prison or to death. On September 1, 1977, the three-judge panel was convened for the sentencing hearing. Before this sentencing hearing began, the trial judge, who acted as the presiding judge of the panel, stated to defendant in open court:

> Bernard, previously, on the 2nd day of August, you appeared in this Court and at that time desired to enter a plea of no contest, which plea I accepted. I want to make certain that you realize that by entering this plea and by its being accepted that you have given up certain Constitutional Rights.

The court then interrogated defendant, in further specific detail, if he was aware of his constitutional rights. At the conclusion of the interrogation, the presiding judge inquired of defendant, "Now, do you still want to let that plea stand?" Defendant answered "Yes."

After this colloquy the sentencing hearing was held before the three-judge panel and the matter taken under advisement by the panel. On September 30, 1977, the sentencing panel reconvened and sentenced defendant to life in prison. No appeal was taken from the sentence imposed or from the denial of defendant's motion for new trial.

On June 1, 1983, defendant pro se filed his verified motion seeking post conviction relief in requesting leave to withdraw his plea of no contest. In the motion the defendant stated: "Defendant alleges that on August 2, 1977, he entered a plea of no contest to an information charging the defendant with murder in the first degree . . . ." The motion further alleged that when the trial court accepted the defendant's plea of no contest, the court did not ask defendant if defendant knew he

> was waiving his right to call witnesses, confront witnesses, remain silent, have a right to a trial either to a judge or to a jury, nor did the Court inquire of the defendant whether

> he knew and understood the elements that the State would have to prove beyond a reasonable doubt should the matter go to trial.

Defendant further alleged in his motion that the court, on September 1, 1977, "did attempt to clear up the problem with the plea; however, the Court did not allow the defendant to withdraw his plea . . . ."

On June 6, 1983, the same attorney who represented defendant at trial was appointed to represent defendant in this post conviction hearing, pursuant to defendant's written request.

On October 17, 1983, the trial court entered its order finding that "upon the files and records . . . the defendant's plea of no contest was intelligently and voluntarily made," and dismissed both the motion to withdraw and the motion to vacate. The court found that files and records available to the court enabled the court to decide the motions pursuant to Neb. Rev. Stat. § 29-3001 (Reissue 1979) without holding a hearing.

On this appeal the defendant assigns three errors: (1) In refusing defendant an evidentiary hearing; (2) In not vacating the conviction of defendant; and (3) In refusing to allow defendant to withdraw his plea and to hold an evidentiary hearing thereon.

With regard to defendant's allegations that the court erred in failing to grant him an evidentiary hearing, we note that all the facts set out above, and hereinafter, are to be found in the defendant's "motion and the files and records of the case," and there was no need for the court to hold an evidentiary hearing. See, § 29-3001; *State v. Meredith*, 212 Neb. 109, 321 N.W.2d 456 (1982); *State v. Nokes*, 209 Neb. 293, 307 N.W.2d 521 (1981).

We agree with the trial court's finding that the files and record affirmatively disclose that the defendant's plea was entered voluntarily and knowingly, and the trial court did not err in refusing an evidentiary hearing.

With regard to defendant's allegation that his conviction should have been vacated because it was not voluntary, we note that defendant's no contest plea was entered in 1977. Defendant contends the checklist set out in *State v. Tweedy*, 209 Neb. 649,

309 N.W.2d 94 (1981), was not strictly adhered to at the arraignments of June 27 and August 2, 1977. The *Tweedy* case, however, was specifically limited to prospective application. The appropriate standard to test the constitutional validity of defendant's plea is clearly expressed in *State v. Lewis*, 192 Neb. 518, 222 N.W.2d 815 (1974), *State v. Hall*, 188 Neb. 130, 195 N.W.2d 201 (1972), and *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971). That standard is whether the guilty plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. That standard was clearly met in this case.

The trial of defendant in this case had commenced and the jury selection process had begun when defendant asked to change his plea. Defendant was represented by the same counsel from his first court appearance seeking bond, through his sentencing. Defendant and his counsel were informed of all of defendant's rights. This court, in *State v. Jones, ante* p. 382, 386, 355 N.W.2d 227, 230 (1984), quoted with approval from *Garland v. Washington*, 232 U.S. 642, 34 S. Ct. 456, 58 L. Ed. 772 (1914), as follows: " 'Due process of law, this court has held, does not require the State to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution.' " Defendant had sufficient knowledge of the charge against him and was given every opportunity to defend himself. Defendant's plea was voluntary and represented a clear, logical choice among the alternatives available to him—to continue the trial or to enter a plea. The court was correct in not vacating defendant's plea.

With regard to defendant's assignment of error that he was not permitted to withdraw his plea, the defendant would have us analogize this case to that of *State v. Lewis, supra*, where we remanded for a rehearing on the issue of voluntariness of the plea because the defendant was not informed of the penalty for the crime until the sentencing hearing and then, the court noted, he was not given an opportunity to change it. That is not the case here. We have held, as set out above, that defendant's plea was voluntary. In addition, on the date of the sentencing hearing, after being specifically informed of other rights not

mentioned in the earlier arraignments, defendant was asked, again in the presence of his counsel, "Now, do you still want to let that plea stand?" and answered, "Yes." This question constituted an offer to defendant and his counsel to elect not to let the plea stand; that is, to withdraw the plea. Defendant, with the advice of his counsel, indicated to the court that he did not want to change the plea. Defendant did not at any time ask to withdraw or change his plea of August 1, 1977, until the filing of this post conviction action on June 1, 1983.

We affirm the court's finding in the post conviction proceeding, that the plea was voluntarily, intelligently, and knowingly entered and therefore should not be vacated. We hold that the court did not err in basing its decision on the files and records of the court before the court without holding an evidentiary hearing.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLAIR JUHL, APPELLANT.

359 N.W.2d 109

Filed December 7, 1984. No. 84-392.

1. **Post Conviction: Motions to Vacate: Appeal and Error.** A motion to set aside a judgment of conviction cannot serve the purpose of an appeal to secure a review of the conviction, nor is such a motion under the Post Conviction Act a substitute for an appeal.
2. **Post Conviction: Appeal and Error.** A defendant in a post conviction proceeding may not raise a question which could have been raised on direct appeal.
3. **Criminal Law: Effectiveness of Counsel.** The standard for determining whether defense counsel has rendered constitutionally required effective assistance is whether counsel has performed at least as well as a lawyer with ordinary training and skill in the criminal law in that area and has conscientiously protected the interests of his client.
4. **Effectiveness of Counsel.** Action of counsel which might otherwise be considered evidence of ineffective assistance of counsel may not be so when it appears as part of a legitimate trial stratagem.
5. **Pretrial Motions: Evidence: Effectiveness of Counsel.** A party should not be permitted to secure an order of the court prohibiting the introduction of certain

evidence and to then complain because such party's lawyer did not require that evidence to be produced.

6. **Effectiveness of Counsel.** Where one maintains that counsel was inadequate or ineffective, one must also show how or in what manner that alleged inadequacy prejudiced the defendant.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Richard C. Anderson, for appellant.

Paul L. Douglas, Attorney General, and L. Jay Bartel, for appellee.

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

HASTINGS, J.

This is an appeal from a denial of defendant's request for relief under the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). Although defendant was convicted of three separate felony counts, he took no direct appeal, and only his conviction for possession of a firearm by a felon is involved in these post conviction proceedings.

The possession of a proscribed firearm by the defendant is not in dispute. It is only whether he previously had been convicted of a felony that is at issue here. To establish this factor, there was received in evidence exhibit 5, a certified copy of a judgment of conviction for receiving, concealing, and retaining stolen government property, in violation of 18 U.S.C. § 641 (1982), from the U.S. District Court for the Southern District of California. The defendant was placed on probation for 3 years.

Defendant's claim for relief is based on alleged ineffective assistance of counsel in that (1) counsel failed to discover and disclose to the court that the federal conviction had been expunged and was no longer capable of supporting a charge of felon in possession of a firearm; (2) counsel failed to object to the introduction into evidence of exhibit 5, which was insufficient to prove a prior felony conviction; and (3) counsel failed to move for a dismissal of the charge of felon in possession of a firearm.

Initially, we must point out that a motion to set aside a judgment of conviction cannot serve the purpose of an appeal to secure a review of the conviction, nor is such a motion under the Post Conviction Act a substitute for an appeal. *State v. Riley*, 183 Neb. 616, 163 N.W.2d 104 (1968); *State v. Nokes*, 209 Neb. 293, 307 N.W.2d 521 (1981). In other words, a defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal. *State v. Shepard*, 208 Neb. 188, 302 N.W.2d 703 (1981). See, also, *State v. Pope, ante* p. 361, 355 N.W.2d 216 (1984).

In considering whether counsel was in fact ineffective in his service to the defendant, the standard for determining whether defense counsel has rendered constitutionally required effective assistance is whether counsel has performed at least as well as a lawyer with ordinary training and skill in the criminal law in that area and has conscientiously protected the interests of his client. *State v. Shepard, supra.*

The defendant first contends that the prior federal conviction used as the basis for the present offense resulted in probation under the Federal Youth Corrections Act, 18 U.S.C. §§ 5005 et seq. (1982), and, because he completed his probation, the conviction has been automatically expunged and could not have been used in this instance. Because defense counsel did not discover this fact and disclose it to the trial court, defendant reasons such counsel was ineffective.

Section 5021(b) provides as follows:

> Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

No such order of discharge appears in the record.

However, the defendant relies on *United States v. Arrington*, 618 F.2d 1119 (5th Cir. 1980), for the proposition that unconditional discharge and conviction expungement are automatic upon completion of the maximum sentence under

the Federal Youth Corrections Act. Nevertheless, not only is *Arrington* distinguishable on its facts, but it has been criticized by more recent cases as being contrary to the clear language of § 5021 and as relying on unpersuasive authority.

More to the point is *Tuten v. United States,* 460 U.S. 660, 103 S. Ct. 1412, 75 L. Ed. 2d 359 (1983). In that case the defendant had been convicted in the Superior Court of the District of Columbia of carrying a pistol without a license and was placed on probation for 2 years under the Federal Youth Corrections Act. At the *end* of the probationary period, he was unconditionally discharged from the program. Nine years later the defendant was convicted for a similar offense, and the original conviction was utilized to enhance his punishment. Defendant there claimed that his conviction had been automatically expunged following the successful completion of his probationary term. This assertion was rejected by both the trial court and the court of appeals. In affirming the judgment of the District of Columbia Court of Appeals, the U.S. Supreme Court said:

> Under the interpretation of § 5021(b) plainly suggested by the language of the statute, the conviction of a youth offender who has been placed on probation under § 5010(a) is not set aside where, as here, the court has *not* exercised its discretion to discharge him unconditionally "prior to the expiration of the maximum period of probation theretofore fixed by the court," which in this case was two years. . . .
>
> In short, the language of § 5021(b), the legislative history, and the rehabilitative purposes of the YCA all point to a single conclusion: that petitioner's previous conviction was not set aside under § 5021(b) because he was unconditionally discharged from probation upon the completion, not prior to the completion, of the two-year term of probation to which he was initially sentenced under § 5010(a).

103 S. Ct. at 1417.

Because the prior conviction in the present case had not been expunged, there was nothing for counsel to disclose to the trial court, and, therefore, no ineffective assistance of counsel.

As to defendant's second assignment of error, he points out that a violation of § 641, reflected by the certificate of judgment, is punishable by imprisonment for not more than 10 years if the value of the property taken was more than $100, or for not more than 1 year if the value of such property is less than $100. It is provided under 18 U.S.C. § 1 (1982) that any offense punishable by imprisonment for a term *exceeding* 1 year is a felony, and all other offenses are misdemeanors. Therefore, he argues, because there is nothing in the record to indicate the value of the property, we cannot tell whether the prior conviction was a felony or a misdemeanor. Accordingly, he asserts, counsel should have objected to the introduction into evidence of exhibit 5.

However, the defendant overlooks one very important point. Prior to the commencement of trial, following a motion in limine by the defendant, the State was ordered not to introduce in evidence "circumstances of prior conviction except language of order of conviction unless such prior conviction is contested by the defendant." As pointed out by the trial court, if counsel had not expressly stipulated defendant's previous conviction was for a felony, he at least had impliedly stipulated to that fact because he did not want evidence of the background and nature of the prior conviction brought out during the trial.

As stated in *State v. Haynes*, 192 Neb. 445, 449, 222 N.W.2d 358, 361 (1974):

> Defendant did not deny that he was a convicted felon. . . . Trial counsel, undoubtedly as a part of trial strategy to minimize the effect of defendant's record, thought it best not to spread the details of the previous convictions on the record. . . .
>
> . . . .
>
> . . . We cannot say that defendant's trial counsel did not perform at least as well as a lawyer with ordinary training and skill in the criminal law, or that he did not conscientiously protect his client's interest.

See, also, *State v. Hoppes*, 202 Neb. 383, 275 N.W.2d 608 (1979).

Additionally, it is apparent from the record that the State possessed sufficient evidence to prove that the prior conviction was a felony, which it could have introduced but for the order

on the motion in limine. Victor Walker, the federal probation officer who supervised defendant's probation, testified at the hearing for post conviction relief that the June 17, 1974, conviction was for a felony.

It would make no sense at all to permit a party to secure an order of the court prohibiting the introduction of certain evidence and to then complain because his lawyer did not require such evidence to be produced.

Counsel in this instance satisfied the test of effective assistance of counsel.

There is no substance to the claim that counsel was ineffective because he failed to move for a dismissal of the charge at the close of the State's evidence, because such a motion would have been of no avail. Where one maintains that counsel was inadequate or ineffective, one must also show how or in what manner that alleged inadequacy prejudiced the defendant. *State v. Holloman*, 209 Neb. 828, 311 N.W.2d 914 (1981). See, also, *State v. Robinson, ante* p. 156, 352 N.W.2d 879 (1984).

The judgment of the district court in denying post conviction relief was correct and is affirmed.

AFFIRMED.

ALLEN R. SMITH AND SHIRLEY K. SMITH, APPELLANTS, V. UNION INSURANCE COMPANY, A NEBRASKA CORPORATION, APPELLEE.

359 N.W.2d 113

Filed December 7, 1984. No. 84-578.

Attorney Fees. The amount of the allowance for attorney fees under Neb. Rev. Stat. § 44-359 (Reissue 1978) generally rests in the sound discretion of the trial court.

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

Bert E. Blackwell, for appellants.

Ronald E. Strasburger of Anderson, Strasburger, Klein,

Peterson and Swan, for appellee.

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

PER CURIAM.

This is an appeal of an award of an attorney fee to plaintiffs' counsel under the provisions of Neb. Rev. Stat. § 44-359 (Reissue 1978). The error assigned is the inadequacy of the fee awarded.

The plaintiffs filed suit against their insurance company in the county court for Furnas County, seeking to recover the damages to their automobile caused by a windstorm. The insurance company offered to confess judgment in the amount of $879.90 plus costs. The plaintiffs rejected this offer and insisted on a jury trial, which resulted in a verdict of $1,235.55. Neither party appealed from the judgment entered on that verdict.

Plaintiffs' attorney filed a motion for attorney fees under the provisions of § 44-359, which require the court to award a plaintiff a reasonable sum as an attorney fee in addition to the amount of the recovery in suits against insurance companies. The county court awarded a fee of $370. This award was affirmed on appeal to the district court. Counsel has prosecuted an appeal to this court.

It is counsel's contention that he has expended a total of 36.31 hours in the prosecution of this cause, including some 10.5 hours devoted to the hearings on fees. He claims reimbursement at the rate of $75 per hour, with some minor exceptions, and insists that a reasonable fee should be at least $2,627.92.

> In determining the value of legal services rendered by an attorney, it is proper to consider the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised and the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. . . . The amount of the allowance generally rests in the sound

discretion of the court.
Schmer v. Hawkeye-Security Ins. Co., 194 Neb. 94, 97, 230 N.W.2d 216, 218 (1975).

The single issue involved in this lawsuit was the amount of damages sustained by plaintiffs' automobile as a result of a windstorm. Applying the criteria cited above, we cannot say that the trial court abused its discretion.

The judgments of the courts below are affirmed.

AFFIRMED.

RONALD EDEN, APPELLEE, V. DENNIS SPAULDING, ERNEST FUNDUM, AND OMAHA WORLD-HERALD COMPANY, A CORPORATION, APPELLANTS.

359 N.W.2d 758

Filed December 21, 1984. No. 83-426.

1. **Directed Verdict.** In reviewing the sustaining of a motion for a directed verdict, the evidence will be construed most strictly against the moving party and in favor of the party against whom the verdict was granted.
2. **Motor Vehicles: Negligence.** Generally, a motorist's failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is indisputably located in a favored position.
3. **Independent Contractors.** The common-law test to determine if an independent contractor status exists includes many factors which are to be considered and weighed, no one of which may be conclusive.
4. **Contracts: Independent Contractors.** While, generally, control, or the right of control, is the chief criterion in the determination of whether one acts as an independent contractor, one engaging an independent contractor may exercise such control as is necessary to assure performance of the contract in accordance with its terms without becoming an employer.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded for a new trial as to Dennis Spaulding and Ernest Fundum. Reversed and remanded with directions to dismiss as to the Omaha World-Herald Company.

Knudsen, Berkheimer, Richardson & Endacott, for appellants Spaulding and Fundum.

Milton A. Katskee of Katskee & Henatsch, and Joseph P. Cashen of Kennedy, Holland, DeLacy & Svoboda, for appellant Omaha World-Herald.

Martin A. Cannon of Matthews & Cannon, P.C., for appellee.

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

PER CURIAM.

This action was brought by the plaintiff-appellee, Ronald Eden, to recover damages for severe injuries he received when his car collided with a truck driven by defendant-appellant Dennis Spaulding and owned by defendant-appellant Ernest Fundum. This truck is referred to herein as "Spaulding's truck," although owned by Fundum. At the time of the collision Spaulding's truck was proceeding from Norfolk, Nebraska, toward the building of defendant-appellant Omaha World-Herald Company, a corporation (hereinafter World-Herald), to pick up and transport World-Herald newspapers back to Norfolk. The accident occurred at about 7:30 p.m. on March 29, 1981, at the intersection of 30th and Lake Streets in Omaha, Nebraska. At the time of the collision Spaulding was driving south on 30th Street and turning left onto Lake Street. Eden's car was going north on 30th Street. The accident happened in the intersection.

At the conclusion of all the evidence offered at the trial, the court determined that Spaulding was negligent as a matter of law; that Spaulding's negligence was imputable to his employer, Fundum; and that Eden, as a matter of law, was not contributorily negligent. The court therefore directed a verdict against defendants Spaulding and Fundum on the liability question.

The court submitted to the jury the question of whether Fundum was an agent of the World-Herald and was operating within the scope of his agency at the time of the accident. The question of damages was submitted to the jury. The jury

returned a verdict in favor of Eden and against all the defendants in the amount of $3,000,000.

Defendants Spaulding and Fundum appeal, assigning as error, among other assignments, that the trial court erred in sustaining Eden's motion for a directed verdict, in that the evidence did not support a conclusion that Spaulding was negligent as a matter of law and that the evidence was sufficient to present a jury question as to whether Eden was contributorily negligent.

Defendant World-Herald appeals, assigning as error, among other assignments, that the trial court erred in submitting the issue of whether Fundum was an agent of the World-Herald at the time of the accident.

For the reasons hereinafter set out we reverse as to defendants Fundum and Spaulding, and remand the case for a new trial as to those defendants. We reverse and remand the case with directions to dismiss the case as to defendant World-Herald. In view of this disposition of the case on appeal, it is unnecessary to consider other assignments of error presented by appellants.

We first address the contention of defendants Fundum and Spaulding that the trial court erred in directing a verdict in favor of Eden on the questions of Spaulding's negligence and Eden's contributory negligence. We have held that "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 verdict was granted." *Otto v. Hongsermeier Farms*, 217 Neb. 45, 49, 348 N.W.2d 422, 425 (1984).

Under the version of the facts most favorable to defendants, there was evidence before the jury that would support findings of the following facts. Spaulding was going south on 30th Street, driving a 19-foot-long truck. Preparatory to turning left onto Lake Street, Spaulding pulled into the "storage lane" just to the east of the two southbound traffic lanes. Spaulding had his driving lights on, and as he turned into the left turn lane, he turned on the left turn signal on his truck. He followed a truck in front of him in the left turn lane and stopped his truck where

the first truck had been stopped. The truck in front of Spaulding made its left-hand turn, and Spaulding observed the traffic lights changing from green to yellow for the north and south traffic. At the time of this observation Spaulding's truck projected into the intersection. In its regular operation the traffic light remained yellow for four seconds and then turned red. Spaulding saw northbound cars in the east lane stopping or slowing down. Spaulding also saw Eden's Volkswagen car going north in the westerly driving lane on 30th Street at a point between "half a block and a block away." Spaulding turned left on the red light, and his truck was struck on the right side near the rear dual wheels by the Eden vehicle.

We have held that "it is established law that a driver who fails to see another who is favored over him is guilty of negligence as a matter of law." *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 408, 308 N.W.2d 503, 510 (1981). That rule of law, however, does not apply to this case. Here, Spaulding did see the Eden car. That was not the situation presented in *Lane*.

We have also held that "[g]enerally, the failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is undisputably located in a favored position." *Treffer v. Seevers*, 195 Neb. 114, 118, 237 N.W.2d 114, 117, (1975). Where there is evidence that shows that one vehicle is not definitely in a favored position, "the applicable rule is that where a motorist looks and does not see an approaching vehicle, or seeing one, erroneously misjudges its speed and distance, or for some other reason assumes that he can proceed and avoid a collision, the question is usually one for the jury." *Kremlacek v. Sedlacek*, 190 Neb. 460, 465, 209 N.W.2d 149, 154 (1973).

In the instant case, the evidence, viewed in the light most favorable to defendants, indicates that Eden was not indisputably in a favored position. There was direct testimony that the light turned red prior to Spaulding's left turn. Spaulding's testimony that the light was red as he completed his turn would necessarily mean that Spaulding's truck and Eden's Volkswagen collided in the intersection while the traffic light was red for each of them. The testimony that Eden's vehicle was

half a block to a block away when the light turned yellow could also lead to an inference that the light turned red prior to the Eden vehicle's entering the intersection. Since it is disputed whether Eden was in a favored position, the latter rule applies, and the question is for the jury. *Treffer v. Seevers, supra; Kremlacek v. Sedlacek, supra.*

Fundum and Spaulding also assigned as error the trial court's refusal to submit the issue of Eden's contributory negligence to the jury. They assert, inter alia, that Eden was negligent in failing to stop for a yellow light when such a stop could have been safely made. The trial court directed a verdict in favor of Eden on the issue of contributory negligence. We reverse that ruling and hold that question is also for the jury.

The applicable rule is: "[U]pon display of a yellow light following the green on an automatic traffic signal, vehicular traffic should stop before the crosswalk on the near side of the intersection unless such stop cannot be made safely, in which event the vehicle may be driven carefully through the intersection as a prudent person would do." *Zavoral v. Pacific Intermountain Express*, 178 Neb. 161, 168, 132 N.W.2d 329, 333 (1965). In the instant case, as stated above, there was testimony that Eden's vehicle was half a block to a block away at the time the light turned yellow. There is also testimony that Eden continued to travel at about the same rate of speed and that he did not apply his brakes until he was about two car lengths away. There were no skid marks on the street. Granting the inferences to the appellants, it becomes clear that a question of fact existed as to whether Eden could have stopped safely from a speed of 30 miles per hour within a distance of half a block to a block. If not, it was for the jury to decide whether he then drove the car through the intersection in the manner a prudent person would.

We next turn to the errors assigned by the defendant World-Herald. As stated above, the World-Herald first asserts that the trial court erred in submitting to the jury the question of whether an agency relationship existed between Fundum and the World-Herald. The World-Herald suggests that a verdict should have been directed in its favor. We agree and hold that, as a matter of law, no agency existed between the two and that

Fundum, in his relationship with the World-Herald, was an independent contractor.

As we stated in *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 71, 333 N.W.2d 646, 648 (1983), "the common-law test for independent contractor includes many factors which are to be considered and weighed in making the determination, no one of which may be conclusive." We then set forth 10 factors from the Restatement (Second) of Agency § 220 (1958) which must be considered in determining the nature of the relationship. An application of these factors to the instant case shows as a matter of law that Fundum was an independent contractor rather than an agent.

As set out in *Maricle v. Spiegel*, 213 Neb. 223, 233, 329 N.W.2d 80, 87 (1983): "Generally, control, or the right of control, is the chief criterion in determining whether someone acts as an independent contractor." Nonetheless, as stated in *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 20, 286 N.W.2d 420, 425 (1979): "However, even the employer of an independent contractor may, without changing the status, exercise such control as is necessary to assure performance of the contract in accordance with its terms." The control exercisable by the World-Herald was minimal. It could only suggest a pickup time to Fundum. Fundum's arrival at a later time would be "inconvenient" to both parties, but the decision as to when to pick up the papers was nonetheless within his discretion. The World-Herald could not object to drivers hired by Fundum to drive his trucks. The World-Herald did not dictate the route a truck was to follow from Norfolk to Omaha and return. Fundum paid for all the gas and oil used by his trucks in the trips. There were no other intimations in the record which would suggest a right of control on the part of the World-Herald. It is clear that the World-Herald possessed no such right.

Eden cites at length from several cases which correlate "the unbridled right of discharge" with control. The existence of such a right is not as concretely established as Eden would have us believe. But, even conceding the point, these cases are not controlling. They involve situations in which the workman served only one person. In such a case, the right to terminate

does involve some control. However, in this case, at the time when Fundum and the World-Herald entered into their contract agreement, Fundum had other contracts to perform—namely, carrying post office "star routes." Fundum did not rely solely on the World-Herald for income.

The second factor suggested in *Erspamer* is whether or not the one employed is engaged in a distinct occupation or business. Clearly, Fundum was engaged in a distinct occupation. The hauling for the World-Herald was not his only business, as stated above; he also had two "star routes." He had three vans and a truck to use in his business. Thus, it cannot be said that his trucking business, though small, was nonexistent.

The third factor includes the kind of occupation involved—whether, in the locality, the job is usually supervised by the employer. Clearly, this is not the case. Other "star route" drivers were hauling for the World-Herald under similar contracts. There was very little World-Herald supervision. There were no fixed routes, no regulations concerning carrying passengers, and no restrictions on the carriage of other baggage.

The fourth suggested consideration—the skill required in the particular occupation—is not very enlightening in this fact pattern. Regardless of whether driving a truck of this type is an unskilled or highly skilled trade, there are great numbers of people who engage in it as independent contractors and as employees.

"That the worker supplies his own materials and tools may be indicative of contractor status." *Voycheske v. Osborn*, 196 Neb. 510, 513, 244 N.W.2d 74, 76 (1976). It is undisputed that Fundum supplied his own truck. He was also responsible for furnishing the necessary oil, grease, gasoline, and repairs to the truck. When one truck wore out, Fundum replaced it on his own, without consulting the World-Herald. On the night of the accident it was Fundum who paid for a substitute truck to haul the newspapers.

The length of time which a person is employed is another element of the test. Again, this factor is not particularly illuminating. While we agree that where the right to terminate without penalty exists, the employee is usually a servant, *Schneider v. Village of Shickley*, 156 Neb. 683, 57 N.W.2d 527,

(1953), we note that any motor carrier's hauling contract could be terminated in such a manner, if the contract permitted such termination.

The seventh criterion deals with the method of payment. "Normally an employee is compensated while he works. An independent contractor's compensation, on the other hand, usually depends upon whether he makes a profit from the contract." *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 22, 286 N.W.2d 420, 426 (1979). Fundum was clearly operating to realize a profit. He was paid a monthly sum. If, after paying his employees' salaries and other operating expenses, there was a surplus, Fundum would make money. If there was a deficit, he would lose money.

Whether or not the work is part of the regular business of the employer also must be examined. While the World-Herald had its own distribution system within the city, it had no trucks which delivered the papers outside of the city. Carriage of newspapers to distribution centers outside the city was contracted out by the World-Herald.

As set out in the Restatement (Second) of Agency § 220, comment *i.* (1958), whether the parties believed they were creating a master-servant relationship is an important guideline. The contrary is clearly true in this case. The World-Herald withheld no income taxes, Social Security, or any other deduction. It carried no workmen's compensation coverage on Fundum. It made no attempt to regulate him. Fundum, on the other hand, made all the necessary deductions from his drivers' paychecks, provided workmen's compensation coverage to his drivers, and issued directions to his drivers. The parties were unquestionably acting in the belief that their relationship was that of independent contractor.

The final factor from *Erspamer* is whether or not the principal is in business. This question is not germane to the issue at hand. If the principal is not in business, an independent contractor's status will be found. This factor is inapplicable here.

In addition to the considerations suggested in *Erspamer*, we have repeatedly said that the failure to withhold taxes indicates that an independent contract exists. *Riggins v. Lincoln Tent &*

Awning Co., 143 Neb. 893, 11 N.W.2d 810 (1943); *Voycheske v. Osborn, supra; Sortino v. Miller*, 214 Neb. 592, 335 N.W.2d 284 (1983). "The deduction of social security taxes and the withholding of income tax tends to indicate an employer-employee relationship, while the failure to do so is a contrary indication." *Stephens v. Celeryvale Transport, Inc., supra* at 20, 286 N.W.2d at 425. The World-Herald made no such deduction from Fundum's payment.

In *Zajic v. Johnson*, 126 Neb. 191, 253 N.W. 77 (1934), we were presented with a nearly identical situation. In that case plaintiff's decedent died from injuries suffered as a result of a collision between the automobile in which he was a passenger and a truck, owned by one defendant, operated by another defendant, and transporting newspapers owned by the defendant publishing companies. We held that the lower court was correct in finding an independent contractor relationship as a matter of law and dismissing the defendant publishing companies.

Eden's attempts to distinguish *Zajic* from the instant case are not persuasive. The dissimilarities suggested are inconsequential. We find the reasoning of *Zajic* to be sound and the precedent to be controlling with respect to the independent contractor status in this case.

For the reasons hereinbefore set out we find that the trial court erred in submitting the agency question to the jury and failing to find as a matter of law that Fundum was an independent contractor.

The case is reversed and remanded for a new trial as to defendants-appellants Fundum and Spaulding. The case as to defendant-appellant Omaha World-Herald is reversed and remanded with directions to dismiss as to such defendant.

REVERSED AND REMANDED FOR A NEW TRIAL AS TO DENNIS SPAULDING AND ERNEST FUNDUM.
REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS AS TO THE OMAHA WORLD-HERALD COMPANY.

MARINA C. TWOREK, APPELLANT, V. RAYMOND A. TWOREK, APPELLEE.

359 N.W.2d 764

Filed December 21, 1984. No. 83-543.

1. **Child Support.** A decree fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modifications in the best interests of the children.
2. _____. A proceeding to modify a judgment for child support is not a retrial of the original case or a review of the equities of the original decree.
3. _____. Where an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest child reaches his majority.
4. _____. A single amount to be paid periodically for the support of more than one child is not subject to an automatic pro rata reduction.

Appeal from the District Court for Polk County: WILLIAM H. NORTON, Judge. Reversed and remanded with directions.

Philip T. Morgan of Morgan & Morgan, for appellant.

James C. Stecker of Robak & Stecker, for appellee, and, on brief, Daniel A. Fullner of Moyer, Moyer, Egley & Fullner.

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

BRODKEY, J., Retired.

This is an appeal from an order of the district court for Polk County, Nebraska, which modified the child support provisions of a divorce decree. The original decree, entered December 30, 1982, awarded custody of four of the parties' seven children to the appellant, Marina C. Tworek. At the time, three of the children were minors and one had attained the age of majority but was living at home with the appellant; the other three had reached majority and were emancipated. The appellee, Raymond A. Tworek, was ordered to pay child support "in the sum of $400.00 per month . . . until all said children are emancipated." No appeal was taken from this decree.

On January 28, 1983, less than 1 month after the entry of the original decree, Raymond filed an application for modification

on the ground that "a child of the parties herein, Norman Tworek, has reached the age of majority and has become fully emancipated." A hearing was held on May 23, 1983, and on June 22, 1983, the district court modified the original decree by reducing the child support payments to $125 per month per child for each child who is presently unemancipated. The court further ordered that as each of the remaining three unemancipated minor children reached legal age, or were otherwise emancipated or died, the child support would abate accordingly.

On appeal Marina Tworek contends that the lower court erred when it determined that there was sufficient change in circumstances subsequent to the initial decree to warrant a reduction in child support. For the following reasons we agree.

It is a well established principle that child support payments are not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modifications in the best interests of the children. *Helgenberger v. Helgenberger*, 209 Neb. 184, 306 N.W.2d 867 (1981); *Soukup v. Soukup*, 208 Neb. 672, 305 N.W.2d 372 (1981).

A proceeding to modify a judgment for child support is not a retrial of the original case or a review of the equities of the original decree. *Gray v. Gray*, 192 Neb. 392, 220 N.W.2d 542 (1974); *Quigley v. Quigley*, 202 Neb. 677, 276 N.W.2d 671 (1979).

As noted earlier, Raymond's application for modification was based on the contention that because the parties' son Norman had attained the age of majority subsequent to the original decree, the child support payments should be reduced. The flaw in Raymond's contention is apparent. Norman Tworek was born August 5, 1963. Norman was age 19 both at the time of the entry of the original decree and at the time the application for modification was filed. This is obviously not a change of circumstances.

Even if the appellee's contention were correct and Norman had attained the age of majority subsequent to the entry of the original decree, the decree would not be subject to modification. Where an award for child support is made in one

amount for each succeeding month for more than one child, as was ordered in the original decree, it will be presumed to continue in force for the full amount until the youngest child reaches his majority. A single amount to be paid periodically for the support of more than one child is not subject to an automatic pro rata reduction. *Johnson v. Johnson*, 215 Neb. 689, 340 N.W.2d 393 (1983); *In re Application of Miller*, 139 Neb. 242, 297 N.W. 91 (1941).

The order modifying the child support payments is reversed and the cause remanded with directions to dismiss the appellee's application for modification and reinstate the child support provisions set forth in the original decree. Appellant is allowed $500 for attorney fees in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

KELLY R. BAILEY, APPELLANT, V. CITY OF NORTH PLATTE, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

359 N.W.2d 766

Filed December 21, 1984. No. 83-690.

1. **Municipal Corporations: Recreation Liability Act: Words and Phrases.** A municipality is an owner within the meaning of the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1984).
2. **Summary Judgment.** On a motion for summary judgment, if the moving party adduces evidence which demonstrates that it was entitled to a judgment if that evidence is not controverted, the burden is shifted to the responding party to produce evidence in opposition thereto.
3. _____. Once a prima facie showing of entitlement to a summary judgment is made by the moving party, if the responding party fails to offer competent evidence that there is a genuine issue as to a material fact, the motion for summary judgment should be sustained.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Affirmed.

Allen L. Fugate of Schneider & Fugate, P.C., for appellant.

Frank E. Piccolo of Murphy, Pederson, Piccolo & Pederson, for appellee.

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

HASTINGS, J.

The plaintiff has appealed from the order of the district court which sustained defendant's motion for summary judgment and ordered plaintiff's petition dismissed. Plaintiff assigns as error that the trial court incorrectly determined that the city of North Platte was an "owner" within the meaning of the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1984), and in determining that no material issue of fact existed as to whether the city charged an entrance fee for the use of its softball diamond. We affirm.

The plaintiff was injured on June 11, 1980, while playing softball at Cody Park. The park is owned by the city of North Platte. Plaintiff was a member of a softball team sponsored by the Coors distributor, which participated in the North Platte Softball Association league. While running after a pop fly, the plaintiff stepped in a hole in the outfield and injured his knee.

This action was brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983). In his petition the plaintiff alleged that the city of North Platte was the owner of Cody Park and was guilty of negligence in permitting the existence of the hole in the ballfield. He did not claim that the city was guilty of willful or malicious conduct, nor did he allege that the city charged him a fee for entrance onto its land.

An owner of land made available for public recreational purposes owes no duty to keep the premises safe or to warn of dangerous conditions. § 37-1002. However, that immunity is not available in the case of willful or malicious conduct on the part of the landowner, or if the landowner charged the victim a fee to enter or go on the land. § 37-1005.

In *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), this court squarely held that the term "owner" as used in the Recreation Liability Act included political subdivisions as well as private persons. The plaintiff urges us to overrule *Watson*. We decline to do so and adhere to our previous holding. There is no merit to the plaintiff's first assignment of

error.

The defendant produced evidence by means of plaintiff's deposition in which he stated categorically that he had paid no fee to enter the park or to use the ball diamond. Such fact would demonstrate that defendant was entitled to a judgment if that evidence was uncontroverted. That shifted the burden of proof to the plaintiff to produce evidence in opposition thereto. *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982).

The closest plaintiff came to discharging the obligation was his testimony that he *thought* Coors paid an entry fee for the team in an amount of somewhere around $160, but he had no idea to whom it was paid or for what it was paid. Plaintiff's counsel was given permission to submit evidence surrounding the nature and purpose of that fee, but failed to do so. A prima facie showing of entitlement to a summary judgment was made by the defendant. Because there was no competent evidence offered by the plaintiff that there was a genuine issue as to a material fact, the motion for summary judgment was properly sustained. *Hanzlik v. Paustian, supra.*

The judgment of the district court is affirmed.

AFFIRMED.

GRANT, J., dissenting.

For the reasons set forth in the dissenting opinion in *Watson v. City of Omaha*, 209 Neb. 835, 312 N.W.2d 256 (1981), and in the dissenting opinion in *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984), I respectfully dissent.

I would reverse on the ground that a municipality is not an owner within the meaning of the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1984).

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

KENNETH G. DEBOER ET AL., APPELLANTS, V. OAKBROOK HOME ASSOCIATION, INC., APPELLEE.

359 N.W.2d 768

Filed December 21, 1984. No. 83-705.

1. **Contracts: Real Estate: Vendor and Vendee.** Upon the execution of a contract for the sale of real estate, the equitable ownership of the property vests in the vendee, even though the seller retains the legal title as security for deferred installment payments of the purchase price.
2. **Contracts: Real Estate: Vendor and Vendee: Deeds.** Where, pursuant to a land contract, the deed is held in escrow until payment of the purchase price, the vendor of an instrument held in escrow loses control over it so long as the vendee does not default, even though the vendor retains bare legal title in the land as security for the payment of the purchase price.
3. **Estoppel.** Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.

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

John B. Ashford of Dowd, Fahey & Ashford, for appellants.

James E. Schaefer, for appellee.

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

KRIVOSHA, C.J.

This appeal presents the question of whether a vendor of real estate may impose additional covenants upon land after it has been sold under a purchase contract and while the deed is held in escrow pending final payment. The district court found that the vendor, Oakbrook, Inc., could impose such covenants and rendered a judgment in favor of the appellee, Oakbrook Home Association, Inc. We believe, however, that the district court was in error, and for that reason we reverse and remand.

The evidence in this case is virtually without dispute. It appears that in September of 1976 the appellants, Kenneth G. DeBoer and Canda L. DeBoer, husband and wife, entered into

a purchase agreement with Oakbrook, Inc., for the purchase of real estate legally described as Lot 3, Raven Oaks Replat No. 2, a subdivision, located in Douglas County, Nebraska. The land contract provided that the sale price was to be $9,000, of which $4,000 was acknowledged to have been paid at the time of the execution of the contract, with the balance due in September of 1977. The contract further provided that upon payment of the balance the vendor would convey to the vendees good and marketable title "free and clear of all encumberances [sic] including the mortgage to Commercial Federal Savings and Loan Association of Omaha, Nebraska." The evidence further discloses that on September 30, 1976, the vendor, Oakbrook, Inc., executed a warranty deed to the land in favor of the DeBoers and placed the deed in escrow, subject to final payment by the DeBoers. The warranty deed recited that it conveyed the property free and clear of any encumbrances.

The evidence further establishes that at the time the purchase agreement was executed, Oakbrook, Inc., had filed in the office of the register of deeds of Douglas County, Nebraska, certain covenants covering a portion of Raven Oaks subdivision, but not covering the property covered by the purchase agreement entered into with the DeBoers. In particular, article IV of the covenants provided that the lot owners, defined as owners of the lots included within the legal description set out in the document, agreed to become members of an association and to pay to the association assessments for such purposes and in such amounts as it determined. Both parties concede that at the time the DeBoers entered into the contract with Oakbrook, Inc., the covenants did not cover the property being purchased by the DeBoers and did not obligate the DeBoers to belong to the association or make payment. Oakbrook, however, maintains that the DeBoers were advised that there were covenants covering other property in the subdivision and that in all likelihood the covenants would be amended sometime in the future to include the property being purchased by the DeBoers. Neither the time when the amendment would be executed nor the nature and extent of the covenant was explained. The evidence further discloses that on May 11, 1977, the covenants were in fact amended to include

the property being purchased by the DeBoers. On June 2, 1977, the amendments were recorded in the office of the register of deeds. On September 30, 1977, the DeBoers made the final payment, as required by their contract, and received possession of the deed previously executed on September 30, 1976, and placed in escrow.

The evidence further discloses that for several years after making final payment the DeBoers did in fact participate in association affairs and made payment in the amount of $37 per quarter. It was not until the assessment was raised to $120 per quarter that the DeBoers objected.

The DeBoers then filed suit seeking a judgment declaring that they were under no obligation to belong to the association or make payment thereto and, further, for an order removing any cloud on their title created by the assessments or the amended covenants. The association answered and filed a counterclaim seeking to recover the unpaid assessments. After trial the district court concluded that the property owned by the DeBoers was subject to the covenants and entered judgment accordingly for the homeowners association.

It was apparently the theory of the homeowners association that until the deed was actually delivered to the DeBoers, additional covenants and restrictions could be placed upon the property without the assent of the DeBoers; and, further, that by reason of the fact that the DeBoers had made payment to the association, they were estopped to deny that they were bound by the covenants. We believe that neither theory is applicable in this case.

Appellee has cited to us authority to the effect that where a deed is placed in escrow subject to a condition, delivery does not occur until after the fulfillment of the condition. See, *Soward v. Moss*, 59 Neb. 71, 80 N.W. 268 (1899); *Mason v. Strickland*, 73 Neb. 783, 103 N.W. 458 (1905). Those cases are not relevant to the instant appeal. The question is not whether the deed has been delivered to the vendees so as to permit them to deal with the land but, rather, whether the vendor has lost control over the deed so as to be precluded from exercising dominion or control over the land except as may be necessary to protect its security interest.

It is clear that on September 11, 1976, when the DeBoers entered into the contract to purchase the land in question, they acquired equitable title to the property, the legal title remaining in the seller only as security for payment. In the case of *Buford v. Dahlke*, 158 Neb. 39, 42-43, 62 N.W.2d 252, 254-55 (1954), we said:

> It has been frequently and consistently decided by this court, as it is quite unanimously agreed by courts generally, that if the owner of real estate enters into a contract of sale whereby the purchaser agrees to buy and the owner agrees to sell it and the vendor retains the legal title until the purchase money or some part of it is paid, the ownership of the real estate as such passes to and vests in the purchaser, and that from the date of the contract the vendor holds the legal title as security for a debt as trustee for the purchaser.

Further, in *Buford, supra* at 43, 62 N.W.2d at 255, we said:

> "An executory contract for the sale of land vests the equitable ownership of the property in the purchaser, and in such case the seller retains the legal title as security for the deferred installments of the purchase price." . . . "A vendee in possession of land under a contract of purchase, on which part of the purchase price has been paid, holds equitable title to the land . . . ."

Furthermore, in *Beren Corp. v. Spader*, 198 Neb. 677, 689, 255 N.W.2d 247, 254 (1977), we said:

> [U]pon the execution of a contract for the sale of real estate, the equitable ownership of the property vests in the vendee, even though the seller retains the legal title as security for deferred installment payments of the purchase price. . . . Under a land contract, the vendee is the equitable owner of the real estate. Graf v. State, 118 Neb. 485, 225 N.W. 466 (1929).

The question, therefore, which must be addressed by this court is whether land in which the equitable title has passed to the vendee, the legal title being retained by the vendor merely as security for payment, can be further encumbered by the vendor without the consent or approval of the vendee when, as here, the deed to the property has been placed in escrow.

We believe the vendor may not so impose such restrictions, particularly where, as here, the vendor agrees to convey the property "free and clear of encumbrances." To hold otherwise would be to give to the vendor the unilateral right to "change the rules" after the fact and without the vendee's assent. It would be a strange contract which would permit such action. By entering into a purchase agreement and placing the deed in escrow, the vendor loses the right to control the property or any incidents of ownership except those which are necessary to protect its security rights.

We had occasion in *Beren Corp. v. Spader, supra* at 689-90, 255 N.W.2d at 255, to consider the effect of placing the deed in escrow, saying that

> where a land contract has an escrow provision providing that the deed will be held in escrow until payment of the purchase price, the grantor of an instrument held in escrow loses control over it so long as the grantee does not default, even though he retains bare legal title in the land as security for the payment of the purchase price.

Furthermore, in *Valentine Oil Co. v. Powers*, 157 Neb. 71, 82, 59 N.W.2d 150, 158 (1953), we said: " 'The grantor or depositor loses control over the instrument placed in escrow, although he retains legal title and its concomitants until performance of the condition . . . .' " Oakbrook, in this case, merely held legal title as security and had no control over the land while the deed was in escrow and the vendee was not in default. Having no control, therefore, the vendor was precluded from imposing new and additional covenants upon the land.

Appellee further argues, as we have noted, that in any event the DeBoers are estopped from denying the covenant by reason of the fact that they had some knowledge that additional covenants of some nature might be subsequently imposed upon the property, and for the further reason that they voluntarily made payment. In effect, appellee relies upon the doctrine of equitable estoppel. We do not believe that equitable estoppel applies in this case. The fact that one may know that an effort may be made to impose obligations on property which has already passed beyond the control of the vendor does not estop

the vendee from refusing to comply with those requirements. Moreover, one may not attempt to impose equitable estoppel unless there has been a change of position in reliance on the actions of the vendee. In *Reed v. Williamson*, 164 Neb. 99, 117, 82 N.W.2d 18, 28 (1957), we noted:

> "Equitable estoppels operate as effectually as technical estoppels. They cannot in the nature of things be subjected to fixed and settled rules of universal application, like legal estoppels, nor hampered by the narrow confines of a technical formula. * * * The following, however, may be ventured as the sum of all cases: That a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon. Such an estoppel is founded on morality and justice, and especially concerns conscience and equity." . . .
>
> . . . "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy."

Appellee cites us to *Hogue v. Dreeszen*, 161 Neb. 268, 73 N.W.2d 159 (1955), in support of its position. While a simple reading of syllabus No. 3 might lead one to believe the case applicable to the case at bar, a reading of the case discloses it has no relevant application. In *Hogue* the land in question was admittedly subject to the covenant, although the purchaser had no actual knowledge thereof. Additionally, the surrounding landowners acted in reliance on the covenant. As we have noted, none of these facts are true in the case at bar.

In the instant case, not only was the land not subject to the covenant but, additionally, there is no showing that the association or any of its members, in any manner, relied upon

anything that the DeBoers did or that they changed position in any way. Had the DeBoers at the outset refused to make the $37-per-quarter payment, there is no indication that the association would not have come into being or would have abandoned all of the other members of the association who in fact were bound to make payment. There is simply no basis upon which the association can maintain there is any equitable estoppel.

The judgment of the trial court, therefore, must be reversed and remanded with directions to enter a judgment finding that the property purchased by the DeBoers and legally described as Lot 3, Raven Oaks Replat No. 2, a subdivision, surveyed, platted, and recorded in Douglas County, Nebraska, is not subject to the terms and conditions of certain covenants recorded by Oakbrook, Inc., either as originally recorded in 1974 or as subsequently amended in 1977.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE DEVENY FREEHOLDER PETITION.
GARY RASMUSSEN, APPELLANT, V. THOMAS D. DEVENY ET AL., APPELLEES.
IN RE FREDRICKS FREEHOLDER PETITION.
GARY RASMUSSEN, APPELLANT, V. DAVID G. FREDRICKS ET AL., APPELLEES.
IN RE ROSTVET FREEHOLDER PETITION.
GARY RASMUSSEN, APPELLANT, V. BERT A. ROSTVET ET AL., APPELLEES.
359 N.W.2d 773

Filed December 21, 1984. Nos. 83-715, 83-716, 83-717.

1. **Schools and School Districts: Statutes: Time: Appeal and Error.** The manner of taking appeals from actions of the State Board of Education, pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), must be in the same manner in which appeals from any action of the State Board of Education are taken to the district court. However, because the language of a specific statute takes precedence over the language of a general statute, the time in which the appeal is to be taken must

be within 20 days as provided in § 79-403(1), rather than 30 days as provided in Neb. Rev. Stat. § 84-917 (Reissue 1981).

2. **Schools and School Districts: Time: Appeal and Error.** The time for taking an appeal from the action of the State Board of Education, pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), begins to run when the board, at a duly convened meeting at which minutes are required to be taken, votes to transfer the land, and not when it approves a formal memorandum.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed.

Kelley Baker of Nelson & Harding, for appellant.

James B. Gessford of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., for appellees.

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

KRIVOSHA, C.J.

The three cases jointly appealed involve petitions filed by three separate landowners seeking to have their land transferred from the Roseland school district, an accredited Class II school district, to the Adams-Central school district, an accredited Class VI school district, and to school district No. 53 of Adams County, a nonaccredited Class I school district, pursuant to the provisions of Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984). The record discloses that on March 11, 1983, the State Board of Education voted to transfer the land as requested by the various freeholder petitions, and further voted to hold an emergency telephone conference call meeting on March 15, 1983, "for the purpose of approving memorandum opinions on the freeholder petition decisions." On March 15, 1983, the board members voted to approve the memorandum orders containing the board's findings of fact and conclusions of law. On April 4, 1983, appellant filed petitions for review in the district court for Adams County, Nebraska. This was more than 20 days after the State Board of Education voted on March 11, 1983, but not more than 20 days after the formal orders were approved. On August 17, 1983, the district court entered an order dismissing each of the petitions "for lack of jurisdiction."

All of these cases are controlled by our recent decision in *In re*

Covault Freeholder Petition, ante p. 763, 359 N.W.2d 349, (1984), and we must affirm the decision of the district court.

In *Covault, supra*, we held that the manner of taking appeals from actions of the State Board of Education, pursuant to § 79-403(1), must be in the same manner in which appeals from any action of the State Board of Education are taken to the district court. Further, we held that because the language of a specific statute takes precedence over the language of a general statute, the time in which the appeal is to be taken must be within 20 days as provided in § 79-403(1), rather than 30 days as provided in Neb. Rev. Stat. § 84-917 (Reissue 1981).

We also held in *Covault, supra*, that the time for taking an appeal from the action of the State Board of Education, pursuant to § 79-403(1), begins to run when the board, at a duly convened meeting at which minutes are required to be taken, votes to transfer the land, and not when it approves a formal memorandum. The time for taking the appeal, therefore, in each of these cases, as in the *Covault* case, started to run on March 11, 1983, when the board approved the request to transfer, and not on March 15, 1983, when the formal orders were approved.

In view of the fact that both the time and manner of taking an appeal are prescribed by statute, the State Board of Education may not promulgate rules contrary to the provisions of the statute. As we noted in *School Dist. No. 8 v. State Board of Education*, 176 Neb. 722, 733-34, 127 N.W.2d 458, 465 (1964): " 'If a statute lays down general standards, the administrative agency may implement the statute by filling in the necessary details. But where, as in the case here, the statute in itself prescribes the exact procedure the administrative agency may not add to or subtract from such a provision.' " Therefore, even if the State Board of Education were to determine that the time for taking appeals should be computed from some date other than the date upon which the board voted to approve the transfer, such rule would be invalid. The decision of the district court is affirmed.

AFFIRMED.

DON J. GILBREATH, APPELLEE, V. REECE E. RIDGEWAY, APPELLANT.

360 N.W.2d 474

Filed December 21, 1984. No. 83-744.

1. **Summary Judgment.** The purpose of a summary judgment proceeding is to pierce allegations of pleadings and show conclusively that the controlling facts are otherwise than alleged and that the moving party is entitled to judgment as a matter of law.
2. _____. Summary judgment is appropriate where the moving party establishes that there exists no genuine issue of material fact or differing inferences to be drawn therefrom in the case and that under the facts he is entitled to judgment as a matter of law.
3. **Summary Judgment: Contracts.** 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.
4. **Summary Judgment.** 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.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Winner, Nichols, Douglas and Kelly, for appellant.

James R. Hancock of James R. Hancock, P.C., for appellee.

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

WHITE, J.

This is an appeal from the district court for Scotts Bluff County, Nebraska, sustaining the plaintiff's motion for summary judgment.

This case arises out of an agreement between Don J. Gilbreath, the seller, and Reece E. Ridgeway, the buyer, for the purchase and sale of 4,999 shares of the capital common stock of Scottana, Inc., a corporation owning the rights in and the business of operating a McDonald's restaurant in Scottsbluff, Nebraska. This appeal centers around the following provisions

contained in the "Agreement for the Sale of a Business" executed by the seller and buyer on August 19, 1977. In paragraph 2 of the agreement the buyer agreed to a purchase price for the shares of stock as follows:

A. The base purchase price shall be Five Hundred Fifty-one Thousand Two Hundred Fifty-Nine Dollars ($551,259.00) which shall bear interest at nine per cent (9%) per annum and if not paid or prepaid in accordance with this Agreement shall, nevertheless, as to any unpaid balance of principal and interest become due and payable on August 31, 1982, payable as follows:

B. The sum of Ten Thousand Dollars ($10,000.00) was paid on this date of execution.

C. The additional sum of Ninety Thousand Dollars ($90,000.00) shall be payable on closing.

D. The balance of Four Hundred Fifty-one Thousand Two Hundred Fifty-nine Dollars ($451,259.00) shall be payable in monthly installments which shall be equal to six per cent (6%) of the monthly gross sales of the principal business of the Corporation, "McDonald's Restaurant", located at 511 West 27th Street, Scottsbluff, Nebraska, computed as of the close of business on the last day of each month while this Agreement remains in effect and payble [sic] to the escrow agent hereinafter identified on the first day of the succeeding month. Such payments shall be applied first to accrued interest as is provided herein and the balance applied to reduce the principal amount of the indebtedness. Irrespective of the amount of gross sales, such payments shall not be less than Three Thousand Dollars ($3,000.00) for any month.

E. There shall be due on, but not before, January 1, 1978, the sum of Fifty-seven Thousand Dollars ($57,000.00) which shall be in addition to all other payments provided for herein.

F. There shall be due from BUYER to SELLER, in addition to the amounts of principal and interest

herein provided for, on or before September 30, 1977, the value, at cost, of all supplies and inventory in stock at "McDonalds Restaurant" in Scottsbluff, Nebraska, as of close of business of August 31, 1977.

G. Commencing 1979 and subsequent years, BUYER may prepay up to, but not in excess of, twenty per cent (20%) of the original principal balance in each year and any succeeding year until the balance of principal and accrued interest shall be payable as is provided hereinabove.

H. Subject to the approval of the bank, BUYER may assume the remaining principal balance due under a loan from Western National Bank unto Scottana, Inc., guaranteed by SELLER herein, and pay said note commencing with the first payment to be due on October 1, 1977, according to it's [sic] terms. In such event, all the amounts so assumed as of September 1, 1977, shall be deemed to reduce the purchase price hereinabove provided for in paragraph 2A. In such event, the payments due under paragraph 2D shall be monthly installments which shall be equal to three per cent (3%) of the monthly gross sales of said Corporation, so long as any amount remains payable pursuant to said loan so assumed. Also, minimum payments shall not be less than the interest computed on the remaining principal balance due hereunder under paragraph 2A herein.

Pursuant to paragraph 2B of the agreement, $10,000 was paid to the seller on the date of execution and $90,000 was paid on the closing date. On September 1, 1977, the buyer, as per paragraph 2H above, assumed notes for approximately $95,785.61. The buyer thereby had the right to reduce the amount of payments under the agreement from 6 percent to 3 percent of gross monthly sales, so long as such payments were not less than $3,000 as provided in paragraph 2D. From records admitted of both the buyer and seller, it appears that the buyer made regular payments of $3,000 to either the seller or Western National Bank from October 1977 through June 1980.

In July 1980 the buyer and seller entered into a modification

of the agreement without the assistance of counsel, whereby in consideration of a $50,000 note obtained by the buyer on favorable terms for the seller, the seller agreed to allow the buyer to deduct the sum of $1,733.27 from the monthly payments due to the seller from the buyer as repayment of the note. The notes assumed by the buyer and referred to in paragraph 2H of the original agreement were paid in full by October of 1980, at which time the payments due under the agreement became 6 percent of the buyer's gross monthly sales.

From the record it appears that the buyer continued to make payments to the seller through December of 1981. The record is silent as to any communication between the buyer and seller through 1982. However, on January 18, 1983, the seller, through his attorney, notified the buyer that he was in default of the agreement due to nonpayment and that the seller intended to exercise his right to accelerate the maturity of the unpaid balance due and owing under the agreement. The buyer, Ridgeway, responded to the notification on February 11, 1983, in a letter to the seller in which he enclosed a check in the amount of $44,349.59 "to bring all payments current through January 31, 1983" and to cure "any default that may have existed pursuant to [the] agreement." This tender was refused by the seller. On March 17, 1983, the seller petitioned the district court for the amount due and owing under the agreement.

The buyer, Ridgeway, contended before the district court and in this court that "[a]t no time did the parties agree that there would be a balloon payment due in August of 1982, but rather the payments were to continue to be paid monthly until paid in full." Brief for Appellant at 6.

In sustaining the seller's motion for summary judgment, the district court found that the contract between the parties was clear and unambiguous on its face and that it provided for the payment of the remaining principal and interest due under the contract on August 31, 1982. In a letter to the respective parties, accompanying the journal entry, Judge Robert O. Hippe went on to add that it appeared obvious that if sales at the restaurant were bad, the loan would never be paid, "[t]hus the need for a balloon provision. The full amount becoming due in only five years seems short, but that was the time picked by the

contracting parties." Although the appellant, Ridgeway, assigns numerous errors to this court, his chief contention is that the trial court erred in sustaining the seller's motion for summary judgment. We believe this contention to be without merit.

The purpose of a summary judgment is to pierce the allegations of the pleadings and to show conclusively that the controlling facts are other than alleged and that the moving party is entitled to judgment as a matter of law. *Strong v. K & K Investments*, 216 Neb. 370, 343 N.W.2d 912 (1984). A motion for summary judgment is to be granted only where there is no genuine issue of material fact or differing inferences to be drawn therefrom and that the moving party is entitled to a judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1979). 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 a contract is a question of law and determinable upon a motion for summary judgment. *De Los Santos v. Great Western Sugar Co.*, 217 Neb. 282, 348 N.W.2d 842 (1984); *Bishop Cafeteria Co. v. Ford*, 177 Neb. 600, 129 N.W.2d 581 (1964); *Grantham v. General Tel. Co.*, 191 Neb. 21, 213 N.W.2d 439 (1973).

The appellant asserts that prior to the time of signing the agreement for the sale of the business, Gilbreath, the seller, stated to Ridgeway, the buyer, that the contract payments were to run at 6 percent of gross sales until paid. He further asserts that no mention of a balloon payment was made by Gilbreath or by his attorney. Appellant's assertion, however, ignores a general principle of contract law, that a written contract expressed in unambiguous language is not subject to interpretation or construction, and the parties' intention must be determined from its contents alone. *Kansas-Nebraska Nat. Gas Co. v. Swanson Bros.*, 215 Neb. 398, 338 N.W.2d 774 (1983). In this case the district judge had no other choice but to grant summary judgment on the issue of contractual liability for default or for failure to make the payment of the unpaid balance on the principal and interest according to the express language of the written sales agreement.

The appellant also assigns as error the trial court's failure to find that there existed a genuine issue of material fact as to the amount of payments made to the seller and the date that each payment was made, contending that such findings affect the amount of the unpaid balance adjudged to be due and owing under the agreement. We find this assignment of error to have merit. From our review of the record there appear to be discrepancies between Gilbreath's and Ridgeway's separate calculations and records of the amounts and dates of payments. Viewing the evidence and all reasonable inferences therefrom in the light most favorable to the appellant, the party against whom the summary judgment is directed, we find that there exists a genuine issue of material fact concerning the amounts and dates of payments and the unpaid balance due to the seller. We therefore remand this case for further proceedings on the issue of damages.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HARVEY RICHARD McCORISON, APPELLANT, V. CITY OF LINCOLN, NEBRASKA, APPELLEE.

359 N.W.2d 775

Filed December 21, 1984. No. 84-156.

1. **Courts: Jurisdiction: Appeal and Error.** The district court may only acquire jurisdiction if an appeal is taken in the mode and manner and within the time provided by statute.
2. _____: _____: _____. If the statutory requirements are not met, the district court acquires no jurisdiction and may not enter any order other than an order of dismissal.

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

Harvey Richard McCorison, pro se.

Dana W. Roper, Assistant Lincoln City Attorney, for appellee.

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

KRIVOSHA, C.J.

Harvey Richard McCorison, acting pro se, appeals from an order of dismissal entered by the district court for Lancaster County, Nebraska. For reasons set forth hereinafter we are compelled to affirm the order of the district court.

The case before the district court was an appeal by McCorison of an adverse decision entered by the personnel board for the city of Lincoln, Nebraska. The evidence establishes that on August 9, 1983, while McCorison was present, the personnel board for the city of Lincoln voted to uphold McCorison's termination of employment by the city. On September 13, 1983, more than 30 days from the date on which the personnel board voted to uphold his termination, McCorison filed a notice of appeal with the city clerk for the city of Lincoln.

The manner in which such appeals are to be taken is set out by statute. Neb. Rev. Stat. § 15-1201 (Reissue 1983) provides:

> Any person or persons, jointly or severally aggrieved by any final administrative or judicial order or decision of the board of zoning appeals, the board of equalization, the city council, or any officer or department or board of a city of the primary class, shall, except as provided for claims in sections 15-840 to 15-842.01, appeal from such order or decision to the district court in the manner herein prescribed.

Neb. Rev. Stat. § 15-1202 (Reissue 1983) provides in part: "(1) The party appealing shall within thirty days from the *date of the order or decision* complained of: (a) File a notice of appeal with the city clerk specifying the parties taking the appeal and the order or decision appealed from . . . ." (Emphasis supplied.)

The district court may only acquire jurisdiction if an appeal is taken in the mode and manner and within the time provided by statute. See *Peck v. Dunlevey*, 184 Neb. 812, 172 N.W.2d 613 (1969). If the statutory requirements are not met, the district court acquires no jurisdiction and may not enter any order

other than an order of dismissal. See, *The Flamingo, Inc. v. Nebraska Liquor Control Commission*, 185 Neb. 22, 173 N.W.2d 369 (1969); *Radil v. State*, 182 Neb. 291, 154 N.W.2d 466 (1967); *Kracman v. Nebraska P.P. Dist.*, 197 Neb. 301, 248 N.W.2d 751 (1976). If, therefore, the time for taking an appeal began to run on August 9, 1983, then the evidence is without dispute that the appeal in the district court was filed more than 30 days from the date of the order or decision complained of. We believe that the authorities in this jurisdiction uniformly and consistently hold that the time for taking an appeal from a body such as the personnel board of the city of Lincoln began on August 9, 1983, and not any subsequent date. In the case of *Brown v. City of Omaha*, 179 Neb. 224, 137 N.W.2d 814 (1965), we held that the rendition of the judgment or final order takes place when the announcement of the decision is made.

> We have held that a judgment is the final determination of the rights of the parties; that a judgment is "rendered" when the *decision is announced* upon the law and the facts; and further that the entry of a judgment upon the record is not an integral part of the judicial act of rendering judgment.

(Emphasis in original.) *Id.* at 226, 137 N.W.2d at 816.

And, recently, in the case of *In re Covault Freeholder Petition, ante* p. 763, 359 N.W.2d 349 (1984), we had occasion to examine a similar statute and again concluded that the time for taking an appeal started to run when the State Board of Education voted and not when it subsequently approved a formal order. See, also, *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976).

McCorison recognizes that he was undoubtedly out of time, but argues to the court that in the interest of fairness and justice the district court should have disregarded his failure to file his appeal within time and should have considered the matter on the merits. Unfortunately, however, a court which does not acquire jurisdiction may not exercise discretion. As we noted in *Brown, supra* at 226, 137 N.W.2d at 816:

> We have no power to extend the period of review for 1 or 2 days any more than we could extend it 6 months, and it is fundamental that the right to review by error

> proceedings or to appeal is statutory and the requirements of the statute must be met before the district court or this court acquires jurisdiction of the subject matter of the action.

In light of the record it is clear that the district court did not acquire jurisdiction and the district court was correct in entering its order of dismissal.

Furthermore, the district court having failed to acquire jurisdiction, this court also does not acquire jurisdiction. An appellate court cannot acquire jurisdiction of a cause if the court from which the appeal is taken had no jurisdiction of the subject matter. See *Bd. of Ed. of Keya Paha County v. State Board of Education*, 212 Neb. 448, 323 N.W.2d 89 (1982).

McCorison has every right to represent himself. By doing so, however, he must be bound by the same rules that bind all others, and the fact that he may not have as much knowledge about the mechanics of the law does not grant the courts the right to disregard them. This may be regrettable, but it is a choice which McCorison made himself. The decision of the district court is therefore affirmed.

AFFIRMED.

R.D.N., APPELLANT, V. T.N., APPELLANT.

359 N.W.2d 777

Filed December 21, 1984. No. 84-223.

1. **Constitutional Law: Appeal and Error.** Constitutional issues not properly before the court below will not be considered by this court for the first time on appeal.
2. **Parental Rights.** Cost to the parties, undue delay, congestion of dockets, and relative resources available for investigative and supervisory assistance are factors which may be considered when determining whether the district court is the more appropriate forum when termination of parental rights is placed in issue.
3. **Judges: Recusal: Appeal and Error.** A ruling of a trial judge on a motion to disqualify himself is immaterial where the cause is an action triable de novo on the record in this court.

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

Drew H. Kouris, for appellants.

Debra Stangl, guardian ad litem.

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

BOSLAUGH, J.

This case is before this court after 11 years of proceedings in the courts below. The appeal is from a judgment terminating the parental rights of R.D.N., the petitioner father, and T.N., the respondent mother, to their minor child, C.A.N. The appellants contend (1) that the trial court did not have jurisdiction to terminate their parental rights; (2) that they were denied due process in that they were not given adequate notice of the reasons for the termination proceedings; (3) that the trial court erred when it refused to disqualify itself; and (4) that the evidence was insufficient to support the judgment.

This court reviews the matter de novo on the record.

The appellants were married in 1954 in Billings, Montana. At that time the petitioner, who is now 73 years old, had five children from a previous marriage and was the father of two children born of the respondent. When the latter two children were born, the respondent was married to another and had two children by that marriage. The respondent has been married a number of times without having been divorced from the previous husband. Respondent was an illegal entrant into this country and is currently under deportation orders by the U.S. Government. Respondent has been convicted for public prostitution on several occasions. She has stipulated that she is an unfit mother.

C.A.N. was born in Pensacola, Florida, on October 20, 1970, and is the youngest child of the marriage. She is the only child whose best interests are before this court.

The appellants separated when C.A.N. was 3 months old. Subsequently, the petitioner sued for divorce on the grounds "of actual violence committed by the Respondent upon the person of the Complainant attended [sic] with danger to his life

or health and her adulteress [sic] conduct." A divorce was granted by the circuit court of Dale County, Alabama, in 1972, and the petitioner was given custody of the appellants' six minor children, including C.A.N. Sometime shortly thereafter, respondent stole the children away from petitioner in the middle of the night and brought them to Omaha, Nebraska.

This action originated on October 30, 1973, as a petition for registration of a foreign judgment. The respondent's demurrer to the petition was sustained. An amended petition was filed, and the action proceeded as a proceeding for a writ of habeas corpus. On December 10, 1974, the trial court took custody of C.A.N. and ordered that she be placed in a foster home.

Over the years both parents have been guilty of "child snatching." Petitioner has, without permission, taken the child out of the jurisdiction on three different occasions, to places as far away as Florida and Oregon. Although on at least one occasion petitioner was granted possession of C.A.N. by the trial court, such possession was of short duration, and she has spent the vast majority of her life in foster care. Currently, C.A.N. is in the custody of the Nebraska Department of Public Welfare and being treated at the Evergreen Consultants in Human Behavior in Evergreen, Colorado.

The transcript filed in this court contains only a few of the hearings and orders alluded to in the five-volume record of testimony and exhibits. The transcript does show that on September 20, 1982, a hearing was had on the petitioner's motion for an order granting him the care and custody of both C.A.N. and one of her brothers. The court granted custody of the brother to the petitioner but ordered that the custody of C.A.N. remain in the state Department of Public Welfare pending a hearing set for December 14, 1982. There is no indication in the transcript of the result of that hearing. Chronologically, the transcript next contains an application for the termination of parental rights filed on June 24, 1983, by the guardian ad litem for C.A.N. The substance of that application provides:

> 1. That the Attorney and Guardian Ad Litem for the minor child has personally investigated the facts and circumstances on all matters pertinent to the best interests

and welfare of the minor child herein, [C.A.N.].

2. It appears to the Guardian Ad Litem that the best interests and welfare of the minor child, [C.A.N.], requires the termination of the parental rights of both parents.

In the final order the trial court summarized the proceedings thereafter as follows:

> In 1983, the Court-appointed Guardian Ad Litem made application to terminate parental rights as to the remaining child, [C.A.N.], who at that time was in the custody of the Court. Said Guardian Ad Litem represented to the Court that she had personally investigated the facts and circumstances on all matters pertinent to the best interests and welfare of the child, and that it appeared to said Guardian Ad Litem that the best interests and welfare of the child required the termination of the parental rights of both the parents. *The Petitioner and his counsel were before the Court and were notified of the day and hour for hearing on said Application to Terminate. The Respondent was notified thereof* and upon her representation to the Court that she was unable to afford legal counsel, *and upon her request for such appointment, counsel was appointed for said Respondent. The parties were granted leave to plead to the Guardian Ad Litem's Application for Termination of Parental rights.* The Nebraska Department of Public Welfare was also notifed [sic] and represented by personnel thereof, as well as being represented by the Attorney General of the State of Nebraska.

(Emphasis supplied.)

Trial was held on July 5, 6, and 7, 1983. At the beginning of the trial the petitioner's attorney stated to the court: "Now, the question of whether or not the Court was going to grant custody to [R.D.N.], or allow what sort of visitation is what I thought was going to be addressed today; not a question of whether [R.D.N.'s] parental rights were to be terminated." The court responded: "Anything else you want to contribute for the record? We will proceed and you may present your evidence on what you think is before the Court, Mr. Fiedler." The petitioner

made no further objection, called his first witness, and proceeded with the hearing.

All parties submitted evidence and examined numerous witnesses, including the appellants and psychologists and foster care workers who had worked with C.A.N. At the conclusion of the evidence the petitioner made an oral motion to take C.A.N.'s deposition, which motion was granted. The substance of that deposition, which was offered and received later, corroborated testimony at the trial that C.A.N. had been sexually attacked by her father, a brother, and a 16-year-old boy.

On August 10, 1983, the petitioner filed a motion for a hearing on rebuttal evidence, alleging in part: "4. That during the afore-mentioned Deposition, numerous evidentiary inconsistencies arose that now make it necessary to either take additional depositions or set the matter for an evidentiary hearing in order to rebut specific allegations contained within the minor child's testimony," and further setting forth specific "inconsistencies." On August 15, 1983, the petitioner filed a motion in opposition to termination of parental rights, alleging that he was "a fit and proper parent," that "parents have a right to raise a child as they see fit," that he "has not neglected his child," and that "parental rights are protected by the Fourteenth Amendment." The rebuttal hearing was had on August 17, 1983. On October 6, 1983, the court terminated the parental rights of the appellants to C.A.N.

The trial court noted that until a few days before the trial the petitioner "had been living in a highly disreputable abode for single working men (a former house of ill repute)" and that the "apartment" to which he had moved was "very inadequate." Furthermore, the court acknowledged, "The investigator who worked with the Guardian Ad Litem testified as to the grossly inadequate home conditions for any minor child," and concluded, "It would be inhumane to require this minor child to live in a residence of either the Petitioner or the Respondent . . ."

C.A.N. is now 14 years old. She is a disturbed child, possessing a history of bedwetting, crazy lying, stealing, gross exaggeration, masturbation, and sexual activity spanning back to repeated incidents at the age of 2 in which she would mimic

sexual acts with dolls. Clinically, she has been diagnosed as an "unattached child," a child who has never developed a bond with a parental figure. Her therapist testified that C.A.N.'s prognosis hinges on the type of permanent life plan that becomes available to her: "Her prognosis is excellent if she can remain in her present environment or a similar environment where she will be with highly trained, skilled parents who are loving and committed to her and are able to provide consistency and support." However, in response to questioning concerning placement with her father, the therapist answered: "Her future would be like her past in that there would be an exacerbation of all the symptoms we have already mentioned."

This action began as a petition for a writ of habeas corpus to determine the petitioner's right to the custody of C.A.N. In that regard this court has said:

> " 'Such proceedings are governed by considerations of expediency and equity, and should not be bound by technical rules of practice.' . . . 'After the court's jurisdiction has been invoked by habeas corpus petition seeking custody of a child, the child is a ward of the court and its welfare lies in the hands of the court; * * *.' . . ."

State ex rel. Cochrane v. Blanco, 177 Neb. 149, 152, 128 N.W.2d 615, 617 (1964). Indeed, this court has long recognized that, in controversies touching the custody of children, the welfare and best interests of the child surpass considerations of strictly legal rights. *In re Application of Schwartzkopf*, 149 Neb. 460, 31 N.W.2d 294 (1948).

The trial court found that appellants should not have possession and custody of C.A.N. and that their parental rights to her should be terminated. We believe the evidence supports the findings and order of the trial court and that it is in the best interests of this child that the parental rights of the appellants be terminated.

The appellants contend that the failure to include specific allegations in the application for termination of parental rights filed by the guardian ad litem resulted in a denial of due process to the appellants. The appellants made no objection to the form of the application either before or during the trial. Generally, constitutional issues not properly before the court below will

not be considered by this court for the first time on appeal. See, e.g., *State ex rel. Douglas v. Schroeder*, 212 Neb. 562, 324 N.W.2d 391 (1982). The appellants argue that the general rule should not be applied where obvious constitutional and procedural errors appear on the face of the record.

In the case at bar we think that no purpose would be served by considering the alleged error. Appellants have not demonstrated any manner in which they were prejudiced by the failure to include more specific allegations in the application.

The issues which were before the trial court on the petitioner's motion for custody were substantially the same as the issues upon the application to terminate parental rights. These issues had been the subject of litigation for over 10 years. There was no claim of surprise, except in regard to the deposition of C.A.N., which was taken by the petitioner after obtaining leave from the court. The deposition supplied direct evidence of sexual abuse by the petitioner, which up to that time if there was any doubt that the parental rights of the petitioner should be terminated, the deposition of C.A.N. eliminated it.

In this case the appellants were able to hear the entire case of the guardian ad litem. Then, on motion of the petitioner, a second hearing was held 5 weeks later in which they had an opportunity to rebut the case against them. The appellants offered no new evidence at that hearing, and they have not offered this court any suggestion of any further evidence which they would offer if given the opportunity for yet a third hearing. Under these circumstances any deficiency in the allegations of the application did not result in any prejudice to any substantial rights of the appellants.

The appellants contend that the district court did not have jurisdiction to terminate parental rights. The application was made pursuant to Neb. Rev. Stat. § 42-364 (Cum. Supp. 1982), which provides in relevant part: "(4) Whenever termination of parental rights is placed in issue by the pleadings or evidence, the court shall transfer jurisdiction to a juvenile court established pursuant to Chapter 43, article 2, unless a showing is made that the district court is a more appropriate forum."

It is apparent from the record that the district court was the more appropriate forum. Section 42-364(4) further provides in

part: "In making such determination the court may consider such factors as cost to the parties, undue delay, congestion of dockets, and relative resources available for investigative and supervisory assistance." In light of the 10 years of proceedings before the district court, it would be unreasonable to conclude that the district court should not have retained jurisdiction of the application.

It is unnecessary to consider the third assignment of error relating to the district court's refusal to disqualify itself. This court has stated previously: "We also observe that a ruling of a trial judge on a motion to disqualify himself is immaterial where the cause is an action triable de novo in this court." *Christensen v. Christensen*, 191 Neb. 355, 360, 215 N.W.2d 111, 115 (1974).

The appellants' final contention, that the evidence was insufficient to support a judgment, is completely without merit. The respondent stipulated that she was an unfit mother. The record shows the petitioner has sexually abused C.A.N. and has not shown that he is capable of providing her with adequate housing. The record is replete with evidence of the need for a stable environment for C.A.N., of the fear C.A.N. has of the petitioner, and of the effect of infrequent visits which cause her emotional distress and adversely affect her progress and treatment. The evidence is more than sufficient to support the termination of the appellants' parental rights.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. NEWTON E. COPPLE, APPELLANT.

359 N.W.2d 782

Filed December 21, 1984. No. 84-239.

1. **Pleas.** Absent a showing of a manifest injustice, a plea of nolo contendere may not be withdrawn pursuant to ABA Standards for Criminal Justice § 14-2.1(b)(ii) (2d ed. 1980).

2. _____. After entry of a plea of guilty or nolo contendere and before sentence, the court should allow the defendant to withdraw the plea for any fair and just reason. Such reason does not include a person's normal reluctance to be incarcerated.
3. **Sentences.** A sentence imposed within statutory limits will not be set aside absent an abuse of discretion.
4. **Criminal Law: Limitations of Actions.** Where the felony committed by the defendant constitutes a continuing offense, the statute of limitations begins to run from the last act committed within the series of acts constituting the continuing offense.

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

Richard J. Bruckner, for appellant.

Richard T. Smith, Gage County Attorney, for appellee.

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

WHITE, J.

At arraignment in the district court for Gage County, Nebraska, appellant, Newton E. Copple, entered a plea of no contest to a charge of making or causing to be made false entries in the books of First Security Bank and Trust, Beatrice, Nebraska, with the intent to deceive persons authorized to examine into the affairs of said bank (Neb. Rev. Stat. § 8-175 (Reissue 1983)), a Class III felony. A Class III felony is punishable by imprisonment for a term of from 1 to 20 years. In addition, a fine of up to $25,000 may be imposed, or both said imprisonment and fine. The plea was accepted. Subsequently, on March 12, 1984, the court sentenced appellant to a term of 16 to 24 months in the Nebraska Penal and Correctional Complex. This appeal followed.

Appellant assigns as error: (1) The district court erred in holding appellant had not shown that a manifest injustice would result if his nolo contendere plea was not withdrawn; (2) The district court abused its discretion in overruling appellant's motion to withdraw his plea of nolo contendere; (3) The sentence is excessive and constitutes cruel and unusual punishment; and (4) The court was without jurisdiction in the matter, since the statute of limitations had run on the offense

when the charge was filed.

Prior to sentence, John Robinson, appellant's counsel at the time of the arraignment, withdrew, and new counsel filed a motion for leave to withdraw the previous plea. The grounds recited in the motion were that the proceedings with respect to appellant's plea were conducted in one working day, to wit, January 6, 1984, that the appellant was unfamiliar with criminal procedures, and that the plea agreement filed was illegal. After a hearing on March 12, 1984, the district court denied the motion to withdraw the plea.

The appellant appeared in the county court the afternoon of January 6, 1984, after extended conversations had taken place between Mr. Robinson and the Gage County attorney. Following their conversations, the original complaint was amended and the plea agreement prepared. In county court the appellant waived preliminary hearing after an exhaustive explanation of the proceedings, his constitutional rights, and the consequences of entering a plea of guilty. In the district court proceedings the appellant further waived 24-hour notice and service of the information. Appellant was then arraigned, and, again, the options relating to the various pleas were explained, and an extensive dialogue between the judge and the appellant took place. All of the appellant's constitutional rights and the implications of the plea of no contest were explained to him, and he affirmatively indicated an understanding of the court's explanation. After receiving an executed copy of a plea agreement in evidence, and a factual basis, the plea was accepted and sentencing set for March 12, 1984.

It is the contention of appellant that he was not "fully aware of the proceedings held on January 6, 1984," nor was he "fully advised of his constitutional rights" in connection with criminal proceedings, and that his then attorney, John Robinson, had "a conflict of interest." Brief for Appellant at 3-4. Appellant did not sign the factual basis of the plea, did not comment on it when it was admitted into evidence, and asserts that it was not factually true or correct. Appellant further contends that the plea agreement was illegal, since it purported to require appellant's cooperation with state and federal authorities in any and all investigations concerning the Beatrice bank and

Commonwealth Savings Company of Lincoln. He also asserts that the plea was the result of "implied threats" that if he did not plead to the charge in the information, other charges would be filed against him and other parties associated with him.

In his argument appellant directs us to the ABA Standards for Criminal Justice § 14-2.1 (2d ed. 1980), which provides:

> (a) After entry of a plea of guilty or nolo contendere and before sentence, the court should allow the defendant to withdraw the plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.
>
> (b) After a defendant has been sentenced pursuant to a plea of guilty or nolo contendere, the court should allow the defendant to withdraw the plea whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.
>
> (i) A motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein, and is not necessarily barred because made subsequent to judgment or sentence.
>
> (ii) Withdrawal is necessary to correct a manifest injustice whenever the defendant proves, for example, that:
>
> (A) the defendant was denied the effective assistance of counsel guaranteed by constitution, statute, or rule;
>
> (B) the plea was not entered or ratified by the defendant or a person authorized to so act in the defendant's behalf;
>
> (C) the plea was involuntary, or was entered without knowledge of the charge or knowledge that the sentence actually imposed could be imposed; or
>
> (D) the defendant did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement;
>
> . . . .

(iii) The defendant may move for withdrawal of the plea without alleging that he or she is innocent of the charge to which the plea has been entered.

Appellant's first assignment of error appears to be directed to subdivision (b)(ii) of the standard, that is, that the withdrawal of his plea was necessary to correct a manifest injustice. A plea may be withdrawn under this subdivision in six separate situations, only four of which are applicable and cited above. The first, Was appellant denied effective assistance of counsel? Appellant asserts that he was by reason of an alleged conflict of interest that arose because of the marriage of John Robinson, appellant's original counsel, to Dana Saylor-Robinson, an employee of Copple and a so-called "target defendant" in this case. If indeed such a conflict existed, appellant was well aware of it and continued to employ his counsel, waiving any prejudice which may have resulted from such conflict. Indeed, on direct examination at the hearing on appellant's motion, Copple testified that he knew the potential for conflict existed, and on cross-examination testified that he unsuccessfully attempted to extract from the county attorney a promise not to prosecute Mrs. Saylor-Robinson.

Was the plea ratified by the defendant? The record demonstrates this most clearly, in that an experienced trial judge ran through a detailed listing of appellant's constitutional rights and possible pleas, and thereafter directly asked appellant if he wished to have the plea of nolo contendere accepted. The suggestion that the plea was not ratified is preposterous.

Did the appellant have knowledge of the charge or that the penalty actually imposed could be imposed? The record reveals that both the charge and the possible penalty were clearly explained. Absent evidence that the appellant was incapable of understanding the English language, it was apparent to the trial court, and is to us, that appellant was fully aware of the charge against him and the possible penalty.

As to subsection (b)(ii)(D) of the standard, no sentence was promised in either the plea agreement or by the court in accepting the plea, nor did the prosecutor violate any agreement with appellant. Having failed to establish manifest injustice by

clear and convincing evidence, this assignment is without merit. *State v. Holtan*, 216 Neb. 594, 344 N.W.2d 661 (1984).

Therefore, if the appellant has any right to withdraw his plea, he must show, pursuant to subsection (a) of the standard, that there is a fair and just reason for such withdrawal and that the prosecution would not be substantially prejudiced by its reliance on the plea. See *State v. Holtan, supra.* As to the second part of the standard, the record is silent. Indeed, considering the extended investigation conducted in this case, the likelihood of prejudice to the prosecution is so remote as to be nonexistent. The evidence available to convict the appellant of the crime charged and of a number of other crimes in his dealings with the bank is overwhelming. However, as to the first part of the standard, whether the appellant has shown a "fair and just" reason why the plea should be withdrawn, other than a person's normal reluctance to be incarcerated, no reason is apparent. The appellant, a sophisticated and experienced businessman, directed false signatures of loans in excess of $500,000, with disastrous consequences to others. He made an arrangement to cut his losses by pleading to one charge out of the many that apparently could have been brought and proven. His story of his naivete of criminal proceedings is imaginative but hardly persuasive. The second assignment of error is also without merit.

As to the third assignment of error, this court has frequently said that, ordinarily, a sentence imposed within the limits prescribed by statute will not be disturbed absent an abuse of discretion. *State v. Cooley*, 217 Neb. 90, 348 N.W.2d 433 (1984); *State v. Turner, ante* p. 365, 355 N.W.2d 219 (1984). No abuse of discretion is shown.

The fourth assignment of error is also nonmeritorious, putting aside the obvious question of whether a valid plea of no contest waives the defense of the statute of limitations. The information alleges a false entry based on a fictitious loan of September 12, 1980, and rewritten a number of times, the last date being July 29, 1981. The rewriting of the loan thus constitutes a continuing offense.

A continuing offense is defined as a "continuous,

> unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy; . . . a breach of the criminal law . . . subsisting for a definite period and intended to cover or apply to successive similar . . . occurrences."

State v. Williams, 211 Neb. 650, 655, 319 N.W.2d 748, 751 (1982). In this case the offense continued until the last date above mentioned, and therefore fell within 3 years of the date of the filing of the complaint, January 6, 1984. Neb. Rev. Stat. § 29-110 (Reissue 1979).

The judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GENE KAKELA, APPELLANT.
359 N.W.2d 786

Filed December 21, 1984. No. 84-307.

Criminal Law: Appeal and Error. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Patrick B. Hays, for appellant.

Paul L. Douglas, Attorney General, and Timothy E. Divis, for appellee.

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

GRANT, J.

This is an appeal from a jury conviction of defendant-appellant, Gene Kakela, for aiding and abetting

another to commit a robbery. Kakela assigns as error the trial court's refusal to sustain his motion to dismiss prior to submission of the case to the jury, and further alleges that the evidence was insufficient to support the verdict. After reviewing the record we affirm.

Kakela was charged in an information which alleged that he aided and abetted Ken Thorpe to commit a robbery at the Short Stop convenience store in North Platte, Nebraska. Jury trial was held. At the trial the county attorney presented evidence which, if believed by the jury, showed that Kakela and Thorpe discussed robbing the Short Stop store earlier in the day while they were both doing laundry; that the two entered the Short Stop to observe the layout in preparation for the robbery; that Kakela drove Thorpe to the Short Stop and waited outside while Thorpe robbed the store clerk; that Kakela drove Thorpe to the Holiday Inn after the robbery; and that Kakela confessed to the crime.

The jury found Kakela guilty as charged. Kakela was sentenced to not less than 1 nor more than 3 years in prison.

Kakela's first assignment of error, that the trial court erred in not dismissing the charge against him, is clearly untenable. In *State v. Tomrdle*, 214 Neb. 580, 582, 335 N.W.2d 279, 281 (1983), we said: "A motion for a directed verdict of acquittal can be sustained only if there is no substantial evidence reasonably tending to support the charge against the accused." In this case there was clearly substantial evidence to support the finding that the accused was guilty beyond a reasonable doubt. If the jury chose to believe Kakela's admission on the night of the robbery that he had helped rob the store, instead of his statement the next day that he was so drunk he did not know what he said the night before, there were ample corroborating facts to support a guilty verdict.

Kakela's second assignment of error is based on the same premise as the first—insufficiency of evidence. In the second assignment he claims the evidence was insufficient for the jury to find him guilty. Nebraska cases are replete with the standard of review we are bound to follow in this appeal:

> [A]fter a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law,

> be set aside on appeal for insufficiency of evidence, if the evidence sustains some rational theory of guilt. . . .
>
> . . . .
>
> . . . In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

State v. Evans, 215 Neb. 433, 443, 338 N.W.2d 788, 794-95 (1983).

In this case the physical acts were not in dispute. Thorpe robbed the Short Stop, and Kakela drove Thorpe to and from the scene of the robbery. The determining fact was whether Kakela had done what he did intentionally or innocently. Both Kakela and Thorpe testified at trial that Kakela did not know about the robbery, but testimony of the police officers suggested Kakela was not only aware of but confessed to the crime. The jury is the trier of fact when there are conflicting facts and inconsistent testimony. The jury chose to believe Kakela's participation was intentional. It is not within the prerogative of this court to reweigh the facts and supplant the jury's decision. The jury was well within its province in convicting Kakela. Although evidence of his guilt was rebutted, it is the jury which weighed the testimony of the defendant and chose which of the conflicting stories to believe. There was substantial evidence to support the jury's verdict.

AFFIRMED.

NORTHERN MESSENGER, INC., APPELLEE, V. RONALD E. SORENSEN, COMMISSIONER OF LABOR, APPELLANT, DOUGLAS MOLZER, INTERVENOR-APPELLANT.

359 N.W.2d 787

Filed December 21, 1984. No. 84-342.

1. **Employment Security Law: Appeal and Error.** The Employment Security Law provides one avenue of judicial appeal when the dispute concerns benefit liability and another when the dispute concerns contribution liability.
2. _____: _____. Neb. Rev. Stat. § 48-638 (Reissue 1984) provides for judicial review in benefit liability disputes by appeal to the district court for the county in which the individual claiming benefits claims to have been last employed, or in which such claimant resides, or to any district court upon which the parties may agree.
3. _____: _____. Neb. Rev. Stat. § 48-650 (Reissue 1984) provides for judicial review in contribution liability disputes only by appeal to the district court for Lancaster County.
4. **Statutes: Jurisdiction: Appeal and Error.** The requirements of a statute granting the right to appeal are mandatory and must be complied with in order for the appellate court to acquire jurisdiction.
5. **Courts: Jurisdiction.** The jurisdiction of a court flows from constitutional and statutory provisions and from the common law, so far as the latter is not repugnant to the federal Constitution or the Constitution of the state.

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

Pamela A. Mattson, for appellant Commissioner of Labor.

Gary L. Fischer, for appellant Molzer.

David M. Woodke, Stephen M. Kalhorn, and John W. Iliff of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee.

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

CAPORALE, J.

This appeal arises from the reversal by the district court for Lancaster County of the Nebraska Appeal Tribunal's affirmance of the determination of the appellant Nebraska Commissioner of Labor that the appellee, Northern Messenger, Inc., is an employer and, as such, is liable under the Employment Security Law for contributions to the

Unemployment Compensation Fund. The commissioner and appellant Douglas Molzer, an intervenor before the appeal tribunal, urge that the district court lacked subject matter jurisdiction because of the manner in which the appeal to that court was taken. We agree, and therefore reverse and remand with directions to dismiss the appeal taken from the appeal tribunal to the district court.

Northern Messenger is in the messenger and courier business and provides its services through drivers who contract to provide their own vehicles in exchange for a portion of the gross revenues generated by the deliveries they make. Apparently as the result of a claim for unemployment compensation benefits filed by Molzer, who formerly drove for Northern Messenger, the Department of Labor conducted an investigation as to the nature of the relationship between Northern Messenger and its drivers. As a result, the commissioner determined that the drivers were employees rather than independent contractors, thereby rendering Northern Messenger liable for contributions as aforesaid. Northern Messenger appealed that determination to the appeal tribunal, which later permitted Molzer to intervene. The intervention is discussed again later in this opinion. On April 20, 1983, the appeal tribunal affirmed the commissioner's determination. An appeal therefrom was taken to the district court for Douglas County. Thereafter, on October 11, 1983, upon the joint motion of the parties, that appeal was transferred to the district court for Lancaster County.

We agree with the contention of the commissioner and Molzer that *Whitehouse Energy Savers v. Hanlon*, 214 Neb. 572, 334 N.W.2d 802 (1983), which came to us in the same procedural posture as the instant case, requires that we reverse the judgment of the district court for Lancaster County. In *Whitehouse* a claim for benefits resulted in an investigation which led the Commissioner of Labor, through his chief of contributions, to determine that Whitehouse was an employer liable for contributions to the Unemployment Compensation Fund. That determination was affirmed by the Nebraska Appeal Tribunal but reversed by the district court for Douglas County. We reversed the district court's judgment on the ground that court lacked subject matter jurisdiction, such jurisdiction

being solely in the district court for Lancaster County.

As noted in *Whitehouse*, the Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1984), provides one avenue of judicial appeal when the dispute concerns benefit liability and another when the dispute concerns contribution liability. Section 48-638 provides for judicial review in benefit liability disputes by appeal to the district court for the county in which the individual claiming benefits claims to have been last employed, or in which such claimant resides, or to any district court upon which the parties may agree. Section 48-650 provides for judicial review in contribution liability disputes only by appeal to the district court for Lancaster County. Both statutes require that the judicial appeals be taken within 30 days of certain occurrences.

The record establishes that the proceedings leading to the appeal before us began as an inquiry to determine Northern Messenger's relationship with its drivers. The commissioner determined that the drivers are not independent contractors as Northern Messenger contends but, rather, are employees, thus rendering Northern Messenger liable for contributions to the Unemployment Compensation Fund. It was that adverse determination which Northern Messenger appealed to the Nebraska Appeal Tribunal and subsequently to the district court for Douglas County. As we have noted earlier, the only court having subject matter jurisdiction to review a determination that one is liable for contributions to the Unemployment Compensation Fund is the district court for Lancaster County. Accordingly, the attempted appeal by Northern Messenger to the district court for Douglas County was completely ineffective. The requirements of a statute granting the right to appeal are mandatory and must be complied with in order for the appellate court to acquire jurisdiction. *State v. Schroder, post* p. 860, 359 N.W.2d 799 (1984); *Nicholson v. City of Bellevue*, 215 Neb. 540, 339 N.W.2d 758 (1983). Since the transfer to the district court for Lancaster County did not occur until well after 30 days following the appeal tribunal's decision, the district court for Lancaster County likewise failed to acquire jurisdiction.

Northern Messenger attempts to distinguish the instant case

from *Whitehouse* by calling our attention to the fact that in *Whitehouse* no claim for benefits to a specific employee was involved, whereas, in the instant case, Molzer's intervention, according to Northern Messenger, resulted in the allowance of his claim for benefits. We point out, first of all, that although the record establishes that Molzer was allowed to intervene while Northern Messenger's appeal was pending before the appeal tribunal, it does not reveal Molzer's allegations or the relief he sought by that intervention, nor does it reveal whether or what relief was granted to him. Whether Molzer should have been allowed to intervene is not before us; what is clear, however, is that no action taken by the appeal tribunal can alter the jurisdiction of the district court to consider and decide a particular appeal. The jurisdiction of a court flows from constitutional and statutory provisions and from the common law, so far as the latter is not repugnant to the federal Constitution or the Constitution of the state. 21 C.J.S. *Courts* § 28 (1940).

Since the district court acquired no jurisdiction, its judgment is reversed and the cause remanded with directions to dismiss the appeal to it from the appeal tribunal.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JOEL R. EVANS, APPELLANT.

359 N.W.2d 790

Filed December 21, 1984. No. 84-351.

1. **Effectiveness of Counsel.** A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions.
2. **Trial: Appeal and Error.** One cannot elect a particular trial strategy and then complain if it proves unsuccessful.
3. **Trial: Mental Competency.** 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.

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

Jerry L. Soucie of Rehm & Bartling, for appellant.

Paul L. Douglas, Attorney General, and L. Jay Bartel, for appellee.

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

BOSLAUGH, J.

The defendant, Joel R. Evans, has appealed from an order denying him post conviction relief.

The proceeding in the district court involved four separate cases. The records in all of these cases demonstrate overwhelming evidence of defendant's guilt.

The information in case No. 43863 alleged two counts of robbery; two counts of use of a firearm in the commission of a felony; and one count of possession of a firearm by a felon. The jury found the defendant guilty on all counts.

Case No. 43868 involved one count of robbery. Case No. 43870 involved one count of robbery and use of a firearm in the commission of a felony. These cases were consolidated for trial, and the jury found the defendant guilty on all counts.

Case No. 43869 involved one count of robbery and use of a firearm in the commission of a felony. The defendant entered pleas of guilty in this case, and charges involving five other armed robberies were dismissed.

The defendant perfected appeals to this court in all four cases. The record in each case was examined by this court and found to be free of prejudicial error. Motions to withdraw filed by his counsel were sustained and the judgments affirmed on July 8, 1981.

In this proceeding the defendant contends that the trial court erred in failing to find (1) that the appellant was denied effective assistance of counsel; (2) that the appellant was incompetent at the time of the offenses and at trial; (3) that appellant's trials were tainted by identifications based on unnecessarily suggestive procedures; and (4) that the sentences imposed were cruel and unusual.

In case No. 43863 the record shows that at around 9 p.m. on April 27, 1980, the defendant entered Jack and Mary's Restaurant in Omaha, Nebraska. He walked through the restaurant to a restroom, then came back to a counter in the front and handed Mary Wollen a note which stated: "This is a robbery, don't be stupid." Believing the defendant was pressing a gun to her side, Mrs. Wollen placed all the $5 bills that were in the cash register in a paper sack. The defendant took the sack and then turned to a waitress, Elsie Smith, placed a short silver gun against her stomach, and demanded her tip money. She gave him $10 to $15. The defendant left through the front door, and as he ran out, was seen by Jack Wollen heading toward the Papio Creek.

Based on a description of the robber given to police, a deputy sheriff stopped the defendant after he was seen crossing a field behind the restaurant. The defendant was arrested, and when searched, a loaded .22-caliber chrome-plated handgun and $147.88, including a roll of $5 bills, were found in his possession. The defendant was then taken back to Jack and Mary's, where he was separately identified by each of the Wollens. Later that same evening, Elsie Smith identified the defendant in a four-man lineup.

At a conference prior to trial the trial judge explained to defendant his alternatives concerning a suppression hearing regarding the one-on-one showups and lineups involved; defendant and his counsel expressly waived any suppression of identification.

In case No. 43868 the robbery took place at Gorat's Steak House in Omaha, Nebraska, on April 25, 1980. The defendant handed a note demanding money to the cashier, Marcella Gray, then ran out the front door with the money in a paper sack. A customer, Robert Stultz, saw the defendant as he was running out. Stultz identified the defendant at a preliminary hearing and in court at trial. Gray identified the defendant at a three-man lineup, the preliminary hearing, and in court at trial.

In case No. 43870 the record shows that on April 17, 1980, at approximately 2:30 p.m., the defendant entered a Village Inn Pancake House in Omaha, Nebraska, and asked Marcelino Sanchez about a cook's job. He then went into the restroom and

returned to the counter, where he gave Sanchez a note demanding money and showed Sanchez a gun. An employee, Judi Kirk, witnessed the robbery.

Sanchez identified the defendant at a three-man lineup. He also identified the defendant at a preliminary hearing and in court at trial. Judi Kirk identified the defendant at the preliminary hearing and in court at trial.

The sentences imposed in all four cases add up to imprisonment for 45 to 80 years.

In his first assignment of error the defendant alleges that he was denied effective assistance of counsel at both the trial and appellate levels. As to the actions of trial counsel which premise this allegation, defendant cites counsel's failure to move to suppress in-court and out-of-court identifications "that were tainted by suggestive line-ups," and failure to obtain psychiatric examinations to determine the appellant's mental status at the time of the offense and at trial. The defendant contends that appellate counsel failed "to properly brief the issues on the tainted identifications, prosecutor's comments on the defendant's right to remain silent, and excessiveness of sentence." Brief for Appellant at 3-4.

There is nothing in the record to support the defendant's claim that the prosecutor commented on the defendant's right to remain silent, and the assignment is not discussed in his brief.

In *State v. Robinson, ante* p. 156, 352 N.W.2d 879 (1984), we set forth at length the rules generally with regard to a claim of ineffective assistance of counsel. Essentially, there is a two-part test for determining whether an attorney has effectively counseled a criminal defendant:

> "First, counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region. Counsel must also conscientiously protect his client's interests. *State v. Leadinghorse*, 192 Neb. 485, 222 N.W.2d 573 (1974); *State v. Lang*, 202 Neb. 9, 272 N.W.2d 775 (1978). A defendant challenging competency of counsel has the burden to establish it. *State v. Auger & Uitts*, 200 Neb. 53, 262 N.W.2d 187 (1978). In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or

> inactions. *State v. Mays*, 203 Neb. 487, 279 N.W.2d 146 (1979); *State v. Lang, supra; State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977)."

State v. Otey, 212 Neb. 103, 105-06, 321 N.W.2d 453, 454-55 (1982).

The record shows that in the Jack and Mary's robberies, trial counsel considered and discussed with defendant the alternative of making a motion to suppress. The trial court explained the motion to the defendant and emphasized the attorney's responsibility concerning the motion: "He doesn't have to make it, and he might consider it better not to, and I don't mean to inquire into his trial tactics. I just want you to be aware of the fact that he could make such a motion . . . ." Thereafter, the defendant and trial counsel waived the right to file a motion to suppress, and defendant stated specifically that he agreed with his counsel's judgment.

One cannot elect a particular trial strategy and then complain if it proves unsuccessful. *State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977). Furthermore, even if a motion to suppress concerning the one-on-one showups complained of at Jack and Mary's Restaurant would have been sustained, there was no objection to the identification of the defendant made by Elsie Smith. Thus, it does not appear that the result of the trial would have been changed.

Defendant further questions trial counsel's failure to file a motion to suppress concerning the three-man lineups in the Village Inn and Gorat's robberies. Again, there were ample other eyewitness identifications made at those trials such that it cannot be said that the defendant was prejudiced by any alleged omissions of counsel in that regard.

The defendant also challenges the effectiveness of trial counsel in not obtaining psychiatric examinations of defendant. In the petition for post conviction relief, the defendant alleged that the crimes "were part of a continuing course of conduct on the part of the defendant who had a history of drug and alcohol dependency, was suffering from diminished capacity, brain damage, and was legally incompetent at the time of the acts which constitute the offenses charged."

At the post conviction hearing trial counsel testified that defendant took an active part in the defense of his case and did not appear to be under the influence of drugs or alcohol or anything of that nature.

" '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.' " *State v. Teater*, 217 Neb. 723, 724, 351 N.W.2d 60, 62 (1984). There is no showing that the defendant failed this test.

A review of the record shows no credible evidence indicating defendant's lack of competency. In its final order the trial court aptly stated: "Inasmuch as there was no indication of defendant's incompetence to stand trial, defendant's trial counsel could hardly be found to be ineffective for failure to have defendant examined in this regard."

In sum, the defendant failed to sustain his burden with regard to the two-part test. This is equally true as applied to appellate counsel.

We considered the merits of the appeals before sustaining appellate counsel's motions to withdraw. In *State v. Robinson, ante* p. 156, 159, 352 N.W.2d 879, 881 (1984), we said:

> " '[I]f competent counsel, after investigation, considers a point worthless, the fact that he is court-appointed does not require him to pursue it. * * * the right to counsel * * * does not include the right to counsel, whether at counsel's expense or government expense, to advance a totally frivolous claim merely because some layman thinks it has merit. . . .' "

The defendant's last assignment of error is that his punishment was cruel and unusual. He classifies his sentences as "preventive detention" as opposed to those tending "to punish or rehabilitate"; he also complains of the length of time he must spend in prison before he is eligible for parole. Defendant concedes, however, and this court has often stated before, that matters which relate to sentences imposed within statutory limits are not a basis for post conviction relief. *State v. Webb, ante* p. 238, 352 N.W.2d 624 (1984).

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JULIEANNE TAINTER, APPELLANT.
359 N.W.2d 795

Filed December 21, 1984. No. 84-380.

1. **Motions for New Trial: Appeal and Error.** A motion for a new trial is addressed to the sound discretion of the trial court, and unless an abuse of discretion is shown, its determination will not be disturbed.
2. _____: _____. The asserted ground for a new trial must affect adversely the substantial rights of the defendant, and it must be shown that he was prejudiced thereby.
3. **Trial: Evidence: Witnesses.** The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness is usually within the discretion of the trial court.
4. _____: _____: _____. If a witness is cross-examined on a matter collateral to the issues, his answer cannot be subsequently contradicted by the party conducting the examination.
5. **Trial: Evidence.** If a fact could be proved as a part of the offerer's case, it is material and not a collateral fact.
6. **Witnesses: Appeal and Error.** This court will not reexamine or pass on the trier of fact's determination of credibility.
7. **Witnesses: Juries: Appeal and Error.** To warrant reversal the misconduct of a witness must be of such a nature as to unduly influence the decision of the jury.

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

Gregory P. Drew, for appellant.

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

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

BOSLAUGH, J.

After trial to a jury the defendant was convicted of driving while under the influence of intoxicating liquor and was

sentenced to 6 months' probation, fined $200 and costs, and her driving privileges were suspended for 60 days. Upon appeal to the district court the judgment was affirmed. The defendant has now appealed to this court.

The record shows that on April 12, 1984, the defendant was stopped by the Nebraska State Patrol after Leslie W. Peterson, chief of police in Arlington, Nebraska, had followed her as she repeatedly crossed the centerline while driving on U.S. Highway 30 near Fremont. After failing a preliminary breath test the defendant was taken to the Blair Police Department, where her breath was again tested by Officer Fred Carritt. Her blood alcohol level registered .158 percent.

At the trial Officer Carritt testified in detail as to how the breath test was administered and as to the results of the breath test. He first testified that he held a Class B permit to operate the Intoxilyzer 4011AS. He then explained the mandatory step-by-step procedure used in administering the test and the safeguards employed to protect the machinery.

On cross-examination Officer Carritt testified that he had no personal knowledge of any time when the Intoxilyzer or evidence obtained therefrom or other evidence was removed from the evidence room for other than law enforcement purposes. This statement, however, was impeached when the defendant introduced a letter dated March 15, 1982, from the Blair police chief, which informed Officer Carritt that he was suspended for 12 days for violating department rules in removing and improperly disposing of evidence held in the evidence room on or about August 19, 1981.

After the jury had found the defendant guilty, the defendant filed a motion for new trial alleging misconduct and irregularity in the testimony of Officer Carritt. This motion was overruled. The defendant's only assignment of error relates to the ruling on this motion.

Neb. Rev. Stat. § 29-2101 (Reissue 1979) provides in pertinent part: "A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following reasons affecting materially his substantial rights: . . . (2) misconduct of the jury or the prosecuting attorney, or of the witnesses for the state."

A motion for a new trial is addressed to the sound discretion of the trial court, and unless an abuse of discretion is shown, its determination will not be disturbed. *State v. Haynes*, 186 Neb. 238, 182 N.W.2d 199 (1970). The asserted ground for a new trial must affect adversely the substantial rights of the defendant, and it must be shown that he was prejudiced thereby. *Fugate v. State*, 169 Neb. 420, 99 N.W.2d 868 (1959).

The defendant asserts that her substantial rights were prejudiced by the conduct of the State's witness. She contends that Officer Carritt's lying about his past misconduct with respect to evidence removed from the evidence room created a foundational inadequacy in the State's case as to proof of intoxication. Such a claim is without merit.

In *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980), we held that as foundation for an offer into evidence of the results of a breath test to prove intoxication, the State must establish (1) that the testing device was in proper working order at the time the test was given; (2) that the person giving the test was qualified and held a valid permit from the state Department of Health; (3) that the test was properly conducted in accordance with a method prescribed by the Department of Health; and (4) that there was compliance with any statutory requirements.

Here, each of the foregoing requirements was established by Officer Carritt's testimony. The record shows that he tested the machine before using it, was qualified to conduct the test, followed the 14-step checklist required in conducting a breath test using the Intoxilyzer 4011AS, and in doing so complied with the statutory requirements set out in Neb. Rev. Stat. §§ 39-669.07 through 39-669.18 (Reissue 1984).

No direct evidence was introduced to rebut the results of the breath test. The defendant introduced collateral evidence to attack Officer Carritt's credibility. The applicable rules were stated in *State v. Zobel*, 192 Neb. 480, 484, 222 N.W.2d 570, 572-73 (1974):

> The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness is usually within the discretion of the trial court and the ruling concerning it is not grounds for reversal in the absence of an abuse of discretion. Hampton v. Struve, 160 Neb. 305,

70 N.W.2d 74. If a witness is cross-examined on a matter collateral to the issues, his answer cannot be subsequently contradicted by the party conducting the examination. Griffith v. State, 157 Neb. 448, 59 N.W.2d 701. The witness' alleged activities in the cult of Satan were clearly collateral. The material fact, of course, was the truth of his testimony as to the facts of the crime. If a fact could be proved as a part of the offerer's case, it is material and not a collateral fact. Griffith v. State, *supra*. The court did not abuse its discretion in limiting the pursuit of the collateral facts to the questions which were answered.

In *State v. Claire*, 193 Neb. 341, 344, 227 N.W.2d 15, 18 (1975), we said:

> Defendant sought to show that Uphoff had supplied controlled substances to others. He was permitted to go into it when he called Uphoff as his own witness. Uphoff denied the charge. Defendant was permitted to question Uphoff about giving controlled substances to one John Scott. Uphoff denied doing so. Defendant then sought to prove by John Scott and his sister that Uphoff had given them controlled substances. Objections to this line of questioning were sustained. The evidence had no bearing on, and was not pertinent to, the issues. It was offered with a view to impeaching Uphoff on a collateral matter. Ordinarily if a witness is examined on a matter collateral to the issue, he cannot as to his answer be subsequently contradicted by the party conducting the examination. See, Griffith v. State, 157 Neb. 448, 59 N.W.2d 701; Latham v. State, 152 Neb. 113, 40 N.W.2d 522. "Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded."

The rule was stated in *Jones v. Tranisi*, 212 Neb. 843, 846, 326 N.W.2d 190, 192 (1982), as follows:

> "[A] witness may not be impeached by producing extrinsic evidence of 'collateral' facts to 'contradict' the first witness's assertions about those facts." McCormick on Evidence § 47 at 98 (2d ed. 1972). McCormick further says at 98: "What is to be regarded here as within this

> protean word of art, 'collateral'? The inquiry is best answered by determining what facts are not within the term, and thus finding the escapes from the prohibition against contradicting upon collateral facts. The classical approach is that facts which would have been independently provable regardless of the contradiction are not 'collateral.' " The above is the rule in Nebraska. " 'It is only as to matters relevant to some issue involved in a case that a witness can be contradicted for the purpose of impeachment.' Carpenter v. Lingenfelter, 42 Neb. 728, 60 N.W. 1022, 32 L.R.A. 422.
>
> . . . .
>
> " 'The general rule is that a witness cannot be impeached as to collateral or immaterial matter brought out on cross-examination;* * *.' " *Ambrozi v. Fry*, 158 Neb. 18, 26, 62 N.W.2d 259, 265 (1954).

See, also, *Griffith v. State*, 157 Neb. 448, 59 N.W.2d 701 (1953); *Latham v. State*, 152 Neb. 113, 40 N.W.2d 522 (1949).

The fact that Officer Carritt on some other occasion may have removed evidence from the evidence room for other than law enforcement purposes was clearly a collateral matter. The defendant was bound by the answer of the witness and was not entitled to introduce evidence to prove that the answer was incorrect.

The fact, however, is that the exhibit offered by the defendant was received in evidence. Under these circumstances there could have been no prejudice to any substantial right of the defendant.

The defendant seems to have a theory that an incorrect or false statement by a witness for the State about his own past misconduct on the job somehow invalidated the results of the breath test.

The fact that a witness may have lied about a past act does not invalidate the rest of his testimony. It only means the jury must weigh these statements against the rest of the evidence in reaching a verdict. See *Wilson v. State*, 170 Neb. 494, 103 N.W.2d 258 (1960), *cert. denied* 364 U.S. 887, 81 S. Ct. 178, 5 L. Ed. 2d 108. This court will not reexamine or pass on the trier of fact's determination of credibility. *State v. Huffman*, 214

Neb. 429, 334 N.W.2d 3 (1983).

The evidence as to the breath test was not the only evidence of intoxication. There was the testimony of the Arlington police chief, who witnessed the defendant's driving as she repeatedly crossed the centerline, and that of the arresting officer, who found her slumped across the wheel of the car when the defendant was first stopped. She was initially unresponsive, her face and eyes were red, and there was an odor of alcohol in the car. It was his opinion, as a police officer, that the defendant was under the influence of alcohol.

When the defendant took the stand in her own defense, she admitted having four drinks that evening, but did not know how much alcohol was in each drink. She had no clear time reference for the events which took place that night. On the consent form for the breath test, she misspelled her name.

The misconduct of the State's witness here was insufficient to materially affect the defendant's substantive rights. As pointed out in the early case of *Argabright v. State*, 62 Neb. 402, 87 N.W. 146 (1901), which dealt with misconduct of an attorney at trial, to warrant reversal the misconduct must be of such a nature as to unduly influence the decision of the jury. Here, there was no undue influence. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). The trial court did not abuse its discretion in denying the defendant's motion for a new trial.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNIE SCHRODER, APPELLANT.
359 N.W.2d 799

Filed December 21, 1984. No. 84-389.

1. **Criminal Law: Courts: Appeal and Error.** A district court, on criminal appeals from the county court, acts as an intermediate court of appeals reviewing the record for error.
2. **Criminal Law: Constitutional Law: Appeal and Error.** A review by an appellate

court of a final judgment in a criminal case is not a necessary element of due process of law.

3. **Statutes: Jurisdiction: Appeal and Error.** There must be compliance with the requirements set forth in a statute granting the right to appeal or this court gains no jurisdiction over the case.
4. **Criminal Law: Appeal and Error.** An undue delay in ruling upon an appeal does not warrant dismissal of a criminal charge.
5. **Records: Presumptions: Appeal and Error.** While a recital in a journal entry appearing in the transcript is presumptively true, an affirmative showing in the bill of exceptions that it is not true prevails over the presumption.
6. **Sentences: Probation and Parole.** When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute.
7. **Trial: Rules of Evidence: Appeal and Error.** An offer of proof is generally a prerequisite to our review of a ruling which excludes evidence unless it is apparent from the context within which the question was asked that the answer would have been material and competent.
8. **Criminal Law: Appeal and Error.** 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 finder of fact.
9. **Verdicts: Appeal and Error.** A guilty verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
10. **Trial: Evidence: Presumptions: Appeal and Error.** In a criminal case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant, and this court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.

Appeal from the District Court for Loup County: RONALD D. OLBERDING, Judge. Affirmed.

Curtis A. Sikyta, for appellant.

Paul L. Douglas, Attorney General, and Timothy E. Divis, for appellee.

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

CAPORALE, J.

Defendant-appellant, Ernie Schroder, was convicted in the county court, following a bench trial, of a misdemeanor third degree assault upon his wife, Barbara. Defendant was thereupon sentenced to probation for a term of 6 months, the conditions of which included the payment of a $100 fine and

that he serve 10 days in the county jail. The conviction and sentence were each affirmed on appeal to the district court. In this appeal defendant assigns as error (1) the failure of the district court to dismiss the charge due to the unreasonable delay of that court in processing the appeal; (2) the failure of both the county and district courts to "find the degree of assault" and to determine "whether the assault was part of a mutual scuffle"; (3) the imposition by both courts of more than one penalty; (4) the receipt of certain evidence; (5) the exclusion of certain evidence; and (6) the insufficiency of the evidence to support the conviction. The record sustains none of the assignments; accordingly, we affirm.

The Schroders spent the afternoon, evening, and night of August 10, 1982, and the early morning hours of the next day getting drunk together in a number of towns. Although the evidence is in conflict as to what transpired while defendant drove and Mrs. Schroder rode home in their truck, Mrs. Schroder testified that defendant had gotten angry, hit her several times, and then stopped the truck while she got out and began walking. According to Mrs. Schroder, her husband "came after her," hit her, kicked her, grabbed her by the hair, and pulled her back into the pickup. When the couple arrived at their home, defendant continued to hit and shove his wife, and threatened her with a gun. Later, when Mrs. Schroder was leaving in her car, defendant shot at her with his gun. Mrs. Schroder then drove to the sheriff's house for help.

The evidence is such that the trier of fact could find that as a result of the altercation Mrs. Schroder suffered pain and sustained nosebleeds, bruises on her arm and throat, and a black eye. She received no medical treatment for her injuries, nor did she miss work because of them.

Defendant testified that his wife initiated the fight while they were in the truck and that he responded by "showing speed," that is, he hit her lightly with the tips of the fingers to exhibit reflexive speed. According to defendant, after they arrived home Mrs. Schroder continued to "rant and rave," so he went outside to shoot his pistol in order to relieve his tension. He denies assaulting Mrs. Schroder with the gun. According to defendant, when his wife proceeded to drive away in the car, she

ran into him, knocking him onto the windshield.

At the behest of Mrs. Schroder the county attorney filed a complaint against defendant on August 11, 1982, charging him with assault in violation of Neb. Rev. Stat. § 28-310 (Reissue 1979). That statute provides:

> (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.
>
> (2) Assault in the third degree shall be a Class I misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it shall be a Class II misdemeanor.

Trial was had in the county court on September 8, 1982, and defendant was sentenced as aforesaid on that day. He appealed the conviction and sentence to the district court on September 13, 1982. On December 21, 1982, the appeal was submitted to the district court. Notwithstanding nine inquiries by the parties between January 3 and September 21, 1983, it was not until April 25, 1984, that the district court affirmed the judgment of the county court. In doing so, the district judge who acted on the appeal, and who was not responsible for the delay, noted the delay, expressed regret over its occurrence, and attributed it to the illness and retirement of the judges who had preceded him.

Defendant cites no direct authority for his contention that the delay in processing his appeal should result in a dismissal of the charge against him, but analogizes the right to a speedy trial to his situation, claiming a right to a speedy appeal.

The speedy trial statute, Neb. Rev. Stat. § 29-1205 (Reissue 1979), states that its purpose is "[t]o effectuate the right of the accused to a speedy trial and the interest of the public in prompt disposition of criminal cases . . . ." Neb. Rev. Stat. § 29-1207 (Reissue 1979) provides: "Every person indicted or informed against for any offense shall be brought to trial within six months . . . ." Neb. Rev. Stat. § 29-1208 (Reissue 1979) provides that "[i]f a defendant is not brought to trial before the running of the time for trial . . . he shall be entitled to his absolute discharge from the offense charged . . . ."

If there was ever any basis for doubt as to the nature of the proceeding in the district court when a criminal matter has been appealed to it from the county court, that doubt has been dispelled. The proceeding is not a trial. A district court, on criminal appeals from the county court, acts as an intermediate court of appeals reviewing the record for error. Neb. Rev. Stat. § 24-541.06(1) (Cum. Supp. 1982); Neb. Rev. Stat. § 29-613 (Reissue 1979); *State v. Hatfield, ante* p. 470, 356 N.W.2d 872 (1984); *State v. Turner, ante* p. 365, 355 N.W.2d 219 (1984); *State v. Olson*, 217 Neb. 130, 347 N.W.2d 862 (1984); *State v. Ferris*, 216 Neb. 606, 344 N.W.2d 668 (1984).

The right to appeal and the right to a speedy trial differ in two important respects.

First, the right to appeal a criminal conviction is not guaranteed by the U.S. Constitution, *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977), whereas a defendant is guaranteed the right to a speedy trial by the sixth amendment to the U.S. Constitution, *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), and *Klopfer v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967). Neb. Const. art. I, § 23, guarantees the right to appeal in all felony criminal cases, and Neb. Const. art. I, § 24, guarantees the right to appeal in all civil cases. However, our Constitution does not guarantee the right to appeal in misdemeanor cases. Therefore, defendant's right to appeal is not constitutionally based. As such, that right may be limited in certain ways without running afoul of constitutional principles. In *State v. Kelley*, 198 Neb. 805, 255 N.W.2d 840 (1977), we held that a period of limitation imposed on the right to appeal is constitutionally permissible. In doing so we stated: "It should first be said that a review by an appellate court of a final judgment in a criminal case, no matter how grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law . . . ." 198 Neb. at 808-09, 255 N.W.2d at 843.

The appeal in this case is grounded in Neb. Rev. Stat. §§ 24-541.01 (Cum. Supp. 1982) and 29-611 (Reissue 1979), each of which grants the right to appeal any county court final order or judgment and any judgment imposing a fine or

imprisonment, or both, to the district court. The provisions of these statutes govern the exercise of that right. As such, that right to appeal is of a different nature than the constitutionally based right to a speedy trial, as evidenced by our well-established rule that there must be compliance with the requirements set forth in a statute granting the right to appeal or this court gains no jurisdiction over the case. *Nicholson v. City of Bellevue*, 215 Neb. 540, 339 N.W.2d 758 (1983); *Whitehouse Energy Savers v. Hanlon*, 214 Neb. 572, 334 N.W.2d 802 (1983); *State v. Mills*, 179 Neb. 853, 140 N.W.2d 826 (1966).

Second, the Nebraska statutes codifying the sixth amendment right to a speedy trial, §§ 29-1205 through 29-1208, require that each defendant indicted or informed against be brought to trial within 6 months. The statutes which establish defendant's right to appeal, however, do not mention any time within which the appeal must be heard.

For the foregoing reasons the analogy which defendant invites us to adopt does not fit, and we therefore decline the invitation.

Defendant also cites us to *State v. Files*, 183 Conn. 586, 441 A.2d 27 (1981), as indirect authority for his position. Therein, the Connecticut Supreme Court held that a delay of 13 months in the filing of the state's appellate brief was unreasonable, and granted the defendant's motion to set aside the conviction. The court said: "We would be derelict in our responsibility for the administration of criminal justice if we were to permit the right to appeal to be undermined by unreasonable delay *by the state in defending against appeals*." (Emphasis supplied.) 183 Conn. at 589, 441 A.2d at 29. The court adopted a balancing test, identifying four factors to be weighed in determining undue delay: " '[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.' " *Id.*, quoting *Barker v. Wingo, supra.*

We note first that *Files* is factually distinguishable from the case presently before us. Here, the reason for the delay ascribed by the record was the illness and retirement of the judges involved in its disposition, while the delay in *Files* was caused by the state's failure to attend to the appeal with due diligence. The

Files court did not deal with appellate delay generally; rather, its language and holding are directed only to delay caused by the state's failure to timely defend appeals. Further, several cases have held, in the context of a defendant's right to a speedy trial, that the illness or incapacity of a judge justified a delay. *State v. Jennings*, 195 N.W.2d 351 (Iowa 1972); *Kopacka v. State*, 22 Wis. 2d 457, 126 N.W.2d 78 (1964). Finally, the *Files* court found that Files was prejudiced by the delay in his appeal because he was incarcerated for the entire 13-month period. The record here tells us defendant has not yet begun to serve his sentence and has been free to conduct his affairs during the pendency of his appeal. Moreover, we do not consider the *Files* rule to be sound and, accordingly, decline the invitation to adopt it as a part of the jurisprudence of this state. That is not to say we condone the delay involved here; such a failure of the system is inexcusable. Nonetheless, there are better and more just ways to deal with the problem than the method adopted by *Files*.

We therefore find defendant's first assignment of error to be without merit.

We have difficulty understanding the first portion of the second assignment of error. It complains that the lower courts failed to "find the degree of assault." The complaint refers to the specific statute alleged to have been violated, § 28-310. That statute defines the acts enumerated as being an assault in the third degree. Such being the case, there is no judicial discretion involved, nor is a specific finding required, in determining the degree of assault proved. The evidence either supports the charge or it does not.

The last portion of the second assignment of error complains that the trial court failed to find whether the assault was part of a mutual scuffle. This complaint requires that we recall the penalties for Class I and Class II misdemeanors. Neb. Rev. Stat. § 28-106 (Cum. Supp. 1984) provides no minimum punishment for Class I misdemeanors and a maximum punishment of imprisonment for not more than 1 year, a fine of $1,000, or both such imprisonment and fine. That same statute provides no minimum punishment for a Class II misdemeanor and a maximum punishment of imprisonment for 6 months, a

fine of $1,000, or both such imprisonment and fine.

Even if the evidence were to be held such as to support a finding that there was a mutual fight or scuffle, there is no evidence that there had been any mutual consent. The language of § 28-310(2) requires such consent to render the assault a Class II misdemeanor. The mere fact that two persons engage in a fight does not mean that both consented to fight. The assault was therefore necessarily a Class I misdemeanor. Consequently, the trial judge's failure to specify the class of misdemeanor in no way prejudiced the defendant.

There is no more merit to defendant's second assignment of error than there is to his first assignment.

In his third assignment of error defendant claims he was given multiple penalties for conviction of a single charge. The problem arises because, in its journal entry, the trial court did not specifically state that the fine and the jail sentence were imposed as conditions of probation. The bill of exceptions demonstrates, however, that at the sentencing hearing the judge stated: "[A]s part of the probation the defendant [will] pay a fine in the amount of $100 including the cost of this action and that the defendant serve 10 days in the county jail as part of the probation." We have said that "[w]hile a recital in a journal entry appearing in the transcript is presumptively true, an affirmative showing in the bill of exceptions that it is not true prevails over the presumption." *Waite v. State*, 169 Neb. 113, 119, 98 N.W.2d 688, 691 (1959). Here, the bill of exceptions affirmatively shows that the fine and jail term were intended to be a part of defendant's probation. In *State v. Sampson*, 203 Neb. 786, 280 N.W.2d 81 (1979), we stated that when a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute. Neb. Rev. Stat. § 29-2262(2)(b) (Reissue 1979) authorizes the court to require the defendant to be jailed periodically, not to exceed 90 days, and § 29-2262(2)(m) authorizes the court to require the defendant to pay a fine as conditions of probation. The conditions of probation imposed upon defendant were authorized by statute and, as such, were proper.

The record does not sustain the third assignment of error.

Defendant next argues that the trial court improperly

admitted into evidence a photograph which shows certain items of furniture and clothing lying outside the Schroder home the day following the incident. We need not decide whether that photograph was properly received in evidence, because our review of the record shows that in any event its admission, if erroneous, was harmless. The testimony of Mrs. Schroder, if believed by the trier of fact, contained enough information without the photograph to sustain a conviction of defendant for third degree assault. Further, defendant himself testified that he had thrown Mrs. Schroder's clothes and dresser into the yard during the episode in question. Defendant fails to convince us that the admission of evidence about which he later testified prejudiced him in any way. See *State v. Massey, ante* p. 492, 357 N.W.2d 181 (1984).

The fourth assignment of error is not sustained by the record.

Defendant next asserts that the trial court erred in sustaining the State's objection to certain testimony which he attempted to elicit on his own behalf. During defendant's direct testimony, the following colloquy took place:

> Q. [Defense Counsel] Okay, and then what happened?
>
> . . . .
>
> A. . . . Just the other side of the Mobil station the sheriff and the town cop pulled me into the Mobil station. And Weber asked me where I was hit and I said in the leg; I didn't know what he was talk'n about. He said which leg and I said both legs. He said you shot yourself---
>
> [Prosecutor]: Your Honor, objection. Hearsay as to what Weber may have told this particular witness.
>
> [Judge]: That'll be sustained.
>
> [Defense Counsel]: Your Honor I would respectfully show the Court that the testimony he's trying to give simply is what the sheriff said to him. He certainly is able to repeat what the sheriff said. I don't think he's said anything that's hearsay. He simply said the sheriff asked him certain questions.
>
> [Prosecutor]: But those were leading questions.
>
> [Judge]: Well probably if that area were testimony as to the conversation having taken place it would be admissible

> but the contents of the conversation and the veracity of that would be in question. The objection will be sustained as to being hearsay.

No offer of proof was ever made as to the contents of the disputed testimony. Neb. Rev. Stat. § 27-103 (Reissue 1979) provides in part:

> (1) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
>
> . . . .
>
> (b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

The substance of the testimony is not apparent from the context within which the question was asked, nor from the rambling response to it. We have said where, on objection, a ruling excluding evidence is made, an offer of proof is generally a prerequisite to our review on appeal unless it is apparent from the context within which the question was asked that the answer would have been material and competent. *State v. Fonville*, 197 Neb. 220, 248 N.W.2d 27 (1976). See, also, *Morris v. Laaker*, 213 Neb. 868, 331 N.W.2d 807 (1983). Accordingly, error, if any, in the trial court's refusal to allow the defendant's testimony may not be predicated on that ruling.

The fifth assignment of error fails.

Finally, defendant complains that the evidence presented at trial is not sufficient to sustain his conviction. Primarily, he argues that Mrs. Schroder's testimony was unreliable and unconvincing. We remind defendant 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 finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Coburn, ante* p. 144, 352 N.W.2d 605 (1984). Further, in a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision,

considered only evidence that is competent and relevant, and this court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment. *State v. Tomes, ante* p. 148, 352 N.W.2d 608 (1984). Our review of the record convinces us that the prosecution presented sufficient competent and relevant evidence to sustain defendant's conviction. We will not, therefore, overturn the lower court's decision.

As did the preceding five, the sixth, and last, assignment of error fails.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNEST HARPER, APPELLANT.
359 N.W.2d 806

Filed December 21, 1984. No. 84-448.

1. **Effectiveness of Counsel.** The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
2. **Criminal Law: Effectiveness of Counsel: Appeal and Error.** A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.
3. _____: _____: _____. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.

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

Anthony S. Troia, for appellant.

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

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

KRIVOSHA, C.J.

Ernest Harper appeals from an order entered by the district court for Douglas County, Nebraska, denying his request for post conviction relief sought pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). Specifically, Harper maintains that because his trial counsel failed to object to the introduction of evidence of a subsequent crime admittedly committed by Harper in Iowa, he was denied effective assistance of counsel in violation of his constitutional rights. We have reviewed the record and conclude that the district court was correct in denying Harper's request for post conviction relief.

Harper was initially charged by information with one count of robbery, one count of use of a firearm in the commission of a felony, and two counts of first degree sexual assault, all in violation of Nebraska statutes. Following trial to a jury, he was convicted on all counts and appealed to this court. On direct appeal his conviction was affirmed. See *State v. Harper*, 215 Neb. 686, 340 N.W.2d 391 (1983) (*Harper I*). The basis of Harper's direct appeal was that the district court erred in permitting the introduction into evidence of the subsequent crime committed by Harper in Iowa. We refused to consider that assignment on the merits in *Harper I* because Harper's trial counsel did not object to the introduction of the evidence and therefore waived any objection. Harper now maintains that the failure of trial counsel to object to the introduction of the evidence constituted ineffective assistance of counsel, thereby entitling him to post conviction relief.

The specific crime for which Harper was convicted in *Harper I* involved the robbery of a restaurant, during which Harper sexually assaulted an employee of the restaurant. The evidence which was offered at trial concerned a subsequent robbery committed by Harper and three others. During the robbery, one of the restaurant's female employees was forced to disrobe,

before Harper, anxious about the amount of time spent at the restaurant, ordered his companions to flee.

In attempting to determine whether Harper's counsel failed to provide him with effective assistance, it is necessary that we consider the standards by which effective assistance is measured. In *State v. Robinson, ante* p. 156, 159-60, 352 N.W.2d 879, 881-82 (1984), quoting from the U.S. Supreme Court decision of *Strickland v. Washington,* 466 U.S. ____, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), we said:

> "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
>
> . . . .
>
> "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.
>
> . . . .
>
> "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364-365, 101 S. Ct. 665, 667-668, 66 L. Ed. 2d 564 (1981). The purpose of the Sixth Amendment guarantee of

counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."

Further, in *State v. Robinson, supra* at 160-61, 352 N.W.2d at 882, we said:

"The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

. . . .

"The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. . . .

"In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."

Even before the U.S. Supreme Court rendered its decision in *Strickland*, this court adopted a two-part test for determining ineffective assistance of counsel. In *State v. Otey*, 212 Neb. 103,

105-06, 321 N.W.2d 453, 454-55 (1982), we said:

> "Nebraska employs a two-part test for determining whether an attorney has effectively counseled a criminal defendant. First, counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region. Counsel must also conscientiously protect his client's interests. *State v. Leadinghorse*, 192 Neb. 485, 222 N.W.2d 573 (1974); *State v. Lang*, 202 Neb. 9, 272 N.W.2d 775 (1978). A defendant challenging competency of counsel has the burden to establish it. *State v. Auger & Uitts*, 200 Neb. 53, 262 N.W.2d 187 (1978). In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. *State v. Mays*, 203 Neb. 487, 279 N.W.2d 146 (1979); *State v. Lang, supra; State v. Bartlett,* 199 Neb. 471, 259 N.W.2d 917 (1977)."

See *State v. Evans, ante* p. 849, 359 N.W.2d 790 (1984).

An examination of the record discloses that evidence of Harper's guilt presented at the trial on the merits was overwhelming and more than sufficient to convict Harper in any event. Harper was identified as the assailant through voice identification. Additionally, one of the victims identified clothing worn by Harper in the Iowa robbery as similar to the clothing worn by one of the assailants. A forensic serologist also testified that semen found on the slacks of one of the victims came from a person with the same blood type as Harper. And perhaps most important of all, Harper voluntarily took the stand and, on direct examination, admitted he had committed the Iowa crime, but maintained that because he did not assault the waitress in Iowa, he could not be guilty of assaulting the waitress in Nebraska, in effect attempting to use Neb. Rev. Stat. § 27-404(2) (Reissue 1979) in reverse. Once Harper testified on direct about the Iowa crime, he waived any objection to the earlier introduction of the Iowa crime. *Johnson v. Airport Authority*, 173 Neb. 801, 115 N.W.2d 426 (1962); *Sump v. Omaha Public Power Dist.*, 168 Neb. 120, 95 N.W.2d 209 (1959). One cannot elect a particular trial strategy and then complain if it proves unsuccessful. *State v. Evans, supra; State v. Otey, supra; State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917

(1977). We are unable to say that counsel's failure to object so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result or that if objection had been made, there is a reasonable probability that the result of the proceedings would have been different. It appears that the result of the trial would have been unchanged whether the evidence of the Iowa robbery had been admitted in evidence or not.

Harper has simply failed to show that he was prejudiced by the introduction of the evidence. For this reason, therefore, the judgment of the district court denying Harper's request for post conviction relief is affirmed.

AFFIRMED.

TIMOTHY L. CHOAT, APPELLANT, V. VICKY M. CHOAT, APPELLEE.
359 N.W.2d 810

Filed December 28, 1984. No. 83-722.

1. **Divorce: Courts: Jurisdiction.** During the 6-month period following a dissolution of marriage decree, the action is still pending, and the court can, at any time, for good reason, vacate or modify it.
2. **Divorce: Marriage.** During the entire pendency of a dissolution of marriage decree, the marital relation continues.
3. **Property Division: Appeal and Error.** The division of property in marriage dissolution cases is a matter initially entrusted to the sound discretion of the trial judge, which, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; however, where the evidence is in conflict, this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
4. **Property Division.** There is no mathematical formula for dividing property when a marriage is dissolved; such awards are to be determined by the facts in each case, the ultimate test being one of reasonableness.

Appeal from the District Court for Boone County: JOHN M. BROWER, Judge. Affirmed as modified.

Larry D. Bird of Treadway, Bird & Albin, P.C., for appellant.

Stan A. Emerson of Luckey, Sipple & Hansen, for appellee.

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

COLWELL, D.J., Retired.

Petitioner appeals a dissolution of marriage decree, claiming two errors, (1) the finding that medical charges incurred by his wife were joint debts to be paid by him and (2) the order requiring him to pay all major marital debts was unfair.

Timothy L. Choat and Vicky M. Choat were married August 2, 1980. No children were born of the marriage. Timothy is employed by his father, earning between $10,000 and $13,000 annually. Vicky has two jobs, earning about $6,000 annually.

The facts involve two successive dissolution proceedings commenced by Timothy. In the first, a decree was entered April 6, 1982; in May, Vicky had brain surgery, incurring about $11,000 in hospital and medical expenses; in August the parties reconciled, and upon joint motion the April 6 decree was set aside on September 21, 1982.

In February 1983 Timothy filed his second petition. A decree was entered July 12, 1983, assigning personal property to the parties: to Vicky, about $2,000, and to Timothy, from about $3,500 to $7,000, depending on whether the car assigned was valued at the time of separation or time of trial. This decree was modified as to debts on August 23, 1983, ordering Timothy to assume the obligations owed to his father (no amount stated), the medical bills amounting to $11,078.13, and a $400 utility account. Vicky was ordered to pay a $160 telephone bill. She had paid $400 on the medical bill.

As to the first assignment, there is no merit to Timothy's argument that since Vicky's medical expense occurred after the April 6, 1982, decree was entered, it was her separate debt. Neb. Rev. Stat. § 42-372 (Reissue 1984) provides in part:

> A decree dissolving a marriage shall not become final or operative until six months after the decree is rendered, except for the purpose of review by appeal . . . . If no such proceedings have been instituted, the court may, at any time within such six months, vacate or modify its decree. . . .

This statute has been long interpreted to mean that during the 6-month period following a dissolution of marriage decree, the action is still pending, and the court can, at any time, for good reason, vacate or modify it. See, *Shinn v. Shinn*, 148 Neb. 832, 29 N.W.2d 629 (1947); *State v. Palmer*, 215 Neb. 273, 338 N.W.2d 281 (1983). " ' "During the entire pendency of that decree, the marital relation continues. . . ." ' " *In re Estate of Watson*, 217 Neb. 305, 307, 348 N.W.2d 856, 858 (1984).

The April 6, 1982, decree was set aside within the 6-month period; it was a nullity, as the trial court found. The hospital and medical expenses were the joint debts of the parties. See *In re Estate of White*, 150 Neb. 167, 33 N.W.2d 470 (1948).

> [T]he division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. In our de novo review, where the evidence is in conflict, we will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.

Guggenmos v. Guggenmos, ante p. 746, 748-49, 359 N.W.2d 87, 90 (1984). "There is no mathematical formula for dividing property when a marriage is dissolved. *Such awards are to be determined by the facts in each case. . . . The ultimate test is one of reasonableness.*" (Emphasis supplied.) *Id.* at 752, 359 N.W.2d at 92-93.

Concerning the last assigned error, the focus is on two debt areas: (1) the joint medical debts above discussed and (2) Timothy's claim that he owes his father, Gary Choat, $22,000. The father did not testify, and there is no direct written evidence of that debt. Timothy's supporting testimony, including answers to questions put to him by the court seeking clarification, was evasive, inconclusive, and contradictory. In 1982 Timothy bought cattle for $33,000 with money supplied by his father; just prior to the entry of the July 12 decree, he sold the cattle for $47,000; from these proceeds he paid $16,000 on bills (no accounting made), and the $31,000 remaining was paid to his father to pay such bills as he saw fit. He testified as to

other advancements made by his father that were a part of the $22,000 debt: a $450 loan, $595 to Vicky, $5,558 for feed, $5,000 paid to a creditor bank, and $1,000 owing on Timothy's hospital account; however, the amount of liability, if any, of either party to Gary Choat is not established. It is noted that Timothy's motion for new trial includes a request to present new evidence to explain the confusion in the record concerning the $22,000 debt.

The debts of the parties are facts and circumstances to be considered in the property division. See, *Redmond v. Redmond*, 209 Neb. 745, 311 N.W.2d 517 (1981); 24 Am. Jur. 2d *Divorce and Separation* § 935 (1983). Likewise, Timothy's failure to account for the livestock and their sale proceeds as marital assets is a circumstance to be considered when assigning debt responsibility, see, *Edwards v. Edwards*, 199 Neb. 581, 260 N.W.2d 319 (1977), and *Baker v. Baker*, 201 Neb. 409, 267 N.W.2d 756 (1978), and the trial judge noted this circumstance when entering judgment.

Considering the joint obligation of the parties to pay the hospital and medical debts, the division of property, the earning capabilities of the parties, the failure to prove Timothy's liability to his father in any amount, and the other attending circumstances, there was no abuse of discretion in the debt responsibility order entered August 23, 1983, except that the first sentence should be modified to read, "1. Petitioner is to hold respondent harmless and to assume the outstanding obligation owed to his father as well as all medical bills that were incurred by the Respondent as identified in Exhibit '8' offered herein and admitted into evidence."

The appellee is allowed the sum of $750 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

VALERIE DUNCZA, APPELLEE, V. DONALD W. GOTTSCHALK, APPELLANT.

359 N.W.2d 813

Filed December 28, 1984. No. 83-862.

1. **Verdicts: Appeal and Error.** Generally, a verdict will not be set aside unless it is against the weight of the evidence or appears to be the result of passion, prejudice, mistake, or disregard of the evidence or the law.
2. **Verdicts: Damages: Appeal and Error.** Where damages include the intangible and quite subjective elements of pain and suffering, a verdict for such damages will not be interfered with unless it is so excessive or grossly disproportionate to the evidence as to be indicative of passion, prejudice, mistake, or disregard of the evidence or law.
3. **Verdicts: Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in such party's favor, giving also the benefit of inferences reasonably deducible from it.
4. **Assault: Damages.** Compensatory damages for assault and battery include the nature of the injuries sustained, and pain and suffering.

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

George A. Sutera of Sutera & Sutera, for appellant.

Stephen M. Swartz, for appellee.

BOSLAUGH, WHITE, and CAPORALE, JJ., and RIST, D.J., and COLWELL, D.J., Retired.

RIST, D.J.

The defendant, Donald W. Gottschalk, appeals from a verdict and judgment for the plaintiff, Valerie Duncza, in the amount of $6,500. Plaintiff's action was for an assault and battery upon her by the defendant.

Defendant's assignments of error are (1) that the verdict was excessive and the result of passion or prejudice, (2) that there was no sufficient or proper evidence of damages to sustain the verdict, and (3) that the trial court erred in not granting defendant a judgment notwithstanding the verdict or a remittitur or a new trial because the evidence as a matter of law would not sustain the amount of the verdict.

The applicable rules with respect to such assignments are as follows:

(1) Generally, a verdict will not be set aside unless it is against the weight of the evidence or appears to be the result of passion, prejudice, mistake, or disregard of the rules of evidence or the law. *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983).

(2) Where recovery is not a mere matter of computation and depends upon the intangible and quite subjective elements of pain and suffering, it will not be interfered with unless it is so excessive and so grossly unresponsive to the evidence as to be indicative of passion, prejudice, mistake, or misconception. *Stewart v. Ritz Cab Co.*, 185 Neb. 692, 178 N.W.2d 577 (1970).

(3) In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in his favor, and he must have the benefit of inferences reasonably deducible from it. *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979).

(4) The measure of recovery in a case of assault and battery is limited to compensatory damages. *Haumont v. Alexander*, 190 Neb. 637, 211 N.W.2d 119 (1973). Such damages include the nature of the injuries, and pain and suffering.

We consider the record in light of the foregoing rules, and find the evidence reflects the following. The plaintiff and her husband were renting an apartment in Omaha, Nebraska, from a nonresident landlord with whom they had a rent dispute after several months' occupancy. The landlord retained the defendant as his agent with respect to the apartment. On March 7, 1982, defendant entered the apartment without permission, ostensibly to inspect the premises and to deliver a 3-day notice to quit. Plaintiff objected to defendant's entry of the apartment and he left shortly thereafter.

Sometime during the middle of March 1982, an action in forcible entry and detainer was filed against plaintiff and her husband by the defendant and set for hearing on March 29. On that date plaintiff's husband appeared for the hearing, but plaintiff did not attend and remained in the apartment.

On the afternoon of March 29 the defendant came to the door of the apartment, requesting entry. Plaintiff refused and shut the door. Shortly thereafter, plaintiff heard glass shatter in another room of the apartment and, upon investigation, found

that defendant had entered the apartment through another door and had knocked a picture off a table. Plaintiff requested defendant to leave and he refused. Plaintiff, who was clad in a robe, became upset and sought to push defendant from the apartment. Defendant laughed at her. He then subsequently caught her arm, twisted it up behind her, and pushed her 8 to 10 feet across the room, where she fell, hitting her head and falling against an electric fireplace. The defendant held her down for several minutes. When defendant released her, she ran from the house to a neighbor to seek help.

The evidence reflects that as a result of this assault, plaintiff sustained a black eye, which partially swelled shut, bruising on the right side of her face, a bruise on her hip, and a minor cut on her foot. Plaintiff had no medical treatment for her injuries, and they cleared up in approximately 2 weeks.

Plaintiff testified that as a result of the assault, she was emotionally upset and remained so for some time thereafter; that she suffered embarrassment and humiliation at having to confront the defendant partially clad, being assaulted by him, and having to flee to a neighbor's home in that condition. She further testified that as a result of her eye being partially swelled shut, she was unable to drive until the injury abated and that she was embarrassed to appear at her job with her facial injuries.

We have examined the totality of the circumstances and the evidence offered, and determine that we are unable, as a matter of law, to hold that the jury abused its discretion in the verdict rendered. Paraphrasing *Anson v. Fletcher,* 192 Neb. 317, 220 N.W.2d 371 (1974), we determine that with respect to such subjective elements as the emotional distress and anguish caused by a humiliating assault and battery, and the resulting pain and suffering, this court is unwilling to substitute its personal views on damages for those of the jury. The jury, having seen and heard the witnesses, is in a better position to assess those damages than we are from a paper record. While the damages awarded may appear ample for the injuries and pain and suffering sustained, they are not such as warrant a finding on review that they are the result of passion or prejudice, and such damages are sustained by the evidence.

Appellee suggests in her brief that she be awarded attorney

fees in this proceeding. We know of no rule or doctrine permitting the same in a law action for damages such as this, and such request is denied.

The verdict and judgment thereon are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. IRIS JALLEN, APPELLEE.

359 N.W.2d 816

Filed December 28, 1984. No. 83-970.

1. **Sentences: Appeal and Error.** Where the State appeals a sentence under Neb. Rev. Stat. §§ 29-2320 et seq. (Cum. Supp. 1984), on the ground that the sentence is excessively lenient, a sentence imposed within statutory limits will not be disturbed on appeal unless there appears an abuse of the sentencing court's discretion.
2. **Probation and Parole: Appeal and Error.** The granting of probation, as opposed to the imposition of a sentence of imprisonment, will not be disturbed on appeal in the absence of any abuse of discretion by the sentencing court.

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

George Rhodes, Custer County Attorney, for appellant, and, on brief, Paul L. Douglas, Attorney General, and Lynne R. Fritz.

Brad Roth of Black & Sennett, and Robert Driscoll, for appellee.

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

GRANT, J.

On April 11, 1983, the sheriff of Custer County, Nebraska, served a copy of the information on defendant. The information charged defendant, Iris Jallen, with five separate counts of the delivery of a controlled substance, marijuana, during the time from August 5 to December 17, 1981. Each count was a Class III felony with a penalty of 1 to 20 years, or a

fine, or both. Jury trial was had on October 25 and 26, 1983, and defendant was convicted on each of the five felony counts against her. Defendant's motion for a new trial was overruled on December 9, 1983, and defendant was sentenced to "eighteen months of probation." Defendant did not appeal from the denial of her motion for new trial nor from the sentence imposed. The State has appealed only from the order of the district court placing defendant on probation, and has assigned as error only that the district court "abused its discretion in placing the defendant on probation, as based on the facts and circumstances of this case, said sentence is excessively lenient." For the reasons hereinafter stated we affirm the sentence of the district court.

The appeal herein taken by the State is based on Neb. Rev. Stat §§ 29-2320 to 29-2325 (Cum. Supp. 1984). These statutes authorize an appeal of a sentence imposed on a defendant by the county attorney charged with the prosecution of the defendant if, as stated in § 29-2320, "such attorney reasonably believes, based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient."

First of all, the State, through its brief, sets out the premise that a sentence imposed by a district court within the statutorily prescribed limits will not be disturbed on appeal unless there appears an abuse of the court's discretion. Defendant Jallen agrees with this premise in her brief. We too adopt this scope of review. We have consistently held, in affirming sentences imposed by trial courts, that a sentence imposed within statutory limits will not be overturned on appeal in the absence of abuse of discretion by the trial court. See, *State v. Reuter*, 216 Neb. 325, 343 N.W.2d 907 (1984); *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984); *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983). It is clear that the trial court's sentence in this case is within statutory limits provided by Neb. Rev. Stat. § 29-2260(2) (Cum. Supp. 1984), which authorizes the granting of probation in any case "for which mandatory imprisonment is not specifically required . . . ."

We apply the rule set out in *State v. Last*, 212 Neb. 596, 324 N.W.2d 402 (1982), with regard to appeals by defendants from the denial of probation, to the situation presented under

§ 29-2320 where the State appeals the granting of probation to a defendant. As provided in *Last* at 604, 324 N.W.2d at 406:

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

In reviewing the granting of probation, as distinguished from the denial of probation, we must use the same scope of review.

In so reviewing the case for an abuse of the trial court's discretion, our review is governed by § 29-2322, which sets out the factors we are to consider in determining whether the sentence imposed is "excessively lenient." Additionally, we note that § 29-2260(2)(a), (b), and (c) sets out factors to be considered by a sentencing judge in determining if a defendant should be imprisoned, while § 29-2260(3)(a) through (k) sets out factors to be considered in the decision to withhold imprisonment. The sentencing judge's discretion is guided by all these factors. Our review of the alleged abuse of the sentencing judge's discretion, therefore, must recognize these statutory guidelines set out for the direction of the sentencing judge in imposing or withholding imprisonment.

We turn, then, to the record before us in our review to determine if the sentencing court abused its discretion in placing this defendant on probation. The first matter which we are directed by § 29-2322 to have regard for is "The nature and circumstances of the offense." The record of the trial shows that each of defendant's convictions was based on a sale of approximately 1 pound of marijuana to an undercover law

enforcement officer in the town of Arnold, Nebraska, on the dates of August 5, September 10, 21, and 24, and December 17, 1981. The information was apparently prepared on January 12, 1983. Jury trial was had on October 25 and 26, 1983, resulting in the conviction of defendant. Defendant was sentenced to probation on December 9, 1983.

Other circumstances appear in the record by being placed therein by the prosecuting attorney in his remarks at sentencing to the sentencing judge. Those underlying circumstances were stated by the prosecuting attorney to be that this case was

> one of the Arnold cases and I guess the Court is well aware that the other Defendants received probation but I would point out the vast amount of difference between the other cases and this one. For one thing, in all the other cases but one there was a plea bargain in return for a plea of guilty the State agreed to recommend probation and to those Defendants that did that, they gave up their right to a trial, their right to a Jury and the right to take the chance that they could walk away from it a free person. They gave up all those things to enter a plea of guilty with the recommendation of probation and I think it would be unfair to them to give somebody the benefit of a bargain that wasn't made. There was one other case from Arnold where there was no plea bargain. That person took a Jury trial but in that case and all the other Arnold cases, the Defendant was charged with one count, just one transaction and in this case the Defendant had been convicted of five different counts occurring over a period of time.

In response, defendant's counsel informed the sentencing judge that "it would be contrary to all principles of American jurisprudence to tax her or penalize her for exercising her right to trial." The county attorney explained his statement to the sentencing court in his rebuttal remarks, when he said, "I didn't mean to say she shouldn't [sic] be punished for asking for a Jury trial. I simply wanted to say her case was different than all the rest and she shouldn't automatically get the same sentence as the rest of them did." The State makes much the same argument in its brief at 7.

The next matter the statute sets out that we should consider is "The history and characteristics of the defendant." The presentence investigation (hereinafter PSI) prepared by the probation officer showed defendant was 21 years old at the time of the crimes and 23 at the time of sentencing. The PSI also showed that defendant had worked at the same $3.75-per-hour job in Arnold, Nebraska, from May of 1981 to September of 1983, when she left due to a disagreement with her employer. This employment covered times before the crimes and for approximately 21 months after the crimes. The PSI report also showed that defendant had never been convicted of any felony before her arrest in this case and that she had not been involved in any criminal activity between the date of her arrest on July 9, 1982, and the preparation of the PSI on November 29, 1983. Defendant did have two speeding tickets—one in May of 1979 and one in February of 1980.

The PSI also showed that defendant's mother and father live in Sidney, Nebraska. They both have a good relationship with defendant and are supportive of her. Defendant graduated from high school in Sidney in 1978 and later fulfilled the requirements for state licensing in the field of cosmetology by completing courses at Western Nebraska Technical Community College, a state-operated vocational-technical school in Sidney. In early 1981 she worked three minimum wage jobs in Sidney at the same time, until she quit all her jobs, and she moved to Arnold after March of 1981 to live with a man 3 years her senior. As set out above, she remained employed in Arnold from May 1981 through September of 1983.

Other matters to be considered, as set out in § 29-2322 are: "The need for the sentence imposed" and "Any other matters appearing in the record which the court shall deem pertinent." No specific factual matters appear in the record in connection with these circumstances.

After being made aware of these factual matters, we then determine if the sentencing judge has applied correct law in considering all these matters. First, the law is settled that no defendant can be penalized for exercising his or her right to a jury trial. As the court has said in *State v. Lacy,* 195 Neb. 299, 304, 237 N.W.2d 650, 653, (1976), "It is true that a more severe

punishment cannot be exacted in order to punish a convicted person for exercising his right to trial." See, also, *Hess v. United States*, 496 F.2d 936, 938 (8th Cir. 1974), where the court stated, "This circuit has joined a host of other courts in recognizing that whether a defendant exercises his constitutional right to trial by jury to determine his guilt or innocence must have no bearing on the sentence imposed." Any conclusion to the contrary, as advocated by the county attorney herein, raises the possibility of misleading the sentencing judge as to defendant's constitutional rights. The sentencing judge apparently determined, and properly so, that he could not impose punishment on defendant for availing herself of her right to trial.

Further, the record does not disclose the dates of the earlier sentencings in the "Arnold cases," but the record does show that the other sentences were imposed before the sentence in this case. The sentencing judge is then faced with the possible problem of disparity in sentencing. *State v. Nix*, 215 Neb. 410, 411, 338 N.W.2d 782, 783 (1983), set out:

> In *State v. Shonkwiler*, 187 Neb. 747, 751, 194 N.W.2d 172, 174 (1972), we stated: "At least as early as 1905, this court expressed its view that where two or more defendants are convicted for the same offense and different penalties are inflicted, and it appears from the evidence that the defendant receiving the least punishment is at least equally guilty, it may be necessary for this court to examine the evidence to determine whether there were justifiable reasons for the distinctions and whether the higher sentence should be reduced."

Nix involved a "sting" operation in Lincoln, where defendant Nix and another defendant sold stolen property to undercover officers. The instant case involved an undercover drug operation in which, apparently, many criminals were caught. We are not given any information by either party as to the degree of involvement of the other criminals, nor their prior criminal records, but we do know they received probation. It is also clear that the sentencing judge knew the other defendants and was aware of the facts in the other cases.

The PSI includes the report made by the undercover officer

and indicates that although defendant made the sales in question, she may well have been acting as a dupe of others. It may well have been difficult for the sentencing judge, in possession of more knowledge about the cases than is presented to us, to view a 21-year-old first offender, newly arrived in Arnold, living in sordid conditions with a man somewhat older, as a mastermind in drug dealing. The number of drug sales, while disturbing, is not dispositive of the sentence for this defendant. After the first sale to the undercover agent, this defendant was merely one more fish caught in the State's net and was merely permitted by the State, while in this net, to entangle herself more deeply in illegal activities and make an absolute fool and disgrace of herself.

The trial judge knows that somewhere in his sentencing decision he must face the holdings of this court that he must not give disparate sentences for similarly situated defendants.

The State argues in its brief at 7 that defendant "refused to enter into a plea arrangement, but rather in spite of overwhelming evidence of guilt she proceeded to trial on all five counts." Defendant's counsel, without contradiction by the county attorney, told the sentencing court that the State had never offered this defendant a chance to enter into a plea agreement. All these factors bear on the sentencing court's consideration in treating this defendant fairly. The sentencing judge, on the scene, knows far more about the defendant and the crime than a court reviewing a cold record about all these matters, and may well determine that the court should grant this defendant probation, since other defendants had received probation.

When a judge makes his own determination and places an unpopular defendant on probation, he knows he is inviting criticism. Such a judge now is also inviting possible reversal of his sentence determination by this court if the local county attorney can get the Attorney General's permission to appeal to this court. We, as the reviewing court, must examine all the facts in the record (many of which are mentioned in the State's brief) that affect that sentencing judge's exercise of discretion. If we determine that the judge has not abused his discretion, we must affirm his decision—popular or not.

All in all, the sentencing judge in this case has determined a sentence within statutory limits. We cannot say that in view of all the facts, including those set out above, that he has abused his discretion.

Our review in this case has been made more difficult because the sentencing judge has not expressed the reasons for his sentence. The judge is not required to do so. Nonetheless, the parties are entitled to have us examine the record to determine if the sentencing judge has abused his discretion.

It may well have been that this court, if it were imposing the original sentence, might have concluded that a sentence of imprisonment was required. Whether granting probation, however, in this case is an abuse of discretion is another question. We answer that question to the contrary.

In so holding we recognize that defendant may not successfully complete her probation. As set out in *State v. Komor*, 213 Neb. 376, 378, 329 N.W.2d 120, 122 (1983):

> It may be that the defendant will prove himself incapable of successfully carrying out a sentence of probation; however, we deem that, in view of the treatment accorded defendant's coperpetrator, and especially in view of the fact defendant has no prior criminal record, defendant must in any event be given the opportunity to try.

We agree with that statement in this case.

AFFIRMED.

IN RE INTEREST OF M.S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. P.S.W., APPELLANT.

360 N.W.2d 478

Filed December 28, 1984. No. 84-218.

1. **Parental Rights: Appeal and Error.** This court reviews parental termination cases de novo on the record, giving great weight, where the evidence is in conflict, to the fact that the trial court has observed the parties and witnesses and judged their credibility.
2. **Parental Rights.** An order terminating parental rights must be supported by

clear and convincing evidence.

3. _____. A court may, within its discretion, order a parent to make reasonable efforts to rehabilitate, and a parent's failure to do so is an independent reason justifying termination of parental rights.
4. _____. When the best interests of a child so require because of the unfitness of a parent, the natural right of the parent to the care and custody of his or her own child must give way to the paramount interest of the state in protecting the rights of the child.
5. **Constitutional Law: Parental Rights.** A proceeding to terminate parental rights is not criminal in nature and therefore, absent questions which would subject the parent to criminal sanctions, does not trigger the protection afforded by the fifth amendment against self-incrimination.

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

Randal B. Brown, for appellant.

Randall L. Rehmeier, Otoe County Attorney, and Alan M. Wood, guardian ad litem, for appellee.

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

CAPORALE, J.

On June 29, 1983, the county court, sitting as a juvenile court, terminated the parental rights of the appellant mother with respect to M.S., a son born to her out of wedlock on April 17, 1981. The district court affirmed. On appeal to this court the mother assigns five errors, which combine to present two complaints: (1) That the evidence is not sufficient to support the termination of her parental rights; and (2) That she was unconstitutionally required to give testimony against her own interest. The record does not support either complaint. We therefore affirm.

The events leading to this appeal began on December 26, 1981, when police were called to a Nebraska City bar where they found the mother in a highly intoxicated state, with her infant son in tow. The infant was found to have vomited on himself and to be inadequately clothed in view of the below-freezing temperatures. In addition, the milk which the mother had been trying to feed him was sour. The police immediately placed the infant in temporary foster care, where it was observed that

there was an odor of alcohol on his breath; he appeared dazed, and although he would whimper occasionally, appeared lifeless and demonstrated little physical movement. During that first night in temporary foster care, he alternately screamed and resumed a lifeless appearance. He also broke out in cold sweats, refused to accept food, and vomited when force-fed. The following day he continued to break out in cold sweats, and it was then noted that the sweat smelled of alcohol.

On December 29, 1981, the State filed a petition seeking to terminate the mother's parental rights under the provisions of then Neb. Rev. Stat. § 43-202(2)(b) and (c) (Reissue 1978). The State alleged, among other things, that the child lacked proper parental care by reason of the mother's fault or habits; that she neglected and refused to provide necessary parental care and protection; and that she was unfit by reason of the habitual use of intoxicating liquor.

At the time the State filed its petition, § 43-202(2)(b) and (c) granted juvenile courts jurisdiction over a child lacking proper parental care by reason of the parents' fault or whose parents neglected or refused to provide the subsistence, education, or other care necessary for the child's health, morals, or well-being. Section 43-202 was repealed effective July 1, 1982; however, the aforedesignated provisions of that section are included in present Neb. Rev. Stat. § 43-247(3) (Cum. Supp. 1982). Neb. Rev. Stat. § 43-292 (Reissue 1984), which became effective July 1, 1982, authorizes termination of parental rights when it is in the best interests of a child who, among other circumstances, falls under the provisions of § 43-247(3). Prior to July 1, 1982, former Neb. Rev. Stat. § 43-209 (Reissue 1978) authorized termination of parental rights when it was in the best interests of a child, and the parent, among other things, substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection, or was unfit by reason of the habitual use of intoxicating liquor. Since the substance of the statutory provisions relevant to the State's allegations in this case has remained the same throughout these proceedings, we need not be concerned with the effect, if any, of the repeals of and changes in various portions of the statutes relating to juveniles

and juvenile courts, notwithstanding the State's failure to amend its petition.

In addressing the mother's first complaint, which questions the sufficiency of the evidence to support the termination of her parental rights, we review the matter de novo on the record, giving great weight, where the evidence is in conflict, to the fact that the trial court has observed the parties and witnesses and judged their credibility. We also keep in mind that an order terminating parental rights must be supported by clear and convincing evidence. *In re Interest of D.R. and S.B.*, 217 Neb. 883, 351 N.W.2d 424 (1984); *In re Interest of W.*, 217 Neb. 325, 348 N.W.2d 861 (1984).

Upon the filing of the State's petition the county court placed temporary care and custody of the infant in the Department of Public Welfare, now the Department of Social Services, which, in turn, placed his possession in a foster home. At this time the infant had poor motor coordination, did not hear well due to an ear infection, and had swollen genitals.

The evidence adduced at the adjudication hearing held on February 12, 1982, established that the mother was addicted to and dependent upon alcohol and that the prognosis for her recovery was poor. She had been arrested on October 31, 1981, for third offense drunk driving, and had frequently been intoxicated, on many of which occasions she had her inadequately clothed infant son with her. Upon this evidence the county court continued its prior custody order, directed that a social evaluation be prepared, and scheduled what proved to be the first of several dispositional hearings.

The first dispositional hearing was had on April 16, 1982, at which time the county court again continued its earlier order as to the infant's temporary custody, set a further hearing to determine whether parental rights should be terminated, and ordered the mother to follow a plan of rehabilitation. The plan required that the mother marry the man with whom she was then living; that both she and her husband then undergo alcohol counseling and treatment and attend parenting skills classes at Blue Valley Mental Health Center; that she refrain from criminal conduct; and that she exhibit the ability to financially and emotionally take care of the child.

At the second dispositional hearing held on July 28, 1982, it developed that the mother had, on May 7, 1982, been committed to the Nebraska Center for Women in York as the result of a conviction on the October 1981 drunk driving arrest. The mother testified that she had gone to the Blue Valley center two or three times following the April hearing for alcohol counseling, but had to quit upon her incarceration. She also testified that she had just begun to attend Alcoholics Anonymous meetings and parenting classes at the women's center.

The final dispositional hearing began on June 1, 1983, and concluded on its second day on June 15, 1983. It established that the mother had been living in a pickup camper until about the first day of this last hearing and had not obtained employment to that time. She had had a number of altercations with her husband of such a nature as to require police intervention. She had made but three contacts with the Blue Valley center regarding alcohol counseling following her release from the women's center on January 6, 1983, and had attended but one parenting class. She contacted the Blue Valley center again after the first day of this dispositional hearing, saying she had to have alcohol counseling and parenting training so that "it would look good to the court," but attended no alcohol abuse classes. Because of their limited contact with the mother, the counselors at the Blue Valley center were unable to give any opinion as to her eventual rehabilitation. The mother's Alcoholics Anonymous sponsor did testify that she had been attending Alcoholics Anonymous meetings for about a month and a half and believed that she had a sincere desire to deal with her alcoholism. He admitted, however, that her progress was slow. The mother testified she had visited her son but five times after her release from the women's center.

It is clear that the mother failed to substantially comply with the rehabilitation plan ordered by the county court. Although she did comply with the requirement that she marry the man with whom she was living, that event did nothing to make her a fit and capable parent. Having complied with that requirement, she cannot now complain of it. Neither are we required to comment as to the legal validity or invalidity of that

requirement. The feeble efforts the mother made to overcome her alcoholism and to acquire parenting skills were a classic case of "too little, too late" and were completely ineffective.

We have said that a court may, within its discretion, order a parent to make reasonable efforts to rehabilitate, and a parent's failure to do so is an independent reason justifying termination of parental rights. *In re Interest of W.*, 217 Neb. 325, 348 N.W.2d 861 (1984).

More importantly, when the best interests of a child so require because of the unfitness of a parent, the natural right of the parent to the care and custody of his or her own child must give way to the paramount interest of the State in protecting the rights of the child. *In re Interest of Levey*, 211 Neb. 66, 317 N.W.2d 760 (1982).

The evidence is clear and convincing that the mother has not become a fit parent and that the best interests of the infant require that her parental rights be terminated. The infant cannot be allowed to revert to the state in which he was found on December 26, 1981. Neither can the infant be made to " 'await uncertain parental maturity.' " *State v. Souza-Spittler*, 204 Neb. 503, 511, 283 N.W.2d 48, 52 (1979), quoting *Long v. Long*, 255 N.W.2d 140 (Iowa 1977). Stated another way, when a parent cannot rehabilitate herself within a reasonable time, the best interests of the child require that a final decision be made without delay. *In re Interest of W., supra.*

In her second complaint the mother argues that the State forced her to testify against her own best interest at the final dispositional hearing and, consequently, violated her federal constitutional right against self-incrimination. The claim rests on the fact that on the second day of that hearing, after the county judge overruled her objections, she testified about her failure to take full advantage of the counseling offered at the women's center, her unemployment, and her inadequate living accommodations.

The mother relies on *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), and *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), to support her contention. *Santosky* holds that the due process clause of the fourteenth amendment to the

U.S. Constitution requires that a state support its allegations in a parental termination proceeding by "clear and convincing evidence," a holding which we foreshadowed. *State v. Souza-Spittler, supra. Lassiter* holds that due process does not require that an indigent parent be appointed counsel in parental termination proceedings. Thus, both *Lassiter* and *Santosky* ground a parent's fundamental liberty interest in the care and custody of his or her child on the due process clause of the fourteenth amendment to the U.S. Constitution.

The right to remain silent is grounded upon the language of the fifth amendment to the U.S. Constitution, which in pertinent part reads: "No person shall be . . . compelled in any *criminal case* to be witness against himself . . . ." (Emphasis supplied.)

Although *In re Interest of Spradlin*, 214 Neb. 834, 336 N.W.2d 563 (1983), presented the issue in the context of a claimed requirement for the presence of counsel at interviews between the parents and expert witnesses, we said that a proceeding to terminate parental rights is statutorily mandated and brought about to protect a child; it is not criminal in nature. We now conclude that, absent questions which would subject the parent to criminal sanctions, a proceeding to terminate parental rights does not trigger the protection afforded by the fifth amendment against self-incrimination. No incriminating questions were asked of the mother in this case.

Nonetheless, the mother asks us to somehow blend a parent's fundamental fourteenth amendment due process right to the care and custody of his or her child with a criminal defendant's fifth amendment right to remain silent, so as to produce a hybrid right for a parent to remain silent in a parental termination proceeding. The request is without merit, and we consequently decline it.

The mother's complaints being unfounded, we affirm the judgment of the district court affirming the judgment of the county court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JASPER EDDIE FALKNER, APPELLANT.

360 N.W.2d 482

Filed December 28, 1984. No. 84-280.

1. **Prior Convictions: Right to Counsel: Waiver.** In order for a record of previous convictions to be used in an enhancement proceeding, the accused must be shown to have had counsel or to have knowingly and voluntarily waived counsel.
2. **Effectiveness of Counsel.** A claim of ineffective assistance of counsel must be supported by some proof of prejudice to the defendant before relief will be granted.

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

James P. Miller and Owen A. Giles, for appellant.

Jasper Eddie Falkner, pro se.

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

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

WHITE, J.

Appellant, Jasper Eddie Falkner, was convicted, after a jury trial, of being a felon in possession of a firearm (Neb. Rev. Stat. § 28-1206 (Reissue 1979)). At a separate enhancement hearing he was found to be a habitual criminal (Neb. Rev. Stat. § 29-2221 (Reissue 1979)) and sentenced to a term of from 10 to 20 years' imprisonment in the Nebraska Penal and Correctional Complex. He appeals.

Appellant assigns as error that there was insufficient evidence to convict him of the charge of being a felon in possession of a firearm. Appellant also contends that his trial counsel was incompetent and thus his rights under the sixth amendment of the U.S. Constitution were abridged.

About 9 p.m. on September 28, 1983, State Troopers William H. Jackson and Jim McConnell were traveling in a patrol car west on Interstate 80 near the Platte River in Sarpy County, Nebraska. The troopers observed debris partially obstructing traffic on one of the eastbound lanes of the

Interstate. Upon investigation the troopers found a speed limit sign which had apparently been damaged by a van located about 30 yards off the Interstate. The van was also damaged.

The troopers inspected the van, found no one in it, and determined that it was registered to the appellant. Trooper Jackson was apprised of the fact that appellant was on parole from the Nebraska Penal and Correctional Complex.

Returning to their patrol car, the troopers drove approximately a quarter of a mile in an easterly direction when they sighted four persons walking eastbound on the shoulder of the Interstate. Approaching from the rear, Trooper Jackson shined the patrol car floodlight on the group and advised them to walk back toward the patrol car. As the appellant neared the patrol car, he stepped off the paved shoulder and slid or fell down a muddy embankment, landing approximately 10 feet below the shoulder. When the defendant came to a rest, his back was to the officers and his hands were not visible. An impression of appellant's rear was left in the soft mud at the place where he came to rest. A light was shone on the area, and the officers recovered a loaded .22-caliber revolver within inches of the impression.

In order to prove the appellant's past felony conviction, the State introduced self-authenticating copies of court records indicating that the appellant had been convicted of robbery in Douglas County, Nebraska, and was sentenced to a term of from 7 to 8 years' imprisonment, and of the crime of "going armed with intent" in Pottawattamie County, Iowa, and sentenced to a term of 5 years. Each of the certified transcripts indicated appellant was represented by counsel during the proceedings.

Appellant does not dispute that he is the same Jasper Eddie Falkner named in the above convictions. He did, however, introduce evidence through the testimony of two of his companions that another person in the group, not the appellant, was in possession of the gun on the night in question. Although sketchy, it was apparently the appellant's defense that another person in the group had thrown the gun into the ditch prior to the troopers' arrival. The jury, as is its province, obviously chose not to accept the appellant's version of the facts

but, rather, concluded that the gun was carried by Falkner and then discarded at the end of his conveniently arranged slip or fall from the paved portion of the Interstate. Therefore, the first assignment is without merit.

The second assignment of error is more difficult to follow. Appeal counsel argues on direct appeal that the trial counsel was incompetent because he did not first investigate to determine the constitutional validity of the appellant's prior convictions in Douglas and Pottawattamie Counties. It is apparent on the face of the certified transcripts that the appellant at the time of the conviction had counsel, thus satisfying *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984), and *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983).

At the enhancement hearing, in addition to the evidence of the two previous convictions mentioned above, a certified copy of a third judgment and sentence for the crime of assault with intent to commit robbery was introduced into evidence. The transcript shows that the appellant was represented by counsel, convicted, and sentenced to a term of from 2 to 5 years' imprisonment for this crime.

We have recently repeated in *State v. Evans, ante* p. 849, 359 N.W.2d 790 (1984), our rule with respect to a claim of ineffective assistance of counsel. See, also, *State v. Robinson, ante* p. 156, 352 N.W.2d 879 (1984). We need not repeat it here. We merely point out that in those cases we stated that " '[i]n addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. . . .' " *State v. Evans, supra* at 852-53, 359 N.W.2d at 793.

Apart from the rather bold assertion that if trial counsel had investigated he may have found something constitutionally suspect in the previous convictions, we are not favored with any clue as to what those deficiencies might have been. Indeed, we are not even informed whether counsel on appeal investigated and discovered any such deficiencies. This assignment is also without merit.

It is extremely easy for appellate counsel to sully the reputation of trial counsel, yet like a thrown stone such a charge

is impossible to recall. The damage is done. Trial counsel is now labeled as incompetent, with absolutely no evidence to sustain that charge. We do not urge counsel on appeal to be anything less than aggressive in the representation of their clients on appeal. However, we do not condone representation in an irresponsible manner.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. BENITA M. RAMIREZ, APPELLEE.

360 N.W.2d 484

Filed December 28, 1984. No. 84-319.

Drunk Driving: Sentences. Under Neb. Rev. Stat. § 39-669.07(1) (Reissue 1984), the court-ordered suspending of driving privileges must be for a continuous period computed from the date the order of probation is entered.

Appeal from the District Court for Dawson County: HUGH STUART, Judge. Exception sustained.

Glenn A. Clark, Dawson County Attorney, for appellant.

James M. O'Rourke of Smith & Smith, for appellee.

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

PER CURIAM.

This case involves an appeal by the State, through the county attorney of Dawson County, pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1984). The State argues that the sentence given by the trial judge was not authorized by Neb. Rev. Stat. § 39-669.07 (Reissue 1984). We agree, and determine that under § 39-669.07(1) the court-ordered suspending of driving privileges must be for a continuous period computed from the date the order of probation is entered.

Defendant, Benita M. Ramirez, was cited on January 11, 1984, for driving while intoxicated. On January 26, 1984, she

entered a plea of guilty, which plea was accepted by the trial court. She was sentenced at that time to probation for 6 months. Terms of probation included a provision "[t]hat she shall not operate a motor vehicle for any purpose in the State of Nebraska for a period of sixty days. Said sixty days of suspension of driving privileges shall be on weekends only with the Defendant having the right to operate a motor vehicle during the week."

During the pendency of this appeal, we decided *State v. Havorka, ante* p. 367, 355 N.W.2d 343 (1984). We there stated that § 39-669.07 does not authorize a trial court to give an interrupted suspension of driving privileges. *Havorka* controls in this instance.

We note that defendant did not raise any issue as to the constitutionality of § 39-669.07 in this court until her response to the State's motion for summary dismissal or affirmance. Accordingly, we need not reach the issue.

As was *Havorka*, this case is here pursuant to § 29-2315.01. Therefore, we do not reverse and remand. We need only point out the trial court's error in light of our holding in *Havorka*.

EXCEPTION SUSTAINED.

TRACY CORPORATION II, A NEBRASKA CORPORATION, AND MICHAEL J. TRACY, APPELLANTS, V. NEBRASKA PUBLIC SERVICE COMMISSION ET AL., APPELLEES.

360 N.W.2d 485

Filed December 28, 1984. No. 84-491.

Jurisdiction: Appeal and Error. After an appeal has been perfected in this court, the trial court or any other lower tribunal is without jurisdiction to hear a case involving the same matter between the same parties.

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

John W. Herdzina of Abrahams, Kaslow & Cassman, for appellants.

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

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

PER CURIAM.

This is an appeal from the decision of the district court for Lancaster County which dismissed the petition of appellants. In their petition the appellants prayed the court to find void certain actions of the Nebraska Public Service Commission for failure to comply with the provisions of the Nebraska public meetings law. Neb. Rev. Stat. §§ 84-1408 et seq. (Reissue 1981 & Cum. Supp. 1984). A further explanation is necessary in order to understand the rather unusual jurisdictional problems raised by the appeal.

Sometime in the period from August 23 to September 6, 1983, the United Telephone Company of the West submitted a revised schedule of rates in an action pending before the commission. On September 6, 1983, a hearing was held and the revised rate schedule was approved by the commission. Unfortunately, the commission's mechanisms for providing notice to interested parties dismally failed, and the action of the commission, as conceded by the commission at a later time, was void.

On September 9, 1983, a motion for rehearing was filed by Tracy. This motion was overruled by the commission on October 25, 1983. Notice of appeal was filed on November 17, 1983. *Tracy Corp. II v. Nebraska Pub. Serv. Comm.*, No. 83-906.

On November 22, 1983, the instant petition was filed in the district court requesting that the commission's action be declared void. A request for an attorney fee was also made. Section 84-1414 provides in part:

> (3) Any citizen of this state may commence a suit in the district court of the county in which the public body ordinarily meets or in which the plaintiff resides for the purpose of requiring compliance with or preventing violations of sections 79-327, 84-1408 to 84-1414, and 85-104, for the purpose of declaring an action of a public

> body void, or for the purpose of determining the applicability of sections 79-327, 84-1408 to 84-1414, and 85-104 to discussions or decisions of the public body. The court may order payment of reasonable attorney fees and court costs to a successful plaintiff in a suit brought under this section.

Meanwhile, pursuant to the rules of this court, the appeal from the action of the commission was assigned to a prehearing conference officer. In their prehearing statement filed November 18, 1983, appellants stated as issue No. 4: "Whether the Commission violated the provisions of the Nebraska Public Meeting law and as a result thereof whether the Opinion and Findings and Order of the Commission dated September 6, 1983, is void . . . ."

After the prehearing conference a stipulation was entered into by the parties which agreed, subject to the approval of this court, that the order of the commission be set aside and the issue of the propriety of the proposed rate schedules be remanded to the commission for reconsideration after proper notice to all interested parties.

This court subsequently approved the stipulation by appropriate order. At issue here is paragraph 4 of the stipulation, which states:

> 4. A lawsuit is presently pending in the District Court of Lancaster County, Nebraska, at Docket No. 377 and page 12, captioned as follows: Tracy Corporation II, a Nebraska Corporation, and Michael J. Tracy, Plaintiff, v. Public Service Commission, Bob Brayton, Duane Gay, James F. Munnelly, Eric Rasmussen, Harold D. Simpson, Defendants. Section 84-1414 R.R.S. Nebraska, 1943, as amended states in part as follows: "The Court may order payment of reasonable attorney fees and court costs to a successful plaintiff in a suit brought under this section."
>
> The District Court of Lancaster County, Nebraska will determine the payment, if any, of a reasonable attorney fee to be awarded Tracy Corporation II and Michael J. Tracy.

Subsequently, the application for attorney fees was presented to the district court for Lancaster County. The trial court, in

rejecting the application, held:

> 4. This Court finds that it has no jurisdiction to allow fees in the instant case. Section 84-1414 R.R.S. 1943 provides that when a petitioner is successful in the DISTRICT COURT that the Court MAY allow attorney's fees. In the instant case filed in this court, there has been no decision in the case and the case is moot because the Supreme Court on direct appeal from the Public Service Commission determined the primary issue involved.
>
> 5. It is questionable as to whether this Court ever had jurisdiction in this case because the appeal to the Supreme Court with the identical issue was filed prior to the petition being filed in this Court. The Supreme Court having first acquired jurisdiction of the subject of the action retains such jurisdiction to the exclusion of any other Court in which the identical issue is raised.

We agree with the trial court. In *Tracy v. United Telephone Co., ante* p. 331, 353 N.W.2d 273 (1984), we held that after an appeal has been perfected in this court, the trial court or any other lower tribunal is without jurisdiction to hear a case involving the same matter between the same parties. The issue as to the violation of the public meetings law was before us at the time the instant petition was filed in the district court. The district court lacked power to act on the case at all times. It is elementary that the relief granted was in this court and that the issue in the district court was then moot as to the violation of the public meetings law. This court having previously approved the parties' stipulation that the public meetings law was violated, the district court had nothing left to decide.

So far as appellants' argument that this court, in approving the stipulation of the parties, directed the district court to consider payment of an attorney fee, it is rejected. This court merely approved the parties' stipulation. It did not forbid the district court to consider whether it had jurisdiction or whether the action was moot. The determination of the district court, being correct, is affirmed.

AFFIRMED.

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Accounting

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Acknowledgments

An acknowledgment is the act by which a party who has executed an instrument of conveyance as grantor goes before a competent officer or court and declares or acknowledges the same to be his genuine and voluntary act and deed.
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Actions

1. A litigant has no vested right in a mode of procedure, and an action commenced before an enactment changing the procedure in the court where the action is pending is properly triable under the changed procedure after the enactment becomes effective, unless the procedure is specifically retained by a saving clause.
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2. The management and internal affairs of a voluntary association are governed by its constitution and bylaws, which constitute a contract between the members of the association. While courts generally do not interfere with the internal affairs of a voluntary association, an action may be maintained for breach of contract if it can be shown that defendants violated the contractual terms of membership.
Straub v. American Bowling Congress 241
3. Generally, courts will not interfere with the internal affairs of an association to settle disputes between members or with regard to discipline or internal government, provided that the government of the society is administered fairly and in conformity with its laws and other applicable law and no property or civil rights have been violated.
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2. In order to be valid a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated.
County of Dodge v. Department of Health 346
3. An administrative agency cannot use its rule-making power to modify, alter, or enlarge provisions of a statute which it is charged with administering.
County of Dodge v. Department of Health 346
4. An administrative agency cannot interpret its rules and regulations in such a manner so that self-interpreted rules and regulations contravene the statute which the agency is obliged to administer.
County of Dodge v. Department of Health 346

Administrative Law

1. An appeal from a decision of the State Personnel Board is governed by the provisions of the State Administrative Procedure Act. In such an appeal the Supreme Court determines only whether the findings of the agency are supported by substantial evidence and whether the district court

applied the proper statutory criteria.
Buhrmann v. Sellentin 288
2. A failure to provide due process at some point in a termination procedure does not invalidate the termination if that defect is later cured.
Buhrmann v. Sellentin 288
3. Generally, the word "may" will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning.
Buhrmann v. Sellentin 288
4. The combination of investigative and adjudicative functions does not necessarily create an unconstitutional risk of bias in administrative adjudication.
Buhrmann v. Sellentin 288
5. When seeking to appeal an order of the director of the Department of Motor Vehicles, the appellant must execute and file the required bond within 20 days of the date of the final order complained of, and such filing is a jurisdictional requirement and condition precedent to the initiation of the appellate process.
Black v. State 572

Adoption

1. Appeals in adoption proceedings are reviewed by the district court and this court for error appearing in the record.
In re Adoption of C.L.R. and J.M.R. 319
2. As a general rule, satisfactions and discharges of accrued child support obligations, or the termination of future responsibility for the same as to the natural father, do not constitute an unwarranted payment of consideration which will vitiate a child relinquishment and consent to adoption.
In re Adoption of C.L.R. and J.M.R. 319
3. In cases involving the vacation or annulment of adoption decrees, the welfare of the child is the paramount consideration of the court.
In re Adoption of C.L.R. and J.M.R. 319
4. In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption form signed by a natural parent knowingly, intelligently, and voluntarily is valid.
McCormick v. State 338
5. A relinquishment conditioned upon the retention of some parental rights is invalid.
McCormick v. State 338

Adverse Possession

1. Title to real estate by adverse possession cannot be acquired without the simultaneous and continuous existence of each element of adverse possession for a period of 10 years.
   Hardt v. Eskam 81
2. Generally, seasonal and recreational use and, therefore, occasional use, even if occurring annually, cannot ripen into title for the real estate on which such recreation takes place.
   Hardt v. Eskam 81
3. Intermittent use by the adverse claimant, not inconsistent with and excluding the predominant and most suitable use of a disputed tract, cannot be the foundation for ownership by adverse possession.
   Hardt v. Eskam 81
4. The burden is on one who claims title by adverse possession to prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the statutory period, namely, 10 years.
   State Nat. Bank & Trust Co. v. Jacobsen 682
   Steinfeldt v. Klusmire 736
5. Where one by mistake as to the true boundary line enters upon and takes possession of land of another, claiming it as his own to a definite and certain boundary, by an actual, open, exclusive, and continuous possession thereof under such claim for 10 years or more, he acquires title thereto by adverse possession.
   State Nat. Bank & Trust Co. v. Jacobsen 682
6. Payment of taxes is a circumstance which may be considered with all other circumstances in determining the question of adverse possession.
   State Nat. Bank & Trust Co. v. Jacobsen 682
7. The claimant of title by adverse possession must show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description.
   Steinfeldt v. Klusmire 736

Affidavits

1. The oath to an affidavit is not required to be administered with any particular ceremony, but the affiant must perform some corporal act whereby he consciously takes upon himself the obligation of an oath.
   Moore v. Peterson 615
2. When attention of the person making an affidavit is called to the fact that it must be sworn to and, in recognition of this, he is asked to do some corporal act and he does it, the instrument

constitutes a statement under oath, irrespective of other formalities.
Moore v. Peterson 615
3. The act of signing an affidavit before an officer authorized to administer oaths may be a sufficient corporal act to satisfy the requirement of execution under oath.
Moore v. Peterson 615
4. Affidavits for search warrants must be tested in a commonsense, realistic fashion. Where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the court should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner.
State v. Hoxworth 647

Alcoholic Liquors

1. As a general rule, knowledge and consciousness of possession of alcoholic liquor are essential elements of proof to support a conviction for a minor being in possession of alcoholic liquor.
State v. Harris 75
2. Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction, in the absence of any other reasonable explanation for its presence.
State v. Harris 75
3. As a general rule, the mere presence of the minor passenger in a vehicle where alcohol is found, without more, is not sufficient to convict the minor of possession.
State v. Harris 75

Alimony

1. The ultimate test for determining the correctness of the division of marital property and an award of alimony is one of reasonableness.
Ruhnke v. Ruhnke 355
Raley v. Raley 644
2. An award of alimony may be modified or revoked for good cause shown.
Roth v. Roth 417
3. The condition of a spouse's business is not the sole factor in determining proper alimony. Rather, the earning capacity of a spouse operating a business is an element which is to be considered in determining alimony.
Gleason v. Gleason 629
4. It is proper to consider retirement benefits in determining

whether alimony should be awarded.
Raley v. Raley 644
5. In determining the amount of alimony to be awarded, a retirement benefit earned prior to the marriage may be considered.
Raley v. Raley 644
6. The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined.
Raley v. Raley 644
7. In awarding alimony the total obligation imposed upon the party and that party's ability to make the payments required must be considered in determining whether the award made was erroneous.
Raley v. Raley 644
8. The division of property and the awarding of alimony in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; however, where the evidence is in conflict, this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
Reuter v. Reuter 732

Appeal and Error

1. 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.
Suarez v. Omaha P.P. Dist. 4
2. A finding of fact made by a jury will not be set aside on appeal if it is supported by credible evidence.
Erin Rancho Motels v. United States F. & G. Co. 9
3. In an appeal of a juvenile case, including termination of parental rights, we review the record de novo, and regarding any disputed facts make our own findings independent of any conclusion reached by the trial court.
In re Interest of D. 23
4. A trial court's admission into evidence of a confession constitutes an independent determination by the trial court that the confession was voluntarily made, and such determination will not be set aside unless clearly erroneous.
State v. Gonzales 43
5. An order placing a juvenile in the Youth Development Center for evaluation is predispositional, interlocutory in nature, and not a final order for the purposes of appeal.
In re Interest of J.M.S. 72

6. There is no absolute right to trial by jury on appeal to the district court in probate matters unless such right is expressly conferred by statute.
In re Estate of Massie 103
7. There is no constitutional right to trial by jury in appeals to the district court from the county court in probate matters.
In re Estate of Massie 103
8. The lower court's findings concerning products of undue influence are determinations of fact. As such, the standard of review is whether the findings are supported by sufficient evidence, which are not to be disturbed unless clearly wrong.
In re Estate of Massie 103
9. In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant. This court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.
State v. Tomes 148
State v. Ruzicka 594
State v. Schroder 860
10. The findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and will not be reversed or set aside unless there is insufficient evidence in the record to warrant the award.
Tranmer v. Mass Merchandisers 151
Scott v. State 195
Smith v. Fremont Contract Carriers 652
11. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.
State v. Robinson 156
State v. Harper 870
12. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
State v. Robinson 156
13. In cases arising before January 1, 1982, a mechanic's lien foreclosure is to be considered by the Supreme Court on appeal de novo on the record, giving weight to the fact that the trial court has observed the witnesses and their manner of testifying.
Crane Rental, Inc. v. Hunnicutt Land Co. 170
14. The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not

disturb an order granting a new trial unless it clearly appears that there are no tenable grounds existing therefor.
Chmelka v. Continental Western Ins. Co. 186
State v. Tainter 855
15. The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, and its ruling will be upheld absent an abuse of discretion.
Chmelka v. Continental Western Ins. Co. 186
16. A jury verdict will not be disturbed on appeal unless it is clearly erroneous, against the preponderance of the evidence, and so clearly contrary to the findings that it is the duty of the reviewing court to correct it.
Chmelka v. Continental Western Ins. Co. 186
17. On appeal the findings and decision of the Workmen's Compensation Court must be considered in the light most favorable to the successful party, and every controverted fact must be decided in its favor.
Scott v. State 195
18. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred.
State v. Smith 201
State v. Massey 492
19. The admissibility of evidence of other crimes lies largely within the discretion of the trial court.
State v. Baker 207
20. As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workmen's Compensation Court.
Starr v. Swift & Co. 223
21. Where any of the substantial rights of the parties to a dissolution case remain undetermined and the case is retained for further action by the trial court, any orders entered are interlocutory and not final.
Gerber v. Gerber 228
22. The power of the courts to review the quasi-judicial actions of voluntary associations is extremely limited. The court can only determine whether there are inconsistencies between an association's rules and the action taken; whether the member has been treated unfairly in the proceedings; whether the association's actions were prompted by fraud, malice, or collusion; and whether the association's rules contravene public

policy or law.
Straub v. American Bowling Congress 241
23. Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong.
State v. McCarthy 246
24. The standard of review for denial of a motion to amend a pretrial order is whether there was an abuse of discretion.
Peterson v. North American Plant Breeders 258
25. The rules of this court require that assignments of error be separately numbered and paragraphed, and consideration of the case will be limited to errors assigned and discussed.
Scoular-Bishop Grain Co. v. Bassett Grain 280
26. An appeal from a decision of the State Personnel Board is governed by the provisions of the State Administrative Procedure Act. In such an appeal the Supreme Court determines only whether the findings of the agency are supported by substantial evidence and whether the district court applied the proper statutory criteria.
Buhrmann v. Sellentin 288
27. Appeals in adoption proceedings are reviewed by the district court and this court for error appearing in the record.
In re Adoption of C.L.R. and J.M.R. 319
28. An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.
Travelers Indemnity Co. v. Heim 326
29. After an appeal has been perfected in this court, the trial court or any other lower tribunal is without jurisdiction to hear a case involving the same matter between the same parties.
Tracy v. United Telephone Co. 331
Tracy Corp. II v. Nebraska Pub. Serv. Comm. 900
30. While matters in equity are reviewed de novo on appeal, the rule is that where there are issues of credibility of witnesses, this court must give weight to the fact that the trial court saw and heard them; the rule is also that this court will 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.
Krafka v. Brase 335
31. A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court.
McCormick v. State 338

32. A motion for post conviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
State v. Pope 361
State v. Juhl 792
33. A petitioner in a post conviction proceeding may not raise questions which could have been raised on direct appeal unless the questions are such that they would make the judgment of conviction void or voidable under the state or federal Constitution.
State v. Pope 361
State v. Juhl 792
34. Matters already litigated or which could have been raised on direct appeal are not properly included in an action seeking post conviction relief.
State v. Pope 361
35. Where an issue is known to the defendant at trial and he fails to raise it in his direct appeal, the appeal is waived.
State v. Pope 361
36. In criminal appeals from the county court, the district court serves as an intermediate court of appeals reviewing for error appearing on the record.
State v. Turner 365
State v. Schroder 860
37. In a criminal prosecution an assignment of error which requires an examination of evidence cannot prevail in the absence of a bill of exceptions; in such a case the only question is whether the pleadings are sufficient to sustain the judgment of the trial court.
State v. Turner 365
38. This court may reduce excessive criminal sentences.
State v. Klappal 374
39. A sentence imposed within statutory limits will not be disturbed on appeal absent evidence of an abuse of discretion by the trial court.
State v. Klappal 374
State v. McGuire 511
State v. Ruzicka 594
State v. Gillette 672
40. Holdings of this court on questions presented to it in reviewing the proceedings of the trial court become the law of the case.
Bass v. Dalton 379
41. Where questions are presented to this court on appeal, our holdings conclusively settle, for the purpose of that litigation, all matters ruled upon, either expressly or by necessary implication.
Bass v. Dalton 379

42. Where substantial rights of the parties remain undetermined and the cause is retained for further action, the order is interlocutory and not final.
Bass v. Dalton 379
43. In the absence of a final judgment, an order granting an accounting is not appealable.
Bass v. Dalton 379
44. Ordinarily, the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal, unless there is a plain error indicating a probable miscarriage of justice.
McCauley v. Briggs 403
45. Where an instruction presents an issue to the jury and correctly reflects the law on the issue, it is not error for the trial court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one.
McCauley v. Briggs 403
46. Objections to the validity of the judgment other than those pertaining to inadequate waiver of counsel must be raised by direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.
State v. Baxter 414
47. Generally, failure to object to instructions after they have been submitted to counsel for review, or failure to offer more specific instructions if counsel feels the court's instructions are not sufficiently specific, will preclude raising an objection on appeal.
Enyeart v. Swartz 425
48. The failure to give an instruction on the definition of proximate cause where it is one of the principal issues in the case must be considered by the court to be plain error, requiring reversal.
Enyeart v. Swartz 425
49. Appeals under the Nebraska Employment Security Law are reviewed de novo on the record from the district court, and it is the duty of this court to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof.
Taylor v. Collateral Control Corp. 432
McClemens v. United Parcel Serv. 689
50. Under the Nebraska Employment Security Law, where an employee appeals from a disqualification of unemployment compensation benefits, the burden of proof is on the employee to show that he involuntarily left his employment or did so with good cause.
Taylor v. Collateral Control Corp. 432

51. In reviewing whether there is sufficient evidence to support a conviction, this court neither determines the plausibility of explanations nor weighs the evidence, such matters being for the trier of fact; the conviction must be sustained if, viewing the evidence most favorably to the State, there is sufficient evidence to support it.
State v. Brennen 454
State v. Kakela 843
State v. Schroder 860
52. A finding by the trial court that a consent to search was given voluntarily will not be set aside on appeal unless clearly erroneous.
State v. Ferrell 463
53. On direct appeal this court has the power to remand the cause for 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 invoked appellate jurisdiction for the correction of errors.
State v. Ferrell 463
54. Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court.
State v. Hatfield 470
55. In a review on the record, where the bill of exceptions contains nothing to the contrary, the reviewing court will be limited in its consideration of the particular error alleged to a determination of whether the transcript supports the judgment.
State v. Hatfield 470
56. The duty of this court in determining whether probable cause to issue a search warrant exists is only to ensure that the magistrate had a substantial basis for concluding that such existed.
State v. Abraham 475
57. A proper decision will not be disturbed on review merely because it was rendered for the wrong reason.
State v. Fisher 479
58. Where a jury is waived in a law action, the disposition of the trial court has the effect of a jury verdict and is not to be disturbed on appeal unless it is clearly wrong.
South Sioux City Star v. Edwards 487
59. In determining whether to uphold a conviction, this court will sustain the jury's verdict if, viewing the evidence in a light most favorable to the State, there is sufficient evidence to support it.
State v. Massey 492
60. This court treats the determination of factual issues in a declaratory judgment action, which would otherwise be an action at law and tried without a jury, in the same manner as any

other action at law; accordingly, the findings of the trial court have the effect of a jury verdict and will not be set aside unless clearly wrong.
Occidental S. & L. v. Bell Fed. Credit Union 519

61. 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.
State v. Kaiser 556
R.D.N. v. T.N. 830

62. In a facial challenge to the overbreadth and vagueness of a law, that is, a claim that the law is invalid in toto and therefore incapable of any valid application, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge fails. The court then examines the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, upholds the challenge only if the enactment is impermissibly vague in all its applications.
State v. Frey 558

63. It is not the function of the Supreme Court to second-guess the Public Service Commission or to make independent findings. Determinations by the Public Service Commission are a matter peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed by the Supreme Court in the absence of a showing that the action of the Public Service Commission was illegal, arbitrary, capricious, or unreasonable.
In re Application of Northwestern Bell Tel. Co. 563

64. The striking of the balance between the competing interests of legitimate competition and the protection of the public interest are matters of legislative and administrative determination peculiarly resting in the judgment of the Public Service Commission. If there is evidence to sustain the findings of the Public Service Commission, the Supreme Court cannot substitute its judgment therefor.
In re Application of Northwestern Bell Tel. Co. 563

65. It is only where the findings of the Public Service Commission are against all the evidence that the Supreme Court may hold the Public Service Commission's findings are arbitrary or capricious.
In re Application of Northwestern Bell Tel. Co. 563

66. Where the Supreme Court reverses and remands a cause to the district court for a special purpose, on remand the district court has no power or jurisdiction to do anything except to proceed in

accordance with the mandate as interpreted in the light of the Supreme Court's opinion.
State ex rel. Hilt Truck Line v. Jensen 591
67. A trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. No judgment other than that directed or permitted by the Supreme Court's mandate may be rendered in the district court upon remand of a cause.
State ex rel. Hilt Truck Line v. Jensen 591
68. A 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 is insufficient to support it.
State v. Ruzicka 594
State v. Schroder 860
69. It is not the province of this court to weigh or resolve conflicts in the evidence or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it.
In re Application of McCarty 637
70. This court upon appeal cannot disturb findings of the Nebraska Public Service Commission unless it appears that some requirements of the law have been violated or disregarded or that the result reached cannot reasonably be derived from the facts proved.
In re Application of McCarty 637
71. On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.
In re Application of McCarty 637
72. The constitutionality of a statute is not before this court where the court order issued pursuant to the statute was never served upon the defendant.
State v. Skolnik 667
73. It is the rule in this jurisdiction that an order or sentence of the trial court denying probation will not be overruled on appeal unless there has been an abuse of discretion.
State v. Gillette 672
74. Where a summary judgment has been entered, the absence of a bill of exceptions results in the presumptions that the evidence sustains the trial court's finding that there was no genuine issue as to any material fact and that the case was correctly decided.
Stromsburg Bank v. Nuttelman 687

75. In the absence of a bill of exceptions, the only issue which will be considered on appeal of a summary judgment is the sufficiency of the pleadings to support the judgment.
Stromsburg Bank v. Nuttelman 687
76. On appeal a party may not complain of evidence to which he did not object at trial.
McClemens v. United Parcel Serv. 689
77. This court is obliged to reach its own independent conclusions on questions of law.
In re Estate of Corrigan 723
78. An action to foreclose a mechanic's lien is equitable in nature, and we review it de novo.
Smith v. Central Inv. Co. 728
79. The division of property and the awarding of alimony in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; however, where the evidence is in conflict, this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
Reuter v. Reuter 732
80. In an equitable action it is the duty of this court to try the issues of fact de novo on the record and to reach an independent conclusion without reference to the findings of the district court.
Steinfeldt v. Klusmire 736
81. In an equity action, when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
Steinfeldt v. Klusmire 736
82. Error without prejudice is not a ground for reversal.
Emery v. Mangiameli 740
83. The party appealing from the judgment has the burden to show prejudicial error.
Emery v. Mangiameli 740
84. A judgment will not be reversed by reason of any error or defect in the proceedings which does not affect the substantial rights of the adverse party.
Emery v. Mangiameli 740
85. The division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal,

will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; however, where the evidence is in conflict, this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
Guggenmos v. Guggenmos 746
Choat v. Choat 875

86. An abuse of discretion exists where the reasons or rulings of the trial judge are clearly untenable and deprive a party of a substantial right such as to amount to a denial of justice; it does not imply an improper motive, willful purpose, or intentional wrong.
Guggenmos v. Guggenmos 746

87. It is the duty of this court, on appeal of an action to annul a marriage, to retry the issue or issues of fact complained of de novo on the record and reach independent conclusions without reference to the conclusions reached by the trial judge, giving weight, where the evidence is in conflict, to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
Guggenmos v. Guggenmos 746

88. The manner of taking appeals from actions of the State Board of Education, pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), must be in the same manner in which appeals from any action of the State Board of Education are taken to the district court. However, because the language of a specific statute takes precedence over the language of a general statute, the time in which the appeal is to be taken must be within 20 days as provided in § 79-403(1), rather than 30 days as provided in Neb. Rev. Stat. § 84-917 (Reissue 1981).
In re Covault Freeholder Petition 763
In re Deveny Freeholder Petition 819

89. Pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), appeals are filed in the district court where the land is located rather than where the action is taken by the State Board of Education.
In re Covault Freeholder Petition 763

90. The time for taking an appeal from the action of the State Board of Education, pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), begins to run when the board, at a duly convened meeting at which minutes are required to be taken, votes to transfer the land, and not when it approves a formal memorandum.
In re Covault Freeholder Petition 763
In re Deveny Freeholder Petition 819

91. The action of the statutory board created under Neb. Rev. Stat.

§ 79-403(2) (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and on appeal therefrom to the district court the cause is triable de novo as though it had originally been instituted in such court.
In re Covault Freeholder Petition 763
92. When an appeal is conducted as a "trial de novo," as opposed to a "trial de novo on the record," it means literally a new hearing and not merely new findings of fact based upon a previous record.
In re Covault Freeholder Petition 763
93. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.
In re Covault Freeholder Petition 763
94. Where all of the acts necessary to effect accreditation of a school district have been met prior to the statutory board's ordering the transfer, and, in fact, formal accreditation is granted prior to the time the children begin school and prior to the time the district court acts on the appeal, the issue of accreditation must be considered to have become moot.
In re Covault Freeholder Petition 763
95. The district court may only acquire jurisdiction if an appeal is taken in the mode and manner and within the time provided by statute.
McCorison v. City of Lincoln 827
Northern Messenger v. Sorensen 846
State v. Schroder 860
96. If the statutory requirements are not met, the district court acquires no jurisdiction and may not enter any order other than an order of dismissal.
McCorison v. City of Lincoln 827
Northern Messenger v. Sorensen 846
State v. Schroder 860
97. A ruling of a trial judge on a motion to disqualify himself is immaterial where the cause is an action triable de novo on the record in this court.
R.D.N. v. T.N. 830
98. The Employment Security Law provides one avenue of judicial appeal when the dispute concerns benefit liability and another when the dispute concerns contribution liability.
Northern Messenger v. Sorensen 846
99. Neb. Rev. Stat. § 48-638 (Reissue 1984) provides for judicial review in benefit liability disputes by appeal to the district court for the county in which the individual claiming benefits claims to have been last employed, or in which such claimant resides, or to any district court upon which the parties may agree.
Northern Messenger v. Sorensen 846

100. Neb. Rev. Stat. § 48-650 (Reissue 1984) provides for judicial review in contribution liability disputes only by appeal to the district court for Lancaster County.
Northern Messenger v. Sorensen 846
101. One cannot elect a particular trial strategy and then complain if it proves unsuccessful.
State v. Evans 849
102. The asserted ground for a new trial must affect adversely the substantial rights of the defendant, and it must be shown that he was prejudiced thereby.
State v. Tainter 855
103. This court will not reexamine or pass on the trier of fact's determination of credibility.
State v. Tainter 855
104. To warrant reversal the misconduct of a witness must be of such a nature as to unduly influence the decision of the jury.
State v. Tainter 855
105. A review by an appellate court of a final judgment in a criminal case is not a necessary element of due process of law.
State v. Schroder 860
106. An undue delay in ruling upon an appeal does not warrant dismissal of a criminal charge.
State v. Schroder 860
107. While a recital in a journal entry appearing in the transcript is presumptively true, an affirmative showing in the bill of exceptions that it is not true prevails over the presumption.
State v. Schroder 860
108. An offer of proof is generally a prerequisite to our review of a ruling which excludes evidence unless it is apparent from the context within which the question was asked that the answer would have been material and competent.
State v. Schroder 860
109. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.
State v. Harper 870

110. Generally, a verdict will not be set aside unless it is against the weight of the evidence or appears to be the result of passion, prejudice, mistake, or disregard of the evidence or the law.
Duncza v. Gottschalk 879
111. Where damages include the intangible and quite subjective elements of pain and suffering, a verdict for such damages will not be interfered with unless it is so excessive or grossly disproportionate to the evidence as to be indicative of passion, prejudice, mistake, or disregard of the evidence or law.
Duncza v. Gottschalk 879
112. In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in such party's favor, giving also the benefit of inferences reasonably deducible from it.
Duncza v. Gottschalk 879
113. Where the State appeals a sentence under Neb. Rev. Stat. §§ 29-2320 et seq. (Cum. Supp. 1984), on the ground that the sentence is excessively lenient, a sentence imposed within statutory limits will not be disturbed on appeal unless there appears an abuse of the sentencing court's discretion.
State v. Jallen 882
114. The granting of probation, as opposed to the imposition of a sentence of imprisonment, will not be disturbed on appeal in the absence of any abuse of discretion by the sentencing court.
State v. Jallen 882
115. This court reviews parental termination cases de novo on the record, giving great weight, where the evidence is in conflict, to the fact that the trial court has observed the parties and witnesses and judged their credibility.
In re Interest of M.S. 889

Appeal Bonds

1. When seeking to appeal an order of the director of the Department of Motor Vehicles, the appellant must execute and file the required bond within 20 days of the date of the final order complained of, and such filing is a jurisdictional requirement and condition precedent to the initiation of the appellate process.
Black v. State 572
2. A defective or invalid bond may be amended if it has been filed and approved within the prescribed statutory time limits.
Black v. State 572

Arrests

1. "Fresh pursuit" is pursuit instituted immediately and with intent to take into custody a person fleeing and reasonably believed to

have committed a crime.
State v. Ferrell 463
2. A failure to take a prisoner arrested in a foreign state before a magistrate as required by statute does not invalidate an arrest made by officers in fresh pursuit.
State v. Ferrell 463
3. Where probable cause exists for the arrest of an accused in his motor vehicle upon a public highway and at that time probable cause for the search of his vehicle exists as well, a search of the vehicle a short time later at a different location while the vehicle is still in police custody is not unreasonable even though made without a warrant.
State v. McGuire 511
4. In determining the point at which an arrest has occurred, a court must look to the totality of the circumstances of a law enforcement officer's encounter with an individual and must view such circumstances objectively under a "reasonable person" standard.
State v. Horn 524
5. A peace officer may arrest without a warrant, if the officer has reasonable cause to believe that the person to be arrested has committed a felony.
State v. Horn 524
6. Under the guarantees of both the U.S. Constitution and the Constitution of the State of Nebraska, one may not be arrested without probable cause.
State v. Harrison 532
7. Probable cause to arrest exists at the moment when the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed.
State v. Harrison 532
8. If the facts available to the officer at the time of the arrest would warrant a man of reasonable caution in the belief the action was appropriate, then probable cause exists.
State v. Harrison 532

Assault

1. The questions as to who was the aggressor, whether there existed in the mind of the defendant apprehension based upon reasonable grounds therefor of imminent peril to life or limb of the defendant so as to justify his using force, and whether the means adopted for his defense were reasonable and appropriate for that purpose, in view of all the circumstances surrounding him at the time, are all essentially questions of fact of which the

judge or jury, as the case may be, is the sole judge.
State v. Hatfield 470
2. In dealing with a criminal charge all attempts to do physical violence which amount to a statutory assault are unlawful and a breach of the peace, and a person cannot consent to an unlawful assault.
State v. Hatfield 470
3. Compensatory damages for assault and battery include the nature of the injuries sustained, and pain and suffering.
Duncza v. Gottschalk 879

Assignments

Subject to any statute or decision which establishes a different rule for buyers of consumer goods, an agreement by a buyer that he will not assert against an assignee any claim or defense which he may have against the seller is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense.
AgriStor Credit Corp. v. Radtke 386

Associations

1. The management and internal affairs of a voluntary association are governed by its constitution and bylaws, which constitute a contract between the members of the association. While courts generally do not interfere with the internal affairs of a voluntary association, an action may be maintained for breach of contract if it can be shown that defendants violated the contractual terms of membership.
Straub v. American Bowling Congress 241
2. Generally, courts will not interfere with the internal affairs of an association to settle disputes between members or with regard to discipline or internal government, provided that the government of the society is administered fairly and in conformity with its laws and other applicable law and no property or civil rights have been violated.
Straub v. American Bowling Congress 241
3. A decision of the governing body of the association is binding and generally not subject to collateral attack in the courts.
Straub v. American Bowling Congress 241
4. The power of the courts to review the quasi-judicial actions of voluntary associations is extremely limited. The court can only determine whether there are inconsistencies between an association's rules and the action taken; whether the member has been treated unfairly in the proceedings; whether the association's actions were prompted by fraud, malice, or collusion; and whether the association's rules contravene public policy or law.
Straub v. American Bowling Congress 241

Attorney and Client

1. The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another, where a lawyer's representation of one client is rendered less effective by reason of his representation of another client, or where it becomes a lawyer's duty on behalf of one client to contend for that which his duty to another client would require him to oppose.
   State v. Turner 125
2. A conflict of interest exists whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing.
   State v. Turner 125
3. A sole attorney's multiple representation of codefendants is not per se a violation of the constitutional guarantee of effective assistance of counsel.
   State v. Turner 125
4. Prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance.
   State v. Turner 125
5. A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel.
   State v. Turner 125
6. A defendant can waive his right to assistance of an attorney unhindered by a conflict of interest, provided such waiver is voluntarily, knowingly, and intelligently done with sufficient awareness of relevant circumstances and likely consequences.
   State v. Turner 125
7. Henceforth, unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel in situations of joint and multiple representation.
   State v. Turner 125
8. A defendant will not be allowed to disrupt the orderly procedure of the trial court by discharging his counsel on the eve of trial and demanding that all proceedings be stayed while he attempts to find other counsel.
   State v. Keithley 707

Attorney Fees

1. A provision in a security agreement which seeks to impose an attorney fee on a debtor as part of the costs of suit to enforce the

security agreement and its underlying contract is contrary to the public policy of Nebraska and, therefore, void and unenforceable.
First National Bank v. Schroeder 397

2. Attorney fees may not be awarded in a filiation proceeding under Neb. Rev. Stat. ch. 13 (Reissue 1983).
State ex rel. Toledo v. Bockmann 428

3. An amendment to a workmen's compensation statute which provides for the payment of attorney fees relates to the remedy and affects procedure only, and does not interfere with substantive rights. Therefore, such fees as are provided may be taxed as an item of costs in entering judgment on a claim that arose before the amendatory act was passed.
Smith v. Fremont Contract Carriers 652

4. In a workmen's compensation case an employee may not withhold evidence of medical expense at the first hearing, inadvertent though it might be, and then claim on rehearing that an attorney fee should be awarded because the award was increased.
Smith v. Fremont Contract Carriers 652

5. The division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; however, where the evidence is in conflict, this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
Guggenmos v. Guggenmos 746

6. The award of an attorney fee involves a consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, the customary charges of the bar for similar services, the earning capacity of the parties, and the general equities of the case.
Guggenmos v. Guggenmos 746

7. The amount of the allowance for attorney fees under Neb. Rev. Stat. § 44-359 (Reissue 1978) generally rests in the sound discretion of the trial court.
Smith v. Union Ins. Co. 797

Attorneys at Law

A cause of action for malpractice accrues upon the violation of a legal right.
Rosnick v. Marks 499

Banks and Banking

1. Under Neb. U.C.C. § 3-802 (Reissue 1980), unless otherwise agreed, where a personal check is taken for an underlying obligation, the obligation is suspended pro tanto until the presentment of the check. If the check is dishonored, an action may be maintained on either the check or the obligation.
   Rose v. United States Nat. Bank 97
2. When a check is sent for collection to be held by the payor bank for a reasonable period until sufficient funds become available in the account, it is not a presentment within the meaning of Neb. U.C.C. § 3-504 (Reissue 1980).
   Rose v. United States Nat. Bank 97

Blood, Breath, and Urine Tests

1. Law enforcement agencies are not required to preserve breath samples in order to introduce breath analysis tests at trial.
   State v. Vernon 539
2. Where the arrest and refusal took place prior to the effective date of the amendment to the implied consent law, the rights of the parties are fixed by the statute as it existed prior to the amendment.
   Moore v. Peterson 615

Breach of Contract

1. The management and internal affairs of a voluntary association are governed by its constitution and bylaws, which constitute a contract between the members of the association. While courts generally do not interfere with the internal affairs of a voluntary association, an action may be maintained for breach of contract if it can be shown that defendants violated the contractual terms of membership.
   Straub v. American Bowling Congress 241
2. A suit to recover monetary damages for services rendered presents an action at law for the breach of a contract.
   South Sioux City Star v. Edwards 487

Burglary

1. Neither an acquittal nor a conviction of a larceny committed in the course of a burglary bars a prosecution for the crime of burglary.
   State v. Cole 1
2. Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry, if those facts and circumstances are of such a nature as to present a jury question as to defendant's intent.
   State v. Coburn 144

Child Custody

1. Custody of minor children is determined on the basis of their best interests.
   Trimble v. Trimble 118
2. An award of joint custody of minor children is not favored. Such an award must be reserved for the most rare of cases.
   Trimble v. Trimble 118
3. A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court.
   McCormick v. State 338

Child Support

1. Alteration of ability to pay is a factor in determining whether there has been a material change in circumstances justifying a modification of a child support order.
   Morisch v. Morisch 412
2. In a contested filiation proceeding under Neb. Rev. Stat. ch. 13 (Reissue 1983), the district court has jurisdiction to modify the amount of child support where there is a change of circumstances of the parties after the entry of a support order.
   State ex rel. Toledo v. Bockmann 428
3. A decree fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modifications in the best interests of the children.
   Tworek v. Tworek 808
4. A proceeding to modify a judgment for child support is not a retrial of the original case or a review of the equities of the original decree.
   Tworek v. Tworek 808
5. Where an award for child support is made in one amount for each succeeding month for more than one child, it will be presumed to continue in force for the full amount until the youngest child reaches his majority.
   Tworek v. Tworek 808
6. A single amount to be paid periodically for the support of more than one child is not subject to an automatic pro rata reduction.
   Tworek v. Tworek 808

Circumstantial Evidence

1. Where circumstantial evidence is relied upon to prove the elements of a crime, the circumstances must relate directly to the guilt of the accused beyond all reasonable doubt.
   State v. Harris 75
2. A plaintiff may establish his case by direct or circumstantial

evidence.
Chmelka v. Continental Western Ins. Co. 186
3. The burden of establishing a cause of action by circumstantial evidence requires that the evidence be of such character and the circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved.
Chmelka v. Continental Western Ins. Co. 186
4. One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt.
State v. Piskorski 543

Claims

1. Where the amount of a loss, the subject of litigation, cannot be computed without opinion or discretion, as a general rule the claim is unliquidated and prejudgment interest is not recoverable.
Erin Rancho Motels v. United States F. & G. Co. 9
Peterson v. North American Plant Breeders 258
2. When a counterclaim is filed by an estate, the defendant may plead the defense of recoupment to reduce the amount of the counterclaim even though the defendant did not file a claim against the estate.
In re Estate of Massie 103
3. The defense of recoupment is not barred by Neb. Rev. Stat. § 30-2485 (Reissue 1979).
In re Estate of Massie 103
4. The defense of recoupment, by its nature, can only be used in a defensive character relating to the same transaction.
In re Estate of Massie 103

Collateral Attack

A decision of the governing body of the association is binding and generally not subject to collateral attack in the courts.
Straub v. American Bowling Congress 241

Confessions

1. A trial court's admission into evidence of a confession constitutes an independent determination by the trial court that the confession was voluntarily made, and such determination will not be set aside unless clearly erroneous.
State v. Gonzales 43
2. A statement from a person involved in a crime with the defendant may provide enough trustworthy information to permit the issuance of an arrest warrant.
State v. Gonzales 43
3. Voluntary statements made to third persons who were not then

acting as police officers or their equivalent are not inadmissible, even though the individual did not receive his *Miranda* warnings.
State v. Robinson 156

4. Statements made by a person not accused of a crime but in custody or otherwise deprived of his freedom of action in a significant way are not admissible in evidence unless the person has been advised of his *Miranda* rights.
State v. McCarthy 246

5. In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances.
State v. Joy 310

6. Once the right to counsel and the right to remain silent have been invoked by a defendant, the defendant cannot be persuaded to waive his rights, and there is a strong presumption against waiver. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.
State v. Joy 310

7. An accused who has expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.
State v. Joy 310

Conflict of Interest

1. The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another, where a lawyer's representation of one client is rendered less effective by reason of his representation of another client, or where it becomes a lawyer's duty on behalf of one client to contend for that which his duty to another client would require him to oppose.
State v. Turner 125

2. A conflict of interest exists whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing.
State v. Turner 125

3. A sole attorney's multiple representation of codefendants is not per se a violation of the constitutional guarantee of effective

assistance of counsel.
State v. Turner 125
4. Prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance.
State v. Turner 125
5. A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel.
State v. Turner 125
6. A defendant can waive his right to assistance of an attorney unhindered by a conflict of interest, provided such waiver is voluntarily, knowingly, and intelligently done with sufficient awareness of relevant circumstances and likely consequences.
State v. Turner 125
7. Henceforth, unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel in situations of joint and multiple representation.
State v. Turner 125
8. A prosecutor who has previously represented the spouse of one who is now being prosecuted for a crime is not necessarily disqualified as a prosecutor unless the alleged criminal act arose out of the marital relationship or, because of such prior representation, the attorney has obtained confidential information which may be prejudicial to the interest of the defendant.
State v. Hatfield 470

Constitutional Law

1. There is no constitutional right to trial by jury in appeals to the district court from the county court in probate matters.
In re Estate of Massie 103
2. A sole attorney's multiple representation of codefendants is not per se a violation of the constitutional guarantee of effective assistance of counsel.
State v. Turner 125
3. The combination of investigative and adjudicative functions does not necessarily create an unconstitutional risk of bias in administrative adjudication.
Buhrmann v. Sellentin 288
4. It is differing treatment accorded on the basis of an arbitrary and unreasonable classification which is prohibited by the fourteenth amendment to the U.S. Constitution.
State v. Fisher 479

5. The requirement of Neb. Const. art. I, § 13, that all courts be open and every person have a remedy by due process of law for any injury to his person, does not mean that reasonable limits may not be imposed upon the time within which one must seek redress in the courts.
Rosnick v. Marks 499
6. Under the guarantees of both the U.S. Constitution and the Constitution of the State of Nebraska, one may not be arrested without probable cause.
State v. Harrison 532
7. An indictment or information meets all constitutional requirements (1) if it shows that the acts which defendant is charged with committing amounted to a crime which the court had power to punish and that it was committed within the territorial jurisdiction of the court, (2) if it informs the defendant of the nature of the charge against him, and (3) if it constitutes a record from which it can be determined whether a subsequent proceeding is barred by the former adjudication.
State v. Piskorski 543
8. 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.
State v. Kaiser 556
9. A statute may be constitutionally infirm by reason of being vague, or because it is overbroad.
State v. Frey 558
10. A statute is vague if its prohibitions are not clearly defined.
State v. Frey 558
11. A statute which is clear and precise, and therefore not vague, may nonetheless be overbroad in the sense that it prohibits the exercise of constitutionally protected conduct, such as the exercise of first amendment rights.
State v. Frey 558
12. In a facial challenge to the overbreadth and vagueness of a law, that is, a claim that the law is invalid in toto and therefore incapable of any valid application, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge fails. The court then examines the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, upholds the challenge only if the enactment is impermissibly vague in all its applications.
State v. Frey 558
13. Jeopardy does not attach to the sustainment of a criminal

defendant's motion to quash an information.
State v. Frey 558
14. The sixth amendment to the U.S. Constitution guarantees to a defendant compulsory process for obtaining witnesses in his favor. That clause is violated when a defendant is arbitrarily deprived of testimony that would have been relevant, material, and vital to the defense. The defendant must at least make some plausible showing of how the testimony of the absent witness would have been both material and favorable to the defense.
State v. Rayes 588
15. This court does not sit as a superlegislature to review the wisdom of legislative acts.
State v. Ruzicka 594
16. All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature. If the classification of persons singled out by the legislation is reasonable and not arbitrary, and is based on substantial differences having a reasonable relation to the persons dealt with and the public purpose to be achieved, it meets the constitutional test of equal protection.
State v. Ruzicka 594
17. Neb. Rev. Stat. § 28-802 (Reissue 1979) does not violate the constitutional guarantee of equal protection.
State v. Ruzicka 594
18. The eighth amendment to the U.S. Constitution prohibits punishment which is grossly disproportionate to the severity of the crime.
State v. Ruzicka 594
19. Neb. Const. art. I, § 9, prohibiting "cruel and unusual" punishment, does not abridge the Legislature's power to select such punishment as it deems most effective in the suppression of crime, provided the punishment is not grossly disproportionate to the crime.
State v. Ruzicka 594
20. The constitutionality of a statute is not before this court where the court order issued pursuant to the statute was never served upon the defendant.
State v. Skolnik 667
21. Seizure of theater owner's films without a warrant is not justified under the fourth amendment to the U.S. Constitution or article I, § 7, of the Nebraska Constitution in the absence of probable cause and exigent circumstances or some other recognized exception.
State v. Skolnik 667
22. The party attacking a statutory classification must carry the burden of showing that the classification does not rest on any

reasonable basis.
Farm Bureau Life Ins. Co. v. Luebbe 694
23. When no fundamental rights or suspect classification is affected, the equal protection clause of the fourteenth amendment to the U.S. Constitution requires only that the state law be shown to bear some rational relationship to legitimate state purposes.
Farm Bureau Life Ins. Co. v. Luebbe 694
24. A statute may discriminate in favor of a certain class if the discrimination is founded upon a reasonable distinction, or difference in state policy, or if any state of facts can reasonably be conceived which would sustain the classification.
Farm Bureau Life Ins. Co. v. Luebbe 694
25. Neb. Rev. Stat. § 44-359 (Reissue 1978) violates neither the equal protection clause of the fourteenth amendment to the U.S. Constitution nor the special law clause of article III, § 18, of the Nebraska Constitution, and is constitutional.
Farm Bureau Life Ins. Co. v. Luebbe 694
26. Neb. Rev. Stat. § 20-148 (Reissue 1977) does not waive the sovereign immunity of the State of Nebraska as to actions brought in federal court under 42 U.S.C. § 1983 (1982) to protect rights under the contract clause (article I, § 10, of the U.S. Constitution) and property interests protected under the fourteenth amendment to the U.S. Constitution.
Wiseman v. Keller 717
27. Constitutional issues not properly before the court below will not be considered by this court for the first time on appeal.
R.D.N. v. T.N. 830
28. A review by an appellate court of a final judgment in a criminal case is not a necessary element of due process of law.
State v. Schroder 860
29. A proceeding to terminate parental rights is not criminal in nature and therefore, absent questions which would subject the parent to criminal sanctions, does not trigger the protection afforded by the fifth amendment against self-incrimination.
In re Interest of M.S. 889

Construction Contracts

1. Agreed prices between a lessor of equipment and a general contractor are not binding on the owner of land where the leased equipment is used, but such prices may be taken as prima facie correct.
Crane Rental, Inc. v. Hunnicutt Land Co. 170
2. Where leased equipment is used by a general contractor on more than one jobsite, the lessor of the equipment has the burden of proving both the rental price of the leased equipment and the length of time it was used on the land as to which a lien is

claimed.
Crane Rental, Inc. v. Hunnicutt Land Co. 170

Consumer Protection

Generally, institutions that are governed by the Nebraska Department of Banking and Finance or the Nebraska State Real Estate Commission are exempt from the provisions of the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1978).
Little v. Gillette 271

Contempt

1. A coercive contempt sanction is not final and therefore not appealable; it is subject to collateral attack by habeas corpus.
Rol v. Rol 305
Sorensen v. Peterson 680
2. A contempt sanction which aims to compel future obedience to the court's orders and decrees is conditioned upon the contemner's continued noncompliance and is coercive in nature.
Sorensen v. Peterson 680
3. A punitive contempt sanction is absolute and not subject to mitigation if the contemner alters his future conduct toward the court.
Sorensen v. Peterson 680
4. A punitive contempt sanction takes on the aspects of a final order or an order affecting a substantial right issued in a special proceeding and is appealable.
Sorensen v. Peterson 680

Contracts

1. In an action for reformation of a written contract or deed, the burden of proof rests on the moving party to overcome the strong presumption arising from the terms of the written instrument.
Johnson v. Stover 250
2. Equity will decree reformation of a contract for mutual mistake or where there is a mistake on one side and fraud or inequitable conduct on the other.
Johnson v. Stover 250
3. Where a party is induced to enter a contract by fraud, the party must, upon discovery of the fraud, elect a remedy and shall either affirm the contract and sue for damages or disaffirm and be reinstated to the position existing prior to the contract.
Little v. Gillette 271
4. Subject to any statute or decision which establishes a different rule for buyers of consumer goods, an agreement by a buyer that he will not assert against an assignee any claim or defense which he may have against the seller is enforceable by an assignee who

takes his assignment for value, in good faith and without notice of a claim or defense.
AgriStor Credit Corp. v. Radtke 386
5. A provision in a security agreement which seeks to impose an attorney fee on a debtor as part of the costs of suit to enforce the security agreement and its underlying contract is contrary to the public policy of Nebraska and, therefore, void and unenforceable.
First National Bank v. Schroeder 397
6. One who by contract imposes a duty upon himself must substantially comply with that undertaking.
Occidental S. & L. v. Bell Fed. Credit Union 519
7. A sublessor who undertakes to grant renewal options he cannot deliver becomes, by reason of that breach of contract, liable in damages.
Occidental S. & L. v. Bell Fed. Credit Union 519
8. In order to satisfy the requirements of Neb. Rev. Stat. § 36-106 (Reissue 1978), the burden is upon the proponent to prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in performance are referable solely to the contract sought to be enforced, so that nonperformance by the other party would amount to a fraud upon him.
Darsaklis v. Schildt 605
9. A contract to convey the homestead of a married person is absolutely void and unenforceable unless validly executed and acknowledged by both husband and wife.
Christensen v. Arant 625
10. It is well recognized that, as a general rule, every contract for work or services includes an implied duty to perform the work or services skillfully, carefully, diligently, and in a workmanlike manner.
Smith v. Central Inv. Co. 728
11. While, generally, control, or the right of control, is the chief criterion in the determination of whether one acts as an independent contractor, one engaging an independent contractor may exercise such control as is necessary to assure performance of the contract in accordance with its terms without becoming an employer.
Eden v. Spaulding 799
12. Upon the execution of a contract for the sale of real estate, the equitable ownership of the property vests in the vendee, even though the seller retains the legal title as security for deferred installment payments of the purchase price.
DeBoer v. Oakbrook Home Assn. 813
13. Where, pursuant to a land contract, the deed is held in escrow

until payment of the purchase price, the vendor of an instrument held in escrow loses control over it so long as the vendee does not default, even though the vendor retains bare legal title in the land as security for the payment of the purchase price.
DeBoer v. Oakbrook Home Assn. 813

14. 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.
Gilbreath v. Ridgeway 822

Controlled Substances

1. Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction, in the absence of any other reasonable explanation for its presence.
State v. Harris 75
State v. Brennen 454

2. Evidence that an accused has physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession.
State v. Brennen 454

3. Although one's mere presence at a place where narcotics are found is not sufficient to prove possession, proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found.
State v. Brennen 454

Convictions

1. As a general rule, knowledge and consciousness of possession of alcoholic liquor are essential elements of proof to support a conviction for a minor being in possession of alcoholic liquor.
State v. Harris 75

2. Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction, in the absence of any other reasonable explanation for its presence.
State v. Harris 75
State v. Saccomano 435
State v. Brennen 454

3. As a general rule, the mere presence of the minor passenger in a

vehicle where alcohol is found, without more, is not sufficient to convict the minor of possession.
State v. Harris 75
4. In reviewing whether there is sufficient evidence to support a conviction, this court neither determines the plausibility of explanations nor weighs the evidence, such matters being for the trier of fact; the conviction must be sustained if, viewing the evidence most favorably to the State, there is sufficient evidence to support it.
State v. Brennen 454
5. The fact that a conviction is later reversed does not transform the period of time served in prison as a result of that conviction to jail time for which credit must be given.
State v. Fisher 479
6. In determining whether to uphold a conviction, this court will sustain the jury's verdict if, viewing the evidence in a light most favorable to the State, there is sufficient evidence to support it.
State v. Massey 492
7. The improper admission of cumulative evidence constitutes nonreversible harmless error where there is other competent evidence sufficient to support the conviction.
State v. Ruzicka 594

Corporations

1. A corporation is a legal entity complete and separate from its shareholders and officers.
Slusarski v. American Confinement Sys. 576
2. Generally, the shareholders of a corporation are not liable for its debts or other obligations.
Slusarski v. American Confinement Sys. 576
3. In equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice. Some of the factors which are relevant in determining to disregard the corporate entity are: (1) Grossly inadequate capitalization; (2) Insolvency of the debtor corporation at the time the debt is incurred; (3) Diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses; and (4) The fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity.
Slusarski v. American Confinement Sys. 576
4. Generally, equity will disregard the corporate entity only if it is used as a cloak to cover fraud or illegality or to work injustice, or if necessary to achieve equity.
Slusarski v. American Confinement Sys. 576

Corroboration

Corroboration of the principal act constituting the offense is not required.
State v. Keithley 707

Courts

1. In criminal appeals from the county court, the district court serves as an intermediate court of appeals reviewing for error appearing on the record.
State v. Turner 365
2. Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court.
State v. Hatfield 470
3. In order to set aside a judgment after term on the ground of fraud practiced by the successful party, as provided for in Neb. Rev. Stat. § 25-2001 (Reissue 1979), the petitioning party must prove that due diligence was exercised by him or her at the former trial and that the failure to secure a just decision was not attributable to his or her fault or negligence.
Caddy v. Caddy 582
4. Where the Supreme Court reverses and remands a cause to the district court for a special purpose, on remand the district court has no power or jurisdiction to do anything except to proceed in accordance with the mandate as interpreted in the light of the Supreme Court's opinion.
State ex rel. Hilt Truck Line v. Jensen 591
5. A trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. No judgment other than that directed or permitted by the Supreme Court's mandate may be rendered in the district court upon remand of a cause.
State ex rel. Hilt Truck Line v. Jensen 591
6. In civil cases a court of general jurisdiction has inherent power to vacate or modify its own judgment during the term at which it was rendered. However, this is a rule of the common law and does not apply to statutory tribunals such as the Workmen's Compensation Court.
Smith v. Fremont Contract Carriers 652
7. The district court may only acquire jurisdiction if an appeal is taken in the mode and manner and within the time provided by statute.
McCorison v. City of Lincoln 827
8. If the statutory requirements are not met, the district court acquires no jurisdiction and may not enter any order other than an order of dismissal.
McCorison v. City of Lincoln 827

9. The jurisdiction of a court flows from constitutional and statutory provisions and from the common law, so far as the latter is not repugnant to the federal Constitution or the Constitution of the state.
Northern Messenger v. Sorensen 846
10. A district court, on criminal appeals from the county court, acts as an intermediate court of appeals reviewing the record for error.
State v. Schroder 860
11. During the 6-month period following a dissolution of marriage decree, the action is still pending, and the court can, at any time, for good reason, vacate or modify it.
Choat v. Choat 875

Criminal Law

1. Neither an acquittal nor a conviction of a larceny committed in the course of a burglary bars a prosecution for the crime of burglary.
State v. Cole 1
2. The rule that a person cannot twice be 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. Cole 1
3. It is a fundamental principle of statutory construction that a penal statute is to be strictly construed.
State v. Beyer 33
4. No act is criminal unless the Legislature in express terms has declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of the written law.
State v. Beyer 33
5. Where no penalty is provided in a penal statute for certain described activities, no penalty may be applied.
State v. Beyer 33
6. In order to be a "deadly weapon" per se under Neb. Rev. Stat. § 28-1202(1) (Reissue 1979), the weapon in question must be one specifically enumerated in that statute.
State v. Williams 57
7. Under Neb. Rev. Stat. § 28-1202(1) (Reissue 1979), whether an object or weapon not specifically named in the statute is a "deadly weapon" is a question of fact to be determined by the trier of fact, and the resolution of that fact question will depend on the evidence adduced as to the use or intended use of the object or weapon.
State v. Williams 57

8. Where circumstantial evidence is relied upon to prove the elements of a crime, the circumstances must relate directly to the guilt of the accused beyond all reasonable doubt.
State v. Harris 75
9. Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry, if those facts and circumstances are of such a nature as to present a jury question as to defendant's intent.
State v. Coburn 144
10. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.
State v. Robinson 156
State v. Harper 870
11. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
State v. Robinson 156
12. Voluntary statements made to third persons who were not then acting as police officers or their equivalent are not inadmissible, even though the individual did not receive his *Miranda* warnings.
State v. Robinson 156
13. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred.
State v. Smith 201
14. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
State v. Baker 207
15. The admissibility of evidence of other crimes lies largely within the discretion of the trial court.
State v. Baker 207
16. If police officers, while lawfully engaged in an activity in a particular place, perceive a suspicious object, they may seize it immediately, provided that the initial intrusion is lawful, the

discovery of the evidence is inadvertent, and it is apparent to the officer that the item seen might be contraband or evidence of a crime.
State v. Haselhorst 233
17. In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances.
State v. Joy 310
18. In criminal appeals from the county court, the district court serves as an intermediate court of appeals reviewing for error appearing on the record.
State v. Turner 365
State v. Schroder 860
19. In a criminal prosecution an assignment of error which requires an examination of evidence cannot prevail in the absence of a bill of exceptions; in such a case the only question is whether the pleadings are sufficient to sustain the judgment of the trial court.
State v. Turner 365
20. The evidentiary rule provided in Neb. Rev. Stat. § 27-410 (Reissue 1979), that a withdrawn guilty plea is not admissible in any civil or criminal action or proceeding against the person who made it, does not apply to the sentencing stage of a criminal proceeding.
State v. Klappal 374
21. "Fresh pursuit" is pursuit instituted immediately and with intent to take into custody a person fleeing and reasonably believed to have committed a crime.
State v. Ferrell 463
22. Fresh pursuit is a relative term and has reference to time or distance, or both, depending on the facts of the case.
State v. Ferrell 463
23. A failure to take a prisoner arrested in a foreign state before a magistrate as required by statute does not invalidate an arrest made by officers in fresh pursuit.
State v. Ferrell 463
24. A prosecutor who has previously represented the spouse of one who is now being prosecuted for a crime is not necessarily disqualified as a prosecutor unless the alleged criminal act arose out of the marital relationship or, because of such prior representation, the attorney has obtained confidential information which may be prejudicial to the interest of the defendant.
State v. Hatfield 470

25. The questions as to who was the aggressor, whether there existed in the mind of the defendant apprehension based upon reasonable grounds therefor of imminent peril to life or limb of the defendant so as to justify his using force, and whether the means adopted for his defense were reasonable and appropriate for that purpose, in view of all the circumstances surrounding him at the time, are all essentially questions of fact of which the judge or jury, as the case may be, is the sole judge.
State v. Hatfield 470
26. In dealing with a criminal charge all attempts to do physical violence which amount to a statutory assault are unlawful and a breach of the peace, and a person cannot consent to an unlawful assault.
State v. Hatfield 470
27. It is differing treatment accorded on the basis of an arbitrary and unreasonable classification which is prohibited by the fourteenth amendment to the U.S. Constitution.
State v. Fisher 479
28. It is admissible and proper for a forensic serologist to testify that pubic hairs found on a victim are similar in character to the accused's standard pubic hairs, thereby showing that the accused cannot be excluded from the class of possible suspects. Such testimony has probative value and may be considered by the jury, although the weight to be given such testimony is for the jury to decide.
State v. Harrison 532
29. In a criminal prosecution any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony.
State v. Swillie 551
30. Jeopardy does not attach to the sustainment of a criminal defendant's motion to quash an information.
State v. Frey 558
31. The prosecution may not deliberately withhold evidence which it knows or has reason to know will be beneficial to the defendant. This does not require the prosecution to disclose every fact which might conceivably benefit the defense.
State v. Rayes 588
32. The eighth amendment to the U.S. Constitution prohibits punishment which is grossly disproportionate to the severity of the crime.
State v. Ruzicka 594
33. Neb. Const. art. I, § 9, prohibiting "cruel and unusual" punishment, does not abridge the Legislature's power to select such punishment as it deems most effective in the suppression of crime, provided the punishment is not grossly disproportionate

to the crime.
State v. Ruzicka 594
34. A defendant will not be allowed to disrupt the orderly procedure of the trial court by discharging his counsel on the eve of trial and demanding that all proceedings be stayed while he attempts to find other counsel.
State v. Keithley 707
35. Whether evidence of previous conduct is not relevant because of remoteness or lack of similarity is a matter within the discretion of the trial court.
State v. Keithley 707
36. Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused.
State v. Keithley 707
37. The standard for determining whether defense counsel has rendered constitutionally required effective assistance is whether counsel has performed at least as well as a lawyer with ordinary training and skill in the criminal law in that area and has conscientiously protected the interests of his client.
State v. Juhl 792
38. Where the felony committed by the defendant constitutes a continuing offense, the statute of limitations begins to run from the last act committed within the series of acts constituting the continuing offense.
State v. Copple 837
39. In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Kakela 843
State v. Schroder 860
40. A review by an appellate court of a final judgment in a criminal case is not a necessary element of due process of law.
State v. Schroder 860
41. An undue delay in ruling upon an appeal does not warrant dismissal of a criminal charge.
State v. Schroder 860
42. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged

not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.
State v. Harper 870

Crops

The measure of damages where a crop is injured but not rendered entirely worthless as a result of the acts or omissions of another is the difference between the value at maturity of the probable crop if there had been no injury and the value of the actual crop at the time injured less the expense of fitting for market that portion of the probable crop which was prevented from maturing.
Peterson v. North American Plant Breeders 258

Damages

1. The measure of damages where a crop is injured but not rendered entirely worthless as a result of the acts or omissions of another is the difference between the value at maturity of the probable crop if there had been no injury and the value of the actual crop at the time injured less the expense of fitting for market that portion of the probable crop which was prevented from maturing.
Peterson v. North American Plant Breeders 258
2. Damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact, in this case the jury, to estimate with a reasonable degree of certainty and exactness the actual damages.
Peterson v. North American Plant Breeders 258
3. The measure of general damages for fraud in inducing the purchase of property is the difference between the actual value of the property at the time of the purchase and the value it would have had if the seller's representation had been true.
Little v. Gillette 271
4. Where damages include the intangible and quite subjective elements of pain and suffering, a verdict for such damages will not be interfered with unless it is so excessive or grossly disproportionate to the evidence as to be indicative of passion, prejudice, mistake, or disregard of the evidence or law.
Duncza v. Gottschalk 879

5. Compensatory damages for assault and battery include the nature of the injuries sustained, and pain and suffering.
Duncza v. Gottschalk 879

Death Penalty

Where a sentence of life imprisonment and a sentence of death are imposed at the same time by the same court, the life sentence is to be served until the death sentence is carried out.
State v. Jones 713

Decedents' Estates

1. County courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.
In re Estate of Massie 103
2. There is no absolute right to trial by jury on appeal to the district court in probate matters unless such right is expressly conferred by statute.
In re Estate of Massie 103
3. There is no constitutional right to trial by jury in appeals to the district court from the county court in probate matters.
In re Estate of Massie 103
4. When a counterclaim is filed by an estate, the defendant may plead the defense of recoupment to reduce the amount of the counterclaim even though the defendant did not file a claim against the estate.
In re Estate of Massie 103
5. The defense of recoupment is not barred by Neb. Rev. Stat. § 30-2485 (Reissue 1979).
In re Estate of Massie 103
6. The defense of recoupment, by its nature, can only be used in a defensive character relating to the same transaction.
In re Estate of Massie 103

Declaratory Judgments

1. A declaratory judgment is a statutory remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights.
Russell v. First York Sav. Co. 112
2. This court treats the determination of factual issues in a declaratory judgment action, which would otherwise be an action at law and tried without a jury, in the same manner as any other action at law; accordingly, the findings of the trial court have the effect of a jury verdict and will not be set aside unless clearly wrong.
Occidental S. & L. v. Bell Fed. Credit Union 519

Deeds

1. In an action for reformation of a written contract or deed, the burden of proof rests on the moving party to overcome the strong presumption arising from the terms of the written instrument.
   Johnson v. Stover 250
2. Where, pursuant to a land contract, the deed is held in escrow until payment of the purchase price, the vendor of an instrument held in escrow loses control over it so long as the vendee does not default, even though the vendor retains bare legal title in the land as security for the payment of the purchase price.
   DeBoer v. Oakbrook Home Assn. 813

Demurrer

In ruling on a demurrer the district court and this court are obligated to accept the plaintiff's well-pleaded facts, as distinguished from conclusions, as true.
Allen v. County of Lancaster 163

Directed Verdict

1. It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty.
   State v. Piskorski 543
2. In considering a motion for a directed verdict or a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.
   Farm Bureau Life Ins. Co. v. Luebbe 694
3. In reviewing the sustaining of a motion for a directed verdict, the evidence will be construed most strictly against the moving party and in favor of the party against whom the verdict was granted.
   Eden v. Spaulding 799

Disciplinary Proceedings

1. Implicit in the license to practice law is the requirement that the recipient of the license shall demean himself in a proper manner and shall refrain from practices which bring discredit upon the lawyer, the profession, and the courts.
   State ex rel. NSBA v. Statmore 138
   State ex rel. NSBA v. Hahn 508
2. A lawyer's poor accounting procedures and sloppy office

management are not excuses or mitigating circumstances in reference to commingled funds.
State ex rel. NSBA v. Statmore 138
3. A lawyer's restitution of a client's funds after being faced with legal accountability does not exonerate professional misconduct.
State ex rel. NSBA v. Statmore 138
4. The oath of an attorney requires that he observe established standards of professional ethics.
State ex rel. NSBA v. Hahn 508
5. The knowing and willful failure to make income tax reports as required by federal law is misconduct involving moral turpitude and a violation of the oath of an attorney and the canons of ethics.
State ex rel. NSBA v. Hahn 508

Divorce

1. Where any of the substantial rights of the parties to a dissolution case remain undetermined and the case is retained for further action by the trial court, any orders entered are interlocutory and not final.
Gerber v. Gerber 228
2. During the 6-month period following a dissolution of marriage decree, the action is still pending, and the court can, at any time, for good reason, vacate or modify it.
Choat v. Choat 875
3. During the entire pendency of a dissolution of marriage decree, the marital relation continues.
Choat v. Choat 875

Double Jeopardy

1. Neither an acquittal nor a conviction of a larceny committed in the course of a burglary bars a prosecution for the crime of burglary.
State v. Cole 1
2. The rule that a person cannot twice be 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. Cole 1
3. An information must inform the accused with reasonable certainty of the charge against him that he may prepare his defense and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense.
State v. Piskorski 543
4. An indictment or information alone need not be full protection

against double jeopardy, because a defendant may allege and prove facts outside the record in support of a plea of former adjudication.
State v. Piskorski 543
5. Jeopardy does not attach to the sustainment of a criminal defendant's motion to quash an information.
State v. Frey 558

Drunk Driving

1. A trial court does not have the authority under Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982) to interrupt the period of suspension or permit one convicted of driving under the influence of alcoholic liquor or drug, first or second offense, to drive for limited work-related purposes. On second offense the period of prohibition against driving must be for a period of 6 continuous months computed from the date the order of probation is entered.
State v. Havorka 367
State v. Ramirez 899
2. Where the arrest and refusal took place prior to the effective date of the amendment to the implied consent law, the rights of the parties are fixed by the statute as it existed prior to the amendment.
Moore v. Peterson 615

Due Process

1. A failure to provide due process at some point in a termination procedure does not invalidate the termination if that defect is later cured.
Buhrmann v. Sellentin 288
2. Mere failure to comply with precise ceremonial or verbal formality in respect to arraignment and entry of a plea is not a denial of due process for which conviction must be set aside if the essential requisites of clearly informing the accused and an understanding admission of the offense on his part are shown.
State v. Jones 382
3. Due process of law does not require the State to adopt any particular form of procedure so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution.
State v. Jones 382

Effectiveness of Counsel

1. A sole attorney's multiple representation of codefendants is not per se a violation of the constitutional guarantee of effective assistance of counsel.
State v. Turner 125
2. Prejudice is presumed only if the defendant demonstrates that

counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance.
State v. Turner 125
3. A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel.
State v. Turner 125
4. Where one maintains that counsel was inadequate, one must likewise show how or in what manner the alleged inadequacy prejudiced the defendant.
State v. Robinson 156
State v. Juhl 792
5. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
State v. Robinson 156
State v. Harper 870
6. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.
State v. Robinson 156
State v. Harper 870
7. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
State v. Robinson 156
8. In the absence of allegations of fact specific enough to permit the trial court to make a preliminary determination of a question relating to an alleged violation of a defendant's constitutional rights, the court need not have an evidentiary hearing on the issue of ineffective counsel.
State v. Webb 238
9. The standard for determining whether defense counsel has rendered constitutionally required effective assistance is whether counsel has performed at least as well as a lawyer with ordinary training and skill in the criminal law in that area and has conscientiously protected the interests of his client.
State v. Juhl 792
10. Action of counsel which might otherwise be considered evidence of ineffective assistance of counsel may not be so when it appears as part of a legitimate trial stratagem.
State v. Juhl 792

11. A party should not be permitted to secure an order of the court prohibiting the introduction of certain evidence and to then complain because such party's lawyer did not require that evidence to be produced.
State v. Juhl 792
12. A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions.
State v. Evans 849
13. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.
State v. Harper 870
14. A claim of ineffective assistance of counsel must be supported by some proof of prejudice to the defendant before relief will be granted.
State v. Falkner 896

Election of Remedies

Where a party is induced to enter a contract by fraud, the party must, upon discovery of the fraud, elect a remedy and shall either affirm the contract and sue for damages or disaffirm and be reinstated to the position existing prior to the contract.
Little v. Gillette 271

Electricity

1. Power companies engaged in the transmission of electricity, especially electricity of high voltage, are charged with the duty of exercising a very high degree of care to safeguard those whose lawful activities expose them to the risk of inadvertent contact with the electric lines, but they are not insurers and not liable for damages in the absence of negligence.
Suarez v. Omaha P.P. Dist. 4
2. Power companies which are engaged in the transmission of electricity cannot be totally oblivious to the fact that children have a propensity to climb trees. It is ordinarily a question of

fact, to be resolved by the trier of fact, whether or not a power company was negligent in the stringing, inspection, and maintenance of its transmission lines located in proximity to trees.
Suarez v. Omaha P.P. Dist. 4

Eminent Domain

1. In an appeal by a condemnee, if the condemnee obtains a greater amount than that allowed by the appraisers, the condemnee shall not be entitled to interest on the amount deposited in the county court which the condemner had offered to stipulate for withdrawal. The 1982 amendment to Neb. Rev. Stat. § 76-711 (Cum. Supp. 1982), which requires that the condemnee agree to the stipulation, is applicable only where the appeal is taken by the condemner.
   Iske v. Papio Nat. Resources Dist. 39
2. The power of eminent domain is to be exercised only where the taking is for a public use, just compensation is paid, and due process of law has been observed.
   Chimney Rock Irr. Dist. v. Fawcus Springs Irr. Dist. 777
3. Whether the use for which property is taken is public or private in nature is a judicial question and not a legislative one.
   Chimney Rock Irr. Dist. v. Fawcus Springs Irr. Dist. 777
4. In determining whether a taking by eminent domain is for a public or private use, the concern is with the use for which the property is taken, not the agency or instrumentality through which the taking is accomplished.
   Chimney Rock Irr. Dist. v. Fawcus Springs Irr. Dist. 777

Employer and Employee

Where an employer retains a hold on employees during their lunch period so that the employees are not actually at liberty, the lunch period constitutes compensable time.
Bolan v. Boyle 85

Employment Security Law

1. Appeals under the Nebraska Employment Security Law are reviewed de novo on the record from the district court, and it is the duty of this court to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof.
   Taylor v. Collateral Control Corp. 432
   McClemens v. United Parcel Serv. 689
2. Under the Nebraska Employment Security Law, where an employee appeals from a disqualification of unemployment compensation benefits, the burden of proof is on the employee to show that he involuntarily left his employment or did so with good cause.
   Taylor v. Collateral Control Corp. 432

3. The phrase "to leave work voluntarily" means to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment.
McClemens v. United Parcel Serv. 689
Nuss v. Sorensen 703
4. It cannot be said that leaving employment is without good cause if the reason for leaving, although it may appear voluntary, has some justifiably reasonable connection with or relation to the conditions of employment.
McClemens v. United Parcel Serv. 689
5. The rule of construction that the Employment Security Law is to be liberally construed in order that its beneficent purposes may be accomplished applies to the interpretation of the law but not to consideration of the evidence offered in support of a claim under the law.
McClemens v. United Parcel Serv. 689
6. In voluntary termination cases the burden of proof is on the employee to prove that the leaving was for good cause.
McClemens v. United Parcel Serv. 689
7. As a general rule, an employee who leaves employment for the sole purpose of obtaining a better job has left work voluntarily within the meaning of the Nebraska Employment Security Law.
Nuss v. Sorensen 703
8. The Employment Security Law provides one avenue of judicial appeal when the dispute concerns benefit liability and another when the dispute concerns contribution liability.
Northern Messenger v. Sorensen 846
9. Neb. Rev. Stat. § 48-638 (Reissue 1984) provides for judicial review in benefit liability disputes by appeal to the district court for the county in which the individual claiming benefits claims to have been last employed, or in which such claimant resides, or to any district court upon which the parties may agree.
Northern Messenger v. Sorensen 846
10. Neb. Rev. Stat. § 48-650 (Reissue 1984) provides for judicial review in contribution liability disputes only by appeal to the district court for Lancaster County.
Northern Messenger v. Sorensen 846

Equal Protection

1. All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature. If the classification of persons singled out by the legislation is reasonable and not arbitrary, and is based on substantial differences having a reasonable relation to the persons dealt with and the public purpose to be achieved, it meets the constitutional test of equal protection.
State v. Ruzicka 594

2. Neb. Rev. Stat. § 28-802 (Reissue 1979) does not violate the constitutional guarantee of equal protection.
State v. Ruzicka 594

Equity

1. The general rule in an equity case where a motion to dismiss at the close of plaintiff's case is erroneously sustained requires that the cause be remanded to the trial court for a new trial.
Fink v. O'Neill Country Club 30
2. County courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.
In re Estate of Massie 103
3. Equity will decree reformation of a contract for mutual mistake or where there is a mistake on one side and fraud or inequitable conduct on the other.
Johnson v. Stover 250
4. While matters in equity are reviewed de novo on appeal, the rule is that where there are issues of credibility of witnesses, this court must give weight to the fact that the trial court saw and heard them; the rule is also that this court will 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.
Krafka v. Brase 335
5. In an equitable action it is the duty of this court to try the issues of fact de novo on the record and to reach an independent conclusion without reference to the findings of the district court.
Steinfeldt v. Klusmire 736
6. In an equity action, when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
Steinfeldt v. Klusmire 736
7. An action to annul a marriage is equitable in nature.
Guggenmos v. Guggenmos 746

Estoppel

1. In order to prove a partnership by estoppel, there must be evidence that a nonpartner held himself or herself out as a partner, or permitted himself or herself to be so held out, and that the third person relied on that misrepresentation to his or her detriment.
South Sioux City Star v. Edwards 487

2. Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.
DeBoer v. Oakbrook Home Assn. 813

Evidence

1. Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction, in the absence of any other reasonable explanation for its presence.
State v. Harris 75
State v. Brennen 454
2. Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.
State v. Burchett 78
3. In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant. This court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.
State v. Tomes 148
State v. Ruzicka 594
State v. Schroder 860
4. In testing the sufficiency of the evidence, every controverted fact must be resolved in favor of the successful party, and the successful party is given the benefit of every inference that can be drawn from the evidence.
Tranmer v. Mass Merchandisers 151
Duncza v. Gottschalk 879
5. The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, and its ruling will be upheld absent an abuse of discretion.
Chmelka v. Continental Western Ins. Co. 186
6. A plaintiff may establish his case by direct or circumstantial evidence.
Chmelka v. Continental Western Ins. Co. 186
7. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

preparation, plan, knowledge, identity, or absence of mistake or accident.
State v. Baker 207
8. The admissibility of evidence of other crimes lies largely within the discretion of the trial court.
State v. Baker 207
9. If police officers, while lawfully engaged in an activity in a particular place, perceive a suspicious object, they may seize it immediately, provided that the initial intrusion is lawful, the discovery of the evidence is inadvertent, and it is apparent to the officer that the item seen might be contraband or evidence of a crime.
State v. Haselhorst 233
10. To warrant reformation of a written instrument, the evidence must be clear, convincing, and satisfactory.
Johnson v. Stover 250
11. As a prerequisite to the admission of hearsay statements into evidence under Neb. Rev. Stat. § 27-804 (Reissue 1979), the proponent of the statement must make a showing that the declarant is unavailable as a witness. It is within the discretion of the trial court to determine whether the unavailability of the witness has been shown.
State v. Bothwell 395
12. Ordinarily, when an object is found in an automobile possessed and operated by the defendant, the evidence of unlawful possession is sufficient to sustain a conviction.
State v. Saccomano 435
13. The requirement that the State prove that the defendant "knowingly and intentionally" concealed the weapon is satisfied by evidence that the defendant voluntarily and intentionally concealed the weapon.
State v. Saccomano 435
14. Evidence that an accused has physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession.
State v. Brennen 454
15. Although one's mere presence at a place where narcotics are found is not sufficient to prove possession, proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found.
State v. Brennen 454
16. The questions as to who was the aggressor, whether there existed in the mind of the defendant apprehension based upon

reasonable grounds therefor of imminent peril to life or limb of the defendant so as to justify his using force, and whether the means adopted for his defense were reasonable and appropriate for that purpose, in view of all the circumstances surrounding him at the time, are all essentially questions of fact of which the judge or jury, as the case may be, is the sole judge.
State v. Hatfield 470

17. Where the evidence is contradictory, the determination of whether a partnership exists presents questions of fact for the jury.
South Sioux City Star v. Edwards 487

18. In order to prove a partnership by estoppel, there must be evidence that a nonpartner held himself or herself out as a partner, or permitted himself or herself to be so held out, and that the third person relied on that misrepresentation to his or her detriment.
South Sioux City Star v. Edwards 487

19. In a criminal case this court will not set aside a judgment on the grounds of the improper admission of evidence if, after an examination of the entire case, we consider that no substantial miscarriage of justice actually occurred.
State v. Massey 492

20. Under the inevitable discovery exception to the exclusionary rule, illegally obtained evidence which would have been discovered in the course of a proper investigation is admissible.
State v. McGuire 511

21. It is admissible and proper for a forensic serologist to testify that pubic hairs found on a victim are similar in character to the accused's standard pubic hairs, thereby showing that the accused cannot be excluded from the class of possible suspects. Such testimony has probative value and may be considered by the jury, although the weight to be given such testimony is for the jury to decide.
State v. Harrison 532

22. The prosecution may not deliberately withhold evidence which it knows or has reason to know will be beneficial to the defendant. This does not require the prosecution to disclose every fact which might conceivably benefit the defense.
State v. Rayes 588

23. The improper admission of cumulative evidence constitutes nonreversible harmless error where there is other competent evidence sufficient to support the conviction.
State v. Ruzicka 594

24. A bill of exceptions is the only vehicle for bringing evidence to this court.
Stromsburg Bank v. Nuttelman 687

25. Whether evidence of previous conduct is not relevant because of remoteness or lack of similarity is a matter within the discretion of the trial court.
State v. Keithley 707
26. Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused.
State v. Keithley 707
27. Evidence of previous similar conduct has independent relevancy in prosecutions for sexual offenses.
State v. Keithley 707
28. In an equity action, when credible evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.
Steinfeldt v. Klusmire 736
29. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.
In re Covault Freeholder Petition 763
30. A party should not be permitted to secure an order of the court prohibiting the introduction of certain evidence and to then complain because such party's lawyer did not require that evidence to be produced.
State v. Juhl 792
31. The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness is usually within the discretion of the trial court.
State v. Tainter 855
32. If a witness is cross-examined on a matter collateral to the issues, his answer cannot be subsequently contradicted by the party conducting the examination.
State v. Tainter 855
33. If a fact could be proved as a part of the offerer's case, it is material and not a collateral fact.
State v. Tainter 855

Expert Witnesses

1. Opinions of an expert witness are not binding on the trier of fact.
Scott v. State 195
2. It is admissible and proper for a forensic serologist to testify that pubic hairs found on a victim are similar in character to the

accused's standard pubic hairs, thereby showing that the accused cannot be excluded from the class of possible suspects. Such testimony has probative value and may be considered by the jury, although the weight to be given such testimony is for the jury to decide.
State v. Harrison 532

3. Under the provisions of Neb. Rev. Stat. § 27-702 (Reissue 1979), it is no longer necessary to have formal training in order to be considered as an expert witness; actual practical experience in the field can also qualify one as an expert in that field.
State v. Hoxworth 647

Extradition and Detainers

1. The Agreement on Detainers was designed to promote the expeditious and orderly disposition of outstanding charges against a prisoner and to determine the proper status of any and all detainers based on untried indictments, informations, or complaints.
State v. Reynolds 753

2. Under the Agreement on Detainers, Neb. Rev. Stat. §§ 29-759 et seq. (Reissue 1979), a "detainer" is a notification filed with the institution in which an individual is serving a sentence, advising the prisoner that he is wanted to face criminal charges pending in another jurisdiction.
State v. Reynolds 753

3. The provisions of the Agreement on Detainers apply only when a detainer has been lodged against a prisoner who has entered a term of imprisonment in a party state.
State v. Reynolds 753

4. Article III of the Agreement on Detainers prescribes the procedure by which a prisoner against whom a detainer has been lodged may demand a speedy disposition of outstanding charges.
State v. Reynolds 753

5. Upon receipt of a proper request for disposition under Article III of the Agreement on Detainers, the receiving state must bring the prisoner to trial within 180 days.
State v. Reynolds 753

6. Article IV of the Agreement on Detainers sets forth the procedures by which the authorities where the charges are pending may initiate the process whereby a prisoner is returned to the state for trial.
State v. Reynolds 753

7. In respect of any proceedings made possible under Article IV of the Agreement on Detainers, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state.
State v. Reynolds 753

8. Article V(c) of the Agreement on Detainers provides for dismissal of a pending complaint on which a detainer is based if the appropriate authority shall refuse or fail to accept custody of the prisoner against whom the charges are pending or fail to bring that prisoner to trial within the period provided in Article III or Article IV.
State v. Reynolds 753
9. Under Article III of the Agreement on Detainers, for a prisoner's demand for disposition of the charges to trigger the 180-day period, it must be made in the manner required by Article III.
State v. Reynolds 753
10. The Agreement on Detainers provides the remedy of dismissal of charges with prejudice in those specific cases not including possible errors made by another party's prison officials.
State v. Reynolds 753

Final Orders

1. An order placing a juvenile in the Youth Development Center for evaluation is predispositional, interlocutory in nature, and not a final order for the purposes of appeal.
In re Interest of J.M.S. 72
2. Where any of the substantial rights of the parties to a dissolution case remain undetermined and the case is retained for further action by the trial court, any orders entered are interlocutory and not final.
Gerber v. Gerber 228
3. Where substantial rights of the parties remain undetermined and the cause is retained for further action, the order is interlocutory and not final.
Bass v. Dalton 379
4. In the absence of a final judgment, an order granting an accounting is not appealable.
Bass v. Dalton 379
5. Probation is a sentence, and an order of probation is a final order from which an appeal may be taken.
State v. Vernon 539

Foreclosure

1. The phrase "costs of management" includes all expenses necessary to perpetuate the actual commercial use of real estate, including the payment of real estate taxes.
Conservative Sav. & Loan Assn. v. Karp 217
2. Where a successful bidder at a judicial sale pays only a small deposit or part of his bid at the sale and pays the balance of his bid later but does not pay interest on the balance of his bid, such bidder is not entitled to rents accruing from the date of sale until

the balance of the bid is paid. To hold otherwise would bestow an undeserved windfall on the bidder: a bidder could, in good or bad faith, force a mortgagee in possession to finance the balance of the bid without any obligation to pay interest for the use of that money representing the balance of the bid.
Conservative Sav. & Loan Assn. v. Karp 217

3. An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.
Travelers Indemnity Co. v. Heim 326

4. An action to foreclose a mechanic's lien is equitable in nature, and we review it de novo.
Smith v. Central Inv. Co. 728

Fraud

1. It is a general rule that fraud must relate to a present or preexisting fact and cannot ordinarily be predicated on an unfulfilled promise or a statement as to future events. An exception to this rule is representations as to future acts that are falsely and fraudulently made with an intent to deceive.
Little v. Gillette 271

2. Where a party is induced to enter a contract by fraud, the party must, upon discovery of the fraud, elect a remedy and shall either affirm the contract and sue for damages or disaffirm and be reinstated to the position existing prior to the contract.
Little v. Gillette 271

3. The measure of general damages for fraud in inducing the purchase of property is the difference between the actual value of the property at the time of the purchase and the value it would have had if the seller's representation had been true.
Little v. Gillette 271

4. In order to defeat coverage on the basis of fraud, an insurer must plead and prove, among other things, that a misrepresentation of fact or opinion was made knowingly with intent to deceive, that the insurer relied and acted upon such statement, and that the insurer was deceived to its injury.
Farm Bureau Life Ins. Co. v. Luebbe 694

5. The nature of a false statement in an insurance application may be such that the trier of fact may infer from the mere making of the statement that it was made knowingly with the intent to deceive.
Farm Bureau Life Ins. Co. v. Luebbe 694

Good Cause

1. An award of alimony may be modified or revoked for good cause shown.
   Roth v. Roth 417
2. Good cause means a material and substantial change in circumstances and depends upon the circumstances of the individual case. A finding of its existence lies largely in the discretion of the court to which it is committed.
   Roth v. Roth 417
3. It cannot be said that leaving employment is without good cause if the reason for leaving, although it may appear voluntary, has some justifiably reasonable connection with or relation to the conditions of employment.
   McClemens v. United Parcel Serv. 689
4. In voluntary termination cases the burden of proof is on the employee to prove that the leaving was for good cause.
   McClemens v. United Parcel Serv. 689

Habeas Corpus

A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court.
McCormick v. State 338

Habitual Criminals

1. Contentions that prior criminal convictions, relied on to enhance a penalty under the habitual criminal statute, are constitutionally invalid may be raised at the habitual criminal hearing.
   State v. Gonzales 43
2. The Nebraska habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1979), is not a separate offense but, rather, provides an enhancement of the penalty for the crime committed, with a minimum sentence of 10 years and a maximum sentence of 60 years for each conviction of one found to be a habitual criminal, even though, absent a conviction as a habitual criminal, the minimum or maximum sentence might be less.
   State v. Rolling 51

Hearsay

As a prerequisite to the admission of hearsay statements into evidence under Neb. Rev. Stat. § 27-804 (Reissue 1979), the proponent of the statement must make a showing that the declarant is unavailable as a witness. It is within the discretion of the trial court to determine whether the unavailability of the witness has been shown.
State v. Bothwell 395

Homesteads

1. In order to qualify real estate as a homestead under Neb. Rev. Stat. § 40-101 (Cum. Supp. 1982), a homestead claimant and his family must reside in habitation on the premises. A person cannot have two homesteads, nor can he have two places either of which at his election he may claim as a homestead.
   Travelers Indemnity Co. v. Heim 326
2. A contract to convey the homestead of a married person is absolutely void and unenforceable unless validly executed and acknowledged by both husband and wife.
   Christensen v. Arant 625
3. An interest in the homestead simply will not pass nor be created unless the documents for that purpose are signed and acknowledged by both husband and wife.
   Christensen v. Arant 625

Homicide

Where an information charges a defendant with a killing committed in the perpetration of or an attempt to perpetrate one of the specific felonies set out in Neb. Rev. Stat. § 28-303(2) (Reissue 1979), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested.
State v. Massey 492

Identification Procedures

Although identification of the accused is an essential element in establishment of guilt beyond a reasonable doubt, such identification can be inferred from all the facts and circumstances that are in evidence.
State v. Hoxworth 647

Implied Consent Law

Where the arrest and refusal took place prior to the effective date of the amendment to the implied consent law, the rights of the parties are fixed by the statute as it existed prior to the amendment.
Moore v. Peterson 615

Independent Contractors

1. The common-law test to determine if an independent contractor status exists includes many factors which are to be considered and weighed, no one of which may be conclusive.
   Eden v. Spaulding 799
2. While, generally, control, or the right of control, is the chief criterion in the determination of whether one acts as an independent contractor, one engaging an independent

contractor may exercise such control as is necessary to assure performance of the contract in accordance with its terms without becoming an employer.
Eden v. Spaulding 799

Indictments and Informations

1. Two or more offenses may be charged in the same information if the offenses charged are of the same or similar character.
State v. Cole 1
2. The court may order two or more informations to be tried together if the offenses could have been joined in a single information.
State v. Cole 1
3. Offenses of the same or similar character may be joined in one information and tried together.
State v. McGuire 511
4. An information must inform the accused with reasonable certainty of the charge against him that he may prepare his defense and be enabled to plead the judgment thereon as a bar to a later prosecution for the same offense.
State v. Piskorski 543
5. A complaint or information charging an offense in substantially the words of the statute is generally sufficient.
State v. Piskorski 543
6. An indictment or information meets all constitutional requirements (1) if it shows that the acts which defendant is charged with committing amounted to a crime which the court had power to punish and that it was committed within the territorial jurisdiction of the court, (2) if it informs the defendant of the nature of the charge against him, and (3) if it constitutes a record from which it can be determined whether a subsequent proceeding is barred by the former adjudication.
State v. Piskorski 543
7. An indictment or information alone need not be full protection against double jeopardy, because a defendant may allege and prove facts outside the record in support of a plea of former adjudication.
State v. Piskorski 543

Insurance

1. The term "actual cash value," as used in a policy of property insurance, means market value, i.e., that amount for which property may be sold by a willing seller who is not compelled to sell it to a buyer who is willing but not compelled to buy it. In deciding market value of property one should consider the situation and condition of the property as it was at the time, and all the other facts and circumstances shown by the evidence that

affected or had a tendency to establish its value.
Erin Rancho Motels v. United States F. & G. Co. 9

2. A standard policy of title insurance is a contract of indemnity which only insures against defects, discrepancies, or other impediments of record affecting title to the real estate designated in the policy or interfering with the marketability of title to the land described in the policy. Such indemnification does not protect the insured from matters dependent upon a survey or critical inspection of the property unless the policy provides for extended coverage or the insured requests special endorsements.
Heyd v. Chicago Title Ins. Co. 296

3. Unless agreed by a title insurance company or required by a provision of the policy of title insurance, an insurance company has no obligation to obtain a survey of the subject real estate before a policy of title insurance is issued.
Heyd v. Chicago Title Ins. Co. 296

4. A title insurance company rendering a title report has the duty to use due care regarding inspection of public records.
Heyd v. Chicago Title Ins. Co. 296

5. A title insurance company which renders a title report and also issues a policy of title insurance has assumed two distinct duties. In rendering a title report the title insurance company serves as an abstracter of title and must list all matters of public record adversely affecting title to the real estate which is the subject of the title report. By issuing a policy of title insurance, a title insurance company has the contractual duties which are imposed by its policy of insurance.
Heyd v. Chicago Title Ins. Co. 296

6. The parties to an insurance contract may make the contract in any legal form they desire, and in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed.
Swedberg v. Battle Creek Mut. Ins. Co. 447

7. In order to recover upon a policy of insurance of limited liability, the insured must bring himself within its express provisions.
Swedberg v. Battle Creek Mut. Ins. Co. 447

8. In general, the terms "vandalism" and "malicious mischief" refer to wanton or malicious acts intended to damage or to destroy property. Thus, to recover under a policy assuring against loss caused by vandalism and malicious mischief, the plaintiff must show by a preponderance of the evidence, direct

or circumstantial, that the damage was caused by acts intended to damage the property in question.
Swedberg v. Battle Creek Mut. Ins. Co. 447

9. Regardless of how careless, negligent, or even illegal an act might be, it is not malicious mischief absent evidence that the act was motivated by malice toward the property or its owner.
Swedberg v. Battle Creek Mut. Ins. Co. 447

10. In order to defeat coverage on the basis of fraud, an insurer must plead and prove, among other things, that a misrepresentation of fact or opinion was made knowingly with intent to deceive, that the insurer relied and acted upon such statement, and that the insurer was deceived to its injury.
Farm Bureau Life Ins. Co. v. Luebbe 694

11. The provisions of Neb. Rev. Stat. § 44-710.14 (Reissue 1978), applying to sickness and accident insurance, are to be read in pari materia with the provisions of Neb. Rev. Stat. § 44-358 (Reissue 1978), applying to all insurance policies.
Farm Bureau Life Ins. Co. v. Luebbe 694

12. The nature of a false statement in an insurance application may be such that the trier of fact may infer from the mere making of the statement that it was made knowingly with the intent to deceive.
Farm Bureau Life Ins. Co. v. Luebbe 694

Intent

1. Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry, if those facts and circumstances are of such a nature as to present a jury question as to defendant's intent.
State v. Coburn 144

2. The intention to form a partnership, where in dispute, is to be ascertained objectively from all the evidence and circumstances.
South Sioux City Star v. Edwards 487

3. The sharing of profits is a primary factor to be considered in ascertaining the intention of the parties to form a partnership.
South Sioux City Star v. Edwards 487

4. The extent to which one has a voice in the management of the business is a factor to be considered in ascertaining the intention to form a partnership.
South Sioux City Star v. Edwards 487

5. A legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
Moore v. Peterson 615

Interest

In an appeal by a condemnee, if the condemnee obtains a greater

amount than that allowed by the appraisers, the condemnee shall not be entitled to interest on the amount deposited in the county court which the condemner had offered to stipulate for withdrawal. The 1982 amendment to Neb. Rev. Stat. § 76-711 (Cum. Supp. 1982), which requires that the condemnee agree to the stipulation, is applicable only where the appeal is taken by the condemner.
Iske v. Papio Nat. Resources Dist. 39

Joinder

1. The court may order two or more informations to be tried together if the offenses could have been joined in a single information.
State v. Cole 1
2. Offenses of the same or similar character may be joined in one information and tried together.
State v. McGuire 511
3. The question of the advisability of joint or separate trials is one directed to the sound discretion of the trial court.
State v. McGuire 511

Judges

1. Remarks of a sentencing court judge about possible adverse verdicts which might have been returned against a defendant do not demonstrate per se an abuse of discretion on the part of the sentencing court.
State v. Hurlburt 121
2. A ruling of a trial judge on a motion to disqualify himself is immaterial where the cause is an action triable de novo on the record in this court.
R.D.N. v. T.N. 830

Judgments

1. A decision of the governing body of the association is binding and generally not subject to collateral attack in the courts.
Straub v. American Bowling Congress 241
2. The power of the courts to review the quasi-judicial actions of voluntary associations is extremely limited. The court can only determine whether there are inconsistencies between an association's rules and the action taken; whether the member has been treated unfairly in the proceedings; whether the association's actions were prompted by fraud, malice, or collusion; and whether the association's rules contravene public policy or law.
Straub v. American Bowling Congress 241
3. A proper decision will not be disturbed on review merely because it was rendered for the wrong reason.
State v. Fisher 479

4. Where a jury is waived in a law action, the disposition of the trial court has the effect of a jury verdict and is not to be disturbed on appeal unless it is clearly wrong.
South Sioux City Star v. Edwards 487
5. In a criminal case this court will not set aside a judgment on the grounds of the improper admission of evidence if, after an examination of the entire case, we consider that no substantial miscarriage of justice actually occurred.
State v. Massey 492
6. In order to set aside a judgment after term on the ground of fraud practiced by the successful party, as provided for in Neb. Rev. Stat. § 25-2001 (Reissue 1979), the petitioning party must prove that due diligence was exercised by him or her at the former trial and that the failure to secure a just decision was not attributable to his or her fault or negligence.
Caddy v. Caddy 582
7. A decree or award in a workmen's compensation case is final unless the petitioner seeking to reopen the case can bring the case within the terms of any statute to that effect.
Smith v. Fremont Contract Carriers 652
8. In civil cases a court of general jurisdiction has inherent power to vacate or modify its own judgment during the term at which it was rendered. However, this is a rule of the common law and does not apply to statutory tribunals such as the Workmen's Compensation Court.
Smith v. Fremont Contract Carriers 652
9. The party appealing from the judgment has the burden to show prejudicial error.
Emery v. Mangiameli 740
10. A judgment will not be reversed by reason of any error or defect in the proceedings which does not affect the substantial rights of the adverse party.
Emery v. Mangiameli 740

Judicial Sales

1. Where a successful bidder at a judicial sale pays only a small deposit or part of his bid at the sale and pays the balance of his bid later but does not pay interest on the balance of his bid, such bidder is not entitled to rents accruing from the date of sale until the balance of the bid is paid. To hold otherwise would bestow an undeserved windfall on the bidder: a bidder could, in good or bad faith, force a mortgagee in possession to finance the balance of the bid without any obligation to pay interest for the use of that money representing the balance of the bid.
Conservative Sav. & Loan Assn. v. Karp 217
2. An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for

inadequacy of price, when there was no fraud or shocking discrepancy between value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.
Travelers Indemnity Co. v. Heim 326

Juries

1. A finding of fact made by a jury will not be set aside on appeal if it is supported by credible evidence.
Erin Rancho Motels v. United States F. & G. Co. 9
2. Where the evidence is contradictory, the determination of whether a partnership exists presents questions of fact for the jury.
South Sioux City Star v. Edwards 487
3. To warrant reversal the misconduct of a witness must be of such a nature as to unduly influence the decision of the jury.
State v. Tainter 855

Jurisdiction

1. The separate juvenile court does not have statutory authority to order expungement of a juvenile record.
In re Interest of P.L.F. 68
2. County courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.
In re Estate of Massie 103
3. After an appeal has been perfected in this court, the trial court or any other lower tribunal is without jurisdiction to hear a case involving the same matter between the same parties.
Tracy v. United Telephone Co. 331
Tracy Corp. II v. Nebraska Pub. Serv. Comm. 900
4. In a contested filiation proceeding under Neb. Rev. Stat. ch. 13 (Reissue 1983), the district court has jurisdiction to modify the amount of child support where there is a change of circumstances of the parties after the entry of a support order.
State ex rel. Toledo v. Bockmann 428
5. A failure to take a prisoner arrested in a foreign state before a magistrate as required by statute does not invalidate an arrest made by officers in fresh pursuit.
State v. Ferrell 463
6. When seeking to appeal an order of the director of the Department of Motor Vehicles, the appellant must execute and file the required bond within 20 days of the date of the final order complained of, and such filing is a jurisdictional requirement and condition precedent to the initiation of the appellate process.
Black v. State 572

7. The Workmen's Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
Smith v. Fremont Contract Carriers 652
8. Pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), appeals are filed in the district court where the land is located rather than where the action is taken by the State Board of Education.
In re Covault Freeholder Petition 763
9. The district court may only acquire jurisdiction if an appeal is taken in the mode and manner and within the time provided by statute.
McCorison v. City of Lincoln 827
10. If the statutory requirements are not met, the district court acquires no jurisdiction and may not enter any order other than an order of dismissal.
McCorison v. City of Lincoln 827
11. The requirements of a statute granting the right to appeal are mandatory and must be complied with in order for the appellate court to acquire jurisdiction.
Northern Messenger v. Sorensen 846
12. The jurisdiction of a court flows from constitutional and statutory provisions and from the common law, so far as the latter is not repugnant to the federal Constitution or the Constitution of the state.
Northern Messenger v. Sorensen 846
13. There must be compliance with the requirements set forth in a statute granting the right to appeal or this court gains no jurisdiction over the case.
State v. Schroder 860
14. During the 6-month period following a dissolution of marriage decree, the action is still pending, and the court can, at any time, for good reason, vacate or modify it.
Choat v. Choat 875

Jury Instructions

1. Jury instructions should be considered as a whole, and the meaning of an instruction or instructions, when taken as a whole, must be considered, and not just the phraseology of a particular part.
Bashus v. Turner 17
2. When appropriate, it is the better practice for the trial court to instruct the jury as to specific acts of negligence rather than general allegations of negligence.
Chmelka v. Continental Western Ins. Co. 186
3. Proper practice is to instruct the jury as to specific acts of negligence charged and supported by the evidence.
Chmelka v. Continental Western Ins. Co. 186

4. It is the duty of the trial court to instruct the jury, without any request to do so, on the issues presented by the pleadings and supported by the evidence.
McCauley v. Briggs 403
5. The trial court need not instruct on an issue not pleaded or proved.
McCauley v. Briggs 403
6. Ordinarily, the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal, unless there is a plain error indicating a probable miscarriage of justice.
McCauley v. Briggs 403
7. Where an instruction presents an issue to the jury and correctly reflects the law on the issue, it is not error for the trial court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one.
McCauley v. Briggs 403
8. Generally, failure to object to instructions after they have been submitted to counsel for review, or failure to offer more specific instructions if counsel feels the court's instructions are not sufficiently specific, will preclude raising an objection on appeal.
Enyeart v. Swartz 425
9. The failure to give an instruction on the definition of proximate cause where it is one of the principal issues in the case must be considered by the court to be plain error, requiring reversal.
Enyeart v. Swartz 425
10. Where an information charges a defendant with a killing committed in the perpetration of or an attempt to perpetrate one of the specific felonies set out in Neb. Rev. Stat. § 28-303(2) (Reissue 1979), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested.
State v. Massey 492

Jury Trials

1. A demand is required to invoke the statutory right to a jury trial under Neb. Rev. Stat. § 24-536 (Reissue 1979).
State v. Vernon 539
2. A defendant may orally request a jury trial while he is before the court or make a written request therefor.
State v. Vernon 539
3. A failure to file a timely request in accordance with the rules of the court constitutes a waiver of the statutory right to a jury trial.
State v. Vernon 539

Juvenile Courts

1. The separate juvenile court does not have statutory authority to order expungement of a juvenile record.
   In re Interest of P.L.F. 68
2. An order placing a juvenile in the Youth Development Center for evaluation is predispositional, interlocutory in nature, and not a final order for the purposes of appeal.
   In re Interest of J.M.S. 72

Leases

1. Agreed prices between a lessor of equipment and a general contractor are not binding on the owner of land where the leased equipment is used, but such prices may be taken as prima facie correct.
   Crane Rental, Inc. v. Hunnicutt Land Co. 170
2. Where leased equipment is used by a general contractor on more than one jobsite, the lessor of the equipment has the burden of proving both the rental price of the leased equipment and the length of time it was used on the land as to which a lien is claimed.
   Crane Rental, Inc. v. Hunnicutt Land Co. 170
3. Any ambiguity in a lease will be construed against the party whose language was used.
   Occidental S. & L. v. Bell Fed. Credit Union 519
4. A sublessee can in no event have greater rights against the original lessor than were given by the original lessor to the original lessee.
   Occidental S. & L. v. Bell Fed. Credit Union 519
5. A sublessor who undertakes to grant renewal options he cannot deliver becomes, by reason of that breach of contract, liable in damages.
   Occidental S. & L. v. Bell Fed. Credit Union 519

Legislature

1. No act is criminal unless the Legislature in express terms has declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of the written law.
   State v. Beyer 33
2. The court will, if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning.
   Iske v. Papio Nat. Resources Dist. 39
3. A legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
   Moore v. Peterson 615

Lesser-Included Offenses

1. Criminal trespass is not a lesser-included offense of burglary.
   State v. Coburn 144
2. Where an information charges a defendant with a killing committed in the perpetration of or an attempt to perpetrate one of the specific felonies set out in Neb. Rev. Stat. § 28-303(2) (Reissue 1979), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested.
   State v. Massey 492

Liability

A sublessor who undertakes to grant renewal options he cannot deliver becomes, by reason of that breach of contract, liable in damages.
Occidental S. & L. v. Bell Fed. Credit Union 519

Limitations of Actions

1. If a petition alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.
   Russell v. First York Sav. Co. 112
2. A cause of action for malpractice accrues upon the violation of a legal right.
   Rosnick v. Marks 499
3. The requirement of Neb. Const. art. I, § 13, that all courts be open and every person have a remedy by due process of law for any injury to his person, does not mean that reasonable limits may not be imposed upon the time within which one must seek redress in the courts.
   Rosnick v. Marks 499
4. Where the felony committed by the defendant constitutes a continuing offense, the statute of limitations begins to run from the last act committed within the series of acts constituting the continuing offense.
   State v. Copple 837

Marriage

1. An action to annul a marriage is equitable in nature.
   Guggenmos v. Guggenmos 746
2. It is the duty of this court, on appeal of an action to annul a marriage, to retry the issue or issues of fact complained of de novo on the record and reach independent conclusions without reference to the conclusions reached by the trial judge, giving weight, where the evidence is in conflict, to the fact that the trial

judge observed and heard the witnesses and accepted one version of the facts rather than another.
Guggenmos v. Guggenmos 746
3. An annulment will be granted only in the presence of one or more of the grounds enumerated in Neb. Rev. Stat. § 42-374 (Reissue 1978).
Guggenmos v. Guggenmos 746
4. A marriage is presumed valid, and the burden of proving otherwise is upon the party seeking the annulment.
Guggenmos v. Guggenmos 746
5. During the entire pendency of a dissolution of marriage decree, the marital relation continues.
Choat v. Choat 875

Mechanics' Liens

1. In cases arising before January 1, 1982, a mechanic's lien foreclosure is to be considered by the Supreme Court on appeal de novo on the record, giving weight to the fact that the trial court has observed the witnesses and their manner of testifying.
Crane Rental, Inc. v. Hunnicutt Land Co. 170
2. Agreed prices between a lessor of equipment and a general contractor are not binding on the owner of land where the leased equipment is used, but such prices may be taken as prima facie correct.
Crane Rental, Inc. v. Hunnicutt Land Co. 170
3. Where leased equipment is used by a general contractor on more than one jobsite, the lessor of the equipment has the burden of proving both the rental price of the leased equipment and the length of time it was used on the land as to which a lien is claimed.
Crane Rental, Inc. v. Hunnicutt Land Co. 170
4. An action to foreclose a mechanic's lien is equitable in nature, and we review it de novo.
Smith v. Central Inv. Co. 728

Mental Competency

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.
State v. Evans 849

Mentally Disordered Sex Offender

Neb. Rev. Stat. § 29-2912 (Reissue 1979) imposes upon the sentencing court the mandatory duty to order a presentence investigation for the purpose of evaluating whether one guilty of a felony sexual offense is a mentally disordered sex offender.
State v. Klappal 374

Minors

1. If the actor is a child, the standard of care to which he must conform to avoid being contributorily negligent is that of a reasonable person of like age, intelligence, and experience under the same circumstances.
   Suarez v. Omaha P.P. Dist. 4
2. As a general rule, knowledge and consciousness of possession of alcoholic liquor are essential elements of proof to support a conviction for a minor being in possession of alcoholic liquor.
   State v. Harris 75
3. As a general rule, the mere presence of the minor passenger in a vehicle where alcohol is found, without more, is not sufficient to convict the minor of possession.
   State v. Harris 75

Miranda Rights

1. Voluntary statements made to third persons who were not then acting as police officers or their equivalent are not inadmissible, even though the individual did not receive his *Miranda* warnings.
   State v. Robinson 156
2. Statements made by a person not accused of a crime but in custody or otherwise deprived of his freedom of action in a significant way are not admissible in evidence unless the person has been advised of his *Miranda* rights.
   State v. McCarthy 246

Modification of Decree

1. Alteration of ability to pay is a factor in determining whether there has been a material change in circumstances justifying a modification of a child support order.
   Morisch v. Morisch 412
2. An award of alimony may be modified or revoked for good cause shown.
   Roth v. Roth 417
3. In a contested filiation proceeding under Neb. Rev. Stat. ch. 13 (Reissue 1983), the district court has jurisdiction to modify the amount of child support where there is a change of circumstances of the parties after the entry of a support order.
   State ex rel. Toledo v. Bockmann 428
4. Where modification of a dissolution decree is made during the 6-month period, Neb. Rev. Stat. § 42-372 (Reissue 1978), such modification can be made only upon good cause shown after notice to all interested parties and hearing.
   Neujahr v. Neujahr 585

Motions for New Trial

1. The standard of review of an order granting a new trial is

whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that there are no tenable grounds existing therefor.
Chmelka v. Continental Western Ins. Co. 186

2. A motion for new trial must be filed within 10 days after the verdict or decision was rendered.
State ex rel. Douglas v. Bible Baptist Church 307

3. A motion for a new trial is addressed to the sound discretion of the trial court, and unless an abuse of discretion is shown, its determination will not be disturbed.
State v. Tainter 855

4. The asserted ground for a new trial must affect adversely the substantial rights of the defendant, and it must be shown that he was prejudiced thereby.
State v. Tainter 855

Motions to Dismiss

The general rule in an equity case where a motion to dismiss at the close of plaintiff's case is erroneously sustained requires that the cause be remanded to the trial court for a new trial.
Fink v. O'Neill Country Club 30

Motions to Suppress

Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong.
State v. McCarthy 246

Motions to Vacate

A motion to set aside a judgment of conviction cannot serve the purpose of an appeal to secure a review of the conviction, nor is such a motion under the Post Conviction Act a substitute for an appeal.
State v. Juhl 792

Motor Vehicles

1. A traveler on a highway, when approaching and while crossing a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight as a matter of law and no recovery can be had for damages resulting from a collision with a passing train.
Whitaker v. Burlington Northern, Inc. 90

2. The driver of a motor vehicle is under a continuing duty to exercise reasonable care for the safety of others.
Chmelka v. Continental Western Ins. Co. 186

3. The general rule in Nebraska is that it is negligence as a matter of

law for a motorist to drive his vehicle on the highway in such a manner that he is unable to stop in time to avoid a collision with an object within the range of his vision.
McCauley v. Briggs 403

4. The applicability of the general "range of vision" rule depends on the individual circumstances and is for the court's initial determination.
McCauley v. Briggs 403

5. Where one vehicle has been struck from the rear by another, but where the evidence presents facts from which reasonable minds might draw different conclusions, the question of the negligence of the driver of the following vehicle is for the jury.
McCauley v. Briggs 403

6. Generally, a motorist's failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is indisputably located in a favored position.
Eden v. Spaulding 799

Municipal Corporations

A municipality is an owner within the meaning of the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1984).
Bailey v. City of North Platte 810

Negligence

1. If the actor is a child, the standard of care to which he must conform to avoid being contributorily negligent is that of a reasonable person of like age, intelligence, and experience under the same circumstances.
Suarez v. Omaha P.P. Dist. 4

2. One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.
Suarez v. Omaha P.P. Dist. 4

3. Power companies engaged in the transmission of electricity, especially electricity of high voltage, are charged with the duty of exercising a very high degree of care to safeguard those whose lawful activities expose them to the risk of inadvertent contact with the electric lines, but they are not insurers and not liable for damages in the absence of negligence.
Suarez v. Omaha P.P. Dist. 4

4. Power companies which are engaged in the transmission of electricity cannot be totally oblivious to the fact that children have a propensity to climb trees. It is ordinarily a question of fact, to be resolved by the trier of fact, whether or not a power company was negligent in the stringing, inspection, and maintenance of its transmission lines located in proximity to

trees.
Suarez v. Omaha P.P. Dist. 4
5. A traveler on a highway, when approaching and while crossing a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight as a matter of law and no recovery can be had for damages resulting from a collision with a passing train.
Whitaker v. Burlington Northern, Inc. 90
6. A person who is himself negligent may not recover under the doctrine of the last clear chance where his negligence is active and continuing to the very time of the accident. Such a situation involves questions of contributory and comparative negligence and not those of the last clear chance doctrine.
Whitaker v. Burlington Northern, Inc. 90
7. The discretionary function or duty exemption in the State Tort Claims Act extends only to the basic policy decisions made in governmental activity and not to ministerial activities implementing such policy decisions. The State is liable for negligence of its employees at the operational level.
Wickersham v. State 175
8. The State, as in the case of an individual, must act with reasonable care in reference to action undertaken without obligation to act.
Wickersham v. State 175
9. Where the gravamen of the complaint is negligent performance of operational tasks rather than misrepresentation, the State cannot rely upon the misrepresentation exclusion found in the State Tort Claims Act.
Wickersham v. State 175
10. The driver of a motor vehicle is under a continuing duty to exercise reasonable care for the safety of others.
Chmelka v. Continental Western Ins. Co. 186
11. When appropriate, it is the better practice for the trial court to instruct the jury as to specific acts of negligence rather than general allegations of negligence.
Chmelka v. Continental Western Ins. Co. 186
12. Proper practice is to instruct the jury as to specific acts of negligence charged and supported by the evidence.
Chmelka v. Continental Western Ins. Co. 186
13. Where reasonable minds might draw different conclusions from the evidence, the question as to negligence or contributory negligence under the circumstances is a matter for determination by the jury.
Chmelka v. Continental Western Ins. Co. 186

14. The general rule in Nebraska is that it is negligence as a matter of law for a motorist to drive his vehicle on the highway in such a manner that he is unable to stop in time to avoid a collision with an object within the range of his vision.
McCauley v. Briggs 403
15. The applicability of the general "range of vision" rule depends on the individual circumstances and is for the court's initial determination.
McCauley v. Briggs 403
16. Where one vehicle has been struck from the rear by another, but where the evidence presents facts from which reasonable minds might draw different conclusions, the question of the negligence of the driver of the following vehicle is for the jury.
McCauley v. Briggs 403
17. Generally, a motorist's failure to see an approaching vehicle is not negligence as a matter of law unless the vehicle is indisputably located in a favored position.
Eden v. Spaulding 799

New Trial

The general rule in an equity case where a motion to dismiss at the close of plaintiff's case is erroneously sustained requires that the cause be remanded to the trial court for a new trial.
Fink v. O'Neill Country Club 30

Oaths and Affirmations

1. The oath to an affidavit is not required to be administered with any particular ceremony, but the affiant must perform some corporal act whereby he consciously takes upon himself the obligation of an oath.
Moore v. Peterson 615
2. When attention of the person making an affidavit is called to the fact that it must be sworn to and, in recognition of this, he is asked to do some corporal act and he does it, the instrument constitutes a statement under oath, irrespective of other formalities.
Moore v. Peterson 615
3. The act of signing an affidavit before an officer authorized to administer oaths may be a sufficient corporal act to satisfy the requirement of execution under oath.
Moore v. Peterson 615

Ordinances

Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court.
State v. Hatfield 470

Parental Rights

1. In an appeal of a juvenile case, including termination of parental rights, we review the record de novo, and regarding any disputed facts make our own findings independent of any conclusion reached by the trial court.
   In re Interest of D. 23
2. In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption form signed by a natural parent knowingly, intelligently, and voluntarily is valid.
   McCormick v. State 338
3. A relinquishment conditioned upon the retention of some parental rights is invalid.
   McCormick v. State 338
4. Cost to the parties, undue delay, congestion of dockets, and relative resources available for investigative and supervisory assistance are factors which may be considered when determining whether the district court is the more appropriate forum when termination of parental rights is placed in issue.
   R.D.N. v. T.N. 830
5. This court reviews parental termination cases de novo on the record, giving great weight, where the evidence is in conflict, to the fact that the trial court has observed the parties and witnesses and judged their credibility.
   In re Interest of M.S. 889
6. An order terminating parental rights must be supported by clear and convincing evidence.
   In re Interest of M.S. 889
7. A court may, within its discretion, order a parent to make reasonable efforts to rehabilitate, and a parent's failure to do so is an independent reason justifying termination of parental rights.
   In re Interest of M.S. 889
8. When the best interests of a child so require because of the unfitness of a parent, the natural right of the parent to the care and custody of his or her own child must give way to the paramount interest of the state in protecting the rights of the child.
   In re Interest of M.S. 889
9. A proceeding to terminate parental rights is not criminal in nature and therefore, absent questions which would subject the parent to criminal sanctions, does not trigger the protection afforded by the fifth amendment against self-incrimination.
   In re Interest of M.S. 889

Parol Evidence

The parol evidence rule is ordinarily applied in the absence of fraud,

mistake, or ambiguity.
Johnson v. Stover 250

Parties

1. At any time after commencement of the action, a defendant, as a third-party plaintiff, may cause a summons to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.
AgriStor Credit Corp. v. Radtke 386
2. The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff.
AgriStor Credit Corp. v. Radtke 386
3. A third-party claim may be asserted only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant.
AgriStor Credit Corp. v. Radtke 386

Partnerships

1. The dissolution of a partnership is but a preparatory step to its termination; a partnership continues after dissolution until the winding up of its affairs is completed.
Bass v. Dalton 379
2. Equal partners are to share equally in the net profits of the partnership until dissolution; from the date of dissolution on, the use of each partner's interest in the capital and assets of the partnership and the time and skill devoted by a partner to winding up the partnership are factors to be considered in determining each partner's share of profits.
Bass v. Dalton 379
3. Where the evidence is contradictory, the determination of whether a partnership exists presents questions of fact for the jury.
South Sioux City Star v. Edwards 487
4. A partnership is a contract of two or more competent persons to place their money, effects, labor, or skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions.
South Sioux City Star v. Edwards 487
5. The intention to form a partnership, where in dispute, is to be ascertained objectively from all the evidence and circumstances.
South Sioux City Star v. Edwards 487
6. The sharing of profits is a primary factor to be considered in ascertaining the intention of the parties to form a partnership.
South Sioux City Star v. Edwards 487
7. The extent to which one has a voice in the management of the business is a factor to be considered in ascertaining the intention

to form a partnership.
South Sioux City Star v. Edwards 487
8. The fact that a wife signs notes, security agreements, or financing statements with her husband is not, without further explanation of the circumstances, determinative that a partnership exists.
South Sioux City Star v. Edwards 487
9. In order to prove a partnership by estoppel, there must be evidence that a nonpartner held himself or herself out as a partner, or permitted himself or herself to be so held out, and that the third person relied on that misrepresentation to his or her detriment.
South Sioux City Star v. Edwards 487

Paternity

1. In a contested filiation proceeding under Neb. Rev. Stat. ch. 13 (Reissue 1983), the district court has jurisdiction to modify the amount of child support where there is a change of circumstances of the parties after the entry of a support order.
State ex rel. Toledo v. Bockmann 428
2. Attorney fees may not be awarded in a filiation proceeding under Neb. Rev. Stat. ch. 13 (Reissue 1983).
State ex rel. Toledo v. Bockmann 428

Penalties

Where no penalty is provided in a penal statute for certain described activities, no penalty may be applied.
State v. Beyer 33

Pensions

1. It is proper to consider retirement benefits in determining whether alimony should be awarded.
Raley v. Raley 644
2. In determining the amount of alimony to be awarded, a retirement benefit earned prior to the marriage may be considered.
Raley v. Raley 644

Plea Bargains

A defendant has no legal basis to rely on a sentence recommendation as a part of a plea bargain where the trial court has made it clear that it was not in any way bound by such agreement. Therefore, the failure to make a recommendation under such circumstances would also furnish no basis for setting aside the plea and conviction of the defendant.
State v. Hutton 420

Pleadings

1. The purpose of pleadings is to frame the issues upon which a cause is to be tried and advise the adversary as to what he must meet.
   Bashus v. Turner 17
2. If a petition alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.
   Russell v. First York Sav. Co. 112
3. Proper pleading requires a petition to state in logical and legal form the facts which constitute the plaintiff's cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute. The character of the facts alleged, not necessarily the prayer for relief, determines the nature of the action.
   Russell v. First York Sav. Co. 112
4. It is the facts well pleaded that determine the nature of the action and the relief to be granted.
   Johnson v. Stover 250
5. In order to defeat coverage on the basis of fraud, an insurer must plead and prove, among other things, that a misrepresentation of fact or opinion was made knowingly with intent to deceive, that the insurer relied and acted upon such statement, and that the insurer was deceived to its injury.
   Farm Bureau Life Ins. Co. v. Luebbe 694

Pleas

1. The requirements of *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), as to guilty pleas are applied prospectively only after August 7, 1981.
   State v. Gonzales 43
2. Regarding a guilty plea, a defendant is informed of the nature of the charge against him if the defendant had fair notice of what he was being asked to admit.
   State v. Turner 125
3. The evidentiary rule provided in Neb. Rev. Stat. § 27-410 (Reissue 1979), that a withdrawn guilty plea is not admissible in any civil or criminal action or proceeding against the person who made it, does not apply to the sentencing stage of a criminal proceeding.
   State v. Klappal 374
4. Mere failure to comply with precise ceremonial or verbal formality in respect to arraignment and entry of a plea is not a denial of due process for which conviction must be set aside if the essential requisites of clearly informing the accused and an understanding admission of the offense on his part are shown.
   State v. Jones 382

5. Due process of law does not require the State to adopt any particular form of procedure so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution.
State v. Jones 382
6. A factual basis for a plea of guilty may be obtained from sources other than the defendant, including information furnished by the county attorney.
State v. Hutton 420
7. In the final analysis it is only necessary that the record affirmatively disclose that a counseled defendant entered the guilty plea understandingly and voluntarily.
State v. Hutton 420
8. A checklist may properly constitute a part of the record, and may affirmatively establish a voluntary and intelligent waiver of a defendant's rights and a counseled misdemeanor conviction for purposes of an enhanced penalty statute.
State v. Schaf 437
9. Before accepting a guilty plea, a judge should sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea.
State v. Fischer 678
10. The test for the voluntariness of a plea of guilty is determined by the law in effect at the time of the plea.
State v. Schaeffer 786
11. Absent a showing of a manifest injustice, a plea of nolo contendere may not be withdrawn pursuant to ABA Standards for Criminal Justice § 14-2.1(b)(ii) (2d ed. 1980).
State v. Copple 837
12. After entry of a plea of guilty or nolo contendere and before sentence, the court should allow the defendant to withdraw the plea for any fair and just reason. Such reason does not include a person's normal reluctance to be incarcerated.
State v. Copple 837

Police Officers and Sheriffs

If police officers, while lawfully engaged in an activity in a particular place, perceive a suspicious object, they may seize it immediately, provided that the initial intrusion is lawful, the discovery of the evidence is inadvertent, and it is apparent to the officer that the item seen might be contraband or evidence of a crime.
State v. Haselhorst 233

Political Subdivisions Tort Claims Act

1. 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.
Suarez v. Omaha P.P. Dist. 4

2. Where a county legislative body delegates duties to a county official, and gives that official discretion in performing those duties within broad overall guidelines, actions of that county official in issuing permits are discretionary functions within the meaning of Neb. Rev. Stat. § 23-2409(2) (Reissue 1977).
Allen v. County of Lancaster 163

Post Conviction

1. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief.
State v. Rolling 51
State v. Webb 238
2. Once post conviction relief has been denied, subsequent petitions will not be entertained unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing the prior motion for post conviction relief.
State v. Rolling 51
3. In the absence of allegations of fact specific enough to permit the trial court to make a preliminary determination of a question relating to an alleged violation of a defendant's constitutional rights, the court need not have an evidentiary hearing on the issue of ineffective counsel.
State v. Webb 238
4. Where the files and records of a case affirmatively show that the prisoner is entitled to no relief, an evidentiary hearing is not required.
State v. Webb 238
5. A motion for post conviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
State v. Pope 361
6. A petitioner in a post conviction proceeding may not raise questions which could have been raised on direct appeal unless the questions are such that they would make the judgment of conviction void or voidable under the state or federal Constitution.
State v. Pope 361
7. Matters already litigated or which could have been raised on direct appeal are not properly included in an action seeking post conviction relief.
State v. Pope 361
State v. Juhl 792
8. Under the Nebraska Post Conviction Act, Neb. Rev. Stat.

§§ 29-3001 et seq. (Reissue 1979), an evidentiary hearing is required upon an appropriate motion containing a factual allegation which, if proved, constitutes a violation or infringement of a constitutional right. However, a court may properly deny an evidentiary hearing upon a determination after an examination of the files and records of the case that the petitioner is entitled to no relief.
State v. Williams 618
State v. Schaeffer 786

9. A motion to set aside a judgment of conviction cannot serve the purpose of an appeal to secure a review of the conviction, nor is such a motion under the Post Conviction Act a substitute for an appeal.
State v. Juhl 792

Prejudgment Interest

1. Where the amount of a loss, the subject of litigation, cannot be computed without opinion or discretion, as a general rule the claim is unliquidated and prejudgment interest is not recoverable.
Erin Rancho Motels v. United States F. & G. Co. 9
Peterson v. North American Plant Breeders 258

2. 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.
Slusarski v. American Confinement Sys. 576

3. It is the rule in this jurisdiction that prejudgment interest is allowable only where the amount of the claim is liquidated; conversely, where reasonable controversy exists as to the plaintiffs' right to recover or as to the amount of such recovery, the claim is considered to be unliquidated and prejudgment interest is not allowed.
Smith v. Central Inv. Co. 728

Preliminary Hearings

The standard of proof at a preliminary hearing requires only that the evidence establish that a crime has been committed and that there is probable cause to believe that the accused committed it.
State v. Ruzicka 594

Presentence Reports

Neb. Rev. Stat. § 29-2912 (Reissue 1979) imposes upon the sentencing court the mandatory duty to order a presentence investigation for the purpose of evaluating whether one guilty of a felony sexual offense is a mentally disordered sex offender.
State v. Klappal 374

Presumptions

1. In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant. This court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.
   State v. Tomes 148
   State v. Ruzicka 594
   State v. Schroder 860
2. Where a summary judgment has been entered, the absence of a bill of exceptions results in the presumptions that the evidence sustains the trial court's finding that there was no genuine issue as to any material fact and that the case was correctly decided.
   Stromsburg Bank v. Nuttelman 687
3. While a recital in a journal entry appearing in the transcript is presumptively true, an affirmative showing in the bill of exceptions that it is not true prevails over the presumption.
   State v. Schroder 860

Pretrial Conferences

The standard of review for denial of a motion to amend a pretrial order is whether there was an abuse of discretion.
Peterson v. North American Plant Breeders 258

Pretrial Motions

A party should not be permitted to secure an order of the court prohibiting the introduction of certain evidence and to then complain because such party's lawyer did not require that evidence to be produced.
State v. Juhl 792

Prior Acts

1. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
   State v. Baker 207
2. The admissibility of evidence of other crimes lies largely within the discretion of the trial court.
   State v. Baker 207
3. Whether evidence of previous conduct is not relevant because of remoteness or lack of similarity is a matter within the discretion of the trial court.
   State v. Keithley 707
4. Evidence of other crimes may be admitted in a criminal prosecution where the evidence is so related in time, place, and

circumstances to the offense or offenses charged so as to have substantial probative value in determining the guilt of the accused.
State v. Keithley 707
5. Evidence of previous similar conduct has independent relevancy in prosecutions for sexual offenses.
State v. Keithley 707

Prior Convictions

1. Contentions that prior criminal convictions, relied on to enhance a penalty under the habitual criminal statute, are constitutionally invalid may be raised at the habitual criminal hearing.
State v. Gonzales 43
2. A transcript of conviction which fails to show on its face that counsel was afforded or the right waived cannot be used for enhancement purposes.
State v. Baxter 414
3. Objections to the validity of the judgment other than those pertaining to inadequate waiver of counsel must be raised by direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.
State v. Baxter 414
4. A checklist may properly constitute a part of the record, and may affirmatively establish a voluntary and intelligent waiver of a defendant's rights and a counseled misdemeanor conviction for purposes of an enhanced penalty statute.
State v. Schaf 437
5. Although proof of prior convictions to establish a charge of driving while intoxicated, third offense, may be waived by the voluntary and intelligent admission of the defendant, nevertheless, there must be proof in the record in some form that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right.
State v. Tichota 444
6. In order for a record of previous convictions to be used in an enhancement proceeding, the accused must be shown to have had counsel or to have knowingly and voluntarily waived counsel.
State v. Falkner 896

Probable Cause

1. A statement from a person involved in a crime with the defendant may provide enough trustworthy information to permit the issuance of an arrest warrant.
State v. Gonzales 43

2. The duty of this court in determining whether probable cause to issue a search warrant exists is only to ensure that the magistrate had a substantial basis for concluding that such existed.
State v. Abraham 475
3. Probable cause is a reasonable suspicion founded on articulable facts.
State v. Abraham 475
4. In evaluating the showing of probable cause necessary to support the issuance of a search warrant, only the probability, and not a prima facie showing, of criminal activity is required.
State v. Abraham 475
5. A search warrant may be issued for a location where it is probable that the property described would be found.
State v. Abraham 475
6. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.
State v. McGuire 511
7. Where probable cause exists for the arrest of an accused in his motor vehicle upon a public highway and at that time probable cause for the search of his vehicle exists as well, a search of the vehicle a short time later at a different location while the vehicle is still in police custody is not unreasonable even though made without a warrant.
State v. McGuire 511
8. A peace officer may arrest without a warrant, if the officer has reasonable cause to believe that the person to be arrested has committed a felony.
State v. Horn 524
9. Under the guarantees of both the U.S. Constitution and the Constitution of the State of Nebraska, one may not be arrested without probable cause.
State v. Harrison 532
10. Probable cause to arrest exists at the moment when the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed.
State v. Harrison 532
11. If the facts available to the officer at the time of the arrest would warrant a man of reasonable caution in the belief the action was appropriate, then probable cause exists.
State v. Harrison 532
12. In determining whether to issue a search warrant, the task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the

affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
State v. Hoxworth 647

Probation and Parole

1. Probation is a sentence, and an order of probation is a final order from which an appeal may be taken.
State v. Vernon 539
2. When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute.
State v. Schroder 860
3. The granting of probation, as opposed to the imposition of a sentence of imprisonment, will not be disturbed on appeal in the absence of any abuse of discretion by the sentencing court.
State v. Jallen 882

Proof

1. As a general rule, knowledge and consciousness of possession of alcoholic liquor are essential elements of proof to support a conviction for a minor being in possession of alcoholic liquor.
State v. Harris 75
2. Where circumstantial evidence is relied upon to prove the elements of a crime, the circumstances must relate directly to the guilt of the accused beyond all reasonable doubt.
State v. Harris 75
3. In order to establish a case of undue influence, the party asserting the claim must show clearly and convincingly (1) that the party who executed the instrument was subject to undue influence; (2) that there was an opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence.
In re Estate of Massie 103
4. The lower court's findings concerning products of undue influence are determinations of fact. As such, the standard of review is whether the findings are supported by sufficient evidence, which are not to be disturbed unless clearly wrong.
In re Estate of Massie 103
5. Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry, if those facts and circumstances are of such a nature as to present a jury question as to defendant's intent.
State v. Coburn 144
6. The burden of establishing a cause of action by circumstantial evidence requires that the evidence be of such character and the

circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved.
Chmelka v. Continental Western Ins. Co. 186

7. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
State v. Baker 207

8. In an action for reformation of a written contract or deed, the burden of proof rests on the moving party to overcome the strong presumption arising from the terms of the written instrument.
Johnson v. Stover 250

9. Damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact, in this case the jury, to estimate with a reasonable degree of certainty and exactness the actual damages.
Peterson v. North American Plant Breeders 258

10. In a civil case the burden of proof is on the plaintiff to prove, by a preponderance of the evidence, all facts essential to recovery.
Scoular-Bishop Grain Co. v. Bassett Grain 280

11. Under the Nebraska Employment Security Law, where an employee appeals from a disqualification of unemployment compensation benefits, the burden of proof is on the employee to show that he involuntarily left his employment or did so with good cause.
Taylor v. Collateral Control Corp. 432

12. Although proof of prior convictions to establish a charge of driving while intoxicated, third offense, may be waived by the voluntary and intelligent admission of the defendant, nevertheless, there must be proof in the record in some form that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right.
State v. Tichota 444

13. The standard of proof at a preliminary hearing requires only that the evidence establish that a crime has been committed and that there is probable cause to believe that the accused committed it.
State v. Ruzicka 594

14. Although identification of the accused is an essential element in establishment of guilt beyond a reasonable doubt, such identification can be inferred from all the facts and circumstances that are in evidence.
State v. Hoxworth 647

15. In voluntary termination cases the burden of proof is on the employee to prove that the leaving was for good cause.
McClemens v. United Parcel Serv. 689
16. A marriage is presumed valid, and the burden of proving otherwise is upon the party seeking the annulment.
Guggenmos v. Guggenmos 746

Property Division

1. There is no precise mathematical formula which can be employed to determine the equitable division of property in an action for dissolution of marriage.
Ruhnke v. Ruhnke 355
Reuter v. Reuter 732
Guggenmos v. Guggenmos 746
Choat v. Choat 875
2. The ultimate test for determining the correctness of the division of marital property and an award of alimony is one of reasonableness.
Ruhnke v. Ruhnke 355
Reuter v. Reuter 732
Guggenmos v. Guggenmos 746
Choat v. Choat 875
3. In an action for dissolution of marriage, the courts may divide the property between the parties according to the equities, regardless of how legal title is held.
Ruhnke v. Ruhnke 355
4. The rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined.
Raley v. Raley 644
5. The division of property and the awarding of alimony in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; however, where the evidence is in conflict, this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
Reuter v. Reuter 732
Choat v. Choat 875
6. The division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; however, where the evidence is in conflict, this court will give weight to the fact that the trial judge observed and heard the witnesses and

accepted one version of the facts rather than another.
Guggenmos v. Guggenmos 746

Prosecuting Attorneys

A prosecutor who has previously represented the spouse of one who is now being prosecuted for a crime is not necessarily disqualified as a prosecutor unless the alleged criminal act arose out of the marital relationship or, because of such prior representation, the attorney has obtained confidential information which may be prejudicial to the interest of the defendant.
State v. Hatfield 470

Proximate Cause

The failure to give an instruction on the definition of proximate cause where it is one of the principal issues in the case must be considered by the court to be plain error, requiring reversal.
Enyeart v. Swartz 425

Public Officers and Employees

Where a county legislative body delegates duties to a county official, and gives that official discretion in performing those duties within broad overall guidelines, actions of that county official in issuing permits are discretionary functions within the meaning of Neb. Rev. Stat. § 23-2409(2) (Reissue 1977).
Allen v. County of Lancaster 163

Public Purpose

All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature. If the classification of persons singled out by the legislation is reasonable and not arbitrary, and is based on substantial differences having a reasonable relation to the persons dealt with and the public purpose to be achieved, it meets the constitutional test of equal protection.
State v. Ruzicka 594

Public Service Commission

1. It is not the function of the Supreme Court to second-guess the Public Service Commission or to make independent findings. Determinations by the Public Service Commission are a matter peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed by the Supreme Court in the absence of a showing that the action of the Public Service Commission was illegal, arbitrary, capricious, or unreasonable.
In re Application of Northwestern Bell Tel. Co. 563
2. The striking of the balance between the competing interests of legitimate competition and the protection of the public interest

are matters of legislative and administrative determination peculiarly resting in the judgment of the Public Service Commission. If there is evidence to sustain the findings of the Public Service Commission, the Supreme Court cannot substitute its judgment therefor.
In re Application of Northwestern Bell Tel. Co. 563

3. It is only where the findings of the Public Service Commission are against all the evidence that the Supreme Court may hold the Public Service Commission's findings are arbitrary or capricious.
In re Application of Northwestern Bell Tel. Co. 563

4. The ascertainment of a fair return in a given case is a matter incapable of exact mathematical determination and is one which must be, to some extent, left to the discretion of the Public Service Commission. At best, it is one of reasonable approximation given its basis in a proper consideration of all relevant facts.
In re Application of Northwestern Bell Tel. Co. 563

5. It is not the province of this court to weigh or resolve conflicts in the evidence or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it.
In re Application of McCarty 637

6. This court upon appeal cannot disturb findings of the Nebraska Public Service Commission unless it appears that some requirements of the law have been violated or disregarded or that the result reached cannot reasonably be derived from the facts proved.
In re Application of McCarty 637

7. On an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.
In re Application of McCarty 637

Public Utilities

1. Power companies engaged in the transmission of electricity, especially electricity of high voltage, are charged with the duty of exercising a very high degree of care to safeguard those whose lawful activities expose them to the risk of inadvertent contact with the electric lines, but they are not insurers and not liable for damages in the absence of negligence.
Suarez v. Omaha P.P. Dist. 4

2. Power companies which are engaged in the transmission of

electricity cannot be totally oblivious to the fact that children have a propensity to climb trees. It is ordinarily a question of fact, to be resolved by the trier of fact, whether or not a power company was negligent in the stringing, inspection, and maintenance of its transmission lines located in proximity to trees.
Suarez v. Omaha P.P. Dist. 4

Quo Warranto

1. Quo warranto is the exclusive means of challenging the legal existence of a public entity.
Chimney Rock Irr. Dist. v. Fawcus Springs Irr. Dist. 777
2. Generally, quo warranto will not lie to challenge an improper exercise of a conferred power, although such irregularity may be sufficient, when tested by other means, to void the act done.
Chimney Rock Irr. Dist. v. Fawcus Springs Irr. Dist. 777

Railroads

A traveler on a highway, when approaching and while crossing a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight as a matter of law and no recovery can be had for damages resulting from a collision with a passing train.
Whitaker v. Burlington Northern, Inc. 90

Rates

The ascertainment of a fair return in a given case is a matter incapable of exact mathematical determination and is one which must be, to some extent, left to the discretion of the Public Service Commission. At best, it is one of reasonable approximation given its basis in a proper consideration of all relevant facts.
In re Application of Northwestern Bell Tel. Co. 563

Real Estate

1. Upon the execution of a contract for the sale of real estate, the equitable ownership of the property vests in the vendee, even though the seller retains the legal title as security for deferred installment payments of the purchase price.
DeBoer v. Oakbrook Home Assn. 813
2. Where, pursuant to a land contract, the deed is held in escrow until payment of the purchase price, the vendor of an instrument held in escrow loses control over it so long as the vendee does not default, even though the vendor retains bare legal title in the land as security for the payment of the purchase price.
DeBoer v. Oakbrook Home Assn. 813

Rebuttal Evidence

1. It is within the discretion of the trial court to allow testimony from a rebuttal witness who is in violation of a sequestration order. Such discretion is abused only where it is shown that the permitted testimony prejudiced the defendant's rights.
   State v. Swillie 551
2. In a criminal prosecution any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony.
   State v. Swillie 551

Records

1. The separate juvenile court does not have statutory authority to order expungement of a juvenile record.
   In re Interest of P.L.F. 68
2. In a criminal prosecution an assignment of error which requires an examination of evidence cannot prevail in the absence of a bill of exceptions; in such a case the only question is whether the pleadings are sufficient to sustain the judgment of the trial court.
   State v. Turner 365
3. In a review on the record, where the bill of exceptions contains nothing to the contrary, the reviewing court will be limited in its consideration of the particular error alleged to a determination of whether the transcript supports the judgment.
   State v. Hatfield 470
4. A bill of exceptions is the only vehicle for bringing evidence to this court.
   Stromsburg Bank v. Nuttelman 687
5. Where a summary judgment has been entered, the absence of a bill of exceptions results in the presumptions that the evidence sustains the trial court's finding that there was no genuine issue as to any material fact and that the case was correctly decided.
   Stromsburg Bank v. Nuttelman 687
6. In the absence of a bill of exceptions, the only issue which will be considered on appeal of a summary judgment is the sufficiency of the pleadings to support the judgment.
   Stromsburg Bank v. Nuttelman 687
7. While a recital in a journal entry appearing in the transcript is presumptively true, an affirmative showing in the bill of exceptions that it is not true prevails over the presumption.
   State v. Schroder 860

Recoupment

1. When a counterclaim is filed by an estate, the defendant may plead the defense of recoupment to reduce the amount of the counterclaim even though the defendant did not file a claim

against the estate.
In re Estate of Massie 103
2. The defense of recoupment is not barred by Neb. Rev. Stat. § 30-2485 (Reissue 1979).
In re Estate of Massie 103
3. The defense of recoupment, by its nature, can only be used in a defensive character relating to the same transaction.
In re Estate of Massie 103

Recreation Liability Act

A municipality is an owner within the meaning of the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1984).
Bailey v. City of North Platte 810

Recusal

A ruling of a trial judge on a motion to disqualify himself is immaterial where the cause is an action triable de novo on the record in this court.
R.D.N. v. T.N. 830

Reformation

1. In an action for reformation of a written contract or deed, the burden of proof rests on the moving party to overcome the strong presumption arising from the terms of the written instrument.
Johnson v. Stover 250
2. To warrant reformation of a written instrument, the evidence must be clear, convincing, and satisfactory.
Johnson v. Stover 250
3. Equity will decree reformation of a contract for mutual mistake or where there is a mistake on one side and fraud or inequitable conduct on the other.
Johnson v. Stover 250

Right to Counsel

1. Once the right to counsel and the right to remain silent have been invoked by a defendant, the defendant cannot be persuaded to waive his rights, and there is a strong presumption against waiver. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.
State v. Joy 310
2. An accused who has expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication,

exchanges, or conversations with the police.
State v. Joy 310
3. A transcript of conviction which fails to show on its face that counsel was afforded or the right waived cannot be used for enhancement purposes.
State v. Baxter 414
4. In order for a record of previous convictions to be used in an enhancement proceeding, the accused must be shown to have had counsel or to have knowingly and voluntarily waived counsel.
State v. Falkner 896

Rules of Evidence

1. Where it is shown by a preponderance of the evidence that information or evidence obtained by an illegal search would ultimately or inevitably have been discovered by lawful means, the evidence is admissible under the inevitable discovery exception to the exclusionary rule.
State v. Burchett 78
2. The inevitable discovery exception to the exclusionary rule allows illegally obtained evidence to be admitted if the illegal act merely contributed to the discovery of the allegedly tainted information and it would have been acquired lawfully even if the illegal act had not occurred.
State v. Burchett 78
3. The evidentiary rule provided in Neb. Rev. Stat. § 27-410 (Reissue 1979), that a withdrawn guilty plea is not admissible in any civil or criminal action or proceeding against the person who made it, does not apply to the sentencing stage of a criminal proceeding.
State v. Klappal 374
4. Under the provisions of Neb. Rev. Stat. § 27-702 (Reissue 1979), it is no longer necessary to have formal training in order to be considered as an expert witness; actual practical experience in the field can also qualify one as an expert in that field.
State v. Hoxworth 647
5. An offer of proof is generally a prerequisite to our review of a ruling which excludes evidence unless it is apparent from the context within which the question was asked that the answer would have been material and competent.
State v. Schroder 860

Sales

1. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
Peterson v. North American Plant Breeders 258

2. The existence of an express warranty depends upon the particular circumstances in which the language is used and read. A catalog description or advertisement may create an express warranty in appropriate circumstances. The trier of fact must determine whether the circumstances necessary to create an express warranty are present in a given case. The test is whether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment.
Peterson v. North American Plant Breeders 258
3. When a producer of seed places sealed bags of hybrid seed corn in its chain of distribution, it carries with it, unless effectively excluded or modified, an implied warranty of merchantability that protects the ultimate buyer-user in that chain.
Peterson v. North American Plant Breeders 258

Schools and School Districts

1. The manner of taking appeals from actions of the State Board of Education, pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), must be in the same manner in which appeals from any action of the State Board of Education are taken to the district court. However, because the language of a specific statute takes precedence over the language of a general statute, the time in which the appeal is to be taken must be within 20 days as provided in § 79-403(1), rather than 30 days as provided in Neb. Rev. Stat. § 84-917 (Reissue 1981).
In re Covault Freeholder Petition 763
In re Deveny Freeholder Petition 819
2. Pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), appeals are filed in the district court where the land is located rather than where the action is taken by the State Board of Education.
In re Covault Freeholder Petition 763
3. The time for taking an appeal from the action of the State Board of Education, pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), begins to run when the board, at a duly convened meeting at which minutes are required to be taken, votes to transfer the land, and not when it approves a formal memorandum.
In re Covault Freeholder Petition 763
In re Deveny Freeholder Petition 819
4. The action of the statutory board created under Neb. Rev. Stat. § 79-403(2) (Reissue 1976) is an exercise of quasi-judicial power, equitable in character, and on appeal therefrom to the district court the cause is triable de novo as though it had originally been instituted in such court.
In re Covault Freeholder Petition 763

5. Where all of the acts necessary to effect accreditation of a school district have been met prior to the statutory board's ordering the transfer, and, in fact, formal accreditation is granted prior to the time the children begin school and prior to the time the district court acts on the appeal, the issue of accreditation must be considered to have become moot.
In re Covault Freeholder Petition 763
6. Where a freeholder seeks to transfer land located in an unaccredited Class I district to an accredited Class II, III, IV, or V district and the Class I district is a part of an accredited Class VI district, the transfer must be effected pursuant to Neb. Rev. Stat. § 79-403(2) (Cum. Supp. 1984) and the land is transferred out of both the Class I district and the Class VI district.
In re Pelan Freeholder Petition 771

Search and Seizure

1. Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.
State v. Burchett 78
2. Where it is shown by a preponderance of the evidence that information or evidence obtained by an illegal search would ultimately or inevitably have been discovered by lawful means, the evidence is admissible under the inevitable discovery exception to the exclusionary rule.
State v. Burchett 78
3. The inevitable discovery exception to the exclusionary rule allows illegally obtained evidence to be admitted if the illegal act merely contributed to the discovery of the allegedly tainted information and it would have been acquired lawfully even if the illegal act had not occurred.
State v. Burchett 78
4. If police officers, while lawfully engaged in an activity in a particular place, perceive a suspicious object, they may seize it immediately, provided that the initial intrusion is lawful, the discovery of the evidence is inadvertent, and it is apparent to the officer that the item seen might be contraband or evidence of a crime.
State v. Haselhorst 233
5. A finding by the trial court that a consent to search was given voluntarily will not be set aside on appeal unless clearly erroneous.
State v. Ferrell 463
6. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.
State v. McGuire 511

7. Where probable cause exists for the arrest of an accused in his motor vehicle upon a public highway and at that time probable cause for the search of his vehicle exists as well, a search of the vehicle a short time later at a different location while the vehicle is still in police custody is not unreasonable even though made without a warrant.
State v. McGuire 511
8. Under the inevitable discovery exception to the exclusionary rule, illegally obtained evidence which would have been discovered in the course of a proper investigation is admissible.
State v. McGuire 511
9. The consent required to support a consensual search must be essentially free and unconstrained choice, and not the product of a will "overborne."
State v. Horn 524
10. Seizure of theater owner's films without a warrant is not justified under the fourth amendment to the U.S. Constitution or article I, § 7, of the Nebraska Constitution in the absence of probable cause and exigent circumstances or some other recognized exception.
State v. Skolnik 667

Search Warrants

1. The duty of this court in determining whether probable cause to issue a search warrant exists is only to ensure that the magistrate had a substantial basis for concluding that such existed.
State v. Abraham 475
2. Probable cause is a reasonable suspicion founded on articulable facts.
State v. Abraham 475
3. In evaluating the showing of probable cause necessary to support the issuance of a search warrant, only the probability, and not a prima facie showing, of criminal activity is required.
State v. Abraham 475
4. A search warrant may be issued for a location where it is probable that the property described would be found.
State v. Abraham 475
5. Affidavits for search warrants must be tested in a commonsense, realistic fashion. Where some of the underlying circumstances are detailed in the affidavit, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the court should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner.
State v. Hoxworth 647
6. In determining whether to issue a search warrant, the task of the issuing magistrate is simply to make a practical, commonsense

decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
State v. Hoxworth 647

Secured Transactions

1. Under Neb. U.C.C. § 3-802 (Reissue 1980), unless otherwise agreed, where a personal check is taken for an underlying obligation, the obligation is suspended pro tanto until the presentment of the check. If the check is dishonored, an action may be maintained on either the check or the obligation.
Rose v. United States Nat. Bank 97
2. A provision in a security agreement which seeks to impose an attorney fee on a debtor as part of the costs of suit to enforce the security agreement and its underlying contract is contrary to the public policy of Nebraska and, therefore, void and unenforceable.
First National Bank v. Schroeder 397

Security Interests

1. The phrase "costs of management" includes all expenses necessary to perpetuate the actual commercial use of real estate, including the payment of real estate taxes.
Conservative Sav. & Loan Assn. v. Karp 217
2. Where a successful bidder at a judicial sale pays only a small deposit or part of his bid at the sale and pays the balance of his bid later but does not pay interest on the balance of his bid, such bidder is not entitled to rents accruing from the date of sale until the balance of the bid is paid. To hold otherwise would bestow an undeserved windfall on the bidder: a bidder could, in good or bad faith, force a mortgagee in possession to finance the balance of the bid without any obligation to pay interest for the use of that money representing the balance of the bid.
Conservative Sav. & Loan Assn. v. Karp 217

Self-Defense

The questions as to who was the aggressor, whether there existed in the mind of the defendant apprehension based upon reasonable grounds therefor of imminent peril to life or limb of the defendant so as to justify his using force, and whether the means adopted for his defense were reasonable and appropriate for that purpose, in view of all the circumstances surrounding him at the time, are all essentially questions of fact of which the judge or jury, as the case may be, is the sole judge.
State v. Hatfield 470

Sentences

1. The Nebraska habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1979), is not a separate offense but, rather, provides an enhancement of the penalty for the crime committed, with a minimum sentence of 10 years and a maximum sentence of 60 years for each conviction of one found to be a habitual criminal, even though, absent a conviction as a habitual criminal, the minimum or maximum sentence might be less.
   State v. Rolling 51
2. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief.
   State v. Rolling 51
3. 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 in the record. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant.
   State v. Rolling 51
4. Remarks of a sentencing court judge about possible adverse verdicts which might have been returned against a defendant do not demonstrate per se an abuse of discretion on the part of the sentencing court.
   State v. Hurlburt 121
5. Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief.
   State v. Webb 238
6. A sentence imposed within statutory limits will not be set aside absent an abuse of discretion.
   State v. Turner 365
7. A trial court does not have the authority under Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982) to interrupt the period of suspension or permit one convicted of driving under the influence of alcoholic liquor or drug, first or second offense, to drive for limited work-related purposes. On second offense the period of prohibition against driving must be for a period of 6 continuous months computed from the date the order of probation is entered.
   State v. Havorka 367
8. This court may reduce excessive criminal sentences.
   State v. Klappal 374
9. A sentence imposed within statutory limits will not be disturbed on appeal absent evidence of an abuse of discretion by the trial court.
   State v. Klappal 374
10. A defendant has no legal basis to rely on a sentence

recommendation as a part of a plea bargain where the trial court has made it clear that it was not in any way bound by such agreement. Therefore, the failure to make a recommendation under such circumstances would also furnish no basis for setting aside the plea and conviction of the defendant.
State v. Hutton 420

11. Where the term of a sentence of imprisonment is the statutory maximum for the offense, credit must be given for presentence jail time. However, it is not an abuse of discretion for a court to fail to give credit, under such circumstances, for time spent by a defendant in a voluntary alcohol treatment program.
State v. Hutton 420

12. On direct appeal this court has the power to remand the cause for 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 invoked appellate jurisdiction for the correction of errors.
State v. Ferrell 463

13. "Jail time" is commonly understood to be the time an accused spends in detention pending trial and sentencing.
State v. Fisher 479

14. The fact that a conviction is later reversed does not transform the period of time served in prison as a result of that conviction to jail time for which credit must be given.
State v. Fisher 479

15. Credit for jail time must be granted where an indefinite sentence up to the maximum prison term possible is imposed.
State v. Fisher 479

16. In the absence of an abuse of discretion by the trial court, a sentence imposed within statutory limits will not be disturbed on appeal.
State v. McGuire 511

17. Probation is a sentence, and an order of probation is a final order from which an appeal may be taken.
State v. Vernon 539

18. A sentence validly imposed takes effect from the time it is pronounced, and a subsequent, different sentence is a nullity.
State v. Vernon 539

19. In imposing a sentence a trial court should consider inter alia the defendant's age, mentality, education, experience, and social and cultural background, as well as his past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
State v. Swillie 551

20. The seriousness of the offense is an important factor in the

setting of a sentence.
State v. Swillie 551
21. A sentence will not be set aside if it is within the statutory limits, absent an abuse of discretion by the trial court.
State v. Ruzicka 594
22. After conviction a trial judge has broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct. In gaining this information the trial court may consider reports of probation officers, police reports, affidavits, and other information, including his own observations of the defendant.
State v. Gillette 672
23. The latitude allowed a judge at a sentencing hearing to determine the nature and length of punishment, other than in recidivist cases, is almost without limitation as long as it is relevant to the issue.
State v. Gillette 672
24. The rule is firmly established in this state that in the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.
State v. Gillette 672
25. It is the rule in this jurisdiction that an order or sentence of the trial court denying probation will not be overruled on appeal unless there has been an abuse of discretion.
State v. Gillette 672
26. That part of Neb. Rev. Stat. § 29-2260(2) (Cum. Supp. 1984) providing that the court "may withhold sentence of imprisonment" is a guideline for the court and is not mandatory.
State v. Gillette 672
27. Where a sentence of life imprisonment and a sentence of death are imposed at the same time by the same court, the life sentence is to be served until the death sentence is carried out.
State v. Jones 713
28. A court may impose a lesser sentence when an erroneous sentence has been vacated.
State v. Jones 713
29. A sentence imposed within statutory limits will not be set aside absent an abuse of discretion.
State v. Copple 837
30. When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute.
State v. Schroder 860

31. Where the State appeals a sentence under Neb. Rev. Stat. §§ 29-2320 et seq. (Cum. Supp. 1984), on the ground that the sentence is excessively lenient, a sentence imposed within statutory limits will not be disturbed on appeal unless there appears an abuse of the sentencing court's discretion.
State v. Jallen 882
32. Under Neb. Rev. Stat. § 39-669.07(1), the court-ordered suspending of driving privileges must be for a continuous period computed from the date the order of probation is entered.
State v. Ramirez 899

Sexual Assault

1. Corroboration of the principal act constituting the offense is not required.
State v. Keithley 707
2. Evidence of previous similar conduct has independent relevancy in prosecutions for sexual offenses.
State v. Keithley 707

Specific Performance

In order to satisfy the requirements of Neb. Rev. Stat. § 36-106 (Reissue 1978), the burden is upon the proponent to prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in performance are referable solely to the contract sought to be enforced, so that nonperformance by the other party would amount to a fraud upon him.
Darsaklis v. Schildt 605

Standing

In order to have standing to challenge a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of the law as applied to the conduct of others.
State v. Frey 558

Statute of Frauds

In order to satisfy the requirements of Neb. Rev. Stat. § 36-106 (Reissue 1978), the burden is upon the proponent to prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in performance are referable solely to the contract sought to be enforced, so that nonperformance by the other party would amount to a fraud upon him.
Darsaklis v. Schildt 605

Statutes

1. It is a fundamental principle of statutory construction that a penal statute is to be strictly construed.
State v. Beyer 33
2. No act is criminal unless the Legislature in express terms has declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of the written law.
State v. Beyer 33
3. A statute is open to construction where the language used requires interpretation or may reasonably be considered ambiguous.
Iske v. Papio Nat. Resources Dist. 39
4. The court will, if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning.
Iske v. Papio Nat. Resources Dist. 39
5. Referential and qualifying words in a statute, where no contrary intention appears, refer solely to the last antecedent.
Iske v. Papio Nat. Resources Dist. 39
6. The Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute. However, the agency is limited in its rule-making authority to the powers delegated to it by the statute which it is to administer.
County of Dodge v. Department of Health 346
7. In order to be valid a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated.
County of Dodge v. Department of Health 346
8. An administrative agency cannot use its rule-making power to modify, alter, or enlarge provisions of a statute which it is charged with administering.
County of Dodge v. Department of Health 346
9. An administrative agency cannot interpret its rules and regulations in such a manner so that self-interpreted rules and regulations contravene the statute which the agency is obliged to administer.
County of Dodge v. Department of Health 346
10. Neb. Rev. Stat. § 29-2912 (Reissue 1979) imposes upon the sentencing court the mandatory duty to order a presentence investigation for the purpose of evaluating whether one guilty of a felony sexual offense is a mentally disordered sex offender.
State v. Klappal 374
11. The term "sexual offense," as used in Neb. Rev. Stat. § 29-2912 (Reissue 1979), includes any felony in which the sexual excitement of the person committing the crime is a substantial

motivational factor.
State v. Klappal 374
12. A statute may be constitutionally infirm by reason of being vague, or because it is overbroad.
State v. Frey 558
13. A statute is vague if its prohibitions are not clearly defined.
State v. Frey 558
14. A statute which is clear and precise, and therefore not vague, may nonetheless be overbroad in the sense that it prohibits the exercise of constitutionally protected conduct, such as the exercise of first amendment rights.
State v. Frey 558
15. In a facial challenge to the overbreadth and vagueness of a law, that is, a claim that the law is invalid in toto and therefore incapable of any valid application, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge fails. The court then examines the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, upholds the challenge only if the enactment is impermissibly vague in all its applications.
State v. Frey 558
16. In order to have standing to challenge a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of the law as applied to the conduct of others.
State v. Frey 558
17. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.
State v. Ruzicka 594
18. This court does not sit as a superlegislature to review the wisdom of legislative acts.
State v. Ruzicka 594
19. All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature. If the classification of persons singled out by the legislation is reasonable and not arbitrary, and is based on substantial differences having a reasonable relation to the persons dealt with and the public purpose to be achieved, it meets the constitutional test of equal protection.
State v. Ruzicka 594
20. A legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
Moore v. Peterson 615
21. Where the arrest and refusal took place prior to the effective

date of the amendment to the implied consent law, the rights of the parties are fixed by the statute as it existed prior to the amendment.
Moore v. Peterson 615
22. An amendment to a workmen's compensation statute which provides for the payment of attorney fees relates to the remedy and affects procedure only, and does not interfere with substantive rights. Therefore, such fees as are provided may be taxed as an item of costs in entering judgment on a claim that arose before the amendatory act was passed.
Smith v. Fremont Contract Carriers 652
23. The provisions of Neb. Rev. Stat. § 44-710.14 (Reissue 1978), applying to sickness and accident insurance, are to be read in pari materia with the provisions of Neb. Rev. Stat. § 44-358 (Reissue 1978), applying to all insurance policies.
Farm Bureau Life Ins. Co. v. Luebbe 694
24. The party attacking a statutory classification must carry the burden of showing that the classification does not rest on any reasonable basis.
Farm Bureau Life Ins. Co. v. Luebbe 694
25. When no fundamental rights or suspect classification is affected, the equal protection clause of the fourteenth amendment to the U.S. Constitution requires only that the state law be shown to bear some rational relationship to legitimate state purposes.
Farm Bureau Life Ins. Co. v. Luebbe 694
26. A statute may discriminate in favor of a certain class if the discrimination is founded upon a reasonable distinction, or difference in state policy, or if any state of facts can reasonably be conceived which would sustain the classification.
Farm Bureau Life Ins. Co. v. Luebbe 694
27. Neb. Rev. Stat. § 44-359 (Reissue 1978) violates neither the equal protection clause of the fourteenth amendment to the U.S. Constitution nor the special law clause of article III, § 18, of the Nebraska Constitution, and is constitutional.
Farm Bureau Life Ins. Co. v. Luebbe 694
28. Neb. Rev. Stat. § 20-148 (Reissue 1977) does not waive the sovereign immunity of the State of Nebraska as to actions brought in federal court under 42 U.S.C. § 1983 (1982) to protect rights under the contract clause (article I, § 10, of the U.S. Constitution) and property interests protected under the fourteenth amendment to the U.S. Constitution.
Wiseman v. Keller 717
29. The manner of taking appeals from actions of the State Board of Education, pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), must be in the same manner in which appeals from

any action of the State Board of Education are taken to the district court. However, because the language of a specific statute takes precedence over the language of a general statute, the time in which the appeal is to be taken must be within 20 days as provided in § 79-403(1), rather than 30 days as provided in Neb. Rev. Stat. § 84-917 (Reissue 1981).
In re Covault Freeholder Petition 763
In re Deveny Freeholder Petition 819

30. The requirements of a statute granting the right to appeal are mandatory and must be complied with in order for the appellate court to acquire jurisdiction.
Northern Messenger v. Sorensen 846
State v. Schroder 860

Summary Judgment

1. 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 judgment as a matter of law.
Straub v. American Bowling Congress 241

2. Where a summary judgment has been entered, the absence of a bill of exceptions results in the presumptions that the evidence sustains the trial court's finding that there was no genuine issue as to any material fact and that the case was correctly decided.
Stromsburg Bank v. Nuttelman 687

3. In the absence of a bill of exceptions, the only issue which will be considered on appeal of a summary judgment is the sufficiency of the pleadings to support the judgment.
Stromsburg Bank v. Nuttelman 687

4. Summary judgment is an extreme remedy which may properly be granted only 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 judgment as a matter of law.
Stromsburg Bank v. Nuttelman 687

5. On a motion for summary judgment, if the moving party adduces evidence which demonstrates that it was entitled to a judgment if that evidence is not controverted, the burden is shifted to the responding party to produce evidence in opposition thereto.
Bailey v. City of North Platte 810

6. Once a prima facie showing of entitlement to a summary judgment is made by the moving party, if the responding party fails to offer competent evidence that there is a genuine issue as to a material fact, the motion for summary judgment should be sustained.
Bailey v. City of North Platte 810

7. The purpose of a summary judgment proceeding is to pierce allegations of pleadings and show conclusively that the controlling facts are otherwise than alleged and that the moving party is entitled to judgment as a matter of law.
Gilbreath v. Ridgeway 822
8. Summary judgment is appropriate where the moving party establishes that there exists no genuine issue of material fact or differing inferences to be drawn therefrom in the case and that under the facts he is entitled to judgment as a matter of law.
Gilbreath v. Ridgeway 822
9. 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.
Gilbreath v. Ridgeway 822
10. 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.
Gilbreath v. Ridgeway 822

Termination of Employment

A failure to provide due process at some point in a termination procedure does not invalidate the termination if that defect is later cured.
Buhrmann v. Sellentin 288

Testimony

1. It is within the discretion of the trial court to allow testimony from a rebuttal witness who is in violation of a sequestration order. Such discretion is abused only where it is shown that the permitted testimony prejudiced the defendant's rights.
State v. Swillie 551
2. Prejudice is established where the witness' testimony has changed or been influenced by what he heard from other witnesses. Such prejudice must clearly appear on the record.
State v. Swillie 551
3. In a criminal prosecution any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony.
State v. Swillie 551

Time

1. A motion for new trial must be filed within 10 days after the verdict or decision was rendered.
State ex rel. Douglas v. Bible Baptist Church 307

2. The manner of taking appeals from actions of the State Board of Education, pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), must be in the same manner in which appeals from any action of the State Board of Education are taken to the district court. However, because the language of a specific statute takes precedence over the language of a general statute, the time in which the appeal is to be taken must be within 20 days as provided in § 79-403(1), rather than 30 days as provided in Neb. Rev. Stat. § 84-917 (Reissue 1981).
In re Covault Freeholder Petition 763
In re Deveny Freeholder Petition 819
3. The time for taking an appeal from the action of the State Board of Education, pursuant to Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984), begins to run when the board, at a duly convened meeting at which minutes are required to be taken, votes to transfer the land, and not when it approves a formal memorandum.
In re Covault Freeholder Petition 763
In re Deveny Freeholder Petition 819

Tort Claims Act

1. The "discretionary function or duty" exemption under the State Tort Claims Act includes determinations or judgments made by the State in establishing plans, specifications, or schedules of operations as policy judgments.
Wickersham v. State 175
2. The discretionary function or duty exemption in the State Tort Claims Act extends only to the basic policy decisions made in governmental activity and not to ministerial activities implementing such policy decisions. The State is liable for negligence of its employees at the operational level.
Wickersham v. State 175
3. The State, as in the case of an individual, must act with reasonable care in reference to action undertaken without obligation to act.
Wickersham v. State 175
4. Where the gravamen of the complaint is negligent performance of operational tasks rather than misrepresentation, the State cannot rely upon the misrepresentation exclusion found in the State Tort Claims Act.
Wickersham v. State 175
5. As used in the State Tort Claims Act, the phrase "the county in which the act or omission occurred" means the site where the wrongful conduct actually takes place, not where the results of the wrongful conduct take place or occur.
Wickersham v. State 175

Trial

1. A finding of fact made by a jury will not be set aside on appeal if it is supported by credible evidence.
Erin Rancho Motels v. United States F. & G. Co. 9
2. A litigant has no vested right in a mode of procedure, and an action commenced before an enactment changing the procedure in the court where the action is pending is properly triable under the changed procedure after the enactment becomes effective, unless the procedure is specifically retained by a saving clause.
In re Estate of Massie 103
3. There is no absolute right to trial by jury on appeal to the district court in probate matters unless such right is expressly conferred by statute.
In re Estate of Massie 103
4. There is no constitutional right to trial by jury in appeals to the district court from the county court in probate matters.
In re Estate of Massie 103
5. Henceforth, unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel in situations of joint and multiple representation.
State v. Turner 125
6. In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant. This court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.
State v. Tomes 148
State v. Ruzicka 594
State v. Schroder 860
7. The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, and its ruling will be upheld absent an abuse of discretion.
Chmelka v. Continental Western Ins. Co. 186
8. A plaintiff may establish his case by direct or circumstantial evidence.
Chmelka v. Continental Western Ins. Co. 186
9. The burden of establishing a cause of action by circumstantial evidence requires that the evidence be of such character and the circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved.
Chmelka v. Continental Western Ins. Co. 186
10. Where reasonable minds might draw different conclusions from the evidence, the question as to negligence or contributory negligence under the circumstances is a matter for

determination by the jury.
Chmelka v. Continental Western Ins. Co. 186
11. In a civil case the burden of proof is on the plaintiff to prove, by a preponderance of the evidence, all facts essential to recovery.
Scoular-Bishop Grain Co. v. Bassett Grain 280
12. Law enforcement agencies are not required to preserve breath samples in order to introduce breath analysis tests at trial.
State v. Vernon 539
13. The improper admission of cumulative evidence constitutes nonreversible harmless error where there is other competent evidence sufficient to support the conviction.
State v. Ruzicka 594
14. A defendant will not be allowed to disrupt the orderly procedure of the trial court by discharging his counsel on the eve of trial and demanding that all proceedings be stayed while he attempts to find other counsel.
State v. Keithley 707
15. An abuse of discretion exists where the reasons or rulings of the trial judge are clearly untenable and deprive a party of a substantial right such as to amount to a denial of justice; it does not imply an improper motive, willful purpose, or intentional wrong.
Guggenmos v. Guggenmos 746
16. When an appeal is conducted as a "trial de novo," as opposed to a "trial de novo on the record," it means literally a new hearing and not merely new findings of fact based upon a previous record.
In re Covault Freeholder Petition 763
17. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.
In re Covault Freeholder Petition 763
18. One cannot elect a particular trial strategy and then complain if it proves unsuccessful.
State v. Evans 849
19. 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.
State v. Evans 849
20. The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness is usually within the discretion of the trial court.
State v. Tainter 855
21. If a witness is cross-examined on a matter collateral to the issues,

his answer cannot be subsequently contradicted by the party conducting the examination.
State v. Tainter 855
22. If a fact could be proved as a part of the offerer's case, it is material and not a collateral fact.
State v. Tainter 855
23. An offer of proof is generally a prerequisite to our review of a ruling which excludes evidence unless it is apparent from the context within which the question was asked that the answer would have been material and competent.
State v. Schroder 860

Undue Influence

1. In order to establish a case of undue influence, the party asserting the claim must show clearly and convincingly (1) that the party who executed the instrument was subject to undue influence; (2) that there was an opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence.
In re Estate of Massie 103
2. The lower court's findings concerning products of undue influence are determinations of fact. As such, the standard of review is whether the findings are supported by sufficient evidence, which are not to be disturbed unless clearly wrong.
In re Estate of Massie 103

Uniform Commercial Code

1. Under Neb. U.C.C. § 3-802 (Reissue 1980), unless otherwise agreed, where a personal check is taken for an underlying obligation, the obligation is suspended pro tanto until the presentment of the check. If the check is dishonored, an action may be maintained on either the check or the obligation.
Rose v. United States Nat. Bank 97
2. When a check is sent for collection to be held by the payor bank for a reasonable period until sufficient funds become available in the account, it is not a presentment within the meaning of Neb. U.C.C. § 3-504 (Reissue 1980).
Rose v. United States Nat. Bank 97
3. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
Peterson v. North American Plant Breeders 258
4. The existence of an express warranty depends upon the particular circumstances in which the language is used and read. A catalog description or advertisement may create an express

warranty in appropriate circumstances. The trier of fact must determine whether the circumstances necessary to create an express warranty are present in a given case. The test is whether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment.
Peterson v. North American Plant Breeders 258

5. When a producer of seed places sealed bags of hybrid seed corn in its chain of distribution, it carries with it, unless effectively excluded or modified, an implied warranty of merchantability that protects the ultimate buyer-user in that chain.
Peterson v. North American Plant Breeders 258

6. Subject to any statute or decision which establishes a different rule for buyers of consumer goods, an agreement by a buyer that he will not assert against an assignee any claim or defense which he may have against the seller is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense.
AgriStor Credit Corp. v. Radtke 386

Vendor and Vendee

1. Upon the execution of a contract for the sale of real estate, the equitable ownership of the property vests in the vendee, even though the seller retains the legal title as security for deferred installment payments of the purchase price.
DeBoer v. Oakbrook Home Assn. 813

2. Where, pursuant to a land contract, the deed is held in escrow until payment of the purchase price, the vendor of an instrument held in escrow loses control over it so long as the vendee does not default, even though the vendor retains bare legal title in the land as security for the payment of the purchase price.
DeBoer v. Oakbrook Home Assn. 813

Venue

As used in the State Tort Claims Act, the phrase "the county in which the act or omission occurred" means the site where the wrongful conduct actually takes place, not where the results of the wrongful conduct take place or occur.
Wickersham v. State 175

Verdicts

1. A verdict will not be set aside as inadequate unless so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent on the record, or that the jury disregarded the evidence or rules of law.

Bashus v. Turner 17
Duncza v. Gottschalk 879

2. A jury verdict will not be disturbed on appeal unless it is clearly erroneous, against the preponderance of the evidence, and so clearly contrary to the findings that it is the duty of the reviewing court to correct it.
Chmelka v. Continental Western Ins. Co. 186

3. A 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 is insufficient to support it.
State v. Ruzicka 594

4. In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it.
Farm Bureau Life Ins. Co. v. Luebbe 694
Duncza v. Gottschalk 879

5. A guilty verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
State v. Schroder 860

6. Where damages include the intangible and quite subjective elements of pain and suffering, a verdict for such damages will not be interfered with unless it is so excessive or grossly disproportionate to the evidence as to be indicative of passion, prejudice, mistake, or disregard of the evidence or law.
Duncza v. Gottschalk 879

Wages

Where an employer retains a hold on employees during their lunch period so that the employees are not actually at liberty, the lunch period constitutes compensable time.
Bolan v. Boyle 85

Waiver

1. A defendant can waive his right to assistance of an attorney unhindered by a conflict of interest, provided such waiver is voluntarily, knowingly, and intelligently done with sufficient awareness of relevant circumstances and likely consequences.
State v. Turner 125

2. Once the right to counsel and the right to remain silent have been invoked by a defendant, the defendant cannot be persuaded to waive his rights, and there is a strong presumption against waiver. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and

his right to retained or appointed counsel.
State v. Joy 310
3. Although proof of prior convictions to establish a charge of driving while intoxicated, third offense, may be waived by the voluntary and intelligent admission of the defendant, nevertheless, there must be proof in the record in some form that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right.
State v. Tichota 444
4. A failure to file a timely request in accordance with the rules of the court constitutes a waiver of the statutory right to a jury trial.
State v. Vernon 539
5. In order for a record of previous convictions to be used in an enhancement proceeding, the accused must be shown to have had counsel or to have knowingly and voluntarily waived counsel.
State v.Falkner 896

Warrants

1. A statement from a person involved in a crime with the defendant may provide enough trustworthy information to permit the issuance of an arrest warrant.
State v. Gonzales 43
2. A peace officer may arrest without a warrant, if the officer has reasonable cause to believe that the person to be arrested has committed a felony.
State v. Horn 524

Warranty

1. Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
Peterson v. North American Plant Breeders 258
2. The existence of an express warranty depends upon the particular circumstances in which the language is used and read. A catalog description or advertisement may create an express warranty in appropriate circumstances. The trier of fact must determine whether the circumstances necessary to create an express warranty are present in a given case. The test is whether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment.
Peterson v. North American Plant Breeders 258
3. When a producer of seed places sealed bags of hybrid seed corn

in its chain of distribution, it carries with it, unless effectively excluded or modified, an implied warranty of merchantability that protects the ultimate buyer-user in that chain.
Peterson v. North American Plant Breeders 258

Waters

1. The flow of surface water may be increased and diverted upon the land of another if it is done through an existing natural watercourse and is done in a careful manner without negligence.
Fink v. O'Neill Country Club 30
2. Water velocities which increase as a result of proper maintenance or construction of drainage tubes or ditches, done without negligence, are a burden which must be accepted by the servient estate.
Fink v. O'Neill Country Club 30
3. Surface waters resulting from rainfall or melted snow which collect and flow into a natural drainage channel or depression may not be dammed, diverted, or otherwise repelled by the owner of the land upon which they flow. In other words, it is the continuing duty of a lower landowner who builds a structure across a natural drainageway to provide for the natural passage through such obstruction of all the water which may be reasonably anticipated to drain therein.
Fink v. O'Neill Country Club 30
4. An upper landowner has the right to have surface waters that are naturally on his land flow freely off that land onto a lower landowner's adjoining property, so long as the surface waters flow under natural conditions.
LaPuzza v. Sedlacek 285
5. Surface waters are waters which appear upon the surface of the ground in a diffused state, which ordinarily result from rainfall or melting snow, and may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence.
Krafka v. Brase 335
6. An irrigator has no right to discharge waste water across a neighbor's land unless he has an easement, either by agreement or prescription, to do so.
Darsaklis v. Schildt 605
7. Where all use was based upon the condition that the discharged waste water do no damage, such a limited agreement was no more than allowing a permissive use and was not an easement.
Darsaklis v. Schildt 605

Weapons

1. In order to be a "deadly weapon" per se under Neb. Rev. Stat. § 28-1202(1) (Reissue 1979), the weapon in question must be one

specifically enumerated in that statute.
State v. Williams 57
2. Under Neb. Rev. Stat. § 28-1202(1) (Reissue 1979), whether an object or weapon not specifically named in the statute is a "deadly weapon" is a question of fact to be determined by the trier of fact, and the resolution of that fact question will depend on the evidence adduced as to the use or intended use of the object or weapon.
State v. Williams 57
3. A weapon is concealed on or about the person if it is concealed in such proximity to the driver of an automobile as to be convenient of access and within immediate physical reach.
State v. Saccomano 435
4. Ordinarily, when an object is found in an automobile possessed and operated by the defendant, the evidence of unlawful possession is sufficient to sustain a conviction.
State v. Saccomano 435
5. The requirement that the State prove that the defendant "knowingly and intentionally" concealed the weapon is satisfied by evidence that the defendant voluntarily and intentionally concealed the weapon.
State v. Saccomano 435

Wills

1. A patent ambiguity in a will is one appearing on the face of the instrument as a result of the language contained therein.
In re Estate of Corrigan 723
2. A patent ambiguity in a will must be resolved without resort to extrinsic evidence.
In re Estate of Corrigan 723
3. The cardinal rule in construing a joint and mutual will is to ascertain and effectuate the intention of the testators if that intention is not contrary to law.
In re Estate of Corrigan 723
4. In searching for the intention of the testators of a joint and mutual will, we must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge in the presumption that the testators understood the meaning of the words used.
In re Estate of Corrigan 723
5. The presumption that a testator intends to dispose of his entire estate and not to die intestate as to either a part or the whole of his estate cannot supplant the actual intent of the testator as derived from the language of the will.
In re Estate of Corrigan 723
6. It is not the province of the courts by construction to supply omissions or to write residuary clauses for testators who neglect

to do so.
In re Estate of Corrigan 723
7. The presumption that one making a will intended to fully dispose of his or her estate by that document does not overcome the rule requiring an express provision or necessary implication to disinherit one's heirs.
In re Estate of Corrigan 723

Wiretaps

Although interceptions of telephonic communications need not cease upon the obtaining of a described communication, unless the order authorizing them so provides, they must cease when the objective of the authorization has been achieved, whether the order authorizing them so states or not, and in no event may the interceptions extend beyond 30 days.
State v. Brennen 454

Witnesses

1. As a prerequisite to the admission of hearsay statements into evidence under Neb. Rev. Stat. § 27-804 (Reissue 1979), the proponent of the statement must make a showing that the declarant is unavailable as a witness. It is within the discretion of the trial court to determine whether the unavailability of the witness has been shown.
State v. Bothwell 395
2. It is within the discretion of the trial court to allow testimony from a rebuttal witness who is in violation of a sequestration order. Such discretion is abused only where it is shown that the permitted testimony prejudiced the defendant's rights.
State v. Swillie 551
3. Prejudice is established where the witness' testimony has changed or been influenced by what he heard from other witnesses. Such prejudice must clearly appear on the record.
State v. Swillie 551
4. The sixth amendment to the U.S. Constitution guarantees to a defendant compulsory process for obtaining witnesses in his favor. That clause is violated when a defendant is arbitrarily deprived of testimony that would have been relevant, material, and vital to the defense. The defendant must at least make some plausible showing of how the testimony of the absent witness would have been both material and favorable to the defense.
State v. Rayes 588
5. The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness is usually within the discretion of the trial court.
State v. Tainter 855
6. If a witness is cross-examined on a matter collateral to the issues, his answer cannot be subsequently contradicted by the party

conducting the examination.
State v. Tainter 855
7. This court will not reexamine or pass on the trier of fact's determination of credibility.
State v. Tainter 855
8. To warrant reversal the misconduct of a witness must be of such a nature as to unduly influence the decision of the jury.
State v. Tainter 855

Words and Phrases

1. The term "actual cash value," as used in a policy of property insurance, means market value, i.e., that amount for which property may be sold by a willing seller who is not compelled to sell it to a buyer who is willing but not compelled to buy it. In deciding market value of property one should consider the situation and condition of the property as it was at the time, and all the other facts and circumstances shown by the evidence that affected or had a tendency to establish its value.
Erin Rancho Motels v. United States F. & G. Co. 9
2. Referential and qualifying words in a statute, where no contrary intention appears, refer solely to the last antecedent.
Iske v. Papio Nat. Resources Dist. 39
3. In order to be a "deadly weapon" per se under Neb. Rev. Stat. § 28-1202(1) (Reissue 1979), the weapon in question must be one specifically enumerated in that statute.
State v. Williams 57
4. Under Neb. Rev. Stat. § 28-1202(1) (Reissue 1979), whether an object or weapon not specifically named in the statute is a "deadly weapon" is a question of fact to be determined by the trier of fact, and the resolution of that fact question will depend on the evidence adduced as to the use or intended use of the object or weapon.
State v. Williams 57
5. Continuous means uninterrupted, or stretching on without break or interruption.
Hardt v. Eskam 81
6. The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another, where a lawyer's representation of one client is rendered less effective by reason of his representation of another client, or where it becomes a lawyer's duty on behalf of one client to contend for that which his duty to another client would require him to oppose.
State v. Turner 125
7. A conflict of interest exists whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of

a codefendant whom counsel is also representing.
State v. Turner 125
8. The "discretionary function or duty" exemption under the State Tort Claims Act includes determinations or judgments made by the State in establishing plans, specifications, or schedules of operations as policy judgments.
Wickersham v. State 175
9. The discretionary function or duty exemption in the State Tort Claims Act extends only to the basic policy decisions made in governmental activity and not to ministerial activities implementing such policy decisions. The State is liable for negligence of its employees at the operational level.
Wickersham v. State 175
10. As used in the State Tort Claims Act, the phrase "the county in which the act or omission occurred" means the site where the wrongful conduct actually takes place, not where the results of the wrongful conduct take place or occur.
Wickersham v. State 175
11. The phrase "costs of management" includes all expenses necessary to perpetuate the actual commercial use of real estate, including the payment of real estate taxes.
Conservative Sav. & Loan Assn. v. Karp 217
12. Generally, the word "may" will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning.
Buhrmann v. Sellentin 288
13. In order to qualify real estate as a homestead under Neb. Rev. Stat. § 40-101 (Cum. Supp. 1982), a homestead claimant and his family must reside in habitation on the premises. A person cannot have two homesteads, nor can he have two places either of which at his election he may claim as a homestead.
Travelers Indemnity Co. v. Heim 326
14. The term "sexual offense," as used in Neb. Rev. Stat. § 29-2912 (Reissue 1979), includes any felony in which the sexual excitement of the person committing the crime is a substantial motivational factor.
State v. Klappal 374
15. Good cause means a material and substantial change in circumstances and depends upon the circumstances of the individual case. A finding of its existence lies largely in the discretion of the court to which it is committed.
Roth v. Roth 417
16. A weapon is concealed on or about the person if it is concealed in such proximity to the driver of an automobile as to be convenient of access and within immediate physical reach.
State v. Saccomano 435

17. The requirement that the State prove that the defendant "knowingly and intentionally" concealed the weapon is satisfied by evidence that the defendant voluntarily and intentionally concealed the weapon.
State v. Saccomano 435
18. In general, the terms "vandalism" and "malicious mischief" refer to wanton or malicious acts intended to damage or to destroy property. Thus, to recover under a policy assuring against loss caused by vandalism and malicious mischief, the plaintiff must show by a preponderance of the evidence, direct or circumstantial, that the damage was caused by acts intended to damage the property in question.
Swedberg v. Battle Creek Mut. Ins. Co. 447
19. Regardless of how careless, negligent, or even illegal an act might be, it is not malicious mischief absent evidence that the act was motivated by malice toward the property or its owner.
Swedberg v. Battle Creek Mut. Ins. Co. 447
20. "Fresh pursuit" is pursuit instituted immediately and with intent to take into custody a person fleeing and reasonably believed to have committed a crime.
State v. Ferrell 463
21. Fresh pursuit is a relative term and has reference to time or distance, or both, depending on the facts of the case.
State v. Ferrell 463
22. "Jail time" is commonly understood to be the time an accused spends in detention pending trial and sentencing.
State v. Fisher 479
23. A partnership is a contract of two or more competent persons to place their money, effects, labor, or skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions.
South Sioux City Star v. Edwards 487
24. "Injury" means an invasion of a legally protected interest of another. "Damage" means the harm, detriment, or loss sustained by reason of the injury.
Rosnick v. Marks 499
25. The phrase "to leave work voluntarily" means to intentionally sever the employment relationship with the intent not to return to, or to intentionally terminate, the employment.
McClemens v. United Parcel Serv. 689
Nuss v. Sorensen 703
26. Under the Agreement on Detainers, Neb. Rev. Stat. §§ 29-759 et seq. (Reissue 1979), a "detainer" is a notification filed with the institution in which an individual is serving a sentence, advising the prisoner that he is wanted to face criminal charges pending in another jurisdiction.
State v. Reynolds 753

27. When an appeal is conducted as a "trial de novo," as opposed to a "trial de novo on the record," it means literally a new hearing and not merely new findings of fact based upon a previous record.
In re Covault Freeholder Petition 763
28. A municipality is an owner within the meaning of the Recreation Liability Act, Neb. Rev. Stat. §§ 37-1001 et seq. (Reissue 1984).
Bailey v. City of North Platte 810

Workmen's Compensation

1. Employers of farm or ranch laborers are generally exempt from the provisions of the Nebraska Workmen's Compensation Act, and farm or ranch laborers injured while employed by one operating a farm or ranch are not entitled to receive any of the benefits of the Nebraska Workmen's Compensation Act.
Leppert v. Parker 63
2. Under the provisions of Neb. Rev. Stat. § 48-106(2) (Reissue 1978), it is the nature of the employer's business which determines the exemption, and not the work performed by the employee.
Leppert v. Parker 63
3. The findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and will not be reversed or set aside unless there is insufficient evidence in the record to warrant the award.
Tranmer v. Mass Merchandisers 151
Scott v. State 195
Smith v. Fremont Contract Carriers 652
4. In testing the sufficiency of the evidence, every controverted fact must be resolved in favor of the successful party, and the successful party is given the benefit of every inference that can be drawn from the evidence.
Tranmer v. Mass Merchandisers 151
Scott v. State 195
5. As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workmen's Compensation Court.
Starr v. Swift & Co. 223
6. The Workmen's Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
Smith v. Fremont Contract Carriers 652
7. A decree or award in a workmen's compensation case is final unless the petitioner seeking to reopen the case can bring the case within the terms of any statute to that effect.
Smith v. Fremont Contract Carriers 652

8. In civil cases a court of general jurisdiction has inherent power to vacate or modify its own judgment during the term at which it was rendered. However, this is a rule of the common law and does not apply to statutory tribunals such as the Workmen's Compensation Court.
Smith v. Fremont Contract Carriers 652
9. An amendment to a workmen's compensation statute which provides for the payment of attorney fees relates to the remedy and affects procedure only, and does not interfere with substantive rights. Therefore, such fees as are provided may be taxed as an item of costs in entering judgment on a claim that arose before the amendatory act was passed.
Smith v. Fremont Contract Carriers 652
10. In a workmen's compensation case an employee may not withhold evidence of medical expense at the first hearing, inadvertent though it might be, and then claim on rehearing that an attorney fee should be awarded because the award was increased.
Smith v. Fremont Contract Carriers 652
11. In cases involving disability arising from a stroke, the employee has the burden of establishing by a preponderance of the evidence that exertion in his employment, in reasonable probability, contributed in some material and substantial degree to cause the injury. The presence of a preexisting disease or condition would enhance the degree of proof required to establish that an injury arose out of and in the course of employment.
Smith v. Fremont Contract Carriers 652
12. 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.
Smith v. Fremont Contract Carriers 652